[2016] UKFTT 0348 (TC)

# TC05107

**Appeal number: TC/2015/06645**

***VAT – default surcharge –surcharge liability notice –was it received by appellant – no –s7 Interpretation Act 1978 – appeal allowed***

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

**ENGLAND AND WALES CRICKET BOARD LIMITED** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ALEKSANDER**
**KAMAL HOSSAIN FCA FCIB**

**Sitting in public at Fox Court, London on 22 April 2016**

**Sarabjut Singh, counsel, instructed by Hays Macintyre, for the Appellant**

**Mary Donnelly, an officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against a review decision of HMRC dated 17 October 2015 by which HMRC upheld a VAT default surcharge dated 15 June 2015 for £106,602. Although the Appellants, in their Notice of Appeal, set out a number of grounds for their appeal, by the time of the hearing the only ground being pursued was whether a Surcharge Liability Notice had been received by the Appellants.

2. At the hearing, the Appellants were represented by Mr Singh (counsel) and HMRC were represented by Ms Donnelly (an officer of HMRC).

3. Procedural issues arose at the commencement of the hearing. On the day before the hearing the Appellants served a skeleton argument, a witness statement given by Harvey Mannie, and a copies of the authorities on which they intended to rely. These were served by e-mail very late in the day, and were only received by HMRC and the Tribunal panel on the day of the hearing, shortly before the time it was listed to commence. Ms Donnelly applied for the hearing to be postponed in order to allow her time to consider these. We refused Mrs Donnelly's application, but adjourned the hearing for 45 minutes to allow her time to read these documents. Our reasons were that the Tribunal's directions made no provision for the service of skeleton arguments or witness statements. Default surcharge appeals are in the nature of "turn up and talk" hearings, and HMRC are expected to deal with evidence and submissions on the hearing day. The Tribunal's directions had made provision for the parties to provide the names of their witnesses, and this had been done. HMRC were therefore aware that Mr Mannie was going to give evidence, and should have been prepared to address his evidence at the hearing in any event. The Appellants were not required to provide a witness statement in respect of Mr Mannie's evidence, but the fact that they had done so was helpful and not a hindrance (even if it was provided at a very late stage). Similarly, there was no requirement for the Appellants to provide a skeleton argument, and HMRC should have been prepared to deal with any submissions that the Appellants may have raised at the hearing – but (as with the provision of a witness statement), the provision of a skeleton argument (however late) was helpful.

4. The late provision of the authorities was another matter, as the Tribunal's directions had made express provision for lists of authorities to be exchanged several days before the hearing. No good excuse had been given by the Appellants for their failure to comply with the directions. Nonetheless, we decided to proceed with the hearing (having given HMRC 45 minutes to review the documents). Two authorities were listed by the Appellants. The first was the *Medway* decision (which we deal with in more detail below). This is the leading case on the requirement for Surcharge Liability Notices to be served, and should be familiar to HMRC. The case was specifically mentioned in the Appellants' Notice of Appeal, and therefore HMRC were in any event aware that this case was relevant to the facts of this appeal. The other case, *Dow Engineering* ((1991)

Decision 5771), was a decision of the VAT and Duties Tribunal, and was cited merely as an illustration of how *Medway* had been applied in practice.

5. We decided that it was in the interests of justice to proceed with the hearing, notwithstanding the Appellants' failure to comply with the Tribunal's directions as regards authorities. We considered that HMRC were not prejudiced by the late provision of these authorities, as they were aware from the outset of the appeal that *Medway* was relevant, and *Dow Engineering* was cited merely in support of *Medway*.

6. We directed that Mr Mannie's witness statement be treated as his evidence in chief, and adjourned the hearing for 45 minutes to give HMRC the opportunity to review the documents that the Appellants had served.

7. When the hearing recommenced, we were provided with a bundle of documents in evidence. In addition we read Mr Mannie's witness statement, and he was cross-examined by Ms Donnelly.

**The Law**

8. Section 59A VAT Act 1994 applies to the "payment on account" ("POA") regime, and provides that a default surcharge may arise if HMRC do not receive a payment by the due date.

9. Sections 59A(2)(b) and 59A(4)(a) provide for the service of surcharge liability notices and the levying of surcharges in the case of defaults. The Appellants' case is that if a surcharge liability notice ("SLN") has not been received by the Appellant, then no surcharge can be levied.

10. Section 98, VAT Act 1994 makes provision for notices and other documents to be served by HMRC on taxpayers by post to the taxpayer's last or usual residence or place of business. Section 7, Interpretation Act 1978 provides that service by post is 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.

11. The Appellants cite the case of *Customs and Excise Commissioners v Medway Draughting and Technical Services Ltd* [1989] STC 346 (a decision of the High Court) in support of their submission. In the *Medway* case, Medway's appeal was on the grounds that it had not received any SLN prior to its default, and it was therefore not liable to a surcharge. The VAT and Duties Tribunal (at first instance) found that the SLN had been posted by Customs, but also found that Medway had not received it in sufficient time to ensure that it did not default in respect of the return for the period under appeal. The decision of the tribunal was upheld on appeal to the High Court. Macpherson J held that it was Parliament's intention that a warning in the form of an SLN must be given before a default surcharge can be levied:

"… the whole scheme of default surcharge is dependent on service of the surcharge liability notice." (at 351g)

**Background Facts**

12. We find the background facts to be as follows:

13. Between 14 January 2004 and 1 June 2015, the Appellants were at various times within the VAT "payment on account" ("POA") regime. They were within the POA regime at all material times for the purposes of this appeal.

14. The Appellants' payments on account for the period 04.15 (1 February 2015 to 30 April 2015) were due on 31 March 2015 and 30 April 2015 and were made on time. The VAT return for that period was due by 31 May 2015 and was submitted electronically on 27 May 2015. The balancing payment for the period was due by 29 May 2015 (the last working day of the month), but was in fact paid three working days late, on 3 June 2015.

15. It is not in dispute that the balancing payment was paid late, and the Appellants do not argue that they had any excuse for the lateness of the payment. Mr Mannie stated in his evidence that there were sufficient funds in the Appellants' bank account to have paid the balancing payment on the due date – shortage of funds is not in issue. The Appellants' only ground of appeal is that there is no liability to a default surcharge because they did not receive a SLN in respect of an earlier default.

16. Included in the bundle of documents was a copy of a SLN dated 19 June 2014. We note that normally HMRC do not keep copies of default surcharge notices, but exceptionally they are kept in the case of taxpayers within the POA regime (as was the case here). The SLN was generated in relation to the VAT period 04/14. The Appellants submitted their VAT return for that period electronically and on time, and made their second payment on account and balancing payment on time. However it is not disputed that the first payment on account for that period was received by HMRC 11 days late.

17. There was included in the bundle of documents a print-out of entries in the electronic ledgers of HMRC. Ms Donnolly drew our attention to the following two entries:

| Date | Period | Description | S/Code | Reference |
|---|---|---|---|---|
| 20/06/14 | | SLN EXPIRY DATE AMD | 443 | 40620901551 |
| 20/06/14 | | SLN EXPIRY DATE | 443 | 30/04/15 |

Ms Donnelly told us that these entries meant that the SLN had been posted to the Appellant no later than 20 June 2014.

18. The Appellants submit that the 19 June 2014 SLN was never received by them.

19. Mr Mannie has been the management accountant for the Appellants since October 2000. His responsibilities include the preparation and submission of the Appellants' VAT returns. He also has responsibility for the preparation and submission of VAT returns for eight other entities – being cricket boards of other countries who are VAT registered in the UK in respect of supplies made when touring in the UK.

20. Mr Mannie stated that he had no recollection of ever having received the 19 June 2014 SLN. He stated that even though the SLN did not impose any liability on the Appellant, it would have nonetheless have been treated seriously. Mr Mannie stated that he had reviewed his files and the 19 June 2014 SLN was not in them.

21. In his evidence, Mr Mannie described to us the Appellants' incoming post procedures, and said that all correspondence from HMRC would be distributed to his department and given to him.

22. Mr Mannie also stated in his evidence that there were examples of other correspondence from HMRC not being received. He gave as an example the POA schedule for the return periods 07/14 to 04/15, apparently sent by HMRC to the Appellant on 21 April 2014. Because this notice had not been received, Mr Mannie telephoned HMRC on 30 June 2014 to obtain confirmation of whether the Appellants were still in the POA regime and, if so, the amounts due. Mr Mannie recorded the amounts, and requested that a copy of the POA schedule be sent to him. No such copy, despite further requests on 30 July 2014 and 30 September 2014, was ever received.

23. Mr Mannie also referred us to a letter from HMRC dated 10 November 2015 cancelling a default surcharge raised in error. Yet the surcharge to which that letter relates was never received by the Appellants. Mr Mannie mentioned other instances of HMRC correspondence not being received.

24. Ms Donnelly cross examined Mr Mannie, but did not challenge his evidence that the SLN had never been received by the Appellants. In her closing submissions she made much of the fact that the missing correspondence referred to in Mr Mannie's evidence all had some connection to the period in which the default occurred. But in the light of the fact that she had not challenged Mr Mannie's evidence that these items of correspondence had not been received, we considered that her submissions were largely irrelevant.

25. Ms Donnelly also told us that HMRC had no record of the SLN having been returned undelivered by the Post Office – however there was no documentary evidence in the Bundle to support this assertion.

**Discussion**

26. It follows from the decision of the High Court in *Medway* that if the SLN had not been served, then HMRC have no power to levy a surcharge.

27. As HMRC's submissions in relation to factual matters were for the most part unsupported by any evidence, and as HMRC did not challenge the Appellants' evidence that the SLN had not been received, it inevitably follows that the appeal must succeed.

28. Section 98 VAT Act 1994 allows for SLNs to be served by post. Section 7, Interpretation Act 1978 provides that service by post is 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. It is for HMRC to show that the SLN was properly addressed and posted pre-paid. If it does, then the SLN is treated as served at the point in time when it would have been received by the Appellant in the ordinary course of post - unless the Appellant can prove otherwise.

29. We are satisfied, and find, that the SLN was produced by HMRC and was properly addressed to the Appellant. However there was no evidence before us that the SLN was posted pre-paid to the Appellant. It is unclear what inferences can be drawn from the entries in HMRC's computer ledgers, and there is no evidence before us that explains the entries. The entries do not state on their face that the SLN was posted. The fact that the entries are dated 20 June (after the date of the SLN) suggests to us that they are not a record of the SLN being posted. Ms Donnelly submitted that the entries meant that the letter had been posted no later than 20 June – but with all respect to Ms Donnelly, her submissions are not evidence.

30. HMRC therefore fail at the first hurdle as they have no evidence of the posting of the SLN. On the basis of the evidence before us, we find that the SLN had not been posted to the Appellant.

31. But even if our finding that the SLN had not been posted is incorrect, there is the unchallenged evidence of Mr Mannie that the SLN had not been received. Although s7 Interpretation Act 1978 makes provision for service to be deemed to occur when the SLN would have been received in the ordinary course of post, this is subject to the proviso "unless the contrary is proved". The Appellants' unchallenged evidence was that the SLN had not been received by them, and this evidence is corroborated by examples of other correspondence from HMRC not being received (and again this evidence was unchallenged by HMRC). We therefore find that the Appellants have proved "the contrary", and that the presumption as to service in s7 does not apply. Even if we are wrong in our finding that the SLN had not been posted, we find that it had not been received by the Appellants, and had therefore not been served on them.

32. We also note Ms Donnelly's statement that HMRC had no record of the SLN having been returned by the Post Office as undelivered. But as this statement was not supported by any evidence, we have disregarded it.

## Conclusion

33. Following the decision of the High Court in the *Medway* case, for a taxpayer to be liable to a default surcharge, it is essential that they have previously been served with a SLN. Given our findings that the Appellant had not been served with an SLN by HMRC, the surcharge under appeal cannot stand.

34. The appeal is therefore allowed.

35. 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.

**NICHOLAS ALEKSANDER**

**TRIBUNAL JUDGE**
**RELEASE DATE: 19 MAY 2016**