[2015] UKFTT 0204 (TC)

TC04396

Appeal number: TC/2014/05705

VAT – default surcharge – ss 59 and 71, Value Added Tax Act 1994 - reasonable excuse – payment six days late – mistaken belief that a direct debit was in place – Public Notice 700/50 incorrect - whether or not a disproportionate penalty - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

COUNTY INNS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD CHAPMAN
MR PHILIP JOLLY

Sitting in public at Liverpool Civil and Family Court, 3rd Floor, 35 Vernon Street, Liverpool, L2 2BX on 20 March 2015.

Miss Gemma Hughes, employee of the Appellant, for the Appellant

Mr John Nicholson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by County Inns Limited ("the Appellant") against a default surcharge for the late payment of VAT in the 04/14 period.

2. The main dispute is as to whether or not the Appellant has a reasonable excuse for its late payment based upon its mistaken belief that a direct debit had been set up and was operative. The proportionality of the penalty is also in issue.

The Factual Background

3. The Appellant carries on business as a public house in Mickle Trafford, Chester. Miss Hughes is an accountant and is employed by the Appellant. She deals with the Appellant's accountancy matters including completing and submitting VAT returns and ensuring that VAT liabilities are paid.

4. The parties agree that the VAT period 04/14 had a due date of 7 June 2014 for electronic submission of the return and for electronic payment. The return for the period was received by HMRC on 6 June 2014 and payment was received by HMRC by five electronic transfers on 13 June 2014. The payment was therefore 6 days after the due date.

5. By a notice of assessment of surcharge dated 13 June 2014, HMRC imposed a default surcharge of £16,219.30, representing 15% of the £108,128.67 due under the VAT return for the period 04/14. The percentage rate to be applied to calculate the surcharge is specified by section 59(5)(a) to (d) of the Value Added Tax Act 1994 ("VATA 1994") (quoted in full below) whereby the rate is 2% for a first default in a surcharge period, 5% for a second default, 10% for a third default and 15% for each subsequent default. HMRC applied a 15% rate to the surcharge because the Appellant had been in the default surcharge regime since the period 10/12 and there had been previous defaults in the periods 01/14, 10/13, and 07/13. The 01/14 default surcharge was £11,763.64 calculated by reference to a 10% rate, and was notified to the Appellant on 14 March 2014.

6. The Appellant sought a review in respect of the default surcharges for periods 01/14 and 04/14. The Appellant's position was that Miss Hughes had set up a direct debit through HMRC's online system on 5 March 2014. When the payment for the period 01/14 did not take effect, she assumed that the direct debit had not been set up in time so paid it though the Appellant's bank. When the payment for the period 04/14 did not take effect either, Miss Hughes contacted HMRC on 11 June 2014 and was told that the direct debit was not active. The Appellant stated that it had been let down by the online direct debit system as, until 11 June 2014, Miss Hughes had understood that the direct debit was in place.

7. By a review decision dated 17 September 2014, HMRC cancelled the default surcharge for the period 01/14. HMRC upheld the imposition of a default surcharge for the period 04/14 but reduced it to £10,812.86 calculated by reference to a 10% rate. This reduction reflected the fact that the 04/14 default was being treated as a third default following the cancellation of the 01/14 default surcharge.

Grounds for Appeal

8. The Appellant's Grounds for Appeal are as follows:

> A direct debit was set up online through HMRC website on 05/03/2014. Unfortunately it was not set up correctly and the payment was not taken for our 04/14 return on 11/06/2014 as we expected. HMRC has been provided with a copy of the screen print, but this was not sufficient evidence.
>
> When we realised on 11/06/2014 that the DD paymet [sic] had not left our bank we telephoned HMRC and were informed that the DD was not active.
>
> A further DD was set up whilst we were on the phone to HMRC and it was confirmed at that time that it had successfully been created.
>
> Unfortunately we were unable to make an immediate payment for the 04/14 vat liability as our bank account was unable to make a large immediate payment.
>
> We made 4 payments which totalled the amount due and they were all received by HMRC on 13/06/2014.
>
> Whilst we understand that the payment was late, we do not agree that the surcharge is reasonable or [a] fair amount given that the payment was received in full 6 days after the due date.
>
> The surcharge of 10%, when calculated over the 6 days, equates to an APR of 600%.
>
> Having to pay this surcharge will have a large detrimental effect on our business being able to meet its liabilities.
>
> The company has incurred losses in both 2012 & 2013 and we have draft accounts showing a loss for 2014 also.

The Evidence

9. We heard evidence from Miss Hughes on behalf of the Appellant. She adopted as her evidence the information provided in the Appellant's Grounds for Appeal and the letter to HMRC requesting a review.

10. Miss Hughes also gave further evidence. She stated that she believed that she had done everything necessary to set up the direct debit including pressing the final submission button and therefore believed that the direct debit was active. She had printed out a document that appears in the hearing bundle headed "Set up Direct Debit Instruction". She explained the process of filling out the online direct debit instruction, which included completing the Appellant's details and pressing the "next" button on each page. Miss Hughes stated that she believed that she had reached a page

stating that the submission of the form had been successful. She had successfully completed HMRC direct debit instruction forms before but was not sure whether or not she had seen any confirmation pages in the past. Miss Hughes did not print out any other screen shots and said that it was not her custom to do so for online applications. Miss Hughes emphasised that she and the Appellant had no reason not to set up the direct debit properly. The money was in the bank to pay for the Appellant's VAT liabilities and they were paid in short order after she realised that the direct debits had not left the Appellant's bank account. Miss Hughes provided the Tribunal with copies of the Appellant's bank statements to this effect.

11. Mr Nicholson put to Miss Hughes in cross-examination that she should have realised that the direct debit was not in place at the time that she tried to set it up, as she would not have received the consequent notification as to when the direct debit was to leave the Appellant's account. Miss Hughes said that she was not sure whether or not she saw such a notification and, in any event, did not accept that this should have alerted her. She repeated that it was her belief that the direct debit had been set up properly.

12. Miss Hughes explained that she appreciated the importance of the Appellant paying its VAT liabilities on time. With that in mind, she was careful to check the Appellant's bank account to ensure that the payment had been made. She saw this as particularly important given that the Appellant had struggled to make payments in the past and had defaulted and that the VAT payments were large sums for the Appellant when compared with other payments made from the Appellant's bank account. She said that this was not (to use her word) a "normal" direct debit. It was these checks on the bank account that prompted Miss Hughes to make transfers in respect of the 01/14 period and to contact HMRC on 11 June 2014 when she realised that the direct debits had not been paid.

13. This begged the question as to why Miss Hughes thought that the direct debit payment for the 01/14 period had not gone through. She said that she had set it up on 5 March 2014 and, on checking the account on 11 March 2014 and seeing that the payment had not been made, thought that there had not been enough time for the direct debit to take effect. She said that she did not ask anybody for an explanation at that time, as she had printed the direct debit instruction and believed that it would still be active for future payments.

14. Mr Nicholson put to Miss Hughes that, upon realising that the direct debit had not been taken from the Appellant's bank account for the 01/14 period, it would have been prudent to check that the direct debit was actually in place. Miss Hughes stated that it was now apparent to her that it would have been prudent to do this.

15. Miss Hughes accepted that there had been defaults before the 01/14 period and did not seek to excuse them. There was a payment plan in place in respect of the 10/13 period liabilities, the Appellant was up to date in all its payments to HMRC and all periods after 04/14 had been paid on time by way of a new direct debit set up by telephone on 11 June 2014.

16. HMRC did not adduce any witness evidence.

The Statutory Framework

17. Before summarising the parties' respective cases, we set out the relevant legislation as follows.

18. The default surcharge regime is contained within section 59 of VATA 1994.

> 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 subsection (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) and (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 subsection (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).

(8) For the purposes of subsection (7) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

(9) In any case where –

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

19. The parties both agreed that the test is whether or not the Appellant had a reasonable excuse and that this did not mean whether or not the Appellant had an honest and genuine belief. They both relied upon the First-Tier Tribunal decision of *Coales v HMRC* [2012] SFTD 1371, [2012] UKFTT 477 (TC), in which Judge Brannan stated as follows at [30] to [32], dealing with a surcharge on unpaid income tax and capital gains tax:

"[30] Recently, this tribunal (Judge Geraint Jones QC and Mr Derek Speller) in *Chichester v Revenue and Customs Comrs* [2012] UKFTT 397 (TC) held that an honest and genuine belief, even if unreasonable, could be a reasonable excuse. The tribunal said:

'[14] In its decision in *Intelligent Management UK Ltd v HMRC* [2011] UKFTT 704 (TC) this Tribunal recognised that an honest belief in a given state of affairs could amount to a reasonable excuse for not thereafter doing a particular act, but at paragraph 22 of its decision went on to say *'If honest and genuine belief that the filing had taken place within the deadline can be a reasonable excuse, the Tribunal considers that there must be some reasonable basis for the honest and genuine belief. The Tribunal does not consider that an irrational or unreasonable belief, even if honest and genuine, would suffice.'*

[15] Whether a person holds an honest and genuine belief is a question of fact. It is an enquiry into the subjective state of mind of a given individual. There is no objective element to the enquiry; it is entirely subjective. That is the effect of the decision of the Court of Appeal in *R v Unah, The Times, 2/8/11* the Court of Appeal (Criminal Division) where Elias LJ, Wyn Williams J & Sir David Clarke decided, albeit in a rather different context, that a genuine or honestly held belief can amount to a reasonable excuse for not doing something that a person is required to do.

[16] If the claimant's (honest) belief is, when viewed objectively, irrational or apparently unreasonable, that is a factor that might weigh in the forensic exercise of deciding whether the person claiming to hold the stated (honest) belief did in fact hold the claimed (honest) belief. It is not a separate test to be applied in deciding whether an honest belief amounts to a reasonable excuse. If it was, it would inject an impermissible element of objectivity into an enquiry which is solely subjective, in the sense that it turns solely upon the state of mind or subjective belief of the relevant person. Accordingly, it is wrong in law to proceed on the basis that an honestly held belief would not amount to a reasonable excuse if, from an objective standpoint, it

was considered that that belief was irrational or unreasonable. The objective analysis goes solely to the issue of credibility. If a Tribunal finds that a person, as a matter of fact, held a particular honest and genuine belief, that may amount to a reasonable excuse (on appropriate facts) regardless of whether that belief would be characterised as irrational or unreasonable when viewed objectively.'

[31] With respect, I disagree. The starting point for any analysis of the concept of 'reasonable excuse' must always be the statute. In this case s59(C)(9)(a) TMA provides that I may set aside the surcharge if the taxpayer has a reasonable excuse for not paying the tax. Parliament has balanced the interests of the taxpayer with those of the Exchequer. A taxpayer may be spared a surcharge if the taxpayer has an excuse, but the excuse must been a reasonable one. 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 some hypothetical) taxpayer.

[32] The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse. It is true that the absence of a genuine and honest belief would usually indicate that the excuse could not be reasonable, but its presence does not mean that the excuse is necessarily reasonable."

The Appellant's Case

20. Miss Hughes put the Appellant's case in a commendably concise and articulate manner. In essence, the Appellant's case is that Miss Hughes believed that she had set up the direct debit properly. Although she accepts that this was a mistaken belief, Miss Hughes maintains that it was a reasonable belief and so constitutes a reasonable excuse. She effectively adopted her evidence as set out above as the circumstances for this reasonable belief.

21. Miss Hughes made the point that the explanation for the default in the 01/14 period was the same as for the default in the 04/14 period. Given that HMRC had already conceded that there was a reasonable excuse for the first of these periods, it was inconsistent for them to argue that there was no reasonable excuse for the second.

22. The Appellant's Grounds for Appeal suggest that the Appellant also argues that the surcharge is disproportionate. Miss Hughes clarified this in her submissions, stating that the comparison to the annual percentage rate of a loan was merely to emphasise that the surcharge operated harshly in the present case where the payment was only six days late.

HMRC's Case

23. Mr Nicholson did not accept that Miss Hughes' explanation of the default was capable of constituting a reasonable excuse. He submitted that this was simply Miss Hughes' mistake.

24. Mr Nicholson relied upon the First-Tier Tribunal decision of *Garnmoss Limited trading as Parham Builders v HMRC* [2012] UKFTT 315 (TC) (Judge Hellier and Mrs Hewett). He referred us to paragraphs [11] and [12] of the judgment, which provide as follows:

> "[11] The Act provides that a person is to be regarded as being in default if he fails to pay the amount of VAT shown on the return as payable by him. The appellant therefore defaulted in respect of this period. The question for us is whether the appellant had a reasonable excuse.
>
> [12] What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse. Thus this default cannot be ignored under the provisions of subsection (7)."

25. Mr Nicholson also referred us to paragraph 6.3 of Public Notice 700/50, which, whilst not having the force of law, represents HMRC's understanding of the position. The relevant extract is as follows:

> …
>
> Genuine mistakes, honest and acting in good faith are not reasonable excuses …

26. We asked Mr Nicholson whether it was HMRC's case that an honest and genuine mistake could never constitute a reasonable excuse. He said that he did not go quite so far as this and that it depended upon the circumstances.

27. Mr Nicholson's central point was that Miss Hughes ought to have realised that there was a problem with the direct debit when she realised that the payment had not been effective for the 01/14 period. He submitted that a reasonable taxpayer in the circumstances of the Appellant would have checked whether or not it was active before the payment was due for the 04/14 period. This was a material difference to the 01/14 period as Miss Hughes was now aware, or should have been aware, that there was a potential problem with the direct debit.

28. In any event, Mr Nicholson suggested that HMRC had been lenient in cancelling the surcharge for the 01/14 period, as Miss Hughes ought to have been aware that the direct debit had not been set up properly as she had not received a notification of when the direct debit would be taken from the Appellant's account.

29. Mr Nicholson submitted that the surcharge was proportionate. He relied upon the Upper Tribunal decision of *HMRC v Total Technology (Engineering) Limited* [2012] UKTC 418 (TCC) for the proposition that the general system of surcharges was proportionate. This authority is of course binding upon this Tribunal and Miss Hughes did not argue against it.

30. Although the default was only for six days, there was a history of defaults. A schedule of defaults was contained in the hearing bundle and was not disputed. For the 10/12 period, the VAT liability had been £83,152.22 and the payment had been 31 days late. For the 07/13 period, the VAT liability had been £46,760.44 and payment in full had been over three months late. For the 10/13 period, the VAT liability had been £84,751.99 and the return was received six days late. A payment plan was agreed for the 10/13 period, although we were not told whether this was before or after the due date. Miss Hughes accepted that there was no reasonable excuse for these defaults and that they had not been challenged.

Discussion

Findings of fact

31. There were no real disputes of fact in this case. In any event, we find as a matter of fact that Miss Hughes did believe that she had set up the direct debit properly and that she continued to believe this at all times until 11 June 2014. Miss Hughes was a clear and honest witness. We agree with her observation that there was no reason for her to fail to complete the final stage of the online direct debit instruction in circumstances in which the Appellant had the funds and she made payment as soon as she knew that it had not been taken out of the Appellant's account. We also accept Miss Hughes' evidence that she appreciated the significance of the direct debit and that she was assiduous about checking whether or not a payment had been made on the due date.

32. We are not in a position to make any findings of fact as to why the direct debit did not take effect. We did not hear any evidence about whether or not it is possible for a confirmation page to appear and yet for the direct debit not to take effect. This may have been relevant if the surcharge for the 01/14 period was still in dispute. However, HMRC's acceptance of reasonable excuse and the consequent cancellation of this surcharge mean that the key issue is as to the reasonableness of the continuation of Miss Hughes' belief after the 01/14 default.

Reasonable excuse

33. Both *Coales v HMRC* and *Chichester v HMRC* [2012] UKFTT 397 (TC) (the relevant part of which is cited by Judge Brannan in *Coales v HMRC*) are decisions of the First-Tier Tribunal and so are not binding upon this Tribunal. However, we respectfully agree that the test expounded in *Coales v HMRC* is the correct one for the reasons set out in that case.

34. *Garnmoss Limited v HMRC* is not authority for the proposition that a mistake is never capable of constituting a reasonable excuse. In saying at [12] that, "the Act does not provide shelter for mistakes, only for reasonable excuses," the Tribunal was not ruling out the possibility that an act or omission can be a mistake *and* a reasonable excuse. Instead, the Tribunal was in our view making the straightforward point that a mistake is not enough on its own to excuse a default; the mistake has to have been reasonably made in order to constitute a reasonable excuse. This is, in our judgment, made clear by the following passages in *Garnmoss Limited v HMRC* at [29] and [30]:

> "[29] Mr Parham submitted that it was reasonable for the company to expect that an instruction for a CHAPS payment would be executed on the date it was given and thus that the default should be expunged by section 59(7)(a). Mrs Davey said that a reasonably conscientious businessman would not have made this mistake or expected the money to be received on time.
>
> [30] We agree with Mrs Davey. It is reasonable to expect that if it is important that payment is received by a particular date the sender will check to ensure that its method of payment will achieve that objective."

35. It follows that we do not agree that paragraph 6.3 of Public Notice 700/50 is a correct statement of the law. It is correct that a, "genuine mistake, honest and in good faith," is not sufficient in its own right to give rise to a reasonable excuse. However, the Public Notice gives the impression that such a mistake can *never* be a reasonable excuse. This is wrong. As set out above, a mistake that has been made reasonably is, in principle, capable of being a reasonable excuse.

36. Applying this to the present case, it is our view that the Appellant does not have a reasonable excuse for the default. Although we have found that Miss Hughes was genuinely mistaken until 11 June 2014 that the direct debit was in place, a reasonable taxpayer in the Appellant's circumstances would not have reached the same conclusion and would not have acted in the same way. Crucially, Miss Hughes was on notice that there was a problem with the direct debit when it failed to give effect to the payment for the 01/14 period. It was not reasonable for her simply to assume that this was because the direct debit had not been set up in time or to assume that the payment would be taken on the next occasion. It would have been reasonable for Miss Hughes to investigate why the payment had not been made for the 01/14 period, whether with the Appellant's bank or with HMRC. Miss Hughes herself accepted that this would have been prudent. However, she did not investigate the status of the direct debit until 11 June 2014. Our view is reinforced by the fact that Miss Hughes appreciated the importance of the direct debit and that she was so careful to check whether or not the payments had in fact been made. It is surprising that this did not extend to checking the more fundamental question as to whether or not the direct debit was active, at least once she realised that the first payment had not been made.

37. Whilst it goes too far to say that (as submitted by Mr Nicholson) Miss Hughes should have realised that she would be notified of a date for the payment to leave the Appellant's account, the absence of anything from HMRC or the Appellant's bank referring to the direct debit meant that Miss Hughes had no reassurance that it was active and so should not have assumed that the problem with the direct debit would only affect the 01/14 payment. Miss Hughes said that she felt reassured by the printout of the direct debit instruction. However, this was an instruction, had a blank section under the heading "Direct Debit Reference", was generated prior to the final submission of the instruction (as it referred to the need to click "Next" to submit the instruction) and was not confirmation that the direct debit instruction had been successful. Again, in our judgment it was not reasonable to remain reassured by this once Miss Hughes knew that the first payment had failed to leave the Appellant's bank account for the 01/14 period.

Proportionality

38. As set out above, the general system of surcharges has already been held to be proportionate by the Upper Tribunal in *HMRC v Total Technology (Engineering) Limited*. The question, therefore, is whether or not the facts of this particular case make the penalty disproportionate. In considering this, we keep in mind the following passages in the judgment of Warren J and Judge Bishopp in *HMRC v Total Technology (Engineering) Limited*:

"[87] *A trader who is late but has a reasonable excuse is not subject to a penalty. Nor, however long he then delays in payment, is he subjected to a penalty.* This, as we see it, is not a valid criticism of a regime which imposes a penalty for the late filing of a return and late payment of tax. Rather, it is criticism of HMRC in failing to procure the passing of legislation which imposes a penalty for delay in payment once the reasonable excuse has ceased to exits. It is not as though such a trader escapes liability to pay tax and any interest due. This feature does not result in a breach of the principle of proportionality at either the level of the regime viewed as a whole or from the point of view of the individual taxpayer concerned.

[88] *In contrast, a trader who is late is subject to a penalty which cannot be reduced even though his payment is only a single day late.* This, as we see it, is a reflection of the aim of the legislation which, as we have explained, is to ensure compliance with the obligation to file and pay by the due date. The issue is not, in our view, whether the absence of a different treatment depending on the extent of the delay in filing the return undermines the system; the issue is whether the amount of the penalty is proportionate to the breach of duty in being a single day late. At the level of the scheme viewed as a whole, a penalty which is incurred as the result of a particular failure is entirely acceptable and compliant with the principle of proportionality provided that the amount of the penalty for that failure (however innocent its cause) is itself proportionate to the failure. At the level of the individual taxpayer, the question is not whether it would be a more coherent regime to have sequential penalties as time passes without the default having been remedied. Rather it is whether the amount of the penalty for the failure to file and pay by the due date is proportionate. If it is of an appropriate amount, then there is no need for a power to mitigate.

[89] *The regime does not distinguish between traders who are a day late, a week late or even a month late.* This is really another aspect of the previous complaint. If the penalty imposed on the person who is a day late is proportionate, it is not to the point that a different regime might properly impose further penalties on a person who continues in default. The penalty is for failure to file and pay by the due date, not for delay after the due date. See also paragraph 80 above.

…

[99] In our judgment, there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are, however, some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But, in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's Convention rights. The freedom which Parliament has in establishing the appropriate penalties is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to Convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged).

39. In our judgment, the penalty was not disproportionate. The focus of Miss Hughes' argument was that the payment was only six days late. It follows from *HMRC v Total Technology (Engineering) Limited* that this does not assist the Appellant. Further, the surcharge has been reduced to £10,812.86, the Appellant's turnover is substantial (the total value of sales and all other outputs excluding VAT was over £1,600,170 in the 04/14 period alone) and the Appellant has a recent history of defaults.

40. Miss Hughes was keen to point out that the Appellant had not been in default since 11 June 2014. However, this does not have a bearing upon the question of the proportionality of the surcharge for the 04/14 period.

Decision

41. For the reasons set out above, we do not accept that the Appellant had a reasonable excuse for the default in payment of VAT for the 04/14 period and we do not accept that the surcharge is disproportionate. It follows that we must dismiss the appeal.

42. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 6 May 2015