

[2010] UKFTT 20 (TC)

Appeal number MAN/09/0668

**FIRST-TIER TRIBUNAL
TAX**

ENERSYS HOLDINGS UK LIMITED

Appellant

– and –

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

Respondents

Tribunal : Judge Colin Bishopp

Sitting in public in Manchester on 9 September 2009 (with later written submissions)

Michael Conlon QC and Hui Ling McCarthy, counsel, for the Appellant

Nigel Bird, counsel, instructed by the **General Counsel and Solicitor to HM Revenue and Customs**, for the Respondents

DECISION

Introduction

1. The appellant, Enersys Holdings UK Limited (“EHUK”) is a member of a worldwide group of companies, with an American parent, which manufactures and distributes stored energy products. It is the representative member of a number of UK-based companies, like itself subsidiaries of the American parent, which constitute a VAT group. EH Europe GmbH (“EHE”), a Swiss company, is another subsidiary which carries on some of its business in the United Kingdom, and it is separately registered here for VAT. The VAT group’s accounts team deals with the VAT returns for both EHUK and EHE.
2. At the material time EHE was required to submit its returns by reference to standard calendar quarters, but EHUK had non-standard period ends. They are, or were, designed to coincide with its management accounts dates, the majority of which in fact fell at the ends of calendar months, though some did not. Non-standard periods were agreed by the Commissioners at EHUK’s request. Both EHUK and EHE were required to submit returns for their three-month prescribed periods which ended in December 2007—EHUK’s on 30 December, and EHE’s on 31 December. The due date for the submission of EHE’s return and payment was 31 January 2008, but EHUK was required to submit its return and payment by 30 January, as directed by the Commissioners in exercise of the powers conferred on them by reg 25(1)(c) of the Value Added Tax Regulations 1995.
3. EHUK’s turnover is such that at the time relevant to this appeal it was required to make payments on account (see s 28 of the Value Added Tax Act 1994, the VAT (Payments on Account) Order 1993 and regs 44 to 48 of the 1995 Regulations). A trader subject to the requirements must make interim payments of estimated amounts a month after the end of each of the first two months of each prescribed period, followed by a balancing payment, representing the remainder of the VAT due for that period, by the due date. One further consequence of being subject to the requirements is that the seven days of grace allowed by concession to other traders paying electronically are not available; cleared funds must be in the Commissioners’ account by the due date.
4. EHUK’s return and payment, due on 30 January 2008, were in fact received by the Commissioners on 31 January. This was not the first occasion on which EHUK had failed to pay on time, and it was accordingly within the default surcharge regime for which ss 59, 59A and 59B of the 1994 Act provide. Such was EHUK’s record that a penalty of 10% of the tax was imposed; it amounted to £263,763. The Commissioners later accepted that EHUK had a reasonable excuse for an earlier default, and discharged the penalty for that period. One consequence of the discharge was that the penalty for the January 2008 default was reduced to 5%, or £131,881. The present appeal is against that reduced penalty.
5. The foregoing, which was common ground, is taken from the documents provided to me and from the evidence of EHUK’s three witnesses, David Delves, who is employed by it as a cost accountant, Anthony Clark, its UK Finance Manager, and Nicholas King, its European Tax Manager. They also dealt with the details of the relevant defaults, described in the next section of this decision. Here, there was some, though relatively minor, controversy about their evidence; what follows represents my findings of fact.

6. EHUK's case, as it was advanced by Michael Conlon QC leading Hui Ling McCarthy, is that it has a reasonable excuse for the January 2008 default; but that if I should reject that submission, the penalty is so disproportionate to the offence that I should disapply the legislation. The Commissioners, represented before me by Nigel Bird, resist both of those arguments.

The defaults

7. The first of the five defaults relevant to this appeal occurred in May 2006, when EHUK's balancing payment for period 03/06 was paid late. As this was EHUK's first default, it led only to the issue of a surcharge liability notice, that is a notice informing EHUK that it had defaulted and warning it that a further default within the next year would lead to the imposition of a monetary penalty: see s 59(2) of the 1994 Act. EHUK appealed against the notice; that appeal and this were later consolidated.
8. The second occurred when an interim payment due to be made by 28 February 2007 was one day late. Mr Delves, who was responsible at that time for the making of VAT payments, accepted that the late payment was due to a mistake on his part, in turn caused by pressure of work. The penalty, 2% of the tax, was £1,164. EHUK did not and does not contend that it has any excuse for that default.
9. The third default occurred when an interim payment due on 31 May 2007 was made on 1 June. Mr Delves again candidly accepted that the mistake was his, also caused by pressure of work. The penalty, at 5% of the tax, amounted to £3,660. Mr Delves wrote to the Commissioners asking for a reconsideration, but the penalty was upheld. EHUK did not take the matter further, and does not now contend that it has an excuse for the default.
10. The fourth default occurred when EHUK submitted its return for period 09/07 one day late. As it was a repayment return no monetary penalty was imposed, but the fact of the default extended EHUK's surcharge liability period and a notice—a surcharge liability extension notice—to that effect was sent to it.
11. The fifth default, the one against which this appeal has been brought, occurred, as I have said, in January 2008. By this time EHUK had recognised that it needed to take greater care over its VAT returns and payments. Mr Delves had hitherto had limited input into the returns but had dealt with the payments—that is, he received from other members of the accounting staff details of the amount due, ensured that sufficient funds were available and then arranged for a payment authorisation to be passed to Mr Clark, who keyed the necessary details into a computer terminal linked to EHUK's bank in order to effect a CHAPS (same day) payment.
12. The decision had been taken in the latter part of 2007 that Mr Delves should be trained to process the return itself. He and the person who was training him (EHUK's financial accountant, who had until then had primary responsibility for the VAT returns) had to fit the training around their other duties, and the exercise was taking rather longer than had been expected. Mr Clark realised during the course of January that there was a risk that the training exercise would also result in the late submission of EHUK's VAT return and payment at the end of the month, and decided that he would deal with the return himself. The return was completed in good time and the necessary funds were available. Mr Clark was aware that EHUK had non-standard period ends, and looked at what he thought was its return in order to check what the date for submission was. However, by mistake he looked at EHE's, rather than EHUK's, return, and saw a due

date of 31 January. He faxed the return and transmitted the money on that date, unfortunately one day late.

13. A surcharge assessment amounting to 10% of the net tax due arrived in February. Mr Clark wrote to HMRC explaining the circumstances in which the error occurred, and asking for reconsideration. His request was refused, and Mr King then corresponded with the Commissioners. Eventually EHUK appealed against the surcharge. After the two appeals had been consolidated, the Commissioners decided that EHUK had a reasonable excuse for the first of the defaults I have described and withdrew the surcharge liability notice issued in respect of it. That disposed of the first of EHUK's two appeals, and also led to changes in the consequences of the following defaults. The second, now treated as if it were the first, gave rise only to a surcharge liability notice; the penalty of £1,164 was removed. The third was now treated as the second, giving rise to a penalty of 2%, or £1,464 rather than the £3,660 originally imposed. The fourth of the defaults had not led to a monetary penalty, and that remained the position; but the surcharge liability extension notice remained effective. The penalty for the last default was, as I have said, reduced to 5%, or the £131,881 now in dispute.

Reasonable excuse

14. Section 59A(8) of the 1994 Act provides that a taxable person in the position of EHUK will not be liable to a surcharge if he satisfies the Commissioners or, on appeal, this tribunal that he has a reasonable excuse for the default. "Reasonable excuse" cannot be considered at large, since what may constitute a reasonable excuse is circumscribed by statute and precedent. First, s 71(1)(a) provides that an insufficiency of funds cannot excuse. That is not a consideration in this case. Second, 71(1)(b) states that "where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied on is a reasonable excuse". Thus EHUK cannot be excused on the ground that the error was made by an employee: see, if authority is needed, *Profile Security Services v Customs and Excise Commissioners* [1996] STC 808. Third, the courts and this tribunal and its predecessor have consistently taken a narrow view of the circumstances which may constitute a reasonable excuse.
15. The best-known of the authorities on reasonable excuse is the decision of the Court of Appeal in *Customs and Excise Commissioners v Steptoe* [1992] STC 757. The taxpayer in that case argued that although the proximate cause of his default was a shortage of funds, the underlying cause of that shortage, namely the unexpected failure by his major customer to pay him on time, did amount to a reasonable excuse, bringing him outside the confines of the predecessor to s 71(1)(a). The Court determined—though only by a majority—that the seemingly absolute exclusion by the statute of an insufficiency of funds as an excuse did not preclude consideration of the underlying cause of the insufficiency, and that a trader might have a reasonable excuse if it were caused by an unforeseeable or inescapable event or when, despite the exercise of reasonable forethought and due diligence, it could not have been avoided. The Court nevertheless made it clear that the test was to be applied strictly. That approach has been applied since, by analogy, to other reasons for defaults.
16. Against that background, it seems to me that it is impossible to conclude that there was a reasonable excuse for this default. Even if—which I doubt—the unexpectedly long time taken by the training exercise could have formed the basis of such an excuse, the difficulty for EHUK is that the training exercise is relevant only in that it led to Mr Clark's preparing the return, and thus set the scene for the default. The proximate cause

of the default was Mr Clark's error in looking at EHE's return and taking from it the wrong due date. The training exercise did not make it impossible or even difficult to submit the return or make the payment in time; Mr Clark could easily have done both on 30 January. The only reason he did not is that he looked at the wrong document. It is also no excuse, in my judgment, that EHUK had irregular period ends; even if (as I understand) they had by then outlived their purpose it was incumbent on EHUK to respect the dates it had itself requested. It is also worth pointing out that the obligation is to submit the payment and return no later than the due date. Mr Clark made a conscious decision to delay the submission of the return and the making of the payment until the last moment in order to retain the money in EHUK's account for as long as possible. It is understandable that he did so, but it seems to me that a trader who makes a choice of that kind must take great care to ensure that he does not leave the submission until it is too late.

17. I am satisfied that the late submission of the return and payment were due solely to Mr Clark's simple mistake, that he intended to submit them on what he believed to be the due date, and that the default was attributable to nothing worse than human error. It is nevertheless an inescapable conclusion that he was guilty of the "inaccuracy" which the legislation expressly provides cannot amount to a reasonable excuse. In most other contexts an error of that kind would be of little importance, but the legislation is designed to penalise any lateness, however short, and as I have explained it is to be applied strictly. The first ground of appeal must therefore be rejected.

Proportionality

The default surcharge

18. It is necessary to begin with some background to the default surcharge regime. The Principal VAT Directive, 2006/112/EC, provides (primarily by art 193) for the payment of VAT by a taxable person and (primarily by art 250) for the submission of periodic returns, but it says very little about the manner in which these obligations are to be enforced. Title XI of the directive contains a number of provisions which enable the member States to deal with particular circumstances, usually in a manner of their own choosing, but the closest the directive comes to a generic enforcement power is art 273, which provides that "Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT ...". Nevertheless it is perfectly clear, even if only inferentially, from the directive that the member States are expected to enforce its requirements, as they have been transposed into national law. It is only the manner in which enforcement is to be undertaken which is left to the member States' discretion. There is some case law on the subject, to which I shall come later.
19. The default surcharge regime was introduced in the United Kingdom in 1986, as one of a range of measures designed to promote VAT compliance. The measures replaced the previous system by which defaulting traders were prosecuted; delay in the submission of a return and payment, however egregious, may no longer lead to prosecution. Default surcharges are correspondingly considered in the UK's domestic law to be civil rather than criminal penalties. The background to the introduction of the default surcharge, the extent of the mischief at which it is aimed and the manner in which it has, in part, achieved its objective are all described in some detail in the decision of the VAT and Duties Tribunal in *Greengate Furniture Ltd v Customs and Excise Commissioners* (2003, Decision 18280), a decision to which I shall refer again later. I shall not repeat the descriptions here, but instead suggest that those interested should read the *Greengate Furniture* decision for themselves. Some relatively minor changes to the

system were made in 1992 and 1993, but its essentials remain as they were in 1986. Most of the other civil penalties introduced in 1986 have been, or are in the course of being, replaced by the Finance Acts 2007 to 2009, but while replacement of the default surcharge is expected, it has not yet occurred.

20. The scheme is well known, and a brief description is all that is required for present purposes. The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next, again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence.
21. There is no fixed maximum penalty; the amount levied is simply the prescribed percentage of the net tax due. The Commissioners do not collect some small penalties; this concession has no statutory basis but is the product of a (published) exercise of the Commissioners' discretion, conferred on them by the permissive nature of s 76(1) of the 1994 Act, providing that they "may" impose a penalty, and their general care and management powers. Even though the penalty is not collected, the default counts for the purpose of the regime (unless, exceptionally, the Commissioners exercise the power conferred on them by s 59(10) of the Act to direct otherwise). Similarly, where the monetary penalty is nil, because no tax is due or the trader is entitled to a repayment (as in the case of EHUK's fourth default) the default nevertheless counts for the purposes of the regime, subject again to a s 59(10) direction to the contrary.
22. As I have explained, a trader may escape the penalty if he has a reasonable excuse for the default. He will also escape if, as s 59(7)(a) of the Act puts it, "the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit." However, if a penalty is due then (subject to the exception for small penalties I have mentioned) it is due in full; the default surcharge is excluded from the scope of s 70 of the Act, which enables the Commissioners or the tribunal to mitigate some other civil penalties, and there is no other provision which would enable either the Commissioners or the tribunal to mitigate a surcharge.
23. The system has some clear advantages. It is mechanical in its operation, to the extent that the penalties can be, and usually are, imposed by computer. The absence of any power of mitigation relieves the Commissioners of the obligation to consider cases individually; they need to do so only when a taxpayer challenges a penalty. Since the penalty is tax-g geared there is some correlation between the size of the trader and the size of the penalty, and the escalating percentage of the penalty reflects the persistence of the offence. However, save that the mechanical nature of the system enables a taxpayer to know in advance the magnitude of the penalty to which he may expose himself, those factors are largely to the benefit of the Commissioners.
24. There are, by contrast, several features of the system which have led to criticism. It does not discriminate between the trader who, as in this case, has made a trivial slip and the trader who deliberately pays late; and the system equally does not cater for degrees of culpability in between those extremes. The potential hardship caused to the trader by the imposition of the penalty is not a relevant factor. The penalty is the same no matter how long the delay. If a trader has a reasonable excuse for not sending in his payment on

time, but the excuse then comes to an end, he suffers no penalty however much longer he delays. The correlation between the size of the trader and the size of the penalty is far from exact. For example, two manufacturers may have similar levels of turnover and profit, but if the major cost component of the products of one is attributable to standard-rated raw materials, he will have a smaller exposure than the other, whose product has a high labour content, since the former will, and the latter will not, have a large amount of input tax to set against his output tax, leaving a smaller net liability—the penalty being assessed by reference to the net liability. And a repayment trader (that is, one whose input tax consistently exceeds his output tax) is never exposed to a monetary penalty.

25. The last of those factors—the inexact correlation of turnover and penalty—has, as it happens, worked to EHUK’s disadvantage, and it demonstrates what may be considered another flaw in the scheme. It will be observed from the details I have set out above that the other penalties imposed on EHUK, even allowing for the differing percentage rates, were far smaller. Its sales in the 12/07 period were unusually high, leaving it with a large net liability. Had the error occurred in another period the penalty, for exactly the same mistake, would have been much less.

The scope of the dispute

26. It was common ground that a domestic measure providing for the enforcement of a Community obligation—a term which, despite the vagueness of the VAT directive to which I have referred, includes the timely payment of VAT—must be proportionate. The Court of Justice put the position succinctly in *Garage Molenheide BVBA and others v Belgium* (Joined cases C-286/94, C-340/95, C-401/95 and C-47/96) [1998] STC 126. At paras 48 and 49 of its judgment it observed that

“48 ... the principle of proportionality is applicable to national measures which ... are adopted by a member state in the exercise of its powers relating to VAT, since, if those measures go further than necessary in order to attain their objective, they would undermine the principles of the common system of VAT and in particular the rules governing deductions which constitute an essential component of that system.

49 As regards the specific application of that principle, it is for the national court to determine whether the national measures are compatible with Community law, the competence of the Court of Justice being limited to providing the national court with all the criteria for the interpretation of Community law which may enable it to make such a determination”

27. Although Mr Conlon relied on some specifically Human Rights Convention-related authorities, neither party argued that there was any material difference between Community law and Convention concepts in this respect.
28. There are two essential differences between the parties. The first is whether, as the respondents contend, the focus must be on the default surcharge system, taken as a whole, rather than the penalty imposed on a single trader; the appellant’s position is that the proper approach is to consider the individual penalty, and that it has no need to attack the system itself. The second is whether the penalty or, depending on the approach I adopt, a system which is capable of imposing a penalty of such magnitude represents a disproportionate approach to the offence it is designed to penalise. Before examining those arguments it is necessary to consider the nature of the tribunal’s powers.

The tribunal's powers

29. Mr Conlon argued that, notwithstanding its classification in domestic law as a civil penalty, a default surcharge amounted, for Convention purposes, to a criminal penalty, with the consequence that a taxpayer subject to such a penalty had all the rights that art 6 of the Convention conferred. He referred me to the judgment of the European Court of Human Rights in *Jussila v Finland* [2009] STC 29, in which a penalty of about €300, imposed in accordance with the Finnish equivalent of what was until recently known in the United Kingdom as the misdeclaration penalty (see s 63 of the 1994 Act, now repealed and replaced), was found to be criminal in character, even though it was classified as civil in Finnish law. That penalty, like the default surcharge, was intended to have a deterrent and punitive purpose. It was, Mr Conlon said, a necessary inference that the default surcharge, too, must be regarded as criminal in character.
30. The engagement of art 6 was not important in itself: Mr Conlon did not suggest that there is anything about the manner in which appeals against default surcharges are heard which offends it. Rather, the effect of the judgment on which he relied was that, as the ECHR had decided in *Taddei v France* (1998, Application 36118/97), a court or tribunal dealing with a penalty to which art 6 applied must have “the power to quash, on questions of fact and law, the decision of the body below”. Since (as in *Taddei* itself) the law does not permit reduction of the penalty, I must discharge it if I find it disproportionate.
31. Mr Bird did not accept that a default surcharge could be described as criminal in nature; *Jussila*, he said, was not binding on this tribunal because the United Kingdom had made no representations to the ECHR, which had accordingly not considered the default surcharge system. He referred me also to observations of Potter LJ in *Customs and Excise Commissioners v Han and another* [2001] STC 1188 at [81], and of Stephen Oliver QC, now the President of this Chamber, in *Ali & Begum v Customs and Excise Commissioners and other appeals* (2002, Decision 17681) at para 33, both to the effect that regulatory penalties of which the default surcharge is an example cannot properly be classed as criminal.
32. Those observations, which I do not think it necessary to set out, are indeed contrary to Mr Conlon’s argument; the judges unequivocally stated that regulatory penalties are not to be treated as criminal. It may be that, as the jurisprudence relating to the interpretation of the Convention adapts to reflect changing perceptions, *Jussila* must be taken to have effectively overruled, or at the least to have cast significant doubt on, the decisions in *Han* and *Ali & Begum*, but I do not think this a matter I need to decide, since it does not seem to me that the application of art 6 and, consequently, of the Court’s observations in *Taddei* add anything of present relevance to what the ECJ said in *Garage Molenheide*. Penalties were not in issue in that case; the Court was required to consider the indisputably non-criminal measure adopted by the Belgian tax authorities of withholding claimed tax credits pending investigation of the claims. The Court made it clear that the measure could be disapplied by the national court if it was found to be disproportionate. In other words, a trader in EHUK’s position has no need to invoke art 6; if the remedy is disproportionate to the aim, the court or tribunal has a Community law duty to intervene.
33. Quite what form the intervention should take was also the matter of some debate although it was not, ultimately, very contentious. Mr Conlon, rather tentatively, suggested that it might be possible to interpret the legislation in a manner which conformed to Community law, by treating a delay of one day, due to a minor slip, as sufficient to constitute a reasonable excuse. He did not advance the argument with

vigour and in my judgment he was right not to do so. First, there is a large body of precedent, including at Court of Appeal level, which is contrary to such an approach. Second, his argument leads inexorably to an obvious conundrum. If one day's delay is excusable, why not two days' delay? And if two, why not three? The legislation draws the line at a calendar month after the end of the prescribed period (a time limit imposed in accordance with the discretion conferred on the member States by art 252(1) of the VAT Directive). It does not seem to me an arguable proposition that a month is excessively short, and Mr Conlon did not suggest as much. Against that background I can see no possible scope for judicial discretion to draw the line somewhere else. If the statutory requirement was to render the return and payment on the due date, neither before nor after, there might, perhaps, be some merit in the argument that missing the target by one day was excusable, but as I have already observed, the obligation requires no more than that the return and payment are received not later than the due date. It seems to me unlikely that a delay of only a day might ever, without more, amount to a reasonable excuse; here it is in my judgment impossible to reach the conclusion that I can properly interpret the legislation in a manner which affords EHUK such an excuse.

34. The possibility that the legislation might be interpreted so as to allow the tribunal to find a reasonable excuse where it appeared to be precluded was not considered in *Greengate Furniture*. Instead, the tribunal adopted a more head-on approach. At para 75 it remarked that if it should find “that the surcharges imposed in the present case were incompatible with the principle of proportionality under Community law, it is the duty of the tribunal to disapply the domestic legislation in this case.” It was not a question of interpretation, but of straightforward disapplication. For that proposition the tribunal relied on comments of Simon Brown J in *Customs and Excise Commissioners v Peninsular and Oriental Steam Navigation Co* [1992] STC 809 (reversed by the Court of Appeal on grounds irrelevant to proportionality, on which it expressed no opinion: see [1994] STC 259). At [1992] STC 821g Simon Brown J said:

“My inclination, therefore, for the purposes of this appeal is to assume without finally deciding that in circumstances such as arise here the court could indeed strike down national penal legislation simply on the ground that it offends the principle of proportionality. That said, however, it seems to me that only most exceptionally could the court properly do so.”

35. In *International Transport Roth GmbH v Home Secretary* [2003] QB 728 Simon Brown LJ, as he had then become, added this:

“[26] ... it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show such deference. I take as a single example what Lord Bingham of Cornhill said in *Brown v Stott* [2003] 1 AC 681, 703:

‘Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies ...’

[27] That said, the court’s role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility. If ultimately it judges the scheme to be quite simply unfair, then the features that make it so must inevitably breach the Convention.”

36. The question in that case was whether fixed penalties imposed on hauliers whose vehicles were found to contain clandestine entrants to the UK, with limited opportunity for escape from the penalty, no possibility of mitigation and no right of access to an independent tribunal, were disproportionate. The Court held (though by a majority, Simon Brown LJ being in that majority) that they were. That case is not directly comparable with this, but what the learned judge, and Lord Bingham before him, said is clearly of general application, taking, as I do, Convention and Community law rights to be indistinguishable for practical purposes. The tribunal in *Greengate Furniture*, too, drew on the decision in *Roth*, distinguishing the case before it on the ground that the default surcharge which had been imposed in that case was not comparably harsh, when viewed in relation to the offence.
37. *Sony Ericsson Mobile Communications AB v Customs and Excise Commissioners* (2007, Decision 20513) was another case in which the proportionality of the default surcharge was considered by the VAT and Duties Tribunal, against the background of the decisions in *Roth* and *Greengate Furniture*. The tribunal decided that the penalty was not disproportionate, but it is clear from its observations that it would simply have discharged the penalty had it decided it was.
38. I proceed therefore upon the basis that, in the absence of any power to mitigate or otherwise reduce a penalty, discharge is the only possible course open to a tribunal which does conclude that a penalty is disproportionate. Mr Bird did not argue against that conclusion, nor did he suggest any other remedy should the appellant succeed in its arguments about the proportionality of this penalty, to which I now come.

The appellant’s arguments

39. Mr Conlon began with the analysis undertaken by the *Greengate Furniture* tribunal at paras 75 to 112 of its decision which, he said, contained a comprehensive guide to the considerations I must bear in mind. In the event, the tribunal concluded that while there might be cases in which the default surcharges imposed on a taxpayer were disproportionate, the instant case was not one of them. Nevertheless, it dealt with the arguments (in respect of which it was assisted by an advocate to the court) in detail and I agree with Mr Conlon that its analysis is very helpful, though I think it more convenient to approach the matter in a slightly different order.
40. The principles to be respected by the member States, when imposing regulatory penalties, were described by the Court of Justice at para 17 of its judgment in *Anklagemyndigheden v Hansen und Søn I/S* (Case C-326/88) [1990] I ECR 2911:

“ ... where a Community regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, article 5 of the EEC Treaty requires the Member States

to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”

41. There is no suggestion in this case that the UK adopts different approaches to breaches of Community and domestic law. The question is whether it has struck the right—a proportionate—balance between the effective and dissuasive (which in the United Kingdom would more usually, I think, be described as punitive and deterrent) aims of the penalty on the one hand, and reasonableness, that is the setting of the penalty at a level which avoids excessive and unjustified harshness, on the other. The approach to be adopted by the national court—here, this tribunal—was described by Lord Nicholls of Birkenhead in *Wilson and others v. Secretary of State for Trade and Industry* [2004] 1 AC 816 at [62]:

“The legislation must not only have a legitimate policy objective. It must also satisfy a ‘proportionality’ test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a ‘value judgment’ by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force.”

42. Mr Conlon argued that a penalty which, when first imposed, equated to an annual interest rate of 3,650% and even when reduced, in consequence of the Commissioners’ acceptance that there was a reasonable excuse for the first of EHUK’s defaults, to an equivalent annual rate of 1,825% was self-evidently disproportionate since interest of that magnitude not only far exceeded a fair commercial rate but also bore no relation to the value of the Commissioners’ loss of use of the money for one day. I should say at once that I reject that argument. The equation of the penalty with interest, on which it depends, is in my view quite the wrong approach. Arithmetically it is inevitable that a penalty of 5% of the tax will amount to the same sum as interest calculated at 1,825% pa if the delay is of one day, just as it will amount to the same sum as interest of 182.5% if the delay extends to 10 days, and of 18.25% if it is of 100 days. Those arithmetical relationships merely emphasise the fact that the penalty does not, and is not intended to, represent compensation to the Commissioners for being out of their money; it is a pure penalty.
43. The fact that the equivalent interest rate diminishes as the delay in payment increases does, however, lend some support to Mr Conlon’s argument that the default surcharge is unduly harsh when compared with other penalties for the late payment of tax. Most of them start from a much smaller initial amount, to which further sums are added as the delay continues. He particularly drew my attention to the new regime set out in Schedules 55 and 56 to the Finance Act 2009, imposing penalties for, respectively, late returns and late payments, the penalties being initially of fairly modest amounts which escalate only after prolonged delay. The regime introduced by those Schedules also makes allowance for degrees of culpability, and both the Commissioners and the tribunal have powers of mitigation. VAT returns and payments are not among those to which the Schedules apply; for whatever reason they remain within the default surcharge system. Mr Conlon also drew my attention to the less onerous penalties

imposed in a number of other countries, those penalties too reflecting the degree of lateness.

44. The penalty was, he said, also grossly disproportionate when compared to the appellant's financial circumstances. It represented almost 16% of its profits for the entire year; was equivalent to its earnings on turnover of more than £15 million, or about two months' sales; and amounted to 44% of its corporation tax liability for the whole year. He drew also some comparisons with other surcharges which have been the subject of appeals to this tribunal and its predecessor, almost all of which—including those in *Greengate Furniture*—have been far smaller, but this comparison was rather undermined, if I may say so, by the scale of the penalty in *Sony Ericsson*, which amounted to £675,575 at 2%. As I have said, that penalty was found by the tribunal not to be disproportionate, a conclusion which I shall explore in more detail shortly. Mr Conlon also relied on the judgment of the European Court of Human Rights in *Mamidakis v Greece* (Application No 35533/04), delivered in 2007, in which it concluded that the imposition on an individual of a penalty in excess of €3 million, when he was also made jointly and severally liable with others for the payment of a separate penalty of almost €5 million, infringed his rights not to be arbitrarily deprived of his property, contrary to article 1 of the First Protocol to the Convention. The penalty, up to ten times the tax sought to be evaded, was found to be disproportionate to the legitimate objective of preventing tax evasion.
45. Although Mr Conlon said that the default surcharge regime was not itself the focus of his attack, he nevertheless argued that the absence from it of a power to mitigate was a serious fault. In *Greengate Furniture*, the tribunal made the point that the absence of a power to mitigate is not a necessary characteristic of a penalty regime. The conclusion to be drawn from that observation is that the “measures go further than necessary in order to attain their objective”, to adopt the phrase used by the Court of Justice in *Garage Molenheide*. Here, again, the conclusion of the ECHR in *Taddei v France* was relevant. The regime considered in that case imposed penalties which differed with the degree of culpability and it was for that reason that the Court concluded that the applicant's article 6 rights were not offended. The absence of any possibility of adjustment of a default surcharge to take account of the degree of culpability must, by contrast, be an indication that the taxpayer's article 6 rights are, or are at least capable of being, offended. It was, Mr Conlon added, difficult to see how a penalty which was fixed, without regard to the relative gravity of the offence, could be proportionate; the mere fact that the penalty was fixed was inconsistent with the proposition that it was. He pointed out that the tribunal in *Greengate Furniture* had not been referred to *Taddei v France*; had it been, and had it reached its decision after *Jussila v Finland* had been decided, its conclusion might well, he said, have been different.

The Commissioners' arguments

46. Mr Bird accepted that the penalty regime must strike a fair balance between the need to ensure that traders comply with their fiscal obligations, and their own rights—simply put, the penalty must not impose an excessive burden. However, as Simon Brown J pointed out in *P & O*, at p 821h:

“Member states must inevitably have the very widest margin of appreciation for determining just what penalties are appropriate to underpin the efficient functioning of the value added tax system operating in their own country. This they must do in the light of their own individual experience. That, indeed, seems to me implicit in the judgment of the European Court of Justice in [*Anklagemyndigheden v Hansen und Søn I/S*] and, whatever emerges from the many other cases cited to

me, certainly nothing in them encourages the view that the court will readily regard a system of penalties as falling foul of the doctrine of proportionality.”

47. Accordingly, as the judge also pointed out in *P & O*, “only most exceptionally could the court properly” strike down legislation. The state’s margin of appreciation necessarily applied to the measure, rather than the individual case. As he observed in *Roth*, at [9],
“What is presently in issue, however, is the intrinsic legality of the scheme itself rather than the liability of carriers in individual cases.”
48. The authorities made it clear that a measure may not be struck down unless it is “not merely harsh but plainly unfair” or, as Waller LJ put it in *R (Federation of Tour Operators) v HM Treasury* [2008] STC 2524 at [32], it is “devoid of reasonable foundation”, a phrase derived from observations made by the ECHR in *Gasus Dosier- und Fördertechnik GmbH v Netherlands* (Application 15375/89) (1995) 20 EHRR 403. The tribunal had not reached the conclusion in *Greengate Furniture* that the default surcharge regime was of such a character, and there was no basis upon which I should do so here.
49. Although, he said, the tribunal had arrived at the right conclusion in *Greengate Furniture*, there was a flaw in its reasoning. It was clear from the decision, and in particular para 113, that it was the regime, rather than its application in the individual case, which was the tribunal’s focus:
“Notwithstanding our opinion as to whether the present system is ‘strictly necessary’, we are however unable to conclude that the system is ‘devoid of reasonable foundation’ (see *Gasus Dosier*) or ‘not merely harsh but plainly unfair’ (see *Roth*).”
50. The tribunal had been critical of the lack of a power to mitigate, but as that passage showed it had gone on to conclude, correctly, that the default surcharge regime did not merit the descriptions in *Gasus Dosier* and *Roth*. It was the observation in the same paragraph that “[t]here may be cases where a surcharge does meet the test in *Roth*”, an observation which was unnecessary for the decision because of what the tribunal had already decided, which was wrong: once the measure was found to satisfy the test of proportionality there was no scope for the examination of individual penalties.
51. The appellant in this appeal had not attempted to attack the proportionality of the system—despite what I have said at para 45 above, Mr Conlon had expressly disavowed any such intention in his skeleton argument—and, Mr Bird said, if the system was not disproportionate, the penalty must stand even if, taken out of the context of the system, it might be thought excessive. That conclusion necessarily followed from the extract from the judgment of Simon Brown LJ in *Roth* which is set out at para 47 above. There was no warrant for finding that the system itself was disproportionate; the tribunals in both *Greengate Furniture* and *Sony Ericsson* had been right not to do so. Some individual penalties might be high, but there was nothing before me from which I could properly conclude that the penalty in this case was so high that Parliament had exceeded a proper margin of appreciation.
52. There was, Mr Bird said, also nothing in Mr Conlon’s argument that the tribunal did not have full jurisdiction, with the consequence that EHUK’s art 6 rights were infringed. The argument was circular. Even if, contrary to the contention which I have recorded above, *Jussila v Finland* was binding, or at least strong persuasive authority, I would first need to be persuaded that the penalty regime was disproportionate before concluding that there was the potential for the infringement of art 6 rights; the judgment in *Jussila* could not be used as a means of reaching that conclusion. Moreover, as Lord

Hoffman pointed out in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [87],

“... European authority shows that ‘full jurisdiction’ does not mean full decision-making power. It means full jurisdiction to deal with the case as the nature of the decision requires.”

53. The tribunal’s jurisdiction satisfies that test. It can review the facts and the correctness of the application of the legal provisions. That is all that is necessary: there is no reason why a power to mitigate is a necessary element of a full jurisdiction, nor any judicial support for Mr Conlon’s argument to that effect.
54. The judgment of the European Court of Human Rights in *Mamidakis* is of little or no assistance because the Court was persuaded to its conclusion by the absence of any possibility of a “reasonable excuse” defence, and by the fact that the penalty was not a proportion, but a multiple, of the tax. In addition, the Court did not strike down the legislation pursuant to which the penalties had been imposed, or even the penalties themselves, but merely awarded the applicant a relatively modest sum of damages for the infringement of his rights under art 1 of the First Protocol to the Convention.

Conclusions

55. I have come to the conclusion that there is, in the end, nothing of substance in the apparent dispute between the parties about the focus of the attack—that is, whether one needs to look no further than the individual penalty, as Mr Conlon argued, or whether it is necessary for EHUK to mount a successful attack on the system as a whole in order to succeed, as Mr Bird maintained. If Mr Conlon is right in his claim that this penalty is so offensive that it must be discharged it necessarily follows that there is a flaw in the system whose mechanical operation generated it, but it does not follow that the whole system is defective. I see no inherent difficulty in the possibility that a usually reasonable and—within the bounds of the state’s margin of appreciation—proportionate system might occasionally lead to an unacceptable result, one which cannot be salvaged by recourse to the proposition that because, by and large, the system produces reasonable results the occasional disproportionate outcome must be tolerated, and an individual taxpayer’s rights offended, in the interests of the greater good. Nor does it seem to me that I am forced to the opposite conclusion by the authorities on which Mr Bird relied. *Roth* was a case in which a group of hauliers were attempting to challenge the system itself, and not an individual penalty; it is for that reason that Simon Brown LJ expressed himself as he did in the extract from his judgment set out at para 47 above. Taken together, the observations of the tribunal in *Greengate Furniture* too show that it was considering both the system and the penalties imposed on the individual appellant. Its comment that “[t]here may be cases where a surcharge does meet the test in *Roth*” is in my view incapable of being read in a way which is consistent with the proposition that only an attack on the whole system will suffice. Of course, the system is not irrelevant to the enquiry since its objective is an important factor, perhaps the most important factor, but I am satisfied that it is open to me to consider the individual penalty without having first concluded that the system, as a whole, is disproportionate.
56. I should, however, deal with what was said by the tribunal in *Sony Ericsson* before leaving this topic. There, the appellant blamed the unexpected audit of its Austrian operations by the local tax authorities and the additional work it imposed on the person who was also responsible for its UK VAT return for a two-day delay in making its payment. The tribunal found that there was no reasonable excuse for that delay. At paras

38 and 39 of its decision, after quoting the criticism of the tribunal in *Greengate Furniture* of the absence of a power to mitigate, it said

“38. The Tribunal then went on to consider whether in European terms the absence of a power to mitigate is ‘strictly necessary’ and whether the exclusion of mitigation goes ‘further than is necessary in order to attain [the] objective’. At paragraph 110 of its decision, the Tribunal concluded that the justifications for the absence of a power to mitigate seemed less than convincing. It did not seem to the Tribunal that the absence of a power to mitigate was strictly necessary and without such a power the regime arguably went further than is necessary. Nevertheless, the Tribunal noted that its judgment on these issues was not conclusive. The legislature had a wide margin of appreciation in arriving at the appropriate balance between the general interest of the community and individual rights. As it was unable to conclude that the system was ‘devoid of reasonable foundation’ or ‘not merely harsh but plainly unfair’ the Tribunal had dismissed the taxpayer’s appeal.

39. It seems to us that the same result must follow in this case. The Appellant’s position does not seem to us to be as meritorious as the taxpayer’s in *Greengate Furniture*. In that case the taxpayer was unable to establish a reasonable excuse because it was unable to point to any particular event or events beyond normal business hazards, which had deprived it of its ability to pay the VAT on time. It had made considerable efforts to overcome its financial difficulties and comply but its financial problems were not allowed as a reasonable excuse. In the present case the Austrian tax audit might be considered a particular event that was beyond the normal business hazards but we do not accept that the Appellant has a reasonable excuse because, in effect, we accept the Respondents’ view that the Appellant was at fault in failing to deal adequately with that event. Having so concluded the penalty is in the circumstances 2% of the relevant tax, whether the trader be small or, in this case, large and irrespective of how late payment is made. If that is disproportionate in the Appellant’s case it must equally be so in many other cases but as the Tribunal concluded in *Greengate Furniture*, it is impossible to conclude that those features result in the system being devoid of reasonable foundation or plainly unfair because no mitigation is allowed. Accordingly, we do not believe that the European concept of proportionality assists the Appellant where it has otherwise failed to satisfy us that it has a reasonable excuse for its default..”

57. With the greatest of respect to an experienced tribunal, I find myself unable to agree with that reasoning. It proceeds, it appears, upon the footing that the *Greengate Furniture* tribunal had concluded that the default surcharge regime was not disproportionate despite the absence of a power to mitigate, but in my view that is not what it said; indeed, at the risk of repetition, I do not understand how the observation by that tribunal at para 113 of its decision that “[t]here may be cases where a surcharge does meet the test in *Roth* but this is not one of them” is consistent with the conclusion that the appellant there failed because, irrespective of the penalty in its individual case, the system as a whole stood up to scrutiny. In my view the *Sony Ericsson* tribunal has misunderstood what was said in *Greengate Furniture*, and in consequence has applied a general, to the exclusion of an individual, test. I remain unpersuaded that there is anything offensive in testing an individual penalty even when the regime itself is, on the whole, acceptable.
58. Having disposed of that argument, I approach the “value judgment” to which Lord Nicholls referred in *Wilson v. Secretary of State*. It is, I think, necessary to begin with the purpose of the surcharge regime before coming to the penalty imposed in the instant case.

59. It goes without saying that there is a public interest, recognised by the Human Rights Convention itself, in the timely payment of taxes. As I have pointed out, the law allows a taxable person a calendar month from the end of each of his prescribed periods to prepare his return and arrange for the payment of the net amount due, a period which, as I have said, is of reasonable length. It also seems to me impossible, in principle, to criticise a penalty system which is designed to deter delay, even of as little as one day, beyond that month, and to punish delay when it occurs. It is necessary also to bear in mind that the tax due from many traders amounts to a very large sum; the imposition of a small fixed penalty, such as the £100 imposed in many of the cases to which Mr Conlon referred me, would constitute in such circumstances neither deterrent nor punishment. For that reason I see nothing offensive in principle in a tax-gearred penalty nor, self-evidently, in a system which increases the rate of the penalty for repeated offences. The tax-gearing of the default surcharge is, as I have said, somewhat unsophisticated, but I am not willing to accept that the lack of sophistication, taken alone, is a reason for concluding that the method adopted is disproportionate. A link with the net amount of tax due has the considerable advantage of simplicity, and any other means of linking the penalty to the tax is, I think, equally likely to produce results which might be thought anomalous in individual cases.
60. As what I have already said indicates, the feature of the system which was identified by the tribunal in *Greengate Furniture* as having the potential to undermine its proportionality was the absence of a power to mitigate. Others which, in my view, have the same potential are the fact that the penalty is the same whatever the delay and the absence of any upper limit.
61. Before examining those considerations in more detail it seems to me that a pertinent question to ask is whether, if the penalty were not determined mechanically but by a court or tribunal with the power to set any monetary penalty it chose without statutory constraint, that court or tribunal, exercising ordinary judicial discretion, would impose a penalty of as much as £130,000 for an error of this kind. In my view the answer is obvious: it is unimaginable that such a high penalty would be imposed. It is worth returning briefly to my rejection of Mr Conlon's argument relating the penalty to interest, in order to repeat that the penalty is just that; it is not a means of compensating the Commissioners for being out of their money. They may additionally assess for interest, though I understand they generally do not do so, at least when the delay is comparatively short. The fact remains, however, that a taxable person who pays late is liable to pay interest as well as a penalty, a factor which should be borne in mind when fixing the amount of the latter. I should add that I have considered whether it is also a relevant factor that the Commissioners are able to impose a penalty and require the payment of interest when most other creditors are unable to do either, but have concluded that it is not. Taking the penalty imposed in this case in isolation, though against the background of the public interest in the prompt payment of taxes, it seems to me that it is an inescapable conclusion that it is disproportionate.
62. In reaching that conclusion I have derived some assistance from *Mamidakis*, which itself drew on the judgment of the European Court of Justice in *Louloudakis v Greece* (Case C-262/99), in which it observed that an essentially fixed (but high) penalty "is compatible with the principle of proportionality only in so far as it is made necessary by overriding requirements of enforcement and prevention, when gravity of the infringement is taken into account". The Court concluded in *Mamidakis* that the penalties imposed on the applicant amounted to a disproportionate measure imposing an excessive financial burden, despite its acceptance of Greece's argument that the

problem it faced, of oil smuggling, was serious, that the applicant was found to have been guilty of wilful misconduct and this was not his first offence.

63. The judgment and the reasoning are not altogether easy to understand, and it is unfortunate that at para 48 the Court merely declared the penalties disproportionate, even allowing for the state's margin of appreciation, without giving any guidance, even in the most general terms, about the level at which it thought a proportionate penalty might have been set. It is also true that neither the gravity of the conduct in *Mamidakis* nor the magnitude of the penalties is readily comparable with the corresponding features of this case. However, what is apparent from the judgment, as well as from *Louloudakis*, is that the imposition of a high penalty cannot be justified merely because it is the product of a mechanical scheme, or because it is a multiple of the tax in issue; the requirement of proportionality remains.
64. Those conclusions do not, however, dispose of the matter since, as has been repeatedly pointed out, not only does the state has a wide margin of appreciation, but the courts and tribunals should also not strike down a scheme or an individual penalty save in exceptional circumstances. One should be particularly careful in the case of a penalty scheme recommended, as the default surcharge was, by a committee headed by a distinguished judge. In its report the committee said, at para 1.5.1(b), that
- “The scope for administrative discretion should be reduced to a minimum, so that it is available only where required for strictly practical reasons. As a general rule particular consequences should follow particular acts or omissions in every case. In this way, everyone knows where they stand, and compliance is likely to be improved. If everyone is treated alike, grounds for complaint are minimised, provided always that the sanction is regarded as broadly fair.”
65. That observation suggests that a high penalty such as that imposed here should be regarded as an acceptable, perhaps desirable, even if individually burdensome, consequence of the scheme. It was, however, made against the background of the committee's recommendation, not accepted by Parliament, that penalties be geared directly to both the amount of tax outstanding and the period of delay (it suggested a small fixed percentage of the tax for each day's delay), and that there should be some, albeit very limited, possibility of mitigation in exceptional cases. It is a matter for speculation whether the observation would have been made in the terms I have quoted had the committee known that the penalty would be the same regardless of the delay, and that mitigation would never be available. I think it is a reasonable assumption, however, that it would not have considered a scheme which penalised one day's inadvertent delay in exactly the same way as a month's deliberate non-payment as “broadly fair”. Had the committee's proposals for linking the penalty to both the tax and the period of delay been accepted, the penalty imposed on EHUK would have been only one tenth of that actually imposed.
66. At this point it seems to me that Mr Conlon's comparison of the default surcharge regime with the new penalty system introduced in relation to other taxes by the Finance Acts 2007 to 2009 is pertinent. The objective is the same: to ensure that those liable to pay tax account for it promptly. Although the new system is arbitrary in that the penalties imposed are fixed, they are on the whole lower, they usually reflect the length of the delay even if in a broad-brush fashion, are in many cases also linked to the amount of tax outstanding and in most cases, at least when the penalty is of more than a relatively nominal sum, there is the possibility of mitigation. It is an obvious question, why the penalties for the late payment of VAT, as far as I know uniquely, should be so much more severe than those imposed for the late payment of other taxes.

67. Mr Bird did not offer an explanation, but some information about the scale of the problem prior to the replacement of prosecution by a civil penalty regime, and of the Commissioners' experience thereafter, is provided by the decision in *Greengate Furniture*. It is apparent that the scheme has been a success in as much as there has been considerable improvement in the timely submission of payments and returns in the years following its introduction. It is also explained that minor penalties (as I have described) are not collected, and that the Commissioners send an advisory letter, rather than a surcharge liability notice, to smaller traders defaulting for the first time. There is no relaxation of the scheme for larger traders, or for penalties which fall outside the concessionary limits. What is not clear, either from the *Greengate Furniture* decision or from any other material put before me, is whether the scheme is materially assisted in its purpose by the fixed nature of the penalty, regardless of the period of delay, the absence of any upper limit and the exclusion of a power to mitigate—in other words, the Commissioners have advanced no evidence or other material to show that these are features of the scheme without which it would be materially less effective.
68. Although, as I have said, the state enjoys a wide margin of appreciation it seems to me that it must be incumbent on the state to show that a penalty which, as I have concluded, is disproportionate should be upheld because its imposition is justified by that margin of appreciation. It is true that Mr Bird focused on the regime rather than the individual penalty and I recognise that his addressing the proportionality of the penalty would have been inconsistent with that approach, but I was nevertheless left with no material to counter Mr Conlon's point that, while the system for penalising other delays in the accounting for and payment of taxes does allow for correspondence of the penalty with the period of delay, mitigation and, in some cases, an upper limit to the penalty, this scheme, for no evident reason, does not.
69. I am quite willing to accept—indeed experience of its operation tells me—that the default surcharge regime, by and large, produces a fair penalty, or at least one which is not obviously disproportionate to the offence, albeit I have particular misgivings about the absence of any correlation between the period of delay and the amount of the penalty. But, as I have indicated, the penalty imposed in this case is in my view wholly disproportionate to the gravity of the offence—it is, as Simon Brown LJ put it in *Roth*, “not merely harsh but plainly unfair”—and I am not persuaded, in the absence of any justification of it, that it can be saved by the state's margin of appreciation. It is, in my view, one of those exceptional cases which the tribunal had in mind in *Greengate Furniture*.
70. As the tribunal observed in that case “it does not seem to us that that the absence of a power to mitigate is strictly necessary ... and it seems to us that without such power the regime arguably goes ‘further than is necessary’”. I would make a similar observation about the lack of any relation between the period of delay and the magnitude of the penalty. The absence of an upper limit may be justifiable upon the basis that it is a necessary consequence of a tax-geared penalty, though in my view there must come a time, even in the case of a large company, when that justification breaks down. I do not, however, attach as much weight to this concern as to the lack of a link between the penalty and the period of delay, and it is not a factor of great significance in the instant case.
71. In those circumstances I discharge the penalty. Mr Conlon accepted that the consequence of such a decision was that EHUK would suffer no penalty at all, but in the absence of any power in the tribunal to impose a more reasonable penalty that is inevitably the result.

72. The parties made only tentative submissions about costs, preferring to await the outcome of the appeal before making formal applications. It may help, however, if I say that in principle it seems to me that this is a case in which I should apply the provisions of para 7 of Sch 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 and that costs should follow the event.