



TC04489

Appeal number: TC/2014/05447

VALUE ADDED TAX – default surcharge – Section 59 Value Added Tax Act 1994 - whether there was a reasonable excuse for the default – no – whether the penalty was disproportionate to the default – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ZINC GROUP LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JANE BAILEY
MR IAN PERRY**

Sitting in public at Birmingham Tribunals Centre on 13 May 2015

The Appellant did not appear and was not represented

Ms Dosanjh, HMRC officer, for the Respondents

DECISION

1. This appeal is stated to be against the decisions of the Respondents (“HMRC”) to impose, or confirm the imposition of, surcharges under Section 59 Value Added Tax Act 1994 (“VATA 1994”) for the periods ended 30 November 2013, 28 February 2014 and 30 May 2014. Those surcharges are in the amounts of £4,902.02, £2,080.18 and £13,265.32, a total of £20,247.52.

The attendance of the parties

2. We were expecting the Appellant to be represented at this hearing of its appeal. As no representative appeared by the notified time, we delayed the start of the hearing and asked the Tribunal clerk to contact Mr McManus (the managing director of the Appellant) and Mr Milliken (of Milliken & Co., the Appellant’s agent) to ascertain whether either intended to appear on behalf of the Appellant. On the Tribunal file was a copy of a letter, dated 20 March 2015, sent to each of the Appellant and to Milliken & Co., at their registered addresses, informing each that this hearing would take place on 13 May 2015.

3. The Tribunal clerk spoke first to a colleague of Mr McManus (as Mr McManus was not available) who refused to respond to enquiries as to whether Mr McManus intended to attend the hearing. The clerk then spoke to Mr Milliken. Mr Milliken informed the clerk that he was aware the hearing was due to take place and had discussed the hearing with Mr McManus on the day before. Mr Milliken stated that he had been instructed by Mr McManus not to attend the hearing to represent the Appellant. Mr Milliken also volunteered his understanding that Mr McManus would be at an exhibition on 13 May with another director of the Appellant, and so he did not expect either director would attend the hearing.

4. In light of the information provided by Mr Milliken, we were satisfied that both Mr McManus and Mr Milliken were aware that this hearing was due to take place on 13 May 2015. We concluded that the Appellant had chosen not to be represented by a director or by Mr Milliken. We therefore decided to proceed with the hearing in the absence of representation for the Appellant.

Application to appeal out of time

5. As a preliminary point we consider whether the Appellant’s appeal was notified to the Tribunal within time. Under Section 83G VATA 1994 an appeal to the Tribunal against the imposition of a surcharge under Section 59 VATA 1994 shall be made before the end of 30 days beginning with the date of the decision appealed against. That decision may be an original decision (i.e. the imposition of a surcharge) or a review decision (i.e. the confirmation of the decision to impose a surcharge).

6. In order to establish whether an appeal is brought within time, it is necessary to identify the date of the relevant decision against which the appeal is made.

7. The Appellant's Notice of Appeal states that the Appellant is appealing against the imposition of surcharges for the periods ended 30 November 2013 (the "First Surcharge"), 28 February 2014 (the "Second Surcharge") and 30 May 2014 (the "Third Surcharge").

5 8. The First Surcharge was issued to the Appellant on 17 January 2014. By letter dated 13 February 2014, Milliken & Co. sought a review of the imposition of the First Surcharge. By letter dated 4 March 2014, HMRC confirmed the imposition of the First Surcharge. Therefore the date of the relevant decision in respect of the First Surcharge is 4 March 2014.

10 9. The Second Surcharge was first issued to the Appellant on 11 April 2014. This surcharge was then recalculated. The recalculated Second Surcharge was re-issued on 17 April 2014. By letter dated 6 May 2014, the Appellant sought a review of this surcharge. By letter dated 30 June 2014, HMRC confirmed the imposition of the Second Surcharge. Therefore the date of the relevant decision in respect of the
15 Second Surcharge is 30 June 2014.

10. The Third Surcharge was issued to the Appellant on 11 July 2014. There is no record of the Appellant having contacted HMRC to seek a review of the Third Surcharge or of a review taking place. Therefore the date of the relevant decision in respect of the Third Surcharge is 11 July 2014.

20 11. The Appellant's Notice of Appeal was filed on 6 October 2014. This was approximately seven months after the first relevant decisions, and approximately three months after the second and third relevant decisions.

12. Having established that the Appellant's appeal had been notified late, we considered whether the Appellant should be given permission to appeal out of time.
25 In considering whether the Appellant should be given permission to appeal out of time we had regard to the length of the delay, the Appellant's reasons for the delay, and the consequences for the parties as a result of our decision. We also had regard to the need for litigation to be conducted efficiently and to the overriding objective in the Tribunal Rules to deal with cases fairly and justly.

30 13. The Appellant's explanation for the delay in filing its Notice of Appeal was that it had been in dispute with the Respondents for approximately 18 months. It is clear from the correspondence in this period that the Appellant had been challenging the imposition of the First, Second and Third Surcharges. These steps included the Appellant writing to the Tribunals service on 16 July 2014, stating that the Appellant
35 wished to appeal against all surcharges imposed after October 2013. (The Tribunals service returned the Appellant's letter of 16 July 2014 and advised that a Notice of Appeal be completed and returned.)

14. Although it was not expressed in the Appellant's Notice of Appeal, we note that HMRC were aware from their correspondence with the Appellant that it wished to
40 challenge the imposition of the surcharges. A copy of the Appellant's letter to the Tribunals service also appears to have been provided to HMRC in early August 2014.

15. In considering the prejudice to each of the parties as a consequence of our decision, we note that HMRC apparently had not noticed that the Appellant's appeal to the Tribunal was notified late, that HMRC had prepared for this hearing as if the appeal had been filed in time and that, when we raised the point at the hearing,
5 HMRC raised no objection to the Appellant being given permission to appeal out of time.

16. Having in mind the over-riding objective to deal with cases fairly and justly, we granted the Appellant permission to appeal out of time, and we admitted this appeal.

Facts relevant to this appeal

10 17. From the documents in the Bundle of documents prepared for use at the hearing, we find the following facts relating to the imposition of the surcharges and the payments made by the Appellant. (Where we refer to the attribution of payments we refer to their current attribution. We are aware from the entries in HMRC's ledger, a copy of which appears in the Bundle, that some payments were attributed differently
15 at the time they were made.) We have summarised the position regarding the outstanding amounts as we proceed chronologically through the facts found.

a) The Appellant was late in filing its VAT return for the quarter ended 31 July 2012 and late in paying the £32,353.78 due in accordance with that return.

20 b) A Surcharge Liability Notice was issued to the Appellant on 14 November 2012.

c) The Appellant's VAT return for the period ended 31 October 2012 was due no later than 7 December 2012. The Appellant filed its return late, on 9 January 2013. This return showed VAT of £37,234.04 was due. On receipt of
25 the late return HMRC imposed a surcharge of £744.68 (being 2% of the VAT due in accordance with that return). No appeal was made against this surcharge.

d) Following the imposition of this surcharge, the Appellant owed £37,234.04 in VAT and £744.68 in a surcharge.

30 e) On 10 January 2013 the Appellant paid £20,000 towards its outstanding VAT. This payment has been attributed to the VAT outstanding for the quarter ended 31 October 2012. By the end of January 2013, £17,234.04 in VAT and £744.68 in a surcharge was owed by the Appellant.

35 f) On 19 February 2013, two payments totalling £17,293.78 were transferred to the Appellant's VAT account from funds held by HMRC to settle the Appellant's indebtedness in respect of other taxes. £17,234.04 from these two payments has been attributed to the VAT outstanding for the quarter ended 31 October 2012 (settling the VAT due for that quarter); the remaining £59.74 has been attributed to the VAT which would be due for the quarter ended 31
40 January 2013. The surcharge of £744.68 was still outstanding at this point.

- 5 g) The Appellant's VAT return for the period ended 31 January 2013 was due no later than 7 March 2013. The Appellant filed this return within time. VAT of £34,427.47 was due under this return. As £59.74 had been credited to the VAT due for the quarter ended 31 January 2013, £34,367.73 was due to be paid by 7 March 2013.
- h) As payment of the VAT due from the Appellant was not made by 7 March 2013, a surcharge of £1,721.37 (being 5% of the VAT due in accordance with that return) was imposed. No appeal was made against this surcharge. At this point the Appellant owed £34,367.73 in VAT and £2,466.05 in surcharges.
- 10 i) On 2 April 2013 the Appellant paid £15,329.35. This has been attributed to the VAT outstanding for the quarter ended 31 January 2013. £19,038.38 of VAT (and £2,466.05 in surcharges) remained outstanding.
- 15 j) The Appellant changed its filing periods and the next return was due for the quarter ended 28 February 2013. That return was due no later than 7 April 2013 and was filed within time. That return showed VAT due of £10,313.43. However, as no payment accompanied the Appellant's return filed for the quarter ended 28 February 2013, a surcharge of £1,031.34 (being 10% of the VAT due in accordance with that return) was imposed. No appeal was made against this surcharge.
- 20 k) By 29 April 2013, the Appellant owed £29,351.81 in VAT and £3,497.39 in surcharges.
- l) On 29 April 2013, the Appellant paid £20,000 towards its VAT debt. £19,038.38 of this payment has been attributed to the VAT outstanding for the quarter ended 31 January 2013 (settling the VAT due for this quarter), and £961.62 has been attributed to the VAT due for the quarter ended 28 February 2013.
- 25 m) By 30 April 2013, the Appellant owed £9,351.81 in VAT and £3,497.39 in surcharges.
- 30 n) The Appellant's return for the period ended 31 May 2013 was due no later than 7 July 2013. The Appellant filed its return within time. VAT of £26,530.02 was due in accordance with the return but this was not paid within time. HMRC imposed a surcharge of £3,979.50 (being 15% of the VAT due in accordance with that return). No appeal was made against this surcharge.
- 35 o) The debt owed by the Appellant by 12 July 2013 was £35,881.83 in VAT and £7,476.89 in surcharges.
- p) In July 2013 there were a number of calls between Mr McManus and HMRC in relation to outstanding amounts of PAYE, Corporation tax and VAT owed by the Appellant to HMRC, with Mr McManus endeavouring to reach agreement on additional time to pay the amounts owed.
- 40 q) On 27 August 2013, the Appellant paid £26,530.02 to HMRC. This amount has been attributed to the quarter ended 31 May 2013 (settling the VAT due for this quarter). This left a total of £16,828.70 outstanding at that date (£9,351.81 in VAT and £7,476.89 in surcharges).

r) On 13 September 2013, an amount of £5,221.30 was reallocated from the Appellant's PAYE account to the Appellant's VAT account. This sum has been attributed to the VAT outstanding for the quarter ended 28 February 2013.

5 s) The Appellant's return for the period ended 31 August 2013 was due by 7 October 2013 and was filed within time. VAT of £41,227.73 was due under this return. As the VAT due was not paid by the due date, HMRC imposed a surcharge of £6,184.15 (being 15% of the VAT due in accordance with the return). No appeal was made against this surcharge. The total of VAT and
10 surcharges due at this point was £59,019.28 (£45,358.24 in VAT and £13,661.04 in surcharges).

t) On 28 October 2013 the Appellant paid £13,742.58 to HMRC. £4,130.51 of this payment was attributed to the VAT due for the period ended 28 February 2013 (settling the VAT due for this quarter). The remaining
15 £9,612.07 was attributed to the VAT due for the quarter ended 31 August 2013.

u) The VAT and surcharges outstanding at this point totalled £45,276.70 (£31,615.66 in VAT and £13,661.04 in surcharges).

v) The Appellant's return for the period ended 30 November 2013 was due
20 no later than 7 January 2014. The return, showing tax due of £32,680.16, was filed within time. As no VAT was paid with this return, HMRC imposed the First Surcharge, in the sum of £4,902.02 (being 15% of the VAT due in accordance with the return).

w) The amount due from the Appellant at this point was £82,858.88
25 (£64,295.82 in VAT and £18,563.06 in surcharges).

x) On 13 January 2014 the Appellant paid £26,061.71 to HMRC. The
30 payment of £26,061.71 was originally allocated to the Appellant's VAT account. An email from the Appellant to HMRC dated 22 January 2014 stated that this payment was intended as a second instalment of the VAT due for the period ended 31 August 2013 (the first instalment being the £13,742.58 paid at the end of October 2013). In July 2014, this payment of £26,061.71 was reallocated to the Appellant's PAYE account.

y) From the beginning of January 2014 there were further telephone calls
35 between Mr McManus and HMRC in relation to the Appellant's indebtedness. In HMRC's notes of those telephone discussions, Mr McManus referred to his understanding that there was a time to pay arrangement which covered the payment of the VAT for this period. HMRC sought written evidence of that arrangement.

z) In its email to HMRC dated 22 January 2014 the Appellant alleged that it
40 had been agreed that the VAT due each quarter could be paid in three monthly instalments. No evidence of HMRC's agreement to such an arrangement was provided to us. In the absence of a written agreement we do not find that there was a time to pay agreement in place.

- aa) By (at the latest) February 2014, Mr McManus had begun to question how payments made by the Appellant to HMRC had been allocated.
- bb) On 4 February 2014 the Appellant paid £10,000 to HMRC. This was attributed to the VAT due for the quarter ended 31 August 2013.
- 5 cc) On 14 February 2014 the Appellant paid £27,011.29 towards its PAYE liability. This payment was incorrectly allocated to the Appellant's Corporation tax account but in late June 2014 this payment was reallocated to meet the Appellant's PAYE liability.
- dd) On 10 March 2014 the Appellant paid a further £10,000 to HMRC. This was also attributed to the VAT due for the quarter ended 31 August 2013. The VAT and surcharges due from the Appellant at this point amounted to £44,295.82 in VAT and £18,563.06 in surcharges.
- 10 ee) On 30 March 2014 the Appellant emailed HMRC to state that £12,719.91 would shortly be paid. This payment was intended to be the Appellant's third instalment of the VAT due for the period ended 30 November 2013. (The first and second instalments were the two payments of £10,000 made on each of 4 February and 10 March 2014.)
- 15 ff) On 3 April 2014 the Appellant paid £12,719.91 to HMRC. £11,615.66 of this payment was attributed to the VAT due for the quarter ended 31 August 2013 (settling the VAT due for this quarter). The remaining £1,104.25 was attributed to the quarter ended 30 November 2014.
- 20 gg) The total of the VAT and surcharges due from the Appellant at this point was £50,138.97 (£31,575.91 VAT and £18,563.06 in surcharges).
- hh) On 4 April 2014 the Appellant paid £27,153.24 towards its PAYE liability. This was incorrectly allocated to the Appellant's Corporation tax liability. In late June 2014 this payment was reallocated to the Appellant's PAYE liability.
- 25 ii) The Appellant's return for the period ended 28 February 2014 was due to be filed no later than 7 April 2014. The return was filed on 17 April 2014. VAT of £13,867.92 due under the return was paid on 10 April 2014. HMRC imposed the Second Surcharge, in the sum of £2,080.18 (being 15% of the VAT due in accordance with the return).
- 30 jj) The total of the VAT and surcharges outstanding at this point was £52,219.15 (£31,575.91 in VAT and £20,643.24 in surcharges).
- 35 kk) By email to HMRC dated 28 June 2014, Mr McManus confirmed his understanding that the two payments which the Appellant had intended to meet the Appellant's PAYE liability (but which had been incorrectly allocated to the Appellant's Corporation tax account) had been reallocated to the Appellant's PAYE liability.
- 40 ll) The Appellant's return for the period ended 31 May 2015 was filed on the due date of 7 July 2014 but the VAT of £88,435.47 due under the return was paid four days late. HMRC imposed the Third Surcharge, in the sum of £13,265.32 (being 15% of the VAT due in accordance with the return).

mm) The total of the VAT and surcharges outstanding at this point was £65,484.47 (£31,575.91 in VAT and £33,908.56 in surcharges).

5 nn) There was subsequent correspondence between the Appellant and HMRC concerning the payments which had been made to HMRC, to taxes to which they had been allocated and the number of surcharges under appeal. By (at the latest) October 2014 the Appellant asserted that all surcharges issued since November 2013 were under appeal.

10 18. We note that this appeal is concerned only with the First, Second and Third Surcharges. If there are later surcharges which are under appeal, such appeals have not been linked with the present appeal.

The relevant legislation

15 19. Section 59(1) of VATA 1994 provides that if a person has not provided a VAT return, or paid the amount of VAT shown on that return as due, by the last date on which a VAT return for a particular accounting period is required, then that person is to be regarded as being in default.

20. Where a person is in default under Section 59(1) then Section 59(2) enables HMRC to serve a surcharge liability notice on that person, specifying a surcharge period.

20 21. Section 59(4) provides that, while in a surcharge period, a person who is in default in respect of an accounting period within the surcharge period (either by filing a VAT return late or by late payment of the VAT shown on a return as due) shall be liable to a surcharge. The surcharge is the greater of a specified percentage of the outstanding VAT for the relevant period, and £30.

25 22. Section 59(5) provides that the specified percentage is determined by reference to the number of such periods in respect of which a person is in default during the surcharge period and for which he has outstanding VAT. The specified percentage in relation to the first default while in the surcharge period is 2%. In relation to the subsequent defaults while in the surcharge period, the specified percentages are 5% (second default), 10% (third default) and 15% (fourth and subsequent defaults).

30 23. However, under Section 59(7), a person who would otherwise be liable to a surcharge is not liable if either the return, or the VAT shown on the return, was despatched with the reasonable expectation that it would be received within time, or that there is a reasonable excuse for the return or VAT not being so despatched.

35 24. Section 71 VATA 1994 qualifies Section 59(7) by specifically excluding from the categories of reasonable excuse: an insufficiency of funds to pay any VAT due and reliance on any other person to perform a task.

Burden and standard of proof

25. The burden of proof lies first upon HMRC to establish that the Appellant was in a surcharge period and that, while in this surcharge period, the Appellant filed its

return late or made late payment of the amount of VAT shown in the return as having been due. Once the surcharge has, on the face of it, been established, the burden of proof in establishing that there was a reasonable excuse for late submission lies upon the Appellant. The standard of proof is the civil standard of the balance of probabilities.

The submissions of the Appellant set out in the correspondence and Notice of Appeal

26. The Appellant's principal submission, as set out in the correspondence which appears in the Bundle and in the Notice of Appeal, is that the amounts paid to HMRC have been incorrectly allocated. As set out in the Appellant's letter of 16 July 2014 to the Tribunals service, the Appellant's argument is that had the payments it made to HMRC been allocated differently, the surcharges would have been avoided. The Appellant cites in particular three payments allocated to its Corporation tax account at a time when no Corporation tax was owed to HMRC.

27. The Appellant also complains, in relation to the Second and Third Surcharges, that the size of the surcharge imposed by HMRC is disproportionate to the length of the delay.

HMRC's submissions

28. HMRC's submissions were that the First, Second and Third Surcharges had been correctly imposed and that this appeal depended on whether the Appellant had a reasonable excuse for the delay in making payment. In addressing the Appellant's argument in relation to misallocation, HMRC argued that the Appellant had allocated the payments itself by entering a reference when making payment. It was suggested that the Appellant could also have telephoned HMRC to ask for its payments to be allocated in a specific way.

29. We asked for an explanation of how payments made to HMRC would be allocated in the absence of an instruction from the taxpayer. Ms Dosanjh was clear that amounts paid as VAT would not be allocated to settle an outstanding PAYE or Corporation tax debt and that there would be no reallocation between taxes. However, we note references in the correspondence in the Bundle to HMRC reallocating payments between VAT and PAYE (see for example HMRC's letter dated 30 July 2014) so it is clear that reallocations between taxes can take place, and have taken place in this case.

30. Ms Dosanjh was unable to respond to our questions as to whether HMRC would allocate an amount paid as VAT first towards VAT debts (in the order those debts arose), to outstanding interest due on VAT debts (in the order those interest debts arose) or to surcharges (in the order those surcharges arose). As appears from the facts found, all payments made and allocated to VAT are currently allocated to VAT debts (in the order those debts arose) and none of the payments have been allocated to the payment of surcharges. This appears to be at the recent insistence of the Appellant and not due to any systematic allocation on the part of HMRC.

31. HMRC did not address the issue of whether the Second and Third Surcharges were disproportionate.

Conclusion

5 *Have HMRC established that the First, Second and Third Surcharges were, on the face of it, correctly imposed?*

32. We are satisfied that the Appellant entered a surcharge period on 14 November 2012 when it was issued with the Surcharge Liability Notice in respect of its delay in filing its VAT return for the period ended 31 July 2012 and in paying the VAT due.

10 33. A surcharge period runs until the first anniversary of the last day of the period in which there is a default. Where there are further defaults within the original surcharge period then the surcharge period is extended until the first anniversary of the last day of the period in which the most recent default occurred.

15 34. Having regard to the documents in the bundle we are satisfied that the Appellant was in default on 7 December 2013, 7 March 2014, 7 April 2014, 7 July 2014, 7 October 2014, 7 January 2014, 7 April 2014 and 7 July 2014. On each of these occasions the Appellant was due to file a VAT return and pay the VAT due under that return, but on each of these occasions the Appellant either failed to file its VAT return on time and/or failed to pay the VAT due on time. We are also satisfied that the Appellant was in a surcharge period on each of these occasions.

20 35. Therefore, on the face of it, HMRC have established that the First, Second and Third Surcharges were correctly imposed.

Reasonable excuse

25 36. We now consider whether the Appellant has a reasonable excuse for its default. The Appellant's submission is that it has a reasonable excuse because, if the Appellant's payments had been allocated differently, it would have been possible for it to have avoided the surcharges imposed.

30 37. In paragraph 17 above, we set out our findings as to how the payments made by the Appellant are currently allocated. We also noted, in paragraphs 28-30 above, the absence of a satisfactory explanation from HMRC as to how payments made towards VAT indebtedness would or could be allocated. Following the rule in *Clayton's case* (1816) 35 ER 767, in the absence of an express instruction to the contrary, payments are allocated to debts in the order in which they arose. However, if the Appellant made a payment with an instruction that the payment be put towards its VAT liability, and that payment was erroneously allocated to another liability of the Appellant, then
35 we consider it possible that such misallocation could provide the basis of a reasonable excuse for the Appellant failing to the VAT due under its return by the due date if such misallocation led the Appellant to believe that VAT had been paid on time and no further payment was due.

Was there any payment which the Appellant instructed be allocated to meet its VAT liability but which was allocated elsewhere?

38. We only have evidence of one payment made by the Appellant which was originally intended to be allocated to the Appellant's VAT account but which was
5 allocated to other tax liabilities. That is the payment of £26,061.71 received by HMRC on 13 January 2014.

39. Although there are two other instances of misallocation in respect of the payments we have set out in paragraph 17 (the payments of £27,011.29 made on 14 February 2014, and £27,153.24 made on 7 April 2014), the email from the Appellant
10 to HMRC dated 28 June 2014 makes it clear that these two payments were intended to meet the Appellant's PAYE liability, they were not intended to be allocated to the Appellant's VAT account.

40. There is no evidence before us that any other payment, made with the instruction that such payment should be allocated to the Appellant's VAT account,
15 was incorrectly allocated to meet another liability.

If the payment of £26,061.71 had been allocated to the Appellant's VAT account, would this have provided the Appellant with a reasonable excuse for any default which led to any of the surcharges?

41. We consider the position if, instead of being reallocated to the Appellant's PAYE account, the payment of £26,061.71 had been allocated as instructed by the
20 Appellant.

42. It is clear from the Appellant's email dated 22 January 2014 that the payment of £26,061.71 was intended to be the second instalment of the VAT due for the period ended 31 August 2013. The Appellant was required to pay the VAT due for this
25 period no later than 7 October 2013. Therefore, if once HMRC had received this payment, they had immediately allocated the £26,061.70 to the VAT period ended 31 August 2013 then the Appellant would still have been late in making payment of the VAT due for this period and would still have been in default.

43. Therefore, the misallocation of the payment of £26,061.71 could not have led
30 the Appellant reasonably to have believed that the VAT due for the period ended 31 August 2013 was paid on time. The VAT shown on the return as due for the period ended 31 August 2013 was already overdue before the Appellant made the payment of £26,061.71.

Would the reallocation of the payment of £26,061.71 to the period ended 31 August 2013 affect the subsequent allocation of payments by the Appellant?
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44. We have also considered whether, if HMRC had allocated the payment of £26,061.71 to the period ended 31 August 2013 as instructed, this would have affected the subsequent allocation of payments by the Appellant. In particular, would the correct allocation of the £26,061.71 have meant that the Appellant avoiding being
40 in default in any subsequent period?

45. Immediately before the Appellant's payment of the £26,061.70 to HMRC, the amount outstanding was £64,295.82 in VAT and £18,563.06 in surcharges. If the Appellant's payment of £26,061.70 had been allocated to meet the VAT due for the quarter ended 31 August 2013 then the amount of VAT outstanding would have been £38,234.11.

46. After paying £10,000 in February and March 2014, and a further £12,719.91 on 3 April 2014, the Appellant would have reduced the VAT outstanding to £5,514.20.

47. However, the Appellant did not further reduce its VAT debt. The next payment made by the Appellant was £13,867.92 paid on 10 April 2014 to meet the VAT due under the return due for the quarter ended 28 February 2014. This payment was three days after the last date by which the return should have been filed and the VAT should have been paid. We conclude that the earlier misallocation of the payment of £26,061.70 could not have been the reason for the Appellant making this quarter's payment late as, even if the Appellant had believed that the £26,061.70 had been allocated to its VAT liability, it should have been clear to the Appellant that it still owed £5,514.20 in VAT. Therefore the Appellant could not reasonably have believed that the allocation of the £26,061.70 to the Appellant's VAT account had resulted in the build-up of so much VAT credit that that credit could be put towards the VAT due for the quarter ended 28 February 2014 instead of the Appellant making a timely payment of the VAT due under the return. The same reasoning applies in respect of the Appellant's late payment of £88,435.47 due for the quarter ended 31 May 2014.

48. We conclude that the incorrect allocation of the £26,061.70 does not provide the Appellant with a reasonable excuse for filing a late return for the period ended 28 February 2014 or for making late payment of the VAT due for the periods ended 30 November 2013, 28 February 2014 or 31 May 2014.

Proportionality

49. Finally, we address the issue of proportionality which the Appellant has raised in respect of the Second and Third Surcharges. The Second Surcharge is in the sum of £2,080.18 and was imposed in respect of a delay of three days in making payment of the VAT due (and ten days delay in filing the return); the Third Surcharge is in the sum of £13,265.32 and is in respect of a delay of four days in paying the VAT due.

50. The default surcharge regime was considered at length by the Upper Tribunal in *HMRC v Total Technology* [2012] UKUT 418 (TCC) ("*Total Technology*"). After extensive review of case-law of both the European Court of Justice and the European Court of Human Rights, the Upper Tribunal held that the architecture of the default surcharge regime as a whole did not offend the principle of proportionality but that it was appropriate to consider cases on an individual level. The Upper Tribunal concluded that at that individual level, it was possible that some surcharges would be disproportionate to the default.

51. In considering whether the surcharge imposed is proportionate, we look to the objectives of the legislation and the effect on the Appellant of the surcharge imposed,

and we ask whether the surcharge imposed goes beyond the objectives of the legislation. We bear in mind that the intention of Section 59 VATA 1994 is to deter late payment but it does so without distinguishing between degrees of lateness. We also bear in mind that it is acceptable for the surcharge to be of a substantial rather than nominal amount but there is an upper limit which the surcharge should not exceed, and the surcharge must not be plainly unfair.

52. The delays in making payment of VAT which led to the Second and Third Surcharges were only three and four days respectively but, as we mention above, Section 59 does not distinguish between degrees of lateness. The Appellant had been late either in failing its return or in paying the VAT due for every quarter for two years, and it was this large number of defaults which led to the escalation of the percentage surcharge imposed. There also appears to have been a spike in trading in the quarter ended 31 May 2014 to explain why the Third Surcharge is approximately four times the average of the First and Second Surcharges.

53. In considering whether the Second and Third Surcharge are disproportionate we have had regard to the level of surcharges imposed in other cases. In *Total Technology* the surcharge imposed was £4,260, which the Upper Tribunal held (at paragraph 93) was “comfortably ... below any possible upper limit” and not disproportionate. In *Trinity Mirror plc v HMRC* [2014] UKFTT 35 (TC) (which is under appeal) (“*Trinity Mirror*”) a surcharge of £70,906.44 for a one day delay was considered by the First-tier Tribunal to be disproportionate. This followed the earlier decision of the First-tier Tribunal in *Enersys Holdings UK Limited v Revenue and Customs Commissioners* [2010] UKFTT 20 (TC) (“*Enersys*”) where a surcharge of £131,881 for a one day delay in making payment was also held to be disproportionate.

54. The Second Surcharge here is smaller than that imposed in *Total Technology*, but the Third Surcharge is larger and can fairly be described as ‘substantial’. However, both the Second and Third Surcharge are of a different scale entirely to the surcharges imposed in *Enersys* and *Trinity Mirror*.

55. In all the circumstances of this case we consider that neither the Second Surcharge (of £2,080.18) nor the Third Surcharge (of £13,265.32) is plainly unfair to the Appellant. We do not consider that either the Second Surcharge or Third Surcharge goes beyond what is necessary to achieve the aim of the legislation. We conclude that neither the Second Surcharge nor the Third Surcharge is disproportionate to the Appellant’s default.

35 **Decision**

56. We therefore dismiss this appeal. We confirm the First Surcharge in the sum of £4,902.02, the Second Surcharge in the sum of £2,080.18 and the Third Surcharge in the sum of £13,265.32.

57. 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.

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JANE BAILEY

TRIBUNAL JUDGE

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RELEASE DATE: 23 June 2015