**Appeal number: TC/2015/02307**

***VAT – Default Surcharge; proportionality; Value Added Tax 1994 s59, penalties for inaccuracies in VAT returns; Finance Act 2007, Schedule 24; appeal allowed in part***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**JSJ METAL RECYCLING LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE J GORDON REID QC FCIArb**
**IAN MALCOLM BSc, BA, JP**

**Sitting in public at George House, 126 George Street, Edinburgh on 14 March 2016**

**Martin Kaney, VAT consultant, for the Appellant**

**Elizabeth McIntyre, Officer of HMRC, for the Respondents**

DECISION

## Introduction

1. This is a Default Surcharge and penalty appeal. The amount at stake is £40,518 (£21,595 + £18,923), being calculated default surcharges under the VAT regime and statutory penalties in respect of incorrect returns.

2. A Hearing took place at George House, Edinburgh on 14 March 2016. The appellant was represented by Martin Kaney, a VAT consultant. He led the evidence of Jasperit Oberoi, one of the appellant's directors. Mrs Elizabeth McIntyre appeared on behalf of the respondents (HMRC). She led the evidence of Robert Payne, the HMRC officer dealing with this matter. A bundle of documents was lodged. By agreement, HMRC led their evidence first.

## Statutory Background

*The Default Surcharge Regime*

3. The default surcharge regime is summarised in *Total Technology (Engineering) Ltd v HMRC*,[1] and more recently in *HMRC v Trinity Mirror plc.*[2] *Total Technology*, in turn, referred to an earlier decision, *Enersys Holdings UK Ltd v HMRC*[3] where the default surcharge regime was also described.[4] *Enersys*, which was decided in favour of the appellant on the ground of proportionality, was appealed to the Upper Tribunal. The appeal was subsequently withdrawn.

4. In essence, the default surcharge regime, as set out in ss59 and 59A VATA 1994, establishes a system of civil penalties for defaulting traders who delay in the submission of a return or payment. There is no penalty for the first default but it brings the trader within the regime. He receives a surcharge liability notice which warns him that further default will lead to a penalty. A second default within a year of the first (the surcharge period) leads to a penalty of 2% of the net tax due. Further defaults lead to a penalty at an increased rate of 5%, then 10% and finally to 15% of the net tax due. If a trader does not default for a whole year, he is removed from the regime. If he thereafter defaults, the whole process starts again.

5. There is no prescribed maximum penalty. The Tribunal has no power to mitigate the penalties imposed. However, if the return or the VAT is timeously despatched, or there is a reasonable excuse for the return or VAT not having been so despatched, the trader is treated as not being liable to the surcharge (s59(7)). An insufficiency of funds to pay any VAT due is not a reasonable excuse, although some underlying

[1] [2013] STC 681 paragraphs 7-9

[2] [2016] STC 352 paragraphs 9-16.

[3] [2010] UKFTT 20 (TC)

[4] paragraphs 14-16, 18-25

cause of the insufficiency may be; generally, too, reliance on a third party is not a reasonable excuse (s71(1)). Finally, it should be noted that the amount of the penalty levied is not affected by the extent of the default. Thus, a payment in default by one day attracts the same penalty as a payment 100 days late.

*Finance Act 2007, Schedule 24 Penalties*

6. Insofar as relevant and material for present purposes, this penalty regime provides *inter alia* that a penalty is payable by a trader where a VAT return submitted contains a careless or deliberate inaccuracy which leads to an understatement of a liability to tax or an inflated claim to repayment of tax.[5] A careless inaccuracy is due to a failure to take reasonable care.[6] A deliberate inaccuracy may be concealed or *not concealed.*

7. The amount of a penalty depends primarily on its category and the potential lost revenue (PLR). Here, we are concerned with category 1 (that is to say a domestic rather than an offshore matter).[7] The (PLR) is the additional amount payable to correct the inaccuracy.[8] If the inaccuracy is careless, the standard rate of the penalty is 30% of the PLR; if it is deliberate but not concealed it is 70%.

8. Paragraph 9 provides for reductions in penalties where an inaccuracy is disclosed. It is disclosed where HMRC are told about it,[9] are given reasonable help in quantifying it,[10] or allowed access to records to ensure that the inaccuracy is corrected.[11]

9. Disclosure may be *prompted* or *unprompted*. It is unprompted if made at a time when the trader making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy. Otherwise, the disclosure is *prompted*.[12]

10. Where the disclosure made relates to a careless inaccuracy and is unprompted the standard penalty of 30% of PLR must be reduced and may be reduced down to zero for unprompted disclosure; but may only be reduced to 15% of PLR for prompted disclosure. The reduction must reflect the quality of the disclosure.[13] Quality includes *timing, nature and extent.*[14]

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[5] Paragraph 1

[6] Paragraph 3(1)

[7] Paragraph 4(1) and 4A(1)(a)

[8] Paragraph 5(1)

[9] Paragraph 9(1)(a)

[10] Paragraph 9(1)(b)

[11] Paragraph 9(1)(c)

[12] Paragraph 9(2)

[13] Paragraph 10(1)

[14] Paragraph 9(3)

11. Where the disclosure made relates to a deliberate inaccuracy and is unprompted, the standard penalty of 70% of PLR must be reduced and may be reduced to 20% for unprompted disclosure; but may only be reduced to 35% of PLR for prompted disclosure. The reduction must reflect the quality of the disclosure.

12. HMRC may reduce the penalty if they think it right because of special circumstances.[15] Special circumstances do not include ability to pay or the fact that PLR from one taxpayer is balanced by a potential overpayment by another.[16] HMRC may stay the penalty or reach a compromise in relation to proceedings for a penalty.[17] Beyond that, *special circumstances* are not defined.

13. There are also statutory powers to suspend a penalty for careless inaccuracies[18] but we are not concerned with suspension.

14. A trader may appeal to the Tribunal against HMRC's decision that a penalty is payable,[19] against the amount of the penalty,[20] and in relation to a decision not to suspend the penalty or the conditions of suspension.[21] The Tribunal may affirm or cancel HMRC's decision or substitute a different decision being one that HMRC had power to make eg reducing further, within the prescribed limit, the standard percentage.

15. We also have limited power to interfere with any decision HMRC may make in relation to special circumstances and suspension.[22]

## Facts

*General nature of business*

16. The appellant carries on business at Sheffield as suppliers of metal particularly exporting it to India and the Far East. It also has premises in India. It has been in business for about seven years. It has three directors. It has a large turnover. Between about 2012 and 2105, its average annual turnover was between £16m-£18m. It buys scrap metal. It deals only in ferrous metals, which are of low value. They therefore turn over a high volume of such metal selling it in the UK and abroad.

17. The correspondence discloses that the appellant asserts that its essential business model is that it pays 20% (VAT) on its purchases, and when the goods are exported,

[15] Paragraph 11(1)

[16] Paragraph 11(2)

[17] Paragraph 11(3)

[18] Paragraph 14

[19] Paragraph 15(1)

[20] Paragraph 15(2)

[21] Paragraph 15(3) & (4)

[22] Paragraph 17(3) & (4)

no VAT is charged on the sales. Accordingly, VAT has to be reclaimed and received in order to sustain cash flow. The refusal of or the delay in authorising repayment claims seriously affects their cash flow and the financial stability of its business.

18. The correspondence discloses that the appellant and its accountants, in general, responded promptly to requests for information and provided information about various companies with which the appellant traded and in respect of which HMRC had doubts or queries. Its accountants, Parkins CA, Rotherham, made significant efforts to deal with HMRC's enquiries. Mr Payne made several visits to the appellant's premises and was given access to the appellant's records.

19. On 6 November 2012, HMRC called at the appellant's premises to levy distraint on its goods in respect of a sum of £18,258.20. The detail of this was not the subject of evidence from which we can or need make further findings of fact.

*VAT History*

20. The appellant, at least during the periods with which we are concerned, rendered monthly VAT returns.

21. In their returns for 03/12, 04/12, and 05/12, the appellant made substantial repayment claims. By letter to the appellant dated 9 May 2012, HMRC intimated that the appellant's return for the period ended 31 March 2012 (03/12), which made a very large repayment claim, had been selected for verification. The background to the verification was the possibility that the appellant was involved in MTIC fraud. The appellant operated in the metal trades sector of business in which MTIC fraud occurred from time to time. The letter was lengthy (although probably in a standard format). It explained that the verification process was detailed and complex and could take a considerable period of time. It mentioned the possibility of repayment on a *without prejudice* basis subject to the provision of security such as a bank guarantee.

22. An HMRC officer visited the appellant's premises on several occasions, examined certain records and in due course received further information and records from the appellant.

23. By letter to HMRC dated 8 June 2012, the appellant pointed out that the delay in processing its repayment claim for the period ending 03/12 and 04/12 was placing it under severe commercial and financial pressure. It sought release of the repayment claims on a *without prejudice* basis. HMRC responded by drawing the appellant's attention to the requirement for security through a bank guarantee. By this stage the repayment claim for the period 05/12 was also the subject of investigation and verification.

24. HMRC raised further queries in a letter dated 18 June 2012 and the appellant provided an immediate and detailed explanation in its letter dated about 19 June 2012.

25. The appellant emailed HMRC on 4 July 2012 requesting an update and expressed the hope that they now had all the paperwork they needed. The delay in repayment was said to be having serious repercussions on its business and it was struggling to

continue trading. This point was underlined in a letter to HMRC, dated 17 July 2012 from the appellant's accountants (Parkins). They pointed that the appellant's main business was exporting scrap metals charging VAT at a zero rate, and that it was not able to provide security to enable repayment to be made on a *without prejudice* basis. They also suggested *inter alia* that HMRC should identify acceptable traders from whom the appellant purchased metal and in respect of which input tax would be repayable without the delays being caused by the verification process.

26. Further correspondence ensued. HMRC pointed out that the appellant had purchased goods as part of a chain of transactions in which a trader had defaulted leading to loss of revenue. They said that enquiries were continuing. Parkins pointed out that the appellant was reputable, that its first repayment claim had been authorised after an HMRC inspection; they were an expanding company that was creating employment; and that special investigations by HMRC were not intended to close down such a company.

27. The appellant's return for the period 09/12 was late. It thus entered the default surcharge regime. No surcharge was levied at that stage or in respect of the next return that was rendered late (11/12).

28. By letter to the appellant dated 28 November 2012, HMRC authorised a repayment claim of £84,456.57 for the period 08/12. Outstanding VAT of £22,030.14 for the period 04/09 and outstanding corporation tax of £198.93 was set off and the net sum of £62,227.50 released to the appellant in early December 2012.

29. The returns from 12/12 to 4/13 were also all rendered late, but no surcharge was levied.

30. In early April 2013, the appellant's accountants again raised the question of the release of the repayment claims. They also suggested agreeing in principle procedures which would enable the appellant to satisfy HMRC that its repayment claims were genuine and should be authorised.

31. By letter to the appellant's accountants (Parkins) dated 26 April 2013, HMRC stated that they were still not in a position to authorise the release of the three repayment claims (03/12, 04/12 and 05/12). A meeting was arranged to take place between Mr Oberoi and Mr Payne on 9 May 2013 at the appellant's premises, to enable Mr Payne to uplift business records from 1 November 2012 onwards. The appellant's accountants intimated to HMRC that they would attend the meeting and requested a *deal template.*

32. The monthly returns for the periods 05/13 to 02/14 were all rendered after the due date. Where tax was due (as in most periods) it was paid after the due date. Default surcharges were imposed as follows:-

| | | |
|---|---|---|
| 05/13 | 5% | £1,617.22 |
| 06/13 | 10% | £2,102.35 |

| | | |
|---|---|---|
| 07/13 | 15% | £5,394.89 |
| 08/13 | 15% | £1,004.70 |
| 09/13 | 15% | £2,570.36 |
| 10/13 | 15% | £5,329.50 |
| 11/13 | 15% | £00 |
| 12/13 | 15% | £3,313.62 |
| 01/14 | 15% | £00 |
| 02/14 | 15% | £262.59 |
| | **Total** | **£21,595.23** |

33. Throughout, no Time to Pay agreement under FA 2009 s108 was entered into or sought.

34. Meanwhile, by letter dated 11 June 2013 HMRC authorised the release of the repayment claims for the periods 03/12 (£221,645), 04/12 (£65,341) and 05/12 (£84,456 - subsequently corrected to £170,440), without prejudice to post-payment verification that might be undertaken by HMRC. In that letter Mr Payne recorded his thanks for providing him with *all the official and supplementary evidence which is required in order to meet the conditions for zero-rating your exports.* The letter also explained in some detail the nature of the verification enquiries undertaken and the results of his supply chain enquiries. He noted that he had traced 95 of the appellant's stock purchases over the three periods under verification to four defaulting traders earlier in the supply chain; loss of VAT was said to exceed £244,483.

35. Mr Payne also noted that the appellant operated commercial relationships with well-established metal dealers; that the metal trades sector was a market place where VAT fraud was perpetrated; that in May 2012, the appellant's due diligence structure was not robust, although the appellant had declared its desire to improve it. He stated that such improvements could and should be made. He concluded by recording his appreciation for the assistance which the appellant had given him throughout the duration of the verification process; and observed that during his verification he had identified various errors in both the appellant's and HMRC's favour, in respect of which a tax assessment would be raised.

36. In a subsequent letter to the appellant dated 26 June 2013, HMRC stated that the repayment was being released without prejudice to any action that might result from future enquiries, and was subject to any outstanding VAT and other debts.

37. According to the HMRC ledger printout produced, the sums of £65,341.14 and £170,440.03 were credited to the appellant's account on 2 July 2013 and the sum of £221,645 credited on 15 October 2013. However, Mr Oberoi stated in evidence and we have no reason to doubt it, that the repayment sums were released to the appellant at some point in August 2013.

38. Following the issue of default surcharge notices, the appellant requested a review of periods 04/13, 05/13, 07/13 and 08/13. HMRC responded by requesting further information, by letter dated 17 December 2013. There does not appear to have been any response to that letter and the surcharge liability was confirmed by HMRC letter dated 13 January 2014.

39. By letter dated 27 January 2014, HMRC notified the appellant of 15 occasions between periods 08/11 and 11/13 when output tax of £9,489 was under-declared, and 15 occasions between periods 07/10 and 6/13 when input tax of £47,398 was over-declared or non-deductible, producing an outstanding balance of £56,887 due to HMRC. The letter followed correspondence and discussions between HMRC with Parkins at which agreement on all outstanding inaccuracies was eventually reached. The appellant and his accountants fully co-operated with HMRC. An assessment of outstanding VAT in the sum of £56,887 plus interest of £2,628.17 was duly issued (in total £59,515.17).

40. By letter dated 31 July 2014, the appellant, through Parkins, requested a review of the default surcharges issued. The argument then was that the appellant had a reasonable excuse for the defaults. However, by letter dated 24 September 2014, the default surcharges were upheld.

41. By letter to the appellant dated 2 December 2014, HMRC intimated the intention to charge statutory penalties for the errors detected in the returns specified in their letter dated 27 January 2014 (paragraph 40 above). A schedule to the letter dated 2 December 2014 identified the amount of each penalty. They were set out in two groups.

42. The first group related to duplicated input tax claims and various non-deductible input tax claims relating to insurance and property rental expenses. These were said to be *careless* inaccuracies disclosed by *prompted* disclosure. The penalty imposed for each monthly inaccurate return is specified in a table. The total reduction given was 80%. This was applied to the difference between the minimum and maximum percentage (15%; [30-15]) to produce a percentage reduction of 12% (80% of 15%). 12% was deducted from 30% to produce an overall penalty percentage of 18% which was applied to the PLR.

43. The second group related to under-declared output tax. These were said to be *deliberate* inaccuracies disclosed by *prompted* disclosure. The total reduction given was 100%. This was applied to the difference between the minimum and maximum percentage (35%; [70-35]) to produce a percentage reduction of 35% (100% of 35%). 35% was deducted from 70% to produce an overall penalty percentage of 35% which was applied to the PLR.

44. Further reduction for *special circumstances* was considered and rejected in relation to both groups as was the question of *suspension*.

45. A Notice of Penalty assessment was issued on 5 January 2015. It specifies the various penalties for the inaccuracies in returns between the periods 07/10 to 06/13. The total amount levied is £18,923.31.

46. In February 2015, the appellant's accountants raised the question of a repayment supplement being due. By letter dated 3 March 2015, HMRC declined to pay such a supplement. That may not be the end of that matter.

47. Finally, we note that the appellant suffered significant cash flow difficulties before, during and after the verification period relating to the repayment claims. The appellant has been *factoring* its invoices for some years and was doing so before the HMRC verification process began and after repayment was made.

**Grounds of Appeal**

48. In relation to the Penalty Assessments, these should have been calculated taking into account the repayment sums due. Moreover, the disclosures were *unprompted.*

49. In relation to the Default Surcharges, the appellant asserts that, for the 12 month period prior to default, it was in significant credit with HMRC due to withheld repayment claims. Thus the first late return was July 2013 and the surcharges have been calculated incorrectly. *Reasonable excuse* was not argued.

50. These grounds were developed in argument at the Hearing. In particular, a short argument based on the proportionality of the Default Surcharge regime was advanced.

**Issues**

51. In light of the largely undisputed facts, we consider that the principal issues are

1) Whether the inaccuracies relating to input tax were prompted or unprompted, it being accepted that they were careless;
2) Whether the inaccuracies relating to output tax were prompted or unprompted it being accepted that they were deliberate;
3) Whether the default surcharges are *disproportionate.*

**Discussion**

*Penalties*

52. The admitted input/output errors to which these penalties relate occurred over a three year period and amounted to about £56,000 in comparison with an annual turnover of between about £16-18m. This is almost *de minimis.*

53. We have reviewed the correspondence before us. Much of it is concerned with the verification of the appellant's claims for repayment of substantial sums made in its

03/12, 04/12 and 05/12 returns. HMRC began their verification checks in March 2012. It was not until their letter to the appellant dated 11 June 2013 that they authorised repayment in full. Repayment in full was not made until about August 2013 or possibly October 2013.

54. Throughout the period of verification and beyond, the appellant co-operated in full. They provided information promptly. It engaged its accountants, Parkins CA, to assist them; they, in turn, engaged in correspondence and had numerous discussions with HMRC officials. This spirit of co-operation continued notwithstanding the decision to impose penalties for inaccuracies which came to light during HMRC's verification process. It was largely through the accountants that parties were able to agree all the inaccuracies.

55. The background to the HMRC investigations was possible involvement in MTIC fraud. HMRC were eventually satisfied that the repayment claims should be made in full. The appellant had no reason to believe that HMRC would discover the relatively minor inaccuracies they identified in the course of MTIC investigations.

56. In these circumstances, we consider that it would be harsh and unfair to classify the disclosure of the inaccuracies as *prompted*. It seems to us that having regard to the evidence we heard and the correspondence produced, the quality of disclosure was high and was all that could reasonably be expected of the appellant. The evidence does not persuade us to classify these inaccuracies as *prompted*. Accordingly, they should be classified as *unprompted*.

57. In relation to over-declared input tax, the appellant accepted that the disclosure was careless but submitted that the disclosure of the inaccuracies was *unprompted*. We agree having regard to the circumstances set out in the preceding two paragraphs.

58. We hold that these disclosed inaccuracies were careless but *unprompted*, and that the co-operation was 100% and not 80%. The penalty in relation to the first group of inaccuracies (input tax) should therefore be re-calculated. In order to reflect the quality of disclosure the standard percentage should, in our view, be reduced to nil.

59. In relation to the undeclared sales (output tax), Mr Kaney accepted on behalf of the appellant that the inaccuracies were deliberate but submitted that the disclosure was *unprompted*. We agree for the same reasons discussed above. The penalty in relation to the second group of inaccuracies (output tax) should therefore be re-calculated. In order to reflect the quality of disclosure the standard percentage should, in our view, be reduced to the statutory minimum of 20%.

*Default Surcharges*

60. *Reasonable excuse* is not advanced as a ground of appeal. It is therefore unnecessary to consider or identify any specific links between the appellant's substantial repayment claims which were outstanding for over a year and the lateness of numerous monthly returns and the tax declared to be due in terms thereof.

61. The challenge is based on proportionality, pure and simple. The submission for the appellant, as we understood it, was that default surcharges are grossly excessive, outrageous, harsh and unfair in their totality. The purpose of a return, it was said, was to pay the tax. Here, given the substantial repayment claim, there was no tax due. Thus, the outcome, namely liability for all the surcharges, was disproportionate.

62. In the light of this submission, we do not need to discuss in detail the extent of the lateness of the returns or the VAT declared to be due. In general, they were rendered and paid on different dates often several weeks or longer after the due date. We should, however, record that at one stage Mr Kaney suggested that the default surcharge regime should not bite until the repayment claims were released. The effect, if well founded, would be to reduce considerably the cumulative effect of the defaults by postponing the commencement of any charge and reducing the rate of charge from 15% to 2%, then 5% then 10% before finally reaching 15%, which was the rate imposed in relation to the surcharge in respect of period 07/13 and thereafter.

63. Although there was evidence, including the testimony of Mr Oberoi, that the appellant suffered significant cash flow difficulties before, during and after the verification period relating to the repayment claims (which we are prepared to accept), this does not explain or excuse the lateness of the returns (as opposed to payment of the VAT declared to be due). The fact that the appellant has been factoring its invoices suggests other cash flow difficulties over and above those attributable to the verification period. We therefore cannot accept that the start of the surcharge liability should somehow be deferred.

64. There has been much discussion on whether the default surcharge regime or its application to a particular case is disproportionate according to the principles of EU law. The current view of the Upper Tribunal in *Trinity Mirror* (the ratio of which we regard as binding on us) appears to be that the default surcharge regime, viewed as a whole, is a rational scheme.[23] However, it seems that the absence of a maximum penalty means that a proper challenge on the grounds of proportionality cannot be ruled out, although it is unlikely to succeed.[24] The Upper Tribunal has been unable to identify any common characteristics of a case where such a challenge would likely succeed.[25] This leaves the door, if not open, at least ajar, for further challenge by the inventive and the ingenious. *Trinity Mirror* may not therefore be the last word on the subject.

65. We were not addressed in detail on the authorities or what precisely the principle of *proportionality* means and how it falls to be applied in favour of the appellant in this case. We note the recent discussion of proportionality in the context of partner

[23] Paragraph 65

[24] paragraph 66

[25] Paragraph 66

payment notices and Convention rights in *Rowe v HMRC*[26], where it is observed that tax measures are seen as entitled to particular deference.[27]

66. Having regard to the decision of the Upper Tribunal in *Trinity Mirror,* and especially paragraphs 66-72, there is no material before us which would entitle us to conclude that the surcharge imposed on the appellant should be classified as disproportionate. At the most general level, the bulk of the surcharge liability was incurred at or after the repayment claims were released.

67. In particular, we resist the temptation to carry out a comparative exercise based on the appellant's turnover or other financial circumstances. Nor do we consider it appropriate to analyse and compare the figures in *Trinity Mirror* or the other default surcharge cases we have mentioned. Such an arithmetical approach received much criticism in *Trinity Mirror*.[28] We have identified no exceptional circumstances that could render this surcharge disproportionate (within either EU or Convention jurisprudence)[29].

68. While there are or may be widespread misgivings about the absence of any correlation between the period of delay and the magnitude of the penalty, between the gravity of the *offence* and the amount of the penalty and the fact that delays in the accounting for and payment of other taxes allow for such correspondence and for mitigation, and sometimes impose a maximum penalty, all as discussed in *Enersys,* these factors seem to us now to be superseded by the tests set forth in *Trinity Mirror* at paragraph 63 but subject to the wholly exceptional case with, as yet, unidentified characteristics (paragraph 66).

69. *Trinity Mirror* does not state *Enersys* was wrongly decided (see paragraph 47). Instead, *Trinity Mirror* emphasises the principle of fiscal neutrality; and what underlies that principle which according to the Upper Tribunal includes the accounting for tax on a timely basis (paragraphs 59, 60, and 65). There is nothing to assist the appellant in the approach of the Upper Tribunal, which we are bound to follow, or in its facts or those of *Enersys*, or *Total Technology*.

70. We are unaware of any other regulatory area where a fine of thousands, even tens of thousands of pounds may be levied for lodging an administrative document one day late or for paying tax one day after the due date. Exactly the same fine is due where the extent of the lateness is significantly different, say one month or even one year. While we tend to agree that it is hard to justify such huge administrative fines as those levied in total here, we regard ourselves as bound to refuse this part of the appeal as our hands are tied by the decisions of the Upper Tribunal in *Total*

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[26] [2015] EWHC 2293 (Admin) paragraphs 138-148

[27] Paragraph 141

[28] paragraphs 47, 51 and 52

[29] see paragraphs 68, 69 and 72; and the more recent discussion on proportionality in Staniszewski v HMRC [2016] UKFTT 128 (TC) paragraphs 42-52 and authorities there cited

*Technology* and *Trinity Mirror*. In particular, it seems to us impossible for a First-tier tribunal to declare the outcome here as disproportionate where, in *Trinity Mirror,* a default surcharge of £70,906.44 was held to be justified by the Upper Tribunal for the failure, by one day, to file a VAT return and pay the VAT due. However, as we have said, *Trinity Miirror* may not be the last word on the proportionality of the VAT default surcharge regime even although a very high threshold has to be crossed.

**Summary**

71. The penalty appeal is allowed in part. The penalties should be recalculated in accordance with paragraphs 58 and 59 of this decision.

72. The appeal, insofar as relating to the Default Surcharges, is dismissed.

73. 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.

**J GORDON REID QC FCIArb**

**TRIBUNAL JUDGE**
**RELEASE DATE:6 MAY 2016**