



**TC06968**

**Appeal number: TC/2018/04869**

*VALUE ADDED TAX – default surcharge – payment late – no reasonable excuse – no effective time to pay arrangements - surcharge liability notice properly served – appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**YE OLD CIDER BAR LTD**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL  
MS ELIZABETH BRIDGE**

**Sitting in public at Exeter on 29 January 2019**

**The Appellant did not appear and was not represented**

**Miss Jessica Parlour, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is a VAT case. It concerns the default surcharge regime. The respondents have assessed the appellant to a default surcharge ("**surcharge**") for the VAT period ending 31 January 2018 (i.e. 01/18) in an amount of £1,039.35 (the "**default period**").
2. The appellant (or the "**company**") does not believe it is liable to, nor should it pay the surcharges. It says this for a variety of reasons with which we deal later on in this decision.
3. We have come to the conclusion that the appellant is liable to the surcharge. And so we dismiss the appeal.

### Absence of the appellant

4. The hearing was listed to start at 2.00pm. We heard two cases before this one so the hearing of this case did not start until 4.05pm. The appellant was not in attendance. It is clear from the court file that a letter dated 18 December 2018 was sent to the appellant at 99 East Street, Newton Abbot. We sought the view of Miss Parlour. She told us that the documents notifying the appellant of the hearing had been sent to the same address that HMRC have always had on file for the appellant. The bundles that she had sent the appellant for this hearing had been sent in November 2018 to that address and had been signed for by or on behalf of the appellant. We were satisfied on the basis of this that it was likely that the appellant has received notice of the hearing and certainly that reasonable steps had been taken to notify the appellant of the hearing. We considered that it was in the interests of justice to proceed with the hearing in the appellant's absence.

### Default surcharge regime

#### Overview

5. The default surcharge regime is described by Judge Bishopp in *Enersys Holdings* [2010] UKFTT 20 TC0335 ("*Enersys*").

"The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next, again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence."

## The legislation

6. The legislation for the default surcharge regime is found primarily in Section 59 of the Value Added Tax Act 1994 ("VATA") the relevant parts of which are set out below:

### 59 – The default surcharge

59(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.

59(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.

59(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.

59(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed account 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.

59(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.

59(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.

59(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.

59(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).

59(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.

59(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.....

7. Section 71(1) VATA provides:

For the purposes of any provision of section 59 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 a task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

8. Section 108 Finance Act 2009 provides:

(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 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.

### **Service of surcharge liability notice**

9. S59(2) of VATA, which is set out [5] above, makes it plain that a taxpayers liability to pay a surcharge arises only if "the Commissioners serve notice on the taxable person (a "surcharge liability notice") ..."

10. Furthermore S59(4) of VATA directs that a surcharge may only be visited on a taxable person "on whom a surcharge liability notice has been served ...".

11. It seems clear therefore from the legislation that if no surcharge liability notice has been served on the Appellant, it cannot be liable for the surcharges for the default periods.

12. This principle was recognised in the High Court, in *Customs & Excise Commissioners v Medway Draughting & Technical Services Ltd; Customs & Excise Commissioners v Adplates Offset Ltd* [1989] STC346. In that case, Medway had appealed to the VAT Tribunal, against a default surcharge assessment, on the basis that it had not received a surcharge liability notice prior to the assessment and accordingly was not liable to the surcharge. It was found as a fact that Medway had not received the notice in time.

13. The Tribunal granted Medway's appeal and the Crown appealed against that decision.

14. In the High Court it was held that it was Parliament's intention that a warning in the form of a surcharge liability notice should be given before a surcharge could be

levied. Receipt of the notice was crucial so as to enable the taxpayer to avoid the surcharge.

15. Macpherson J said

"The scheme of the Act therefore provides that taxpayers shall be given notice of their liability to surcharge. And it is right to stress at the outset that a taxable person conversant with the provisions of s19 could say to himself that he could expect a warning in the form of a surcharge liability notice before surcharge could be levied in respect of any further default during the surcharge period"

16. He then went on to say

"I have come firmly to the conclusion that in the present cases it was the intention of Parliament that a warning should be given before a surcharge could be levied. And thus I agree with His Honour Judge Medd's first conclusion. As a matter of construction of s19, the whole scheme of default surcharge is dependent on service of the surcharge liability notice. If this were not so the legislature could simply have decreed (for example) that a third default in any defined period would of itself trigger the commissioner's right to surcharge the taxpayer. It was decided that this should not be the scheme of the section and that even defaulting taxpayers were entitled to be warned of an impending surcharge.

I am not sure that the phrase "condition precedent" used by His Honour Judge Medd is wholly apt in a non-contractual case. But the requirement for the warning notice is express, and the time for its service, namely after the first two relevant defaults and before the next default, is explicit.

It is perfectly true that the taxpayer has a duty in any event not to default in respect of each return and payment of tax. And he is warned that this is so and that penalties may follow if he is late in making his returns. But there are quite separate penalties which may be incurred in respect of individual defaults. And in my judgment Parliament intended that the taxpayer should be properly warned before the additional default surcharge could be exacted".

17. Service of a default surcharge notice is governed by two statutory provisions. The first of these, Section 98 of VATA is set out below:

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

18. The second provision is Section 7 of the Interpretation Act 1978 which states

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other

expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

### **Reasonable excuse**

19. When considering whether the appellant has a reasonable excuse, we adopt, with gratitude, the principles promulgated by Judge Brannan in the case of *Stuart Coales -v- The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT (477) ("*Coales*") which was considered and approved by the Upper Tribunal in the case of *Perrin v HMRC* [2018] UKUT 156, and which are set out below:

#### *"Meaning of "reasonable excuse"*

25. Under Section 59C(9)(a) I can, however, set aside the surcharge determination if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax. The onus is on the appellant to satisfy me that there was a reasonable excuse. The statute provides (Section 59C(10)) that inability to pay the tax shall not be regarded as a reasonable excuse.

26. In this context, I consider the reasonable excuse exception to be an objective test applied the individual facts and circumstances of the appellant in question.

27. In *Bancroft and another v Crutchfield (HMIT)* [2002] STC (SCD) 347 in relation to Section 59C(9)(a) the learned Special Commissioner (Dr John Avery Jones CBE) stated:

"A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way. A reasonable taxpayer would at least have read the literature issued by the Revenue..."

28. The concept of "reasonable excuse" appears throughout VAT and direct tax legislation in respect of the imposition of surcharges on penalties. There is a considerable amount of case law in this tribunal as well as its predecessors (the VAT and Duties Tribunal and the Special and General Commissioners). It is not possible to do justice to all these decisions but I think that helpful guidance can be obtained from the decision of the VAT Tribunal in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239 and I can do no better than quote from the passage where the Tribunal (HH Judge Medd OBE QC) said:

"So I may allow the appeal if I am satisfied that there is a reasonable excuse for the Company's conduct. Now the ordinary meaning of the word 'excuse' is, in my view, "that which a person puts forward as a reason why he should be excused".



A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr Pellew-Harvey [for the Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.

In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it cannot. It has been said before in cases arising from default surcharges that 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? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse. Such a way of interpreting a statute which requires a court to decide an issue by judging the standards of the reasonable man is not without precedent of the highest authority, though in a very different field of the law. (See *DPP v Camplin* ([1978] 2 All ER 168)."

### **Evidence and findings of fact**

20. No oral evidence was given on behalf of the appellant. We were provided with a bundle of documents which included correspondence between the parties, and contact records, compiled by the respondents, which set out details of contact between the appellant and the respondents, including contact during the default periods.
21. On the basis of the documentary evidence, we make the following findings of fact:

- (1) The appellant has been registered for VAT since 31 July 2015. HMRC understand that the appellant's business is running a public house.
- (2) The appellant has been in the default surcharge regime from the period 01/17. Since period 01/18, the appellant has defaulted in three further periods. In each of these periods (including the period 01/18) the appellant has submitted its VAT return on time, but has paid the VAT late.
- (3) The period 01/18 had a due date of 7 March 2018 for electronic payment and submission of the return. The return was received on 6 March 2018. However payments of the VAT have been received in 13 separate payments the first of which was sent to HMRC more than six months late and the balancing payments more than eight months late.
- (4) On 16 March 2018 the respondent's records show that the appellant was issued with a surcharge liability notice for 01/18.
- (5) On 13 April 2018 the appellant wrote to HMRC in which it states "the surcharge letter of 16 March 2018 refers". In that letter, the appellant then went on to request a review of the surcharge.
- (6) The outcome of the review was communicated to the appellant in a letter dated 25<sup>th</sup> of March 2018. The outcome of the review was that HMRC were not prepared to cancel the surcharge.
- (7) On 6 July 2018 (and so out of time) the appellant appealed the review conclusion to the tribunal.
- (8) In a call with HMRC on 18 July 2017, Jonathon McCool ("**Mr McCool**"), a director of the appellant, indicated that "demand letters received".
- (9) In a call 8 June 2017, Mr McCool indicated that the appellant was unable to pay the full amount due for period 04/17 due to lost/reduced business, lack of work, unexpected repairs.
- (10) In a call with HMRC on 7 September 2017, the appellant indicated that VAT had been used to cover the cost of building repairs which were not covered by insurance.
- (11) In a call with HMRC on 8 January 2018, Mr McCool indicated that he was looking for a time to pay arrangement and that he was struggling with the business as lease/rent is prohibitive and not covering costs in full and VAT.
- (12) In a call with HMRC on 15 January 2018 the appellant indicated that he may be able to pay in full a lump sum to reduce VAT outstanding in May 2018 when its pop-up bars commenced trading.
- (13) A time to pay agreement was agreed between HMRC and the appellant on 2 August 2018 for the total amount outstanding on the appellant's account at

that date. This included the balance remaining unpaid for the 10/17 period, together with the sums due for the 08/18 and 04/18 periods and relevant surcharges.

### **Burden and standard of proof**

22. The respondents accept that the initial burden of proof lies with them to show that

- (1) VAT was paid late and the liability to the surcharge has been incurred;
- (2) valid surcharge liability notices for the default periods were served on the appellant.

23. Once the respondents have satisfied their burden of proof, then the burden shifts to the appellant to show that

- (1) it did not receive a valid surcharge liability notice;
- (2) a reasonable excuse exists;
- (3) the surcharges are disproportionate.

24. In each case the standard of proof is the usual civil standard, namely the balance of probabilities.

### **Appellant's submissions**

25. The appellants grounds of appeal appear to be:

- (1) The surcharge notice of 16 March 2018 was the first letter about surcharges or surcharge periods that the appellant had received, and it should have received warning letters about the surcharges before then. Had it received such earlier warning letters, it would have dealt with things differently.
- (2) It does not understand why it has been unable to pay the VAT on time. It has consulted accountants about this. Independent accountants and stock takers are investigating.
- (3) There has been significant shrinkage and loss to the company in respect of which the appellant may involve the police.
- (4) It has an arrangement to pay VAT which it has honoured “satisfactorily”
- (5) What is happening is having a serious effect on its business.
- (6) It is not being treated fairly.

## **Respondents submissions**

26. On behalf of the respondents, Miss Parlour submitted as follows:

- (1) VAT for the default period was paid late.
- (2) All default surcharge notices were properly sent out to the appellant's principal place of business and there is no evidence that they were not delivered.
- (3) The appellant has no reasonable excuse. Shortage of funds cannot be a reasonable excuse. There was no unforeseen event which caused the default.
- (4) If there was no time to pay agreement in place prior to the default period.
- (5) The surcharge is proportionate.
- (6) Although the appeal is out of time, she is content that we can hear it.

## **Discussion**

27. It is up to HMRC to show that it is more likely than not that the appellant received not just the default surcharge notice for the period 01/18 but for previous periods. We consider that it has done so.

28. It is clear from the letter from the appellant to HMRC of 13 April 2018 (see [21(5)]) that the appellant had received the default surcharge notice for the period 01/18.

29. HMRC claim to have sent all correspondence, including default surcharge notices for previous periods, to the appellant at its principal place of business. That has not changed since it registered for VAT in July 2015.

30. HMRC tell us that no correspondence has been returned undelivered. The bundle for this hearing was served on the appellant at the aforesaid address, and was signed for. The appellant has put forward no additional evidence that he did not receive correspondence other than the default surcharge notice for the period 01/18 other than a bald denial of receipt.

31. Yet it is abundantly clear, from the records of the telephone conversations between the appellant and HMRC set out at [21(8)-(12)], that the appellant had received communications about its liability to pay VAT in 2017 and in 2018.

32. We conclude that the respondents did serve the appropriate default surcharge notices on the appellant, and the appellant has not proved the contrary.

33. Turning now to reasonable excuse, regrettably for the appellant it is our view that it does not have one. Its submissions about failure to understand why it cannot pay on time, and shrinkage and loss are largely irrelevant. Any submissions that it cannot afford to pay cannot be a reasonable excuse by dint of section 71(1) VATA.

The records of the telephone conversations mentioned above do provide some reasons why the appellant has not been able to pay its VAT. But these, in our view, relate to the ordinary financial vicissitudes of commercial life. The appellant clearly has cash flow issues. It has used VAT it has received (it is mainly a cash trader) to pay a variety of creditors (landlord/suppliers/builders). The appellant has not provided any evidence that these liabilities arose from an unforeseen event which has caused the default.

34. For a time to pay arrangement to exonerate the appellant, the arrangement must be agreed with HMRC prior to the default period. This is not the case here. The default period ended on 31 January 2018 and the time to pay arrangement was not agreed until 2 August 2018.

35. We have also considered whether the surcharge is proportionate and have reviewed a number of cases dealing with proportionality. These are:

(1) *Paraskevas Louloudakis v Elliniko Dimosio* (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(2) *The Commissioners for HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC), [2013] STC 681 ("*Total Technology*")

(3) *The Commissioners for HMRC v Trinity Mirror plc* [2015] UKUT 0421 (TCC) ("*Trinity Mirror*")

(4) *International Transport Roth GmbH v Secretary of State for the Home Dept* [2003] QB 728 ("*Roth*")

(5) *James v UK* (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(6) *R (on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent)* [2015] UKSC 41 ("*Lumsden*")

36. From these we have derived the following principles:

(1) Proportionality is a general principle of EU law which is enshrined in article 5 (4) of the Treaty on European Union. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties (*Lumsden* at [24]).

(2) In the context of its application to penalties, the principle of proportionality is that:

(A) penalties may not go beyond what is strictly necessary for the objective pursued; and

(B) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (*Louloudakis* at [67]).

- (3) In the field of VAT, the freedoms enshrined in the Treaty means the underlying aims of the EU Directives which govern VAT (the "Directive") (*Trinity Mirror* at [14]).
- (4) The objective of the surcharge in enforcing the collection of tax is itself a natural consequence of the essential aim of the Directive to ensure the neutrality of taxation of economic activities (*Trinity Mirror* at [56]).
- (5) The underlying aim of the Directive for this purpose is the fiscal neutrality which protects taxable persons since VAT is intended to tax only the final consumer (*Trinity Mirror* at [59]).
- (6) And given that this is achieved by the collection and deduction at each stage of the supply chain, ensuring the timely payment at each stage is a necessary consequence of that aim (*Trinity Mirror* at [60]).
- (7) The correct approach, therefore, is to determine whether the surcharge goes beyond what is strictly necessary for the objectives pursued by the default surcharge regime (*Trinity Mirror* at [63]).
- (8) The application of the doctrine of proportionality can apply to the surcharge regime as a whole, or at the application of that regime to a particular taxpayer's circumstances (*Total* at [74]).
- (9) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (*James* at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).
- (10) The principles of "devoid of reasonable foundation" or "not merely harsh but plainly unfair" can be applied to a case relating to a particular taxpayer just as much as it can be applied to the regime as a whole (*Total* at [93], *Trinity Mirror* at [72]).
- (11) A UK court should be cautious in the extreme in saying that national legislation has overstepped the mark in setting the level of surcharge (*Total* at [73]).
- (12) The default surcharge regime viewed as a whole is a rational scheme (*Trinity Mirror* at [65]).
- (13) A penalty (if it is not a fixed rate penalty) must vary according to some objective criteria. The use of the amount unpaid as an objective criterion is an appropriate if not the most appropriate criterion (*Trinity Mirror* at [65], *Total* at [90]).
- (14) But this is only so if the amount of the surcharge for a failure to file or pay is itself proportionate to that failure (*Total* at [88]).

(15) Since the surcharge is for failing to pay and file by the due date, and not for delay in paying after that date, the fact that a trader is only one day late in paying does not, per se, render an otherwise proportionate surcharge, disproportionate (*Total* at [88]).

(16) The absence of any financial limit does not render the regime disproportionate; but may, in a wholly exceptional case, (dependent on its own circumstances), render its application to a particular case, disproportionate (*Trinity Mirror* at [66]).

37. Applying these principles to the company's circumstances;

(1) The default surcharge regime is a rational and proportionate scheme and we are bound by precedent to find that it is consistent with the doctrine of proportionality.

(2) The application of the regime to the company's circumstances is also proportionate.

(3) In absolute terms the surcharge of £1039.35 is a modest amount, and simply reflects an application of the surcharge percentage (over which we have no jurisdiction) to the outstanding VAT for that period.

(4) In relative terms, it is modest too. In the period 01/18, the VAT due was about £7,000. This reflects turnover of about £42,000.

(5) It is our view, therefore, that the surcharge is very far from being not merely harsh but plainly unfair. We find that the application of the default surcharge regime to the company's failure to pay its VAT on time to be wholly proportionate.

38. Finally, the appellant contends that it has been treated unfairly. This tribunal has no jurisdiction to consider complaints of generally unfair treatment by HMRC towards a taxpayer. We have considered, at some length, the issue of proportionality which does fall within our jurisdiction. We have found that the surcharge is not disproportionate, and so not “unfair” in this respect.

## **Decision**

39. For the reasons given above we dismiss this appeal.

40. 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.

**JUDGE NIGEL POPPLEWELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 07 FEBRUARY 2019**