



TC02845

Appeal number: TC/2012/03061

Value Added Tax – Surcharges for late payments of VAT; whether payment made late due to lack of advice of changes to banking terms and conditions for the making of payments constituted reasonable excuse; Yes, appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANGUS ALLIANCE PAINTERS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER PETER R SHEPPARD, FCIS,
FCIB, CTA
CHARLOTTE BARBOUR, CA, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh, EH2 4HH on
30 July 2013**

Hermann Twickler and Jesse Youmans, for the Appellant

Elizabeth McIntyre, Officer of HMRC, for the Respondents

DECISION

Introduction

5 1. This concerns an appeal made late by the Appellant against a surcharge of £2,331.12 assessed by the Respondents for the late submission by the Appellant of payment for its VAT return for the quarter ended 31 August 2011.

2. Following an application from the Respondents the Tribunal issued a Direction dated 23 February 2012 whereby the appeal was sisted pending the Decision of the
10 Upper Tribunal (Tax and Chancery Chamber) in the appeal of *Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC). It was then listed for hearing following the release of that Decision. Mrs McIntyre had included the Decision in the bundle of papers presented to the Tribunal and copied to the Appellant.

3. Mrs McIntyre for the Respondents said she had no objections to the hearing
15 proceeding even though the appeal had been made late and the Tribunal granted permission for the appeal to proceed.

Legislation

VAT Act 1994 Section 59

The Payment Services Directive 2009/64/EC

20 The Payment Services Regulations 2009, S.I.209 of 2009 especially Regulation 70

Case law

Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC)

J B Steptoe, CA [1992] STC757

Statutory Framework

25 4. Section 59 of the VAT Act 1994 sets out the provisions whereby a Default Surcharge may be levied where HMRC have not received a VAT return for a prescribed accounting period by the due date, or have received the return but have not received by the due date the amount of VAT shown on the return as payable.

5. When the first default occurs a surcharge liability notice is issued which
30 specifies a surcharge period of 12 months beginning on the date of the notice and ending 12 months later assuming no further defaults occur. If a further default does occur then a surcharge of 2% of the tax due for the period may be levied and the period of the notice is extended to one year from that default. Further defaults within the surcharge period can give rise to increasing surcharges of 5%, 10% and a
35 maximum of 15% of the tax due, and the period of the surcharge notice is extended to one year from each default. If a taxpayer makes all returns and payments on time for

one year within the period of the surcharge liability notice he will not receive a surcharge during that period and will be removed from the default system. If he subsequently defaults the whole process starts again.

Facts

- 5 6. The Appellant is based in Dundee and is a subsidiary of Pressurefab Group Ltd. It was incorporated on 27 November 2009. Together the companies supply industrial coating and blast cleaning services.

Appellant's Submissions

- 10 7. Mr Twickler, a director of the Appellant, made two main submissions which he considered gave the Appellant reasonable excuse for the late payment of the VAT stated to be due on the Appellant's VAT return for the quarter ended 31 August 2011.

- 15 8. The first was that the Appellant's bankers, Bank of Scotland, had, without adequate notice, changed their terms and conditions for the making of payments. He said that he had been in the habit of making a payment in the knowledge that if he gave an instruction to his bank to make a payment it would be debited to his account that day and would arrive at the recipient's s[CB1] account two days later. Thus when he instructed his bank to make a payment to the Respondents on 5 October 2011 he expected it to be debited to his account on 5 October 2011 and that it would arrive at
20 the recipient's account on Friday 7 October 2011. In fact it arrived on Tuesday 11 October 2011.

- 25 9. On making enquiry of Bank of Scotland as to why the payment had taken longer on this occasion he was told that in May 2011 they had sent him a letter headed "Important changes to our services". The letter itself highlights some of the main changes but does not refer to any changes in the payment system. However it does say that some of the key changes are detailed in a brochure which was enclosed. Mr Twickler pointed out that the tone of the brochure was that these changes were to
30 "improve the service" and indeed those words are used on page 5. However on page 6 there is a separate heading "Making payments through Business Internet Banking". This paragraph says "You can choose to send payments by Faster Payments or standard payments. Faster payments normally reach the recipient's account within two hours. When making a standard payment, please allow three full days for the funds to reach the recipient's account. This does not include the day that
35 you give us the instruction. For example a payment instructed on Monday will be received on Thursday."

- 40 10. Mr Twickler argued that this was the opposite of an improved service as payment now took one day longer. Previously the three days had included the day the instruction was given. Mr Twickler asserted that he was entitled to think that payment would have been made more quickly. He asserted that Bank of Scotland had been acting illegally in that they were acting contrary to European law. When pressed

he could not be precise about which law but said it was common knowledge. On reflection the Tribunal assumes he was speaking of the Payment Services Directive 2009/64/EC. This law was implemented in the United Kingdom by The Payment Services Regulations 2009 SI 209 of 2009. The Tribunal notes that Regulation 70 states:

Payment transactions to a payment account

70.—(1) Subject to paragraphs (2), (3) and (4), the payer’s payment service provider must ensure that the amount of the payment transaction is credited to the payee’s payment service provider’s account by the end of the business day following the time of receipt of the payment order.

(2) Until 1st January 2012, the payer and their payment service provider may agree that the amount of the payment transaction is to be credited to the payee’s payment service provider’s account by the end of the third business day following the time of receipt of the payment order.

(3) Where a payment transaction is initiated by way of a paper payment order—

(a) the reference in paragraph (1) to the end of the business day following the time of receipt of the payment order is to be treated as a reference to the end of the second business day following the time of receipt of the payment order; and

(b) the reference in paragraph (2) to the end of the third business day following the time of receipt of the payment order is to be treated as a reference to the end of the fourth business day following the time of receipt of the payment order.

(4) Where a payment transaction—

(a) does not fall within paragraphs (a) to (c) of regulation 69(1); but
(b) is to be executed wholly within the EEA,

the payer’s payment service provider must ensure that the amount of the payment transaction is credited to the payee’s payment service provider’s account by the end of the fourth business day following the time of receipt of the payment order.

(5) The payee’s payment service provider must value date and credit the amount of the payment transaction to the payee’s payment account following its receipt of the funds.

(6) The payee’s payment service provider must transmit a payment order initiated by or through the payee to the payer’s payment service provider within the time limits agreed between the payee and its payment service provider, enabling settlement in respect of a direct debit to occur on the agreed due date.

11. The covering letter of 20 May 2011 which enclosed the brochure also said “The changes won’t happen straight away as we want to give you advance notice of what to look out for. It will be at least two months from the date of this letter before the changes take effect. Once they are made, we’ll write to you again to let you know”.

12. In the bundle of papers there was a letter dated 26 October 2011 from Bank of Scotland to the Appellant. This included the following paragraphs:

“Prior to 12th September 2011 payments made by bill payment were debited to your account on the same day as requested and should be credited to the recipient’s account 2 days later. For example, a payment requested on a Monday should be in the recipient’s account on a Wednesday.

Our procedures changed on 12th September 2011 and from that date it takes three full business days for the funds to reach the recipient’s account. This does not include the day you give us the instruction. For example a payment instructed on a Monday will be received on Thursday.

These changes were covered in Page 6 of the ‘Business Banking is changing’ booklet which was sent to you in May this year”.

13. The Tribunal note that this letter is dated after the changes were made but refers to the booklet issued in May with a covering letter dated 20 May 2011 neither of which advises the date of the change. The covering letter states the changes will be made at least two months after the date of the letter and that they will write again. Had Bank of Scotland written again they would no doubt have mentioned it in their letter of 26 October 2011. The Tribunal also notes that the letter confirms Mr Twickler’s understanding that before the changes he could give the instructions to the Bank of Scotland on day one and expect the recipient to receive funds on day three.

14. Mr Twickler’s second submission was that HMRC made it difficult for traders to make faster payments. He said that HMRC banked with Citibank which was one of the few banks at the time that did not accept faster payments. Taxpayers were therefore forced to use the slower BACS or CHAPS to effect payments. Coupled with the Bank of Scotland’s changes this meant he now had to send money four working days before it would be credited to the recipient’s account.

15. A third submission was made by Jesse Youmans. She said that notwithstanding what was said by the Upper Tribunal in *Total Technology (Engineering) Ltd* she considered that the charge was disproportionate. She pointed out that although she understood that the surcharge was not interest nevertheless it was a percentage calculation and was similar to it. A surcharge of £2,331.12 for the payment four days late of £23, 311.12 was equivalent to an interest rate of 912.5%. She added that it was interesting to note that the Government were attacking pay day loan companies for their very high interest rates and at the same time they themselves were making surcharges of a similar level.

16. The Tribunal enquired as to the reason for the three earlier failures which had resulted in a surcharge at a rate of 10% for the fourth failure. Mr Twickler advised that the Appellant was a new business and in common with many new businesses had experienced cash flow difficulties. These he considered had now been dealt with. On further enquiry Mr Twickler advised that the biggest problem that had been experienced was with a gas pipeline contract for £186,000 for which payment was in part delayed 155 days. However he also advised that it had been agreed that payment was to be made by way of around 18 instalments of varying amounts up to £20,000 payable after 60 days from the invoice date and although most were delayed it was only one that was delayed as long as 155 days.

Respondent's Submissions

17. Mrs McIntyre for the Respondents referred to a schedule in the bundle which detailed four incidences of late payments and/or late returns in the periods ended 31 August 2010, 30 November 2010, 28 February 2011 and 31 August 2011.

18. It is the surcharge that was levied for the last of these failures that is the subject of this appeal. The Appellant's VAT return for the quarter ended 31 August 2011 was due to be submitted by 30 September 2011. A further seven days grace is given where payment is made electronically. The return was submitted on 26 September 2011 so was in time but the VAT payment of £23,311.12 shown as due was not received by the Respondents until 11 October 2011, which is four days late. The three earlier failures had resulted in a surcharge rate of 10% of the tax due applying so an assessment of £2,331.12 was made by the Respondents.

19. Mrs McIntyre said that HMRC had no say in which bank the Appellant uses to make payments. It is the Appellant's responsibility to ensure that payments due on VAT returns are made in such a way and at such time that they will reach the Respondents by the due day.

20. In respect of the submission about the use of Citibank Mrs McIntyre stated that the fact that Faster Payments were not accepted by HMRC at the time was well publicised. She provided an information sheet which is headed "Advice to help you avoid a Default Surcharge". Paragraph 6 covers the subject of electronic payments and clearly states in bold letters "**Please note – HMRC is currently unable to accept Faster Payments**".

21. A copy of this information sheet was sent to the Appellant with a letter dated 28 November 2011 which is after the default had occurred. However, Mrs McIntyre indicated that it was part of the VAT Notice 700/50 Default Surcharge which was available on the internet prior to the default and that the surcharge liability notices sent to the Appellant in respect of the three earlier failures should have included a copy of the information sheet though she had no evidence to support whether or not this had been done in this case. She confirmed that changes had since been made and HMRC can now accept Faster Payments.

22. Mrs McIntyre submitted that the matters of the fairness and proportionality of the surcharge had been considered by the Upper Tribunal in the case of Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC) and put forward that decision to support her submission that the appeal should be dismissed.

5 **Decision**

23. The Appellant has made comment both in writing and at the hearing about the unfairness of the level of the surcharge and that it is disproportionate. However, Mrs McIntyre pointed out that The Upper Tribunal addresses these points in the case of Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC) and though they
10 may be considered harsh its conclusions must apply in this case.

24. The surcharge of £2,331.12 for the quarter ending 31 August 2011 that has been assessed by HMRC has been correctly calculated as 10% of the tax due as reported by the Appellant on its VAT return for that period.

25. In respect of the Respondents' use of Citibank the Tribunal does not accept the
15 Appellant's submissions. It was well publicised that HMRC could not accept payments by the Faster Payments system. It was therefore the Appellant's responsibility to make payments by other methods which enabled them to comply with the requirement for the tax due to reach the Respondents by the due date.

26. The Tribunal does not accept the Appellant's allegation that the Bank of
20 Scotland were acting illegally in September 2011. The reduction in the times for electronic payments to 24 hours from the time the payment instruction was received had to be implemented by 1 January 2012.

27. However [CB3]the Tribunal does find it remarkable that at a time when a
25 European Directive which had been implemented in the United Kingdom so as to come into effect on 1 January 2012 which required a reduction in the time taken by financial institutions to make payments, Bank of Scotland on 12 September 2011 changed their systems so that it took longer to make a payment. They would have needed to change their systems again by 1 January 2012 when the Payment Services Regulations 2009 became effective.

30 28. Bank of Scotland had notified the Appellant of their intention to make the change but the correspondence did not specify a start date and clearly indicated they would write again to advise the Appellant. In their response to the enquiry by the Appellant they refer to their 20 May letter which does not advise a start date. Had
35 they written again as promised they would no doubt have referred to that communication in their letter. In conducting their review the Respondents drew attention to the fact that by the letter of 20 May and accompanying brochure the Appellant had been advised of the imminent changes. However the Respondents failed to notice that no precise date for the introduction of the changes was given or that Bank of Scotland had stated they would write again to advise. So it was, that by
40 5 October 2011 the Appellant had received no notification of the 12 September 2011 implementation date for the changes to the payment system. The Appellant therefore

5 paid in the same way they had previously, believing payment would be with the Respondents by the third day. This extraordinary and unadvised (because of the lack of the provision of a start date) implementation of a change to the payment system in the Tribunal's view gives the Appellant reasonable excuse for the late payment for the August 2011 VAT return. The appeal is therefore allowed.

10 29. In respect of the surcharges for the three earlier periods the Tribunal finds that although there were clearly delayed payments causing cash flow difficulties these could fairly be described as the normal hazards of trade and were not of the magnitude or proportions considered in the *Stepto* case [*J B Stepto*, CA 1992 STC 757].

15 30. 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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**PETER R SHEPPARD
PRESIDING MEMBER**

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RELEASE DATE: 23 August 2013