Neutral Citation: [2023] UKFTT 575 (TC)

Case Number: TC08850

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video]

Appeal reference: TC/2022/11544

VAT – Default Surcharge – Whether Time-to-Pay arrangement in place before the due date – no – Section 108 of the Finance Act 2009 considered - Whether payment of VAT late – yes - Whether reasonable excuse established – no – Appeal dismissed

Heard on: 1 March 2023
Judgment date: 28 June 2023

Before

JUDGE NATSAI MANYARARA
SONIA GABLE JP

Between

POLYTECK BUILDING SERVICES LTD.

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Martin Kaney, VAT Consultant

For the Respondents: Mr Colin Williams, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant appeals against a VAT default surcharge issued by HMRC, pursuant to s. 59 of the Value Added Tax Act 1994 (hereinafter referred to as 'VATA'). The default surcharge was issued in respect of the late payment of VAT for the period 03/21, as follows:

Date	Legislation	Description	Amount
23/03/2022	s. 59(5)(c) VATA	03/21 - Surcharge Assessment at 10%	£20,165.61 (varied from £52,665.61)

2. With the consent of the parties, the form of the hearing was V (video). Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media, or members of the public, could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. The documents to which we were referred were (i) a Documents Bundle consisting of 117 pages; and (ii) a Legislation and Authorities Bundle consisting of 198 pages.

BACKGROUND FACTS

3. The Appellant is a limited company and its business activity is "Building Services". The Director is Mr Yiannakis Georgiou Polycarpou. The Appellant has been registered for VAT, with effect from 20 December 2005 and submits VAT returns on a quarterly basis. The Appellant's normal method of payment is Faster Payment Service ('FPS').

4. The due date for the VAT return and payment for the period 06/20 was 7 August 2020. The Appellant's VAT return was received on 7 August 2020. VAT was paid on multiple dates, by FPS, between 12 March 2021 and 21 May 2021. A Surcharge Liability Notice ('SLN') was issued to the Appellant by HMRC, giving a surcharge period of 14 August 2020 to 30 June 2021.

5. The due date for the VAT return and payment for the period 09/20 was 7 November 2020. The Appellant's VAT return was received by 7 November 2020. VAT was paid on multiple dates between 6 November 2020 and 16 November 2020, by FPS. The Appellant became liable to a surcharge at 2%, as it was within the surcharge period. The total amount of outstanding VAT was £373,913.64 and the penalty charged was £7,478.27.

6. On 24 November 2020, the Appellant requested a review of the decision to issue a surcharge for the period 09/20. On 15 March 2021, HMRC conducted a review and found that £211,000.00 had been paid prior to the due date and the surcharge was reduced to £3,258.26. The Surcharge Lability Notice of Extension ('SLNE') notified the Appellant that the surcharge period was extended to 30 September 2021.

7. The due date for the VAT return and payment for the period 12/20 was 7 February 2021. The Appellant's VAT return was received on 5 February 2021. VAT was paid on multiple dates between 21 May 2021 and 20 August 2021, by FPS. The Appellant became liable to a surcharge at 5% of the outstanding VAT due, as it was within the surcharge period. The total amount of outstanding VAT was £411,478.26 and the penalty charged was £20,573.91. The SLNE notified the Appellant that the surcharge period was extended to 31 December 2021

8. The due date for the VAT return and payment for the period 03/21 (the period under appeal) was 7 May 2021. The Appellant's VAT return was received on 30 April 2021. VAT was paid between 7 May 2021 and 11 May 2021, by FPS. The Appellant became liable to a surcharge at 10% of the outstanding VAT due, as it was within the surcharge period. The total outstanding VAT was £526,656.15 and the penalty charged was £52,665.61. HMRC conducted a review and found that £325,000.00 was paid prior to the due date and the surcharge was reduced to £20,165.61. The SLNE notified the Appellant that the surcharge period was extended to 31 March 2022.

9. On 20 December 2021, the Appellant requested a review of the decision to issue a surcharge for the period 03/21. On 23 February 2022, HMRC issued a review conclusion letter varying and reducing the surcharge for the period 03/21 from £52,665.61 to £20,165.61.

10. On 5 April 2022, the Appellant notified its appeal to the Tribunal.

THE PARTIES' RESPECTIVE POSITIONS

HMRC's Case

11. HMRC's case can be summarised as follows:

(1) By failing to pay VAT by the due date, the Appellant failed to comply with VATA and the Value Added Tax Regulations 1995 SI 1995/2518 ('the VAT Regulations').

(2) The Appellant is not alleging non-receipt of the SLN issued on 14 August 2021. The Appellant contends that a VAT Notice of Assessment and a SLNE were not received in relation to the period 03/21. HMRC contend that their systems demonstrate that the SLN and subsequent SLNEs were posted to the Appellant at the address at 143 Leman Street and were not returned undelivered. They are deemed to have been served. The Appellant has not supplied any evidence to displace the statutory presumption of service.

(3) The Time-to-Pay ('TTP') arrangement requested on 6 May 2021 was refused on 10 May 2021, as the Appellant already had a TTP arrangement in place for the period 09/20. The Appellant's cashflow difficulties were neither new, nor sudden. They

existed prior to the pandemic. Due diligence required the Appellant to secure sufficient funds from other sources. Insufficiency of funds does not constitute a reasonable excuse.

(4) The rates of penalty have been calculated in line with the legislation. Having been issued with the SLN and SLNEs, the Appellant should have been aware of the potential financial consequences of failing to render full payment by the due date.

Appellant's Grounds of Appeal

12. The Appellant's arguments can be summarised as follows:

(1) The default surcharge notice for the period 03/21 was not received. The Appellant found out that the surcharge had been applied through the online VAT account.

(2) The Appellant was already in discussions with HMRC Debt Management at the time that the VAT return and payment were due. The Appellant contacted HMRC before the payment date and requested a TTP arrangement.

(3) The business has suffered due to the pandemic and this has affected cashflow. Payment of additional penalties for a minor default of four days exacerbates the problem.

THE APPEAL HEARING

Preliminary matters

13. At the commencement of the appeal hearing, Mr Williams made amendments to two typographical errors that appeared in the Statement of Case on behalf of HMRC. The first related to paragraph 49.2., where reference is made to the date 23 February 2021. The year should read 2022, and not 2021. The second related to paragraph 55, which should read 14 August 2021, and not 2020.

14. Mr Williams then proceeded to open HMRC's case and we heard oral evidence from Mr Polycarpou.

Evidence and Submissions

15. Mr Williams confirmed that the default surcharge related to the period 03/21 and was in the varied amount of £20,165.61, which represented 10% of the outstanding VAT that was due at that time. He then summarised the Appellant's grounds of appeal and highlighted the issues before the Tribunal; namely (i) whether the default surcharge was correctly issued by HMRC; (ii) whether the Appellant had established a reasonable excuse; and (iii) if so, whether any reasonable excuse was remedied without unreasonable delay after it ended. Mr

Williams then referred to the relevant case law and legislation, making reference to the Legislation and Authorities Bundle. He further took the Tribunal through the history of defaults leading up to the decision under appeal.

16. We then heard oral evidence from Mr Polycarpou.

17. In his oral evidence, Mr Polycarpou confirmed that he was the director of the Appellant company and that his duties include looking after staff, key clients and large accounts. He added that everything concerning the Appellant's finances comes through him (receipts and invoices) and that he knew the Appellant's finances and gave instructions about which customers to chase. He also confirmed that he was aware that the deadline for submission of the VAT return, and payment, was the seventh of the month.

18. In respect of the Appellant's approach to planning cashflow, Mr Polycarpou said that the Appellant does its utmost best, but that VAT payments are due at the same time as wages are. He added that he tries to bring in income on a weekly basis and does not wait until the due date for VAT or PAYE. In relation to the payment date for the period under appeal, Mr Polycarpou said that there was no point in making excuses and he was not looking for sympathy. He then proceeded to say that he had suffered a heart attack during that period and the Appellant's turnover had halved during the pandemic. He added that 2020 had been a difficult year and he had lost family members.

19. He further added that although the Appellant had numerous clients, Brent Council had delayed making payment of an invoice. The income should have come in on the Friday before the default in question and, at one point, Brent Council owed the Appellant £1,000,000.00. He then said that sometimes VAT payments were two days late. Mr Polycarpou could not, however, remember when the Appellant was eventually paid by Brent Council, but he explained that he is constantly contacting clients about payment.

20. In relation to the notice from HMRC for the period 03/21, Mr Polycarpou said that he opens all of the post and he hands it over to his accountant, who deals with it on his instructions. He said that he only found out about the default surcharge when he looked at the Appellant's online VAT account but would leave such matters to the accountant. He added that he could not remember whether or not he received the surcharge notice in relation to the period 03/21. He further added that Mr Stylianou had been the Appellant's Finance Manager, but that someone else was now in that position. Mr Stylianou would have been the person who submitted the VAT return and the Appellant endeavours to pay the maximum VAT due on the payment due date. He said that the Appellant has had a few TTP arrangements and the Appellant has always made timely payment and pays any VAT due in full if the money comes in as nobody likes delaying payment. He also confirmed that he remembered that other surcharge notices had been varied.

21. Mr Polycarpou's evidence was that he could not remember what Mr Stylianou told him about payment for the period 03/21, but that Mr Stylianou would have spoken to HMRC and that he (Mr Stylianou) would have asked him what to tell HMRC. He added that his attention to clients was of equal importance to him as payment of VAT. He said that he could not recall exactly what had happened during the period under appeal as there have been other similar situations and his work takes up a lot of his time. Mr Polycarpou also said that he accepted that the email to him from Mr Stylianou, dated 7 May 2021, would have made it clear that Kathy Duffey (of HMRC) confirmed that the Appellant would receive a default surcharge for the period 03/21.

22. In closing submissions, Mr Williams submitted that the Appellant was in default for the period 03/21 and a reasonable excuse had not been established. He added that HMRC's systems established that the SLN, and the subsequent notices, were posted to the address held on file for the Appellant by HMRC; and that the Appellant had not supplied any evidence to displace the statutory presumption under s. 98 VATA. He further added that records indicate that none of the notices were returned to HMRC undelivered.

23. He submitted that in relation to s. 108 of the Finance Act 2009 (deferral of payment), a person is required to contact HMRC before the due date for payment and the Appellant is familiar with the TTP arrangement process. He added that the TTP arrangement requested by Mr Stylianou had been refused by HMRC, and that the Appellant's cashflow difficulties were neither new, nor sudden, and began before the COVID pandemic started in March 2020. The causes of the insufficiency of funds did not, therefore, constitute a reasonable excuse. He concluding by submitting that the length of the delay in making payment is immaterial and a surcharge applies even if payment is one day late. He further submitted that the statutory presumption of deemed service of the notices must be accepted.

24. In reply, Mr Kaney submitted that in May 2021, the Appellant's turnover fell by half and that the Appellant is still suffering from the catastrophic consequences of the pandemic. He submitted that by contacting HMRC, the Appellant was taking reasonable care to ensure that payment was made by the due date. He added that TTP was only refused by HMRC on 10 May 2021, despite the Appellant contacting HMRC on the sixth or seventh of the month. He added that the Appellant was also working with a client. He concluded by saying that the timing of full payment indicates that there was an intention to comply by the due date.

25. At the conclusion of the hearing, we reserved our decision and subsequently issued a Summary Decision. We now give our full findings of fact and reasons for the Decision.

APPLICABLE LAW

26. The relevant law, so far as is applicable to the issues under appeal, is as follows:

59 The default surcharge.

(1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

(a) the Commissioners have not received that return, or

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period, then that person shall be regarded for the purposes of this section as being in default in respect of that period.

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where —

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period, he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

(b) there is a reasonable excuse for the return or VAT not having been so despatched, he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served)."

27. Section 71 VATA limits the types of conduct which may afford a reasonable excuse within s. 59(7)(b) by providing that:

"71 Construction of sections 59 to 70.

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse."

[Emphasis added]

DISCUSSION

28. This is an appeal by the Appellant against the imposition of a VAT default surcharge in respect of the late payment of VAT for the period 03/21. The surcharge is in the amount of £20,165.61, which represents 10% of the outstanding tax that was due at that time. An appeal to the Tribunal against a penalty imposed in respect of VAT is governed by the provisions of s. 83 VATA. It is trite law that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute. In *Perrin v R & C Commrs* [2018] BTC 513 ('*Perrin*'), at [69], the Upper Tribunal explained the shifting burden of proof as follows:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, *prima facie*, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

29. The factual prerequisite is, therefore, that HMRC have the initial burden of proof. The standard of proof is the civil standard; that of a balance of probabilities.

30. Mr John Polycarpou, for the Appellant, gave evidence and he was cross-examined. A witness statement was provided for him, which was admitted as his evidence-in-chief. Having considered the submissions and documentary evidence, and having regard to the applicable law, we make the following findings of fact and give our reasons for the decision:

Findings of Fact

31. The due date for the VAT return and payment for the period 06/20, covering the period from 1 April 2020 to 30 June 2020, was 7 August 2020. The VAT return was received on 7 August 2020. The Appellant failed to pay the VAT due on the return for the period 06/20 by the due date and was issued with a SLN. The SLN gave a surcharge period from 14 August 2020 to 30 June 2021. VAT was paid by eleven FPS payments between 12 March 2021 and 21 May 2021.

32. The due date for the VAT return and payment for the period 09/20, covering the period from 1 July 2020 to 30 September 2020, was 7 November 2020. The Appellant's VAT return was received on 7 November 2020. The Appellant subsequently failed to pay the VAT due for the period 09/20 by the due date and became liable to a surcharge at 2% of the outstanding VAT, as it was within the surcharge period. The total amount outstanding was £373,913.64 and the penalty charged was £7,478.27. VAT was paid by five FPS payments between 6 November 2020 and 16 November 2020.

33. On 24 November 2020, the Appellant requested a review of the decision for the period 09/20. HMRC conducted a review on 15 March 2021 and found that £211,000.00 had been paid prior to the due date, so the surcharge was reduced to £3,258.26. The SLNE notified the Appellant that the surcharge period had been extended to 30 September 2021.

34. The due date for the VAT return and payment for the period 12/20, covering the period 1 October 2020 to 31 December 2020, was 7 February 2021. The VAT return was received on 5 February 2021. The Appellant then failed to make payment for the period 12/20 by the due date and became liable to a surcharge of 5% as it was within the surcharge period. The total amount of outstanding VAT was £411,478.26, so the penalty charged was £20,573.91.

The SLNE notified the Appellant that the surcharge period was extended to 31 December 2021. VAT was paid by 15 FPS payments between 21 May 2021 and 20 August 2021.

35. The due date for the VAT return and payment for the period 03/21, covering the period from 1 January 2021 to 31 March 2021, was 7 May 2021. The VAT return was received on 30 April 2021. The Appellant failed to make payment for the period 03/21 (the period under appeal) by the due date and became liable to a surcharge at 10% of the outstanding VAT due. The total outstanding VAT was £526,656.15, so the penalty charged was £52,665.61. VAT was paid by three FPS payments between 7 May 2021 and 11 May 2021.

36. On 20 December 2021, the Appellant requested a review of the decision to issue a surcharge for the period 03/21.

37. HMRC conducted a review and found that £325,000.00 had been paid prior to the due date, so the surcharge was reduced to £20,165.61. The SLNE notified the Appellant that the surcharge period was extended to 31 March 2022.

38. On 23 February 2022, HMRC issued a review conclusion letter.

Consideration

39. The issues under appeal are, firstly, whether HMRC were correct to issue the penalty in accordance with legislation and, secondly, whether or not the Appellant has established a reasonable excuse for the default which has occurred. In this regard, HMRC bear the initial burden of demonstrating that the penalty is due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse.

40. Two further questions arise in determining this appeal. They are: if the Appellant is in default of an obligation imposed by statute: (a) what was the period of default? and (b) did the Appellant have a reasonable excuse throughout the period?

41. The above matters are to be considered in light of all of the circumstances of the case.

Q. Was the Appellant in default of an obligation imposed by statute?

42. VAT is a tax that is imposed on the supply of goods or services in the United Kingdom made in the course of a business carried on by the taxpayer. The tax is imposed by VATA. Responsibility for the collection of the tax is primarily placed on the supplier of the goods or services, the supply of which has attracted the tax. Section 25(1) VATA requires a taxable

person to account for, and pay, VAT for a prescribed accounting period at such a time, and in such manner, as determined by regulations. Those regulations are the VAT Regulations. Regulation 25(1) of the VAT Regulations provides that a return must be submitted to HMRC by no later than the last day of the month following the end of the period to which it relates, as follows:

> "**25. Making of returns**
>
> (1) Every person who is registered or was required to be registered shall, in respect of every period of a quarter or in the case of a person who is registered, every period of 3 months ending on the dates notified either in the certificate of registration issued to him or otherwise, not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return [in the manner prescribed in regulation 25A] showing the amount of VAT payable by him or to him and containing full information in respect of the other matters specified in the form and a declaration, [signed by that person or by a person authorised to sign on that person's behalf], that the return is [correct] and complete;"
>
> …

43. Regulation 25A of the VAT Regulations provides that:

> "[**25A-**
>
> [(A1) Where a person makes a return required by regulation 25 by means of electronic communications using functional compatible software, such a method of making a return shall be referred to in this Part as a "compatible software return system".]
>
> (1) Where a person makes a return required by regulation 25 using electronic communications [other than functional compatible software], such a method of making a return shall be referred to in this Part as an 'electronic return system".
>
> …

44. Regulation 25A (20) provides that:

> "…
>
> (20) Additional time is allowed to make-
>
> (a) a return using an electronic system, [a compatible software system] or a paper return system for which any related payment is made solely by means of electronic communications (see regulation 25(1)-time for making return, and regulations 40(2) to 40(4)-payment of VAT), or
>
> (b) a return using an electronic return system [or compatible software return system] for which no payment is required to be made."

45. Regulation 40 provides that:

> "**40 VAT to be accounted for on returns and payment of VAT**

…

(2) Any person required to make a return shall pay to the Controller such an amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return.

[(2A) Where a return is made [or is required to be made] in accordance with [regulations 25 and 25A] above using an electronic return system, the relevant payment to the Controller required by paragraph (2) above shall be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose.]"

46. The law allows a taxable person a calendar month from the end of each of their prescribed periods to prepare their return and arrange for the payment of the net amount due. HMRC have discretion, under reg. 25A (20) and reg. 40 of the VAT Regulations, to allow extra time for the filing of a return and the making of payment where these are carried out by electronic means.

47. We find the words of Judge Colin Bishopp in *R & C Commrs v Enersys Holdings UK Ltd.* [2010] UKFTT 20 (TC) ('*Enersys*') to be of material relevance to the statutory obligation. At [33], he said this:

"…The legislation draws the clear line at a calendar month after the end of the prescribed period…Against that background I can see no possible scope for judicial discretion to draw the line somewhere else. If the statutory requirement was to render the return and payment on the due date, neither before nor after, there might, perhaps, be some merit in the argument that missing the target by one day was excusable…the obligation requires no more than that the return and payment are received not later than the due date."

48. The due date for the VAT return and payment for the period 03/21 was 7 May 2021. The VAT return was received on 30 April 2021. The Appellant failed to make payment for the period 03/21. VAT was paid by three FPS payments between 7 May 2021 and 11 May 2021. The legislation makes clear that there is a statutory obligation to both file a VAT return, and pay VAT, on time.

49. The documentary evidence before us (email dated 6 May 2021) shows that Mr Stylianou spoke to Kathy Duffey on 6 May 2021, with a view to splitting the Appellant's VAT payments for the period 03/21 over three months. Mr Stylianou spoke to Kathy Duffey again on 7 May 2021 and an email of the same date records the following:

"Hi John

I spoke with Kathy Duffey again this morning regarding our proposal of £175K today to HMRC…She still needs to seek approval from someone above her but has unofficially said that we can go ahead with it…"

50. We find that this email shows that contact was only made with HMRC on the day before payment was due, and the day that payment was due. The email clearly shows that Ms Duffey needed to confirm whether an agreement would be accepted by HMRC. There is no evidence before us to support a finding that there was an agreement in place before the due date for payment for the period 03/21 and, indeed, contact was only made with HMRC shortly before payment was due.

51. Section 108 of the Finance Act 2009 provides that:

> "**108 Suspension of penalties during currency of agreement for deferred payment**
>
> (1) This section applies if—
>
> (a) a person ("P") fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,
>
> (b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and
>
> (c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period ("the deferral period").
>
> (2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if—
>
> (a) the penalty falls within the Table, and
>
> (b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.
>
> (3) But if—
>
> (a) P breaks the agreement (see subsection (4)), and
>
> (b) an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from subsection (2), P becomes liable, at the date of the notice, to that penalty.
>
> (4) P breaks an agreement if—
>
> (a) P fails to pay the amount of tax in question when the deferral period ends, or
>
> (b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it."

[Emphasis added both above and below]

52. This provision relates to deferred payments during the currency of an agreement to that effect. The agreement must be reached prior to the default. This was not the situation that arose in the appeal before us. The Appellant cannot, therefore, rely on the provisions of s. 108 in defence of the default.

53. The default surcharge regime was introduced in the United Kingdom as one of a range of measures designed to promote VAT compliance. Default surcharges are considered in law to be civil, rather than criminal, penalties. The first default does not give rise to a penalty, but brings the taxpayer within the regime. The taxpayer is sent a SLN, which informs them that a

further default will lead to the imposition of a penalty. There is no fixed maximum penalty. The amount levied is simply the prescribed percentage of the net tax due. The penalty is the same no matter how long the delay.

54. The surcharge provisions are contained in s. 59 VATA.

55. Section 59(1) VATA provides that a person is in default in respect of a period if he has not furnished a VAT return for that period, or paid the VAT shown as payable on that return, by the due date. Where a person defaults in respect of a period, the Commissioners may serve a SLN specifying a period (a surcharge period) which ends 12 months after the last day of the period for which he was in default (i.e., the period ending on the first anniversary of the last day of the period in default and beginning on the date of the notice). When a SLN is served by reason of a default in a VAT period that ends at, or before, the end of an existing surcharge period already notified, the existing surcharge period is extended: s. 59(3) VATA. We have found that the Appellant entered the surcharge period during the period 01/21.

56. Section 59(4) VATA provides that if a person defaults in respect of a period ending within a surcharge liability period and has outstanding VAT for the period, he becomes liable to a surcharge. This is an amount which is the greater of £30 and a percentage of the outstanding VAT. The £30 surcharge thus might, for example, apply where the return showed VAT due to the taxpayer.

57. Section 59(5) VATA specifies the rates of penalty for any further default within a surcharge period. The first default within a surcharge period results in a penalty of 2% of the outstanding VAT at the date of the surcharge. The second default within a surcharge period results in a penalty of 5% of the outstanding VAT. The third default within a surcharge period results in a penalty of 10% of the outstanding VAT, and the fourth and any subsequent defaults within a surcharge period result in a penalty of 15% of the outstanding VAT at the date of the surcharge.

58. Similarly, each SLN issued details, on the reverse, how surcharges are calculated, as follows:

> *"**About surcharges***
>
> - *If you don't submit your return and make sure that payment of the VAT due has cleared to HMRC's bank account by the due date you will be in default. Each time you default, we will send you a Surcharge Liability Notice.*
> - *The notice will explain what will happen if you default again in the following 12 months. This is your **Surcharge Period**.*
> - *If you default during the surcharge period you may also have to pay a surcharge which is a percentage of the VAT unpaid at due date.*
> - *For the first late payment during a surcharge period the surcharge will be 2%, increasing to 5%, 10% and 15%. There is a minimum surcharge of £30 for*

surcharges calculated at the 10% and 15% rates. We do not issue a surcharge at the 2% and 5% rates if we calculate it to be less than £400."

59. The SLN and SLNE provide the following information:

> *"**About surcharges***
>
> *If you do not submit your return and make sure that payment of the VAT due has cleared to HMRC's bank account by the due date, you will be in default. Each time you default, we'll send you a surcharge liability notice.*
>
> *The notice will explain what will happen if you default again in the following 12 months. This is your surcharge period.*
>
> *If you default during the surcharge period you may also have to pay a surcharge which is a percentage of the VAT unpaid at the due date."*

60. The SLN then goes on to explain the matters set out at s. 59(5) VATA, as to the rates of penalty. Each SLN provides details of how to avoid further defaults in the future, as follows:

> *"**Think ahead***
>
> *…*
>
> *If you cannot pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service before the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge."*

61. We are satisfied that the Appellant is in default of an obligation imposed by statute. This is because the Appellant failed to pay VAT due by the statutory deadline. By failing to pay VAT by the statutory deadline, the Appellant failed to comply with the legislation. Subject to considerations of 'reasonable excuse', the surcharge imposed is due and has been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the default that has occurred?

62. A taxpayer may avoid a penalty if s/he has a reasonable excuse. There is no statutory definition of a 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Commrs* (2006) Sp C 548 ('*Rowland*'), at [18]. The test we adopt in determining whether the Appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 ("*Clean Car*"), in which Judge Medd QC said this:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to

> comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

63. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word 'reasonable' imports the concept of objectivity, whilst the words 'the taxpayer' recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer.

64. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer exercising reasonable foresight and due diligence in the position of the taxpayer in question, and having proper regard for their responsibilities under the Taxes Acts: *Collis v HMRC* [2011] UKFTT 588 (TC). The decision, therefore, depends upon the particular circumstances in which the failure occurred.

65. We proceed by firstly determining whether facts exist, which when judged objectively, amount to a reasonable excuse for the default and, accordingly, give rise to a valid defence. In this regard, we have assessed whether the facts put forward and any belief held by the Appellant are sufficient to amount to a reasonable excuse. In essence, it is submitted on the Appellant's behalf that (i) the default surcharge notice for the period 03/21 (the period under appeal) was not received; (ii) the business had suffered due to the pandemic, and that this affected cashflow; and (iii) the Appellant was already in discussions with HMRC Debt Management at the time that the VAT return and payment were due.

66. In respect of the first of the Appellant's submissions, we had the benefit of hearing Mr Polycarpou's evidence. We find that by his own oral evidence, Mr Polycarpou confirmed that he is the person who is responsible for finance, saying *"Everything comes through me"* and *"I open the post and hand over to accountant who deals with it on my instructions"*. In respect of whether he received the surcharge, Mr Polycarpou says *"I can't remember"*. We find that an inability to remember whether one has received a document by post is not tantamount to the document not being received. Furthermore, Mr Polycarpou did not seek to gainsay the fact that the address HMRC had on file for the Appellant was the correct address.

67. We, therefore, find that the notices and assessments were sent to the address that HMRC had on file for the Appellant and there is no suggestion that they were returned undelivered. There is no suggestion on the evidence before us that there were any difficulties with the postal service at around the time of those deliveries; and the Appellant has not supplied any evidence to displace the statutory presumption at s. 98 VATA.

68. Section 98 VATA provides that:

"**98 Service of notices**

Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative."

69. The Interpretation Act 1978, at s. 7 (which relates to service by post), provides that:

"Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

70. The notices are therefore deemed to have been delivered, unless the contrary is proved.

71. In respect of the second of the Appellant's submissions, in *Customs & Excuse Commrs v Steptoe* (1992) STC 757 ('*Steptoe'*), the Court of Appeal held that the provision at s. 71 VATA meant that an insufficiency of funds, or reliance, can never *of itself* constitute a reasonable excuse, but that the tribunal was obliged to consider whether the reasons for an insufficiency of funds, or the underlying cause of a default, might do so. In the case of a default occasioned by an insufficiency of funds, Lord Donaldson MR indicated that:

"if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non payment."

72. In *Steptoe*, the taxpayer argued that although the proximate cause of his default was a shortage of funds, the underlying cause of that shortage, namely the unexpected failure by his major customer to pay him on time, did amount to a reasonable excuse. The court determined that the seemingly absolute exclusion by statute of an insufficiency of funds as an excuse did not preclude consideration of the underlying cause of the insufficiency, and that a trader might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable foresight and due diligence, it could not have been avoided. The court nevertheless made it clear that the test was to be applied strictly.

73. We have considered whether the reasons for an insufficiency of funds, or the underlying cause of the default, might constitute a reasonable excuse in the circumstances of this appeal.

74. Whilst we accept that the Appellant's turnover may have halved to what it was in 2020, Mr Polycarpou's evidence was that payment was being expected from a customer. We find

that a client not paying an invoice immediately is a normal (though undesirable) business circumstance. We find that the underlying problem was cashflow. There is, we find, considerable force in HMRC's submissions that these problems were *"neither sudden nor new"*. As to the cashflow problems, we are satisfied that the problems encountered by businesses are nothing more than the normal hazards and difficulties encountered by most traders. Problems such as slow payment from clients/customers cannot provide shelter when such a situation occurs with reasonable regularity.

75. By Mr Polycarpou's own evidence, Brent Council had delayed payment on more than one occasion. It is reasonable to expect the Appellant would have put measures in place to ensure compliance with legal obligations in respect of VAT. Mr Polycarpou's evidence was that he would then leave everything to the accountant. In any event, the Appellant did, indeed, have many big clients (with Brent Council being the client to pay late). There is no suggestion that the Appellant stopped trading as a result of the problems with Brent Council, or any other client.

76. In respect of the pandemic, we are satisfied that HMRC had put measures in place in response to the pandemic, which resulted in the first lockdown in March 2020. The VAT deferral guidance provides for the following:

> *"**Pay VAT deferred due to coronavirus (COVID-19)***
>
> *If you deferred VAT payments between 20 March 2020 and 30 June 2020 you can:*
>
> - *pay the deferred VAT in full now*
> - *join the VAT deferral new payment scheme – the online service is open between 23 February 2021 and 21 June 2021*
> - *contact HMRC on 0800 024 1222 by 30 June 2021 if you need extra help to pay*
>
> *You may be charged a 5% penalty or interest if you do not pay in full or make an arrangement to pay by 30 June 2021*
>
> ***Pay your deferred VAT in full***
>
> *If you were unable to pay in full by 31 March 2021, you may still be able to avoid being charged penalties or interest by either:*
>
> - *joining the new payment scheme by 21 June 2021*
> - *paying your deferred VAT in full by 30 June 2021*
>
> ***Join the VAT deferral new payment scheme***

The VAT deferral new payment scheme is open from 23 February 2021 up to and including 21 June 2021…"

…

The VAT deferral period covered accounting periods for:

- *February 2020*
- *March 2020*
- *April 2020*
- *May 2020 – for payment on account customers and certain non-standard tax periods only, in addition to the above periods*

If you're not able to pay your deferred VAT

…

If you're still unable to pay and need more time, find out what to do if you cannot pay your tax bill on time.

To find out what support is available, use the Get help and support for your business guide."

77. Whilst the coronavirus pandemic was an unforeseeable (or inescapable) event for all, we are satisfied that measures were put in place to assist taxpayers. While having every sympathy for the personal losses and illness suffered by Mr Polycarpou, it is the case that the Appellant had never put forward illness or bereavement as a reason for the default in this appeal. This is not a finding that Mr Polycarpou was not personally affected by the pandemic, but is a balanced appraisal of the evidence before us.

78. In respect of the third of the Appellant's submissions, we find that the Appellant did not contact HMRC prior to the due date to arrange a payment deferment. The file notes on HMRC's system show that a call was made on 7 May 2021. Any agreement to defer payment was no reached prior to the default in this appeal.

79. Having considered all of the evidence, we find that the Appellant has failed to establish a reasonable excuse. This is because following a series of defaults from the period 06/20, the Appellant has been in the default surcharge regime. Furthermore, the Appellant accepts that VAT was paid late. Mr Polycarpou's evidence in this respect was that he was aware of the VAT payment deadline.

80. Whilst the Appellant may have honestly believed that late VAT payments could be excused if they were only a few days late, having registered for VAT (as long ago as 2005),

and having received an SLN and SLNEs (and assessments), the initial belief is not objectively reasonable. In our judgment, that is insufficient. From the period 04/15, each SLN issued details, on the reverse, how surcharges are calculated and provides details of how to avoid further defaults in the future, as follows:

> *"**Think ahead***
>
> *...*
>
> *If you cannot pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service before the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge."*

81. We find that there is considerable force in the submission on behalf of HMRC that the Appellant would therefore have been aware of the rate of surcharge having received earlier surcharge notices. The surcharge was reviewed and reduced according to the amount paid by the Appellant by the due date. There was, however, no attempt to contact HMRC before the due date (in the evidence before us).

82. We find that it is reasonable to expect the Appellant would have put measures in place to ensure compliance with its legal obligations in respect of VAT. As already considered, each SLN provides details of how to avoid further defaults in the future (*supra*). We find that there is considerable force in the submission on behalf of HMRC that the Appellant would have been aware of the rate of surcharge having received the SLN, and would have been aware of the potential financial consequences of continued default(s). The Appellant has had a TTP arrangement in the past and would, we find, have been aware of the proactive steps that could been taken to avoid further default. Such steps include agreeing a TTP arrangement prior to the due date.

83. In *Katib v HMRC* [2009] UKUT 189 (TCC) ('*Katib*'), the Upper Tribunal concluded that the lack of experience of the appellant and the hardship that is likely to be suffered was not sufficient to displace the responsibility on the appellant to adhere to time limits. The differences in fact in *Katib* and in the appeal before us do not negate the principle established in relation to the need for statutory time limits to be adhered to, and the duty placed upon taxpayers to adhere to statutory duties.

84. We have also considered the case of *Revenue & Customs Commrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255. There, the Upper Tribunal held that this Tribunal did not have power to discharge penalties on the ground that their imposition was unfair. In *Rotberg v Revenue & Customs Commrs* [2014] UKFTT 657 (TC), it was accepted that the tribunal's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. The Tribunal held, at [109], that the First-tier Tribunal has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Tribunal found, at [116], that the jurisdiction of the Tribunal in cases of that nature was limited to considering the application of the tax provisions themselves.

85. The Upper Tribunal in *R & C Commrs v Trinity Mirror plc* [2015] UKUT 421 (TCC) held that the default surcharge regime, viewed as a whole, is a rational scheme which is a proportionate method of enforcing statutory deadlines for filing returns and making payment of VAT. The Tribunal has no jurisdiction to determine issues of fairness. The default surcharge regime seeks to ensure that taxable persons who fail to pay VAT on time do not gain a commercial advantage over the majority who comply with time-limits. Since the requirement to make VAT payments is imposed by law, the issue of proportionality does not arise.

86. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and, as such, not imposing the penalty, HMRC would not be adhering to its own legal obligations. The Tribunal has no jurisdiction to discharge the penalties if they are properly due. Its jurisdiction in respect of this and other similar penalty provisions is limited to whether or not payment was late, as a matter of fact, and, if so, whether there is a reasonable excuse for lateness. Only if it decides the issue of a reasonable excuse in favour of the Appellant may it discharge the penalty and fairness is not a permissible consideration.

87. We have borne in mind the comments in *Hesketh & Anor v HMRC* [2018] TC 06266. There, Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [48], Judge Mosedale said this:

> "Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

88. As similarly held by Clauston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p 12:

> "the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis."

89. It is therefore trite law that ignorance of the law cannot come to the defence of a violation of the law. Furthermore, a mistake (albeit an innocent one) cannot provide shelter for a violation of the law. The onus is upon an appellant to ensure that they properly understand their obligations under the law.

90. Having regard to the findings of fact, and in light of the relevant test, we are satisfied that the Appellant has not established a reasonable excuse.

91. In reaching these findings, the Tribunal has applied the test set out in *Clean Car*.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

92. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 28 JUNE 2023