TC04466

Appeal numbers: TC/2011/01119
TC/2011/01121
TC/2011/01131
TC/2011/01132

VALUE ADDED TAX – default surcharge – allocation of payments – whether VAT due at time of payments – whether surcharges plainly unfair – if so, whether within state's margin of appreciation – whether poor financial position of companies a reasonable excuse for late payment as a consequence of financing arrangements – no – whether sufficient evidence as to financial position – no – whether appropriate to consider in the alternative the question of lateness of returns – yes, if reasonable excuse for late payment had been established – appeals dismissed, subject to reductions of certain surcharges

FIRST-TIER TRIBUNAL
TAX CHAMBER

SWANFIELD LTD
QN HOTELS (WREXHAM) LTD
QN HOTELS (AYLESBURY) LTD
QN HOTELS LTD **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
CAROLINE DE ALBUQUERQUE

Sitting in public at The Royal Courts of Justice on 15 April 2015

Hywel Jones of Counsel, instructed by Controlled Tax Management Ltd, for the Appellant

Erika Carroll, Appeals and Reviews, HM Revenue and Customs, for the Respondents

DECISION

1. The respective Appellants appeal against various default surcharges imposed on them by the Respondents ("HMRC") for a range of VAT periods, beginning in the case of QN Hotels (Wrexham) Ltd with period 12/09, until later 2012. (We set out below the schedules containing the detailed information.)

The background facts

2. The documentary evidence was voluminous, consisting of 13 large lever-arched files. These included a witness statement given by Mr Qamar Ahmed. In addition, the Appellants provided a further, smaller, binder entitled "Appellants' Additional Materials", containing an application dated 24 March 2015 to serve additional witness evidence, a second witness statement given by Mr Ahmed, a third witness statement given by Mr Ahmed, and other items to which we refer below. Mr Ahmed also gave oral evidence.

3. From the evidence we find the following background facts. Further factual matters are considered at a later point in this decision.

4. The four Appellant companies are not registered as a VAT group. They are referred to as the "QN Hotels Group", and according to the accounts of QN Hotels Ltd ("QN") they constitute a group for Companies Act purposes. Those accounts show that QN owns 100 per cent of the issued share capital of each of the other Appellants. The QN Hotels Group incurred substantial capital expenditure in the 1990s and the early 2000s. The Wrexham hotel was completed in 2006, and opened in 2007, not long before the recession began. VAT default surcharges were incurred by companies in the group and appeals made against those surcharges. (The present appeals do not relate to those earlier surcharges.)

5. In August 2007, QN entered into a business loan agreement with Lloyds TSB providing for a maximum loan (excluding interest) of £18.5 million, to be used to repay an existing loan made by the Bank of Ireland plc. One of the conditions subsequent to the loan agreement was that within 30 days it was required to provide evidence that it had entered into a hedging transaction equal to the amount borrowed for a five year period from the borrowing date under the loan agreement. Lloyds TSB viewed the QN Hotels Group as a single portfolio.

6. On 26 October 2007 QN entered into an interest rate cap agreement. This was supplemented by amendments made in November 2007, January and February 2008; these gave different designations to the contract.

7. In March 2010 QN entered into a new loan agreement with Lloyds TSB for a loan facility of £19,142,207.45. The agreement referred to QN and its "Subsidiary Undertakings". One of the conditions precedent to the agreement was that QN had to enter into a hedging transaction in order to limit its exposure to the effect of future increases in interest rates.

8. On 5 February 2010 QN entered into a transaction with Lloyds TSB described as a "Sterling LIBOR Swap Transaction". This referred to the "Trade Date" as 25 October 2007.

9. (To the extent necessary for the purposes of the appeals, we consider in further detail below specific terms of the agreements relating to the LIBOR interest rate.)

10. Until November 2008, the LIBOR interest rate was sufficient to provide a discount to QN. In December 2008, it dropped below 3 per cent, as a result of which QN had to make extra payments pursuant to the Interest Rate Cap Agreement; these were in addition to the interest which was payable under the terms of the business loan agreement. These extra payments continued (pursuant to the respective amended agreements) for the whole of the period up to and including December 2012.

11. Over the period from 2008 to 2011 the four Appellant companies incurred losses. (No evidence was provided as to the position in 2012.) During that period the companies had difficulties paying the VAT due to HMRC.

12. The Appellants took steps to remedy the situation and repay their creditors. They made various staff members redundant, and adjusted the payroll. The directors' personal earnings were reduced. Litigation against Lloyds Banking Group plc was eventually commenced by QN in 2013. Litigation by QN Hotels (Aylesbury) Ltd against another lender is currently under consideration. The companies traded out of their difficulties and paid off all the arrears of VAT.

13. One course of action which the Appellant companies sought to pursue was to make payments of current liabilities during current VAT periods, in order to reduce future default surcharges; their intention was to have the payments allocated to those current liabilities. We return to this issue later in this decision.

14. The Appellant companies' positions in relation to the VAT default surcharge regime were as follows. QN, QN Hotels (Aylesbury) Ltd ("Aylesbury") and Swanfield Ltd ("Swanfield") entered into that regime in respect of the periods in question during 2009. QN Hotels (Wrexham) Ltd ("Wrexham") entered the default surcharge regime in respect of period 12/07.

Arguments for the Appellants

15. Mr Jenkins referred to the Appellants' Consolidated Grounds of Appeal. These were:

(1) Reasonable excuse. The Appellant companies contended that they had reasonable excuse for the irregularities which gave rise to the default surcharges at issue in these appeals. (We review the factual issues below, in the context of both parties' submissions.)

(2) Incorrect allocation of VAT payments. The Appellants submitted that their payments covered the VAT liability, were made from VAT received

throughout the quarter in question in each case, and should not have been used to pay the arrears of VAT in the manner adopted by HMRC.

(3) Proportionality. The Appellants submitted that the substantial and continuous penalties were plainly unfair, particularly in the light of the incorrect allocation of payments; had payments been allocated to the ongoing VAT liability and not to the arrears, no liability at all would have arisen. Even if the Tribunal were to find that the Appellants made payments towards the arrears and not the ongoing liability, the mere fact that the payments amounted to the ongoing liability rendered the amount of penalty surcharge "plainly unfair" and disproportionate. For these reasons, this was an exceptional case.

16. In the context of reasonable excuse, HMRC had referred in their skeleton argument to *Oriel Holdings Ltd v Revenue and Customs Commissioners* (2007) VAT Decision 20184. They argued that as the Appellants in the present case were separately incorporated and separately registered for VAT, any problems relating to the associated companies were therefore not relevant to the specific Appellant. Mr Jenkins submitted that the Appellants' case was nothing like *Oriel Holdings*, as the loan applied to all four of the Appellant companies.

17. He referred to the decision of the Tribunal in *Electrical Installation Solutions Limited v Revenue and Customs Commissioners* [2013] UKFTT 419 (TC), TC02813. He submitted that, following that decision, the way in which the principle in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 (CA) had been applied was to show a little more liberality. He cited *Robert P Slight & Sons Limited v Revenue and Customs Commissioners* [2015] UKFTT 0016 (TC), TC04229 and *Scrimsign (Micro-Electronics) Ltd v Revenue and Customs Commissioners* [2014] UKFTT 866 (TC), TC03982 as examples of the more liberal interpretation of the test following the *Electrical Installations* decision.

18. He made reference to an earlier summary decision of the First-tier Tribunal concerning QN's liability to default surcharge for the periods 06/09 and 09/09; to the extent necessary, we consider this later in the context of the facts.

19. On the second ground of appeal, which he emphasised was linked to the third ground, the allocation by HMRC of the sums which the Appellants contended should have been allocated to the current period (in each case), Mr Jenkins submitted that the result was so pernicious to the taxpayer that it could be described as unfair and harsh, and so (in European terms) disproportionate.

20. He accepted the point made by Mrs Carroll in HMRC's Statement of Case that a debtor was entitled to allocate payments in any way the debtor chose, as long as they did so before the money changed hands. In his submission, it followed that it was no good HMRC saying that the debt had not crystallised. Everybody was familiar with paying on account. He referred to examples of payments, considered below. He submitted that HMRC should have made allocations as the Appellant companies had asked; it was HMRC's obligation, being proportionate, to allocate the payments in the way most advantageous to the Appellant companies. HMRC had referred to the decision of the Tribunal in *Voicenet Solutions Limited* [2013] UKFTT 781 (TC),

TC02432; the Appellants in the present case contended that the system should be operated in a way least punishing to the debtor. Mr Jenkins referred to the decision of the VAT Tribunal in *Clifford Construction Ltd v Commissioners of Customs and Excise* (1989) VAT Decision 3929. He argued that it was not appropriate for HMRC to adopt an approach different from that mentioned in that decision.

21. In relation to the third ground of appeal, proportionality, the Appellants were not arguing that the surcharge system was disproportionate or unfair. However, to operate a system in the way in which HMRC had done in the present case, by not applying the allocation of cheques to the taxable persons' advantage, and in some cases ignoring the taxable person's allocation, was harsh and unfair. The system was intended to encourage the payment of VAT on time. The result of HMRC dealing with matters as they had was to earn hundreds of thousands of pounds in surcharges.

22. *Enersys Holdings UK Ltd v Revenue and Customs Commissioners* [2010] UKFTT 20 (TC), [2010] SFTD 387 and *Revenue and Customs Commissioners v Total Technology (Engineering) Limited* [2012] UKUT418 (TCC) had been dealing with a different situation, namely how overdue a payment was, and the level of that payment. Here, the circumstances were very different; the question was that of the manner in which the system had been operated in relation to the Appellant companies.

23. Mr Jenkins acknowledged that *Enersys* and *Total Technology* required a high threshold; was the manner in which the system had been operated both harsh and unfair? He submitted that in any event, where a specific allocation had been made, HMRC had no business to allocate the payment to a different debt.

24. The Appellants accepted that there had been earlier appeals by companies within the QN Group. It was submitted that those appeals were not relevant to the present proceedings. Mr Jenkins referred to the circumstances of those appeals; where appropriate, we consider below his comments on those circumstances, all relating to arguments based on reasonable excuse.

25. Mr Jenkins also submitted that the issue of the dates of submission of returns was not now appropriate for HMRC to adopt as an additional ground of objection to the Appellant companies' appeals. Again, we refer as necessary to this at a later stage.

Arguments for HMRC

26. Mrs Carroll summarised the points at issue (in a different order to that adopted by the Appellants):

(1) Had the payments been allocated in accordance with the law, giving rise to a liability to default surcharge?

(2) Were the default surcharges not merely harsh but plainly unfair and to an extent that could not be saved by the State's margin of appreciation?

(3) Did the respective Appellant companies' poor financial positions amount to a reasonable excuse for late payment?

27. HMRC bore the burden of proof with regard to the liability to surcharge. Once that liability had been established, it was for the Appellants to produce evidence to support their contentions that they had a reasonable excuse.

28. HMRC's understanding was that on the whole there was no dispute between the parties with regard to the dates of payment or amounts of payment.

29. Mrs Carroll referred to s 59(1) of the VAT Act 1994 ("VATA 1994"). She submitted that the Appellant companies had failed to make payments of VAT on time, and had therefore become liable to surcharges under the legislation. She made various submissions as to the facts; we consider these below, together with the parties' submissions on the application of various authorities in the context of those facts. HMRC argued that each default surcharge penalty was for a particular period and that liability to a surcharge penalty had to be determined by reference to the facts of that particular default. An appellant allowing defaults to accrue over a long period of time could not reasonably use this as a defence against further surcharges for further defaults.

30. In relation to the issue of allocation of payments, HMRC submitted that they were entitled to allocate the payments in the manner which they had, and had been reasonable in adopting the approach which they had taken. Mrs Carroll referred to regulation 40 of the VAT Regulations 1995 (SI 1995/2518) (the "VAT Regulations"). This imposed a statutory obligation on a person required to make a VAT return to pay the VAT to HMRC not later than the last day on which that person was required to make that return. The Appellant companies were debtors in respect of the amounts of VAT due from them.

31. As reg 40 VAT Regulations used the words "in respect of the period to which the return relates", HMRC submitted that each quarter's return was a separate debt and that therefore there was no "running account". As a result, the rule in *Cory Brothers and Company Limited v The Owners of the Turkish Steamship "Mecca"* [1897] AC 286 ("*The Mecca*") applied.

32. If HMRC were wrong and a "running account" existed, the rule in *Devaynes and others v Noble and others; Baring and others v Noble and others; Clayton's Case* [1814-23] All ER Rep 1 ("*Clayton's Case*") meant that the VAT payments would automatically be allocated to reduce the earliest debt first; the company would have no right of allocation. This (and HMRC's above submission) followed the reasoning of the Tribunal in *AJM Mansell Limited* [2012] UKFTT 602 TC) at [47]-[55].

33. On the basis of these authorities, the common law allowed the Appellants to appropriate their VAT payments to debts in any way they chose, as long as they did so before the money changed hands.

34. Mrs Carroll submitted that HMRC were therefore entitled to allocate payments to the oldest debt, for those payments for which no allocation was made prior to payment by the Appellants.

35. If the respective Appellants could show that:

(1) there was a payment which they appropriated to a particular debt on or before payment was made, and

(2) that payment was not allocated in that way by HMRC, and

(3) such allocation would have meant that the payment was made not later than the last day on which the Appellant in question was required to make the associated return,

then there would be no liability to a default surcharge in respect of that amount, as it would have been paid on time.

36. Mrs Carroll submitted that the payments had been lawfully allocated. There was no right of appeal against payment allocation. The only option for the Appellants, if they objected to payment allocation, was to seek a judicial review. In accordance with the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Noor* [2013] UKUT 071 (TCC), the Tribunal had no jurisdiction over the allocation of payments lawfully allocated.

37. HMRC submitted that in any case their allocation of payments was reasonable. This was confirmed in *Meteor Capital Group v Revenue and Customs Commissioners* [2012] UKFTT 101 (TC), TC01797 at [24].

38. The Appellants had argued that the payments made covered the VAT liability, were made from VAT received throughout the quarter, and should not have been used to pay the arrears.

39. This assertion was based on the logical fallacy that payments made could be directly linked to receipts of VAT during a given period. Receipts would have been paid into the general bank account of the company and lost any specific character, forming part of the general funds held by the company. Payments of VAT would have been made out of those general funds, which would have had a number of sources.

40. Payments made at the beginning of a period were likely to have been paid from the receipts of a previous period, and it would be impossible for HMRC to identify to what extent this was the case.

41. HMRC submitted that allocating the payments in this manner would mean allocating them to sums not yet accrued. The amount of the debt (the tax due) only crystallised on the due date for the return and payment for the period, after the period had ended. Mrs Carroll referred to *Voicenet Solutions Limited* at [7]. HMRC were not aware of any such principle concerning allocation to debts not yet due.

42. Amounts declared on a VAT return were not subject to interest; there was therefore no commercial restitution for such debts that remained outstanding. HMRC submitted that it was reasonable to extinguish the oldest of such debts first, as the public purse would have lost most from their late payment.

43. Such overdue amounts constituted an interest-free loan to the debtor. HMRC used their administrative powers to make time to pay arrangements for debtors facing

temporary difficulties, but failure to pursue the payment of such debts in general at the earliest opportunity would offend against fiscal neutrality.

44. In HMRC's submission, the allocation of payments in the manner suggested by the Appellants was not necessarily the most favourable to them. If payment had not been allocated to the oldest debts they would have been subject to collection procedures, possibly leading to winding up proceedings, as suggested in the correspondence.

45. HMRC fully accepted that if there were any payments which had not been allocated as requested and they were payments towards specific debts accrued and due at the time of the request (in order that the payment could be assigned to the actual liability for that period), then these could be reallocated and any surcharges recalculated accordingly.

46. In respect of proportionality, Mrs Carroll indicated that it was not clear to HMRC what point the Appellants were attempting to make in referring to the decision of the Tribunal in *Enersys* at [69]. She referred to *Total Technology* at [89]. In the present case the Appellants argued that if payments had been allocated to their ongoing VAT liability and not to arrears then no penalties would arise at all. HMRC referred to the absence of any schedules being produced to show that this was the case. What would have happened if the payments had been allocated differently was not relevant when they had been lawfully allocated. In HMRC's submission, they had been legally entitled to allocate the payments as they did. It followed that the Appellants' argument [in this respect] was without substance.

47. Mrs Carroll made legal and factual submissions relating to the Appellants in the context of *Total Technology*, which we consider below. She referred to *Access Employment Law Limited* [2014] UKFTT 084 (TC), TC03224 at [22]-[23].

48. HMRC rejected any suggestion that the surcharges under appeal should be considered in their entirety rather than individually, period by period. Each individual default surcharge was a distinct and separate surcharge imposed for a default in a particular period to which it related. This was implicitly recognised in *Total Technology* at [91].

49. In respect of reasonable excuse, the Appellants accepted that mere insufficiency of funds did not, in the normal run of circumstances, constitute a reasonable excuse for default, but they considered that, taking all of the attendant circumstances into consideration and viewing their case in the round, there was a reasonable excuse for the defaults which were the subject of these appeals.

50. Mrs Carroll made submissions relating to the factual circumstances of the Appellants (considered below). She referred to *European Development Company (Westhill Hotel) Limited and European Development Company (Hotels) Limited v Revenue and Customs Commissioners* [2013] UKFTT 671 (TC), TC03053, to s 59(7) VATA 1994 and to *Eastwell Manor Limited* [2011] UKFTT 293 (TC). She also drew

attention to the citation by Nolan LJ in *Steptoe* at p 768 of his earlier judgment in *Salevon*.

51. She submitted that it was for the Appellants to produce evidence to show—

(1) that there was in fact a shortage of funds; and

(2) that this was caused by reasonably unforeseeable or unavoidable events outside their control.

In support of her submission, she referred to *Mill Lane Engineering (Aldershot) Limited v Revenue and Customs Commissioners* [2011] UK FTT 75 (TC), TC01137, at [33].

52. It had been confirmed in *The Gardens Entertainments Ltd v Commissioners of Customs and Excise* (1992) VAT Decision 8972 that generic risks common to a wide range of businesses, such as economic recession, could not in themselves provide reasonable excuse for default. HMRC fully accepted that the reasons behind financial difficulties might result in a reasonable excuse. However, if the reason behind the Appellants' financial difficulties was that they were continually transferring money to one another to help pay their liabilities, HMRC submitted that this could not be a reasonable excuse.

53. Mrs Carroll referred to *Oriel Holdings Limited* at [46], which made clear that separately incorporated companies which were separately registered for VAT purposes were individually liable to account properly for their own VAT liability. The Tribunal in that case indicated that the appellant could not use the circumstances of an associated company which was not a member of that appellant's VAT group as a reason for its own non-payment of VAT.

Discussion and conclusions

54. As the appeals raised questions of law and issues of fact, we deal first with matters of law and then consider the facts by reference to our conclusions as to the law.

Matters of law

55. As the issue of attribution goes to the question whether there have been any defaults, we consider attribution first.

56. The parties were in agreement that the Appellants were permitted at common law to appropriate their VAT payments to debts in any way they chose, as long as they did so before the money changed hands.

57. Mrs Carroll argued that where no allocation was made by the Appellants, HMRC were entitled to allocate payments to the oldest debt. This was either because each quarter gave rise to a separate VAT debt and therefore there was no "running account", so that the principle in *The Mecca* applied, or because, if a running account

was considered to exist, the rule in *Clayton's Case* meant that VAT payments would automatically be allocated to reduce the earliest debt first.

58. For the Appellants, Mr Jenkins submitted that it was not open to HMRC to ignore the Appellants' attributions and allocations of their VAT payments; it was the right of a debtor at law to allocate payments. He also referred to the comments of the VAT Tribunal in *Clifford* concerning the approach which the Chairman understood from the representative of HM Customs and Excise was about to be adopted in 1990:

> "I appreciated hearing from Mr Hawkins that, as from the beginning of next year, there will be no risk of similar misapprehensions because, due to developments in computer programming, funds received from a trader will be allocated in the manner most beneficial to him."

59. We accept Mrs Carroll's submissions as to the treatment of payments where no allocation is made by the taxable person before making the payment to HMRC. We therefore fully agree with the reasoning of the Tribunal in *AJM Mansell Limited* at [47]-[55].

60. Mrs Carroll further submitted that where payments were made in advance of the due date for VAT, they could not be regarded as allocated to the VAT due for that period, as allocating them in this manner would mean allocating them to sums not yet accrued.

61. Mr Jenkins argued that it was no good HMRC saying that the debt had not crystallised; the procedure of paying on account was familiar. He submitted that if technically the taxable person was not a debtor, the obligation on the recipient (ie HMRC) was to return a cheque, not to pocket it, and send a letter asking the taxable person what they wished to do.

62. We reject these submissions made by Mr Jenkins. We agree with HMRC's argument that the VAT for a VAT period does not become a debt until the due date for the return and payment in respect of that period, ie the last day on which the return may be submitted and payment may be made. In practical terms, as Mrs Carroll pointed out, the amount of VAT would not be known by HMRC until a return had been produced. There would be difficulty for HMRC in operating some form of specific VAT suspense account pending receipt of a return, possibly a matter of months before a return was due to be submitted. The approach referred to in *Clifford* could not be applied to payments in respect of VAT which was yet to become due.

63. In addition, Mr Jenkins' argument failed to take into account a significant point. Although a taxable person in similar circumstances to those in these appeals is not a debtor in respect of the current VAT period during which payments on account of the eventual VAT liability for such period are sought to be made, that person does not cease to be a debtor in respect of any earlier periods for which payment has not yet been made. Thus there can be no logical justification for his suggestion that HMRC should send back the payment pending a decision by the taxable person as to its allocation.

64. Regulation 40(2) VAT Regulations provides:

> "(2) Any person required to make a return shall pay to the Controller such 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."

It follows that any payment made before that last day is made before it has become due.

65. Mrs Carroll referred to the decision of the Tribunal in *Voicenet Solutions Limited* at [7]:

> "[7] . . . Without expressing any opinion on the issue of whether the respondent has such a duty as the appellant contends, we observe that in this case, allocating payments in the most favourable manner would have meant the respondent allocating payments not to sums accrued due, but to sums yet to accrue due. We can understand a creditor allocating payments to debts presently outstanding in the manner most favourable to the debtor, but do not understand there to be any principle that requires somebody who will become a creditor in respect of a sum yet to accrue due, to allocate a payment presently received to the sum yet to become due."

66. We agree with the Tribunal's view as expressed in that case.

67. Thus, where it can be shown that any of the Appellants made an allocation of a payment at a point where the sum to which it was to be allocated had become due, it follows that in such instances HMRC were required to act in accordance with that allocation. Depending on the circumstances, this may affect the question whether or not a default surcharge applies in respect of the relevant VAT period.

68. In relation to proportionality, Mr Jenkins did not seek to argue that the system as a whole was disproportionate or unfair. However, he submitted that operating the system without reference to the allocations which the Appellants had sought to make was harsh and unfair, resulting in the imposition of substantial surcharges.

69. We consider that the position needs to be examined by reference to the actual factual position. It needs to be established to what extent the allocations were made in respect of debts already due, for the reasons explained above. Instances of allocations made to such debts must be examined in the overall context of each Appellant's compliance position. Other allocations, in respect of debts not yet due, are ineffective and therefore irrelevant to the question whether the operation of the system was harsh or unfair.

70. Mr Jenkins referred to *Total Technology* and *Enersys*. He acknowledged that these cases concerned the questions of the extent to which a payment was late, and the level of that payment in the context of the particular trader's pattern of business. Mrs Carroll submitted that the Appellants' circumstances were entirely different from those in *Enersys*, and that in *Total Technology* the Upper Tribunal had found that the

default surcharge system was not fatally flawed. Further, the Upper Tribunal accepted that a substantial default surcharge sum may be found to be proportionate.

71. We accept Mrs Carroll's submissions on the application of *Enersys* and *Total Technology*. It follows that the only relevance of proportionality to the Appellants' case is to the question whether effective allocations were not acted upon by HMRC. If no effective allocations can be shown to have been requested, the issue of proportionality falls away. We review the factual issues below.

72. On the legal issues concerning reasonable excuse, we accept Mrs Carroll's submission that it is for the Appellants to establish on the evidence that there was a shortage of funds, and that this was caused by reasonably unforeseeable or unavoidable events outside their control. In *Mill Lane Engineering (Aldershot) Limited* at [33] the Tribunal stated:

> "33. Section 71(1)(a) of the Act expressly provides that "an insufficiency of funds to pay any VAT due is not a reasonable excuse". If the Appellant seeks to rely on something more than an insufficiency of funds, such as unforeseen circumstances or events beyond the Appellant's control (compare *Steptoe v Revenue & Customs* [1989] UKVAT V4283), the burden of proof is on the Appellant to establish the existence of such unforeseen circumstances and events, and also to establish that these circumstances and events were the cause of the late payment."

73. Mr Jenkins submitted that the application of the test in *Steptoe* had involved a greater degree of liberality since the decision of the Tribunal in *Electrical Installations Solutions Limited.*

74. Our reading of the decision in that case is not that the Tribunal was seeking to adjust the test, but to determine the precise test to be applied in cases where an appellant argues that the insufficiency of funds is due to unforeseeable events. After citing (at [36] and [37]) passages from the judgment of Lord Donaldson MR in *Steptoe*, the Tribunal considered the respective submissions of the parties, and stated:

> "[43] In our view, the correct test to apply in relation to "reasonable excuse" is that found in the judgment of Lord Donaldson MR quoted in paragraph 36 above. We consider this formulation of the test to be binding upon us. The essential question is the application of this test to the facts. This is an area in which every case turns on its own facts."

75. The background to the Tribunal's approach was that HMRC, relying on the passage from the dissenting judgment of Scott LJ in *Steptoe* which was set out in HMRC's Civil Penalties Manual at paragraph 10534, used that as the test to be applied in cases applying what might be referred to as the "*Steptoe* principle". (This has also been the experience of other tribunals dealing with default surcharge appeals.) The Tribunal reviewed the judgments of the Court of Appeal in *Steptoe*, and arrived at its conclusion as set out in its decision at [43].

76. The final sentence of that paragraph is particularly significant in reviewing cases heard since the decision in *Electrical Installations Solutions Limited*. The

question is, based on what has been established to be the proper test in such a context, whether the facts of the particular case are such to show a reasonable excuse.

77. For ease of reference, we set out the passage from the judgment of Lord Donaldson MR in *Steptoe* at p 770 cited by the Tribunal in *Electrical Installations Solutions Limited* at [36]:

> ". . . [I]f the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds."

78. As the facts of cases differ, we do not consider that any principles can be derived from the tribunal decisions cited by Mr Jenkins in support of his submission that greater liberality is shown in decisions since *Electrical Installations Solutions Limited*.

Application of legal principles to the facts

79. Before dealing with the respective issues, we set out the respective default surcharge notices under appeal:

QN

Period	Percentage	Amount £
02/10	10%	6500.00
08/10	15%	6,948.87
11/10	15%	14,934.10
02/11	15%	8,846.70
05/11	15%	13,313.32
08/11	15%	9,938.21
11/11	15%	12,374.39
02/12	15%	9,637.66
05/12	15%	10,366.22
08/12	15%	13,723.27
11/12	15%	2,677.20

Aylesbury

Period	Percentage	Amount £
06/10	5%	450.52
09.10	10%	2,254.09
06/11	15%	2,494.30
09/11	15%	2,987.52
12/11	15%	2,459.69

03/12	15%	2,195.26
06/12	15%	3,714.98
09/12	15%	4,642.45

Wrexham

Period	Percentage	Amount £
12/09	15%	8,850.00
03/10	15%	10,073.57
06/10	15%	7,500.00
09/10	15%	11,215.74
06/11	15%	9,611.67
09/11	15%	13,199.95
12/11	15%	13,031.83
03/12	15%	9,812.55
06/12	15%	11,786.54
09/12	15%	12,766.58

Swanfield

Period	Percentage	Amount £
02/10	2%	400.00
05/10	5%	2,115.21
08/10	10%	5,319.21
11/10	15%	5,086.56
02/11	15%	3,896.38
05/11	15%	5,974.78
08/11	15%	7,398.88
11/11	15%	5,661.31
02/12	15%	5,153.09
05/12	15%	7,703.93
08/12	15%	6,672.98
11/12	15%	1,423.34

81. We deal first with the issue of allocation.

82. In his reply, Mr Jenkins accepted that many of the payments by the Appellants had been made before the three-month VAT periods had come to an end.

83. As we have concluded, no allocation of payments can be made in respect of VAT which has not yet become due. Mrs Carroll commented that the Appellants had not produced a schedule of how the payments should have been allocated; in their Additional Materials bundle, they had provided a "Master Schedule of VAT Payments", but this did not take account of outstanding arrears or "time to pay"

agreements. She indicated that HMRC had begun to check that schedule and found that it contained errors; in her submission, there were a great many errors, and it could not be relied upon. She gave five examples of errors already established by HMRC on their initial examination of the Master Schedule, which had been provided by the Appellants on the morning of the hearing.

84. In his reply, Mr Jenkins indicated that he did not accept that the inaccuracies which HMRC had discovered in the Master Schedule rendered the whole of that document unreliable.

85. We note Mr Jenkins's view, but we consider that it is for the Appellants to provide sufficient evidence to establish details of their payments, if they are to demonstrate that the records of payments as kept by HMRC are in any way incorrect. On the basis of the errors discovered as a result of HMRC's initial check, we accept Mrs Carroll's submission that the Master Schedule cannot be relied on. Any indications in it as to the period in respect of which a payment was made are therefore of no assistance in determining whether there were any cases in which any of the Appellants expressed a wish to allocate payments to VAT amounts which had already become due.

86. Mr Jenkins took us to a number of examples in the Additional Materials bundle of cheques sent in by various of the Appellants together with compliments slips giving the relevant VAT number and mentioning a VAT period (eg "Period 05/10"). In addition, there are some copy pages, in some cases on the same page as a copy cheque, showing details of the VAT number and the cheque; it is not clear whether these are copies of information written on the reverse of the cheque. In the absence of specific evidence, we are unable to make findings as to the precise nature of the information provided to HMRC with each cheque. However, from these copy documents we are able to make the finding that none of the examples contained in the Additional Materials bundle involves a payment made once the VAT had become due.

87. Mrs Carroll accepted that there was a possibility that payments had been specifically allocated to existing debts, but no such payments had been drawn to HMRC's attention. She commented that if the Appellants had made allocations, this would not necessarily have been favourable, as the result could have been collection proceedings for VAT liabilities and the threat of winding-up proceedings.

88. We find that, despite the Appellants' attempt to establish that allocations of payments were made by HMRC in a manner contrary to the Appellants' expressed wishes, there is no evidence of any failure by HMRC to allocate payments in respect of existing debts in accordance with the wishes expressed by the Appellants.

89. On the question of proportionality, Mr Jenkins emphasised that he was not seeking to raise issues as to the default surcharge regime as such, but simply to argue that failure to take into account the Appellants' allocations involved applying the system in a way that was harsh and unfair. On the basis of our finding that there was no evidence of any failure by HMRC to allocate payments in respect of existing debts

in accordance with the wishes expressed by the Appellants, the issue of proportionality as raised by Mr Jenkins does not arise.

90. On the question of reasonable excuse, the submission for the Appellants is that on the facts, they had a reasonable excuse for not paying their VAT on time because of their financial situation; the insufficiency of funds was due to events which were wholly outwith their control, and could not possibly have been foreseen.

91. As indicated above, it is for the Appellants to establish on the facts that there was a shortage of funds, and that this was caused by reasonably unforeseeable or unavoidable events outside their control. For HMRC, Mrs Carroll submitted that the Appellants had failed to establish that they had insufficient funds; they had provided no analysis of the bank statements contained in the bundles to demonstrate this. If the Appellants transferred funds between each other to pay other liabilities, this was not a reasonable excuse for failure to pay their VAT on time.

92. As the central issue raised for the Appellants was their financial circumstances and the effect which the conduct of their bankers had on those circumstances, we address this question before considering the nature of the evidence provided.

93. As noted above, the first Business Loan Agreement between QN and Lloyds TSB required QN within 30 days to provide evidence of having entered into a hedging transaction. In an email to QN dated 15 October 2007, Declan Marriott of Lloyds TSB stated, in relation to the £5.25 million collar with Allied Irish Bank:

> "As there is only a year and a half left of this trade, and both the Cap and the Floor are a fair way away from the current market rate, there is limited value in the collar. If you are lucky AIB may pay you a few thousand to cancel the contract, however it is more likely that they will terminate the Collar for zero cost. I think the important thing with this one is that they don't try and charge you for cancelling the contract, as the chance of LIBOR dropping below 3.5% in the next 18 months is basically zero!"

94. We did not have our attention drawn to any evidence setting out the precise history of the hedging transactions entered into by QN, but as noted above, on 26 October 2007 it entered into an interest rate cap agreement with Lloyds TSB Financial Markets. It appears to us that Mr Marriott's comments were addressed to a pre-existing agreement involving another financial institution, rather than any arrangement being considered in relation to the financing then being entered into with Lloyds TSB.

95. In their Additional Bundle, the Appellants provided a "Schedule of Additional Interest Paid". This shows the months from November 2007 to December 2012, the LIBOR interest rate for each of those months, the normal interest at LIBOR plus 1 per cent, the total interest paid, and the effect of the interest rate cap agreement, ie the reduction or increase in the normal interest as a result of swap payments. For the months from November 2007 to November 2008 inclusive, the effect was a reduction in the interest payable. From December 2008 onwards, there was an opposite effect;

the interest increased. The Appellants calculated the total benefit over the period as £145,963.69 and the total loss over the period as £2,054,699.81, giving a net loss figure of £1,908,736.12.

96. For November 2007, the LIBOR rate was 4.64 per cent, for December 2007 4.46 per cent, and for January 2008 it was 4.22 per cent. It fell to 2.85 per cent in February 2008, and then fluctuated between 2.71 per cent in March 2008 and 3.96 per cent in October 2008. Thereafter it fell (with one exception) to 2 per cent or below, and at times less than 1 per cent, over the rest of the period to December 2012.

97. In relation to these movements in rates, we do not regard Mr Marriott as having attempted to predict LIBOR rates for the purposes of the interest rate cap agreement; the relevant section of his email was headed "£6m Collar with Allied Irish Bank (Cap at 6.50%, Floor at 3.50%". The context of his comments quoted above is clear; the question was that of QN extricating itself from its then existing hedging commitments.

98. In their Consolidated Grounds of Appeal, the Appellants stated in relation to reasonable excuse:

> "1. The Appellants contend that they have reasonable excuse for the irregularities which gave rise to the default surcharges at issue in these appeals.
>
> 2. The Appellants' financial circumstances were such that, at the material times, there were insufficient funds to meet ongoing liabilities. Moreover, the adverse financial straits in which the Appellants found themselves were directly and unequivocally brought about by the improper conduct of the Appellants' bankers at the material times.
>
> 3. The Appellants had relied upon the advice and prudent fiscal care of their bankers in seeking to administer mortgages held against their various properties. However, as the Appellants will show by way of detailed witness evidence, this advice was of such poor quality and the conduct of the bank was so careless that the Appellants were driven to the brink of financial ruin.
>
> 4. Moreover, the Appellants will show by way of detailed evidence that these events were wholly out-with [*sic*] their control, and could not possibly have been foreseen.
>
> 5. The Appellants will show, by way of detailed evidence that at the material times, and in respect of the mortgages in question, the bank acted improperly and to the detriment of the Appellants' interests and financial well-being.
>
> 6. Such actions on the part of the Appellants' bankers led directly to the defaults in question.
>
> 7. The Appellants are well aware that mere insufficiency of funds does not, in the normal run of circumstances, constitute a reasonable excuse for default. However, that being said, it is the Appellants' case that when view in the round, and taking all of the attendant circumstances

> into consideration, there is a reasonable excuse for the defaults which are the subject of these appeals."

99. We have emphasised the comment of the Tribunal in *Electrical Installations Solutions Limited* that this is an area in which every case turns on its own facts. Mrs Carroll referred to *European Development Company*, and submitted that the position in the present case was the same; the signature page of the 2010 loan agreement referred to the absence of advice given by the bank. The Tribunal in *European Development Company* referred at [14] to the statement by the witness that the appellant companies had not fully understood the implications of the interest rate hedging agreement, and continued:

> "A prudent businessman looking at hedging agreements, for in excess of £21 million for any period, let alone a four year period, should most certainly have taken professional independent advice as to its implications. The documentation is complicated, technical and less than transparent even to the financially literate layperson. That alone should have alerted them to the need to take appropriate advice. He stated that they did not take advice. The fact that interest rates could subsequently fall but the appellants would be tied into the agreements is certainly a risk that a competent professional advisor would have highlighted. It is one that should have been considered and very carefully weighed in the balance. It appears that it was not. Mr Wallace told the Tribunal that they had not understood that interest rates could fall. That is the whole point of hedging arrangements. Although they can be complex instruments the underlying concept is simple. The borrower enters into the agreement to minimize exposure to interest rate rises and the lender the reverse."

100. The signature page of the 2010 loan agreement entered into by QN contains the following acknowledgment:

> "We also acknowledge that . . . and, in deciding to accept your offer and to proceed with any transaction or project for which the Facility had been sought, you have no duty to give us advice and we have not relied on any advice given by you or on your behalf."

101. A slightly differently worded acknowledgment on the part of QN was contained in the 2007 Business Loan Agreement, but the effect of the acknowledgment was the same.

102. In his second witness statement dated 25 March 2015, Mr Ahmed said:

> "I did not consider taking additional advice but did compare products offered by other banks."

103. Mrs Carroll referred us to other paragraphs of the decision in *European Development Company*. At [18], the Tribunal commented:

> ". . . They were undoubtedly at a disadvantage, as Ms McIntyre pointed out, but that was the funding structure that they had chosen. Therefore it is not appropriate to look at the difference between the interest rates available in the general marketplace and that which they

> were paying. Had interest rates in the market place risen, they would have been sheltered from the full impact of that. The inherent risk in any "fixing" of interests [*sic*] rates is that the market will move; that is precisely why such instruments are sold."

104. Mrs Carroll submitted that the Appellants in the present case were aware that interest rates could rise as well as fall.

105. At [20], the Tribunal said:

> "The appellants may well be taking, or considering taking legal action against the Bank in relation to potential mis-selling of the hedging agreements but that is not a matter for this Tribunal. The appellants chose to enter into the funding arrangements and they should have been aware of the terms and implications from the outset."

Mrs Carroll referred to the evidence that claims were being made against banks in the present case, and submitted that, as in *European Development Company*, this was not a matter for the present Tribunal.

106. The final paragraph of that decision referred to by Mrs Carroll was [45], in which the Tribunal said:

> "In summary, this problem of cash flow started before the economic downturn, although subsequently it was slightly affected by the economic downturn and was aggravated by an increase in interest rates by 1.75% taking the rate to 9.09%. Changing interest rates are a normal and everyday hazard of business. The appellants were not alone in having entered into a hedging agreement. It is, or should be, a calculated risk and a not unusual business risk. The fact that cheaper money was available elsewhere is not the point. The appellants had freely entered into the financing agreements. They knew precisely what their finance costs would be and how that would be collected. It was wholly foreseeable from the outset and the rate did not change after early 2009. In any event, when the increase was first applied it did not appear to present a problem and their banking problems apparently only started some months later."

107. Mrs Carroll referred to the Schedule of Additional Interest Paid, and to the benefit which QN had obtained for the first 13 months of the interest rate cap agreement. She submitted that from March 2010, the payments were entirely foreseeable; the Appellants knew what the payments would be.

108. We accept Mrs Carroll's submission, and find that the extra interest payments were broadly predictable. They were in a range between the maximum of £49,258.16 in March 2010 and the minimum of £40,405.40 (in September 2012).

109. In his first witness statement dated November 2013, Mr Ahmed stated:

> ". . . no-one could have anticipated such a recession with interest rates dropping so low."

In the previous paragraph of his statement, he said:

> "The mortgage terms meant that, as interest rates fell, our repayments fell, just as in any mortgage tracked to the base rate. The issue for us was that, whatever amount the base rate fell below 4.5%, our interest rate increased by that amount above the 4.5 level. So, as interest rates tumbled during the recession, our repayments increased just as quickly."

110. The "floor rate" of 4.5 per cent to which Mr Ahmed referred was that set in the Cap/Floor Collar Transaction with Lloyds TSB Financial Markets dated 27 February 2008. This was part of a complex combination of agreements (the effects and nature of which were not explained to us). We note that the floor rate was in excess of the 3.5 per cent to which Mr Marriott referred in his email concerning the possible termination of the Collar with Allied Irish Bank.

111. In a document dated 12 November 2007 amending and restating the original confirmation for the interest rate swap transaction, there was a page which Aftar Ahmed and Qamar Ahmed signed by way of confirmation. By signing, they gave the following acknowledgment:

> "We are aware and accept that Lloyds TSB Bank plc has an option to terminate the transaction on the Optional Termination Date without needing any reason for doing so and without any termination payment being payable. We understand that Lloyds TSB Bank plc is likely to exercise this option if the fixed rates at that time for the period from the Optional Termination Date are higher than the Fixed Rate quoted above. We also acknowledge that if such fixed rates are lower than the Fixed Rate quoted above and Lloyds TSB Bank plc elects not to exercise the option then we will continue to be bound by the terms of the transaction. This is acceptable to us because we are aware that as a result of Lloyds TSB Bank plc having this option the Fixed Rate is lower than the rate that would otherwise apply."

112. We regard the latter sentence as significant. As in *European Development Company*, QN entered into complex arrangements to protect itself from interest rate fluctuations and to make its financing costs predictable. The variation in interest rates was, as Mr Ahmed indicated in the second passage quoted above from his first witness statement, balanced so that the reduction in LIBOR rate would be offset by additional interest payable pursuant to the swap arrangements. It does not appear appropriate to compare the cost of these arrangements with general LIBOR rates, as the whole point of the arrangements was to fix the interest liability within the specified range.

113. As a result, we do not find that the Schedule of Additional Interest Paid assists us in determining the question whether the Appellants had a reasonable excuse for their failure to pay various amounts of VAT by the respective due dates.

114. We acknowledge that, as the Tribunal said in *Electrical Installations Solutions Limited*, each reasonable excuse case turns on its own facts. The facts of the present case are not identical to those in *European Development Company*, but the principles to be derived from that decision are equally applicable to the present case. We accept Mr Jenkins' submission that earlier decisions relating to the present Appellants are of

little assistance in the context of these appeals, as a default in one VAT period is to be considered in the context of the circumstances during that period. We therefore take no account of those earlier decisions.

115. We find that the directors of QN, as experienced businessmen, entered into the financing arrangements in order to ensure that QN was protected from fluctuations in interest rates. Mr Ahmed did not choose to take independent advice before those arrangements were entered into, and we accept that he may not have anticipated the changes in interest rates. Despite this, the liabilities in respect of the financing were broadly predictable. We do not consider that the liabilities pursuant to the financing arrangements amount to a reasonable excuse of the nature described by Donaldson MR in *Steptoe* in the passage cited above.

116. As s 71(1) (a) VATA 1994 provides that an insufficiency of funds to pay any VAT due is not a reasonable excuse, the only way of escaping its effect is for an appellant to establish circumstances falling within the "*Steptoe* principle". The only circumstances relied upon by the Appellants in the present case are those relating to the bank financing arrangements. On the basis of our conclusion that these do not amount to a reasonable excuse, we find that there is nothing else in relation to the Appellants' financial circumstances which can be regarded as within that principle.

117. If our conclusion is correct, the question raised by Mrs Carroll concerning the extent to which the Appellants had established on the evidence that they had insufficient funds to make the VAT payments becomes of no significance to the outcome of these appeals. In case for any reason our conclusion proves to be incorrect, we consider the question of the evidence of insufficiency.

118. The complicating factor is that, for VAT purposes, four different entities are involved, each with its own liabilities in respect of VAT. We accept the consequences of Mrs Carroll's submission; each of the Appellants must individually demonstrate that as a result of its financial position, it is unable to make payments of its VAT by the due date.

119. In oral evidence, Mr Ahmed explained that Lloyds TSB had viewed the Appellants as one portfolio, and had made the loan to the group. Security had been taken over all the Appellants' assets, with all the Appellants being expected to contribute.

120. We accept this evidence, and in reviewing the evidence since the hearing, we have been able to establish by means of the copy accounts included in the evidence that three of the Appellants are wholly-owned subsidiaries of QN. As mentioned above, the loan agreement referred to QN and its "subsidiary undertakings".

121. We explained at the conclusion of the hearing that, given the large volume of the documentary evidence, we would not undertake to examine any part of it except to the extent that our attention had been drawn to it in the course of the parties' arguments. A very substantial part of the evidence consisted of copy bank statements for all the Appellants, amounting to over 2,750 pages. As Mrs Carroll commented, the

Appellants provided no analysis of these bank statements. In the absence of any such analysis, we do not regard them as of any assistance in determining the respective financial positions of the Appellants for the periods under appeal.

122. Mr Jenkins submitted that the accounts of the Appellants provided evidence as to their financial position. We note that for each of the years 2008 to 2011 inclusive (the period covered by the copy accounts included in the evidence) QN on a group basis, and Aylesbury and Swanfield individually, incurred losses as shown by their profit and loss accounts. However, Wrexham's accounts showed profits for each of those years, although there were carried-forward deficiencies in its profit and loss reserve. There are no details given in the accounts of QN's individual profit and loss account, as the note under the profit and loss account for QN states:

> "The company has taken advantage of section 408 of the Companies Act 2006 not to publish its own Profit and Loss Account."

123. A further complication is that there have been inter-company advances as between group members; the nature and timing of these advances is not clear on the face of the documentary evidence. Without some more detailed explanation, we would not find ourselves able to conclude on the evidence that each of the Appellants was not in a financial position to make its VAT payments on time. Although on the face of the accounts three of the Appellants made losses, this does not establish that they had insufficient funds to make their VAT payments. More information as to the Appellants' respective cash flow positions at the relevant times would be necessary in order to establish whether they were unable to pay what was due.

124. In her skeleton argument, Mrs Carroll drew attention to substantial loans which had been made to directors; these loans appeared to have contributed to any shortage of funds which may have arisen. Mr Ahmed explained that these loans were mainly to his father, who had been involved in expensive and ultimately unsuccessful litigation in Pakistan, which had then been enforced in the courts in the UK, but subject to partial success for him in the Court of Appeal, and had therefore needed to be provided with funds to meet his liabilities. Mr Ahmed's father had no assets and consequently the loans to him were not recoverable.

125. The question of those loans is significant; the 2011 accounts for QN show the group figure under "Debtors" for Directors' current accounts to be £1,659,582. To make a proper assessment of whether the loans to Mr Ahmed's father affected the ability of the respective Appellants to make their payments of VAT, it would be necessary to have further evidence concerning the costs of the litigation and the obligations arising from it.

126. In a simple case involving a single trading entity, there should be little difficulty in establishing whether there is an insufficiency of funds. However, the present case is not a simple one. For the Tribunal to be satisfied that each of the Appellants, as a separate taxable person, has suffered an insufficiency of funds it is necessary for the Appellants to demonstrate this clearly by reference to supporting evidence. This requires appropriate analysis to show the cash flow situation for each Appellant in respect of each of the defaults under appeal. In the absence of such analysis of the

relevant evidence, we find ourselves unable to establish to the necessary extent that the respective Appellants did suffer insufficiencies of funds at the relevant times.

127. In her skeleton argument, Mrs Carroll raised a separate issue in the following terms:

> "[HMRC] have issued separate default surcharge notices because the Appellants have failed to pay and submit their returns on time and have become liable to a surcharge under the legislation."

128. Mr Jenkins submitted that HMRC had made no reference in the main points of their Statement of Case to the late submission of returns, although further into that document it had emerged as a side issue. Up until the consolidated Statement of Case was served on 24 October 2014, the issue of late returns had not been relied on in any of the correspondence during the evolution of the dispute. He argued that as the point had never been raised before, it was too late now to find an additional ground of objection to the Appellants' appeals.

129. We do not accept the submission that the point was a side issue. In the section of their Statement of Case entitled "HMRC's case", which follows the section "Appellants' Contentions", HMRC included a paragraph 5.6 in virtually identical terms to the passage in Mrs Carroll's skeleton argument set out above. This paragraph was at a point before the detailed analysis of the three issues of reasonable excuse, incorrect allocation of payments and proportionality. In our view, this provided clear notice, given well in advance of the eventual hearing, that the question of lateness of returns could be in issue.

130. We are therefore satisfied that it was open to HMRC to raise questions concerning lateness of returns, and that the Appellants had not been precluded from relying on s 59(7)(a) VATA 1994 if they could provide evidence that returns which were received late by HMRC had been despatched at such a time and in such a manner that it was reasonable to expect that they would be received by HMRC within the appropriate time limit.

131. As we have concluded that the Appellants' payments of VAT for the periods in question were made late and the Appellants had no reasonable excuse for the late payment, they were in default in this respect and the question of late returns does not need to be considered in addition to that of late payment. It is sufficient for the purposes of s 59(1) VATA 1994 that there has been a default in relation to payment; there is no separate default surcharge in such circumstances where additionally the return has been submitted late. If we had found that the Appellants had a reasonable excuse and therefore were not liable to default surcharges in respect of late payment, it would have become necessary to consider whether the Appellants were liable to default surcharges for the relevant periods as a result of late submission of their VAT returns.

132. We leave it to be considered in some other case involving different facts whether at a late stage in the appeal process HMRC, having relied solely on default in

respect of payment, can be precluded in any way from relying in the alternative on default relating to late submission of returns.

133. In her cross-examination of Mr Ahmed, Mrs Carroll referred to QN's VAT return for period 02/10. Mr Ahmed had stated in his first witness statement that this and other returns were timely. According to HMRC's records, the return had been received on 6 April 2010, after 31 March 2010, which was the due date. Mr Ahmed replied that to the best of his recollection, the return had been sent in on time.

134. Without some form of additional evidence to support this assertion, we find that this statement lacks credibility. We note that the return was dated 30 March 2010. This was five years before the hearing; we are not satisfied that Mr Ahmed would have had any basis for a clear recollection, particularly as the paper returns for each of the Appellants made before the change to the electronic reporting system from April 2010 onwards were signed by Aftab Ahmed rather than by him. He made no reference to surrounding circumstances to indicate the reason for his recollection.

135. In the light of our findings as to lateness of the payments, we make no further findings concerning lateness of returns.

Outcome of the appeals

136. The outcome of the Appellants' appeals against the various default surcharges listed above is that they are dismissed. However, Mrs Carroll requested amendment of the amounts of the following surcharges:

(1) Wrexham – 06/12 surcharge. As certain payments had originally been allocated to default surcharges but, following appeals by Wrexham against those surcharges, had been reallocated, the surcharge is to be reduced from £11,786.54 to £8,411.51.

(2) Wrexham – 09/12 surcharge. Certain sums received by HMRC on 20 September 2012 did not have an accompanying identifying reference number. The amounts had been retained in a suspense account until the correct head of duty could be identified. The amounts had then been transferred into the VAT account of the Appellant. This transfer had not taken place until September 2013, after the surcharge had been calculated and issued. As the monies had originally been received just prior to the end of the 09/12 period, HMRC had treated this in the particular instance as receipt of the monies by the due date. The amount of the surcharge was reduced from £12,766.58 to £11,474.15.

(3) Swanfield – 02/11 surcharge. As certain payments had originally been allocated to default surcharges but, following appeals by Swanfield against those surcharges, had been reallocated to 02/11 and had been made prior to the due date for that period, the surcharge is to be reduced from £3,896.38 to £3,836.38.

137. We accordingly determine the default surcharges for the above periods at the reduced figures as set out in the preceding paragraph.

138. Subject to those revisions, we dismiss all the Appellants' appeals.

Right to apply for permission to appeal

139. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 9 June 2015