Neutral Citation: [2023] UKFTT 00470 (TC)

Case Number: TC08830

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video]

Appeal reference: TC/2022/11291

VAT – Default Surcharge – late payment of VAT – date of collection of direct debit payments by HMRC – Whether this date changes the statutory due date for payment of VAT – no - Whether Time to Pay arrangement requested or agreed prior to due date – no - Whether payment of VAT late – yes – Whether reasonable excuse established – no – Appeal dismissed

Heard on: 7 March 2023
Judgment date: 31 May 2023

Before

JUDGE NATSAI MANYARARA
JULIAN STAFFORD

Between

W. W. M. ROSE & SONS LTD.

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ian Rose, Director, in Person

For the Respondents: Ms Amy Cook, 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 01/22, as follows:

Date	Legislation	Description	Amount
17 March 2022	s. 59(5)(a) VATA	Surcharge Assessment at 2%	£1,936.05

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 a (i) Documents Bundle consisting of 68 pages; (ii) a Legislation & Authorities Bundle consisting of 157 pages; and (iii) a Statement of Reasons dated 6 September 2022.

BACKGROUND FACTS

3. The Appellant is a limited company and its business activity is the wholesale of agricultural machinery, equipment and supplies. Mr Ian Rose is one of four directors. The Appellant is a taxable person and has been registered for VAT with effect from 6 December 1976, and submits VAT returns on a quarterly basis. The Appellant's normal method of payment is National Direct Debit Service ('NDDS').

4. The due date for the VAT return and payment for the period 01/21 was 7 March 2021. The Appellant's VAT return was received on 5 March 2021. The total amount of VAT due was £84,078.50. VAT was paid on multiple dates via NDDS. On 12 March 2021, a Surcharge Liability Notice ('SLN') was issued to the Appellant by HMRC, giving a surcharge period of 12 March 2021 to 31 January 2022.

5. The due date for the VAT return and payment for the period 01/22 (the period under appeal) was 7 March 2022. The Appellant's VAT return was received by 7 March 2022. The total amount of VAT due was £96,802.73.

6. On 10 March 2022, Mr Ian Rose telephoned HMRC's VAT helpline to advise of the difficulty in paying VAT on time. By a letter dated 18 March 2022, he requested a review of the decision to issue a surcharge and referred to the cashflow problems that the Appellant was experiencing. He also referred to his telephone conversation with HMRC, of 10 March 2022.

7. VAT for the period under appeal was paid via NDDS on multiple dates (after the due date). As VAT was not paid by the due date, the Appellant was issued with a penalty (default surcharge) on 17 March 2022. The default surcharge was in the sum of £1,936.05, which represented 2% of the outstanding VAT that was due for that period. The Appellant was also issued with a SLN of Extension ('SLNE'), which notified the Appellant that the surcharge period was extended until 31 January 2023.

THE PARTIES' RESPECTIVE POSITIONS

HMRC's Case

8. 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 was aware of the existing direct debit that was in place, and that there were insufficient funds to pay the tax due for the period 01/22 by the due date.

(3) The Appellant had ample opportunity to contact HMRC in order to agree a Time-to-Pay ('TTP') arrangement before the due date. The first contact made by the Appellant was on 10 March 2022.

(4) The Appellant has not provided any evidence to show the cashflow difficulties which were said to affect the ability to pay the VAT due on time. In any event, an insufficiency of funds is not a reasonable excuse.

(5) The rates of penalty have been calculated in line with the legislation. Having been issued with the SLN and the SLNE, 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

9. The Appellant's grounds for appealing against the default surcharge (see letters dated 18 March 2022 and 31 May 2022 and the notice of appeal) can be summarised as follows (for these purposes we refer to Mr Ian Rose (Director) as the Appellant):

(1) The Appellant understood the due date of payment of VAT for the period 01/22 to be 10 March 2022. A TTP arrangement was agreed when payment was due. This is one of the conditions for cancelling a surcharge. The Appellant called HMRC on 10 March 2022 and was advised to appeal the surcharge. The review conclusion letter wrongly states that the Appellant contacted HMRC on 18 March 2022.

(2) The Appellant was unable to pay the VAT due as a result of shortage of delivery equipment from supplying manufacturers. The Appellant had been unable to purchase new machines due to a lack of production by the manufacturers, who experienced a

shortage of components from their suppliers. The purchase of new equipment would normally offset VAT. The Appellant now expects the war in Ukraine to further aggravate the situation.

THE APPEAL HEARING

Preliminary matters

10. At the commencement of the appeal hearing, both parties confirmed that they had the same documents that were before the Tribunal. Mr Rose then submitted that he had requested the audio of a telephone call that he had made to HMRC on 10 March 2022, in which he had explained the difficulty in paying the VAT that was due and had agreed that VAT would be paid by direct debit. He further submitted that he was advised that he could appeal against the surcharge, which he did on 18 March 2022. In light of the statutory due date for the period 01/22, we were satisfied that we could hear the evidence about the conversation that took place on 10 March 2022, without the audio recording being available.

11. Ms Cook then opened the case on behalf of HMRC, as set out in the Statement of Reasons, and Mr Rose made submissions in reply.

Evidence and Submissions

12. In opening, Ms Cook confirmed that the default surcharge related to the period 01/22 and was in the sum of £1,936.05, calculated at 2% of the outstanding tax that was due at that time. She further submitted that the two issues that were before the Tribunal were whether the default surcharge was correctly issued by HMRC and, if so, whether the Appellant had established a reasonable excuse.

13. In further amplification of HMRC's case, Ms Cook submitted that VAT payments relating to the earlier period 01/21 had been late. She added that the Appellant had, therefore, entered the default surcharge regime at that time. She further submitted that on 8 March 2021, Mr Rose had telephoned HMRC and stated that the return for the period 01/21 had been submitted, but payment could not be made in a timely manner. In this respect, Ms Cook drew our attention to the Notepad Text/Enquiry Notes made on 8 March 2021, at 15:44hrs. She added that A TTP arrangement had, therefore, been set up for that period and the first payment was due on 1 April 2021. The Appellant subsequently made monthly payments thereafter.

14. In relation to the period under appeal (i.e., 01/22), the due date for the VAT return and payment was 7 March 2022. Whilst the VAT return was submitted in time, no payment of VAT was made by the due date. Ms Cook added that Mr Rose first contacted HMRC on 10 March 2022 to discuss the problems with payment for the period 01/22. During the call, Mr Rose had requested a payment plan for the amount of £96,802.73 as the Appellant was said to be experiencing financial issues and the payment would not go through. She further added that Mr Rose was advised to call back once the direct debit payment was declined. Mr Rose made

further contact with HMRC on 18 March 2022 to request a review of the decision to issue a default surcharge. The decision to issue a surcharge was, however, upheld on 11 May 2022 and the surcharge period ended in January 2023.

15. In relation to the Appellant's grounds of appeal, Ms Cook submitted that Mr Rose was aware of the process in respect of VAT, and that he would have been aware that payment was due at the same time that the VAT return was submitted for the relevant period. She added that the SLN for the 01/21 period outlined what the payment details for VAT were so the Appellant could have applied for a TTP arrangement before the due date for the 01/22 period. Ms Cook further submitted that the Appellant failed to mitigate its position despite having experienced cashflow issues in respect of the earlier period (01/21). Ms Cook concluded by saying that the due dates are set down in legislation, and that the Appellant has failed to establish a reasonable excuse.

16. In reply, Mr Rose submitted that the VAT return for the period 01/22 was submitted on 5 March 2022, which was a Saturday. He added that he then made telephone calls to HMRC on 8 March 2022, 10 March 2022 and 18 March 2022. He submitted that cashflow for the Appellant fluctuates wildly, depending on equipment, and that payments on VAT returns vary, accordingly. In further amplification of the Appellant's grounds of appeal, he submitted that it was difficult to control suppliers and how they supply equipment. He added that it was not physically possible for payment to be made by the due date. He further added that he took action on the advice that he received from HMRC during his telephone call to HMRC on 10 March 2022. In this respect, he submitted that the Appellant's appeal was at the advice of HMRC.

17. 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

18. 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)."

19. 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

20. The Appellant appeals against the imposition of a VAT default surcharge in respect of the late payment of VAT for the period 01/22. The surcharge is in the sum of £1,936.05, which represents 2% of the outstanding tax that was due for that period. 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."

21. 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.

22. We derived considerable benefit from hearing the submissions and from considering all of the documentary evidence before us. Having considered all of the submissions and evidence, cumulatively, we make the following findings of fact and give our reasons for the decision:

Findings of Fact

23. The period 01/21, covering the period 1 November 2020 to 31 January 2021, due date for electronic return and payment was 7 March 2021. The Appellant's VAT return was received on 5 March 2021 and VAT was paid on multiple dates, by NDDS. The Appellant failed to pay VAT by the due date and became liable to a surcharge. HMRC issued a SLN and the SLN gave a surcharge period of 12 March 2021 to 31 January 2022. The Appellant, therefore, entered the default surcharge regime during the period 01/21.

24. The Appellant subsequently failed to make payment of VAT for the period 01/22, covering the period 1 November 2021 to 31 January 2022, by the due date and became liable to a surcharge at 2% of the outstanding VAT, as it was within the surcharge period. The due date for the VAT return and payment was 7 March 2022. The VAT return was received on 7 March 2022. The total amount of outstanding VAT was £96,802.73 and the penalty charged was £1,936.05. The SLNE notified the Appellant that the surcharge period was extended to 31 January 2023.

25. On 10 March 2022, Mr Ian Rose telephoned the VAT helpline to advise of the difficulty in paying VAT on time. This was followed up by a letter, dated 18 March 2022, in which Mr Rose requested a review of the decision to issue a surcharge (which he described as an appeal). In the letter dated 18 March 2022, Mr Rose referred to the cashflow problems that the Appellant was experiencing, resulting in the difficulty in rendering payment in full on the due date. He also referred to his telephone conversation of 10 March 2022, in which he had been advised to appeal against the decision to issue a surcharge.

26. On 11 May 2022, HMRC issued their review conclusion letter. The outcome of the review was to uphold the surcharge.

27. By a further letter, dated 31 May 2022, Mr Rose appealed to HMRC once again. In his letter dated 31 May 2022, Mr Rose referred to having agreed a to pay the VAT due by direct debit on 10 March 2022. He further reiterated the cashflow problems that the Appellant was experiencing, resulting in the inability to pay the VAT due for the period on time.

28. On 1 June 2022, the Appellant notified the appeal to the Tribunal.

Consideration

29. 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.

30. 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?

31. 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?

32. 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;"
>
> …

33. 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".

…

34. 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."

35. 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.]"

36. 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. The legislation, therefore, makes clear that there is a statutory obligation to both file a VAT return, and pay VAT, on time.

37. 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."

38. In the appeal before us, the due date for payment of VAT in respect of the period 01/22 was 7 March 2022. The period 01/22 covered the period from 1 November 2021 to 31 January 2022. The Appellant's VAT return was submitted by the due date. Payment was not, however, rendered by the due date. Mr Rose contacted HMRC on 10 March 2022 to explain the issues that the Appellant was experiencing in respect of payment for the period 01/22. In his letter, dated 31 May 2022, Mr Rose says this:

*"**I made a phone call** to VAT Help Line Phone no 03002003701 on the 10/03/2022 to advise difficulty in payment arrangement for repay of VAT*

10/03/2022 – we understand this to be on the due date for payment. (In the review conclusion Letter it states my contact was the 18/03/22…" [sic]

[Emphasis added both above and below]

39. We find that by Mr Rose's own evidence, he only contacted HMRC to arrange payment for the period 01/22 on 10 March 2022, which he believed to be the due date, but which was already after the due date of 7 March 2022. Mr Rose submits that his contact with HMRC on 10 March 2022 constituted agreeing a TTP arrangement. Whilst the due date had already been missed by that date, we have considered whether a TTP arrangement had ever been agreed with HMRC.

40. During the discussions at the hearing, reference was made to s. 108 of the Finance Act 2009, which 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."

41. 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. We find that at the time that Mr Rose called HMRC on 10 March 2022, there was no TTP arrangement in place and we have found that his call on 10 March 2022 was already after the due date. The Appellant cannot, therefore, rely on the provisions of s. 108 in defence of the default.

42. The Appellant pays VAT by NDDS. During the appeal hearing, there was also discussion about when direct debits are collected by HMRC, and whether the date that direct debits are collected means that the due date for payment is significantly later than the due date for the VAT return relating to the period 01/22. Ms Cook submitted that HMRC allow three days for direct debits to clear, but that this did not change the due date of 7 March 2022, even if Mr Rose called HMRC on 10 March 2022. This is correct. The incontrovertible fact of this appeal is that Mr Rose only contacted HMRC after 7 March 2022.

43. In relation to direct debit payments, the VAT FS2 form provides for the following:

*"**How to avoid VAT surcharges***

...

Pay your VAT by the due date

...

How to pay

Same day or next working day transfer

...

3 working days

...

Think about using your VAT online account to set up a Direct Debit. A Direct Debit mandate must be in place at least working days before the submission of your online return."

44. A time period of three days is allowed for a direct debit to clear. The Appellant did not, however, have the funds for the direct debit to be honoured in a timely manner by the due date for the period 01/22. This resulted in the telephone call made by Mr Rose to HMRC. But, once again, the statutory due date had already passed. Mr Rose's belief that the due date was the 10th of the month was premised on the date at which the direct debit goes to HMRC's account and not the statutory due date.

45. The default surcharge regime was introduced in the United Kingdom in 1986 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.

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

47. 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.

48. 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.

49. 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.

50. 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."*

51. 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."

52. 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."

53. Having considered all of the evidence, we find that payment of VAT in this appeal was made after the due date of 7 March 2022. By failing to pay VAT by the statutory deadline, the Appellant failed to comply with the legislation. We are satisfied that the Appellant was in default of an obligation imposed by statute. 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?

54. 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?"

55. 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.

56. 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. Where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

57. 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.

58. In essence, Mr Rose submits that, firstly, a call was made to HMRC to agree a TTP before the due date for payment of VAT; and, secondly, that the deterioration of capital equipment resulted in cashflow problems affecting the timely payment of VAT.

59. In respect of the first of the Appellant's submissions, at the commencement of the appeal hearing, Mr Rose submitted that he had been made aware of the fact that he could access the

audio recordings of the telephone conversation that he had with HMRC on 10 March 2022. Whilst we have not had the benefit of hearing the audio recording, we have found that by his own evidence, Mr Rose only attempted to contact HMRC on 10 March 2022 to discuss the cashflow problems and the direct debit. We have found that Mr Rose's call of 10 March 2022 was already after the statutory due date of 7 March 2022. We have further found that the fact that time is allowed for a direct debit to clear does not alter the statutory due date for submission of the VAT return and payment of VAT.

60. It is clear that in his letter, dated 31 May 2022, Mr Rose was under the misconception that the due date for payment of VAT was 10 March 2022. In his letter dated 31 May 2022, in which Mr Rose refers to the telephone call of 10 March 2022, he states that the review conclusion letter advised that HMRC had received and agreed a TTP arrangement on or before the due date for payment. The review conclusion letter (dated 11 May 2022) does not say this but states, *inter alia*, that:

> *"If the Payment Support Service agrees a Time to Pay for a VAT debt in advance of the due date on the return, any default incurred will be removed..."*

61. This is not the same as saying that a TTP arrangement had been received and agreed prior to the due date.

62. Whilst Mr Rose may have honestly believed that the due date in respect of the period 01/22 was on the day of his telephone call to HMRC on 10 March 2022 (when he expected the direct debit to be taken), having registered for VAT as long ago as 1976, having entered the default surcharge regime during the period 01/21 and having received the SLN and SLNE, the initial belief is not objectively reasonable. We find that there is considerable force in HMRC's submission that the Appellant should have been aware of the potential financial consequences of any continued default, or of the obligations in respect of VAT. We are not told of any other efforts by the Appellant to inform itself (through its directors) of the requirements of VAT (statutory deadlines). We are satisfied that the Gov.uk website provides taxpayers with information in relation to the statutory due dates for payment of tax.

63. 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."

64. 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."

65. 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.

66. In respect of the second of the Appellant's submissions; that relating to the cashflow problems, 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."

67. 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.

68. 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.

69. In respect of the cashflow problems, Mr Rose submits that the Appellant had been unable to purchase new machines due to a lack of production by the manufacturers who experienced a shortage of components from their suppliers, and that the purchase of new equipment would normally offset VAT. Having considered this submission, we find that the reasonable excuse being advanced in this respect amounts to little more than that the conditions of trade have produced cashflow problems. This is because such cashflow problems had been raised in the past by the Appellant (for a previous period), and the description of the problems being experienced by the manufacturers appears to be an ongoing hazard of trade for the Appellant.

We are satisfied that a taxpayer is not relieved of the duty in respect of VAT by conditions of business that produce cashflow problems.

70. The failure to act in a timely manner having entered the default surcharge regime for an earlier period does not assist the Appellant's case. By only acting on 10 March 2022, in relation to the period under appeal, and in light of the previous cashflow problems advanced, the Appellant was not exercising reasonable foresight and due diligence. Furthermore, it was not a reasonable thing for a responsible trader conscious of and intending to comply with their obligations regarding tax in light of their experience and other relevant attributes. We have found that the Appellant registered for VAT as long ago as 1976 and had already received SLNs and an SLNE. Our findings are not a suggestion that the failure that occurred in this case was deliberate, but a balanced appraisal of all of the evidence.

71. The scheme of collection of VAT involves a trader having received the amount of tax which s/he must subsequently pay over to HMRC. The tax which is collected by a trader represents something similar to an interest-free loan from HMRC. There is no suggestion that the Appellant stopped trading as a result of the shortage of components from the manufacturers' suppliers.

72. 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 (i.e., 7 March 2022).

73. 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.

74. 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 and Customs Commissioner* [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.

75. 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.

76. 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.

77. 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.

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

RIGHT TO APPLY FOR PERMISSION TO APPEAL

79. 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: 31st MAY 2023