Neutral Citation: [2023] UKFTT 00662 (TC)

Case Number: TC08883

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/11002

VAT - Default surcharge - late payment of VAT – Regular payments being made by Appellant to HMRC prior to the default period under appeal – no TTP arrangement in place for VAT period under appeal - Whether Appellant requested that payments being made to HMRC be allocated to the default period under appeal – Cory Bros v Owners of the Steamship Mecca ("The Mecca") considered and applied – Appeal dismissed

Heard on: 28 June 2023
Judgment date: 28 July 2023

Before

JUDGE NATSAI MANYARARA
RICHARD LAW

Between

DESSER & CO. LTD

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Peter Buckley, Royce Peeling Green

For the Respondents: Mrs Anne-Laure Raggatt, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant ('Desser & Co. Ltd.') appeals against a VAT default surcharge penalty that was issued by HMRC in respect of the late payment of VAT for the period 12/20. The default surcharge was in the sum of £4,662.19, which represents 5% of the outstanding tax that was due at that time. The Appellant had also appealed against a default surcharge in respect of the period 12/21, but this has been removed by HMRC and is not, therefore, under appeal.

2. With the consent of the parties, the form of the hearing was V (video). Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public. The documents to which we were referred included a Document & Authorities Bundle consisting of 327 pages.

FACTUAL BACKGROUND

3. The background relevant to the decision under appeal is as follows:

4. The Appellant is a limited company and its business activity is "Wholesale of household goods". The Appellant sells conservatory and garden furniture sourced from various countries in the Far East. Cushion materials are purchased locally and the manufacturing process takes place at the Desser factory. The finished products are sold to large scale and independent retailers. The directors of the company are Gordon Russell Desser, Barry Henry Stewart, Elga Caroline Stewart, Joy Lea Stewart, Mark Simon Stewart, Michael Sydney Stewart and Sandra Betty Stewart.

5. The Appellant has been registered for VAT, with effect from 25 March 1976 and submits VAT returns on a quarterly basis. The Appellant's normal method of payment is Faster Payment Service ('FPS').

6. Period 12/18, covering the period 1 October 2018 to 31 December 2018, due date for electronic return and payments was 7 February 2019. The return was received on 30 January 2019 and VAT was paid between 7 February 2019 and 5 April 2019, by FPS. The Appellant failed to pay VAT in full by the due date and became liable to a surcharge. HMRC, therefore, issued a Surcharge Liability Notice ('SLN'). The SLN gave a surcharge period of 15 February 2019 to 31 December 2019.

7. By a letter, dated 31 January 2019, the Appellant's representatives requested a Time-to-Pay ('TTP') arrangement in respect of the period 12/18. The proposal was for the Appellant to pay £20,936.56 on the due date of 7 February 2019 and £20,936.58 on 7 March 2019, and 7 April 2019.

8. This default surcharge was later removed and the Appellant was informed by letter.

9. Period 09/19, covering the period 1 July 2019 to 30 September 2019, due date for electronic return and payments was 7 November 2019. The return was received on 30 October 2019 and VAT was paid between 7 November 2019 and 7 January 2020, by FPS. The Appellant failed to pay VAT in full by the due date and became liable to a surcharge at 2% of the outstanding VAT due. The VAT due was £38,916.86 and the penalty charged was £778.33.as it was within the surcharge period. The Surcharge Liability Notice of Extension ('SLNE') notified the Appellant that the surcharge period was extended until 30 September 2020.

10. By a letter dated 1 November 2019, the Appellant's representatives made a further TTP request. The reason for the request was because the Appellant's biggest customer (who accounted for 40% of the Appellant's turnover) was said to have ceased to trade and had sought to restrict the amount of the debt owed to the Appellant. This was followed up by a further letter re-iterating the Appellant's position, on 26 November 2019, and questioning the imposition of a default surcharge.

11. By a letter dated 11 December 2019, HMRC decided to cancel the surcharge. HMRC stated that due to the prior default in relation to the period 12/18, the surcharge liability period would be amended to expire on 31 December 2019. HMRC further added that if the Appellant defaulted again within the surcharge period, the period would be extended by a further 12 months.

12. Period 12/19, covering the period 1 October 2019 to 31 December 2019, due date for electronic return and payments was 7 February 2020. The return was received on 30 January 2020 and VAT was paid between 7 February 2020 and 10 February 2020, by FPS. The Appellant failed to VAT in full by the due date and became liable to a surcharge at 2% of the outstanding VAT due as it was within the surcharge period. The VAT due was £33,375.58 and the penalty charged was £667.51. The SLNE notified the Appellant that the surcharge period was extended until 30 December 2020.

13. By a letter, dated 31 January 2020, the Appellant's representatives requested a TTP arrangement. The proposal was for the Appellant to pay £16,687.20 on 7 February 2020, 7 March 2020 and 7 April 2020. The letter explained that the directors were marketing their principal asset (a factory) in order to provide sufficient funds to clear all debts and provide a solid cash base for future operations.

14. By a letter, dated 2 March 2020, HMRC informed the Appellant that if there was a proposal to enter into a TTP arrangement, the Appellant would need to call HMRC with the proposal. This was because the Appellant's bank details would be needed if a TTP arrangement was agreed.

15. The Appellant's representatives responded to the letter on 19 March 2020. In the letter dated 19 March 2020, the Appellant referred to its earlier letter of 31 January 2020 (before the due date) and the fact that the VAT return had been filed in time. The Appellant added

that due to the COVID-19 pandemic, the Appellant's sales had collapsed, and that there was no prospect of recovery until the crisis was over. The letter added that the directors were trying to keep the business solvent and staff paid.

16. Following further exchanges of correspondence, by a letter dated 28 April 2020, HMRC informed the Appellant that the debt due for the period had been set on hold until 31 May 2020. The Appellant was advised to contact HMRC if difficulty was still being experienced in order to see whether HMRC could assist. HMRC added that in regard to the period 03/20, the payment had been deferred until 5 April 2020, due to the COVID-19 pandemic.

17. The surcharge was later removed and the Appellant was informed of the removal of the surcharge by letter.

18. Period 6/20, covering the period 1 April 2020 to 30 June 2020, due date for electronic return and payments was 7 August 2020. The return was received on 27 November 2020 and VAT was paid between 22 January 2021 to 19 May 2021, by FPS. The Appellant failed to pay VAT by the due date and became liable to a surcharge at 5% of the outstanding VAT due as it was within the surcharge period. The total amount of outstanding VAT was £68,543.85, so the penalty charged was £3,427.19. The surcharge was reduced to a first default due to the removal of the earlier surcharges and no financial penalty was imposed. The SLNE notified the Appellant that the surcharge period was extended until 30 June 2021.

19. Period 09/20, covering the period 1 July 2020 to 30 September 2020, due date for electronic return and payments was 7 November 2020. The return was received on 8 February 2021 and VAT was paid between 4 December 2020 and 17 September 2021, by FPS. The Appellant failed to pay VAT by the due date and became liable to a surcharge at 10% of the outstanding VAT due as it was within the surcharge period. The total amount of outstanding VAT was £120,907.96, so the penalty charged was £12,090.79. The surcharge was reduced to 2% due to the removal of the earlier surcharges and the penalty was amended to £2,418.15. The SLNE notified the Appellant that the surcharge period was extended until 30 September 2021.

20. Period 12/20, covering the period 1 October 2020 to 31 December 2020, due date for electronic return and payments was 7 February 2021. The return was received on 9 February 2021 and VAT was paid between 17 September 2021 and 7 December 2021, by FPS. The Appellant failed to pay VAT by the due date, and became liable to a surcharge at 15% of the outstanding VAT due as it was within the surcharge period. The total amount of outstanding VAT was £93.243.80, so the penalty charged was £13,986.57. The surcharge was reduced to 5% due to the removal of the earlier surcharges and the penalty was amended to £4,662.19. The SLNE notified the Appellant that the surcharge period was extended until 31 December 2021.

21. By a letter received on 11 March 2021, the Appellant's representatives notified HMRC of the attempts that had been made by the Appellant to get through to the VAT helpline. The Appellant stated that as no progress had been made, in order to protect the company, the Appellant was forced to undertake a reduction programme, unilaterally. The letter stated that

the intention was to pay the VAT due down in ten equal monthly instalments of £21,415.18 from 20 March 2021 onwards.

22. Following further exchanges of correspondence, on 24 March 2022, the Appellant's representatives requested a review of the decision to issue surcharges. HMRC issued a review conclusion on 29 March 2022, upholding the decision. The Appellant's representatives requested a further review on 19 April 2022 and the decision was upheld, once again, on 5 May 2022. On 12 May 2022, the Appellant's representatives lodged an appeal. A further request for a review was made again on 16 June 2022. HMRC upheld its decision on 29 June 2022.

THE PARTIES' WRITTEN ARGUMENTS

23. HMRC's case (as set out in the Statement of Case) can be summarised as follows:

(1) By failing to pay VAT liability by the due date, the Appellant failed to comply with VATA and the Value Added Tax Regulations 1995 SI 1995/2518 ('the VAT Regulations').

(2) There was no Time-to-Pay ('TTP') arrangement in place in respect of the period 12/20.

(3) The VAT due for each VAT period is a separate debt.

(4) Where no allocation has been made by the Appellant, HMRC allocates payment to the oldest debt.

24. The Appellant's case can be summarised as follows (as set out in the Notice of Appeal and Response to the Statement of Case):

(1) By virtue of its trading patterns, working capital is always short for the Appellant. Imports are on the sea for an average of ten weeks and deposits for goods are paid for on order, with further amounts being due on despatch and arrival. As such, there is little trade capital available for raw materials. The Appellant supplies into a market that is notoriously slow at paying debts, so trade debtors are high relative to turnover.

(2) In 2020, the Appellant was thrown into turmoil by the pandemic and the previously long-standing good order of VAT submission was thrown into further chaos as the Appellant faced existential problems.

(3) At all times, TTP arrangements had been applied for and obtained in advance, or were applied for in time and subsequently agreed by HMRC. There was a request for TTP in respect of the period 12/20.

(4) The VAT return for the period 12/20 was submitted on time and the VAT liability was £93,243.80. Payments on account had been made to HMRC in relation to VAT. These were payments of £42,530.61 in August 2020 and £60,000.00 paid in six weekly instalments of £10,000.00 between 4 December 2020 and 5 February 2021, such that by 8 February 2021, the due date for payment in respect of the period 12/20, payments on account amounting to £102,530.61 had been made. The Appellant is entitled to have

these payments credited against the liability for 12/20, rather than for HMRC to allocate it elsewhere.

(5) The case law in relation to how debts should be allocated is not directly applicable to the Appellant's circumstances. Case law shows that an allocation of payments that lead to the imposition of a penalty is contrary to the principle of fiscal neutrality.

(6) HMRC are not at liberty to ignore a taxpayer's allocation as this could lead to real unfairness. Legislation is silent on the meaning of a "debt".

APPEAL HEARING

25. No live evidence was called as none of the Appellant's directors were present.

26. At the commencement of the appeal hearing, Ms Raggatt confirmed that the default surcharge in relation to the period 12/21 had been removed. This was because whilst no TTP arrangement had been agreed in advance of the due date, there had been some confusion as a TTP arrangement had been agreed for the period 09/21. HMRC had decided not to pursue the penalty in respect of the period 12/21 as matters had been resolved in the Appellant's favour. She clarified that the removal of the default surcharges for 12/18 and 12/19 meant that the default surcharge for the period 06/20 had been amended to a first default.

27. Both Ms Raggatt and Mr Buckley were in agreement that there had been a default in respect of the periods 06/20 and 09/20. The period 03/20 was not relevant as this was covered by the VAT deferral scheme.

28. In response to questions from the panel, for the purposes of clarification, Mr Buckley submitted that by 5 February 2021, the Appellant had made payments amounting to £102,530.61 to HMRC (between August 2020 and 5 February 2021). He further submitted that no other payments were made to HMRC during that period. He added that VAT amounting to (i) £68,543.85 was due for the period 06/20; and (ii) £120,907.90 was due for the period 09/20. He agreed that the VAT return for the period 12/20 had only been submitted on 9 February 2021, which a few days after the last payment had been made to HMRC on 5 February 2021, and that the VAT due for the period 12/20 was £93,243.80.

29. When asked why he believed the payments amounting to £102,530.61 could cover the period 12/20 in light of the amounts due for the earlier periods, and the fact that the VAT return for the period 12/20 had only been submitted four days after the last payment had been made to HMRC (therefore the liability did not exist at the time of the last payment), Mr Buckely submitted that the amounts paid to HMRC should have been applied to the period 12/20 first. Mr Buckley was unable to shed light on the lack of any further contact with HMRC by the Appellant until 11 March 2021, when VAT for the period 12/20 was already late.

30. In support of HMRC's decision, Ms Raggatt submitted (in summary) that:

(1) Case law has established that the debtor must specify allocation in advance, otherwise the creditor can (and will) allocate the payment to the oldest debt first. Any allocation by the debtor must be made before money changes hands.

(2) The Appellant was not making payments on account.

(3) The VAT return for the period 12/20 was received late. The VAT due in respect of each VAT period is a separate debt. Payments are allocated to each tax return.

31. In reply, Mr Buckley submitted (in summary) that:

(1) The case relied on by HMRC in respect of the allocation of payments was decided eight years prior to the circumstances of this appeal, and the principles of fiscal neutrality and proportionality are live.

(2) The Appellant's circumstances can be distinguished from the case law relied on as there is no regulatory framework for the allocation of payment.

(3) The expectation of proportionality has been denied. He is not submitting that the default surcharge system as a whole was disproportionate, but that the default surcharge in relation to the period under appeal was not proportionate.

32. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

DISCUSSION

33. The Appellant appeals against the imposition of a VAT default surcharge in respect of the late filing payment of VAT for the period 12/20. The surcharge is in the sum of £4,662.19, which represents 5% of the outstanding VAT that was due at that time. An appeal to the Tribunal against a penalty imposed in respect of VAT is governed by the provisions of s. 83 VATA. The issues under appeal are firstly, whether HMRC were correct to issue the penalty in accordance with legislation and, secondly, whether or not the Appellant has established a reasonable excuse for the default which has occurred. In this regard, HMRC bear the initial burden of demonstrating that the penalty is due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse.

34. The above matters are to be considered in light of all the circumstances of the case.

Findings of fact

35. We have derived considerable benefit from hearing the submissions made by both representatives, and from considering the documentary evidence before us. Having considered all of the evidence and submissions, we make the following findings of fact and give our reasons for the decision:

(1) The Appellant failed to pay VAT by the due date for the period 06/20 and became liable to a surcharge at 5% of the outstanding VAT due as it was within the surcharge period. The surcharge was reduced to a first default due to the removal of the earlier surcharges and no financial penalty was imposed. The SLNE notified the Appellant that the surcharge period was extended until 30 June 2021.

(2) The Appellant failed to pay VAT by the due date for the period 09/20 and became liable to a surcharge at 10% of the outstanding VAT due as it was within the surcharge period. The total amount of outstanding VAT was £120,907.96. The surcharge was reduced to 2% due to the removal of the earlier surcharges and the penalty was amended to £2,418.15. The SLNE notified the Appellant that the surcharge period was extended until 30 September 2021.

(3) The Appellant failed to pay VAT by the due date for the period 12/20 and became liable to a surcharge at 15% of the outstanding VAT due as it was within the surcharge period. The total amount of outstanding VAT was £93.243.80. The surcharge was reduced to 5% due to the removal of the earlier surcharges and the penalty was amended to £4,662.19. The SLNE notified the Appellant that the surcharge period was extended until 31 December 2021.

(4) The Appellant made payments, amounting to £102,530.61, to HMRC between August 2020 and 5 February 2021. No other payments were made to HMRC during that period.

(5) VAT amounting to £68,543.85 was due for the period 06/20; and £120,907.90 was due for the period 09/20.

(6) The VAT return for the period 12/20 had only been submitted on 9 February 2021, which was one day after the last payment had been made to HMRC on 8 February 2021, and that the VAT due for the period 12/20 was £93,243.80.

(7) No TTP arrangement had been agreed with HMRC in relation to the period 12/20.

Consideration

36. It is trite law that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute. In *Perrin v R & C Commrs* [2018] BTC 513 ('*Perrin*'), at [69], the Upper Tribunal explained the shifting burden of proof as follows:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

37. The factual prerequisite is therefore that HMRC have the initial burden of proof and the standard of proof is the civil standard; that of a balance of probabilities.

Q. Was the Appellant in default of an obligation imposed by statute?

38. VAT is a tax that is imposed on the supply of goods or services in the United Kingdom, made in the course of a business carried on by the taxpayer. The tax is imposed by VATA. Responsibility for the collection of the tax is primarily placed on the supplier of the goods or services, the supply of which has attracted the tax. The taxpayer who makes a taxable supply becomes liable to pay the output tax on the supply to HMRC, even though he does not have to actually pay it until the due date for payment which, in the normal case (putting to one side the rules applying to electronic returns), is the last day of the month following the relevant quarter. That appears to be a present obligation, albeit one that is to be discharged in the future, and, on normal principles, is a "debt". This approach is entirely consistent with HMRC's ability, under reg. 25 of the VAT Regulations, to vary the period covered by a return.

39. In respect of the legislation, s. 1(2) VATA provides that VAT due on any supply of goods or services "is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply". Section 25(1) VATA requires a taxable person to account for, and pay, VAT for a prescribed accounting period at such a time, and in such manner, as determined by regulations. Those regulations are the VAT Regulations.

40. Regulation 25(1) of the VAT Regulations provides that a return must be submitted to HMRC by no later than the last day of the month following the end of the period to which it relates, as follows:

> "**25. Making of returns**
>
> (1) Every person who is registered or was required to be registered shall, in respect of every period of a quarter or in the case of a person who is registered, every period of 3 months ending on the dates notified either in the certificate of registration issued to him or otherwise, not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return [in the manner prescribed in regulation 25A] showing the amount of VAT payable by him or to him and containing full information in respect of the other matters specified in the form and a declaration, [signed by that person or by a person authorised to sign on that person's behalf], that the return is [correct] and complete;"
>
> …

41. Regulation 25A of the VAT Regulations then provides that:

> "[**25A-**
>
> [(A1) Where a person makes a return required by regulation 25 by means of electronic communications using functional compatible software, such a method of making a return shall be referred to in this Part as a "compatible software return system".]
>
> (1) Where a person makes a return required by regulation 25 using electronic communications [other than functional compatible software], such a method of making a return shall be referred to in this Part as an 'electronic return system".
>
> …

42. Regulation 25A (20) provides that:

> "(20) Additional time is allowed to make-
>
> (a) a return using an electronic system, [a compatible software system] or a paper return system for which any related payment is made solely by means of electronic communications (see regulation 25(1)-time for making return, and regulations 40(2) to 40(4)-payment of VAT), or
>
> (b) a return using an electronic return system [or compatible software return system] for which no payment is required to be made."

43. Regulation 40 provides that:

> "**40 VAT to be accounted for on returns and payment of VAT**
>
> …
>
> (2) Any person required to make a return shall pay to the Controller such an amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return.
>
> [(2A) Where a return is made [or is required to be made] in accordance with [regulations 25 and 25A] above using an electronic return system, the relevant payment to the Controller required by paragraph (2) above shall be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose.]

44. The law, therefore, allows a taxable person a calendar month from the end of each of their prescribed periods to prepare their return and arrange for the payment of the net amount due. HMRC have discretion, under reg. 25A (20) and reg. 40 of the VAT Regulations, to allow extra time for the filing of a return and the making of payment where these are carried out by electronic means. The legislation makes clear that there is a statutory obligation to both file a VAT return on time, and pay VAT on time. We find the words of Judge Colin Bishopp in *R & C Commrs v Enersys Holdings UK Ltd.* [2010] UKFTT 20 (TC) ('*Enersys*') to be of material relevance in this respect. At [33], he said this:

> "…The legislation draws the clear line at a calendar month after the end of the prescribed period…Against that background I can see no possible scope for judicial discretion to draw the line somewhere else. If the statutory requirement was to render the return and payment on the due date, neither before nor after, there might, perhaps, be some merit in the argument that missing the target by one day was excusable…the obligation requires no more than that the return and payment are received not later than the due date."

45. Whilst the Appellant has had TTP arrangements in the past, and whilst the Appellant was making regular payments to HMRC, the Appellant had not agreed a TTP arrangement with HMRC in respect of the period of default and was not making payments on account. Whilst we acknowledge that various letters were written on behalf of the Appellant in relation to requests for TTP for earlier periods (and indeed the period under appeal), by a letter dated 2 March 2020, prior to the period under appeal, HMRC said this:

"If you are interested in setting up a payment plan, you will need to call us with your proposal, and this will be looked into by the advisor you speak to. You will need your bank details if a payment plan is agreed."

46. By a further letter dated 21 February 2022, relating to a later period, HMRC said this:

"In order to discuss a payment plan, you will need to call us on the number at the top of the letter, as this cannot be discussed via letter."

[Emphasis added both above and below]

47. In the letter dated 11 March 2021, the Appellant said this, in relation to the periods 09/20 and 12/20:

"The directors are becoming concerned that we need to reduce our VAT arrears and were hoping to be able to engage with one of your officers to arrange this.

As no progress has been made, in order to protect the company, we are forced to undertake a reduction programme unilaterally.

The situation is as follows:

We paid the March 2020 quarter even though there was a moratorium as we hoped to be able to "ride out" the first lockdown. We also paid the June quarter on the same basis. However, we have not paid the September or December 20 quarter. These are £120,907.96 and £93,243.80 respectively, giving a total of £212,151.76.

It is our intention to pay this down in ten monthly instalments of £21,415.18, from 20th March onwards.

We trust that you will find this satisfactory and, in the absence of further word from you, will put this programme in action.

However, your agreement would be gratefully received"

48. Mr Buckley did not suggest that the Appellant ever agreed a TTP arrangement in respect of the period 12/20 by telephone and the Appellant's letter dated March 2021 shows that the payment proposal was undertaken unilaterally by the Appellant. In relation to deferred payments, s. 108 of the Finance Act 2009 provides that:

"**108 Suspension of penalties during currency of agreement for deferred payment**

(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 the end of the deferral period.

…

49. This provision relates to deferred payments during the currency of an agreement to that effect. The agreement must be reached prior to the default. This was not the situation that arose in the appeal before us. Whilst the Appellant was making monthly payments to HMRC, the incontrovertible fact in this appeal is that those payments were not in accordance with an agreed TTP plan in respect of the period 12/20. The Appellant cannot, therefore, rely on the provisions of s. 108.

50. In the appeal before us, the due date for submission of electronic returns and payment of VAT in respect of the period 12/20 was 7 February 2021. The period 12/20 covered the period from 1 October 2020 to 31 December 2020. The Appellant's VAT return was submitted on 9 February 2021, which is after the due date. HMRC are not, however, advancing a case for the late filing of that VAT return. The Appellant pays VAT by FPS. Payment of VAT in respect of the period 12/20 was made between 17 September 2021 and 7 December 2021, which is significantly after the due date for payment.

51. The default surcharge regime was introduced in the United Kingdom as one of a range of measures designed to promote VAT compliance. Default surcharges are considered in law to be civil, rather than criminal, penalties. The first default does not give rise to a penalty, but brings the taxpayer within the regime. The taxpayer is sent a SLN, which informs them that a further default will lead to the imposition of a penalty. There is no fixed maximum penalty. The amount levied is simply the prescribed percentage of the net tax due. The penalty is the same no matter how long the delay.

52. The surcharge provisions are contained in s. 59 VATA.

53. Section 59(1) VATA provides that a person is in default in respect of a period if he has not furnished a VAT return for that period, or paid the VAT shown as payable on that return, by the due date. Where a person defaults in respect of a period, the Commissioners may serve a SLN specifying a period (a surcharge period) which ends 12 months after the last day of the period for which he was in default (i.e., the period ending on the first anniversary of the last day of the period in default and beginning on the date of the notice). When a SLN is served by reason of a default in a VAT period that ends at, or before, the end of an existing surcharge period already notified, the existing surcharge period is extended: s. 59(3) VATA.

54. Section 59(4) provides that if a person defaults in respect of a period ending within a surcharge liability period and has outstanding VAT for the period, he becomes liable to a surcharge. This is an amount which is the greater of £30 and a percentage of the outstanding VAT. The £30 surcharge thus might, for example, apply where the return showed VAT due to the taxpayer. Section 59(5) VATA specifies the rates of penalty for any further default within a surcharge period. The first default within a surcharge period results in a penalty of 2% of the outstanding VAT at the date of the surcharge. The second default within a surcharge period results in a penalty of 5% of the outstanding VAT. The third default within a surcharge period results in a penalty of 10% of the outstanding VAT, and the fourth and any subsequent defaults within a surcharge period result in a penalty of 15% of the outstanding VAT at the ate of the surcharge.

55. By failing to pay VAT by the statutory deadline, the Appellant failed to comply with the legislation. We are satisfied that the Appellant was in default of an obligation imposed by statute. Subject to considerations of 'reasonable excuse', the surcharge imposed is due and has been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the default that has occurred?

56. A taxpayer may escape a penalty if s/he has a reasonable excuse. Section 59 (7) VATA provides a relief for excusable defaults. There is no statutory definition of a 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Commrs* (2006) Sp C 548 ('*Rowland*'), at [18]. The test we adopt in determining whether the Appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 ("*Clean Car*"), in which Judge Medd QC said this:

> "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?"

57. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word 'reasonable' imports the concept of objectivity, whilst the words 'the taxpayer' recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer exercising reasonable foresight and due diligence in the position of the taxpayer in question, and having proper regard for their responsibilities under the Tax Acts: *Collis v HMRC* [2011] UKFTT 588 (TC). The decision, therefore, depends upon the particular circumstances in which the failure occurred.

58. Of material relevance in this appeal, the question of 'reasonable excuse' was not raised, or relied on, by Mr Buckley on behalf of the Appellant. The case advanced on behalf of the Appellant in the appeal before us was that HMRC failed to allocate payment to the period 12/20 as the Appellant had been making regular payments since August 2020.

59. We have considered whether an allocation was made by the Appellant in respect of the period under appeal, in the absence of a TTP arrangement.

Q. Was the VAT due for the period 12/20 a separate debt and did the Appellant request that the regular funds paid to HMRC were to be allocated to the period 12/20?

60. We have found that the VAT return and payment for the period 12/20 was due on 7 February 2021. We have further found that the VAT return was submitted on 9 February 2021 and the amount of outstanding VAT due on the return was £93,243.80. We have also found that no TTP arrangement had been agreed in relation to the period 12/20. Whilst our attention has been drawn to the fact that the Appellant made payments in the sum of £102,530.61 between August 2020 and 5 February 2021, the incontrovertible fact in this appeal is that the VAT amounts outstanding when those payments were being made were (i) £68,543.85 in relation to the period 06/20 and (ii) £120,907.96 in respect of the period 09/20. We find that the sum of £102,530.61 would not have been sufficient to cover those periods when the final payment making up the £102,530.61 was made on 5 February 2021, let alone the sum due for 12/20.

61. We further find that at the time that the final payment was made on 5 February 2021, the VAT return in respect of the period 12/20 had not been submitted. We, therefore, cannot see how HMRC could have been expected to allocate the sums paid by instalment to the period 12/20 when the amount due could not have been determined on 5 February 2021. We will later consider the question of allocation of payments.

62. We have had regard to the Appellant's letter of March 2021 (supra), in which the Appellant unilaterally proposed a TTP arrangement. Within that letter, the Appellant clearly said that the VAT due for 09/20 and 12/20 had not been paid. This letter was after the due date for payment of VAT in respect of the period 12/20. Mr Buckley did not seek to gainsay this fact. Mr Buckely has submitted, on behalf of the Appellant, that HMRC should have allocated the regular payments being made between August 2020 and 5 February 2021 to the VAT due for the period 12/20. He could not, however, confirm that the Appellant had contacted HMRC by telephone to agree a TTP arrangement, or to make an allocation in respect of the payments being made. We accept that the Appellant had difficulty in contacting HMRC, but that is not determinative of the issue before us.

63. Having considered all of the evidence and submissions, we find that the Appellant did not make a request for allocation of payment in respect of the period 12/20.

64. Whilst the legislation is silent on the meaning of a 'debt', when a taxpayer makes a taxable supply, a liability for output VAT arises even though it does not have to be paid immediately. At any point, the amount payable in respect of cumulative output tax in the current period can be readily determined. This can properly be regarded as a debt that is in

existence and which increases as each supply is made, even though it is not presently payable. There is reason, in principle, why a taxpayer cannot appropriate a payment made in the current period, or indeed after the end of the current period but before the last date for payment, to such a debt. Where a debtor makes an unallocated payment, the law does not permit the creditor to allocate it to a future amount in circumstances where there is an existing debt that has fallen due. The debtor is assumed to pay the debt that he already owes. That accords with the debtor's presumed (or actual) intention (i.e., the natural inference from the debtor's actions). We find that this is so in respect of the earlier periods (06/20 and 09/20).

65. In respect of the issue of allocation, in *Cory Bros v Owners of the Steamship Mecca ("The Mecca")* [1897] AC 286, the debtor's right to appropriation was found to expire at the time of payment. The creditor has much greater flexibility and can even delay appropriation until a case is being heard. The result of a conclusion that the debtor is not entitled to allocate a payment to an amount that is not presently due is that the debtor never has the chance to allocate a payment made in advance of the due date, whereas the creditor acquires that right as from the due date. As Lord Macnaghten said at p. 293 of the decision in *The Mecca*:

> "When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he made the payment, the right of application devolves on the creditor...[T]he creditor has the right of election 'up to the very last moment'..."

66. We have found that it is correct that the concept of a "debt" does not appear in the relevant VAT legislation. It is relevant only insofar as common law principles on appropriation of payments apply and a distinction is drawn between amounts that are debts and amounts that are not. It is clear that an amount that is owed but that has not yet fallen due for payment is properly described as a debt.

67. In *Swanfield Ltd. & Ors v HMRC* [2017] UKUT 0088 (TCC) ('*Swanfield*') (Nugee J and Judge Sarah Falk (as she then was)), upon which the Appellant in the appeal before us places reliance, the Upper Tribunal considered the question of (i) whether when making a payment of VAT the appellants were able to appropriate that payment to VAT that was not yet required to be paid; and (ii) whether, if no such allocation was made by the appellants, HMRC was nonetheless required, for the purposes of the default surcharge, to allocate the payment in the way that was most favourable to the appellants; namely, and as in (i), to VAT that was not yet due. I shall return to these questions later.

68. At [34] of the decision in *Swanfield*, the Upper Tribunal said this:

> "34. …For example if A borrows £100 from B on terms that it is repayable in 12 months' time, it would be normal to regard A as owing B a debt of £100 even though the 12 months had not expired. This is a well-known type of liability, traditionally called "*debitum in praesenti, solvendum in futuro*", that is a sum presently owing but which is to be discharged in the future: see for example *Webb v Stenton* (1883) 11 QBD 518 at 524 per Brett MR ("The law has always recognised as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future") and 527 per Lindley LJ ("a debt is a sum of money which is now

payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*")."

69. In respect of question (i) that the Upper Tribunal was considering in *Swanfield*, at [50] the Upper Tribunal held that:

> "a taxpayer can allocate payments to VAT for the current period whether or not the payment exceeds the cumulative output tax to that date. If the payment does exceed the then accrued amount, the balance is to be regarded as a payment on account of the tax still due to accrue during the current period. If HMRC accept such payments…then having accepted the payment as a payment towards the current period's liability, HMRC cannot allocate it as a payment to a historic liability."

70. And at [51]:

> "In our view the structure of the legislation also supports our conclusions that VAT payments made in advance of the due date may be allocated by the payer, and that this is the case even in circumstances where the payment made exceeds the output tax that has arisen by the date of payment. Our reasons are as follows:
>
> > (1) It is clear that the entitlement to deduct input tax is only exercised, and becomes effective, by claiming it on the return. Unless and until it is claimed, which it need not be, the full amount of output tax is due. It is only by completing the VAT return that the entitlement to input tax is crystallised and deducted from output tax. This means that, even after the VAT period has ended, the precise amount due is not ascertained, and will not be until the return is completed and submitted. There is therefore never a point in advance of that time when any debt is precisely quantified. It follows that, if the argument that unquantified debts are incapable of allocation by the taxpayer was correct, there would be no time prior to submission of the VAT return when the taxpayer could make an allocation. This would be so even assuming that the further argument that no appropriation could be made to a debt that was not presently due was wrong. It would not be the case that an allocation could be made at any point after the period had ended, since the debt is in fact not finally quantified until the return is made.
>
> …"

71. In respect of question (ii), the Upper Tribunal held that:

> "We have concluded that it is not disproportionate for a penalty to arise from the manner in which HMRC chooses to allocate a payment, in circumstances where the taxpayer could have but failed to make a different allocation at or before the time of payment, as we have decided that it could. Such a system might appear harsh in some cases but is not "plainly unfair", and is not in our view so disproportionate as to be an obstacle to the aim of fiscal neutrality (*Total Technology* at [63]). A taxpayer that has had previous defaults should be aware of them – and indeed the default surcharge system requires notifications to be made to that effect – and if the taxpayer chooses to make a payment without allocating it to a particular period it is not particularly surprising, or unfair, that HMRC may choose to allocate it to an historic debt."

72. As part of its discussion, the Upper Tribunal considered general legal principles that apply to payments in respect of VAT, and that the VAT due in respect of each VAT quarter is a separate debt rather than there being a "running account" between HMRC and the taxpayer. Accordingly, the principles established in *The Mecca* applied. In contrast, where there is a running account, the rule in *Clayton's Case* (1816) 1 Mer 585, 608 applies and credits are allocated to the earliest debits automatically, with no different appropriation being possible.

73. We hold that as the Appellant failed to allocate the payment(s), HMRC were at liberty to allocate the payments as they did. Moreover, the Appellant had not submitted the VAT return for 12/20 when those payments were made.

74. Whilst acknowledging the issues that the Appellant was experiencing in relation to turnover, the scheme of collection of VAT involves a trader having received the amount of tax which s/he must subsequently pay over to HMRC. In *C & E Commrs v Salevon Ltd; C & E Commrs v Harris & Anor* [1989] STC 907, Nolan J said this (in the context of the Finance Act 1985):

> "…There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so…But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to invoke s 19(6)(b)."

75. We are satisfied that the tax which is collected by a trader represents something similar to an interest-free loan from HMRC. There is no suggestion that the Appellant completely stopped trading as a result of what appear to be hazards of trade. Whilst the pandemic was an unforeseen and exceptional situation, we are further satisfied that HMRC put measures in place to help taxpayers. In relation to the support during coronavirus, the VAT deferral guidance says this:

> *"**Pay VAT deferred due to coronavirus (COVID-19)***
>
> *If you deferred VAT payments between 20 March 2020 and 30 June 2020 you can:*
>
> - *pay the deferred VAT in full now*
> - *join the VAT deferral new payment scheme – the online service is open between 23 February 2021 and 21 June 2021*
> - *contact HMRC on 0800 024 1222 by 30 June 2021 if you need extra help to pay*
>
> *You may be charged a 5% penalty or interest if you do not pay in full or make an arrangement to pay by 30 June 2021*

Pay your deferred VAT in full

If you were unable to pay in full by 31 March 2021, you may still be able to avoid being charged penalties or interest by either:

- *joining the new payment scheme by 21 June 2021*
- *paying your deferred VAT in full by 30 June 2021*

Join the VAT deferral new payment scheme

The VAT deferral new payment scheme is open from 23 February 2021 up to and including 21 June 2021…"

…

The VAT deferral period covered accounting periods for:

- *February 2020*
- *March 2020*
- *April 2020*
- *May 2020 – for payment on account customers and certain non-standard tax periods only, in addition to the above periods*

If you're not able to pay your deferred VAT

…

If you're still unable to pay and need more time, find out what to do if you cannot pay your tax bill on time.

To find out what support is available, use the Get help and support for your business guide."

76. We find that the Appellant would have had the option to join the VAT deferral new payment scheme. Whilst the Appellant may have honestly believed that payment of VAT could unilaterally be delayed without consequence, having registered for VAT as long ago as 1976 and having received the SLN and several SLNEs, the initial belief is not objectively reasonable. We are satisfied that the Gov.uk website provides taxpayers with information in relation to the statutory due dates for payment of tax.

77. We have borne in mind the comments in *Hesketh & Anor v HMRC* [2018] TC 06266. There, Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [48], Judge Mosedale said this:

> "Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

78. As similarly held by Clauston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p 12:

> "the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis."

79. It is therefore trite law that ignorance of the law cannot come to the defence of a violation of the law. The onus is upon an appellant to ensure that they properly understand their obligations under the law.

80. In *Katib v HMRC* [2009] UKUT 189 (TCC) ('*Katib*'), the Upper Tribunal concluded that the lack of experience of the appellant and the hardship that is likely to be suffered was not sufficient to displace the responsibility on the appellant to adhere to time limits. The differences in fact in *Katib* and the appeal before us do not however negate the principle established in relation to the need for statutory time limits to be adhered to, and the duty placed upon taxpayers to adhere to statutory duties.

81. The Appellant has been in the default surcharge regime for some time. The Appellant has been issued with a SLN and SLNEs. In this respect, the SLN provides the following information:

> *"**About surcharges***
>
> *...*
>
> *If you default during the surcharge period you may also have to pay a surcharge which is a percentage of the VAT unpaid at the due date."*

82. Each SLN provides details of how to avoid further defaults in the future, as follows:

> *"**Think ahead***
>
> *...*
>
> *If you cannot pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service **before** the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge."*

83. From the period 04/15, each SLN issued details, on the reverse, how surcharges are calculated, as follows:

*"**About surcharges***

- *If you don't submit your return and make sure that payment of the VAT due has cleared to HMRC's bank account by the due date you will be in default. Each time you default, we will send you a Surcharge Liability Notice.*
- *The notice will explain what will happen if you default again in the following 12 months. This is your **Surcharge Period**.*
- *If you default during the surcharge period you may also have to pay a surcharge which is a percentage of the VAT unpaid at due date.*
- *For the first late payment during a surcharge period the surcharge will be 2%, increasing to 5%, 10% and 15%. There is a minimum surcharge of £30 for surcharges calculated at the 10% and 15% rates. We do not issue a surcharge at the 2% and 5% rates if we calculate it to be less than £400."*

84. We find that the Appellant would have been aware of the rates of surcharge having received the SLN and SLNEs, and would have been aware of the financial consequences of continued defaults. The Appellant has had a TTP arrangement in the past and would, we find, have been aware of the proactive steps that could been taken having received correspondence from HMRC about the need to agree a TTP arrangement by telephone.

Q. Does the question of proportionality arise in relation to the specific default surcharge in question?

85. Whilst it was not submitted that the default surcharge scheme, as a whole, is disproportionate, it was submitted, on the Appellant's behalf, that the issue of proportionality arises in respect of the default surcharge under appeal. Having reviewed the authorities, we find that this submission is based on false premises.

86. In *R & C Commrs v Total Technology (Engineering) Ltd.* [2012] UKUT 418 (TCC) ('*Total Technology*'), at [83], the Upper Tribunal said this concerning the default surcharge regime:

> "(a) The regime does not distinguish between a trader who has made a trivial slip and a trader who deliberately fails to file a return and to pay on the due date. Nor does it cater for degrees of culpability between those two
>
> (b) A trader who is late but has a reasonable excuse is not subject to a penalty. Nor, however long he then delays in payment, is he subjected to a penalty.
>
> (c) In contrast, a trader who is late is subject to a penalty which cannot 30 be reduced even though his payment is only a single day late.
>
> (d) The regime does not distinguish between traders who are a day late, a week late or even a month late, in contrast with some other regimes to be found in the United Kingdom tax system.
>
> (e) The potential hardship to a trader is not a factor to be taken into 35 account. In particular, the amount of the penalty is not related to profitability.

(f) The previous compliance record of the trader is not taken into account save in the negative sense that previous defaults within the preceding 12 months affect the amount of the penalty (as a percentage of the tax overdue).

(g) The correlation between the turnover of the trader and the size of the penalty is far from exact even where there is a failure to pay any of the tax due.

(h) There is no maximum penalty.

(i) There is no discretion to reduce or waive a penalty once imposed. Although the 'reasonable excuse' exception provides some relief from the harshness of the regime, there are meritorious cases where a penalty, it is suggested, should not be paid that cannot be brought within that exception."

87. In *Total Technology*, the Upper Tribunal identified, at [84], features of the regime which supported an argument that the scheme was fair. The tribunal said this:

"…The following factors can be prayed in aid in response to the unfairness alleged by the Company:

(a) The simplicity of the system makes it easily understood, as well as being relatively easy to operate.

(b) The surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to surcharge if defaults again within a year. Taxpayers thus know their positions and should be able conduct their affairs so as to avoid any default.

(c) The penalty is not a fixed sum but is geared to the amount of outstanding VAT. Although a somewhat blunt instrument, it does bring about a broad correlation between the size of the business and the amount of the penalty. It does not suffer from the objections which could be made to the fixed penalty in *Urbán.*

(d) The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within 12 months of each other. This is a rational and reasonable response to successive defaults by a taxpayer.

(e) The 'reasonable excuse' exception strikes a fair balance. The gravity 40 of the infringement is reflected in the absence of 'reasonable excuse' and the amount of the penalty reflects the extent of the default, that is to say the amount of tax not paid by the due date."

88. The Upper Tribunal noted that the aim of the default surcharge regime was twofold - from a general perspective it aimed to ensure compliance with a taxpayer's obligations to file returns and to pay tax and, more specifically, it aimed to ensure submission of returns and the payment of tax on the due date. For the reasons explained at [86] – [98], the Upper Tribunal concluded, at [99], in relation to the default surcharge regime itself that *"there is nothing in the VAT default surcharge which leads us to its conclusion that its architecture is fatally flawed"*. The Upper Tribunal urged caution in the assessment of whether an individual penalty is disproportionate, saying:

"... the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's convention rights. The freedom which Parliament has in establishing the appropriate penalties

> is not, we think, necessarily exactly the same as the freedom which it has in accordance with its margin of appreciation in relation to convention rights (and even there, as we have explained, the margin of appreciation will vary depending on the right engaged)."

89. The Upper Tribunal summarised the position thus, at [100]:

> "…the regime viewed as a whole does not suffer from any flaw which renders it non-compliant with the principle of proportionality in the sense that it, or some aspect of it, falls to be struck down."

90. Having reached its conclusion as regards the regime as a whole, the Upper Tribunal turned to the factors put forward in support of the appellant company's complaint of unfairness on its particular facts. Those factors, described at [101], were: (a) the payment was only one day late; (b) previous defaults had been innocent, even if no reasonable excuse could be established; (c) the company's excellent compliance record; and (d) the amount of the penalty represented an unreasonable proportion of the company's profits. The Upper Tribunal held that at the individual level of the company, the amount of the penalty, even if looked at in isolation, could not be regarded as disproportionate. Furthermore, at [103], the Upper Tribunal held that although the surcharge might be considered harsh, it could not be regarded as plainly unfair. The decision in *Enersys* was referred to in *Total Technology*.

91. We have had regard to the fact that Mr Buckely did not seek to argue the issue of reasonable excuse and rested the Appellant's cause on the allocation of payment argument. We have concluded that such an argument was misconceived. Furthermore, in *R & C Commrs v Trinity Mirror plc* [2015] UKUT 421 (TCC) ('*Trinity Mirror*') (Rose J and Judge Roger Berner), the Upper Tribunal said this, at [55]:

> "For proportionality to be in issue it is axiomatic that there will have been no reasonable excuse for the default; if there had been, the effect of s 59A(8) VATA (or, in a normal case, s 59(7)) is that the trader would not be liable to a surcharge at all, and will not be treated as having been in default in respect of the relevant VAT period. Accordingly, the mere fact that there is no reasonable excuse will be a factor universally applicable, and can have no bearing on the question of proportionality. Contrary to Mr Mantle's submissions, the absence of reasonable excuse goes to the fact of the default, and not to the gravity of it. "

92. And at [62]:

> "62. In our judgment, it is not appropriate for the courts or tribunals to seek to set any maximum penalty, or range of maximum penalties. That would in effect be to legislate. The task of the tribunal is to consider the relevant tests in the context of the individual case before it. It must not seek to establish a maximum and then compare the actual penalty to that benchmark. That was what the FTT attempted to do in this case, and it was wrong in law to have done so."

93. As accepted by Mr Buckley, the Upper Tribunal in *Trinity Mirror* held that the default surcharge regime, viewed as a whole, is a rational scheme which is a proportionate method of

enforcing statutory deadlines for filing returns and making payment of VAT. The First-tier Tribunal ('FtT') has no jurisdiction to determine issues of fairness. The default surcharge regime seeks to ensure that taxable persons who fail to pay VAT on time do not gain a commercial advantage over the majority who comply with time-limits. Since the requirement to make VAT payments is imposed by law, the issue of proportionality does not arise.

94. We have also considered the case of *R & C Commrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255. There, the Upper Tribunal similarly held that the FtT did not have power to discharge penalties on the ground that their imposition was unfair. In *Rotberg v R & C Commrs* [2014] UKFTT 657 (TC), it was accepted that the FtT's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. The Upper Tribunal held, at [109], that the FtT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Upper Tribunal found, at [116], that the jurisdiction of the FtT in cases of that nature was limited to considering the application of the tax provisions themselves.

95. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and, as such, not imposing the penalty, HMRC would not be adhering to its own legal obligations. The FtT has no jurisdiction to discharge the penalties if they are properly due. Its jurisdiction in respect of this and other similar penalty provisions is limited to whether or not payment was late, as a matter of fact, and, if so, whether there is a reasonable excuse for lateness. Only if it decides the issue of a reasonable excuse in favour of the Appellant may it discharge the penalty and fairness is not a permissible consideration.

96. Having regard to the findings of fact, and in light of the relevant test, we are satisfied that the Appellant has not established a reasonable excuse. For all of the foregoing reasons, the appeal is dismissed.

97. In reaching these findings, the Tribunal has applied the test set out in *Clean Car.*

RIGHT TO APPLY FOR PERMISSION TO APPEAL

98. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 28 JULY 2023