



TC03587

Appeal number: TC/2014/00537

VALUE ADDED TAX – default surcharge – two payments made one day late – trader’s mistaken understanding as to time taken for electronic transfer of funds – whether reasonable to expect payment to be received by HMRC by due date – held, no – in absence of reasonable excuse, no basis for adjusting or cancelling surcharges – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AARON GUBB

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN CLARK
MRS SHAMEEM AKTAR**

Sitting in public at 45 Bedford Square London WC1B 3DN on 9 May 2014

The Appellant in person, assisted by Mr Wiltshire

Mr Rowe, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Gubb, who runs a public house in Norfolk, appeals against VAT default
5 surcharges for the VAT periods 06/11 and 09/11. In his Notice of Appeal, he also
appealed against a surcharge for the period 12/11, subsequently reduced by the
Respondents (“HMRC”) but at the hearing he accepted that he had made a mistake
when keying the amount of the payment and that therefore he was liable to the
surcharge for the reduced amount of £62.11 in respect of period 12/11.

10 2. At the hearing we adjourned to consider our decision, and then announced to the
parties that we had decided to dismiss Mr Gubb’s appeal. We indicated that we would
set out our reasons in this decision, which we do in the following paragraphs.

The law

15 3. Section 59 of the Value Added Tax Act 1994 (“VATA 1994”) sets out the
matters to be taken into account where a trader appeals against a default surcharge:

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

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

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

he shall not be liable to the surcharge . . .”

4. Thus the questions to be considered by the Tribunal are:

(1) Is the trader liable to a surcharge?

(2) Was the payment despatched in time within the terms of s 59(7)(a)?

30 (3) If the answer to (2) is “no”, did the trader have a reasonable excuse for the
late despatch of the payment?

5. In addition, Mr Gubb raises other issues, which we consider below.

Review of the evidence

6. The surcharges for the periods 06/11 and 09/11 were at the rate of 15 per cent,
35 the amounts being £311.71 and £308.76 respectively. Mr Gubb stated in his Notice of
Appeal that he had only become aware of the surcharge situation with HMRC when
he changed to their on-line system in 2012, and that he had never received any
correspondence from HMRC relating to surcharges.

7. Mr Gubb explained to us that he had paid surcharges for the periods 12/10 and 03/11 totalling about £550, as he had accepted that he had been late in making the VAT payments for these periods.

5 8. According to the documentary evidence provided by HMRC, the amounts of these surcharges were £165.26 and £386.23, representing surcharge rates of 10 and 15 per cent respectively; the total amounted to £551.49.

10 9. Mr Rowe referred to HMRC's ledger records under Mr Gubb's VAT registration number. These recorded the issue of an HMRC "Help Letter" on 12 February 2010 in relation to period 12/09 and the issue of a Surcharge Liability Notice on 14 May 2010 in respect of period 03/10. On 13 August 2010, a Surcharge Liability Extension Notice relating to period 06/10 had been issued, the expiry date of which was 30 June 2011. On 12 November 2010, a further Surcharge Liability Extension Notice had been issued; this related to period 09/10, and the expiry date of this notice was 30 September 2011.

15 10. On 13 May 2011, a Surcharge Liability Extension Notice had been issued in relation to period 03/11; the expiry date of this notice was 31 March 2012. A further Surcharge Liability Extension Notice was issued on 12 August 2011; this related to period 06/11, and the expiry date was 30 June 2012. On 11 November 2011, HMRC issued a further Surcharge Liability Extension Notice in respect of period 09/11, the
20 expiry date being 30 September 2012.

11. Mr Rowe explained that the letter and surcharge notices were sent by second class post to the address specified under the VAT registration. Mr Gubb confirmed that the address given for the business was its own premises, ie the public house.

25 12. We find on the balance of probabilities that the correspondence relating to the VAT late payment defaults was sent by HMRC in accordance with the records shown in the VAT ledger. Section 7 of the Interpretation Act 1978 states:

"References to service by post

30 Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

35 13. We find that there is no evidence to show that the letters did not arrive, and therefore the effect of s 7 is that they must be deemed to have done so.

40 14. In relation to Mr Gubb's statement that he was unaware of the surcharge system before he changed to HMRC's on-line system in 2012, we are not satisfied that this was the case. He paid surcharges in February 2011 and May 2011, having accepted that these were due.

15. In addition, HMRC's ledger shows the first VAT payment by electronic transfer to have been received by them on 23 June 2010; this was a BACS transfer. We accept that Mr Gubb would not have been required to render electronic returns until the VAT period commencing after 31 March 2012, but this would not have affected his knowledge that VAT default surcharges had been incurred.

16. In his Notice of Appeal, he argued that HMRC had not given him exemption for a first default in respect of period 06/11, his business being one with a turnover of less than £150,000. He also argued that the position in relation to period 09/11 was similar, and that he should not have been charged with a 15 per cent surcharge for that period.

17. We find that the surcharges in respect of these periods were properly calculated, as shown by the history of defaults going back to the original Surcharge Liability Notice issued in May 2010, and the subsequent extensions of the surcharge period as a result of further defaults. As the surcharge rate applying to the period 03/11 (the second period for which Mr Gubb paid the surcharge) was 15 per cent, the surcharges for the following three periods also had to be calculated at that surcharge rate.

18. We also find that the entries shown in HMRC's ledger and recorded in the "Schedule of Defaults" prepared for the purposes of the appeal are correct records.

19. In relation to the first of the three questions set out above, we find that Mr Gubb is liable to the surcharges for periods 06/11, 09/11 and 12/11 (the latter being the reduced surcharge for which he accepts liability).

20. The second question is whether the payments were despatched at a time and in a way that it was reasonable to expect that they would be received by HMRC within the appropriate time limit. The time limit for electronic payments is seven days after the due date. HMRC's Notice 700 states at paragraph 21.1:

"You must make sure that your VAT return is received and any payment clears HMRC's bank account by the due date shown on the return. If you fail to do this you could be liable to a default surcharge (see paragraph 21.2.2 below)."

At paragraph 21.2.2, in the section headed "Please remember", Notice 700 continues:

- "Allow enough time for payment to clear HMRC's bank account by the due date. Bank working days are Monday to Friday excluding bank holidays.
- ...
- You should allow three bank working days for payment by Billpay, Bacs direct credit of Bank Giro to reach HMRC (longer if the due date falls on a bank holiday or a weekend)."

21. The extended due dates for payment of the VAT for periods 06/11 and 09/11 were 7 August 2011 and 7 November 2011 respectively. The payments each arrived one day late, on 8 August and 8 November. Mr Gubb's bank account statements show

that these payments left his account on 4 August, which was a Thursday, and on 4 November 2011, which was a Friday. The August payment arrived on the following Monday, three bank working days later. The November payment arrived on the following Tuesday, also three bank working days later.

5 22. Mr Gubb explained that as he had understood the position, he expected the payments to be transferred instantly; he would not have expected them to take four days to get through to HMRC's account.

23. Mr Rowe submitted that it was common knowledge that BACS payments took three bank working days. It was necessary for traders to check on the method of
10 payment; at the relevant time, HMRC did not receive payments via the Faster Payments service. This had changed after November 2011, as shown by Mr Gubb's payment to HMRC made in February 2012; the entry in his bank statement included the initials "FP" (ie Faster Payment).

24. Mr Rowe argued that there was no reason for Mr Gubb to expect that payment
15 in respect of periods 06/11 and 09/11 would be received in HMRC's bank account by the due date (ie the extended due date for electronic payments).

25. On the basis of Mr Gubb's submissions to us, we do not think that he was working on the basis of a three day period for BACS payments; instead, he was under the impression that the payments would go through instantly, as had become common
20 by 2011 for many other forms of payment to firms and organisations other than HMRC. The question for us is whether it was reasonable for him to expect that the payment would be received by HMRC within the seven day extended time limit.

26. We accept that he was under the impression that the payments would be instant. However, the further question is whether it was reasonable for him to expect instant
25 receipt by HMRC.

27. There is some difficulty in seeking to refer to materials such as previous versions of Notice 700 and earlier versions of information on HMRC's website, as such materials are not generally retained. However, we are aware from decisions in other appeals that the acknowledgments of returns issued by HMRC before late 2011
30 specifically stated that HMRC did not operate the Faster Payments system.

28. On the basis of the information provided generally by HMRC to traders as to payment methods as at the times relevant to Mr Gubb's appeal, we feel compelled to find that it was not reasonable for him to expect that the payments would reach HMRC within the seven day period. In making that finding, we acknowledge his
35 belief that the system provided for instant payment, but we are unable to reach a conclusion that such belief met the "reasonableness" test in s 59(7)(a) VATA 1994.

29. The third question is whether Mr Gubb had a reasonable excuse for the payments not being despatched in time. We have considered whether his belief that the system provided for instant payment amounted to a reasonable excuse, but our
40 conclusion is that the availability of information as to the methods of making payment

to HMRC and the respective time limits applying to those methods precludes that belief from amounting to a reasonable excuse.

30. One other matter which we should record in this decision is that, following the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC), a decision which is binding on this Tribunal, the default surcharge regime is not considered to be disproportionate. As a result (except in wholly exceptional and extreme cases) it is not open to traders to argue that a surcharge for making payment one day late is disproportionate. As stated by the Upper Tribunal in *Total Technology* at [89]:

“The penalty is for failure to file and pay by the due date, not for delay after the due date.”

31. We acknowledge that Mr Gubb feels aggrieved by these surcharges. As Mr Rowe made clear, HMRC accepted that Mr Gubb had made a genuine error, but they did not see genuine error as a reasonable excuse. Mr Rowe also emphasised that incurring default surcharges did not cast any adverse aspersions on a trader; it was generally more a matter of bad luck to suffer a surcharge.

32. We also acknowledge, as Mr Gubb stated to us, that he assumed HMRC were getting payment instantly and that he was not intentionally doing anything wrong. He is unfortunate to have incurred these surcharges, but as a tribunal with its jurisdiction limited by statute, we have no basis for adjusting or relieving them, and therefore we find ourselves compelled to dismiss his appeal.

Decision

33. Mr Gubb’s appeal against the surcharges for periods 06/11, 09/11 and the reduced surcharge for period 12/11 is dismissed.

Right to apply for permission to appeal

34. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**JOHN CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 15 May 2014