



TC01937

Appeal number: TC/2011/09327

VAT – default surcharge – late payment of tax – electronic payment – whether despatched in time – erroneous belief that Faster payments system applied – held, not despatched in time – whether reasonable excuse – on facts, no – whether surcharge disproportionate given short delay – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SEW AND GO LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN CLARK
NIGEL COLLARD**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 13 February 2012

Adam Samuels for the Appellant

Bruce Robinson, Appeals and Reviews Unit, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant (“Sew And Go”) appeals against a default surcharge of £1659.55 imposed by the Respondents (“HMRC”), calculated at the rate of 10 per cent of the tax due for the VAT period 07/11.

The facts

2. The evidence consisted of a bundle of documents. Mr Samuels, the current Director of Finance of Sew And Go, who had invested in Sew And Go in October 2011, and thus after VAT period 07/11, and taken over as Director of Finance on 5 October 2011, provided some information in the course of his argument, but had not been involved with Sew And Go in that capacity at the relevant time. We have therefore based our decision mainly on the documents.

3. From these, we find the following background facts; we consider other issues of fact later in this decision.

4. Sew And Go first came within the default surcharge regime in period 07/09. The due date for its VAT return for that period, and for the payment of VAT to HMRC, was 31 August 2009. The return was received by HMRC on 3 September 2009. Out of the £21,636.72 tax due for the period, £8,636.72 was paid by the due date, and the balance of £13,000 was paid by four instalments in September and October 2009, the final balance being received by HMRC on 8 October 2009.

5. A further default occurred in respect of period 01/10, but as the amount of tax involved was less than the “de minimis” level of £400 operated in practice by HMRC in respect of the first and second defaults, the surcharge of 2 per cent was not imposed.

6. In respect of period 07/10, Sew And Go defaulted again. It paid the tax due, amounting to £29,216.40 in a series of instalments from 13 September 2010, the final balance being received by HMRC on 3 October 2010.

7. Surcharges were imposed for periods 10/10, 01/11 and 04/11, but were subsequently withdrawn by HMRC.

8. The VAT in respect of period 07/11 was due to be paid by 7 September 2011, using electronic payment. The payment was received late, in two separate amounts. The first, of £12,000, was received by HMRC on 8 September 2011, and the second, of £4,595.55, on 9 September 2011.

9. As this was the third default within the relevant period, other surcharges having been withdrawn as described above, HMRC imposed a surcharge for late payment. As already indicated, this surcharge was at the rate of 10 per cent. HMRC’s original Surcharge Liability Notice had been dated 11 September 2009; it specified the surcharge period as being from that date until 31 July 2010. The Surcharge Liability

Notice was extended for a further year following the default in respect of period 07/10. HMRC's subsequent notice (entitled "Notice of Assessment of Surcharge" and "Surcharge Liability Notice Extension") was dated 16 September 2011; it extended the previously notified surcharge period until 31 July 2012.

5 10. On 27 October 2011 a Review Officer on behalf of HMRC set out the results of an independent review carried out by that officer, following a letter of unspecified date from Sew And Go requesting a review. (The full copy of this letter in the bundle carries no signature, and therefore, apart from the initials "JMH" shown as HMRC's reference, we have no evidence of the identity of the review officer.)

10 11. The relevant paragraphs of the letter were as follows:

"Having considered all the information you have supplied, I regret to inform you that [HMRC] do not accept that you have a reasonable excuse for the above-mentioned default.

15 Your payments of £12,000 and £4,595.55 were not received until the 8/9 September 2011. You were advised of the criteria for making timely payments in our letters dated the 31/05/11 and the 26/06/11; therefore you did not initiate the payment in time to be received by the due date of the 07/09/11.

The surcharge for period 07/11 will therefore remain in force."

20 12. On 4 November 2011 Mr Samuels on behalf of Sew And Go gave notice of appeal to the Tribunals Service. We have not seen a copy of the Notice of Appeal form, but Mr Samuels sent a letter dated that day explaining the position, and making certain submissions, which we consider below.

Arguments for Sew And Go

25 13. In his letter to the Tribunals Service dated 4 November 2011, Mr Samuels stated:

"As some background the last VAT return was submitted by my predecessor Mr Steven Kanter, who has retired and I took over as Director of Finance on 5 October 2011.

30 Steven made two payments towards the 07/11 liability that were received by you later than 7 September 2011. A £12,000 payment was made by Steven from the Nat West account [*number withheld*] on 6 September 2011 and a further payment of £4,595.55 on 7 September 2011. Copy bank statements are attached. As a retail business we are finding times are hard and are not assured of adequate cash resources to be able to make payments by direct debit.

35 Steven was aware that the account [*number withheld*] was part of the faster payment scheme and as he made payments every day that arrived same day at the recipient's bank account he was expecting payments to
40 HMRC to arrive same day too. I spoke with Nat West today and they explained that the faster payments scheme only involves the big 7 banks and that HMRC's bank is not part of the scheme.

I would ask in the circumstances that:

- a) One payment was 1 day late and the other 2 days late;
- b) We honestly believed that the payment would arrive at HMRC by 7 September 2011

5 the Default Surcharge Liability should be considered to be disproportionate in the circumstances and we are hence asking that it be waived and the Notice withdrawn.”

14. At the hearing Mr Samuels explained that as a Chartered Accountant, he had expertise in tax and VAT, and was aware of the requirements for VAT payments. He
10 therefore knew why the view taken by Mr Kanter had been incorrect. He commented that Mr Kanter was a layman and therefore had not understood why the late payment had arisen.

15. Mr Samuels commented that, had Mr Kanter been made aware of this, he would have made a CHAPS transfer. Mr Samuels submitted that Mr Kanter was not a
15 professional, and that an exception should be made. Mr Samuels also observed that the loss of “income” to the Exchequer had been less than 10 per cent, and that the surcharge was therefore not proportionate to the lateness of the payment made.

16. The payment had been made by two instalments, in the light of the availability of funds. Sew And Go was dependent on funds from customers. It had to work on a
20 “hand to mouth” basis, which meant that the VAT could not be paid to HMRC by the direct debit method.

17. It was in the nature of its retail business that the period of credit averaged one week. Sew And Go had a few contract customers, but this part of the business did not represent a significant proportion of the turnover. It was not on the VAT cash
25 accounting scheme, and completed returns on a quarterly basis.

18. In reply to Mr Robinson’s arguments, Mr Samuels re-emphasised Mr Kanter’s incorrect belief that the payments would reach HMRC on time, and that if Mr Kanter had understood the position, he would have used CHAPS. Mr Kanter had been aware that HMRC accepted payments on line; as the mechanism for on-line payments was
30 the same, it was understandable why he had thought that the position for electronic bank payments was the same. He had made an innocent mistake. Sew And Go had made every effort to make payment on time in respect of period 07/11.

Arguments for HMRC

19. Mr Robinson reviewed Sew And Go’s history of defaults. He explained that the
35 defaults for three periods had been cancelled when Sew And Go had asked for them to be reviewed.

20. The issues raised by the appeal were:

- (1) Was there a reasonable expectation that payment would be received in time by HMRC?

(2) Was there a reasonable excuse for late payment?

(3) Was the surcharge disproportionate?

21. Mr Robinson referred to a letter to Sew And Go dated 31 May 2011 from HMRC's Appeals and Reviews Unit, which confirmed HMRC's agreement to cancel the defaults for periods 10/10 and 01/11. It continued:

"I am today sending instructions for the Surcharge Liability Notices to be removed.

Due to a prior default in period 07/10 the business's Surcharge Liability Period will be amended to expire on 31/07/11. If you default again within this specified period it will be extended by a further 12 months and you may become liable to a financial penalty.

I have enclosed a further information sheet which may help you to avoid further default surcharges."

22. Mr Robinson referred to paragraph 6 of that information sheet. This contained, in bold type, the following sub-paragraph:

"Please note: HMRC is currently unable to accept Faster Payments."

23. He also referred to a similar letter dated 26 July 2011 from HMRC to Sew And Go agreeing to cancel the default surcharge for period 04/11. The attachment was a sheet headed: "Top tips on how to avoid VAT surcharges". The final column contained the following paragraphs:

"Allow enough time for payment to reach HMRC's bank account by the due date. Bank working days are Monday to Friday excluding bank holidays.

CHAPS is the only method of same day payment. Other methods take at least three working days to reach HMRC's bank account. Speak to your bank if you are unsure how long the transfer will take. **We are unable to accept faster payments.**"

24. The relevant legislation was in ss 59 and 71 of the Value Added Tax Act 1994 ("VATA 1994"). Mr Robinson submitted that Sew And Go had been alerted on at least two occasions of the need to make appropriate arrangements for the payment of VAT to reach HMRC in time; it was reasonable to expect the person in charge of making payments to have read the notices which had been issued to Sew And Go. He also referred to s 71(1)(b) VATA 1994 concerning reliance on another person, here Mr Kanter.

25. Mr Samuels had referred to difficult trading conditions. Section 71(1)(a) VATA 1994 made clear that an insufficiency of funds to pay any VAT due was not a reasonable excuse. The case of *Customs and Excise Commissioners v Steptoe* [1992] STC 757 (CA) had been considered by HMRC; there was nothing specific in Sew And Go's trading position that would warrant the state of its finances being treated as a reasonable excuse.

26. Mr Samuels had raised the issue of proportionality. Mr Robinson submitted that the imposition of the surcharge of ten per cent was not disproportionate. Sew And Go had had a history of defaults, and had been made aware of the consequences, including the rates of surcharge applicable.

5 27. The subject of proportionality of default surcharges had been raised in an appeal
being taken to the Upper Tribunal. Mr Robinson asked that if the Tribunal considered
proportionality to be an appropriate issue to be examined in relation to Sew And Go's
appeal, the latter should be stayed so as to "stand behind" HMRC's appeal to the
Upper Tribunal against the decision in *Total Technology Ltd* [2011] UKFTT 473
10 (TC), TC01323.

28. In response to our question concerning HMRC's current view of the Tribunal's
decision in *Greengate Furniture* (2003) VAT Decision 18280, Mr Robinson
explained the position which HMRC were now adopting. This was that the First-tier
Tribunal did not have jurisdiction to consider the matter of proportionality in itself.

15 **Discussion and conclusions**

Introductory matters

29. We should record that a procedural matter arose shortly before the hearing was
due to start. On Friday 10 February 2012, Mr Samuels had emailed the Tribunals
Service with a request for postponement of the hearing, as a meeting had been
20 arranged by someone else requiring him to attend at the same time as the
commencement of the hearing. The Tribunals Service responded that it was unable to
grant the request at such short notice, and stated that any postponement request would
need to be made to the Hearing Judge at the hearing.

30. A copy of the email exchange was passed to the Judge approximately twenty
25 minutes before the hearing was due to start. The Judge's view was that as the request
had been made so late and was not supported by any evidence to show how important
the meeting was for Sew And Go, or even whether it related to that company's affairs,
it had been made too late for it to be granted.

31. In any event, it became clear that Mr Samuels had, after all, arrived for the
30 hearing. We explained to him that it would be very unusual for the Tribunal to grant
such a request without evidence of some very pressing reason such as a medical
emergency. The hearing therefore proceeded in the normal way.

32. We also need to make clear something arising from Mr Samuel's letter dated 4
November 2011 to the Tribunals Service. This appears to assume that the Tribunals
35 Service and HMRC are the same body, as it refers to HMRC's review letter dated 27
October 2011 as "your letter". These Tribunals are independent of HMRC, and come
within the responsibility of the Ministry of Justice. Their purpose is to provide a
means of adjudication in respect of disputes between taxpayers and HMRC by giving
independent consideration to the disputed matters.

Our decision announced at the hearing

33. After hearing both parties' arguments, we retired to consider the matter. Having arrived at our views, we announced them to the parties in the following terms:

5 "We have considered the argument that Sew And Go had a reasonable excuse for not making the payments in time to ensure that they would reach HMRC by the due date. As two notifications had been sent to Sew And Go before 31 August 2011, indicating that HMRC were unable to accept Faster Payments, we do not consider that Sew And Go had a reasonable excuse for late payment of the tax due.

10 In relation to the issue of proportionality, we do not consider that the amount of tax due in respect of period 07/11 was exceptional when compared with the tax due for earlier quarters, and therefore do not consider that the issue of proportionality is engaged in any way differently from the case of *Greengate Furniture*, in which the surcharge was held not to be disproportionate.

15 The appeal must therefore be dismissed."

34. Following our announcement, Mr Samuels requested a full reasoned decision, as, for commercial reasons, he would have to produce the decision to other parties. We therefore set out in greater detail our reasons for arriving at the views expressed in the preceding paragraph.

Full reasons for our conclusions

35. We do not find it necessary to set out in full the text of s 59 VATA 1994, but do wish to highlight the words of s 59(7):

25 "(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

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

35 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 which depended upon that default shall be deemed not to have been served)."

40 36. As the payments did not reach HMRC until after the due date, Sew And Go falls within the initial words. In order to be absolved of liability to the surcharge, Sew And Go must satisfy us that it fulfils one of two tests. As indicated in *Eyestar Consulting Ltd* [2011] UKFTT 651 (TC), TC01493, the first is whether the VAT shown on Sew

And Go's return was despatched at such a time that it was reasonable to expect it to have been received by HMRC within the extended time limit of seven calendar days after the normal due date. If this test is not satisfied, then was there a reasonable excuse for the VAT not having been despatched in time?

5 37. Mr Samuels accepted that Mr Kanter had made an error in assuming that the
Faster Payments system applied to payments made to HMRC. We find that he made
that error despite Sew And Go having been provided with clear information that this
was not the case. We are unable to establish whether Mr Kanter actually read this
information, but we are satisfied that appropriate notice as to the position had been
10 provided to Sew And Go as the taxable person.

38. Although Mr Kanter believed that he had made appropriate arrangements to
ensure that the payments would be received by HMRC by the due date, his subjective
view is not sufficient to fulfil the first test laid down by s 59(7) VATA 1994. The
"person" referred to is Sew And Go, the taxable person. Whatever Mr Kanter's view,
15 Sew And Go had been informed that the only way of making a "same day payment"
to reach HMRC on the day of instigating it was to use the CHAPS system.

39. We find that the payments of VAT were not despatched at times and in a
manner that it was reasonable to expect them to be received by HMRC within the
appropriate time limit, namely the extended period of seven days after the due date as
20 specified by HMRC for electronic payments.

40. As Sew And Go did not satisfy the first test, we consider whether it has satisfied
the second. This is whether there was a reasonable excuse for the payments of VAT
not having been despatched within the terms of s 59(7)(a) VATA 1994. Similar, but
not identical, factors need to be taken into account. Mr Samuels relied on Mr Kanter's
25 belief that the Faster Payments scheme applied, stating in argument that such belief
was honest, despite being erroneous. Again, the question whether there was a
reasonable excuse has to be applied to the taxable person, Sew And Go. As Director
of Finance, Mr Kanter was an officer or employee of the company, with responsibility
for financial matters. We are not satisfied on the evidence that his state of mind
30 should be attributed to Sew And Go, which as a legal entity had been provided with
clear information showing that the Faster Payments system did not apply.

41. Mr Robinson referred to s 71(1)(b) VATA 1994, concerning reliance on another
person. Although we do not consider that this has any relevance to the first test as set
out in s 59(7)(a) VATA 1994, it applies to the other test in s 59(7)(b) because this
35 raises the issue of reasonable excuse. To the extent that Sew And Go can be described
as having relied on Mr Kanter, who acted on the basis of his belief that the Faster
Payments system applied, s 71(1)(b) precludes this from being taken into account.

42. As Sew And Go had been informed on two occasions that the Faster Payments
scheme did not apply to payments to HMRC, we find that it did not have a reasonable
40 excuse for the late payment of VAT for the period 07/11.

43. We are aware of HMRC's recent announcements in VAT Notice 700/12/11 and in VAT Notice 700/50/11 that, with effect from 16 December 2011, they are now able to accept payment under the Faster Payments scheme, but this was not the position for the VAT period under appeal. As we understand that certain banks apply upper limits to the amount which can be paid on any single occasion, we think that Sew And Go, in the same way as any other trader wishing to use the system, would be well advised to obtain specific advice from its bank as to the limit which applies in its case.

44. On the question of proportionality (if we have properly understood the nature of HMRC's position as referred to by Mr Robinson) we are not convinced without further argument that HMRC's view as to lack of jurisdiction is correct. HMRC did not seek to raise the issue before the VAT and Duties Tribunal in *Greengate Furniture*, nor in *Enersys Holdings UK Limited v Revenue and Customs Commissioners* [2010] UKFTT 20 (TC), TC00335. At present, therefore, we see no reason to prevent us from addressing the issue. The matter may well be clarified once the Upper Tribunal has considered the appeal against the decision of the First-tier Tribunal in *Total Technology Ltd*.

45. Mr Samuels' challenge to the level of the surcharge was that, given the short time between the due date and the receipt by HMRC of Sew And Go's VAT payment, a ten per cent surcharge was disproportionate. As the Tribunal in *Enersys* indicated at paragraph 55, it is not necessary for a taxable person to attack the default surcharge system as a whole when seeking to challenge an individual surcharge "penalty". We do not read Mr Samuels' submission as directed against the system; it appears to us to relate specifically to the circumstances in which the particular surcharge which HMRC has imposed on Sew And Go.

46. We have considered the decision of the First-tier Tribunal in *Enersys*, and find that the tax due for VAT period 07/11 was not exceptional in the context of Sew And Go's liabilities for earlier VAT periods. Consequently, the surcharge did not represent an unimaginably high "penalty", as referred to at paragraph 61 of *Enersys*.

47. We therefore find that the surcharge was not disproportionate, and so do not consider it appropriate to comment in any way on the default surcharge system as a whole.

48. Sew And Go's appeal is therefore dismissed.

Right to apply for permission to appeal

49. 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.

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**JOHN CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 4 April 2012