



**TC05968**

**Appeal number: TC/2017/01661**

*VALUE ADDED TAX – default surcharge s 59 VATA – whether liability for surcharge not assessed as under £400 for 06/16 can be appealed late or whether reviewable as a period material to the 09/16 default – whether submission of return before midnight on due date but receipt by HMRC after counts as late return - whether no default because of reasonable expectation of receipt of return by HMRC by due date – whether SLNs received for 03/16 and 06/16 – whether surcharge disproportionate – whether HMRC practice in relation to collection of direct debits relevant - appeals allowed in substance.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRADLEY SAUL (a firm)**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS**

**The Tribunal determined the appeal on 19 June 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 15 February 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 5 April 2017.**

## DECISION

1. This is an appeal by Bradley Saul (“the appellant”) against a decision of the Respondents (“HMRC”) that the appellant was liable to a surcharge for late payment of Value Added Tax (“VAT”) and against an assessment of that surcharge for the appellant’s prescribed accounting period of the three months ending 30 September 2016 (“the 09/16 period”). The amount assessed is £529.12.

### Evidence

2. I had a bundle of papers prepared by HMRC containing among other things the correspondence between the parties. The bundle also contained what was described as a witness statement made by Georgina Mitchell, an officer of HMRC. The statement does not have a holographic signature (original or copy), merely a typed one.

3. The Statement of Case at [79] refers to this as a witness statement which explains how surcharge liability notices (“SLNs”) are issued. Insofar as it explains the computer and letter handling processes within HMRC it is lawful evidence of what is meant to happen and the steps that are taken to ensure that it does. It is I assume offered in support of HMRC’s contention that the appellant was validly served with certain statutory notices, a point the appellant disputes. I have considered this evidence in the discussion section.

4. It also contains an account of the law on default surcharges. I do not need evidence from HMRC to establish that.

### Facts

5. From the papers I have I find the following facts, being ones not in dispute.

6. The appellant was registered for VAT in 2005 and carries on the profession of solicitors in Chipping Norton, Oxfordshire. There are two partners, Nova Bradley and Geoffrey Saul.

7. It has no history before 2016 of any defaults in filing returns or making payments.

8. The appellant is required to file its returns and make payments electronically, and for this purpose it uses the Online Direct Debit facility (“ODD”).

9. For the prescribed accounting period of the three months ending 31 March 2016 (“the 03/16 period”) HMRC records show the VAT return as being received by them on 30 May 2016.

10. HMRC records show that payment for the 03/16 period was received by them on 2 June 2016.

11. HMRC records show that a notice V165 was issued on 13 May 2016. That notice is, from the rather blurred copy of an example in the papers, a notice headed “VAT Notice of assessment to tax and surcharge liability notice.” HMRC admit that no copy of the actual notice is retained by them.
- 5 12. It goes on to say that “Your VAT return for the period [blank] to [blank] was not sent in on time” and “You will not have to pay a surcharge on this occasion. If you default again [*in stated period*] you may receive a [blank]% surcharge...”.
13. For the prescribed accounting period of the three months ending 30 June 2016 (“the 06/16 period”) HMRC records show the VAT return as being received by them  
10 on 8 August 2016.
14. HMRC records show that payment for the 06/16 period was received by them on 11 August 2016.
15. HMRC records show that a notice V161 was issued on 12 August 2016. That notice is, from the example in the papers, a notice headed “VAT Surcharge liability notice extension”. HMRC admit that no copy of the actual notice is retained by them.  
15
16. It goes on to say that “Your payment of the VAT due for the period [blank] to [blank] was not sent in on time” and “We have extended the surcharge previously notified to you. You will not have to pay a surcharge on this occasion. If you default again [*in stated period*] you may receive a [blank]% surcharge...” The reason given  
20 for there being no surcharge to pay was that it was under £400.
17. For the prescribed accounting period of the three months ending 30 September 2016 (“the 09/16 period”) HMRC records show the VAT return as being received by them on 8 November 2016.
18. HMRC records show that payment for the 09/16 period was received by them  
25 on 11 November 2016.
19. HMRC records show that a notice V162 was issued on 11 November 2016. From the example in the papers and from the actual notice, a copy of which was appended to their Notice of Appeal by the appellants, I can see that the notice is headed “VAT Notice of assessment of surcharge and surcharge liability notice  
30 extension”.
20. The actual notice goes on to say that “Your payment of the VAT due for the period 1 July 2016 to 30 September was not sent in on time” and “Because of this you will have to pay a surcharge of £529.12 which is 5% of the £10,582.45 tax outstanding at due [*sic*] date.”
- 35 21. On 21 November the appellant wrote to HMRC requesting a review of the decision to impose the surcharge. That letter was followed up on 5 December to find out what was happening.

22. On 18 January 2017 HMRC’s Appeals and Reviews Team sent a letter to the appellant notifying them of HMRC’s conclusions of the review, which was to uphold the decision to impose the surcharge.

5 23. On 15 February 2017 [the letter was dated “2016” in error] the appellant informed HMRC that they were notifying an appeal to the Tribunal, and did so.

### Law

24. The appellant makes some particular submissions about the law in this area and its availability to a taxpayer in the position of the appellants. I therefore set it out in greater detail than I otherwise might.

10 25. The law dealing with VAT surcharge is in s 59 Value Added Tax Act 1994 (“VATA”):

#### “59 The default surcharge

- 15 (1) ... if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—
- (a) the Commissioners have not received that return, or
  - (b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,
- 20 then that person shall be regarded for the purposes of this section as being in default in respect of that period.
- (2) Subject to subsection[ ] ... (10) below, subsection (4) below applies in any case where—
- 25 (a) a taxable person is in default in respect of a prescribed accounting period; and
  - (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and
  - 30 beginning, subject to subsection (3) below, on the date of the notice.
- (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice
- 35 shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.
- (4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—
- 40 (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,  
he shall be liable to a surcharge equal to whichever is the greater of the  
following, namely, the specified percentage of his outstanding VAT for  
that prescribed accounting period and £30.

5 (5) Subject to subsections (7) to (10) below, the specified percentage  
referred to in subsection (4) above shall be determined in relation to a  
prescribed accounting period by reference to the number of such  
periods in respect of which the taxable person is in default during the  
surcharge period and for which he has outstanding VAT, so that—

10 (a) in relation to the first such prescribed accounting period, the  
specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is  
5 per cent;

15 (c) in relation to the third such period, the specified percentage is 10  
per cent; and

(d) in relation to each such period after the third, the specified  
percentage is 15 per cent.

20 (6) For the purposes of subsections (4) and (5) above a person has  
outstanding VAT for a prescribed accounting period if some or all of  
the VAT for which he is liable in respect of that period has not been  
paid by the last day on which he is required (as mentioned in  
subsection (1) above) to make a return for that period; and the  
reference in subsection (4) above to a person's outstanding VAT for a  
prescribed accounting period is to so much of the VAT for which he is  
25 so liable as has not been paid by that day.

(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—

30 (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

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

he shall not be liable to the surcharge and for the purposes of the  
preceding provisions of this section he shall be treated as not having  
been in default in respect of the prescribed accounting period in  
question (and, accordingly, any surcharge liability notice the service of  
40 which depended upon that default shall be deemed not to have been  
served).

(8) For the purposes of subsection (7) above, a default is material to a  
surcharge if—

45 (a) it is the default which, by virtue of subsection (4) above, gives  
rise to the surcharge; or

5 (b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

...

10 (10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day."

26. Section 71 VATA applies for the purposes of s 59 (see s 59(7)(b)):

15 "(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

20 (b) 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 upon is a reasonable excuse."

27. Section 76 VATA provides for assessments of surcharge:

"(1) Where any person is liable—

(a) to a surcharge under section 59 ...

25 ...

the Commissioners may... assess the amount due by way of ... surcharge ...

...

30 (3) In the case of the ... surcharge referred to in the following paragraphs, the assessment under this section shall be of an amount due in respect of the prescribed accounting period which in the paragraph concerned is referred to as "the relevant period"—

35 (a) in the case of a surcharge under section 59 ..., the relevant period is the prescribed accounting period in respect of which the taxable person is in default and in respect of which the surcharge arises;

...

...

40 (9) If an amount is assessed and notified to any person under this section, then unless, or except to the extent that, the assessment is withdrawn or reduced, that amount shall be recoverable as if it were VAT due from him."

28. Paragraph 2 Schedule 11 VATA deals with returns:

5 “2—(1) Regulations under this paragraph may require the keeping of accounts and the making of returns in such form and manner as may be specified in the regulations ... or by the Commissioners in accordance with the regulations.”

29. The regulations made by paragraph 2 Schedule 11 VATA are in Part 5 of the Value Added Tax Regulations 1995 (SI 1995/2518) (“the VAT Regulations”), of which regulations 25, 25A and 40 are relevant:

**“25 Making of returns**

10 (1) Every person who is registered ... shall, in respect of ... every period of 3 months ending on the dates notified either in the certificate of registration issued to him or otherwise, not later than the last day of the month next following the end of the period to which it relates, make to the Controller a return in the manner prescribed in regulation  
15 25A showing the amount of VAT payable by or to him and containing full information in respect of the other matters specified in the form and a declaration, signed by that person or by a person authorised to sign on that person’s behalf, that the return is correct and complete;

20 **25A—(1)** Where a person makes a return required by regulation 25 using electronic communications, such a method of making a return shall be referred to in this Part as an “electronic return system”.

...

(8) Where an electronic return system is used, it must take a form approved by the Commissioners in a specific or general direction.

25 ...

(10) A direction under paragraph (8) above may in particular—  
(a) modify or dispense with any requirement of the relevant form specified in a notice published by the Commissioners,

...

30 (11) An electronic return system shall incorporate an electronic validation process.

(12) Subject to paragraph (13) below and unless the contrary is proved—

35 (a) the use of an electronic return system shall be presumed to have resulted in the making of the return to the Controller only if this has been successfully recorded as such by the relevant electronic validation process,

40 (b) the time of making the return to the Controller using an electronic return system shall be ... presumed to be the time recorded as such by the relevant electronic validation process,

...

(14) A return made using an electronic return system carries the same consequences as a return made using a paper return system, except in relation to any matter for which alternative or additional provision is made by or under this regulation.

5

...

(20) Additional time is allowed to make—

10

(a) a return using an electronic return system or a paper return system for which any related payment is made solely by means of electronic communications (see regulation 25(1) — time for making return, and regulations 40(2) to 40(4) — payment of VAT), or

(b) a return using an electronic return system for which no payment is required to be made.

15

That additional time is only as the Commissioners may allow in a specific or general direction, and such a direction may allow different times for different means of payment.

The Commissioners need not give a direction pursuant to this paragraph.

...

20

(23) In paragraphs (8) and (20) above “direction” and “direct” refer only to a current direction, and a direction is not current to the extent that it is varied, replaced or revoked by another Commissioners’ direction.

#### **40 VAT to be accounted for on returns and payment of VAT**

...

25

(2) Any person required to make a return shall pay to the Controller such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return.

30

(2A) Where a return is made or is required to be made in accordance with regulations 25 and 25A above using an electronic return system, the relevant payment to the Controller required by paragraph (2) above shall be made solely by means of electronic communications that are acceptable to the Commissioners for this purpose.

35

(3) The requirements of paragraphs (1) or (2) above shall not apply where the Commissioners allow or direct otherwise.

(4) A direction under paragraph (3) may in particular allow additional time for a payment mentioned in paragraph (2) that is made by means of electronic communications.

40

The direction may allow different times for different means of payment.

(5) Later payment so allowed does not of itself constitute a default for the purposes of section 59 of the Act (default surcharge).”

30. Thus the position in law is that a return must be made by the end of the month following the end month of the prescribed accounting period “the standard date”, and

payment of any VAT shown on the return must be paid by the standard date, unless in the case of electronic filing (which is the case in this appeal) the Commissioners (for Her Majesty's Revenue and Customs) have directed, under regulation 25A(2) or regulation 40(3) and (4) that a different date applies.

5 31. HMRC's Manuals also deal with this issue. The VAT Accounting Manual at VATAC 1200 says about electronic payment incentives:

10 "Full details are on HMRC's website under the How to pay VAT section\_(GOV.UK). This section also provides details of additional time to pay that is allowed for electronic payments (see also VATAC1300)."

32. That paragraph says about payment:

15 "For online returns, the standard deadline is extended by seven calendar days (except for Payment on Account and Annual Accounting businesses). This extension is an incentive to encourage compliance with the requirement to pay online returns electronically. The extended due date will be shown on online returns, and also applies to online returns where payment is not required (nil or repayment returns). The legal basis for this extension to due date is a Direction made under regulations 25A(20) and regulation (40)(3) and (4) VAT Regulations 1995."

33. And about due dates:

**"Due date for payment**

25 Regulation 40(2) of the VAT regulations provides that payment must be made no later than the due date for the VAT return, and regulation 40(4) gives the Commissioners a power to make Directions allowing extra time to pay where payment is made electronically. The due date for online returns is extended by seven calendar days ... and any associated electronic payment must clear to HMRC's bank account by the extended due date. Note, however, the following points:

- 30
- Payments by online Direct Debt are collected a further three bank working days after the extended deadline for the return
  - ...

35 ...  
The legal provisions for these rules are in regulation 40(2) (3) and (4) and a Direction made under regulation 40(3)."

**Submissions of appellant**

34. The appellant, through Nova Bradley a partner, makes a number of detailed points in its notice of appeal.

40 35. In relation to 09/16 the appellant says that they accept that the submission of the return was late, it having been submitted at c 0200 on 8 November. They say though that there is no reason why HMRC had to take three days before the tax was in their

account, and they could have arranged for it to be received on 10 November so that it was not late.

36. They say that HMRC stated in a letter of 18 January 2017 that for a payment to be on time it has to be made by the 10<sup>th</sup> of the month in question, but they cannot find any indication of this requirement in any online documentation.

37. But they also say that receipt on 11 November should not be treated as late in view of HMRC's consistent pattern of arranging to receive funds in their account later than the 10<sup>th</sup> of the relevant month. They put forward a table showing the recent history of their direct debit payments:

Quarter	Date money taken by HMRC
12/14	12/02/15
03/15	12/05/15
06/15	12/08/15
09/15	11/11/15
12/15	10/02/16
03/16	02/06/16
06/16	11/08/16
09/16	11/11/16
12/16	10/02/17

38. They comment that at no time in 2015 did HMRC take the money on the 10<sup>th</sup> of the month and so they consider that the receipt on 11 November 2016 was on time, in line with most previous HMRC actions. They see from Notice VAT 700/50 that no surcharge should be applied if payment of VAT is made on time.

39. In relation to the 06/16 quarter they do not accept that submission was late. They say that Nova Bradley submitted the return before midnight on 7 August even though the Government Gateway shows it as received on 8 August.

40. Further they have no record of receiving, and say that they did not receive, an SLN for 06/16. Had they received it they would have contacted HMRC immediately, because Nova Bradley knew she had submitted on 7 August and it was not late. Had they received it they would not have said in a letter to HMRC as they did that the only previous late submission before 09/16 was the 03/16 which they accept was late.

41. In relation to 03/16 they say that the undoubted late submission was due to an error by Nova Bradley who had diarised the wrong month for payment. As soon as the error was realised payment the return was filed and payment made.

5 42. In general they say that they accept that HMRC has to have a system in place to encourage timely submission of returns and to penalise repeated late submissions, but in their case returns are routinely submitted on time.

43. They also refer to a VAT Notice 700/50 about Default Surcharge. The complaint is that section 5.1 of the notice says that a surcharge should not be applied if payment of the VAT is made on time even if the submission was made late.

10 44. A requirement to pay over £500 is not a proportionate punishment for submitting a return two hours late when payment was actually taken on the same day of the month as all payments in 2015 when there was no default indicated by HMRC.

45. It was also inappropriate to levy a surcharge when no warning letter was sent in May 2016 or August 2016.

15 46. In terms of the law, and in the light of HMRC's submissions, I characterise the appellant as appealing against the 09/16 surcharge on the grounds that they did not pay late and so there was no outstanding VAT (s 59(1) and (6) VATA).

20 47. I also characterise their grounds of appeal as arguing that the 06/16 surcharge, being a default material to the 09/16 surcharge in accordance with s 59(8), should be cancelled, the grounds being that the return and payment were not late, or alternatively that they had the reasonable expectation that the return would be received in time (s 59(7)(a)).

25 48. I also characterise their grounds of appeal as arguing that the 03/16 SLN, being a default material to the 09/16 surcharge under s 59(8), should be cancelled on the grounds that the appellant had a reasonable excuse for the failure to file on time.

49. There are also appeals on the grounds that:

(1) no default notice and no default SLN were received by them for 03/16 and 06/16 respectively.

(2) the 09/16 surcharge is disproportionately large.

### 30 **Submissions of HMRC**

50. Information on the requirements for submitting timely electronic payments can be found in regulation 40 of the VAT Regulations, in Notice 700 (the VAT Guide) at 21.3.1 and in the E-VAT return acknowledgement.

51. VAT 700 at 21.3.1 says that:

35 "if you pay by DD, then HMRC will automatically collect your payment on the third working day after the date shown on your return".

52. HMRC's website under "Pay your VAT Bill" at 4. Direct Debit adds that

"if you file your VAT return late your payment will be taken 3 days after you file the return."

53. On each occasion when a VAT return is filed electronically the system issues an acknowledgement which says that the tax declared on the return will be debited from your bank account on [date].

54. In response to the appellant's reference to VAT 700/50 they point out that it says that:

"We will collect payment from your bank account on the third working day after the extended due date for your return."

55. And in response to the suggestion that HMRC could still have taken the money on 10 November they say that DD requests are processed by the bank using the BACS three day cycle and that it is not an HMRC process.

56. In relation to 09/16 the due date for submission of the return was 7 November 2016 but the return was received on 8 November and so there was a default. Where ODD is used, the money is collected automatically on the third working day after the extra seven calendar days following the standard due date. Had the return been on time the tax would have been collected on 10 November, but because the return was late, so was the receipt of the tax in HMRC's bank account.

57. As a result a Surcharge Liability Notice Extension was issued at 5%.

58. The first default in the surcharge liability period extant in November 2016 was in relation to 03/16. A Surcharge Liability Notice was issued and so the appellant would have been on notice that surcharges would become payable if there was further default in the period and this was explained on the reverse of the SLN.

59. In response to the appellant's argument that the late submission of 03/16 was a mistake, HMRC say that genuine mistakes are not a reasonable excuse, quoting *Garnmoss Ltd v HMRC* [2012] UKFTT 315 (TC) (Judge Hellier and Ms Hewett). HMRC exhibit a transcript of a telephone conversation between Nova Bradley and HMRC on 24 May 2016. This shows that Ms Bradley informed HMRC that they had suddenly realised that the return payment was late and they needed to make arrangement to pay the VAT. She referred to staff leaving as a reason for the mistake.

60. The transcript also shows Ms Bradley as being uncertain about how to complete a VAT return. She says it was because staff had left and she had no idea how it didn't "get on the agenda". She does not refer to any SLN.

61. HMRC exhibit VAT return submission details.

62. That for the 06/16 return shows the following entries:

(1) Submission date and time : 08 Aug 2016 07:12

- (2) Receipt of return : 07:12:45
- (3) Various validations : 07:12:45 & 46
- (4) Success message sent to submitter : 07:13:06

63. That for the 09/16 return shows the following entries:

- 5 (1) Submission date and time : 08 Nov 2016 05:51
- (2) Receipt of return : 05:51:22
- (3) Various validations : 05:51:22 & 23
- (4) Success message sent to submitter : 05:51:23

10 64. As a result of this documentation HMRC say that the 06/16 return was received on 8 August at 0712 and the 09/16 was received on 8 November 2016 at 0551, and that the appellant has not provided any documentary evidence to the contrary.

15 65. As to the appellants not receiving SLNs for 03/16 and 06/16 HMRC point out that as they had no “financial element” the appellant may not have realised they were SLNs, whereas they clearly decided that the 09/16 notice was and they obviously received it because they attached a copy of their appeal notice.

66. As to lack of proportionality HMRC cite the Upper Tribunal in *HMRC v Trinity Mirror plc* [2015] UKUT 421 (TCC) (“*Trinity Mirror*”) to the effect that the default surcharge regime as a whole is not disproportionate, and it could not readily identify the characteristic of an individual case where it might be.

20 67. The appellant has not shown a reasonable excuse for the failure to file the 09/16 return on time or to pay on time.

### **Discussion**

68. I deal first with two issues where there is a conflict of evidence.

#### **On what day was the return for 06/16 filed?**

25 69. The appellant says that they submitted the return on 7 August even though they admit that the Gateway record shows it as submitted on 8 August. In support of that Ms Bradley says that she knows that she submitted it on the 7<sup>th</sup> because she was pleased to have done so and had no idea that HMRC had recorded the submission as  
30 30 deny) they would have immediately queried it because they knew they were on time.

70. In support of her submission that there can be a gap of hours between the return being submitted by a taxpayer and receipt by HMRC she refers to the 09/16 submission where she says she knows she submitted the return at 2 am but it was shown as received several hours later.

35 71. HMRC exhibit their records showing “submission and receipt” on 8 August.

72. As this is a dispute that concerns the validity of a penalty the burden is on HMRC to show that the return was late, and therefore so was the payment. The witness statement does not refer to the computer processes involved in submitting and receiving returns, so I have no evidence from HMRC to show that the times and dates recorded by their computer do refer to the time and date when the appellant submitted the return on their computer.

73. The appellant has not provided any documentary proof by way of printout, screenshot or other circumstantial evidence, but Ms Bradley's assertion that she submitted the 06/16 return when she did is not challenged by HMRC, nor is her assertion challenged that, based on her experience of filing two returns, including that for 09/16, there is a gap of some hours between submission and receipt.

74. In relation to this point, I take judicial knowledge of the fact that the 7<sup>th</sup> (and 8<sup>th</sup>) of any month is likely to be a very busy time for HMRC's VAT computers.

75. I have no reason to disbelieve the appellant who is a solicitor and on the balance of probabilities I find that she did submit the return late on 7 August. What the legal consequences of this and my finding that HMRC's computer records the receipt by them of the return on 8 August are covered below.

#### **Did the appellant receive the SLNs for 03/16 and 06/16?**

76. If the SLNs were not served on the appellant then no surcharges can be imposed. The appellant denies that they received either the SLN for the 03/16 period or that for the 06/16 period. HMRC point to the fact that there has been no change of address registered for the appellant and that no notices have been returned undelivered. Further they refer to s 98 VATA which reads:

#### **“Service of notices**

Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative.”

77. The evidence in the unsigned witness statement is that SLNs are so served. By s 7 of the Interpretation Act (“IA”) 1978 such a notice so served is deemed:

“ ..., 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. “

78. Although this part of s 7 IA 1978 is concerned solely with establishing the time of service, it has been interpreted as saying that, subject to proof to the contrary, the fact of service is deemed.

79. In my view the appellant has offered no proof, merely assertion, that the notices were not received and so not served within the meaning of s 98 VATA. Given the difficulties caused by the departure of staff that the appellant admitted to in the phone conversation with HMRC on 24 May 2016, I agree with HMRC that it would not be at all surprising if notices were received the significance of which escaped those

whose job did not normally entail dealing with VAT returns, especially when no financial consequences followed from those notices looked at alone.

80. I therefore find that on the balance of probabilities the notices were served and therefore received by the appellant.

5 81. It follows that the surcharges cannot be invalidated for non-receipt or non-service.

82. I turn now to each period.

### **The 09/16 surcharge**

10 83. That there was a default within the meaning of s 59(1)(a) VATA in that the return was late is not denied by the appellant. Nor is it denied that a SLN for the period was served on them. The question then is whether, for the purposes of s 59(4)(b) there was “outstanding VAT for that prescribed accounting period”. There is such VAT if:

15 “some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required ... to make a return for that period ...”

20 84. That day is said to be 7 November 2016. No return had been made by that day and so the surcharge is due. I note that if the text on the webpage is not that of a valid direction then *a fortiori* the surcharge is due because the date would then be 31 October. But in accordance with the presumption of regularity discussed in eg *R v Commissioners of Inland Revenue ex parte TC Coombs & Co* 64 TC 124 I accept that the text is that of a valid direction. How much simpler it would have been if VAT directions were published in the same way as direct tax directions.

25 85. The complaint about the 09/16 surcharge amount is that it is disproportionate. I agree with HMRC that in the light of *Trinity Mirror* that submission cannot succeed, and in any event I have no jurisdiction to deal with it even if I was inclined to do so.

30 86. That is not the end of the matter as far as 09/16 is concerned because the appellants have raised a number of issues concerning the 06/16 and the 03/16 periods and a successful appeal in relation to either or both of those will affect the surcharge for 09/16. But as there seems to be no timely appeal against the HMRC decisions for those periods I need to look closely at them to see if I have jurisdiction to consider them.

### **Can I consider 06/16 in the course of the 09/16 appeal?**

35 87. The answer to this question depends on the construction in these circumstances of s 59(7) and (8) VATA. Section 59(7) applies to:

“a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies ... a tribunal that, in the case of a default which is material to the surcharge ...”

that they have a reasonable expectation or excuse within paragraph (a) or (b). A “default which is material to the surcharge” is one which is either the default which gives rise to the surcharge (which is not the case for 06/16) or is a default which was taken into account in the service<sup>1</sup> of the SLN upon which the surcharge (for 09/16) depends *and* the appellant has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

88. The SLN on which the 09/13 surcharge depends is that for 03/13. The 06/13 default falls within the surcharge period specified in that notice, but 06/13 is a period in which the appellant was liable to a surcharge. Section 59(7) VATA does not therefore permit me to consider whether the appellant had a reasonable expectation as in s 59(7)(a) or a reasonable excuse as in s 59(7)(b).

89. It is in my view immaterial that for 06/13 HMRC chose not to seek payment of the surcharge to which the appellant was liable. In saying what I do in this and the previous paragraph I am consciously following the decision of Judge Kevin Poole in *Workstation Farnham Ltd v HMRC* [2015] UKFTT 57 (TC) (“*WSF*”) with whose analysis of s 59(8) VATA I am in full agreement. I am aware that other decisions of the Tribunal have taken a different line, but I prefer that of Judge Poole, despite the potentially unfortunate result.

90. One reason why I consider that Judge Poole is correct is that his decision gives a meaningful role to the appeal right in s 83(1)(n) VATA. In cases where there is both liability and an assessment to surcharge, the appeal will be against the assessment under s 83(1)(q), but in cases such as *WSF* and this one, there is a liability but no assessment so the appeal right is given by s 83(1)(n).

#### **25 But can a late appeal be made against 06/13?**

91. HMRC seem to work on the basis that no appeal is possible against the SLN which does not impose a surcharge. For the 06/13 default HMRC issued a Form V161, whereas for the 09/13 default they issued a V162.

92. Section 83(1)(n) VATA gives a right of appeal against liability to a surcharge. In a case where the surcharge is not assessed there remains a liability. A case such as this is one where an appeal therefore lies.

93. Section 83A VATA says that in relation to any decision against which an appeal lies, HMRC must offer a review. I can see nothing on the blank Form V161 included in my bundle which refers to any review. It merely says that if the recipient disagrees with the notice they must write to HMRC with the reasons why they disagree.

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<sup>1</sup> I confess to being confused about what “service” means here. “Serve” and “service” are used in many places in s 59 in relation to the act of giving a person a surcharge liability notice (“SLN”), the notice informing the recipient that they are in default for the period mentioned in the notice. It doesn’t of itself specify the percentage or the amount of the surcharge, which is the job of the assessment. They are combined in a single notice but that does seem to involve an earlier default being taken into account in the “service” of the SLN: rather the earlier default is taken into account in determining the percentage applicable to the default in question.

94. This seems to me to be an inadequate description of a recipient's rights. By contrast the Form V162, the form used for 09/16, at least says that if the recipient disagrees "you can ask us to review our decision or appeal to an independent tribunal within 30 days of this letter", a course the appellant took here.

5 95. HMRC will doubtless say that the V161 does not seek any amount of surcharge from the appellant, so why would they want or need to appeal? But that is to overlook that an appeal lies against liability as well as against an assessment of the surcharge, a right separately given by s 83(1)(q) VATA. It also overlooks the decision in *WSF*.

10 96. The time for appealing liability where an offer of a review has not been made is 30 days from the date of the letter containing the decision. For 06/13 that would be 11 September, whereas the appellant's contesting the 09/16 surcharge by reference to the 06/16 one was on 21 November.

15 97. Judge Poole says in *WSF* that in the circumstances the Tribunal is likely to be sympathetic to accepting a late appeal from anyone caught in what he describes as a "bear trap". Personally I would refer to it as a Heffalump trap. Accordingly I grant the appellant permission under s 83G(6) VATA to make a late appeal to the Tribunal.

### **The 06/16 appeal**

98. I now deal with the appeal I have admitted. The grounds are that

20 (1) the return and payment were not late, or alternatively that s 59(7)(a) applied

(2) the SLN for 03/13 and the SLN for 06/13 were not received.

99. I have already dealt with the latter point and the ground of appeal fails.

25 100. As to the former it is clear from the documents supplied by HMRC about the submission and receipt of the returns that HMRC received the return on 8 August 2016. By regulation 25A(10)(b) of the VAT Regulations that is conclusive proof that they were received on 8 August, unless the contrary is proved. The appellant does not seek to disprove the time of receipt: they dispute the time when they submitted the return.

30 101. The question raised by the appellant's evidence as to the time of submission is whether 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 (s 59(7)(a) VATA). In my view the return was so despatched. Whatever the appellant's understanding of what consisted the making of a return, anyone using an online method of submission is entitled to expect that submission and  
35 receipt will be as near as dammit simultaneous.

102. I take into account that Ms Bradley was not experienced in submitting a VAT return and as I have accepted her evidence and found as a fact that she submitted the return around 2200 on 7 August 2016 I consider that it was reasonable for the appellant to expect that they had despatched the return such that it would be received

by HMRC the same day. “Despatch” is clearly apt to include not just posting (the only case that s 59(7)(a) VATA would have applied to when enacted) but is also apt to cover online submission – ie clicking on the appropriate button on the HMRC VAT Online website. There is nothing in regulation 25A that deals with or makes any presumption about “despatch” or any similar term.

103. I therefore hold that for 06/16 the appellant had no liability to surcharge.

### **What about 03/13?**

104. This period is clearly one which is material to the 09/13 default, as without it there could be no surcharge for that period. Clearly also it cannot be a period where there is an earlier default. Indeed in the light of *WSF* the surcharge warning period is the only one which may be considered on an appeal against a surcharge assessment apart from the period for which the assessment is made. That is not surprising as it is the only default where there is no autonomous right of appeal.

105. I have characterised the appellant’s ground of appeal in relation to 03/13 as that they had a reasonable excuse for the failure to file on time. The excuses were that a member of staff (implicitly the one responsible for submitting VAT returns) had left and that Ms Bradley had put the wrong month in her diary.

106. I do not accept either as being a reasonable excuse. No information is given about the date the staff member left or even whether the person concerned was actually responsible for filing VAT returns. HMRC accepts that where a vital member of staff leaves unexpectedly shortly before the time for submission of the return that may well be (but will not automatically be) a reasonable excuse and that seems to me to be a correct position. But evidence is needed to justify it.

107. As to the incorrect diary entry this was a mistake by Ms Bradley, but it is not one that a person, however inexperienced, should make given the information that HMRC published online. The due date is a matter of law so a solicitor ought to take reasonable care to establish when that date is.

108. I have already dealt with the question of non-receipt of the SLN and found that the appellant has not proved it was not validly served on them.

### **The “10<sup>th</sup> of the month” issue**

109. This issue arises in relation to the 06/16 and 09/16 periods (for 03/16 the appellant accepts, or seems to accept, that as HMRC did not receive payment until early June it cannot arise).

110. I have not considered it in detail in relation to those two later periods because it seemed to me irrelevant to the appeals. For 06/16 there is no default, and for 09/16 the return was late, so default is established irrespective of the payment position and since the VAT was not paid in any manner by the last day laid down for filing the return it was outstanding thus leading to a surcharge. Thus the actual date of receipt by HMRC in their bank account of payment made by ODD seems immaterial.

111. But because the appellant has argued the point and has raised some issues concerning the public availability of the relevant legislation I consider it below, but I stress again that it is not necessary for my decision to consider the point. For that reason I have not sought any submissions from HMRC on it.

5 112. The appellant's complaint is that HMRC have not followed their own statements, that a payment made by ODD will be collected on the 10<sup>th</sup> of the relevant month, since they have collected the VAT on the 11<sup>th</sup> or 12<sup>th</sup> of a month in periods when the return was filed on time. They also say that they could not find the requirement relating to the 10<sup>th</sup> of the month in any online documentation. From a  
10 solicitor I take that as including a request to know what the legislative requirement is.

113. The appellant refers to VAT Notice 700/50. VAT Notices being HMRC's authoritative exposition of the law and practice relating to VAT should provide some clue to the answer.

114. The relevant text of the relevant Notices that I can find is as follows:

15 (1) VAT 700 (the VAT Guide) refers at 21.3 to a person who files electronically being allowed "up to seven extra calendar days to submit your return and pay your VAT". It adds:

20 "The extended due date will be shown on your online VAT return and you must make sure that cleared funds reach HMRC's bank account by this date. (The exception to this is online Direct Debit (DD) - if you pay by DD, then HMRC will automatically collect your payment on the third bank working day after the date shown on your return.)"

(2) VAT 700/12 (How to fill in and submit your VAT return) says at 1.2:

25 "There are legal conditions that apply to submitting returns online and receiving the extra time for paying electronically."

and at 5.1

"You will also be able to make payment by Direct Debit and you may get additional time in which to submit your return and make payment."

30 and at 5.2 in the case where a person sends HMRC an electronic return and pays by ODD:

35 "You will normally get an extra 7 calendar days for your return to reach us ... When you view your return online, the due date shown on-screen includes the extra 7 days. It will then be a further 3 bank working days before the payment is collected from your bank account. Bank working days are Monday to Friday excluding bank holidays."

(3) VAT 700/50 (Default Surcharge) says:

"3.1.1 If you pay by:

- 40 • an electronic method other than Direct Debit you will normally get up to 7 extra calendar days in which to submit your return and payment

- online Direct Debit you will normally get an extra 7 calendar days to submit your return - we will collect payment from your bank account on the third bank working day after the extended due date for your return

5 If the due date falls on a weekend or a bank holiday, you must make sure that cleared funds reach our bank account by the last bank working day beforehand.”

and

“5.1 Circumstances when we won’t charge a surcharge

10 There is no liability to surcharge if you:

- submit a nil or repayment return late
- pay the VAT due on time but submit your return late

We will not issue a surcharge in these circumstances because there is no late payment involved.”

15 115. The appellant’s argument here is that HMRC could, and should, have ensured that payment of VAT reached it by the 10<sup>th</sup> of August and 10<sup>th</sup> November even if the return was not received until the 8<sup>th</sup> of those months. Had HMRC done so, the argument goes, there would be no outstanding VAT. The alternative argument is that the pattern of receipts by HMRC of VAT in this case shows that VAT payments  
20 throughout 2015 did not reach HMRC’s account until after the 10<sup>th</sup> of the relevant month but no default under s 59(1)(b) VATA was alleged then, so that HMRC are precluded from taking the point in 2016.

116. It is clear that the reason this issue arises at all is the particular approach by HMRC to cases where payment is made using ODD. What precisely is that approach  
25 and where is the legal foundation for it? The underlined words in the text quoted from VAT 700/12 at §114(2) signify that there is a hyperlink to a page on HMRC’s website<sup>2</sup>.

117. That page says that it contains the legal conditions relating to the Online VAT registration service and those relating to “[i]ncentives for making an electronic return  
30 and paying VAT due by an approved electronic method”. It adds that:

“These are the conditions under which an incentive is available for making a return electronically and paying VAT due by an approved electronic method. The wording in **bold** is a direction for this purpose having the force of law.”

35 118. The text of the conditions, so far as relevant to this case, reads:

“**Submit a return: conditions**

These are the conditions for submitting returns electronically. The wording in **bold** is a direction for this purpose having the force of law.

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<sup>2</sup> <https://www.gov.uk/government/publications/vat-notice-70012-filling-in-your-vat-return/vat-notice-70012-filling-in-your-vat-return>

**VAT Returns may be made electronically using only an ‘electronic return system’ provided for this purpose. Those systems are the ones described on the HMRC website as ‘Online VAT Return Service’ ...**

5 VAT Returns submitted electronically using any of these electronic returns systems are legal declarations for VAT purposes.

...

10 If transmission of the VAT Return is successful you will receive an on-screen acknowledgement. You should keep a copy of the acknowledgment for your records. This will show that a return has been submitted. If no electronic acknowledgment is received, you must presume the return has not been received. ....

...

15 Any VAT due on a return submitted using the Online VAT Return Service ... must also be paid by an approved electronic payment method.

20 ... HMRC will send you a reminder by email when your VAT Return is due once you have activated an email address and opted to receive VAT messages for your business. If you don’t opt to receive VAT messages you will not receive any reminder that the VAT Return is due. There are penalties for not declaring and paying VAT due at the correct time.

Note

25 The legal basis for these conditions is in the Value Added Tax Regulations 1995 (SI 1995/2518).

If payment is made by Direct Debit, the BACS rules require the account holder/authorised signatory to view the VAT Return acknowledgment before the collection date for payment.”

119. And for the incentives for making returns and payments:

30 **“Incentives for making an electronic return and paying VAT due by an approved electronic method: Conditions**

35 These are the conditions under which an incentive is available for making a return electronically and paying VAT due by an approved electronic method. The wording in **bold** is a direction for this purpose having the force of law.

**Additional time may be available for a return and the payment of any VAT due to reach us where the return is made electronically and any VAT due is paid by an approved electronic payment method.**

40 **Approved electronic payment methods are ...**

**(i) Bankers Automated Clearing Services (Bacs)**

**(ii) Bank Giro Credit Transfer**

**(iii) Clearing House Automated Payment System (CHAPS)**

- (iv) Card payments
- (v) Direct Debit payment
- (vi) Online VAT Direct Debit (DD)

...

5

(viii) Faster Payments

- Payment by Bacs, Bank Giro Credit Transfer, CHAPS, Card payments, Direct Debit payment or GBS must be in our bank account by the seventh calendar day after the standard due date. If the seventh day falls on a weekend or bank holiday, the payment must reach our bank account by the previous business day.
- Faster Payments must be in our bank account by the seventh calendar day after the standard due date.
- Online VAT DD is approved only when the Online VAT Return Service is also used to submit the return.
- Online VAT DD payments will not be collected for a further three working days after the due date for receipt of the return made using the Online VAT Return Service.

10

15

20

... **Electronic returns must be received by the seventh calendar day after the standard due date.**

...

Notes

The legal basis for these conditions is in the Value Added Tax Regulations 1995 (SI 1995/2518).

25

**Standard due date means the last day of the month next following the end of the period.**

For more details about paying electronically see our How to pay VAT due to HM Revenue & Customs guide.”

120. Though this part of the legal conditions document does not actually say so because it specifies no particular regulations of the VAT Regulations, I consider that the words in bold must be the directions referred to in regulations 25A and 40 and so I agree with the VATAC Manual. The document does not show any date or the names of the Commissioners who made the directions, unlike those published by HMRC on its website which relate to direct tax<sup>3</sup>.

30

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<sup>3</sup> See for example “Directions under regulations 3 and 10 of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) dated 8 December 2010 and signed by two Commissioners (Dave Hartnett and Steve Lamey) and to be found at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/365916/mandatory-online-filing-version04012011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/365916/mandatory-online-filing-version04012011.pdf)

121. The bold text in §119 does indeed make separate and different provision where ODD applies, different that is from all other methods of payment such as CHAPS, BACS and Faster Payments.

5 122. However all it says (in bold, so apparently the text of a direction having the force of law) about ODD arrangements is that VAT payable using those arrangements

“will not be collected for a further three working days after the due date for receipt of the return made using the Online VAT Return Service.”

10 I refer from now on to this part of the legally binding text of the webpage as the “ODD receipt direction”

123. The due date for a return using the Online VAT Return Service is the seventh calendar day after the standard due date which is the last day of the month following the prescribed accounting period concerned.

15 124. But note the difference between the two extended periods. The incentive for filing the return online is that the due date is deferred by seven *calendar* days, so that the extended date will always be the seventh of the month. By contrast the direction concerning ODD arrangements is that HMRC will collect the tax on the third *working* day after due date for receipt of the return.

20 125. In 2015 and for the first payment in 2016 (none of which involved defaults in making a return) VAT was received by HMRC on:

(1) Thursday 12 February, the fourth working day after 7 February which was a Saturday.

(2) Tuesday 12 May, the third working day after 7 May which was a Thursday.

25 (3) Wednesday 12 August, the third working day after 7 August which was a Friday.

(4) Wednesday 11 November, the third working day after 7 November which was a Saturday.

30 (5) Wednesday 10 February, the third working day after 7 February which was a Sunday.

126. Thus with the exception of the February 2015 payment, all payments were received by HMRC on the third *working* day after the extended due date. What the receipt pattern for the next four payments shows is that the VAT was received by HMRC three working days after the date the return was received.

35 127. HMRC in their Statement of Case (at [65]) explain the need for three working days to take receipt as due to the workings of the BACS system as it applies to direct debits and that it is out of the control of HMRC. They are then refuting the appellant’s claim that they could somehow receive VAT on the 10<sup>th</sup> of the month when the amount due was only known on the 8<sup>th</sup>.

128. The “working day” rule also explains why VAT had been collected on dates later than the 10<sup>th</sup> for periods when the appellant was not in default, although the receipt in February 2015 seems to be an exception as being taken on the fourth working day.

5 129. I accept then that HMRC could not do what the appellant suggests, and the suggestion by the appellant that they were entitled to rely on HMRC’s taking payments later than the 10<sup>th</sup> of the month to give them an excuse or other let-out where payments in 2016 were taken on the 11<sup>th</sup> is not one that I can accept (even assuming that I had the power to do so).

10 ***Is the “ODD receipt direction” actually a direction and what legal effect does it have?***

130. If the return is late, and payment has not been made by the extended due date (ie the 7<sup>th</sup> of the month – see bold text after the bulleted paragraph in §119) using an approved online method other than ODD then the ODD receipt direction cannot  
15 change the legal position, as the default occurs as a result of the late return, and the actual date of payment is immaterial to the calculation of the surcharge. This is the case here for 09/16 and would be the case of 06/16 had I not accepted that the appellant could rely on s 59(7)(a) VATA. It is also obviously the case for 03/16.

131. But the problem I have in understanding the effect of using ODD arrangements  
20 is this: if a VAT registered business makes an online return by the 7<sup>th</sup> of the month following the standard due date and is paying its VAT by ODD, on what basis can it be said that there is not a default within s 59(1)(b) VATA (return received but VAT not received) and that there is not outstanding VAT within the meaning given by s 59(6) (VAT not paid by due date) if the payment does not reach HMRC’s account  
25 before the third working day after the 7<sup>th</sup>?

132. And the problem I have about the ODD receipt direction itself is that it does not provide for a different due date for a return or explicitly extend extend the time for payment beyond the 7<sup>th</sup>: it says that HMRC will not collect (ie receive) the payment until the third working day after the extended due date (the 7<sup>th</sup>). So where is the  
30 legislation that contains the power to make this particular direction?

133. The only likely places are in regulation 25A or regulation 40 of the VAT Regulations. The directions relevant to the filing of a return that may be made by regulation 25A are in paragraph 20:

35 “(20) Additional time is allowed to make ... a return using an electronic return system ...

That additional time is only as the Commissioners may allow in a specific or general direction, and such a direction may allow different times for different means of payment.”

40 That clearly permits that part of the direction quoted in §119 that says that electronic returns must be received by the seventh calendar day after the standard due date. The second sentence or regulation 25A(2) seems to have some relevance as ODD is a

“different means of payment” but whatever the ODD receipt direction does it does not extend the time for making a return.

134. Regulation 40 of the VAT Regulations is more promising territory as it is solely about payment. The relevant parts are:

5 “(3) The requirements of paragraphs (1) or (2) [that payment must be made by the end of the month following the accounting period in question] above shall not apply where the Commissioners allow or direct otherwise.

10 (4) A direction under paragraph (3) may in particular allow additional time for a payment mentioned in paragraph (2) that is made by means of electronic communications.

The direction may allow different times for different means of payment.

15 (5) Later payment so allowed does not of itself constitute a default for the purposes of section 59 of the Act (default surcharge).”

135. The direction text that extends the due date for payment where an authorised method of electronic payment is made is (bulleted in the original):

20 “Payment by Bacs, Bank Giro Credit Transfer, CHAPS, Card payments, Direct Debit payment ... must be in our bank account by the seventh calendar day after the standard due date. If the seventh day falls on a weekend or bank holiday, the payment must reach our bank account by the previous business day.

Faster Payments must be in our bank account by the seventh calendar day after the standard due date.”

25 136. These say the same thing: the only difference between the two paragraphs is that the first gives a warning about the need to ensure that weekends etc are taken into account, but the requirement is the same. Thus they are made by a direction under the first sentence only of regulation 40(4) of the VAT Regulations, as they do not require a direction that specifies different times for different methods of payment.

30 137. Those two bulleted paragraphs do not apply to ODD. That is covered only in the next two bulleted paragraphs:

“Online VAT DD is approved only when the Online VAT Return Service is also used to submit the return.

35 Online VAT DD payments will not be collected for a further three working days after the due date for receipt of the return made using the Online VAT Return Service.”

40 138. The first paragraph does not relate to the date of payment, and is made presumably by a direction under regulation 40(3) generally. The second paragraph, the relevant one in this case, is not in the same form as those in §135 but the implication seems to be that the due date for payments made by ODD is the third working day after the extended due date for filing the return which is the 7<sup>th</sup> of the month.

139. If that implication can be read in then the text may be part of a direction made under regulation 40(4) and applying the second sentence as well as the first.

140. But it does not read like a direction making the due date for payment the third working day after the seventh calendar day after the due date set out in regulation 40(1). Part of the addition made to regulation 40 by the VAT Amendment (No. 3) Regulations 2003 (SI 2003/1675) is regulation 40(5). This provides that “later payment so allowed does not of itself constitute a default for the purposes of section 59 of the Act (default surcharge).” “So allowed” should refer to the nearest antecedent, ie regulation 40(4) so that later payment allowed by regulation 40(4) does not constitute an automatic default for the purposes of s 59 VATA.

141. But does “so allowed” refer to the first sentence of regulation 40(4), both sentences or just the second sentence (the most obvious grammatical reading)?

142. If it just refers to the second sentence it makes some sense. It is saying that just because the return was on time but payment is not received by HMRC until the third working day after the 7<sup>th</sup> it does not mean that there is a default, ie that there is a failure within s 59(1)(b) VATA to pay on time.

143. To say that regulation 40(5) refers to both sentences is to say that for s 59 VATA purposes there is only one due date and that is the end of the month following the prescribed period, and that payment by the 7<sup>th</sup> is, apart from regulation 40(5) of the VAT Regulations, a default, as well there being a default when a payment is collected on the third working day after where ODD is used for a return made by the seventh. This seems an unnatural reading of a regulation, certainly more unnatural than the one suggested in §142.

144. Thus the collection by HMRC on the third working day is not something that gives rise to a default, at least not by itself. Quite what is meant or implied by “does not of itself” is not something I intend to explore.

145. Where does that leave the situation in February 2015 where apparently the collection was not made until the fourth working day? If that is what happened then the appellant was in default within the meaning in s 59(1)(b) VATA but HMRC took no notice. The only possible explanation is that HMRC have anticipated that a defence by virtue of s 59(7)(a) would succeed. But it is not a satisfactory state of affairs.

146. What I have set out above may be said to be an over-refined analysis. But the appellant’s complaint about the 10<sup>th</sup> of the month combined with a complaint of lack of information about due dates on HMRC’s website, particularly about the ODD situation, are serious points and deserved a proper scrutiny. I have a lot of sympathy for the complaint, especially about the lack of visibility of the law and a clear statement of what the due date actually is. A reasonably thorough scrutiny of the pages where the information might be shown merely discloses that on <https://www.gov.uk/pay-vat> a VAT registered person wishing to pay on time is told:

“You’ll usually [NB] need to pay your VAT bill by the deadline shown on your VAT return.”

147. Clicking through the hyperlink on “VAT Return” takes one to <https://www.gov.uk/vat-returns/deadlines>. There one is told:

5 “Check your VAT Return and payment deadlines in your VAT online account.

Your VAT online account tells you:

- when your VAT Returns are due
  - when the payment must clear HM Revenue and Customs’ (HMRC) account
- 10

The deadline for submitting the return online and paying HMRC are usually [NB] the same - 1 calendar month and 7 days after the end of an accounting period. You need to allow time for the payment to reach HMRC’s account

15 *Exceptions*

The deadlines are different if, for example, you use the VAT Annual Accounting Scheme.”

148. It is no longer possible to access an online return without using a VAT online account, so I do not know what an online return actually says about the due date.

20 149. The page <https://www.gov.uk/pay-vat> does say more. Under the heading “Ways to pay” it says:

“Ways to pay

Make sure your payment will reach HM Revenue and Customs’ (HMRC) bank account by the deadline. You may have to pay a surcharge if you don’t pay on time.

25

You can use the VAT payment deadline calculator to work out how much time to allow.”

150. Clicking through to the calculator and seeking an answer where payment is by ODD does bring up the date of collection as being the third working day after the 7<sup>th</sup>.

30 151. The appellant’s complaint is not quite that they could not find the collection date on the website but that they could not find there what they said they had been told by HMRC in the reviewing officer’s letter of 18 January 2017, that collection will be on the 10<sup>th</sup>. As to that I cannot see anything in HMRC’s letter which does say that the tax will be collected generally on the 10<sup>th</sup> of the month. It says that for the period 09/16 the “the due date for payment by direct debit was 10 November 2016”.  
35 That is a true statement if “due date for payment” is equated with the date HMRC collects the payment, but only for 09/16. For the other periods in issue that so-called “due date” is not the 10<sup>th</sup> because weekends intervene.

152. Indeed the letter from HMRC goes on immediately after to refer correctly to three *working* days as the general rule for ODD. Ms Bradley could not find on the website anything about the 10<sup>th</sup> being the relevant date, because it is not and HMRC had not told the appellant that it was.

5 153. From all the webpages and VAT Notices there is a clear message that the extended due date in all electronic cases is the 7<sup>th</sup> of the month and that the three working day collection rule does not derive from any direction that extends the time of payment just for an ODD case. This fortifies me in my initial conclusion that the three working day rule is an example of regulation 40(5) in action.

### 10 ***The consequences of my decisions***

154. A valid SLN was served on the appellant as a result of the appellant's default for the period 03/16. That SLN established a surcharge period running from 2 June 2016 to 31 March 2017.

15 155. There was no default for the period 06/16 because the appellant had a reasonable expectation that the return would reach HMRC by 7 August. Consequently the surcharge period was not extended by any purported extension notice.

20 156. There was a default for the period 09/16, a period falling within the surcharge period ending 31 March 2017. The VAT outstanding was £10582.45 and the rate of surcharge is 2% which makes £211.64. Any appeal against liability to surcharge under s 83(1)(n) VATA therefore fails, but in relation to the appeal against the assessment of the surcharge under s 83(1)(q) I have the power to vary the assessments and in doing so I take into account HMRC's exercise of their discretion not to assess a 2% surcharge where the result is less than £400 so I cancel the assessment.

25 157. The surcharge liability extension notice for 09/16 does however extend the surcharge period to 30 September 2017.

30 158. 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.

35 **RICHARD THOMAS**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 23 JUNE 2017**