TC01853

Appeal number: TC/2011/03739

INCOME TAX – self assessment – surcharge for late payment of tax – whether reasonable excuse for late payment – whether a time to pay agreement had been negotiated – on facts, no – whether taxpayer honestly and reasonably believed that such an agreement had been negotiated – on facts, no basis for any such belief – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BHARAT THAKRAR **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
CHRISTINA HILL WILLIAMS

Sitting in public at 45 Bedford Square, London WC1 on 17 October 2011

Alan Arenstein and Shakunt Shah of KLSA Chartered Accountants, for the Appellant

Karen Weare, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Thakrar appeals against a surcharge in respect of the late payment of tax for the year ended 5 April 2009 imposed by the Respondents ("HMRC"). As agreed at the hearing, we produced a summary decision dismissing Mr Thakrar's appeal; this was released to the parties on 5 November 2011. On 23 November 2011 Mr Shakunt Shah emailed HM Courts and Tribunals Service ("HMC&TS") to request the issue of a full decision. Unfortunately, this message was overlooked by HMC&TS; the reasons for this are under investigation. On 7 December 2011, following a colleague's telephone call to HMC&TS, Mr Shakunt Shah sent a message requesting a full decision immediately, as his client wished to consider appealing to the Upper Tribunal.

2. The latter message was not relayed to the Judge until 30 December 2011. The reasons for the delay are not apparent, although we assume that part of it was due to the Christmas Holiday, and part to the general backlog of work within HMC&TS.

3. Mr Shakunt Shah may not have been aware that, where a Tribunal has produced either a short form decision or a summary decision, a full decision is not prepared unless one of the parties requests it. This requires additional work to be done by the Tribunal in preparing a full decision providing all the necessary detail to enable a party to consider whether an application for permission to appeal is to be made, and (if such an application proves to be successful) to enable the Upper Tribunal to deal with the appeal.

4. The additional task of preparing this full decision has had to await our availability, as work notified before 30 December 2011 on other appeals has had to take precedence. In addition, one of us has been unavailable over an extended period. The lapse of time since the hearing has been unfortunate, but we hope that the parties understand the reasons for that rather lengthy interval.

5. Paragraph 1 of our summary decision stated:

> "The Tribunal decided that throughout the period of default there was no reasonable excuse for the late payment by the Appellant of the tax due for the year ended 5 April 2009, that the appeal had to be dismissed, and that the surcharge of £19,129.47 in respect of the late payment of tax should be confirmed in that amount."

The facts

6. The evidence consisted of the bundle of documents prepared for the hearing, plus a separate bundle handed in by Mr Arenstein at the hearing. The latter included a copy of a letter faxed by Mr Shakunt Shah together with copies of email correspondence between Mr Vipin Shah and the Tribunals Service, and of email exchanges between Mr Vipin Shah and Murtaza Merali of KLSA and Torrick Hannan

of HMRC's Debt Management office. It also contained notarised witness statements given by Mr Vipin Shah and Mr Merali, as well as a faxed letter to HMRC's Debt Management office and other correspondence with HMRC.

7. In the copies of emails included in the bundle prepared by HMRC, the names and email address of Mr Hannan were redacted. In her letter dated 30 September 2011 to HMC&TS, Miss Weare offered to bring to the hearing unredacted copies of the email extracts contained in the bundle. No request appears to have been made by HMC&TS for her to do so. However, the relevant details were shown on the copies of emails brought by Mr Arenstein and Mr Shah to the hearing, and Miss Weare did not object to these documents being admitted in evidence. We can see no reason for concealing the name of the relevant HMRC officer. We have therefore referred in this decision to Mr Hannan by name, rather than by some form of anonymous description.

8. From the evidence we find the following background facts; where evidence was disputed, we consider it in the later part of this decision.

9. Mr Thakrar's notice to file a self assessment return was issued in the normal way, and dated 5 April 2009. As a result, the due date for filing the return was 31 January 2010 if filed on line (and 31 October 2009 if filed in paper form). His return was filed on 29 January 2010. The "self calculation" of the liability for 2008-09 showed the amount due to be £438,475.42. The automatic calculation following the on-line filing confirmed the liability in the same amount; however, it stated that some of the figures used had been adjusted to agree with the taxpayer's self-calculation. The tax payment in respect of that year was due on or before 31 January 2010.

10. The earliest correspondence recorded in the evidence, a fax from KLSA to Mrs James at HMRC's Debt Management office, related to the tax liabilities of Mr Thakrar and his business partner Mr H Singh, as well as the tax position of a company called London Pilsner Ltd. KLSA stated that this company was 100 per cent owned by Mr Thakrar, and that the partnership had invested in the company. The fax continued:

> "At present, the HM Revenue & Customs are holding back VAT of £1,035,360.95 (as shown in the enclosed letter). [That letter was from London Pilsner Ltd, and showed details of the four amounts withheld, totalling that figure.]
>
> Both Mr Thakrar and Mr Singh have indicated that they will pay the tax as soon as the VAT is refunded and while the VAT refund is processed, they would like to pay the tax by 12 monthly instalments [*sic*]."

11. A subsequent email exchange on 12 February 2010 between Mr Merali and Mr Hannan shows that discussions were in progress concerning arrangements to pay the tax. It included the following comments from Mr Hannan:

> "In order for me to consider the request for an arrangement I need to satisfy myself that your Client is not able to meet the amount due in full in one payment.

> I need to see income from all sources and personal expenses which are serviced by the amounts received. This should include income drawn as a loan from any business.
>
> I also need to have details of your Clients [*sic*] assets and whether any can be used to meet the liability."

12. In his email dated 16 February 2010, Mr Hannan referred to the financial information previously supplied to him, and indicated that as it related to a partnership, it was insufficient. He requested income details from all sources and details of personal expenditure, as referred to in his previous email.

13. In an email from Mr Vipin Shah to Mr Hannan dated 17 February 2010, Mr Vipin Shah explained that Mr Thakrar had put all but one of his properties on the market, and was confident that, given time, he would be able to generate the funds from the sales to pay the tax.

14. On 19 February 2010 Mr Hanna responded. He stated that he was involved in a meeting most of the day, and asked for details of the estate agents being used for the sales, and also for internet links to the marketed properties.

15. With an email sent on 24 February 2010, Abi Shanmuganathan of KLSA provided details of Mr Thakrar's property as advertised by his agents. She explained that his flats were all let to local authorities on long-term lettings. They were all ex-council flats and were being sold in a "job lot" to people in the "buy to let" industry.

16. In his response dated 25 February 2010, Mr Hannan requested details of the mortgages or secured loans associated with the properties. He also wished to know when the properties had been placed on the market and whether any offers had been received. He commented in relation to the flats that the buy to let market was very poor at the moment, and asked whether Mr Thakrar had received any serious offers for those properties.

17. On 15 March 2010 Mr Merali sent Mr Hannan an email setting out the up to date position concerning Mr Thakrar's position. The message indicated that realisation of funds from the sale of properties was likely to be slow. Mr Hannan responded later that morning. He stated that the letter attached to Mr Merali's message was of little value, as the property mentioned belonged to Mr Thakrar's company. Mr Hannan asked about another property which he understood Mr Thakrar to own, but which had not previously been mentioned.

18. On 18 March 2010 London Pilsner Ltd received the refund of VAT from HMRC.

19. The final balance of Mr Thakrar's tax due in respect of the year 2008-09 was paid on 22 March 2010.

20. On 3 April 2010 HMRC issued a surcharge notice. The amount was £19,129.47, calculated at 5 per cent of £382,598.48, which was the amount of the 2008-09 tax outstanding at 28 February 2010, the "surcharge trigger date".

21. KLSA wrote to HMRC on 19 April 2010. They wished to appeal against the self assessment late payment surcharge issued to Mr Thakrar, on the grounds that they were in discussion with the HMRC Business Payment Support Service. They asked for a full postponement of the tax payable. They stated:

> "We were dealing with Mr Torrick Hannan who advised us the surcharge penalty would not be imposed.
>
> Please waive these charges and we look forward to receiving your acknowledgment in due course."

22. In a letter dated 7 June 2010, Mr Nott (an officer of HMRC in the Customer Operations – PAYE and Self Assessment Cardiff office) commented:

> "I have contacted Mr Torrick Hannan who has confirmed that the surcharge is due and payable and is not to be waived.
>
> This was confirmed in the e-mail sent to you by Mr Hannan on 19 April 2010 which clearly states there is no agreement between your client and HMRC and the surcharge is due and payable."

23. Mr Vipin Shah replied on 14 June 2010, stating that KLSA wished to proceed with the appeal procedure in relation to the surcharge, and that:

> "Mr Hannan had confirmed to me and my clerk prior to payment of the tax that surcharge will not be payable."

24. On 18 August 2010 Mr Vipin Shah wrote again to HMRC, referring to the letter dated 14 June 2010, and stating that no response had been received. He asked for a reply, and asked HMRC to instruct the Collector of Taxes to "hold their demands".

25. KLSA wrote again on 25 August 2010 to HMRC, referring to the absence of any communication from HMRC relating to the appeal. The letter enclosed evidence to support the claim that the Inspector [ie Mr Hannan] had agreed that the surcharge would not be levied as KLSA were negotiating with HMRC's Business Payment Support Service. KLSA set out details of the history of the matter. They stated that if the matter could not be resolved, they wished the appeal to go to the commissioners of taxes [ie the Tribunal]. They indicated that Mr Vipin Shah and Mr Merali would provide sworn affidavits as to what had been said by Mr Hannan.

26. On 15 October 2010 HMRC's Cardiff office responded. The officer asked for his apologies to be accepted for the delay in replying. He stated :

> "I have contacted my colleague at the DMB who has advised me that a formal time to pay agreement was never entered into between your client and HMRC.
>
> As such the surcharge is payable. If I do not hear from you within the next 30 days I will release the suspension of the charge to enable pursuit of the outstanding amount."

27. Mr Vipin Shah responded on 29 October 2010, stating that KLSA had received HMRC's letter on 27 October 2010. He commented that the same DMB [ie Debt

Management] officer "had previously verbally agreed with me and my colleague that no surcharge would be imposed". He requested the appeal to be heard.

28. On 8 February 2011, Mrs LM Voce, an officer in HMRC's Cardiff office, wrote to KLSA with her view of the appeal and an offer of an independent review. She stated:

> ". . . I do not agree that you have a reasonable excuse for not paying your tax liability by that date."

She referred to interest accruing on the surcharge, and commented that it could be reduced or avoided by paying the surcharge immediately, even if the appeal was continued.

29. On 3 March 2011 Mr Shakunt Shah wrote to HMRC requesting an independent review of Mrs Voce's decision in respect of Mr Thakrar. The letter enclosed copies of correspondence. Mr Shakunt Shah also asked that when carrying out the review, HMRC should request copies of all telephone recordings of conversations between KLSA and the HMRC officers since January 2010.

30. Mrs J Doherty, the Review Officer, wrote to Mr Thakrar on 18 April 2011 with the results of her review. Her conclusion was that the decision in HMRC's letter dated 18 April 2011 should be upheld. She referred to the due date for the payment of tax, and stated:

> "A period of 28 days is given before a surcharge is imposed to allow you time to make payment or make arrangements to pay. Surcharges can be avoided if the following conditions are met
>
> - Payment proposals are made prior to the surcharge trigger date
> - We agree to the payment proposals, and
> - The arrangement is adhered to, and the Time to Pay arrangement isn't cancelled."

31. She referred to the history, and commented:

> "Your agent was advised on 2 February 2010 by phone and on 12 February 2010 by email that a Time to Pay would not be agreed without full details of your expenditure and income. These details were not provided. Details were provided for the partnership but this was not sufficient as the Time to Pay was for your personal self assessment liability and your personal Income and Expenditure details were required. A Time to Pay arrangement was not put in place. I am sorry but the surcharge has been correctly applied as the liability was not fully paid until 22 March 2010.
>
> I have contacted DMB for transcripts and have been advised that the telephone calls are not recorded at this time. Customers are advised that calls may be recorded."

32. On 12 May 2011 Mr Shakunt Shah as agent for Mr Thakrar gave notice of appeal to HMC&TS.

33. On, respectively, 17 September, 12 November and 17 November 2010, three different offices of HMRC's Debt Management unit wrote to Mr Thakrar demanding payment of the surcharge. The final letter was from the Debt Management Enforcement Unit, indicating that the officer had called at Mr Thakrar's address to collect payment or levy distraint on his goods and assets.

The law

34. Section 59C of the Taxes Management Act 1970 ("TMA 1970") provides:

> "**59C Surcharges on unpaid income tax and capital gains tax**
>
> (1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.
>
> (2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.
>
> (3)- (6) . . .
>
> (7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.
>
> (8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.
>
> (9) On an appeal under subsection (7) above that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may—
>
> (a) if it appears … that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or
>
> (b) if it does not so appear …, confirm the imposition of the surcharge.
>
> (10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.
>
> (11) . . .
>
> (12) In this section—
>
> "the due date", in relation to any tax, means the date on which the tax becomes due and payable;
>
> "the period of default", in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid."

35. The other legislation considered at the hearing was s 108 of the Finance Act 2009; we do not consider it necessary to set it out here.

Arguments for Mr Thakrar

36. Mr Arenstein produced the additional bundle of documents and materials. Mr Thakrar's case was that he thought he was having a "Time to Pay" ("TTP") agreement. This was a government scheme. Mr Arenstein referred to HMRC's Debt Management and Banking Manual at DMBM800020 and DMBM800040. It applied where tax was not paid within 28 days of the due date. He also made reference to HMRC's Self Assessment Manual at SAM62060. This referred to making proposals. Further clarification could be gained from SAM62070, dealing with TTP start and end dates.

37. Mr Arenstein referred to various points on the facts, which we consider below. He emphasised that HMRC's own records showed that KLSA had contacted HMRC before the surcharge trigger date, and that negotiations were continuing through February 2010. The documentation contained in the bundle was not complete; further email exchanges between different individuals at KLSA and Mr Hannan had not been included. The "missing" documents were in the supplementary bundle which he provided to us at the hearing. The email from Abi Shanmuganathan of KLSA dated 24 February 2010 and Mr Hannan's reply dated the following day were both before the surcharge trigger date (Sunday 28 February).

38. He submitted in the light of the Tribunal decision in *John Brady* [2011] UKFTT 415 (TC), in particular at paragraph 60, that Mr Thakrar (and his agents KLSA) had justifiable reason to assume that a TTP agreement had been negotiated. Mr Arenstein acknowledged that there were differences between the position in *John Brady* and that of Mr Thakrar; Mr Brady had thought that he had entered into such an agreement, and Mr Thakrar ultimately paid the tax in full so that an agreement was not agreed.

39. Mr Arenstein also referred to the decision in *C Thompson* [2010] UKFTT 250 (TC) at paragraph 24 referring to reasonable excuse and the negotiation of a TTP agreement. This implied that the continuing negotiation of such an agreement could be a reasonable excuse in circumstances such as Mr Thakrar where the negotiations were still continuing during March 2010.

40. In Mr Thakrar's case it cold be demonstrated that negotiations in good faith were continuing. SAM62070 showed that if Mr Thakrar had made a TTP agreement, on HMRC's argument there would be no surcharge.

41. The reason for the cash flow problems was the delayed repayment of VAT to London Pilsner Ltd. That company had received the repayment on Thursday 18 March 2010, and on Monday 22 March 2010 Mr Thakrar had paid the balance of his tax. He had also made previous payments toward his tax liability. He had also put up for sale his entire property portfolio; Mr Arenstein submitted that Mr Thakrar had been doing his best to pay.

42. He referred to HMRC's record of the progress of the correspondence. The delay between the KLSA email sent on 25 February and KLSA's email dated 15 March 2010 was the longest in the course of that correspondence. He understood that as a general matter HMRC were under a time limit of 14 days to respond to

correspondence. No time limits had been set in the correspondence relating to Mr Thakrar.

43. In their response to Mr Hannan's email dated 12 February 2010, KLSA had provided financial information relating to the partnership; other details of Mr Thakrar's financial position had followed soon afterwards. Mr Arenstein submitted that at no later point had HMRC asked for information concerning Mr Thakrar's income and expenditure.

44. There had been other complications. At one stage, HMRC had told KLSA that there would be three months to pay the tax. HMRC had subsequently indicated that this was not correct. However, even if HMRC were saying that this understanding was not correct, this did not mean that it had been unreasonable for KLSA to rely on it. Further, KLSA had asked whether the 5 per cent surcharge would apply if a TTP Agreement was negotiated and had been told that it would; this was not consistent with the HMRC guidance.

45. Mr Singh was Mr Thakrar's business partner. The fax relating to TTP applied to both. In Mr Singh's case an agreement had been reached. A surcharge had not been raised until February 11 2010. An appeal on Mr Singh's behalf had been made and instantly accepted, as the agreement had been accepted and agreed to.

46. Mr Arenstein indicated that in Mr Thakrar's case, he was not relying on the "three month" point.

47. He referred to comments from Mr Hannan, and to the sworn affidavits of Mr Vipin Shah and Mr Merali. (To the extent necessary, we consider these below.)

48. He further referred to SAM 62060 ("Interest, penalties and surcharge: time to pay and surcharge"). He acknowledged that KLSA and Mr Thakrar could not provide evidence that TTP had been agreed. He submitted that HMRC had made repeated errors in chasing the surcharge despite Mr Thakrar's appeal, and referred to the letters from HMRC's Debt Management unit.

49. He submitted that there had been no indication in the emails from Mr Hannan that surcharge would be imposed. Mr Thakrar acknowledged that he had become liable to surcharges in respect of certain previous years, and had accepted these without seeking to appeal against them.

50. He submitted that the evidence did not show a full record of all the occasions on which KLSA had provided information. As a result, the person carrying out the internal review had not had all the information. Certain comments in the HMRC notes appeared to suggest a prejudiced view.

51. It was not clear whether HMRC accepted that negotiations were still continuing as at the time when Mr Thakrar paid the balance of the tax due. There was no evidence of HMRC having turned down the proposals. The question of the VAT repayment had been mentioned by KLSA to HMRC's Debt Management unit. At no time had a TTP arrangement been finally agreed or rejected.

52. In summary, there should be no surcharge if a TTP had been negotiated and put in place. The reason that a TTP had not finally been negotiated was that funds had become available to Mr Thakrar and he had paid the tax. If he had not paid the tax when he did and had instead negotiated a TTP, there would have been no surcharge. This was especially harsh, as the reason was the repayment due from, and finally made by, HMRC. Effectively Mr Thakrar was being penalised for paying up before the negotiations were complete. Mr Arenstein requested that the appeal should be allowed.

Arguments for HMRC

53. Miss Weare referred to s 59C(9) TMA 1970, and to HMRC's internal guidance relating to reasonable excuse. HMRC's case was that Mr Thakrar did not have a TTP agreement. He had been within the self assessment regime since 1996-97, and was aware of the consequences of late payment, as he had suffered surcharges in the past.

54. The first contact which HMRC had had from KLSA was in January 2010. Mr Thakrar had been asked to submit income and expenditure details; HMRC had put this request to KLSA on 2 February 2010. There was no evidence of any reference to a three month period. HMRC needed information concerning Mr Thakrar's financial position. Negotiations were continuing at the trigger date, but Miss Weare submitted that there was no TTP agreement in existence at that date. On 22 March 2010 KLSA had indicated that Mr Thakrar was making payment of the full balance of tax outstanding. Subsequently the surcharge notice had been issued.

55. KLSA had raised the question of the recording of phone calls. Miss Weare explained that before August 2011 some calls were recorded, but merely for management purposes. Such records were then deleted. As a result, the records of phone conversations were not available.

56. KLSA had not provided the income and expenditure details requested by Mr Hannan. Miss Weare explained that HMRC had a discretion as to the making of TTP arrangements. As no details of Mr Thakrar's means, HMRC could not enter into a TTP arrangement.

57. She submitted that KLSA had not put forward evidence of any discussion indicating that a TTP arrangement would be made, nor of any indications that no surcharge would be issued. HMRC had been trying to obtain from Mr Thakrar the sum legally due to them on 31 January 2010 at the time when that sum was about to fall due. There had been discussions of a TTP arrangement, but at no time had one been agreed, nor had there been any agreement not to impose a surcharge. HMRC believed that KLSA had put the wrong interpretation on comments made by Mr Hannan. She referred to s 108 of the Finance Act 2009 (suspension of penalties, including surcharges, during currency of agreement for deferred payment). HMRC had not agreed that payment could be deferred.

58. Without a TTP arrangement, the surcharge remained due. Miss Weare asked for a finding that there was no reasonable excuse for non-payment of the liability by the due date. The appeal should be dismissed.

Discussion and conclusions

59. The statutory provision governing appeals against surcharges is s 59C TMA 1970. Although this was repealed by the Finance Act 2009, Schedules 55 and 56 (Income Tax Self Assessment and Pension Schemes) (Appointed Days and Consequential and Savings Provisions) Order, SI 2011/702 with effect from 1 April 2011, it continues to apply to returns or tax payable in respect of the tax year 2009-10 or any previous tax year.

60. Section 59C(9) refers to the matters which the Tribunal can take into account and the actions available to the Tribunal. The particular issue which the Tribunal is required to consider is whether, on the evidence, the taxpayer had a reasonable excuse for not paying the tax on the due date.

61. Although the only matter referred to is the question of the presence or absence of a reasonable excuse, we do not consider that this is the only question which the Tribunal is in a position to consider; see, for example, the decision in *Cherie Smith* [2011] UKFTT 593 (TC).

62. In the present case, no specific argument on Mr Thakrar's behalf is adduced to suggest that he had a reasonable excuse for not paying the tax due on 31 January 2010 on time. However, the argument that he and his agents KLSA thought that he was entering into a TTP agreement does indirectly raise the question of reasonable excuse. TTP agreements, though the result of a form of concessionary practice adopted by HMRC, remove from the "surcharge arena" those cases where a TTP agreement is definitely entered into without undue delay. In practice, therefore, surcharges are unlikely to be in question in the majority of cases where there is a TTP agreement in force.

63. We accept, as did the Tribunal in *John Brady*, that in a case where a taxpayer honestly and genuinely believes that he has entered into a TTP agreement, that may form a basis for a reasonable excuse within s 59C TMA 1970. In *John Brady*, the Tribunal was satisfied on the evidence that there was a basis for such belief. Does the evidence in Mr Thakrar's case support a similar conclusion?

64. Before addressing the evidence specifically concerning Mr Thakrar, we need to address the issue of his business partner Mr Singh. We do not consider it to be proper for us to take into account the information given by Mr Arenstein concerning the position of Mr Singh. Although he is Mr Thakrar's business partner, he is a separate taxpayer, and (apart from the fax referred to above) we have not been provided with anything amounting to evidence relating to his position. In any event, decisions by HMRC relating to one taxpayer cannot be taken as any indication of the way in which another taxpayer is to be treated, even if those respective taxpayers' positions may

appear to be very similar; there may be apparently minor differences which have major consequences in deciding how each, respectively, is to be treated.

65. The tax for 2008-09 was due and payable on 31 January 2010, and was not fully paid until 22 March 2010. HMRC's concessionary practice applicable for years up to 2009-10 is set out in HMRC's Self Assessment Manual at paragraph SAM62060:

> "Surcharge (both initial and further) is not imposed if a taxpayer makes proposals which lead to an acceptable arrangement to pay the full liability within 28 days of the due date, that is before the surcharge trigger date (SAM62080). If proposals are made after the 28 day period but before six months of the due date the taxpayer may only avoid further surcharge."

66. The text under that numbered paragraph continues:

> "Where you receive an appeal against a surcharge from a customer on the grounds that they have a TTP arrangement in place for the liability, you should view the SA record to confirm whether the customer meets the following criteria
>
> •Payment proposals were made **on or before** the surcharge trigger date
>
> •HMRC agreed the TTP arrangement
>
> •The customer is keeping to the TTP arrangement"

67. According to the copy in evidence from HMRC's internal records, the first request for a TTP arrangement was made by Mr Merali of KLSA on 21 January 2010. He explained that his client was unable to pay due to the current climate, and his company had cash flow problems. On the following day, Mr Merali requested a TTP arrangement for the whole of the tax falling due on 31 January 2010.

68. We find that negotiations were continuing at 28 February 2010, which was the surcharge trigger date under s 59C(2) TMA 1970. The stage which the negotiations had reached at that point was that Mr Hannan had sent his email dated 25 February 2010 (paragraph 16 above). There was then a gap in the correspondence until Mr Merali's message to Mr Hannan dated 15 March 2010 (paragraph 17 above). There was nothing included in the evidence to suggest that KLSA responded to Mr Hannan's request on 15 March 2010 for details of the other property of which he had become aware. We find the reason for this to have been that his message was overtaken by events, in that the repayment to London Pilsner Ltd came through on 18 March 2010, and in some way not apparent to us this enabled Mr Thakrar to pay to HMRC on 22 March 2010 the outstanding balance of tax due from him to HMRC.

69. In the absence of evidence as to the nature of the arrangements as between the Appellant and London Pilsner Ltd, we make no findings as to the basis on which money belonging to that company was provided to the Appellant. We note that in Mr Hannan's message dated 15 March 2010, he indicated that information concerning a property belonging to "the Company" was "of little value". It is not clear to us

whether he would have taken the same view in respect of the prospective refund of VAT to that company.

70. In terms of SAM62060, we find that KLSA had made initial payment proposals to HMRC on 22 January 2010, but that these were subsequently modified. We further find that on 2 February 2010 HMRC, as shown in their internal records,

> "adv no ttp without full I/E details".

We construe this as "advised no TTP [agreement] without income and expenditure details".

71. We find on the basis of this evidence, as well as the later emails and other correspondence, that HMRC were not prepared to enter into a TTP agreement without being satisfied as to Mr Thakrar's own personal financial position.

72. Although such details were provided in respect of Mr Thakrar's partnership, this did not meet HMRC's requirements because the agreement sought related to his personal self assessment liability and therefore his personal income and expenditure details were required. Consequently, no time to pay arrangement was put in place either before 28 February 2010 or at any time before 22 March 2010, the date on which Mr Thakrar paid the balance then outstanding.

73. In the absence of an effective time to pay arrangement, HMRC's concessionary practice as set out above could not apply. Accordingly, as the tax remained unpaid at the "surcharge trigger date", the normal statutory basis applied and the surcharge became due, despite the attempts by KLSA to negotiate an arrangement.

74. Having determined that a TTP agreement was not in place, we consider whether, despite this, Mr Thakrar reasonably and honestly believed that such an agreement had been negotiated. We find that there was nothing in the course of the negotiations between KLSA and HMRC that would have given him reasonable grounds for such a belief. We have no evidence showing any details of any correspondence or telephone discussions between KLSA and Mr Thakrar, but it is clear to us from KLSA's correspondence and discussions with HMRC that Mr Thakrar was providing various items of information to KLSA to pass on to HMRC. We consider it to be a reasonable inference from the evidence that KLSA were keeping Mr Thakrar informed as to the state of negotiations between KLSA on his behalf and HMRC. We therefore find that he had no basis for holding any belief that a TTP agreement had been put in place. Accordingly, we find that there was no evidence to support any claim that Mr Thakrar had a reasonable excuse for the late payment of the tax due.

75. Mr Arenstein argued on Mr Thakrar's behalf that he had been put in a worse position by making payment of the tax before a time to pay arrangement had been put in place than if he had waited for one to be made and then paid a number of months later in accordance with the arrangement. We do not accept this argument; unless Mr Thakrar had provided all the personal income and expenditure information requested by HMRC, no TTP agreement could ever have been reached. Any statements which

may have been made by HMRC officers as to surcharges not being imposed would in our view clearly have been based on the assumption that an agreement could be reached before the surcharge trigger date. We do not find it necessary to consider the application of the principles in SAM62070 concerning TTP start and end dates. As the negotiations "stalled" because of the absence of the necessary information, the normal statutory position applied, and the surcharge had to be imposed.

76. When notifying Mr Thakrar's appeal to HMRC, KLSA requested postponement of payment in respect of the surcharge. We can find no basis in the legislation relating to self assessment for payment of surcharges to be postponed. This is presumably the reason for enforcement action having been taken by HMRC; despite the appeal, the liability had been incurred as a result of the full amount of the tax not having been paid by 28 February 2010. As the surcharge imposed on Mr Thakrar was substantial, because of the amount of the tax outstanding, it may have appeared to KLSA that there was some reason for delaying payment of the surcharge until the appeal had been finally determined. If they were under that impression, this was a misapprehension. Once a surcharge has been imposed, it is payable, and delayed payment may result in interest on the surcharge being incurred, as indicated in Mrs Voce's letter dated 8 February 2011.

77. In the light of our findings, the appeal must be dismissed.

Right to apply for permission to appeal

78. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 23 February 2012