[2017] UKFTT 0412 (TC)

TC05876

Appeal number: TC/2016/03826

VAT – default surcharge – late filing and payments- whether reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TOTAL FAÇADE SOLUTIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MRS NORAH CLARKE

Sitting in public at Cardiff on 3 April 2017

Mr Andrew Jones for the Appellant

Mr Ben Morgan and Mrs Anne Rees, Officers of HM Revenue and Customs, for the Respondents

Introduction

1. This is a VAT case. It concerns the default surcharge regime which is a penalty regime which penalises a taxpayer for late delivery of a return, or late payment of VAT.

2. The respondents have assessed the appellant (or the "company") to default surcharges ("surcharges" each a "surcharge") for 18 VAT periods (May 2011 to September 2015) in a total amount of £27,548.03 (the "default periods").

3. A table of the default periods (which includes two periods, namely November 2010 and February 2011 where no surcharge was levied) is set out in the appendix to this decision.

4. The appellant does not believe that it is liable to, nor should it pay the surcharges. It says this for a variety of reasons which we consider later in this decision.

5. We have come to the conclusion, however, that the appellant is liable to the surcharges and so we dismiss the appeal.

Default surcharge regime

Overview

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

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

The legislation

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

> 59 – The default surcharge
>
> > 59(1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period –

(a) the Commissioners have not received that return; or

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

then that person shall be regarded for the purposes of this section as being in default in respect of that period.

59(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

59(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where –

(a) a taxable person is in default in respect of a prescribed accounting period; and

(b) the Commissioners serve notice on the taxable person (a "surcharge liability notice") specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

59(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed account period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

59(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served-

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

59(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a

prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that-

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

59(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

59(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge –

(a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

59(8) For the purposes of subsection (7) above, a default is material to a surcharge if –

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

59(9) In any case where –

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above……..

8. Also relevant are sections 70 and 71 VATA and section 108 Finance Act 2009 These are set out in the following paragraphs:

9. Section 70 VATA provides:

(1) Where a person is liable to a penalty under section 60, 63, 64, 67 or 69A or under paragraph 10 of Schedule 11A, the Commissioners or, on appeal, a Tribunal may reduce the penalty to such amount (including nil) as they think proper.

(2) ….

(3) None of the matters specified in subsection (4) below shall be matters which the Commissioners or any Tribunal shall be entitled to take into account in exercising their powers under this section.

(4) Those matters are –

(a) the insufficiency of the funds available to any person for paying any VAT due or for paying of the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of VAT;

(c) the fact that the person liable to the penalty or a person acting on his behalf has acted in good faith.

10. Section 71(1) VATA provides:

For the purposes of any provision of section 59 …. which refers to a reasonable excuse for any conduct:

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform a task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

11. Section 108 Finance Act 2009 provides:

(1) This Section applies if-

(a) a person ("P") fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,

(b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and

(c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period ("the deferral period").

(2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if –

(a) the penalty falls within the Table, and

(b) P would (apart from this subsection) become liable to it between the date on which P makes the request and end of the deferral period.

(3) But if –

(a) P breaks the agreement (see subsection (4)), and

(b) an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from subsection (2),

P becomes liable, at the date of the notice, to that penalty.

Service of surcharge liability notice

12. S59(2) of VATA, which is set out [7] above, makes it plain that a taxpayers liability to pay a surcharge arises only if "the Commissioners serve notice on the taxable person (a "surcharge liability notice") ..."

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

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

Reasonable excuse

15. When considering whether the appellant has a reasonable excuse, we adopt, with gratitude, the principles promulgated by Judge Brannan in the case of *Stuart Coales -v- The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT (477) ("*Coales*"), set out below:

> *"Meaning of "reasonable excuse"*
>
> 25. Under Section 59C(9)(a) I can, however, set aside the surcharge determination if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax. The onus is on the appellant to satisfy me that there was a reasonable excuse. The statute provides (Section 59C(10)) that inability to pay the tax shall not be regarded as a reasonable excuse.
>
> 26. In this context, I consider the reasonable excuse exception to be an objective test applied the individual facts and circumstances of the appellant in question.
>
> 27. In *Bancroft and another v Crutchfield (HMIT)* [2002] STC (SCD) 347 in relation to Section 59C(9)(a) the learned Special Commissioner (Dr John Avery Jones CBE) stated:
>
> > "A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way. A reasonable taxpayer would at least have read the literature issued by the Revenue…"
>
> 28. The concept of "reasonable excuse" appears throughout VAT and direct tax legislation in respect of the imposition of surcharges on penalties. There is a considerable amount of case law in this tribunal as well as its predecessors (the VAT and Duties Tribunal and the Special and General Commissioners). It is not possible to do justice to all these decisions but I think that helpful guidance can be obtained from the decision of the VAT Tribunal in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239 and I can do no better than quote from the passage where the Tribunal (HH Judge Medd OBE QC) said:
>
> > "So I may allow the appeal if I am satisfied that there is a reasonable excuse for the Company's conduct. Now the ordinary meaning of the word 'excuse' is, in my view, "that which a person puts forward as a reason why he should be excused".
> >
> > A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr Pellew-Harvey [for the Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.
> >
> > In reaching a conclusion the first question that arises is, can the fact that

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

Evidence and findings of fact

16. Mr Jones gave oral evidence on behalf of the appellant. A colleague of his who works for the appellant, Jim Crawford, also gave brief oral evidence concerning the delivery of the VAT returns referred to at [22(15)]. The respondents provided no witnesses. We found both Mr Jones and Mr Crawford to be honest, straightforward and credible witnesses and we accept their evidence.

17. We were also provided with a bundle of documents which had been compiled by the respondents (the "respondents' bundle"). This had been supplied to us before the day of the hearing.

18. However, on the day of the hearing, when the time came to present his case, Mr Jones handed up a further bundle, prepared by himself on behalf of the appellant, which amounted to several hundred pages of correspondence (mainly) between the appellant and HMRC.

19. The contents of this bundle (the "appellant's bundle") were not in the respondents' bundle. Mr Jones had been under the impression that correspondence in the appellant's bundle was to be included in the respondent's bundle and thus available to the Tribunal. There was clearly some confusion about the extent to which the appellant had provided a notification of its wish to include the documents which were in the appellant's bundle, to the respondent and indeed to the Tribunal, for onward transmission, by the Tribunal to both the respondent and the Tribunal.

20. We took the view that the appellant should be allowed to rely on the documents contained in the appellant's bundle, but that once Mr Jones had spoken to them, and explained their relevance, Mr Morgan would be given time to consider his position. Should he wish to take time to make considered representations on the contents of the appellant's bundle, we were prepared to give him that time to do so.

21. As things turned out, once Mr Jones had closed his case, Mr Morgan indicated that he did not require any further time, nor indeed wished to make any substantive representations on the contents of the appellant's bundle.

22. On the basis of the evidence presented to us, we make the following findings of fact:

(1) The company was established by Mr Jones and others sometime between April and June 2010 to provide architectural services to the construction industry. The company specialised in façade's and has been registered for VAT since June 2010 with VAT registration number 991 7726 69.

(2) As the company was registered for VAT after 1 April 2010 it was automatically mandated to submit electronic returns and electronic payments in accordance with the relevant VAT regulations.

(3) Since the period 09/14, the company's preferred method of payment has consistently been via the faster payments system.

(4) The company has been within the default surcharge regime from the period 11/10 onwards.

(5) At the time of setting up the company, Mr Jones was working in London but living in Cardiff. Hence the reason the registered office was in Cardiff. He and his colleagues knew little about VAT and employed accountants (Clarke Rees) to give comprehensive advice and to undertake all of the necessary compliance in relation to VAT. This enabled Mr Jones and his colleagues to concentrate on their business activities in London.

(6) Clarke Rees were responsible for compiling and submitting the VAT returns on the company's behalf. The company provided copies of the input side invoices, as well as copies of the sales invoices, to Clarke Rees, and relied on the latter to complete the returns and submit them to HMRC on the basis of that information.

(7) Since the company was involved in largish projects, and could not bill particularly regularly, the number of sales invoices that it sent to Clarke Rees was modest.

(8) The company had no indication of any VAT problems until it received a letter of 7 February 2011 from HMRC's debt management office. At or around that time, it had asked Clarke Rees whether it was worth setting up a flat rate scheme for the company, and it soon came to light, following that letter, that Clarke Rees had simply done nothing as regards VAT. They had not submitted the relevant VAT returns, nor had it paid the corresponding VAT. They had not investigated the flat rate scheme.

(9) In November/December 2011, the company sacked Clarke Rees and appointed a new accountant (Paul Button who worked for) Riverglade Accountants in Cardiff.

(10) The company sought and received much of the information relevant to the VAT history of the company, from Clarke Rees, and on the basis of that information, Mr Button prepared an information report in preparation for a visit by an HMRC Officer on 1 December 2011. A copy of that information report was handed up to the Tribunal by Mr Jones during the course of the hearing.

(11) Following the visit, the HMRC officer issued an officer's assessment. This was issued on 3 April 2012 for the periods 08/10, 11/10, 02/11, 05/11, 08/11, 11/11 and 12/11.

(12) HMRC also issued notices of tax assessment (estimated assessments) for each of those periods (together with surcharge liability notices).

(13) An estimated assessment or an officer's assessment can be displaced by a VAT return. When (see later) VAT returns were submitted for the periods mentioned above, those returns were not processed immediately. There is some confusion as to why this might have been. But it is clear that where a return identifies an amount of VAT for which a trader is liable which is less than the combined total of an officer's assessment and an estimated assessment, the return is not processed immediately.

(14) Following the officer's assessment, Mr Jones telephoned the officer saying he did not agree that the officer's assessment was in accordance with the information that had been provided at the visit.

(15) The company however prepared returns for the periods covered by the officer's assessment. They prepared paper returns from the information provided by Mr Button and Mr Crawford delivered them to HMRC's premises, in Cardiff, in January 2012. He was not allowed into the building but left the documents with a security guard.

(16) Then there followed extensive communications between the company and HMRC in which the company insisted that it had made and submitted those returns; and in which HMRC denied that they had been so received.

(17) Mr Jones accepted that the company was obliged to submit returns online and make payments electronically. Indeed HMRC in a letter to Mr Crawford dated 3 March 2011 state that "paper returns cannot be issued or processed". But notwithstanding that, Mr Jones was able to give to the Tribunal copies of paper VAT returns that the company had been sent. And which (by implication) HMRC were presumably asking the company to complete and submit for the periods 06/16 and 09/16. This caused a degree of confusion to the presenting officers.

(18) Because of the confusion caused by the difference in figures between the returns submitted for the periods in [22(11)], the figures in the estimated assessments and those in the officer's assessments, the returns were not processed, and deemed "received" by HMRC until 6 October 2015 (for the periods 11/10 and 02/11), and 23 November 2015 (for the periods 05/11, 08/11, 11/11 and 12/11).

(19) For the remaining default periods there were no officer's assessments, and so the dates on which the returns were submitted were the dates on which they were duly deemed received by HMRC, notwithstanding that the figures in those returns replaced figures in estimated assessments which had been visited on the company by HMRC.

(20) Mr Jones was able to hand up copies of the relevant surcharge liability notices for two of the periods under consideration. He did not suggest that the company had not received the relevant notices, and we find as a fact that for each of the default periods, the relevant surcharge liability notices and extension notices had been properly served, and were duly received, by the appellant on the dates set out in HMRC's statement of case.

(21) Notwithstanding Mr Button's involvement and the submission of paper returns in January 2012, the company continued to file its VAT returns (and pay its VAT) late. Mr Jones gave two reasons for this. The first is that the company wanted to put all of his relevant financial information, (relevant that is to the company's direct and indirect tax affairs), on to an electronic system (Sage). Uploading everything on to Sage took nearly two years, and was a great deal more difficult and onerous than he had originally anticipated.

(22) The second reason was because his attention was focussed on recovering cash that the company was owed by customers.

(23) Cash flow is (and was) important to the company. The construction industry, in the period under consideration, was going through a recession. The company's customers took advantage of their greater bargaining strength and although the company's credit terms obliged payment on 30 days, this was often

spun out by its customers to 90 or 120 days. So Mr Jones was constantly involved in seeking recovery of cash that the company was owed.

(24) However, although a couple of his small customers went bust, the cash flow difficulties were simply the consequence of his weak bargaining position. They were not a result of any large and significant customer failing its debts by dint of an insolvency process.

(25) It is very clear from the documents in the appellant's bundle and Mr Jones' oral evidence that he has had an unhappy relationship with HMRC. But in response to a direct question from the Judge as to whether there were any specific documents in the appellant's bundle (or indeed in the respondents' bundle) that he wanted to refer to that indicated a confusion which, as a consequence meant that the appellant could not submit a specific VAT return on time, Mr Jones indicated that he could not do so. There was no specific issue with HMRC that prevented him from submitting a particular return on time.

(26) He was, however, generally concerned (because of the failure by Clarke Rees to submit returns in the first place), to ensure that all information that he was to provide to HMRC was wholly accurate, and this was another reason why returns have been submitted late.

(27) In July 2015, following contact from Mr Jones, Owen Smith (MP for Pontypridd) wrote to David Gauke raising Mr Jones' concerns about the company's relationship with HMRC. That letter found its way into the hands of Jennie Granger, the Director General of HMRC who responded to Mr Smith on 14 August 2015.

(28) The company had not appealed against the surcharges until recently because it had been pursuing the HMRC complaints procedure. Mr Jones had not realised that it was possible to appeal to a Tribunal at the same time as making a procedural complaint. It was not until an HMRC officer suggested that the company might wish to appeal that it did so. Hence the reason why it was not until July 2016 that the company appealed against the surcharges.

Burden and standard of proof

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

(1) VAT was paid late and the liability to the surcharges has been incurred;

(2) Valid surcharge liability notices for the default periods were served on the appellant.

24. Once the respondents have satisfied their burden of proof, then the burden shifts to the appellant to show that (for example)

(1) It did not receive a valid surcharge liability notice;

(2) A reasonable excuse exists;

(3) A valid time to pay agreement was in place for the default periods 06/13 and 09/13;

(4) The surcharges are disproportionate.

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

Appellant's submissions

26. The appellant's grounds of appeal are:

(1) Over the past 4 years the company has been dealt with by 17 different individuals at HMRC in 5 different departments.

(2) The amounts purportedly owed throughout this time in tax (not just VAT but also corporation tax and PAYE) has fluctuated and HMRC have not been able to explain how much is owed, at any one time, nor to what liability payments have been applied to.

(3) The company was concerned, after its initial experience with Clarke Rees, to ensure that all information which it was to provide to HMRC, was entirely accurate.

(4) The uploading of the financial and tax information onto the Sage system took more time than originally expected.

(5) Mr Jones attention during the default periods was on collecting debts rather than filing returns.

(6) For the period 09/15 which was made by faster payments, the due date fell on a Sunday. The payment would not go through on that date, nor on the following day, and when it was finally successfully submitted, on the following Tuesday, it was too late to avoid a surcharge.

(7) The company has always accepted that it has had to pay VAT to HMRC and has not deliberately sought to do so. But the amount which is being now levied, at 15%, is not fair or reasonable.

Respondents submissions

27. On behalf of the respondents, Mr Morgan submitted as follows:

(1) The penalties have been correctly calculated, the appropriate surcharge liability notices have been properly served on the company. This tribunal has no power to mitigate the surcharge percentage.

(2) Even if there has been confusion about the amount of VAT, corporation tax and PAYE owed by the company at any one time, this did not prevent the company from filing its returns and paying its VAT on time.

(3) Reliance on a third party (for example Clarke Rees) and that third parties' failure to submit the returns and pay the VAT on time is statutorily prohibited from being a reasonable excuse.

(4) The appellants accept that some, if not all of the surcharges are owed to HMRC.

(5) The respondents have applied the money paid to HMRC by the company to tax debts and penalties in the manner requested by the company.

(6) The time to pay agreement for the periods 06/13 and 09/13 were entered into after those periods, and does not therefore afford protection to the company under Section 108 Finance Act 2009. It was also ineffective for later periods as the company was in breach of the agreement.

(7) For the period 09/15, paid by faster payments, the online portal would have indicated to the appellant, when it logged it on on the Sunday to submit its return, that it was late. The faster payment system, if the due date falls on a weekend, requirements payment to be made by the preceding Friday.

(8) The surcharges are all less than 5% of the total outputs (net of VAT) for the default periods.

Discussion

28. We have found that the surcharges have been correctly calculated and the appropriate notices properly served on the company. Indeed Mr Jones does not suggest otherwise.

29. Mr Morgan is also right when he submits that we have no general power to mitigate the surcharge percentages. But we do have power to correct the surcharges under 84(6) VATA if we think they have been incorrectly calculated (which we don't). But, more importantly, we can strike down the surcharges if we find them to be disproportionate.

30. Having heard Mr Jones and read the respondent's bundle and (in this context and more importantly) the appellant's bundle we have no doubt that the company has had an extremely unhappy relationship with HMRC over the last 4 years, and throughout that period has been extremely confused as to the amounts which it has paid, the application of those amounts to its tax liabilities, and the amount that it still owes.

31. Mr Jones honestly believes that the company has been shabbily treated by HMRC. For example, in letter to Mrs Ralph of HMRC of the 17 December 2015, he says:

> "I will also be making a further complaint to the department as it is becoming abundantly clear the totally disjointed nature of the HMRC department and we as a business are paying the price for the level cohesive approach to our problem as I stated we have telephone the HMRC now 68 times I have emailed over 42 times I have written to the department on 16 occasions, faxed 9 times and over the last three sorry years I have dealt with no less than 18 different people from 7 different factions of the HMRC".

32. This letter was copied to Owen Smith.

33. But it is equally true, as Jenny Granger indicated in her letter to Owen Smith of 14 August 2015 that:

> "Since registering for VAT in July 2010 the company's compliance record has been poor. It has never sent us a VAT return on time and only started to make returns in 2012 and occasional payments from 2013. Because of this, the company has incurred default surcharges (DS) and it is these that Mr Jones has written to you about."

34. The company has been serially not compliant with its obligations to file VAT returns, and pay its VAT, on time.

35. Mr Jones now recognises, we think, the different roles of this tribunal, and the HMRC complaints process. The latter deals with procedural or administrative complaints. We, on the other hand, look at the substantive technical position of the taxpayer. We are a creature of statute which circumscribes our jurisdiction. And importantly for the company, we do not have any statutory power to discharge or adjust a penalty because of a perception that it is unfair.

36. So we must consider Mr Jones' submission not in the context of any administrative failings by HMRC, but whether they exonerate the company for its failures to file and pay VAT on time for the default periods. The essential point that Mr Jones must establish, regarding the (as he sees it) administrative inadequacies of HMRC, and the confusion regarding amounts paid and amounts outstanding, is whether a reasonable taxpayer, in the company's position, would have done the same.

37. And to get anywhere close to this, Mr Jones must provide evidence that the financial confusion with HMRC has been a, if not the, reason why the company has been non-compliant.

38. We have seen no evidence that this is the case.

39. Furthermore, as Mr Jones accepted in evidence, he cannot point to a single failure to file and pay VAT which was caused by this financial confusion with HMRC.

40. Whilst it might have been a backdrop to the failure to comply, it was not the cause of that failure.

41. Whilst, therefore, we have considerable sympathy with Mr Jones, regrettably for him it is our view that the financial confusion with HMRC does not comprise a reasonable excuse for the company's failure to comply with its obligations to file its VAT returns, and to pay its VAT on time.

42. Nor do we think that either the time spent to upload financial information onto Sage, or Mr Jones' attention to collecting debts, or his (commendable) concern to ensure that information supplied to HMRC was entirely accurate constitute a reasonable excuse.

43. Project overruns and cash flow difficulties are common place in business, yet this does not prevent the majority of taxpayers complying with their tax compliance obligations. Whilst they might have taken Mr Jones' eye off the ball, they are a long way from justifying failure to submit VAT returns and pay VAT on time. It would, for example, have been comparatively easy for Mr Jones to have either outsourced the company's tax compliance obligations to a third party (notwithstanding his experience with Clarke Rees) or to have employed someone capable of doing so, in order to comply with its tax obligations. Whilst we wholly accept Mr Jones submission that he has never deliberately sought to avoid his responsibilities to pay tax, it is our view that the company has failed to treat its filing obligations as regards VAT with the importance that a reasonable taxpayer, conscious of its obligations to submit and pay its VAT on time, would have given it. A reasonable taxpayer in the company's position would have paid more attention to its compliance obligations, and would, and could have filed its returns and paid its VAT on time.

44. Mr Jones equally commendable concern to ensure that information that he was to submit to HMRC was entirely accurate does not comprise a reasonable excuse either. Basically, the provision of accurate information to HMRC is a given. Indeed failure to provide it renders a taxpayer liable to accusations of carelessness or even dishonesty. And, as Mr Jones has said, and we accept, he has never deliberately sought to avoid his tax responsibilities.

45. Mr Jones made no submissions as to the efficacy of the time to pay arrangements, and we accept that the respondent's submissions that these were not effective, either for the two periods in question, or thereafter, to provide protection against the surcharges under Section 109 Finance Act 2009.

46. Equally, the failure to pay the VAT for the period 09/15 under the faster payment regime because the online portal would not accept a payment until 3 or 4 days after the due date, does not comprise a reasonable excuse in light of:

(1) The unchallenged assertion by Mrs Rees that the online portal, when the company went online on Sunday, would have told the company that it was too late, given that the faster payment system requires payment which would otherwise be made at a weekend, on the preceding Friday; and

(2) The current online HMRC notice on paying VAT makes it clear that payment must be made on the preceding Friday. We heard no evidence that the

version of the notice in force during the default periods contained the same information but we suspect it did.

47. Mr Jones made no submission as to why, specifically, filing and payment for the period were late. And we have seen nothing which comprises a reasonable excuse.

48. Mr Jones final submission is that whilst appearing to accept that the company is liable to pay the surcharges, they are not fair and reasonable.

49. As mentioned above, the tribunal has no power to adjust or discharge the surcharges simply because of a perception that they are unfair.

50. But if such surcharges are so unfair as to be disproportionate, then we do have power to discharge them.

Proportionality

51. We have reviewed a number of cases dealing with proportionality. These are:

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

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

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

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

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

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

52. From these we have derived the following principles:

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

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

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

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

(3) In the field of VAT, the freedoms enshrined in the Treaty means the underlying aims of the EU Directives which govern VAT (the "Directive") (*Trinity Mirror* at [14]).

(4) The objective of the surcharge in enforcing the collection of tax is itself a natural consequence of the essential aim of the Directive to ensure the neutrality of taxation of economic activities (*Trinity Mirror* at [56]).

(5) The underlying aim of the Directive for this purpose is the fiscal neutrality which protects taxable persons since VAT is intended to tax only the final consumer (*Trinity Mirror* at [59]).

(6) And given that this is achieved by the collection and deduction at each stage of the supply chain, ensuring the timely payment at each stage is a necessary consequence of that aim (*Trinity Mirror* at [60]).

(7) The correct approach, therefore, is to determine whether the surcharge goes beyond what is strictly necessary for the objectives pursued by the default surcharge regime (*Trinity Mirror* at [63]).

(8) The application of the doctrine of proportionality can apply to the surcharge regime as a whole, or at the application of that regime to a particular taxpayer's circumstances (*Total* at [74]).

(9) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (*James* at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).

(10) The principles of "devoid of reasonable foundation" or "not merely harsh but plainly unfair" can be applied to a case relating to a particular taxpayer just as much as it can be applied to the regime as a whole (*Total* at [93], *Trinity Mirror* at [72]).

(11) A UK court should be cautious in the extreme in saying that national legislation has overstepped the mark in setting the level of surcharge (*Total* at [73]).

(12) The default surcharge regime viewed as a whole is a rational scheme (*Trinity Mirror* at [65]).

(13) A penalty (if it is not a fixed rate penalty) must vary according to some objective criteria. The use of the amount unpaid as an objective criterion is an

appropriate if not the most appropriate criterion (*Trinity Mirror* at [65], *Total* at [90]).

(14) But this is only so if the amount of the surcharge for a failure to file or pay is itself proportionate to that failure (*Total* at [88]).

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

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

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

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

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

(3) In absolute terms, the largest surcharge visited on the company is £3,078.81 for the period 12/13. This is a modest amount, and simply reflects an application of the surcharge percentage (over which we have no jurisdiction) to the outstanding VAT for that period. The aggregate total of the surcharges of £27,548.03 is a result of serial non-compliance by the company.

(4) In relative terms, as the respondents have pointed out, the surcharge for any default period is 4% or less of the outputs for that period net of VAT. So, in the period 12/13 where the surcharge is £3,078.81 the outputs for that period are £111, 151. The surcharge is only 3% of the total outputs.

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

Decision

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

Appeal rights

55. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 15 MAY 2017

Appendix

Periods	Amount of surcharge (£)	Surcharge %
11/10	0.00	00
02/11	0.00	02
05/11	441.85	05
08/11	267.81	10
11/11	702.87	15
12/11	30.00	15
03/12	1,279.92	15
06/12	1,256.99	15
09/12	1,488.52	15
12/12	1,627.06	15
03/13	2,593.52	15
06/13	1,636.97	15
09/13	1,539.77	15
12/13	3,078.81	15
03/14	1,899.21	15
06/14	1,440.28	15
09/14	2,233.35	15
12/14	3,054.80	15
03/15	1,992.87	15
09/15	983.43	15