



**TC03462**

**Appeal numbers: TC/2012/10749 & TC/2013/02488**

*VAT –default surcharge –whether penalties proportionate – yes – whether reasonable excuse - appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PRESTED HALL LIMITED**

**First  
Appellant**

**-and-**

**PRESTED HEALTH AND LEISURE LIMITED**

**Second  
Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE BARBARA MOSEDALE  
MR LESLIE HOWARD**

**Sitting in public at Colchester on 25 February 2014**

**Mr M Carter, director of both Appellants, for both Appellants**

**Mr P Rowe, HMRC Officer, for the Respondents**

## DECISION

### Out of time appeals

- 5 1. Both appellants' appeals were lodged out of time. HMRC did not object to them being admitted late. We found the appellants had clearly attempted to file their notices of appeal on time by email, but an electronic glitch had resulted in what was received by the Tribunal service being unreadable and therefore rejected. We found the appellants had re-submitted the notices of appeal as soon as they realised the original submission had not been satisfactory. In these circumstances, we admitted the appeals out of time and went on to consider them.

### Facts

#### *Prested Hall*

2. HMRC's records showed Prested Hall Limited ("Prested Hall") had a history of late payments. As the payments were made electronically, HMRC by concession do not treat them as due until the 7<sup>th</sup> of the month following the month in which payment was actually due. Working on this basis, the payments were late by the following number of days:

Period	Days late	Penalty %	Amount of penalty
4/10	1-2 days	SLN – 0%	0
7/10	3-16 days	2%	0*
10/10	2-3 days	5%	£557.87
1/11	2-3 days	10%	£1444.29
4/11	2 days	15%	£4,666.07
7/11	1 day	15%	£606.72
7/12	3 days	15%	£6,066.76
*penalty would have been less than £400 and therefore not charged by HMRC			

3. HMRC did not receive the payment for 4/12 into their VAT account by the due date; they accepted Prested Hall had a reasonable excuse for late payment and/or it was not paid late because Mr Carter had accidentally sent it (on time) to the HMRC PAYE bank account. HMRC had originally also surcharged Prested Hall for 1/12 but this was removed when HMRC accepted the return and payment had been made on time.

4. Prested Hall appealed the imposition of the defaults for 4/11, 7/11 and 7/12.

*Prested Health and Leisure Ltd*

5. We refer to the second appellant as “PHL”. HMRC’s records were that PHL had paid its VAT late three times. It received a surcharge liability notice for paying VAT late for period 08/10, a 2% surcharge (charged at nil) for 11/10, and a 5% surcharge at £738.38 for paying 02/11 late.

6. We note that a surcharge was also imposed for 05/11 but HMRC accepted that PHL had a reasonable excuse because it was caused by difficulties in using PHL’s bank’s new secured card reading method for payments. We do not refer to this again.

7. The earlier three late payments had been made by BACS. As the payments were made electronically, HMRC by concession do not treat them as due until the 7<sup>th</sup> of the month following the month in which payment was actually due. Working on this basis, the payments were late by the following number of days:

<b>Period</b>	<b>Days late</b>	<b>Penalty %</b>	<b>Amount of penalty</b>
8/10	4 days	0%	0
11/10	5 days	2%	0*
2/11	5 days	5%	£738.38
*penalty would have been less than £400 and therefore not charged by HMRC			

*Warnings from HMRC about faster payments*

8. We find on the evidence that, at a certain point in time, when a VAT return was submitted, the acknowledgement that would appear on the screen would include text about how to pay the VAT that was due on the return. It included the following:

Please note: HMRC does not operate the Faster Payments Service (FPS), which is offered by some banks. Electronic payments will normally take three bank working days to reach the HMRC account.

9. What we did not have was any evidence of when this warning first appeared. All we can be certain (because it was printed off on 31 March 2011) is that it appeared on that date. As HMRC accepted faster payments by December 2011, we find it more likely than not that the warning continued to appear until December 2011.

*The bookkeeper’s difficult situation*

10. The companies employed a bookkeeper, Ms Barber who was responsible for keeping the VAT books and notifying Mr Carter of the due amount of VAT each return period.

11. Her circumstances were very sad. Her husband was diagnosed with a brain tumour in 2010. For a long period, her husband was in hospitals and hospices and eventually he was sent home to die. Ms Barber became unable to work regular hours,

either visiting her husband in hospital/hospice, looking after him at home, and all the while having two young children to care for. At the same time, his prognosis varied considerably with her being told on a number of occasions that he only had a few days left to live. In the event he lingered until the beginning of 2013.

5 12. Mr Carter accepts that Ms Barber made errors. She sometimes notified him of the VAT liability too late and obviously had not read the warning referred to above about faster payments. Mr Carter had tried to bring in an assistant to help her on two occasions. The first was very briefly in early 2011 but the assistant was not up to the role. A second assistant was employed for about three months in early to mid 2012  
10 but Ms Barber would not hand over her VAT responsibilities. While Mr Carter accepts he could have taken action against Ms Barber for failing to fulfil the terms of her contract of employment, he was naturally reluctant to make her life any more difficult than it already was, and in any event he had to consider the “PR” effect on his business if he was considered to have acted harshly against a member of staff in  
15 such circumstances, and he had believed it was only a short term problem as Ms Barber’s unfortunate husband was often given a very short prognosis. He was not expected to linger as he did.

*The circumstances of the payments in issue.*

*Prested Hall*

20 13. 4/10 – 4/11: In the hearing Mr Carter said he was unable to remember anything about the earlier payments so he was unable to confirm whether he paid them late and, if he did, why. His evidence was he always paid the VAT as soon as he knew what the figure was.

25 14. His notice of appeal stated that for 4/11 he had paid £35,000 on 7 June (the due day) as he was unable to find the exact figure owing but believed it to be around £34,000, so he paid more to be safe. He said he paid it in the belief it would go by the faster payments system but it went by BACS, as HMRC’s bank was not on faster payments, and so arrived late. In the event, it was actually slightly less than the full figure owing, and the balance of £1105 was paid three days later.

30 15. 07/11 Mr Carter’s explanation for this late payment was that there was a computer error which led to the return being filed late but not the payment. He knew how much VAT was owing and paid a part of it on time. The rest was paid late. Mr Carter was a little vague as to why this happened. He suggested that there may have been a payment limit and the payment split in two. He explained that the business  
35 never had a lack of funds but did have limits on how much could be transferred in one go.

40 16. 7/12 On 7 September 2012, which was the last date on which the VAT could be paid to HMRC for 07/12, Ms Barber emailed Mr Carter at 3.18pm to give him the figure of VAT which was due. Mr Carter’s evidence was that he would have immediately instructed his bank to pay HMRC this figure. The bank statement shows

that the money did not actually leave the appellant's account until 10 September (the two intervening days being a weekend).

17. Mr Carter's explanation in his Notice of Appeal for the late payment for 7/12 was that he had failed to notice that the sum of money due exceeded the bank's limit of £25,000 for faster payments and it defaulted to BACS. Had he realised he says he would have been able to pay by splitting the payment into two.

18. He explained that since HMRC had accepted faster payments he had paid on time: this was the first time the payment exceeded his bank's limits for faster payments and he was previously unaware that there could be a problem.

19. His letter to HMRC appealing the penalty also said the problem might have been avoided but for Ms Barber's difficulties. At that time in September 2012, she was constantly at the hospital with her husband only expected to live a few days.

#### *Prested Health and Leisure*

20. 08/10 and 11/10: Mr Carter's evidence was that he did not remember the circumstances surrounding payments before 2011, so he gave no explanation for these late payments.

21. 2/11: Mr Carter's explanation for 02/11 was that he had instructed the bank to make payment on the due date (7<sup>th</sup> April 2011) in the belief it would be paid on the same day under the "faster payments" scheme. He explained in his Notice of Appeal that in April 2011 he was under the belief that all banks used faster payments and he was unaware that HMRC's bank did not accept faster payments.

22. HMRC had refused to accept that Mr Carter had a reasonable excuse for the late payment. Their letter of 23 October 2012 responding to PHL's response to the issue of the penalty was that PHL had used BACS as a method of payment since 02/10 and must have known that BACS payments took 3 days to reach HMRC.

#### **Were the penalties properly served?**

##### *Prested Hall*

23. Mr Carter's case is that Prested Hall did not receive the SLN or the first 3 SLNEs (ie the notices imposing the penalties for the periods 7/10-1/11).

24. In fact it is his case that he only knew about the 4/11 penalty when he realised HMRC had taken the amount of it out of an overpayment made by Prested Hall.

25. The law is that default surcharges can only be charged if HMRC have first served the taxpayer with a 'surcharge liability notice' (s 59(2)(b) Value Added Tax Act 1994). HMRC's case is that such a notice, an SLN, was served on the taxpayer in respect of period 4/10, and notices which would serve as SLNs (called SLNEs) were

served for the other periods for which the chart at §2 above shows the appellant to be in default.

26. HMRC's records show that an SLN and subsequent SLNEs were served on the appellant. The appellant agrees that it receives the ones for the periods after 4/11.

5 27. While it is for HMRC to show that they served the notices, our view is that  
HMRC's records are evidence sufficient to show this (a 'prima facie' case) unless the  
appellant can show that either the records are faulty or that there was a reason why the  
appellant might not have received them. However, the appellant offers no explanation  
as to why it received the later ones but not the earlier ones. On the contrary, having  
10 listened to Mr Carter, we find that any such notices would have been (if received)  
dealt with by Ms Barber and Mr Carter explained to us that at the time she was  
working irregular hours under time constraints and with enormous personal pressures  
on her. We find he described a situation in which default notices which either  
charged no penalties at all or only low penalties might easily be overlooked. We find  
15 he has not cast any doubt on HMRC's evidence that the SLNs and SLNEs were sent  
to the taxpayer, and we find (relying on the Interpretation Act 1978 s 7) that they were  
received by the taxpayer in the due course of the postal system.

#### *Prested Health and Leisure*

20 28. Mr Carter's case is that PHL did not receive the SLN or the penalty notice for  
8/10 and 11/10. We find the situation here to be the same as for Prested Hall.  
HMRC's records show that the SLN and two subsequent SLNEs were sent to the  
appellant. There is no explanation offered as to why they would not have been  
received. We think it easy to overlook notices which either charge no penalties.  
There is no dispute that the one for 2/11, which is the one at issue in this appeal, was  
25 received. We find HMRC sent the SLN and SLNEs and therefore that (relying on s 7  
Interpretation Act) they were received in the ordinary course of post.

29. In conclusion, we find that the SLNs for both appellants were duly served, and  
all subsequent SLNEs were also served. The next question is therefore whether the  
payments were actually late.

#### 30 **Were the payments late?**

##### *Prested Hall*

30. Mr Carter did not dispute HMRC's records which showed that the payments  
were late. We note that it was his evidence he didn't really remember anything about  
the payments for the period before 4/11. He did not suggest for that period or any  
35 later period which he could recollect that the payments were on time. We accept  
HMRC's evidence that the payments were late to the extent that HMRC's records  
showed that they were and as recorded in §2 above.

*Prested Health and Leisure*

31. Mr Carter agrees that the payment for 2/11 was late and did not suggest that the earlier two alleged late payments were on time. In these circumstances we accept as proved HMRC's evidence in the form of its records of PHL's account with HMRC that the three payments were late and as recorded at §3 above.

32. The next question which arises for both appellants is whether, therefore, they had a reasonable excuse for the defaults in issue or for the default which caused the original SLN to be issued.

**Reasonable excuse?**

33. We consider that a taxpayer will have a reasonable excuse when it behaves in the same way as someone who seriously intends to honour their tax liabilities and obligations would act. We note that s 71(1)(b) Value Added Tax Act 1994 provides that placing reliance on another person is not a reasonable excuse even where that person is negligent.

34. No specific explanation was given for the late payments prior to 4/11 although we accept that the troubles with the company's bookkeeping had started by that time. Mr Carter was also aggrieved that, while all or virtually all other businesses had swapped to accepting payments by the 'faster payments system' which allowed the money to be credited to the payee on the day of payment, HMRC did not swap onto this system until late 2012. Mr Carter's case was that he made a number of payments on the 7<sup>th</sup> of the month in the belief that they would be credited to HMRC on that day. He alleged in his notice of appeal that HMRC had made a conscious decision to refuse faster payments, making life even harder for the hard pressed business man.

35. We are unable to find that Prested Hall had a reasonable excuse for 4/10 as we do not know the actual reason for the late payment. It seems to have been earlier than the personal difficulties of Ms Barber and possibly before faster payments even became the norm for commercial payments.

36. In any event, we do not accept that a belief that HMRC should or would accept faster payments would have amounted to a reasonable excuse. Firstly, we do not accept that HMRC made a conscious decision to refuse faster payments. We accept Mr Rowe's evidence that HMRC's bank at that time (Bank of England) did not accept faster payments and that it was not until HMRC swapped to a new bank in late 2011 that taxpayers were able to pay by faster payments. Secondly, Mr Carter is the owner and director of both companies and the person responsible for making the payments of VAT. Even if it were the case that for the period 4/10 (Prested Hall) Mr Carter had a genuine belief VAT could be paid by faster payments, he should have known that this was not case by period 8/10 (PHL).

37. So far as the next 3 late payments for Prested Hall are concerned, these are not under appeal. We do not know why they were paid late. It may have been because of Mr Carter's belief that HMRC accepted faster payments but the appellant should have known (from receipt of the SLNs) that HMRC did not.

38. With regards 4/11, this was some two months after the PHL final default (see §42-46 below). We accept Mr Carter's evidence that this was due to a genuine but mistaken belief the payment would go by faster payments. But as we have said, we do not consider that that amounts to a reasonable excuse as it was not reasonable for the appellant to hold that view. We also accept that Mr Carter was unaware of the earlier late payments, but that Ms Barber on behalf of the company ought to have known (see §27). We consider that by the due payment date (7 June) Mr Carter ought to have done more to remedy the difficulties with Ms Barber. He left it until the start of 2012 to attempt a second assistant bookkeeper. We are unable to find that there was a reasonable excuse for 4/11.

39. With regards 7/11, Mr Carter was unable to be precise as to what caused the late payment. For this reason, we are unable to find that there was a reasonable excuse.

40. We accept that with regards 7/12, this was at a particularly difficult time for Ms Barber and led to a late communication of the amount to Mr Carter. We accept that since faster payments had been introduced, Prested Hall had managed to pay on time and that (as Mr Carter's appeal letter said) they had been trying to pay early to avoid last minute problems. We accept that Ms Barber's personal problems had led to the difficulty for this period. It seems to us that her email was too late for the same day payment to take place irrespective of banking limits and that she should have ensured that she communicated the information earlier to Mr Carter.

41. Reliance on a third party who lets a taxpayer down is not a reasonable excuse by itself but it can be if the cause of that person's failures would be a reasonable excuse. Ongoing illness of a family member is not normally a reasonable excuse once sufficient time had lapsed for alternative arrangements to be made. In this case we find Mr Carter had tried on two occasions to provide Ms Barber with an assistant. The second of these arrangements failed in early to mid 2012 and we consider that it was reasonable for Mr Carter not to have appointed a third assistant when at that time Mr Barber was given only a few days to live. As, at that time, Ms Barber was in particular difficulties and stress, we also accept she had a reasonable excuse for her lateness in communicating the figures to Mr Carter, and that Prested Hall therefore had reasonable excuse for the late payment for 7/12.

#### *Prested Health and Leisure*

42. As we have said we are unable to find a RE for the earlier periods due to lack of evidence as to what actually caused any individual late payment.

43. So far as 2/11 is concerned, the return was submitted on 7 April and would have generated a warning about the faster payments system (see §9). The appellant should have known that faster payments did not work as earlier payments had been made late and we have found that the default surcharge notices were received (see §§28-29) (even if not seen by Mr Carter). As we have said, Mr Carter's belief that HMRC should have accepted faster payments does not amount to a RE and in any event the appellant ought to have known that they did not.



44. However, we accept that these failures to recognise that faster payments did not apply to VAT payments stem from Ms Barber's difficulties. She must have known at least about the earlier defaults as she ought to have seen the SLNs and SLNEs. She should have dealt with the return earlier to enable the payment to be made earlier.

5 45. As we have said, the failures of another person, such as an employee, cannot be a reasonable excuse. Nevertheless, the underlying cause of such failure can be a reasonable excuse, but only for a short time as a reasonable taxpayer would take steps to sort out the difficulties. We find at about around 2/11 Mr Carter had recognised  
10 problems caused by Ms Barber's inability to concentrate on her job and had made an unsuccessful attempt to give her an assistant bookkeeper.

46. While Ms Barber's personal difficulties could not continue to be a reasonable excuse, we consider that in the short term they do amount to a reasonable excuse, as at that time around 2/11, the appellant had taken reasonable if ineffective steps to resolve its accounting difficulties by appointing an assistant. Therefore, we find PHL  
15 had a reasonable excuse for its late payment of 2/11.

### **Proportionality**

47. Mr Carter's main case was that he considers that the VAT default surcharge regime to be disproportionate and he considers, even if he is wrong on that, that it operated disproportionately in respect of the penalties levied on his companies in  
20 these appeals.

#### *Proportionality of the regime in general?*

48. He relied on the case of *C R Smith Glaziers (Dunfermline) Ltd* [2003] STC 419 where Lord Hoffman described the principle of proportionality in these terms:

25 "[25] ...the principle of proportionality in its broad sense...is divided into sub-principles: first, a measure must be suitable for the purpose for which the power has been conferred; secondly, it must be necessary in the sense that the purpose could not have been achieved by some other means less burdensome to the persons affected and thirdly, it must be  
30 proportionate in the narrower sense, that is, the burdens imposed by the exercise of the power must not be disproportionate to the object to be achieved...."

49. Mr Carter expressed the view that the VAT default surcharge system obviously could have been in terms less burdensome to taxpayers (eg by imposing penalties at lower percentages) and therefore by definition was disproportionate. However, this  
35 Tribunal is bound by the decision of the Upper Tribunal in the case of *Total Technology (Engineering) Ltd* [2012 UKUT 418 (TCC) where this point was considered. The Judges said:

40 "[73]...a smaller penalty will always be less interventionist than a larger one; but it cannot be sensibly be argued that the State must therefore impose the minimum penalty which might have some deterrent effect...."

50. Indeed, it seems to me, from the discussion in that case of the requirement that measures ‘should go no further than necessary’ that, at least in so far as penalties are concerned, that requirement cannot be taken to mean that the State is permitted only to impose the minimum penalty possible; rather it simply means that the imposition of penalties in general goes no further than necessary; when considering whether a particular penalty regime is proportionate, the test is whether the particular penalty regime is ‘devoid of reasonable foundation’ and on this the State is afforded a “wide margin of appreciation”.

51. We are, in any event, bound by the Upper Tribunal’s decision in *Total Technology* who considered the architecture of the default surcharge regime in detail including whether its failure to distinguish between payments which are only moments late and those which are months late. Its conclusion was that this did not affect the legality of the scheme:

“[89]...If the penalty imposed on the person who is a day late is proportionate, it is not to the point that a different regime might properly impose further penalties on a person who continues in default...”

52. It was really Mr Carter’s case, of course that a regime which could impose a 15% penalty on a taxpayer for making a payment only moments after the deadline was not proportionate. While there was no 15% penalty at issue in *Total Technology*, and therefore there was little said about it, we read §84(e) of the Upper Tribunal’s decision indicating that the Upper Tribunal’s view was that, because the 15% penalty could only be levied where there were 4 previous defaults all within 12 months of the immediately preceding and following defaults, the scheme was “a rational and reasonable response to successive defaults by the taxpayer.” In other words, while a standalone 15% penalty might not be proportionate, it was proportionate where it was levied as the highest level of penalty in a gradually increasing scale of penalties for defaults. We conclude that, had the Upper Tribunal considered the 15% penalty made the system disproportionate it would have said so. It is clear they did not. We are bound by their conclusion:

“[99] In our judgment, there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed...”

53. Mr Carter says Parliament would not have intended at 15% penalty for being only a day or so late: our view is that Parliament enacted and therefore clearly did intend to charge a 15% penalty for being only moments late (in circumstances where there had been at least 4 previous defaults).

54. It was also Mr Carter’s case that the default surcharge system is clearly disproportionate as a whole as Parliament has enacted (although not brought into force a replacement system, thereby demonstrating (says Mr Carter) that the current system was disproportionate as Parliament has enacted less onerous penalties for short term late payments in the future.

55. This point was not specifically considered in *Total Technology*. However, we reject it. The current system could have been less onerous but the fact that it wasn't and the fact that the Government has now chosen for the future to introduce a less onerous (at least in some respects) system does not mean that the current system was beyond the state's margin of appreciation. As we have said, the state is not obliged to chose the least onerous penalty system. As long as the penalty system is proportionate as a matter of law, the fact that it is replaced with a different and less severe system does not mean the earlier system was necessarily too harsh. If this were the case, it would prevent the government changing the law.

56. We consider that the current default surcharge regime, although harsh, is not beyond the state's wide margin of appreciation.

*Proportionality of these particular penalties?*

57. Mr Carter considers the particular fines levied on the appellants out of all proportion to their offences. The appellants had the money to pay; Mr Carter intended to pay on the due date, and indeed tried to pay on the due date, but in the event HMRC got the money a few days late. Yet the penalties are 15% of the outstanding tax.

58. We agree with Mr Carter that, even where a penalty regime as a whole has not been shown to be disproportionate, an individual penalty could be challenged on the grounds that it is disproportionate. This is what the Upper Tribunal said in *Total*:

“[73] It is thus possible to envisage a penalty regime the architecture of which is unobjectionable, but which nevertheless leads occasionally to the imposition of a penalty so high as to be disproportionate....

[78] We accordingly consider...that it is open to us to consider the individual penalty without having first concluded that the system as a whole is disproportionate...”

59. We agree with Mr Carter that the penalties of which the appellants complain in this case are harsh. But are they plainly unfair?

*Plainly unfair?*

60. Mr Carter relies on the decision of the FTT in *Energys Holdings UK Ltd* [2010] UKFTT 20 (TC). He considered, in summary, that the size of the penalty in Prested's case was as large as the fine in *Energys*, if seen in comparison to the size of the business rather than in absolute terms.

61. He also said Prested Hall was caught in the middle: had the tax due been less than £25,000 it would have gone by faster payments and not been late; had the penalty been larger in absolute terms it would have been “plainly unfair” as in *Energys*.

62. Mr Carter does not understand the logic apparently expressed in *Total Technology* that the decision in *Energys* can be justified because of the absolute amount of the penalty. The Upper Tribunal at §93 says the “real flaw” with the VAT

default surcharge regime is the absence of a maximum penalty. We agree with Mr Carter and Mr Rowe that we cannot understand the reasoning of the Upper Tribunal here: if there are two taxpayers with exactly the same default history but the turnover of one is 1% that of the other, and the absolute amount of the late payments by the smaller trader is always 1% of the absolute amount of the late payments by the larger trader, why should a default surcharge imposed on the larger trader be potentially “plainly unfair” but not on the smaller trader? It would look like one rule for the rich and another for the poor.

63. But not only is the Upper Tribunal decision on this binding on us, even if the Upper Tribunal were wrong, it would not help the appellants. That is because, if the Upper Tribunal were wrong on this, it would suggest *Energys* was wrongly decided. In other words, the absence of a maximum penalty is *not* a flaw. But since the appellants here do not suggest (quite rightly) that an upper limit should have been of a level that would affect the penalties actually charged on them, the presence or absence of an upper limit cannot make the penalties charged on them “plainly unfair”.

64. What Mr Carter really means is that, putting aside whether the penalty is “plainly unfair” in absolute terms, he considers it is plainly unfair in relative terms because the taxpayer in *Energys* ‘got away with it’ because they were a much larger trader. It is “plainly unfair”, he says, to treat the appellants differently just because their turnover is so much smaller.

65. We agree that it may be right to judge proportionality in relative as well as absolute terms. So a law that, say, imposed penalties on traders with low turnovers but did not impose penalties on traders with high turnovers, might be disproportionate as not “suitable for the purpose” referring back to the first test of proportionality referred to above at §48. However, proportionality can not be judged by comparing one *tribunal* case to another: different tribunals may take different views of the law. So, even if Mr Carter is right and there is a reasonable comparison to be made between the facts of *Energys* and the facts of these cases, it makes no difference to the outcome of these cases. The outcome of *Energys* does not make the penalty in this case “plainly unfair.” *Energys* may have been wrongly decided. In any event, the facts are not that similar: the taxpayer in *Energys* had made fewer late payments and the penalty in dispute was one levied at 5%.

66. Looking at the amount of the penalties in absolute terms, we agree with Mr Carter that especially the 7/12 penalty on Prested Hall is very large one at 15% for being one working day late. However, as we have said that has been judged on the fact that it was the 7<sup>th</sup> late payment by the company in the space of just over two years. In these circumstances, while we accept it was harsh we are unable to conclude it was plainly unfair. Similarly, the first 15% surcharge (4/11) was the 5<sup>th</sup> late payment in one year. While we accept it was harsh we are unable to conclude it was plainly unfair. In so far as it was Mr Carter’s case that the penalty on PHL was disproportionate, we reject this too for the same reasons.

## **Conclusion**

67. We reject the appellants' case that any of the penalties were disproportionate.

68. We find a reasonable excuse for the default of 2/11 for PHL and discharge the default surcharge of £738.38.

5 69. We found a reasonable excuse for the late payment of 7/12 for Prested Hall and discharge the surcharge of £6,066.76.

70. We dismiss Prested Hall's appeals against the default surcharges for 4/11 and 7/11. The other defaults were not under appeal.

10 71. 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  
15 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

20

**BARBARA MOSEDALE  
TRIBUNAL JUDGE**

**RELEASE DATE: 2 April 2014**

25