



**TC05159**

**Appeal number: TC/2015/05111**

*VALUE ADDED TAX – default surcharges imposed under Section 59  
Value Added Tax Act 1994 – whether Time to Pay arrangement covered  
liabilities arising in the future – no – whether the Appellant had a  
reasonable excuse for late payment of VAT – no – surcharges confirmed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SHERDONS GOLF LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JANE BAILEY  
MR PHILIP JOLLY**

**Sitting in public at Birmingham on 18 March 2016**

**Mr Chatham, director, for the Appellant**

**Ms Ann Rees, presenting officer, for the Respondents**

## DECISION

### Introduction

1. This appeal is against the imposition under Section 59 Value Added Tax Act  
1994 (“VATA 1994”) of seven default surcharges totalling £9,536.74 upon the  
5 Appellant. These surcharges were imposed by the Respondents in respect of the  
Appellant’s failure to pay VAT by the due date for payment for the periods ended  
05/13, 08/13, 11/13, 02/14, 05/14, 08/14 and 11/14.

### Late appeal

2. The decision appealed against is a review decision set out in a letter which is  
10 undated but which was apparently sent on 13 April 2015. The Appellant’s appeal was  
filed on 27 August 2015, and is therefore outside the 30 days permitted for making an  
appeal against the imposition of default surcharges. We first consider whether we  
should exercise our discretion under Rule 5 of the Tribunal Procedure (First-tier  
Tribunal)(Tax Chamber) Rules 2009 to extend the time allowed for the Appellant to  
15 appeal.

3. The principles relevant to deciding whether to decide to extend the time allowed  
to appeal to the Tribunal are set out in *Data Select Ltd v Revenue and Customs  
Commissioners* [2012] STC 2195. Applying those principles here, we note that  
20 although the appeal was submitted over three months late, Mr Chatham was engaged  
in correspondence with the Respondents and the Revenue Adjudicator’s office  
throughout that period. Due to the nature of that correspondence, the Respondents  
could have been in no doubt as to the Appellant’s desire to challenge the imposition  
of surcharges. In considering the potential prejudice to each party we note that if the  
Appellant is not granted permission then it will lose the opportunity to present its  
25 case, and also that the Respondents do not raise any objection to permission being  
granted to the Appellant. Although generally deadlines should be respected as they  
provide certainty for all parties, we conclude that the balance of factors in this case is  
in favour of the Appellant, and so we grant permission for this appeal to be admitted  
out of time.

### 30 Background and chronology of events

4. As the nature of the dispute between the parties concerns the terms of an oral  
agreement reached, we set out the background to that agreement in some detail in this  
chronology.

5. The Appellant ran a golf centre near Tewkesbury in Gloucestershire. This  
35 business was weather-dependent and the business had been affected by the floods to  
that area in 2007. Subsequent weather related difficulties had caused the Appellant to  
struggle financially and, before the events with which we are concerned in this appeal,  
the Appellant had entered into a Time To Pay (“TTP”) arrangement with the  
Respondents. The final instalment under that TTP arrangement was due at the end of  
40 August 2012.

6. In April 2012 the Respondents paid a visit to the Appellant. As a result of that visit, it was discovered that for a number of years the Appellant had been incorrectly accounting for VAT on its catering. On 6 August 2012 the Respondents issued the Appellant with an assessment to VAT in the sum of £29,427, plus £1,707.68 interest.
- 5 7. The Appellant's VAT return for the quarter ended 08/12 was due on or before 30 September 2012. The Appellant made payment of its VAT by electronic means and so the due date for submission of the return and payment of the VAT was extended by seven days. The Appellant submitted its VAT return on 1 October 2012, showing VAT of £14,026.55 due and payable. Only £4,676.55 was paid on time.
- 10 8. On 12 October 2012 the Appellant was issued with a Surcharge Liability Notice ("SLN") and it entered the Surcharge regime. The SLN notified the Appellant that it could become liable to a surcharge if it was late in paying its VAT or in submitting its VAT return in any period over the following year.
- 15 9. There were a number of calls between Mr Chatham and the Respondents in the autumn and winter of 2012 with the Respondents' Action History notes indicating that the Appellant was endeavouring to find the means to pay the sums owed but that this was a struggle. The amounts owed at this time were £9,350 for the quarter ended 08/12, and £31,134.68 for the officer's assessment and interest.
- 20 10. On 31 October 2012 Mr Chatham telephoned the Respondents and advised them that the Appellant's business was for sale. Also on 31 October 2012 the Appellant made payment of £3,350 which was allocated towards the VAT owed for the quarter ended 08/12. Further amounts totalling £3,000 were paid by the Appellant in November and December 2012.
- 25 11. The Appellant's VAT return for 11/12 was due on or before 7 January 2013. This return was submitted on 3 January 2013, showing VAT due of £14,285.28. No VAT was paid within time. The Appellant was issued with a Surcharge at 2% and a Surcharge Liability Extension Notice ("SLNE"). As the surcharge was less than £400, it was reduced to zero.
- 30 12. On 28 January 2013, the Appellant paid a further £1,250 towards the VAT owed for the quarter ended 08/12. Also on 28 January 2013 Mr Chatham told the Respondents in a telephone call that he would need another TTP arrangement. On 4 February 2013 the Appellant made a payment of £2,001.30 towards its VAT debt. £251.30 was allocated to the quarter ended 11/12, and remainder allocated to pay off the VAT due for the quarter ended 08/12.
- 35 13. On 14 February 2013 there is a note in the Respondents' Action History of a distraint call being made to the Appellant. Mr Chatham's subsequent letter records that this visit was made by Mr Bullock. The Action History note made by Mr Bullock records:
- 40 Spoke to Mr Chatham. Co keeping up with latest VAT but need time to clear officer's assessment. Warned levy. Co own land and buildings but bank has charge and unwilling to give loan secured on property.

Members bring own clubs etc to range so no stock of golfing equipment etc. Business in process of being sold. 1k paid imm. Dir will look at cash flow over weekend and write with short term offer. Ball park fig £500 to 1K per month until sale of business completed approx. July/Aug at which time balance can be cleared in full. Warned EIS [the Respondents' Enforcement and Insolvency Service] if ttp not kept to.

14. Mr Chatham did not wait until the following week to make his proposal but sent his letter to the Respondents later that same day. Mr Chatham's letter dated 14 February 2013 stated:

We write in connection with our VAT account ... Whilst we are endeavouring to maintain our quarterly payments, the amount revealed at your officer's inspection last April was totally unbudgeted and remains unpaid. On each occasion we have received a letter on this matter, we have immediately contacted the VAT office to discuss matters with one of your representative and we do have records of all conversations. We attempted to organise a repayment scheme but were informed that was not available to us. ...

We have today received a visit from Mr Jeremy Bullock of your Debt Management Unit at Peterborough and had the opportunity to further discuss the way forward. At his request we made a payment of £1000 to show our wish to clear this matter. We advised Mr Bullock that .... [we] are in the process of preparing the paperwork and necessary documentation to float the sale [of the golf centre] in May this year. Our bankers .... are unwilling to forward any further money but are maintaining support until the completion of the aforementioned sale. We therefore request the opportunity to come to an arrangement with yourselves to make regular staged payments towards the O.A. amount to show our willingness to pay. However, we do assure you that full payment of all outstanding amounts on our account will be made on completion of sale.

Following on to last year's horrendous weather conditions, the recent continued period of snow and floods have only served to exacerbate our problems. We have therefore considered what we can safely commit to on a regular basis and would suggest a two weekly payment of £375 with the obvious guarantee of full payment on the completion of the sale. Should matters improve we would naturally hope to increase these payments as we are genuinely interested in clearing this debt as soon as it is possible.

15. Also on 14 February 2013 the Appellant made payment of the £1,000 promised by Mr Chatham in his discussions with Mr Bullock. On 1 March 2013 the Appellant made two further payments to the Respondents, each of £1,250.

16. On 13 March 2013, Mr Wall of the Respondents and Mr Chatham spoke by telephone. Mr Wall made a note of this call on the Action History:

5                   Comp vc passed. Called and spoke to Richard Chatham. Said that I had received his letter and that I was prepared to accept his interim offer of £375 per month until the business has been sold. Payments are to be made on the 7<sup>th</sup> and 21<sup>st</sup> of each month by BACS. Mr Chatham also said that if there was any extra money he would make payments on top of the £375. I will call him back in May to check on progress re sale of the business. KBW

10 17. On each of 20 March, 8 April and 22 April 2013, the Appellant made a payment to the Respondents of £375. The Respondents' schedule of payments shows that these were allocated to the VAT outstanding for the quarter ended 11/12 (rather than the officer's assessment). As at 1 May 2013, £9,408.98 still remained due in respect of this quarter. The officer's assessment also still remained unpaid.

15 18. In April 2013 the Appellant's golf centre was put on the market.

19. The Appellant's VAT return for the quarter ended 02/13 was due on or before 7 April 2013. The return showed VAT due of £9,623.01 but no VAT was paid by the due date. On 12 April 2013 the Respondents issued the Appellant with a surcharge of 5%, amounting to £481.15, and a SLNE. (This surcharge was subsequently removed  
20 on review.)

20. On 3 May 2013 the Appellant made a payment of £9,535.28 to the Respondents. We note that this is just £87.73 less than the VAT due for the quarter ended 02/13 which was to have been paid by 7 April 2013.

21. On 10 May 2013 Mr Wall made the following entry in the action history:

25                   Tele call to tp. Payments up to date, last payment made was £375 on 08/05/13, also paid latest return at the same time. Called to speak dir Richard Chatham for update on sale of golf course but he wasn't in, might be in after 3 so will call back later KBW.

22. Although Mr Wall had understood the Appellant's payment of £9,535.28 to be  
30 in respect of the quarter ended 02/13, almost all of the amount paid by the Appellant on 3 May 2013 was allocated to the outstanding VAT due for the quarter ended 11/12. Just £126.30 was allocated to the VAT due for 02/13.

23. Throughout May and June of 2013 the Appellant continued to make payment of £375 on approximately 7<sup>th</sup> and 21<sup>st</sup> of each month.

35 24. The Appellant's VAT return for the quarter ended 05/13 was due on or before 7 July 2013. The return was submitted on 3 July 2013 and showed VAT due of £16,479.28. On the same day as submitting the return, the Appellant paid £2,000 to the Respondents. This payment was allocated to the outstanding VAT due for the quarter ended 02/13. On 12 July 2013 the Respondents issued the Appellant with a

surcharge at 10%, amounting to £1,647.92, and a SLNE. (This was subsequently recalculated on review as a surcharge of 5% and so reduced to £823.96.)

5 25. The Appellant continued to pay the Respondents £375 twice a month through July, August and September 2013, and also made an additional payment of £1,500 on 22 August 2013.

10 26. The Appellant's VAT return for the quarter ended 08/13 was due on or before 7 October 2013. On 2 October 2013 the Appellant submitted its VAT return, showing VAT due of £13,651.99. On 7 October 2013 the Appellant made a payment to the Respondents of £3,000. This lump sum was allocated in part to the quarter ended 02/13 and in part to the quarter ended 05/13. On 11 October 2013 the Respondents issued the Appellant with a surcharge at 15%, amounting to £2,047.79, and a SLNE. (This was subsequently recalculated as a surcharge of 10% and reduced to £1,365.19.)

15 27. The Action History notes that Mr Wall called Mr Chatham at regular intervals between May and October 2013 seeking progress on the sale of the golf course. If Mr Wall reminded Mr Chatham during these calls about the quarterly VAT then that fact was not recorded in Action History notes made by Mr Wall.

20 28. During the period May to October 2013 the Respondents also sent letters to the Appellant seeking payment of the quarterly VAT which was unpaid and notifying the Appellant that default surcharges had been imposed due to the late payment of the quarterly VAT. When Mr Chatham telephoned the Respondents in response to these letters he spoke to a person other than Mr Wall. We were shown the transcripts of two telephone calls made during this period.

25 29. The first transcribed call took place on 29 October 2013. The Respondents advisor is identified only as "Brown". He or she is recorded as advising Mr Chatham that there is no official time to pay arrangement recorded and that is why the Appellant's case has been referred to the Respondents' Debt Management team. Mr Chatham reiterates that he has been dealing with Mr Wall and is due to pay £375 each fortnight. Mr or Ms Brown advises that the case will be sent back to Mr Wall for him to recheck his records and take the case away from the Debt Management team if there is a TTP arrangement in place.

30 30. The second transcript is of a call which took place on 7 November 2013 with a Mrs Basra. The Action History notes:

35 Cust to call back. Mr Richard Chatham (Cust) to cb by 08/11/2013. Mr Chatham will cb. TP stated he has been speaking to Mr Wall FFA and that he has kept up with his pymt plan of £375 per fort. Advised tp to make a pymt towards 08/13. 08/13 rtn outstanding. TP stated he will check how much he can pay & CB. TP stated he is in process of selling his business.

31. In the transcript of the telephone call Mr Chatham is recorded as saying:

5 Mr Chatham I've received another letter from you and I don't want to disregard them and I've never disregarded them I've always rung up and spoken with somebody but as I say we are under Mr Kevin Wall who I speak with every month and he is aware of things and he is happy that we are doing our best to fulfil our role at the present moment.

10 32. The transcript records Mrs Basra as checking her notes and then advising Mr Chatham that no funds have been received since 22 October 2013 and that the next instalment of £375 should have been received. Mr Chatham advised that the payment had gone out from his bank on the day of the call. We note that payment on 7 November would be in accordance with dates agreed and noted in the Action History by Mr Wall on 13 March 2013. Mrs Basra reminds Mr Chatham that interest is accruing. The conversation then continues:

15 Mr Chatham Yes, yes, I appreciate that and, erm, I said everything is going to be paid we have undertaken that, erm, I will do my best to make a further payment on top of the fortnightly £375. But I will when I get the chance in a minute when I've finished taking to you I will find out as to why it hasn't gone out every fourteen days which is what the agreement is

Mrs Basra And also the 08/13 return that should have been paid in full, erm, are you able to make any payment towards that amount today?

25 Mr Chatham As, as I said I will do later on today, erm, erm, my accountant is waiting to see me now I know that sounds like the usual thing but it is he's actually just arrived to see me I will go through that with him and I will make you a payment today, erm, towards it

30 33. When pressed by Mrs Basra as to how much will be paid, Mr Chatham explains some of the background stress he was under at that time, including having just come out of hospital. Mrs Basra states that she will make a note of the call and reminds Mr Chatham that he will keep receiving legal action letters and that interest will be added on to the outstanding amount.

35 34. The Respondents ledger shows that four days later, on 11 November 2013, the Appellant made an additional payment of £2,500. Mr Chatham also called the Respondents on 11 November 2013 and spoke to Mr Wall. Mr Wall noted that call in the Action History:

40 Call from Richard Chatham. Said that he has had a call from someone in debt management in Cumbernauld, he had told them about the ongoing arr he has with us. He has paid £2500 this afternoon on top of the nominal

£375 which was paid on Friday. I asked him how the sale of the business was going, he said that they have offers on the table and are in negotiations with buyers. Can't say when sale will go through but progress is being made.

5 35. There is no reference in Mr Wall's note to any reminder that the quarterly VAT must continue to be paid.

36. On 12 December 2013 Mr Wall telephoned Mr Chatham. The Action History notes record Mr Wall asking for an update. Again there was no reminder that the quarterly VAT was due. It was agreed that Mr Wall would call again in mid-January  
10 2014. Mr Wall records that the fortnightly payments of £375 are still being made.

37. On 17 December 2013 the Respondents' Action History records a clerical review by a manager:

15 Case commenced 4/3/13 for £44540.14, debt today £63681.78. If co have not sold business by Jan then we will have to send case to EIS. We can't wait indefinitely.

38. The Appellant's VAT return for the quarter ended 11/13 was due on or before 7 January 2014. On 2 January 2014 the Appellant submitted its VAT return, showing VAT due of £11,115.22. No VAT was paid on time. On 17 January 2014 the Respondents issued the Appellant with a surcharge at 15%, amounting to £1,667.28,  
20 and a SLNE.

39. On 29 January, 20 and 21 February, 12 and 26 March and 3 April 2014, Mr Wall and Mr Chatham spoke to discuss progress on the sale of the business. In each call Mr Chatham assured Mr Wall that the sale of the business was imminent. There is no recorded reference to the quarterly VAT due.

25 40. The Appellant's VAT return for the quarter ended 02/14 was due on or before 7 April 2014. On 6 April 2014 the Appellant submitted its VAT return and made a payment of £2,000. The VAT due on the return was £8,736.89. On 11 April 2014 the Respondents issued the Appellant with a surcharge at 15%, amounting to £1,310.53.

30 41. On 16 April 2014 Mr Chatham and Mr Wall again speak regarding the sale of the business. Mr Chatham reiterates that the sale is imminent. The Respondents undertake a review of the Appellant's case on 6 May 2014 and the relevant officer notes:

35 LAST case review. Debt as at today £81142.62 which has almost doubled since Dec 2013. We have been waiting over a yr for sale of business and notes at end of march adv pyt would go through in a few days but still hasn't been finalised. Unable to wait indefinitely for sale and debt is getting larger so IWL10s [a letter warning that insolvency action is the next step] issued for £81142.62 to reg office ... with SOLS, EF6 and helpline numbers. If no response or PIF case will need to be prepped for  
40 EIS.

42. Mr Chatham and Mr Wall spoke on 7 May 2014, and Mr Wall advised Mr Chatham that the case had been transferred to another office. Mr Chatham spoke to another officer of the Respondents on 8 May stating that funds would be available in 5-6 weeks. The Appellant's agent spoke to an officer of the Respondents on 3 June 2014 advising that the Appellant should be able to pay £50,000 within 2 weeks.

43. The Appellant's VAT return for the quarter ended 05/14 was due on or before 7 July 2014. On 4 July 2014 the Appellant submitted its VAT return showing VAT due of £14,610.47. No VAT was paid. On 11 July 2014 the Respondents issued the Appellant with a surcharge at 15%, amounting to £2,191.57.

44. On 11 August 2014 Mr Chatham spoke to the Respondents and advised that he should be able to make payment within ten days. On 26 August Mr Chatham advised Mr Wall that the payment was being held up by the bank but should be through imminently. On 3 September Mr Chatham advised the Respondents that the bank were still holding up the payment.

45. On 17 September 2014 Mr Chatham advised the Respondents that Mr Wall was handling the case and that terms had been agreed for the sale of the business. On 24 September 2014 Mr Chatham advised that there was a meeting to finalise matters on Friday and he would call back after that. The next event recorded was on 10 October 2014 where an officer of the Respondents notes that he or she was unable to make telephone contact with Mr Chatham.

46. Meanwhile, the Appellant's VAT return for the quarter ended 08/14 was due on or before 7 October 2014. On 7 October 2014 the Appellant submitted its VAT return showing VAT due of £9,869.93. On the same day the Appellant made a payment of £7,869.93. On 17 October 2014 the Respondents issued the Appellant with a surcharge at 15% in the sum of £1,480.48. (This was subsequently reduced to £300 in recognition that £7,869.93 had been paid within time.)

47. On 15 October 2014 an officer of the Respondents spoke to Mr Chatham. Mr Chatham advised that completion of the sale of the business was due in the week beginning 10 November 2014. On 19 November Mr Chatham rang the Respondents to inform them that completion had been put back to 6 January 2015 but that the Appellant would then clear the debt.

48. The Appellant's VAT return for the quarter ended 11/14 was due on or before 7 January 2015. On 6 January 2015 the Appellant submitted its VAT return showing VAT due of £12,521.45. No VAT was paid. On 16 January 2015 the Respondents issued the Appellant with a surcharge at 15%, amounting to £1,878.21.

49. On 7 January 2015 the Respondents telephoned Mr Chatham. Mr Chatham explained that completion had not taken place but that he had continued to pay £375 every two weeks. The Action History records a number of calls taking place on 7 January 2015. In these calls Mr Chatham advises that the Appellant is still trading but the funds from the sale are needed in order to pay the outstanding VAT debt. The

Respondents press Mr Chatham for payment on the basis that the fortnightly payments of £375 are insufficient.

50. The Respondents attempted to telephone Mr Chatham on 23 and 27 January 2015. On 27 January 2015 Mr Chatham rang back and advised that the sale of the business had taken place and that a cheque would be sent to the Respondents. There was some delay in the Respondents processing that cheque but the Respondents' ledger shows a credit of £90,000 being received on 6 February 2015. That sum was set against the Appellant's outstanding VAT, accrued interest and surcharges, leaving £16,761.79 still outstanding. Further amounts were subsequently paid by the Appellant and Mr Chatham to clear the outstanding VAT and interest. We understand that some of the surcharges remain outstanding pending the outcome of this appeal.

51. On 28 February 2015 the Appellant appealed to the Respondents against the imposition of surcharges for the periods ended 02/13 to 11/14 inclusive on the basis that there had been a time to pay arrangement in place throughout the period of default. This was reiterated in an email from Mr Chatham to the Respondents on 17 March 2015.

52. On 26 March 2015 the Respondents dismissed the Appellant's appeal on the basis that the Time to Pay arrangement covered only the debt which existed at the time that the agreement was reached. However, the Respondents reduced the surcharge imposed in respect of the late payment of VAT due for the period ended 08/14 from £1,480.48 to £300 on the basis that all but £2,000 of the VAT due for that period had been paid on time.

53. On 30 March 2015 the Appellant sought a reconsideration of that decision. In an undated letter sent on or about 13 April 2015 in response, the Respondents agreed to the removal of the surcharge imposed for the period ended 02/13. This removal resulted in the reduction of the surcharges imposed for the periods ended 05/13 and 08/13. The Respondents noted that the Appellant would have been aware from its previous TTP arrangement that it was a condition of all such agreements that future liabilities be paid on time.

54. On 26 August 2015 the Appellant appealed to this Tribunal against the remaining seven surcharges.

### **Respondents' submissions**

55. The Respondents began by outlining the background to the appeal. Mrs Rees next outlined the relevant legislation, covering the liability to a surcharge as set out in Section 59 VATA 1994. The Respondents submission was that the Appellant would be liable to a surcharge unless it had a reasonable excuse for either the return or the VAT having been submitted on time. Mrs Rees also referred to Section 108 Finance Act 2009 which provided for the suspension of surcharges for the duration of a TTP agreement which was adhered to by the taxpayer.

56. Mrs Rees took us through the Schedule of Defaults set out in the bundle and which had formed part of HMRC's Statement of Case. The Respondents' submission

was that the TTP arrangement covered only the arrears outstanding at the time the TTP arrangement was reached on 13 March 2013. Mrs Rees explained that the first surcharge imposed (for the period 02/13) had been removed as the Respondents considered that the Appellant might have considered that period to be part of the arrears covered by the TTP arrangement. Mrs Rees submission was that it was not reasonable for the Appellant to consider that the TTP arrangement would cover future periods where the VAT due had yet to be quantified.

57. Mrs Rees referred us to Mr Chatham's letter of 14 February 2013, submitting that the proposal made by the Appellant was specifically in relation to the officer's assessment and that (plus the already existing arrears) was the only VAT covered by the TTP arrangement. The Respondents did not dispute that the Appellant had maintained regular twice monthly payments of £375 but contended that the TTP arrangement did not cover the future debts. Mrs Rees submitted that the Appellant could not reasonably have believed that the level of payment agreed would satisfy the debts accruing each quarter. Mrs Rees also referred to the SLNEs which would have alerted the Appellant to the surcharges which were being imposed.

58. Mrs Rees submitted that the TTP arrangement covered only the officer's assessment and the VAT for the 11/12 period which was outstanding at the date the TTP arrangement was agreed. A mistaken belief, even if honestly held, could not constitute a reasonable excuse for the late payment of the quarterly VAT due. The Respondents sought the dismissal of the appeal and the confirmation of the surcharges in the amounts imposed.

### **Appellant's submissions**

59. On behalf of the Appellant, Mr Chatham submitted that he personally had agreed the TTP arrangement with Mr Wall of the Respondents and the wording had not been challenged until the Appellant appealed against the imposition of surcharges. Mr Chatham had originally suggested that payments be every 14 days but Mr Wall had said the payments should be on specified days of the month to avoid occurring at the end of the month and jeopardising regular end of month payments.

60. Mr Chatham submitted that the TTP arrangement was not specifically to cover the officer's assessment. Mr Chatham noted that nothing had been put in writing and the Appellant had made payments throughout. In all the calls Mr Chatham had had with the Respondents, no one had ever suggested that the TTP arrangement had been breached. Mr Chatham had spoken to at least nine officers. Mr Chatham submitted that the whole case had been a catalogue of errors. The agreement should have been in writing. Mr Chatham considered that the Appellant had complied with the TTP arrangement, the TTP arrangement covered the quarterly VAT and so the Appellant should have the surcharges reimbursed. Mr Chatham briefly mentioned the *Bridport* litigation but accepted that the outcome of that litigation could not affect whether the Appellant was liable to the default surcharges.

61. Under cross examination Mr Chatham accepted that he and Mr Wall had not discussed future VAT when agreeing the TTP arrangement but asserted that Mr Wall

had not said that the agreement did not cover the future VAT. When he had been telephoned by the various officers in the Respondents' debt management team, Mr Chatham had thought each time that it was a misunderstanding which would be corrected. Similarly Mr Chatham had thought that the SLNEs which the Appellant had received were standard documents and that the surcharges would be removed when the outstanding VAT was cleared.

62. Mr Chatham summarised that there was a TTP arrangement which the Appellant had followed to the letter. There was clearly confusion within HMRC and mistakes throughout on their part but the TTP agreement was that £375 should be paid twice a month, with more paid when possible, until the sale of the business was achieved. Therefore surcharges should not have been levied.

### **Decision**

63. In an appeal against the imposition of a default surcharge under Section 59 VATA 1994, the onus of proof is first upon the Respondents to establish that there was late payment of the VAT due and that a surcharge may, on the face of it, be imposed on the Appellant. The onus then shifts to the Appellant to establish that it had a reasonable excuse which comes within Subsection 59(7) VATA 1994 for its late payment of VAT.

64. In this case the Appellant accepts that VAT was paid after the statutory due dates for the periods 05/13 to 11/14 but asserts that the TTP arrangement covered the quarterly VAT as well as the VAT due under the officer's assessment. Given the Appellant's acceptance that the VAT was paid late and the payment dates set out in the Respondents' ledger, we are satisfied that the Respondents have established that the surcharges are, on the face of it, due and we consider whether the Appellant has a reasonable excuse for making late payment.

65. The only argument made by Mr Chatham was that the quarterly VAT was covered by the TTP arrangement. The onus of proof is upon the Appellant to establish that the TTP arrangement reached was in the terms asserted by Mr Chatham. The standard of proof is the balance of probabilities.

66. We heard oral evidence from Mr Chatham. The Respondents directed us to a witness statement from Mr Wall, the inspector involved in the case but Mr Wall was not present at the hearing. We were told that the reason for Mr Wall's absence was that the Respondents "didn't think he could add anything". That is a remarkable conclusion by the Respondents given that the dispute between the parties centred upon the terms of the oral agreement reached between Mr Chatham and Mr Wall. In the light of the Respondents' decision not to call Mr Wall and make him available for cross examination, we give very little weight to the witness statement of Mr Wall.

67. We formed the opinion that Mr Chatham is an honest man. It was clear that, by the date of the hearing before us, Mr Chatham firmly believed that that the twice monthly payments which had been agreed with the Respondents were to cover all VAT, both the officer's assessment and the quarterly VAT becoming due. Mrs Rees

5 challenged this when cross-examining Mr Chatham. We consider that Mr Chatham believed he was telling us the truth when he told us those were the terms of the agreement which had been concluded. However, the contemporaneous documents, including Mr Chatham's own letter of 14 February 2013, the surrounding circumstances and the actions of the parties in the period after 13 March 2013, do not support Mr Chatham's submissions.

10 68. We find that on 13 March 2013, the Appellant and the Respondents reached an oral TTP agreement. This agreement was concluded by Mr Chatham on behalf of the Appellant, and by Mr Wall on behalf of the Respondents. We find that it was a term of the agreement reached on 13 March 2013 that the sum of £375 was to be paid by the Appellant to the Respondents on the 7th and 21st days of each month.

15 69. In both Mr Bullock's note of the visit on 14 February 2013, and in Mr Chatham's letter of 14 February 2013, a distinction is made between the quarterly VAT due from the Appellant and the VAT due under the officer's assessment. It is only the latter which the Appellant is said to need time to pay. We find that the proposal put to the Respondents in Mr Chatham's letter of 14 February 2013 was for the Appellant to make instalments of £375 each fortnight in respect of the outstanding officer's assessment debt of £29,427 plus accruing interest. We find that there was no proposal made in relation to the quarterly VAT.

20 70. Although we have found that the Appellant's proposal related specifically to the officer's assessment, we have considered whether the agreement reached was that the twice monthly payments should also cover the VAT which would arise each quarter in the future. Mr Chatham told us, and we accept, that there was no specific discussion about the quarterly VAT. As there was no discussion about future VAT liabilities which would arise, we consider that it can only have been the parties' common intention that those liabilities would be covered by the TTP arrangement if this aspect was so obvious to both parties that it needed no discussion.

71. In considering this aspect we have borne in mind:

- 30 a. Mr Chatham's assertion at the beginning of his letter of 14 February 2013 that "we are endeavouring to maintain our quarterly payments";
- b. The parties understanding that the sale of the business would take place within a short time frame;
- 35 c. The Respondents published guidance (in the Respondents Debt Management and Banking Manual ("DMBM") 803540) that where there is a TTP arrangement all future liabilities must be paid in full and on time; and
- 40 d. The Respondents published guidance (in DMBM 803540) that any TTP arrangement which, exceptionally, covers future liabilities must be in terms such that the overall debt owed by the taxpayer decreases.

72. In approaching the question of whether the surrounding circumstances were such that it would have been obvious to both parties that future liabilities were intended to be included in the TTP arrangement reached, we have considered the likely reaction if either Mr Chatham or Mr Wall had been asked on 13 March 2013 whether the TTP arrangement was intended to cover the future VAT liabilities of the Appellant. From Mr Chatham's perspective, the Appellant expected to sell the golf centre in the near future and to be able to meet its quarterly VAT liabilities until that sale. Mr Chatham had told Mr Bullock on 14 February 2013 that he expected the sale to complete in July or August 2013. There were only two more VAT instalments due between 13 March 2013 and the end of August 2013. We consider that Mr Chatham would have said, as he did in his 14 February 2013 letter, that there was no need for any agreement to be reached in respect of the VAT which would become due from the Appellant each quarter as these payments could be maintained.

73. From Mr Wall's perspective, we do not consider it credible that any officer of the Respondents would have agreed to accept payments amounting to only £2,250 each quarter from the Appellant if the TTP agreement had been intended to cover the Appellant's future VAT liabilities (averaging over £12,000 each quarter) as well as the officer's assessment and interest of over £30,000. Mr Wall would have been aware of the Respondents' guidance at DMBM 803540: the inclusion of future liabilities would be the exception rather than the rule, and it is clear that two payments of £375 each month would be far too low to reduce the Appellant's debt if future quarterly VAT debts were also included.

74. Therefore we conclude, on the balance of probabilities, that the agreement reached on 13 March 2013 did not include the VAT liabilities of the Appellant which arose after 13 March 2013. The proposal explicitly did not cover the quarterly VAT, the parties did not discuss the quarterly VAT, it was not obvious from the surrounding circumstances that future liabilities should be included, there was no reason for the parties to consider making provision for future liabilities and it is not credible that the payment level which was agreed could include future liabilities which the parties would expect to be far larger than the payments proposed.

75. Our conclusion that the agreement reached did not include quarterly VAT is reinforced by Mr Wall's reaction to the Appellant's payment of £9,535.28 on 3 May 2013. This payment is just short of the VAT due to have been paid by 7 April for the quarter ended 02/13. It is clear from Mr Wall's Action History note of 10 May 2013 that Mr Wall understood this payment as being payment of the VAT due under the most recent quarterly return. If the TTP agreement reached had been intended to include the quarterly VAT then we would have expected Mr Wall to refer this as an extra payment in addition to the TTP arrangement regular payments, rather than as VAT due under the return. We consider that Mr Wall checked the payments made by the Appellant in order to ensure that future liabilities were being met, as required by the Respondents' guidance on TTP arrangements.

76. It is unfortunate that Mr Wall, as the only officer of the Respondents with whom Mr Chatham had consistent contact, did not continue to check the quarterly VAT position and to remind Mr Chatham that the Appellant must continue to pay its

quarterly VAT in full and on time. It would appear that Mr Chatham placed considerable reliance upon there being no reminder from Mr Wall in reaching the understanding he had before us that the quarterly VAT was covered by the TTP arrangement. This reliance appears to have outweighed the large number of SLNEs and other warnings about late payment which the Appellant continued to receive from the Respondents until the outstanding arrears were cleared upon the sale of the business.

77. As we have concluded that the TTP arrangement did not include the quarterly VAT arising, and Mr Chatham offered no other reason for the Appellant's late payment of the VAT due, we conclude that the Appellant does not have a reasonable excuse for the late payment of the VAT due for the periods ended 05/13, 08/13, 11/13, 02/14, 05/14, 08/14 and 11/14. Therefore the imposition of surcharges is confirmed.

78. However, we consider that the surcharges for the periods 05/13, 08/13 and 02/14 have been incorrectly calculated. For the period 08/14 the Appellant made a part payment of VAT by the due date for payment and so, on review, the Respondents reduced the surcharge in recognition that part payment had been made. We consider that the Appellant should also be given credit for the payments of £2,000, £3,000 and £2,000 respectively, paid by the due dates for the periods 05/13, 08/13 and 02/14. This would result in a reduction of £100, £300 and £300 respectively for the surcharges imposed for those periods. We confirm the remainder of the surcharges in the figures imposed.

### **Conclusion**

79. We appreciate that this decision is not the outcome for which the Appellant will have hoped. However, we are satisfied that the default surcharges for the seven periods ended 05/13, 08/13, 11/13, 02/14, 05/14, 08/14 and 11/14 were correctly imposed upon the Appellant (albeit that the surcharges for the periods 05/13, 08/13 and 02/14 should be re-calculated to recognise the part payments made on time). We conclude that the TTP arrangement reached did not include the quarterly VAT arising and that the Appellant did not have a reasonable excuse for its late payment of VAT. Therefore, save for the minor reduction in three of the surcharges imposed, this appeal is dismissed.

80. 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.

**JANE BAILEY**

**TRIBUNAL JUDGE**

**RELEASE DATE: 9 JUNE 2016**