[2016] UKFTT 0303 (TC)

TC05072

Appeal number: TC/2015/04638

VAT –default surcharge – whether the appellant had a reasonable excuse – whether the surcharge was disproportionate - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOVIBONDS BREWERY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER TOBY SIMON

Sitting in public at the Royal Courts of Justice, Strand, London on 23 February 2016

Mr Rosenmeier a director of the Appellant

Mr Bradley, an officer of the Respondents, for the Respondents ("HMRC")

DECISION

1. The appellant appealed against default surcharges of £7,266.73 imposed by HMRC under assessments issued pursuant to s 59 of the Value Added Tax Act 1994 ("**VATA**") in respect of 18 VAT quarterly accounting periods in the period commencing on 1 August 2008 and ending on 31 March 2013 as set out below.

Facts

2. We find the following facts based on the information provided to the tribunal and the evidence of the appellant.

3. The appellant is in the business of brewing ale and lager. Mr Rosenmeier who appeared on behalf of the appellant was a director of the appellant at all relevant times.

4. The appellant first came within the default surcharge regime due to the late payment of VAT and late submission of its VAT return for the period ending on 31 January 2008. The appellant was late in paying the VAT due for each subsequent quarterly VAT accounting period until the period ending on 31 March 2013.

5. HMRC imposed 18 default surcharges in respect of the periods from that ending on 31 October 2008 to that ending on 31 March 2013 except the period ending on 30 April 2011 as no VAT was due in this period. The appellant was also late in submitting its VAT return for 14 of the 18 periods. The time by which payment of the VAT due was made ranged from 14 days late to several months late. All VAT due for the relevant periods was eventually paid.

6. HMRC duly issued a surcharge liability notice for each period each of which for all periods up to and including the period ending on 31 December 2012 set out how the surcharges are calculated. The surcharge was charged at the rate of 10% of the late paid VAT for the first period and 15% thereafter.

7. The appellant's corporation tax computations for the periods 1 July 2011 to 30 June 2012 shows tax losses carried forward of £47,905. The accounts for the appellant show, for each of the years ending 30 June 2008 to 30 June 2011, losses after taxation of £11,992, £924, £2,034 and £13,047 (respectively) and for the years ending on 30 June 2012 and 2013 small profits of £1,294 and £5,402 (respectively).

8. The appellant produced bank statements for its bank accounts showing:

(1) The entries for 10 to 12 days in a particular month, the first month being December 2008 and the last March 2009, and the balance in the account on the last day shown which was typically around the middle of that month.

(2) The entries from the start of a particular month for 5 to 7 days at the start of the month, the first being August 2011 and the last May 2013, and the balance in the account on the last day shown.

9. The appellant also produced an aged creditor analysis which at quarterly dates from 7 December 2008 to 7 February 2013 showed that the appellant had quite substantial outstanding creditors at the date of the report.

10. Mr Rosenmeier gave evidence that in the periods in question the appellant was dealing with cash flow issues beyond its control. For example there were delays in receiving payments from customers and cases where customers had gone bankrupt. The cost of goods used in the business fluctuates and the appellant was obliged to pay its suppliers and could not obtain credit terms. Mr Rosenmeier was not able to point to specific instances in particular periods where there had been an issue but relied on the general information produced as described in 7, 8 and 9.

11. The appellant had usually used the electronic means of paying the VAT due using BACS and more recently the Faster Payment Service.

12. The appellant appealed to the tribunal against the default surcharges on 29 July 2015.

Law

13. Where a business makes quarterly returns for VAT purposes, the return must be made and the tax payment is due on or before the end of the month following the end of the relevant quarter (under regulations 25(1) and 40(2) Value Added Tax Regulations 1995 (SI 1995/2518)). Where, however, the taxable person files returns and pays tax electronically, HMRC allow a further seven days from the end of the next month.

14. In outline, the default surcharge regime operates to impose a surcharge where a taxable person is late in paying VAT by the due date as follows:

(1) If a taxable person is in default for any accounting period (a "**default period**"), HMRC can serve a surcharge liability notice on that person stating that the period from the date of the notice until the anniversary of the last day of the default accounting period is a "surcharge period" (sub-s 59(2) VATA).

(2) A person is in default for this purpose if, by the last day on which the person is required to furnish a return for the period (a) HMRC has not received that return or (b) HMRC has received that return but has not received the amount of VAT shown on the return as payable in respect of that period (sub-s 59(1) VATA).

(3) The effect of the service of a surcharge liability notice is that the taxable person is potentially liable to a surcharge for each further default period falling within the surcharge period for which VAT due is not paid in full by the due date for the return. The rate of surcharge is the greater of a specified percentage of the outstanding VAT and £30 (sub-s 59(4) VATA).

(4) The specified percentage of surcharge increases according to how many defaults there are in the surcharge period. The rate is 2% for the first default

period, 5% for the second, 10% for the third and a maximum of 15% for all further periods (sub-s 59(5) VATA).

(5) The surcharge default regime operates on an on-going rolling basis if the taxable person continues to be in default. HMRC can serve a surcharge liability notice in respect of each and every default period. Where a notice is served for a default period which falls within an existing surcharge period, the new surcharge period is treated as a continuation of the existing one (sub-s 59(3) VATA). In other words the surcharge period is extended to the new end date specified in the later notice.

15. Under sub-s 59(7) VATA, if a person who would otherwise be liable to a surcharge satisfies 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 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 provision 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)."

16. Sub-section 71(1)(a) VATA provides that:

> "(1) For the purposes of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct –
>
> (a) An insufficiency of funds to pay any VAT due is not a reasonable excuse;"

17. Section 108 Finance Act 2009 provides that a default surcharge may be suspended if a person comes to an agreement with HMRC to defer payment. Such an agreement must be reached prior to the due date for this relief to apply.

Submissions

18. The appellant made the following submissions:

(1) During the period in question the appellant found it very difficult to make VAT payments on time. The appellant's corporation tax calculations show that at that time the appellant had carried forward losses of nearly £50,000. As set out in 10 the appellant was dealing with cash flow issues beyond its control.

(2) The surcharges of 15% of the late paid VAT are extraordinarily disproportionate. This is wholly out of kilter with the industry standard as

regards interest rates and the Late Payment of Commercial Debts (Interest) Act 1998 which provides for a charge of 8.5% (8% above a base of 0.5%) daily interest on commercial debt. The surcharges equate to 684% interest on the debt outstanding to HMRC.

(3) The appellant understands that surcharges are designed to stop evasion of VAT but the appellant has never evaded paying VAT. The appellant is strongly opposed to paying surcharges that put the business in jeopardy by charging "Payday lending" style disproportionate interest.

(4) In 2011 HMRC used a commercial debt collector for a time to pay arrangement for a single VAT period who wrongly took an extra payment of £728.67 which has been applied to the surcharges. It would be fair to have £728.67 as the total penalty as it is more in line with the interest rate of 8.5% referred to above.

(5) The appellant had had difficulties in communicating with HMRC. He had not been able to get through to HMRC on the telephone at the relevant time. The appellant had been threatened by bailiffs as regards collecting the amount of the surcharges even though the surcharges were under appeal to HMRC.

19. HMRC made the following submissions:

(1) HMRC accept that the initial burden of proof lies with HMRC to show that the conditions for imposing the default surcharges were met. All VAT was paid late as shown the schedule provided by HMRC to the tribunal and the appellant accepted this in his initial appeal to HMRC on 14 May 2015. There is no dispute that the appellant received the surcharge liability notices issued by HMRC.

(2) The burden of proof then shifts to the appellant so show that there was a reasonable excuse for the failure to pay the VAT on time and the appellant has failed to do this.

(3) Having been registered since 2005, within the default regime since January 2008 and received surcharge liability notices setting out the consequences of failure to comply, the appellant should have been aware of the potential financial consequences of further late payment.

(4) A reasonable excuse has been defined as an unforeseeable event that is beyond a person's control. HMRC consider that if the event is within the person's control the necessary steps should be taken to meet the obligations.

(5) Whilst an insufficiency of funds is not a reasonable excuse the underlying reason for the insufficiency may be such an excuse depending on the circumstances.

(6) As regards the reason for any insufficiency of funds, the appellant did not provide any additional information to HMRC in response to their request of 19 August 2015 for further information regarding its cashflow issues. The appellant has not suggested that insufficient monies were received in the period to pay the VAT due. HMRC calculates the VAT due as between 6% to 15% of

the net outputs in the periods and that in fact the appellant did have sufficient funds to pay in at least 7 of the accounting periods in question.

(7) In any event such a cashflow deficit, which is a normal incidence of trade, is not sufficient to constitute a reasonable excuse. VAT collected by a business does not belong to it. Whilst HMRC does not object to VAT being used to supplement cashflow the business must first ensure that it can meet its tax obligations. As a result of retaining the VAT payable beyond the due date the appellant has derived a financial advantage.

(8) The appellant has not provided details of any action taken to achieve timely payment such has financial assistance in the form of an overdraft or loan or a restructuring to ensure the business could meet its future obligations.

(9) Nor does it appear the appellant considered any other action which would have assisted it in meeting its VAT obligations such as using the cash accounting scheme for VAT purposes of requesting time to pay under a prior arrangement.

(10) The appellant has not submitted any information to indicate an unforeseeable or sudden event that contributed to an inability to pay the VAT by the due date.

(11) On the basis of the decision of the Upper Tribunal in the case of *The Commissioners for Her Majesty's Revenue and Customs Commissioners v Total Technology (Engineering) Ltd* [2010] UKUT 418 (TCC) and *The Commissioners for Her Majesty's Revenue and Customs v Trinity Mirror Plc* [2015] UKUT 0421 the default surcharge system is not of itself disproportionate and nor is the particular surcharge in this case. HMRC referred in particular to paras [65], [66], [68], [71] and [72] of the *Trinity Mirror* case.

(12) The default surcharge regime is intended to have a punitive effect to ensure compliance. The amount of the default surcharge cannot be validly compared with interest rates on commercial debt.

(13) Neither HMRC nor the tribunal has any power of mitigation to reduce the amount of the surcharges.

Discussion

20. It is clear that the conditions for imposing the default surcharges were met. All VAT was paid late as shown the schedule provided by HMRC to the tribunal and the appellant accepted this in his initial appeal to HMRC on 14 May 2015. There is no dispute that the appellant received the surcharge liability notices issued by HMRC.

21. We note that neither HMRC nor the tribunal have any general discretion or powers of mitigation as regards the default surcharge. An appeal can be brought to the tribunal only on the matters on which the tribunal has jurisdiction being, in this case, whether there was a reasonable excuse for late payment as a result of the cash flow problems cited and whether the imposition of the surcharges was disproportionate.

Reasonable excuse

22. There is no statutory definition of what constitutes a reasonable excuse. On the basis of the wording and the approach taken in other cases in this tribunal, we understand the term to require consideration of what can reasonably be expected of a prudent business person exercising reasonable foresight and due diligence as regards its VAT obligations in the light of all the circumstances of the taxpayer's particular case. For example in the case of *The Clean Car Company Ltd v Custom and Excise Commissioners* [1991] VATTR 234 HH Judge Medd QC put the test as follows:

> "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 judgement 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 attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do".

23. We can see no basis for HMRC's view that there can only be a reasonable excuse where there is an unforeseeable event that is beyond a person's control. The test is simply what is reasonable in all the circumstances. This test does not in our view, as conveniently summarised above, carry any implication that only an unforeseeable event beyond a person's control can qualify as a reasonable excuse.

24. Essentially Mr Rosenmeier argues that the appellant has a reasonable excuse on the basis it did not have sufficient funds to pay by the due dates due to its cashflow difficulties as set out in 10 and 33. Section 71(1)(a) VATA precludes an insufficiency of funds from being a reasonable excuse. However, it is established that it does not necessarily prevent the cause of the insufficiency from being a reasonable excuse. This was decided by the Court of Appeal in the case of *Customs & Excise Commissioners v Steptoe* [1992] STC 757.

25. In the *Steptoe* case, the taxpayer's excuse for late payment of VAT as regards three accounting periods was that a customer, which accounted for 95% of the taxpayer's business, never paid its bills until six to eight weeks after the money was due, which in turn meant the taxpayer was not able to meet his VAT liabilities. The majority, Nolan LJ and Lord Donaldson, decided in favour of the taxpayer that this constituted a reasonable excuse with Scott LJ dissenting.

26. All of the judges were agreed that the correct construction of the relevant provision (a prior version of s 71(1)(a) VATA) was that it does not prevent the reason for an insufficiency of funds being put forward as a reasonable excuse. However, there was disagreement as to the test for formulating what reason for an insufficiency of funds could constitute a reasonable excuse.

27. Scott LJ concluded, at 765 d, that:

> "Absent some "unforeseeable or inescapable" event cash flow problems are, in my opinion, barred by s 33(2)(a) [now s 71(1)(a) VATA] from constituting a "reasonable excuse".

28. Nolan LJ and Donaldson LJ agreed that the above test put forward by Scott LJ was not correct. It is not the case that there is a reasonable excuse as a result of an event causing a lack of funds only where the event or circumstances are unforeseeable or inescapable. Donaldson LJ explained the position as follows (at 770 c to f):

> "Nolan LJ, as I read his judgement explaining and expanding on his judgement in *Customs & Excise Comrs v Salevon Ltd* [1989] STC 907, is saying that if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.
>
> Scott LJ on the other hand is of the opinion that the underlying cause of the insufficiency of funds must be an unforeseeable or inescapable event. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness and (b) it treats foreseeability as relevant in its own right, whereas I think that "foreseeability" or as I would say "reasonable foreseeability" is only relevant in the context of whether the cash flow problem was "inescapable" or, as I would say, "reasonably avoidable". It is more difficult to escape from the unforeseeable than from the foreseeable".

29. Nolan LJ, who had decided the previous case (as Nolan J) of *Salevon*, said the following, also expressly rejecting Scott LJ's formulation of the test (at 768 d to e):

> "I would not accept that the reasonable excuse must necessarily involve the wrongful act of another person. My references in *Salevon* to the wrongful act of another and to the distinction between the trader who lacks the money to pay his tax by reason of culpable default and the trader who lacks the money by reason of unforeseeable and inescapable misfortune were directed to the facts of that case. They cannot be regarded as an all purpose test of what constitutes reasonable excuse. The test is to be found in the words of ss 19(6) (b) and 33(2)(a) read in the context of the statutory scheme for the collection of value added tax. As a general rule this scheme has a highly beneficial effect on the cash flow of traders."

30. Nolan LJ went on to quote again (at 768 f to h) from his judgement in *Salevon* (at 911):

> "the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of "reasonable excuse" must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least being entitled to receive) from his customers the amount of tax which he must subsequently pay over to the Commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he had every commercial incentive to do so. The tax which he has collected represents, in substance, an interest free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to it to invoke s 19(6)(b) [now s 59(7) VATA]. In other words he will be hard put to persuade the commissioners or the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian."

Conclusions on reasonable excuse

31. The tribunal is bound by the decision of the majority of the Court of Appeal in the *Steptoe* case. The question here, therefore, as summarised by Donaldson LJ, is whether the exercise of reasonable foresight and of due diligence and a proper regard for the fact that tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default. In that case there may be a reasonable excuse but that excuse "will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds".

32. It is for the appellant to demonstrate that, as regards the default surcharge for each of the 18 accounting periods, he had a reasonable excuse for not paying VAT due for that period on time.

33. Mr Rosenmeier states that it was difficult to make the VAT payments on time due to the general cashflow difficulties of the business during the period in question. He asserts these difficulties were beyond the appellant's control in the sense that it was subject to fluctuations in prices, it could not dictate terms to suppliers or customers, customers were late in making payment and on some occasions had gone bankrupt without making payment. The appellant's bank statements, a schedule of creditors, corporation tax calculations and extracts from the appellant's accounts for the relevant periods were provided in support of the fact that there were such cash flow difficulties. Otherwise, the appellant was not able to point to any particular event as causing a difficulty in any particular period.

34. We are unable to form much in the way of material conclusions from the information provided by the appellant. We note that the appellant either made a loss or small profit only for tax and accounting purposes in the relevant periods. This does not, however, tell us whether the appellant was unable to meet its VAT payments in any period due to lack of funds. The extracts from bank statements provided were for

limited periods only showing a balance in the appellant's account at particular dates which do not correspond to the due dates for VAT purposes. Whilst these show that the appellant had very low amounts in its bank account in some of the short periods shown, this is not sufficient to demonstrate that, at the times in question, the appellant had insufficient funds to pay the VAT due. The schedule of creditors shows that, in some periods, the amounts owing to the appellant were relatively large compared to the turnover of the appellant. Again, it is not possible to conclude from this that, on the balance of probabilities, the appellant was unable to pay the VAT due for each period due to the outstanding creditors and the cash flow situation.

35. Even if it were possible to form such a conclusion, that of itself, as set out, is not a reasonable excuse. The question is whether the underlying cause of the lack of funds constitutes a reasonable excuse. Again the evidence presented does not support a conclusion that any of the difficulties cited by Mr Rosenmeier were such that the exercise of reasonable foresight and due diligence would not have avoided the lack of funds (if indeed there were such a lack of funds).

36. The factors cited by Mr Rosenmeier of price fluctuation, timing of creditor payments and timing of payments due are in general terms part and parcel of what we would see as the usual issues with running a small business of this nature. We appreciate the precise degree of fluctuation and level of any delay in obtaining payment cannot be known. However, in general terms we would expect a business, acting with reasonable diligence and foresight especially where such issues are on-going, to be able to make some allowance for such factors in its business model (such as based on averages over a period), taking account of the need to pay VAT on time. We would also expect such a business, if necessary, to take steps whether through temporary overdraft, loan or adjustment to its manner of trading to ensure it has sufficient funds.

37. We might have been able to form a different view in respect of particular periods if Mr Rosenmeier had been able to point to any particular problems, such as regards creditors, which had caused a lack of funds for that period but this was not the case. The appellant has not provided any evidence of any particular matter on which it relies as regards any of the periods in question (other than the generality of issues set out above which we do not regard as sufficient).

38. Finally we note that Mr Rosenmeier raised that he had had difficulty getting through to HMRC on the telephone at times during the relevant period. That of itself, in the absence of any further explanation of how or why this caused the failure to pay on time, does not constitute a reasonable excuse.

39. For all the reasons set out above, we have concluded that the appellant does not have a reasonable excuse as regards any of the default surcharges.

Disproportionate issue

40. The question of whether the default surcharge regime or a particular surcharge can be defeated on the basis it is disproportionate, both from the perspective of EU

law and of the European Convention on Human Rights, has been considered in detail by the Upper Tribunal in the *Total Technology* and *Trinity Mirror* cases to which we were referred by HMRC.

41. In *Total Technology* the issue was whether a surcharge of £4,260.26 imposed at the rate of 5% as a result of the late payment of VAT of £85,205 was disproportionate. It was held at [99] that there was nothing in the VAT default surcharge regime which led to the conclusion that its architecture was fatally flawed in the sense of the entire scheme being unlawfully disproportionate. However, there were some aspects of the default surcharge regime which may lead to the conclusion that on the facts of a particular case a penalty is disproportionate. The tribunal cautioned that in making any such assessment the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed.

42. At [100] the tribunal noted that:

> "Our conclusion, therefore, is that with the possible omission of an upper limit on the penalty which may be imposed, the regime viewed as a whole does not suffer from any flaw which renders it non–compliant with the principle of proportionality in the sense that it, or some aspect of it, falls to be struck down."

43. The tribunal went on to suggest at [93] that the fact that there was no maximum penalty was a "real flaw" and that "there must be some upper limit, although it is not sensible for us in the present case to suggest what that might be". This was on the basis that it was plain that the penalty in that case could not be described as "devoid of reasonable foundation" or "not merely harsh but plainly unfair" so that it comfortably fell below the possible upper limit.

44. Having concluded that the regime as a whole was not fatally flawed, the tribunal turned to considering whether the particular surcharge was disproportionate. At [101] the tribunal rejected the taxpayer's submissions that the penalty was unfair on the basis that payment was only one day late, previous defaults were innocent, the taxpayer had an excellent compliance record prior to the first of the defaults leading to it being in the regime and the amount of the penalty represented an unreasonable proportion of the taxpayer's profits.

45. The tribunal noted that even if the penalty was more than would be imposed if it were a matter for the decision of a tribunal, the amount of the penalty did not approach the sort of level which had been held to be disproportionate in an earlier case which was described as "unimaginable". It was noted that the result for the taxpayer may be seen by some as harsh, but that the tribunal did not consider that it could be regarded as "plainly unfair".

46. In the *Trinity Mirror* case the Upper Tribunal upheld a default surcharge of £70,906.44 imposed at the rate of 2% for the failure by one day to file a VAT return and pay the VAT due for the relevant period of £3,545,324. The tribunal agreed with

the tribunal in *Total Technology* that the default surcharge regime, viewed as a whole, is a rational scheme (at [65]). The tribunal noted, however, that:

> "applying the tests we have described, the absence of any financial limit on the level of a surcharge may result in an individual case in a penalty that might be considered disproportionate. In our judgement, given the structure of the default surcharge regime, including those features described in *Total Technology*, this is likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances. Although the absence of a maximum penalty means that the possibility of a proper challenge on the basis of proportionality cannot be ruled out, we cannot ourselves readily identify common characteristic of a case where such a challenge is likely to succeed."

47. The Upper Tribunal concluded at [68] that, although payment was only one day late, they accepted that the scheme of the regime is to impose a penalty for failing to pay VAT on time and not penalise further for any subsequent delay in payment. They considered that to be entirely consistent with the fiscal neutrality aim of the directive. They noted at [70] that the gravity of the default must be assessed by reference to the relevant factors, first that it was a second default, in respect of which Trinity Mirror had been notified by the surcharge liability notice issued following the first default that further default within the surcharge period could result in a surcharge and, secondly, that it was in a substantial sum.

48. Finally the tribunal concluded at [70] and [71] that:

> "Having regard to the need, in order to preserve the fiscal neutrality of the VAT system, to enforce prompt payment of VAT collected by a taxable person, a penalty of 2% cannot be regarded as so disproportionate to the gravity of the infringement as to constitute an obstacle to the underlying aim of the directive.
>
> Nor can the surcharge be regarded as disproportionate by reference to the Convention. It has been arrived at by the application of a rational scheme that cannot be characteristics as devoid of all foundation. The penalty might be considered harsh, but in our view it cannot be regarded as plainly unfair."

49. Following the approach in these cases, we have concluded that the surcharges imposed on the appellant are not disproportionate. We note that the appellant is subject to 18 surcharges in total and had been in default accordingly for a substantial period of time. The on-going notices and surcharges would have alerted the appellant to the fact that on-going penalties would be charged at 10% and then at the higher rate of 15%. In such circumstances whilst the penalties may be harsh we do not consider them to be plainly unfair.

50. We note the appellant's representations that the default surcharge penalty is very high compared with a commercial rate of interest on late paid debts. The

surcharge operates according to its own rules at the rates provided for in those rules. As explained above, the Upper Tribunal (by whose decisions we are bound) have concluded that the regime is not itself disproportionate. There is no scope, therefore, for an argument that it should operate by reference to a commercial rate of interest. Also we do not have power to mitigate the surcharge. The default surcharge regime does not include a power to mitigate.

51. In *Total Technology* the Upper Tribunal concluded that the absence of such a power to mitigate did not render the regime as a whole disproportionate but, if they were wrong on that, then such a power should only be regarded as included in exceptional circumstances. We do not consider that there are any exceptional circumstances in this case.

52. Finally we note that the appellant argued that the surcharges should be confined to a much smaller amount which he argues were wrongly accounted for by a debt collector acting on HMRC's behalf. Again we note we do not have power to mitigate on that basis. Also we do not have the power to take into account any debt collection/enforcement issues the appellant has with HMRC in making a decision on the issues under appeal here.

Conclusion

53. For all the reasons set out above we have decided that the appellant is liable to the 18 default surcharges imposed by HMRC.

54. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 6 MAY 2016