



TC07002

Appeal number: TC/2018/03491

VAT – default surcharge – surcharge liability notice not received – no proof of posting – balance of probabilities – surcharge removed – subsequent surcharge becomes first surcharge

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LSDM LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
 MR CHRISTOPHER JENKINS**

**Sitting in public at Court 34, Taylor House, 88 Rosebery Avenue, London, EC1R
4QU on Tuesday 19 February 2019 at 10:30 AM**

Mr Neil Owen of VAT Advisory Services Ltd for the Appellant

**Mr Victor Ulamide, Presenting Officer, HM Revenue and Customs, for the
Respondents**

DECISION

1. The Tribunal decided the appeal should be allowed.

Background

2. This was an appeal by LSDM Ltd (the Company) against VAT default surcharges issued for the periods 09/17 and 12/17.
3. The Company has been registered for VAT since September 1985. Due to the size of its turnover it is obliged to make monthly payments on account in respect of each prescribed accounting period. The Company has been in the Payment on Account regime since April 2011.
4. For the periods subject to this appeal the Company was notified by HMRC by letter dated 1 February 2017 that in respect of the 06/17 quarter it was required to pay £154,178.00 on or before 31 May 2017 with a similar amount due on or before 30 June 2017 and a balancing payment due on or before 31 July 2017. The payment of £154,178.00 due on or before 31 May 2017 was not received by HMRC until 1 June 2017 and accordingly was deemed late.
5. The Company therefor entered the Default Surcharge regime. HMRC claim to have issued a VAT Surcharge liability notice on 23 August 2017 in respect of the 06/17 quarter which detailed the amount of VAT paid late, £154,178.00, but stated that the Company would not have to pay a surcharge on this occasion.
6. HMRC's letter dated 1 February 2017 further advised the Company that similar payments on account for the 09/17 quarter should be paid on or before 31 August 2017 and 29 September 2017 with the balancing payment due on or before 31 October 2017. While the two payments on account were received by HMRC before the due dates the balancing payment of £2,044,786.22 was not received until 8 November 2017. As this was late HMRC issued a VAT Notice of assessment of surcharge dated 6 March 2018 assessing the surcharge at £40,895.00 being 2% of the late payment.
7. HMRC's letter dated 1 February 2017 also advised the Company that similar payments on account for the 12/17 quarter should be paid on or before 30 November 2017 and 29 January 2018 with the balancing payment due on or before 31 January 2018. The first two payments on account were both received on 3 January 2018 with a further payment received on 1 February 2018 and the balancing payment received on 20 February 2018. Accordingly the total amount due for the 12/17 quarter, £774,994.62 was late and HMRC issued a VAT Notice of assessment of surcharge dated 7 March 2018 assessing the surcharge at £38,749.00 being 5% of the total late payment.
8. By letter dated 12 March 2018 the Company wrote to HMRC acknowledging that not all of their payments were made on time but requested a review

“because no notification of the surcharge was made prior to the letter of the 6th March being received by the company”.

9. The letter continued:

“After searching in the company records and incoming correspondence we have found no trace of any notification of a surcharge from HMRC or of the opening of any surcharge period. The first communication received on this subject is your letter dated the 20th of February 2018 which refers to a recalculation and extension of the surcharge. We received two letters from you with respect to late payments in November and December 2017 (dated 27th of December) which were acted upon when opened on the 3rd of January 2018.

You appear to recognise in your letter of the 6th of March that we may not have been notified of a surcharge period since you state that the surcharge period will commence from the 6th of March 2018 if we have not. In addition, your letter contains the text “We have also extended the surcharge period previously notified to you to.” I believe a date from a previous correspondence with the company should be referenced at that point (as it is in your letter dated 7th March 2017) and no reference to previous correspondence is made.”

10. HMRC replied by a review conclusion letter dated 2 May 2018 stating that they had decided not to cancel the default surcharge assessments as the Company had not provided a reasonable excuse.

11. The Company’s agent, Mr Neil Owen, lodged a Notice of appeal to this Tribunal on 30 May 2018 citing the following grounds:

“Whilst the company acknowledges that not all payments were made on time, we contend that the surcharges levied by HMRC are not valid as no surcharge liability notice had been sent to the company, as required by paragraph 2(b) of s59 of VATA 1994 in order for a surcharge to be imposed. The company has no record of receiving any such correspondence and HMRC, in a letter to the company dated 6 March 2018, acknowledge the possibility that it was not sent, stating that the surcharge period would commence from that date if no such notification had been previously made. In addition, the review conclusion letter fails altogether to address this point, which was raised in the request for review.”

12. HMRC’s Complaints Team then wrote to the Company on 26 June 2018 to advise that they had decided to remove the 12/17 surcharge “based on the evidence held”. The letter continued by stating that their records confirmed that surcharge notices were issued for the 06/17 and 09/17 periods and as no items of post had been returned by the Royal Mail and the fact that there had been no address change there was no reason for HMRC to suppose the default surcharge notices had not reached the Company. HMRC was therefore satisfied that the necessary conditions for the service of the Surcharge Notices within the meaning of section 59A(3) of the VAT Act 1994 had been met.

13. HMRC's Solicitor's Office then wrote to the Company on 2 July 2018 to advise that the amount subject to appeal was reduced from £79,644.00 to £40,895.00. The letter continued by advising that the Surcharge Liability Period would be amended to expire on 30 September 2018.

Evidence on behalf of the Company

14. Mr Paul Haslem, former Chief Executive Officer of the Company gave evidence to the Tribunal. He informed the Tribunal that he had become involved with the Company in 2015 when the then owner sought his help in developing the Company. He had become Chief Executive Officer in November 2017 and had been asked by the new owner to go on gardening leave in July 2018 following a sale of the Company in February 2018.

15. The administration of the Company was carried out at the head office in Wembley at the address in HMRC's records. Mr Haslem informed the Tribunal that all mail came to the ground floor reception where the receptionist gave the mail to him for distribution to the appropriate department. As far as he knew no mail had ever gone astray during his time with the Company. The Finance Director met with the then owner every week. Copious notes of these meetings were kept and no mention of a surcharge liability notice appears in them until March 2018. Mr Haslem was certain that if a surcharge liability notice had been received it would have been mentioned at the next weekly meeting.

16. Mr Owen told the Tribunal that on the balance of probabilities the Notice dated 23 August 2017 in respect of the 06/17 quarter had not been duly served and possibly was not even sent. There were errors in the notice dated 6 March 2018 in respect of the 09/17 quarter in that the date for the extension period was blank. It was also strange that this notice was issued one day before the surcharge liability notice for the 12/17 quarter which HMRC had subsequently withdrawn.

17. Mr Owen then referred the Tribunal to the cases of *Customs and Excise Commissioners v Medway Draughting and Technical Services Ltd*; *Customs and Excise Commissioners v Adplates Offset Ltd* [1008] STC 346 and *Garnmoss Limited T/A Parham Builders* [2012] UKFTT 315 to which we shall refer later in this decision.

Evidence on behalf of HMRC

18. Mr Ulamide, when asked by the Tribunal said he had not included in the papers a screen print showing the dates as recorded by HMRC's computer when the various notices were sent. However he was satisfied that their records showed the default surcharge notice was sent on 23 August 2017.

19. HMRC's Statement of Case makes the point that the notes on the reverse of each surcharge liability notice include:

“Please remember: You must submit your VAT return and ensure that the payments on account and balancing payment have cleared to HMRC’s bank account by the due dates.”

20. Liability to a VAT surcharge is governed by section 59 VAT Act 1994 and each notice details how the surcharges are calculated and the percentages used. The fact that a previous default surcharge notice did not contain a financial element may also be relevant in that the Company may not have realised that the Notice dated 23 August 2017 was in fact a default surcharge notice.

21. Mr Ulamide said HMRC relied on section 98 of the VAT Act 1994 and section 7 of the Interpretation Act 1978 which state that the Notice is deemed to have been delivered unless the contrary is proved. The onus of proof in relation to this aspect rests with the Company. All correspondence sent to the Company prior to and subsequent to the Notice dated 23 August 2017 had been received by the Company.

22. Finally Mr Ulamide referred the Tribunal to the case of *Goldfinch Transport Ltd* [1996] BVC 4305 which had held that the wording of the notice was adequate to have effect either as a surcharge liability notice within section 59(2)(b) of the VAT Act 1994 or as an extension notice within section 59(3).

The legislation

23. The relevant portions of section 59A of the VAT Act 1994 are:

(1) For the purposes of this section a taxable person shall be regarded as in default in respect of any prescribed accounting period if the period is one in respect of which he is required, by virtue of an order under section 28, to make any payment on account of VAT and either –

(a) a payment which he is so required to make in respect of that period has not been received in full by the Commissioners by the day on which it became due;

(2) Subject to subsections (10) and (11) below, section (4) below applies in any case where –

(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 which –

(i) begins, subject to subsection (3) below, on the date of the notice; and

(ii) ends on the first anniversary of the last day of the period referred to in paragraph (a) above.

(3) If –

(a) a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period; and

(b) 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 shall be expressed as a continuation of the existing surcharge period; and accordingly, the existing period and its extension shall be regarded as a single surcharge period.

24. Section 98 of the VAT Act 1994 states:

Any notice, notification, requirement or demand to be served on, given to or made of any person for the purpose of this Act may be served 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.

25. Section 7 of the Interpretation Act 1978 states:

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.”

Decision

26. In the *Medway* case referred to in paragraph 17 Macpherson J in the Queen’s Bench Division referred to the decision in *R v County of London Quarter Sessions Appeals Committee, ex p Rossi* [1956] 1 QB 682 where the court held that the words “give notice in due course” imported the requirement that the notice given should be received by the party interested and interpreted in the light of section 26 of the Interpretation Act 1889 (as to effecting service of a document by sending it by post), the service of this notice could not be “deemed to be effected” in the ordinary course of post because it was proved never to have been effected in time or at all.

27. Macpherson J in *Medway* stated:

“I have come firmly to the conclusion that in the present cases it was the intention of Parliament that a warning should be given before a surcharge could be levied. ... As a matter of construction of s 19, the whole scheme of default surcharge is dependent on service of the surcharge liability notice. If this were not so the legislature could simply have decreed (for example) that a third default in any defined period would of itself trigger the commissioner’s right to surcharge the taxpayer. It was decided that this should not be the scheme of the section and that even defaulting tax payers were entitled to be warned of an impending surcharge.”

28. The reference to s 19 is a reference to s 19 of the Finance Act 1985 which created a default surcharge regime which was replaced by section 59A of the VAT Act 1994.

29. Macpherson J continued:

“There seems to me to be no doubt but that receipt of the notice was crucial for the purpose of enabling the taxpayer to avoid the surcharge. Since even if he ought not to have been yet again in default he would have been likely to act, or at least would have been able to take prompt action, to avoid surcharge by performing his duty in time after the first two defaults.”

30. In the *Garnmoss* decision also referred to in paragraph 17 above HMRC had claimed that surcharge extension notices had been sent to the appellant company on 12 February 2010 and 14 May 2010. Judge Charles Hellier in the First Tier Tribunal stated at paragraph 36:

“If, and only if, they were so sent can the defaults for 12/10 and 03/11 give rise to a surcharge liability.”

31. At paragraph 41 Judge Hellier stated:

“We have to decide on the evidence before us whether, on the balance of probabilities, the notices were sent. The evidence that they were not was that of Miss Potheary [of the appellant company], but we thought it was possible that the letters were received but misfiled or lost. On the other hand we had a computer printout which one might expect to be accurately kept, but in relation to which we had no evidence linking the entry to the posting of a letter.

On balance, on that evidence, we are not satisfied that the letters were posted and therefore we are not satisfied that the notices were served on the taxpayer.”

32. Section 59A(2)(b) of the VAT Act 1994 requires HMRC to serve notice on the Company. HMRC has not produced any evidence to show that the surcharge liability notice dated 23 August 2017 was in fact sent. No computer printout as produced in the *Garnmoss* appeal was produced to the Tribunal. HMRC gave no reason why the 12/17 surcharge was withdrawn. The copy of the 09/17 surcharge notice before the Tribunal contained an obvious error and no explanation was given as to why the 09/17 surcharge notice was dated 6 March 2018, only one day before the 12/17 notice.

33. Mr Haslem has persuaded the Tribunal that the Company operated strict procedures concerning the opening and internal delivery of post. He has also informed us that he can find no record of the notice being received or being discussed by the owner and the then Finance Director. We accept his evidence.

34. This Tribunal finds that on the balance of probabilities the surcharge liability notice dated 23 August 2017 was not received by the Company. Following the decision in *Medway* it is a requirement that the Company actually receives the notice for it to be effective. Accordingly the surcharge liability for the 06/17 quarter is removed with the result that the surcharge liability for the 09/17 quarter becomes the first surcharge at 0%.

35. The appeal is therefore allowed.

36. 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.

**ALASTAIR J RANKIN
TRIBUNAL JUDGE**

RELEASE DATE: 26 FEBRUARY 2019