



**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

<b>Applicant: Spirit Motor Company Limited</b>	<b>Tribunal Ref: UT-2023-000127</b>
<b>Respondents: The Commissioners for His Majesty's Revenue and Customs</b>	

**APPLICATION FOR PERMISSION TO APPEAL**

**DECISION NOTICE**

**JUDGE RUPERT JONES**

**Introduction**

1. Mr Mohammed Sadiq, director of the Applicant company, applies on its behalf to the Upper Tribunal (Tax and Chancery) (“UT”) for permission to appeal the decision of the First-tier Tribunal (Tax Chamber) (“the FTT”). The FTT’s decision was released on 30 June 2023 (“the FTT Decision”) and followed a remote hearing conducted by video on 4 April 2023.
2. The FTT dismissed the Applicant’s appeal to the Tribunal against HMRC’s decision to issue it Value Added Tax (‘VAT’) default surcharges under section 59 Value Added Tax Act 1994 (‘VATA’) for the VAT periods 08/21 and 11/21. For 08/21 the surcharge was £2,613.33 and for 11/21, £3,662.09. The former was calculated at 10% of the outstanding VAT and the latter 15% as there had been previous surcharges which are not under appeal.
3. In relation to the 08/21 period, the Applicant had filed its VAT return 5 days late on 12 October 2021 (after the deadline of 7 October 2021) and made payment some six weeks late on 25 November 2021. In relation to the 11/21 period the Applicant had filed its return on time by 7 January 2022 but made payment of its VAT about one month late on 10 February 2022.
4. There was only one contested issue considered in the FTT appeal: whether the Applicant had demonstrated it had a reasonable excuse for the defaults – the late return for 08/21 and late payments for 8/21 & 11/21. The FTT found that the Applicant did not have a reasonable excuse for the defaults in either period 08/21 or 11/21. No issue of proportionality was raised.
5. By a decision dated 7 September 2023 (“the PTA Decision”), the FTT Judge refused permission to appeal to the UT on the grounds of appeal pursued by the Applicant. The deadline for renewing the application to the UT for permission to appeal expired on 7 October

2023 (one month after the PTA Decision was issued – see Rule 21(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (‘the Rules’)). The Applicant renewed its application for permission to the Upper Tribunal in a notice of appeal which was undated but received by the UT on 17 December 2023. The application was therefore made over two months late, being over three months after the PTA Decision.

6. Nonetheless, I admitted the late application on the papers in a decision dated 1 May 2024 but refused permission to appeal to the UT (‘the Papers Refusal’).

7. The Applicant renewed its application for permission to appeal, asking for it to be reconsidered at an oral hearing which took place in person at the Rolls Building on 18 July 2024.

8. Mr Sadiq, the Applicant’s director, appeared for the Applicant at that hearing. I am very grateful to him for the written and oral representations which I have considered with care.

### **UT’s jurisdiction in relation to appeals from the FTT**

9. An appeal to the Upper Tribunal from a decision of the FTT can only be made on a point of law (section 11 of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal has a discretion whether to give permission to appeal. It will be exercised to grant permission if there is a realistic (as opposed to fanciful) prospect of an appeal succeeding, or if there is, exceptionally, some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

10. It is therefore the practice of this Chamber of the Upper Tribunal to grant permission to appeal where the grounds of appeal disclose an arguable error of law in the FTT’s decision which is material to the outcome of the case or if there is some other compelling reason to do so (such as if the appeal raises a point of law of general public importance).

*What is an error of law?*

11. Permission to appeal may only be given when there is an error of law in the Tribunal’s approach. The errors of law most frequently encountered in practice were identified by the Court of Appeal in the case of *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 as follows:

- i) Making perverse or irrational findings on a matter or matters that were material to the outcome (“material matters”); the word “perverse” establishes a high hurdle, see *Miftari v SSHD* [2005] EWCA Civ 481;
- ii) Failing to give reasons or any adequate reasons for findings on material matters;
- iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- iv) Giving weight to immaterial matters;
- v) Making a material misdirection of law on any material matter;
- vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for a mistake, and where unfairness resulted from the fact that a mistake was made.

12. Each of these grounds for detecting an error of law contain the word “material” (or “immaterial”). In *Secretary of State v AH* [2007] UKHL 49, Baroness Hale of Richmond made it clear that decisions by Tribunals in their specialist field “should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently.”

13. All of this can be explained in more simple language for the benefit of an unrepresented party.

14. An appeal to the Upper Tribunal can only succeed if the First-tier Tribunal **erred in law**. What that means is if the First-tier Tribunal got the particular legal test or tests wrong by failing to interpret or apply the law correctly, or if it failed to consider all the relevant evidence, or if it failed to explain its decision properly by failing to give sufficient reasons, or it breached the rules of natural justice by failing to provide a fair procedure or hearing. However, if the First-tier Tribunal does all of this correctly, it will not have erred in law simply because an applicant or appellant considers the FTT made the wrong decision on the facts. The Upper Tribunal will not overturn the FTT’s decision simply because it might have made different findings of fact or come to a different evaluative conclusion unless the decision or conclusion was unreasonable, irrational or perverse such that no reasonable decision maker could have made it. In other words, it is not another appeal on the facts.

15. It is also important to note that an error of law must be **material** ie. that any error may have altered the outcome of the appeal. **Permission** will only be granted if the grounds of appeal are arguable (hold reasonable or realistic prospects of success).

### **Discussion, Analysis and Decision**

16. In my Papers Refusal I addressed the grounds of appeal as they then stood and gave reasons for my decision.

17. In his oral submissions, Mr Sadiq, for the Applicant, expanded upon his previous written grounds and raised new matters.

18. His main complaint was that he considered that his hearing before the FTT was unfair because it took place by video, and he believes he was unable to participate effectively by that medium. He stated that at times during the video hearing he froze and was unable to raise matters or explain his case adequately – hence why he asked for an in-person hearing of his application for PTA to the UT. He submitted that he was not asked whether he consented to a video hearing before the FTT and would not have consented to it if he had had the choice.

19. I do not accept this gives rise to any arguable error of law on the part of the FTT. I am satisfied that the proceedings and hearing before the FTT were procedurally fair. The Applicant did not provide me with any material to suggest that he did not consent to a video hearing at the time it was offered. Nor did he provide me with any material to suggest he was not offered an in-person hearing. Even if he was not offered an in-person hearing by the FTT, he did not provide me with any material to suggest that he raised any issue with his ability to participate in a video hearing before or at the time of the FTT hearing. Further, there was no suggestion that he had raised any issue of having difficulty communicating with the tribunal by video in advance of or during the hearing. It is apparent from the terms of the FTT decision

that Mr Sadiq presented written and oral evidence and submissions on the relevant issues at the time and was able to present his case on the facts and the law. There is no material before me that leads to an arguable inference that he was unable to communicate effectively or fairly participate in proceedings before the FTT. In addition, he had the ability to provide full written submissions and evidence prior to the hearing which were considered by the FTT.

20. There was no arguable error of law on the FTT's Decision raised by this ground.

*Late payment for VAT period 11/21*

21. For convenience, I will first address the second VAT period in question, that of 11/21. It found that the Applicant had no reasonable excuse for the late payment 11/21 on 10 February 2022 for VAT period which was due on 7 January 2022. The FTT made the following findings at [34]-[36] of the Decision:

...

34. In relation to the period 11/21 and step 1 of *Perrin*. Here the return was on time, but the payment was late. Mr Sadiq, for the Appellant, says he still believed the direct debit would take (albeit it hadn't for the previous period and had needed to make a credit card payment). He points out he had cancelled the original direct debit on the advice of the Respondent on 20th November 2020. He has shown that he entered into a TTP with a direct debit from 15th December 2020 which includes all periods up to 05/21. He states that with everything going on it was reasonable to believe that the direct debit would take the payment for 11/21.

35. At step 2 we accept everything that Mr Sadiq has said about these facts and beliefs and find them proved. At step 3 we ask ourselves whether it was objectively reasonable for the Appellant, through Mr Sadiq, to mistakenly believe that the direct debit was in place and would pay.

36. We do not for one moment detract from the position Mr Sadiq found himself in personally and with his family, as well as the problems with the business. Mr Sadiq was the person solely responsible for the Appellant's VAT. He was an experienced person in that regard. The Respondents assert that Mr Sadiq made a mistake in not setting up the direct debit to pay onward VAT and therefore there is no reasonable excuse. We accept that it is right as a matter of fact that it was a mistake. We also remind ourselves of §12 of *Garmoss*. However, that is not authority for the proposition that a mistake cannot be taken into account when assessing reasonable excuse, just that, in the context of that case, of itself it was insufficient. We do not find the mistake of itself is an answer for the Appellant. It is one of the circumstances we consider. Ultimately however by the time the payment for 11/21 was due on 7th January 2022 the Appellant had already needed to make a payment manually for the previous period. Whether that was an error with the bank or not, the reasonable taxpayer would know – as the Appellant knew – that there was a problem. It should have been checked with the bank or the Respondent. Had it been done, and the fact there was no direct debit exposed, then we have no doubt the VAT would have been paid. Having asked ourselves the question that we must, it was not in our judgment objectively reasonable for the taxpayer to omit to check whether there was a direct debit that would pay when it should have done, given what occurred with the previous non-payment. Again, what occurred is an illustration of what can happen when things are left to the last day of the five-week period given to make a return and a payment.'

22. During his submissions, Mr Sadiq initially suggested he had not made a late payment for 11/21, submitting he only made one late payment in respect of 08/21. He then checked his bank statement online during the hearing and accepted the payment was made late (on 10 February 2022). He did not accept that the reason that he relied on for the late payment was

the one that is recorded by the FTT at [34]: ‘He states that with everything going on it was reasonable to believe that the direct debit would take the payment for 11/21.’ However, Mr Sadiq was not able to recall the argument he says he did put before the FTT in relation to reasonable excuse if it was not the one that was recorded.

23. As at the hearing before me, he could not remember the reason for the Applicant’s late payment for VAT period 11/21. He was simply unable to point to a reasonable excuse for this late payment because he had forgotten the circumstances relating to it although he believed he would not have simply forgotten to make the payment on time.

24. He accepted the FTT’s reasoning at the end of [36] of the Decision that a reasonable taxpayer would have known by 7 January 2022 that the direct debit payments to HMRC were no longer in operation (because he knew this as of making the late payment for 08/21 on 25 November 2021). He also would have known that he had to make payment by the 7 January 2022 due date (when he submitted his return) and that he had provided no reasonable excuse for the failure at the time. Nonetheless, he submitted that he did have a reasonable excuse for this late payment and that the FTT had erred in law in making its decision.

25. I reject all these submissions as unarguable. The Applicant was unable to point to any error of law in the FTT’s decision and reasons in respect of VAT period 11/21. I am satisfied that the FTT properly recorded the reasons Mr Sadiq relied upon at the time in support of a reasonable excuse for VAT period 11/21. It did not arguably err in rejecting them. It interpreted and applied *Perrin v HMRC [2018] UKUT 0156 (TCC)* at [81] correctly when considering whether the Applicant had a reasonable excuse for the late payment and did not fail to take into account any relevant evidence. It gave sufficient reasons for its decision which was a rational one that was available to it on the evidence before it. In contrast to the argument that is recorded as being made to the FTT, Mr Sadiq is now unable to point any reasonable excuse for this late payment by the Applicant.

26. While I struggle with the relevance or applicability of the reasoning in the last sentence of [36]: ‘*Again, what occurred is an illustration of what can happen when things are left to the last day of the five-week period given to make a return and a payment*’, I am not satisfied that this was a material part of its reasoning. I return to this line of reasoning when I consider the last sentence of [33] of the Decision in relation to period 08/21 below.

27. I therefore consider that there is no arguably material error of law in the FTT’s decision dismissing the appeal regarding the surcharge for the VAT period 11/21. I refuse permission to appeal on this ground as it holds no realistic prospect of success.

#### *VAT period 08/21*

##### *Late Return*

28. The FTT addressed the late VAT return for 08/21 (received on 12 October 2021) and late payment (received on 25 November 2021) at [32]-[33]:

...

32. Turning to the real issues in this appeal of whether the Appellant has shown there is a reasonable excuse or not, in relation to period 08/21 and step 1 of *Perrin* Mr Sadiq, for the Appellant says he was short of staff and that calls with the Respondent took 2-3 hours, time

which he simply didn't have. Taken together he asserts this is a reasonable excuse for the late return and assumed the direct debit, which had been set up for the TTP, would then pay.

33. At step 2 we accept what he has said and find those proven. However, in relation to step 3 taking everything into account that we have found as facts and recognising the difficulties the Appellant's director had in relation to the late return it simply wasn't objectively reasonable for the taxpayer to be late. Although unfortunate he hadn't appreciated that returns were also needed toward the start the Appellant plainly knew that VAT and returns needed to be paid at the point of 8/21 becoming due, not least because of the previous surcharges that had been applied and Mr Sadiq's telephone call in November 2020. The staff shortage where it impacted upon the return of VAT and payment by the director who always had sole responsibility is not something that is a reasonable excuse, even if it might have meant the Appellant was not reclaiming on the return everything he would be entitled to. In our judgment, a reasonable taxpayer in the Appellant's position would ensure, at this point, that the return was on time. The lateness of the return ensured that any VAT payment would also be late. Although Mr Sadiq was undoubtedly busy and there were problems, what occurred is an illustration of what happens when things are left to the last day of the five-week period given to make a return and a payment.

29. Mr Sadiq submits that the FTT did not fully consider his reasonable excuse for the late return and late payment in 08/21.

30. He made lengthy oral submissions to me which I summarise as follows.

31. In respect of the late return, his firm had suffered greatly under COVID and from the furlough of staff. He had no bookkeeper or accountant to operate his VAT system during the national lockdown so that when it was lifted and his bookkeeper had returned there was a vast amount of paperwork to catch up and VAT returns to file. This consisted of hundreds of transactions for each period which required accounting for and which he was unable to do himself – because he did not know how to do it and in any event he was too busy running the operational side of the business. The VAT returns for the business could only be done by the accountant (who was unavailable during COVID) or the bookkeeper (who was unavailable during COVID as furloughed but who returned thereafter). She had a vast backlog of paperwork to catch up with for multiple VAT periods - hence the three earlier late VAT returns (and Time to Pay arrangement – 'TTP'). During this time there had been difficult personal circumstances, involving his contracting COVID, bereavement following a family member's death, looking after his disabled children and the inability of his wife to be able to help with the business and the conduct the necessary paperwork.

32. Mr Sadiq said that he had constantly tried to contact HMRC throughout the relevant time, to discuss returns and payments and what was required but they were impossible to get hold of by phone, yet he had done everything reasonable to engage. He also had a longstanding unblemished VAT record and then set up a TTP arrangement. HMRC had provided obstacles to helping him and his prevented him understanding that the direct debit only applied to the old VAT liability under the TTP arrangement for which he set up a second direct debit in December 2020. The furlough system meant he had not had any administrative support during the COVID lockdown.

33. The reason for the 5-day late VAT return for period 08/21 was that the bookkeeper had four returns to catch up, involving thousands of transactions, as well as trying to keep up with the ongoing liabilities. The reason for the six-week VAT payment was his reasonable belief was that it was covered by his existing direct debit. He did not expect there to be two separate

systems for paying VAT to HMRC or that he would need two separate payments or direct debits: one in respect of the TTP arrangements for previous periods plus a second separate system for paying ongoing liabilities under new returns and payment periods.

34. He had not appealed the first three default surcharges relating to the earlier periods as there was no liability to pay (they were nil returns so that the surcharges of 2%, 5% and 7% were still for £0 pounds and he did not understand their significance as there was nothing to pay).

35. He stated that he accepted that he had not put all of these reasons before the FTT during the hearing but that was because it was by video and he simply froze and was unable to communicate properly.

36. I have treated that as an application to admit fresh evidence on the appeal to the UT. I take into account the tests for admitting fresh evidence set out in *Ladd v Marshall* [1954] 1 WLR 1489 as explained as applying to the UT in *Donald Graham Ketley v Revenue and Customs* [2021] UKUT 218 (*'Ketley'*) at [52]-[54] but ultimately must apply the tests under Rules 2 and 15 of the Tribunal Procedure Rules to decide if it is just and fair to admit the new evidence.

37. First, I have decided that the evidence given to me was evidence that was properly available to the Applicant at the time of the FTT hearing and the Applicant could normally have been expected to rely upon it at the time as was within his knowledge. However, I accept that the Applicant may have been stressed by participating in a video hearing and not in the best mental state to say everything he wanted to when he was unrepresented and unfamiliar with proceedings. This is notwithstanding my finding that he nonetheless had a fair hearing and was given full opportunity to make submissions and provide evidence in writing to the FTT.

38. Second, I also accept that Mr Sadiq's evidence may carry some weight and merit when deciding whether the FTT erred in law on the issue of reasonable excuse. The FTT found Mr Sadiq's evidence to be credible and the matters he relied upon to be proven. Third, I also accept that it would cause no real prejudice to HMRC in admitting evidence in relation to a surcharge of around £2,600 for period 08/21.

39. I therefore admit the fresh evidence contained in Mr Sadiq's oral submissions when considering the question as to whether there is an arguable error of law in the FTT's analysis and reasoning in relation to 08/21.

40. Nonetheless, I do not consider that the matters relied upon by Mr Sadiq raise an arguable error by the FTT in finding there was no reasonable excuse for the late 08/21 return which was due on 7 October 2021 but which was filed five days late on 12 October 2021.

41. It is not arguable that the FTT failed to take into all the evidence highlighted above - it did so in brief but sufficient terms at [32] as set out above and recorded the other factual matters earlier in the decision at [8] and [9]:

8. Prior to Covid the Appellant appears to have had an excellent VAT history by reference to the timely lodging of returns and the making of payments. When the Covid pandemic struck in March 2020 and for a long time afterwards severe problems arose. It is no coincidence that the first default was the period ending 08/20. Since that period there has been a default including 11/21 which was the final period, we were provided documents about.

9. As time went by the Appellant was able to keep trading but from split sites. Mr Sadiq had staffing problems and the paperwork was going to both sites. In particular, those problems meant it was difficult to locate what would be needed to ensure he was properly reclaiming against VAT that which the Appellant had spent. His personal situation with his children and their disabilities made his position harder in discharging his responsibilities to the Appellant; including VAT. Mr Sadiq suffered illness and bereavement in the period leading up to the surcharges under appeal. It seems more likely than not that at some point Mr Sadiq misunderstood that whilst there was some deferral on the payment of VAT, returns still needed submitting having spoken to the Respondents.

42. I am not satisfied that the FTT arguably failed to give sufficient reasons when finding at [33] that there was no reasonable excuse for the Applicant filing the late 08/21 return despite the difficult circumstances confronting the business which had been caused by the prior COVID lockdowns and furloughing of staff and the difficulties in contacting / lack of response from HMRC to the enquiries Mr Sadiq was seeking to make.

43. Notwithstanding my rejecting Mr Sadiq's grounds of appeal as unarguable, I have independently considered whether the FTT erred in its Decision in relation to the late return for 08/21.

44. The FTT relies on a number of reasons at [33] for its conclusions that there is no reasonable excuse. These include the fact of previous surcharges being made to alert the Applicant to the fact it needed to make its return on time.

[33]...Although unfortunate he hadn't appreciated that returns were also needed toward the start the Appellant plainly knew that VAT and returns needed to be paid at the point of 8/21 becoming due, not least because of the previous surcharges that had been applied and Mr Sadiq's telephone call in November 2020.

45. It is not in dispute that the Applicant business ought to have and did know of the deadline for the return and payment given the history of earlier late returns for earlier periods.

46. The question in this case is whether the circumstances relied upon for lateness of the return were not objectively reasonable for a taxpayer in its circumstances. The FTT addressed these at [33] in brief but rational terms:

33... The staff shortage where it impacted upon the return of VAT and payment by the director who always had sole responsibility is not something that is a reasonable excuse, even if it might have meant the Appellant was not reclaiming on the return everything he would be entitled to. In our judgment, a reasonable taxpayer in the Appellant's position would ensure, at this point, that the return was on time... Although Mr Sadiq was undoubtedly busy and there were problems, what occurred is an illustration of what happens when things are left to the last day of the five-week period given to make a return and a payment.

47. The FTT was entitled in principle to decide that given the earlier late returns in respect of three periods (05/21, 02/21 and 11/20), the Applicant should reasonably have ordered its affairs so as to ensure that the 08/21 return was filed on time even if there was a backlog of paperwork and number of returns for the Applicant to catch up on post COVID (as he now puts it) / staff shortage (as it was put to the FTT). While the FTT does not express so in such explicit terms, that is the essence of its reasoning. That is an entirely rational reason to find that the Applicant did not have a reasonable excuse for the late filing of its return.



48. Nonetheless, I am satisfied that there were two arguable errors of law in the FTT's conclusion that there was no reasonable excuse for the late filing of the 08/21 VAT return.

49. First, the FTT stated in its reasoning at [33] that 'even if it might have meant the Appellant was not reclaiming on the return everything he would be entitled'. It is arguable that when considering a reasonable excuse, if a person has a reasonable excuse for not being able to file a full and accurate VAT return setting out all the VAT it is entitled to deduct or reclaim by the deadline, then this is capable of constituting a reasonable excuse for filing a late return.

50. It is therefore arguable that the FTT applied the wrong test in law. I am satisfied that it is arguable that this is at least a material part of its reasoning - material to its conclusion that 'a reasonable taxpayer in the Appellant's position would ensure at this point that the return was on time'.

51. Second, in the last sentence of [33] the FTT relies in part on its reasoning that the Applicant had left the making of the return or the payment to the last day of the 08/21 period (7 October 2021). However, it is not clear that the FTT had made any factual finding based on any evidence for such a conclusion – as part of stages 1 and 2 in *Perrin*. This is an arguably material part of its reasoning – and one it repeats at [36] in relation to the 11/21 late payment - the implication is that the Applicant should have ordered its affairs such that it was able to consider and prepare the making of the return before the last day of the period. However, it is arguable that there was no finding that this is what happened (and Mr Sadiq strongly disputed such any such finding or implication during his oral submissions) as opposed to the Applicant starting work on the preparation of the return earlier in advance of the deadline (rather than the last day) but not completing the return and filing it until five days late.

52. It is therefore arguable that the FTT took into account or relied upon a reason that it had not found as fact - it conflated stages 1 and 2 of [81] of *Perrin* (establish what facts are relied upon as reasonable excuse and whether they are proved) from stage 3 (whether the facts relied upon and established, were objectively reasonable in the circumstances in which the Applicant found itself so as to establish a reasonable excuse).

53. I therefore grant permission to appeal in respect on these two grounds in respect of the late return for period 08/21.

#### *Late payment*

54. The FTT addressed the background for the late VAT payment for 08/21 received on 25 November 2021 at [10]-[13]:

10. Having received a letter regarding the first surcharge for the period 08/20, on 18th November 2020 Mr Sadiq was advised in terms by the Respondent to cancel the direct debit that allowed the Respondent to take VAT payments. The Appellant was advised of the Time To Pay scheme ('TTP') and told that returns very much did need making, and that three returns were outstanding. On that date the return for the 08/20 period was lodged with the Respondent. The direct debit was cancelled on 20th November 2020.

11. On 7th December 2020 a TTP was set up with a new direct debit to take a number of payments. These appear to have been due to expire on 15th November 2021 with a final payment of £3,844.

12. Thereafter returns for the next four periods, including the 08/21 period were late. Due to the direct debit being taken in relation to the TTP there does seem to have been some payments

taken for VAT liability that post-dated it as set out at page 9 of the bundle and, for example, as accepted by the Respondent in their statement of reasons at §14. The final direct debit payment for £3,844 in fact appears to have been taken on the 12th November 2021.

13. In relation to the surcharges under appeal, the 08/21 return was due by 7th October 2021 and received by the Respondents on 12th October 2021. In clarifying his Notice of Appeal, Mr Sadiq for the Appellant believed that this single direct debit was for both his TTP and for future liabilities. However, any direct debit the Appellant had did not pay the VAT for 08/21. The VAT was paid on 25th November 2021 by credit card when Mr Sadiq discovered no payment had been made. In relation to the 11/21 return, that was due by 7th January 2022 and received on that date. The VAT was paid on 10th February 2022 by faster payment service, again, after no payment had been made by direct debit or otherwise.

55. However, I am satisfied that there is an arguable error of law in relation to the FTT's decision that there was no reasonable excuse for the late payment for VAT period 08/21. I consider that there is an arguable error of law in the finding that there was no reasonable excuse for the late payment made on 25 November 2021.

56. As the FTT found at [11] & [13], the Applicant had set up a direct debit in respect of the TTP arrangement in December 2020 which was due to expire on 15 November 2021 and which Mr Sadiq believed would cover all its ongoing VAT liabilities such as for 08/21. The FTT accepted his account that this is what he honestly believed. At [36] the FTT appears to accept that the Applicant may also have believed there was a bank error in relation to the first missed payment. At [12] it found that there were some payments taken by the direct debit for VAT liability that post-dated the liabilities under the TTP arrangement.

57. Therefore, it is arguable that the FTT failed to take into account Mr Sadiq's evidence and ground of appeal and give reasons for rejecting as unreasonable his belief that it would cover all the Applicant's VAT liabilities up to November 2021 including new liabilities under subsequent VAT periods to 11/20 such as 08/2. This is a ground of appeal that Mr Sadiq has raised in his submissions.

58. In its reasons at [33] the FTT relied on the following reasons: *'The lateness of the return ensured that any VAT payment would also be late. Although Mr Sadiq was undoubtedly busy and there were problems, what occurred is an illustration of what happens when things are left to the last day of the five-week period given to make a return and a payment.'*

59. There are two further arguable errors in this reasoning which I have identified which were not raised by Mr Sadiq.

60. First, it is arguable that the finding that the lateness of the return ensures a late payment contains an error - it is arguable that it is possible file a return late but to make a payment on time (a payment could be made on time that covers the extent of the liability eventually declared in a late return). This finding arguably implies that the lack of reasonable excuse for a late return ensures the lack of reasonable excuse for the late payment but a reasonable excuse for late return and late payment are two independent considerations.

61. Second, as set out above, it is not clear that the FTT had made any factual finding based on any evidence that the Applicant had left the making of the payment to the last day of the 08/21 period (7 October 2021) – arguably conflating steps 1 and 2 with step 3 of *Perrin*.

62. I therefore grant permission to appeal to the Applicant in respect of the finding that there was no reasonable excuse for the late payment for the period 08/21.

63. Permission is granted on three grounds: it is arguable that the FTT erred in law in applying stage 3 of the *Perrin* analysis in concluding that there was no reasonable excuse for the late payment for 08/21 by: a) failing to address Mr Sadiq's evidence and ground of appeal and failing to give reasons for rejecting them as unreasonable; b) failing to independently consider the excuse for the late payment from the excuse for the late return; and c) failing to make any finding of fact that the attempt to make a return and payment was left to last day of the period thus conflating stages 1 and 2 of *Perrin* with stage 3.

### **Important consequential matters**

64. I do observe that the Applicant should not get his hopes up in respect of any substantive appeal succeeding. The grant of permission to appeal does not provide any guarantee that the Applicant will be successful following the final appeal hearing – it simply means that the appeal is permitted to proceed to a full hearing.

65. Given the amount of money at stake in the appeal, the parties may wish to consider engaging with one another as to whether the matter can be settled without proceeding to a full appeal hearing.

66. I would encourage Mr Sadiq to seek free (pro bono) legal representation in this matter. He may wish to consult organisations such as Advocate, (formerly the Bar Pro Bono Unit), the Revenue Bar Association or the Free Representation Unit and give them a copy of this permission decision, in order to establish whether any of them will advise or represent the Applicant in any appeal.

**67. The Applicant should also be aware that appeals to the Upper Tribunal are within a costs shifting jurisdiction. This means that the general rule (subject to the Tribunal's discretion to direct otherwise) is that the losing party to an appeal should pay the winning party's legal costs. That means that if the Applicant is unsuccessful at any final appeal, it may be ordered to pay HMRC's legal costs (which may be thousands of pounds and well in excess of the sum of money under dispute) but if it is successful, HMRC would be liable to pay its costs (if it remains a litigant in person (unrepresented) then costs are capped / limited).**

68. In the event of the appeal proceeding and not being settled, the Applicant may wish to contact HMRC in advance to see if they will waive their right to seek their costs in this case in the event they are successful.

### **Conclusion**

69. Permission to appeal to the Upper Tribunal is **granted** in respect of the late return and payment for the VAT period 08/21 on the grounds set out above. Permission is **refused** in respect of the late payment for VAT period 11/21.

<p><b>JUDGE RUPERT JONES</b> <b>JUDGE OF THE UPPER TRIBUNAL 01 August 2024</b></p>
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**Issued to the parties on: 05 August 2024**