[2013] UKFTT 329 (TC)

TC02732

Appeal number: TC/2012/06663

VALUE ADDED TAX – default surcharge – appeal against 15% surcharge – whether a Time To Pay ("TTP") agreement for an earlier period – TTP requested before due date but agreed afterwards – TTP in place but payment condition broken – VAT payment date falling on Easter Saturday – whether reasonable excuse – whether surcharge disproportionate and/or unfair, taking into account both Easter Saturday and the different treatment of direct debit arrangements – the FTT's jurisdiction – **Total Technology, Hok, Noor and Oxfam** ***considered – appeal dismissed and surcharge upheld.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

SYGMA SECURITY SYSTEMS **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON (TRIBUNAL PRESIDING MEMBER)
JULIAN STAFFORD

Sitting in public at Eastbrook, Brooklands Avenue, Cambridge on 2 May 2013

Mr Barry Burgess, Accountant of the Appellant, for the Appellant

Mrs Lynne Ratnett, Officer of HM Revenue & Customs, for the Respondents

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DECISION

1. This is the appeal of Sygma Security Systems Limited ("the company") against a VAT default surcharge of £3390.28, being 15% of the VAT due for the quarter ended 29 February 2012.

2. The company accepted it had paid the VAT late. The issues in the case were:

(1) whether the company had a reasonable excuse for the default;

(2) if not, whether the 15% rate was correct. The answer to this question depended on whether the company had a Time to Pay ("TTP") agreement for the quarter ended 31 August 2011, and if it had such an agreement, whether it complied with its terms;

(3) whether the amount of the surcharge was disproportionate; and

(4) whether the Tribunal had the jurisdiction to consider fairness, and if so, whether the surcharge was unfair.

3. The Tribunal gave its judgment orally at the end of the hearing and indicated to the parties that we were minded to draft a summary decision. However, Mr White, Managing Director of the Appellant, expressed his dissatisfaction with our decision and we subsequently decided that it would be more appropriate to provide a full decision.

The evidence

4. The Tribunal was provided with a bundle from HMRC, including:

(1) the correspondence between the parties, and between the parties and the Tribunal;

(2) a schedule showing the company's defaults from 1 September 2008 to the quarter under appeal;

(3) a schedule showing payments made after the due date, from the quarter ended May 2009 to the quarter ended 30 November 2011;

(4) HMRC's "Action History" record for the period from 21 April 2011 to 7 August 2012;

(5) HMRC's online guide entitled "how to pay VAT".

5. In addition, both Mr Burgess and Mr Kevin White, the company's managing director, gave oral evidence and were cross-examined by Mrs Ratnett.

6. On the basis of that evidence, the Tribunal found the following facts.

The facts

7. For the quarter ended 30 November 2008, the company paid its VAT late, and received a Surcharge Liability Notice ("SLN").

8. There were further late payments in relation to quarters ending May 2009, August 2009, May 2010 and August 2010. For each of these the company received a Surcharge Liability Extension Notice ("SLEN"). The surcharge rate for the August 2010 default had therefore risen to 15%, and the surcharge liability period was extended to 31 August 2011.

9. HMRC issued the company with a further 15% SLEN for the quarter ended 31 May 2011, but subsequently cancelled the surcharge and withdrew the SLEN because it accepted that the company had a TTP agreement.

10. An SLEN was issued for the quarter ended 31 August 2011, also at 15%. However, the Action History records suggested that there may have been a TTP agreement for this period too. We make further findings of fact on this below.

11. SLENs were also issued for the periods ending November 2011 and February 2012, both at 15%. The second of these was the subject of the appeal before the Tribunal.

12. As the company paid its VAT by BACS, it had the benefit of the HMRC general direction (set out in the next part of this decision) allowing an extra seven days for payment of the VAT due. Seven days after the due date of 31 March 2012 was 7 April 2012, Easter Saturday. The company's VAT was received by HMRC on 10 April 2012, the first working day after Easter.

The legislation, regulations and directions

13. The surcharge was levied under s 59 Value Added Tax Act 1994 ("VATA"). The legislation is set out in the Appendix to this Decision.

14. The company was on a quarterly basis for VAT, so its VAT return and the related payment were due on or before the end of the month following each calendar quarter[1].

15. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. Regulation 25A of the VAT Regulations[2] deals with the filing of returns, and states at paragraph 20 that:

> "Additional time is allowed to make—

[1] Reg. 25(1) and Reg. 40(1) Value Added Tax Regulations 1995, SI 1995/2518

[2] Value Added Tax Regulations 1995, SI 1995/2518

> (a) a return using an electronic return system or a paper return system for which any related payment is made solely by means of electronic communications…
>
> (b) ...
>
> That additional time is only as the Commissioners may allow in a specific or general direction, and such a direction may allow different times for different means of payment."

16. Reg 40 of the VAT Regulations sets out the general rules for the timing of payment of VAT at paragraphs (1) and (2), and then states:

> "(3) The requirements of paragraphs (1) or (2) above shall not apply where the Commissioners allow or direct otherwise.
>
> (4) A direction under paragraph (3) may in particular allow additional time for a payment mentioned in paragraph (2) that is made by means of electronic communications."

17. Under the discretion given to them by Regs 20A and 40, HMRC made general directions, which are published in VAT Notice 700. The version of that Notice which was current at 29 February 2011 contains the following text at paragraph 21.5 (with emboldening in the original):

> "If you choose to pay the VAT shown as due on your return by Bankers Automated Clearing System (BACS), Bank Giro Credit Transfer or Clearing House Automated Payment System (CHAPS), you may receive up to 7 extra calendar days for the return and payment to reach us. Here are some important facts you need to know if you want to benefit from this concession:
>
> - The 7 day extension to the due date will be applied automatically every time you pay your VAT return using BACS Direct Credit or Bank Giro Credit Transfer. You may also pay by CHAPS but please note that this may be the most expensive payment method for you. Payment cannot be made via Girobank.
> - Payment must be in our bank account on or before the 7th calendar day. If the 7th day falls on a weekend, we must receive payment by the Friday. When the 7th day falls on a bank holiday, payment must be in our bank account by the last working day beforehand.
> - To make sure that your payment reaches us in time, **you should check with your bank how many days they need to complete the transaction**."

18. On 5 April 2012, HMRC issued a new version of VAT Notice 700, which included the following paragraph:

> "Paying by an approved electronic method will give you up to seven extra calendar days to submit your return and pay your VAT, unless you make annual returns or Payments on Account (and submit quarterly returns). The extended due date will be shown on your online VAT return and you must ensure that cleared funds reach HMRC's bank account by this date. (The exception to this is online Direct Debit

(DD) - if you pay by DD, then HMRC will automatically collect your payment on the third bank working day after the date shown on your return.) If your due date falls on a bank holiday or weekend, your payment must clear HMRC's bank account before then (unless you use the Faster Payments service - Faster Payments can be received on bank holidays and weekends).

If your payment arrives late you may be liable to a surcharge for late payment. To make sure that your payment clears our account in time, you should check with your bank or building society to find out:

- if there are any single or daily limits to how much you can transfer from your account
- Is there a cut-off time for processing payments on the same day?
- How long your payment will take to clear into HMRC's bank account?

Checking these details will help to ensure that you do not incur any unnecessary late payment surcharges."

19. This later version gives a further three days to those who pay by direct debit. The payment which gave rise to the disputed surcharge was due on 7 April 2012, and it is thus this direction which applied.

20. HMRC's online guidance provided to the Tribunal is date stamped 16 April 2013, and it is thus not contemporaneous with the disputed surcharge under appeal. However, in relation to the key points at issue – what happens on a bank holiday and the position for those on direct debits – it reflects the second version of the Notice set out above.

The percentage applicable to the default

21. From the Action History record it appeared to the Tribunal that there may have been a TTP agreement in place for the period ending 31 August 2011. If this was the case, providing the TTP was complied with, there would be no surcharge for that period (Finance Act 2009, s 108).

22. Mrs Ratnett accepted that, had this been the position:

(1) the company would have had four "clean" quarters without an SLEN;

(2) the default which occurred in the quarter ending 30 November 2011 would have triggered a new SLN; and

(3) the default under appeal would have been charged at 2%.

23. The Tribunal therefore asked the parties whether there was a TTP in place for the period to 31 August 2010.

24. Mr White said that the company had entered into the TTP scheme soon after it was first announced. He said the scheme did "exactly what it was advertised to do: it

allowed the company to trade through a difficult period." The general pattern was for the company to pay its VAT monthly in arrears, so that by the next due date it had cleared the VAT from the previous quarter.

25. Mr White and Mr Burgess said they had "several discussions" with HMRC about the company's TTP arrangements, but they had not kept contemporaneous notes of these calls. At some point HMRC told them that the company could not use TTP any more. However, neither Mr White nor Mr Burgess could remember exactly when this was.

26. HMRC's bundle contained both the contemporaneous "Action History" record and a page headed "payments made after due date". The parties took time to review this evidence in detail, and then agreed that the facts were as follows:

(1) On 12 August 2011 Mr Burgess called HMRC to request a TTP agreement for the payment due at the end of that month. He was told that the amounts were "outside the authorisation levels" of the person to whom he was speaking, but that he should "continue making payments as they are doing". The case would be referred to another part of HMRC who "should be getting in contact shortly."

(2) On 1 September 2011 Mr White met an HMRC officer and asked about the company's "request for ongoing TTP". He was told that the question had been referred "for technical advice" but he was again advised "to continue paying monthly until he heard back and has done so."

(3) On 12 October 2011, Mr Burgess called HMRC. The record says "discussed VAT TTP. Agreed over 3 months £10173.78 comm 21/10 to be paid by BACs". A TTP agreement had therefore been made at this point.

(4) The payment promised for 21 November 2011 was not made. This was recorded by HMRC as "TTP failed case". A letter stating that the TTP had failed was sent to the company.

(5) The missing payment was received on 6 December 2011, with the next following payment being made on 6 January 2012.

(6) By letter dated 6 January 2012 the company asked for a TTP agreement for the following period, that ending November 2011. On 17 January 2012 HMRC spoke to Mr White and "advised unable to accept further TTP." No TTP was agreed for this period or the period under appeal, that ended February 2012.

27. In summary, Mr Burgess asked for a TTP on 12 August 2011, before the due date of 31 August 2011, and the TTP was agreed on 12 October 2011. A TTP agreement was therefore in place which met the requirements of FA 2009, s 108.

28. In particular, we note that the statute requires the TTP be *requested* before the due date for payment: HMRC do not have to agree the TTP before that date, as long

as an agreement is in fact made. To us, this is clear from the wording of the provision, which is as follows:

> (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.

29. Section 108 thus cancels the surcharge if the person would have become liable to it *between the date on which he makes the request and the end of the deferral period*. In other words, he must make the request before the date on which he would have become liable to the surcharge, ie on or before the due date for payment. But merely making a request is not enough: HMRC must subsequently agree.

30. We find support for our reading of the provision in the decision of Judge Connell in *Levi Solicitors LLP v R&C Commrs* [2011] UKFTT 277 (TC) at [34], where he says:

> "There is a requirement that the request for a TTP agreement must be made before the due date for the return payment under s108(2)(b) but no similar provision relating to the period within which the TTP arrangement must be agreed. Otherwise, as the Appellant says, HMRC could protract negotiations and thereby potentially cause the trader to incur additional surcharges which would otherwise be excluded under the time to pay arrangement scheme."

31. However, in this case, once the TTP agreement was made, the company did not meet the agreed payment date, and was classified by HMRC as "failed". The Tribunal asked Mr White if he could recall what happened to cause this slippage in the payment dates and he said that it was because of cash flow difficulties.

32. FA 2009, s 108(4)(b) states that failure "to comply with a condition (including a condition that part of the amount be paid during the deferral period)" means that the TTP agreement has been broken. Once the agreement has been broken, the surcharge is due, provided that the relevant surcharge notice is served (FA 2009, s 108(3)). In this case, HMRC issued an SLEN setting the surcharge at 15% and extending the surcharge period.

33. The effect of all this was that the rate applicable to the default under appeal was also 15%. The Tribunal thus moved on to consider the question of reasonable excuse for the late payment made for that quarter.

Reasonable excuse

34. Mr Burgess and Mr White submitted that the company had a reasonable excuse for the default, on the grounds that the payment was due on Easter Saturday and the money had been received by HMRC on the first banking day thereafter.

35. Mrs Ratnett said that the reasonable person would have followed the HMRC rules, which were clearly stated and publicly available. They required that, where there was a bank holiday, payment had to be made by the last working day beforehand.

36. We found helpful guidance in *Bancroft v Crutchfield (Inspector of Taxes)* [2002] STC (SCD) 347, where Dr John Avery Jones stated at [5] that "A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way."

37. In *The Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234 Judge Medd QC said:

> "It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

38. We respectfully agree with both judgments.

39. In this case, the HMRC Directions relating to payment by BACs are clear and published in both versions of the HMRC Notice set out earlier in this decision. The reasonable taxpayer would make himself aware of, and follow, these rules. It may be that in a particular situation other factors need to be considered – the trader might be unwell, for example, or suffer an unexpected misfortune – but no such elements are present in this case. We therefore find that, without more, paying on the next business day is not a "reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax…to do" and does not provide the company with a reasonable excuse.

Unfairness and proportionality

Submissions of the parties

40. Mr Burgess said that the penalty was unfair and disproportionate for two reasons:

(1) the payment was made on the banking day following Easter Saturday rather than the banking day before that date; and

(2) had the company arranged to pay by direct debit, it would have had a further three days to pay. The company thus suffered a surcharge of over £3,000 for not complying with the seven day rule, when other companies who paid on Easter Saturday suffered no surcharge.

41. Mrs Ratnett said that the company had not, as a question of fact, used direct debit to pay its VAT and so could not benefit from that more tolerant regime. She also referred the Tribunal to the cases of *HMRC v Hok* [2012] UKUT 363(TC) ("*Hok*") and *HMRC v Total Technology* [2012] UKUT 418(TC) (*"Total"*).

42. She said that in *Hok*, the Upper Tribunal decided that the First-tier Tribunal ("FTT") has no power to allow appeals against penalties simply on the basis that they are "unfair". In *Total*, it decided that the VAT default surcharge regime is proportionate. In the context of proportionality, Mrs Ratnett pointed out that this was the company's seventh default. In her submission, the surcharge was both proportionate and fair.

Proportionality: the law

43. In *Total* the Upper Tribunal comprehensively reviewed the relevant case law on proportionality at [23] to [66].

44. At [49] they said that under European law (which is of course relevant as VAT is an EU-wide tax) the position could be summarised as follows:

> "the principle of proportionality as applied to a penalty system, such as …the default surcharge system in the present case, is to be applied in such a way as to give the Member States the widest discretion in deciding the balance between the public interest and the interests of individual taxpayers."

45. The Upper Tribunal also considered the principle of proportionality under human rights law, and said at [50]:

> "…the State is entitled to a wide margin of appreciation, so wide as to allow imposition of taxes, contributions or penalties unless the legislature's assessment of what is necessary is devoid of reasonable foundation." [3].

46. It has also been held that a penalty is disproportionate so as to be a breach of an individual's human rights, if it is[4]:

> "not merely harsh but plainly unfair, so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted."

[3] This phrase "devoid of reasonable foundation" is derived from the case law, see for example *Gasus Dosier- und Fördertechnik GmbH v. The Netherlands* (Application no. 15375/89) at [60]*R (Federation of Tour Operators) v HM Treasury* [2008] STC 2524 at [32]

[4] *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26]

47. The case law thus emphasises that parliament has a great deal of discretion when legislating in the areas of tax and penalties, and that there is very high threshold before a penalty can be found by a court or tribunal to be disproportionate.

48. The Upper Tribunal also set out, at [83], the "main possible areas of complaint" in relation to the VAT default surcharge regime which "might be said to result in unfairness in different circumstances", although the judges said they "cannot be at all certain" it was a complete list.

49. The features they identified included the following:

(1) a trader who pays his VAT late is subject to a penalty which cannot be reduced even though his payment is only a single day late (at (c));

(2) the potential hardship to a trader is not a factor to be taken into account. In particular, the amount of the penalty is not related to profitability (at (e));

(3) the correlation between the turnover of the trader and the size of the penalty is far from exact, in the light of the impact of deduction of input tax incurred in making taxable supplies and of any exempt or zero-rated supplies (at (g) and [6]).

50. Having considered these, and other, points, the Upper Tribunal decided in the light of the case law that:

> "there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are, however, some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed."

51. Although the default surcharge regime is not "fatally flawed", it is possible that it could, in a particular circumstance, give rise to a disproportionate penalty. As the Upper Tribunal says at [76]:

> "Even if the structure of the surcharge regime is a rational response to the late filing of returns and late payment of VAT, it is, nonetheless, necessary to consider the effect of the regime on the individual case in hand."

52. This point is reiterated at [77] of that decision:

> "But even…the architecture, as we have called it, of the regime is unobjectionable, it remains necessary that the resulting penalty in a particular case is proportionate to the gravity of the infringement."

53. The Upper Tribunal then applied their legal analysis to the default surcharge charged on the Appellant, Total Technology Limited. The facts of that case included the following:

(1) The surcharge was £4,260.26.

(2) The company's profits were around £50,000 a year.

(3) It paid the VAT one day late by simple error,

(4) Its earlier defaults had been so small that they were below the level at which HMRC consider it worth issuing the surcharge.

54. The Upper Tribunal nevertheless decided that the surcharge was not disproportionate.

Proportionality: application to this case

55. The Upper Tribunal has found that the "architecture" of the default surcharge system is not disproportionate, but that tribunals must nevertheless consider whether the penalty in a given case is "proportionate to the gravity of the infringement". In making that decision, we must "be astute not to substitute [our] own view of what is fair for the penalty which Parliament has imposed."

56. In this case, Mr Burgess put forward two reasons why the surcharge was disproportionate. The first is, in effect, that the payment was only one day late. The second is that a company which had agreed to pay by direct debit would have been treated differently.

57. The late payment factor was explicitly considered in *Total*, where the trader accidentally paid one day late. There were also a number of other factors in that case which do not apply here - for instance, the trader in *Total* had a higher surcharge than the company and no previous surcharge liabilities (whereas the company had seven). Nevertheless, the Upper Tribunal found the surcharge in *Total* to be proportionate.

58. Taking into account the case law and the Upper Tribunal guidance, we can find no basis for saying that payment made by the company on the working day after Easter, rather than the working day before Easter, is sufficient for the surcharge to be classified as disproportionate.

59. The direct debit comparator was not identified as one of the "main possible areas of complaint" listed by the Upper Tribunal by *Total*, so we consider it here, again in the light of the case law background set out in the preceding section of this decision.

60. Parliament has given HMRC explicit power to allow longer payment periods for those who pay electronically. HMRC has decided that it is in the public interest to encourage payment by direct debit and so used its discretionary powers to allow further time to those who pay by direct debit.

61. Although this may indirectly disadvantage BACs payers, it is a decision which falls comfortably within HMRC's administrative discretion. The use of their powers to encourage traders to use direct debits cannot possibly transform a surcharge which is otherwise compliant with the principles of proportionality into one which is not. We thus find that the company's arguments on proportionality do not succeed.

Fairness

62. Mr Burgess and Mr White were strongly of the view that the company had been treated unfairly by HMRC. Mrs Ratnett submitted that the FTT had no jurisdiction to consider whether HMRC had exercised their discretion in a fair manner.

63. In our oral judgment we said that we agreed that Mrs Ratnett had strong case law support for her position, and that if the FTT did have the jurisdiction to consider the issue, we would find that there was no unfairness in the way HMRC had exercised their discretion. We set out the basis for our oral decision in the following paragraphs.

64. Issues about fairness, or the exercise of a discretion by a public body such as HMRC, are classified as "public law" questions. The power of a court to review the decision-making of a public body is known as "judicial review" or "JR". JR questions have traditionally been considered only by the High Court (and, on appeal, by the Court of Appeal and the Supreme Court).

65. The purpose and ambit of JR is summarised in *Halsbury's Laws*[5] as follows:

> "The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected…The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers. The grounds upon which administrative action is subject to control by judicial review have been conveniently classified as threefold. The first ground is 'illegality': the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is 'irrationality', namely *Wednesbury* unreasonableness. The third is 'procedural impropriety'."

66. Mr Burgess has not argued that HMRC have acted illegally by giving an extra three days to direct debit payers, or by treating those who pay before the bank holiday differently from those who pay the day before, or that there is any procedural impropriety. But he says HMRC have acted unreasonably.

67. The classic formulation of unreasonableness is given by Lord Greene in *Associated Provincial Picture Houses v Wednesbury Corpn* [1948] 1 KB 223 at 229:

> "a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."

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[5] Halsbury's Laws of England - Judicial review (volume 61 (2010) 5th edition) – 1: The ambit of judicial review - (1) introduction - 602. The nature of judicial review

68. In *Boddington v British Transport Police* [1999] 2 AC 143 at 175, Lord Steyn said that a decision will not be unreasonable if it is "within the range of reasonable decisions open to a decision-maker" and in *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 at 452, Lord Cooke said that the issue was whether the decision in question was "one which a reasonable authority could reach."

69. It has until recently been accepted that the FTT does not have the jurisdiction to consider JR questions such as *Wednesbury* unreasonableness. However, in *Oxfam v R&C Commrs* [2009] EWHC 2078, Sales J ascribed a wider jurisdiction to the FTT, saying at [75] that:

> "It is clear that s 83 [VATA]...does not confer any general supervisory jurisdiction on the tribunal, but it seems to me to be a *non sequitur* to say that the tribunal has no power to apply public law principles if they are relevant to an appeal against (ie a decision either to uphold or overturn) a decision of HMRC which falls within the terms of one of the headings of jurisdiction set out in s 83."

70. Earlier this year the Upper Tribunal in *HMRC v Noor* [2013] UKUT 071(TC) ("*Noor*") declined to follow the approach taken by Sales J in *Oxfam*, and said that Parliament had not intended to confer a JR function on the FTT in relation to appeals under VATA s 83, and had not in fact done so. The Upper Tribunal also disagreed with the analysis of the earlier case law set out in *Oxfam*, saying that the authorities supported a narrower view of the FTT's jurisdiction. At [87] they said that this did not mean that the FTT could never review HMRC's exercise of a discretion, but that it could only do so when that review power had been explicitly given by statute.

71. Given our decision that, if the FTT did have the jurisdiction to consider the issue, we would find that there was no unfairness in the way HMRC had exercised their discretion, this decision notice is not the place to attempt an analysis of either *Oxfam* or *Noor*, and we recognise that no summary will fairly reflect the detailed consideration of the law set out in both judgments. At the risk of over-simplifying, however, it seems to us that in *Oxfam* Sales J is saying that the FTT's jurisdiction encompasses public law issues which can be implied by the taxpayer's statutory appeal right, while the Upper Tribunal in *Noor* decided that the FTT has only the jurisdiction to consider public law issues when that power is explicitly stated to exist by the relevant statutory provision.

72. There are thus two different approaches to the question of the FTT's jurisdiction, the wider interpretation of the High Court *Oxfam* and the narrower view of the Upper Tribunal in *Noor*. It is our understanding that the High Court and the Upper Tribunal are at an equivalent level in terms of judicial authority.

73. The Upper Tribunal had previously said (in *Hok* at [49]) that the comments of Sales J in *Oxfam* were *obiter*. This would mean that his comments do not constitute a precedent which has to be followed by the FTT. However, in *Noor* the same judges (Warren J and Judge Bishopp) say at [50] that they "incline now to the view

that…Sales LJ's conclusion was a matter of decision" although they do not express a "final conclusion" on the point.

74. If the Upper Tribunal are correct in their view that Sales J's jurisdictional comments in *Oxfam* are not *obiter,* then this Tribunal may need to decide which of the two decisions – that of Sales J in the High Court in *Oxfam* or that of the Upper Tribunal in *Noor* – we should follow.

75. In either case, it is common ground that statute[6] does not give the FTT any free-standing JR power, and our starting point is therefore that the source of any public law jurisdiction is the taxpayer's appeal right. Here, the company's right of appeal is at VATA s 83(1)(n), which says that "an appeal shall lie to the Tribunal with respect to…any liability to a…surcharge by virtue of…s 59".

76. Section 83(1)(n) does not contain any explicit power for the FTT to consider whether HMRC fairly exercised their discretion when giving direct debit payers three days longer to pay than those who use BACS. If we follow Noor we would therefore find that this Tribunal has no jurisdiction to consider the issue of fairness.

77. If, on the other hand, the FTT has the wider jurisdictional powers indicated by *Oxfam,* then it is arguable that we can consider whether it is fair to charge a £3,390.28 surcharge on the company for paying its VAT on Easter Saturday, when another trader, in an otherwise identical situation but paying via direct debit, pays no surcharge, and a third, who pays the day before the bank holiday, is also not penalised. It was the essence of Mr Burgess's case that these differences were unfair, and that this unfairness was (to use the words of Sales J) "relevant to the appeal" against the surcharge.

78. However, even if the FTT has the wider power indicated by Oxfam, in our judgment HMRC did not act in a manner which was "*Wednesbury* unreasonable" by giving direct debit payers three extra days, or by surcharging those who pay on the first working day after a bank holiday. Direct debits are set up in advance and operate without the need for separate activation: payment by this means can reasonably be considered to be more certain and efficient than normal BACS transfers.

79. HMRC's use of its discretionary powers to encourage direct debits, and its decision that, if the due date falls on a bank holiday, that payments must be made on or before the last working day before that holiday, are both clearly "within the range of reasonable decisions open to [it]". Neither decision was "*Wednesbury* unreasonable". On the contrary, both are a wholly appropriate and proper use of HMRC's statutory discretion.

80. Thus, if (following *Oxfam*) we have the jurisdiction to consider issues of discretion and fairness which are relevant to the appeal, we find that there is no unreasonableness here. If (following *Noor*) we do not have that jurisdiction, then the company's complaint cannot be decided by this Tribunal.

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[6] In particular, the Tribunal, Courts and Enforcement Act 2007

81. On either approach, therefore, we find that the company's arguments on fairness do not succeed.

Decision and appeal rights

82. On the basis of the foregoing, we dismiss the company's appeal and confirm the surcharge of £3,390.28.

83. 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.

84. 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.

ANNE REDSTON
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 4 June 2013

The Value Added Tax Act 1994
S59 Default Surcharge

59 The default surcharge

(1) Subject to subsection (1A) below If, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

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

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

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

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

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

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

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

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

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

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

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

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

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the

number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

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

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

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

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

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

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

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

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

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

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

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

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

(9) In any case where—

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

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

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

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

S71 Construction of sections 59 to 70

(2) For the purposes of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

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

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

(3) …..

S83 Appeals

(1) Subject to s83G and 84, an appeal shall lie to the Tribunal with respect to any of the following matters—

…

(n) any liability to a penalty or surcharge by virtue of any of the sections 59 to 69B.

….

Finance Act 2009 s 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.

(3) But if –

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

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

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

(4) P breaks an agreement if –

(a) P fails to pay the amount of tax in question when the deferral period ends, or

(b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.

(5) The taxes and penalties referred to in subsections (1) and (2) are:

Tax	Penalty
Value Added Tax	Surcharge under s 59(4) …of VATA
…	