Neutral Citation: [2025] UKFTT 00420 (TC)

Case Number: TC09486

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2024/04211

Keywords: VAT Default Surcharge; Evidence

Heard on: 31 March 2025
Judgment date: 8 April 2025

Before

TRIBUNAL JUDGE KEITH GORDON
MRS SONIA GABLE

Between

WG RECRUITMENT LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr CJ van der Westhuizen, Director

For the Respondents: Mr Gift Nyoni, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was V (video).

2. The documents to which we were referred are:

   (1) a 69-page bundle of documents;

   (2) a 157-page bundle of authorities;

   (3) an 18-page submission from HMRC, headed "statement of reasons"; and

   (4) a 2-page letter from Mr van der Westhuizen on behalf of the Appellant.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

THE OUTCOME OF THE APPEAL

4. We announced our decision at the hearing itself. That decision was to allow the appeal. This decision notice has been prepared at the request of the Appellant.

THE SUBJECT MATTER OF THE APPEAL

5. The Appellant is a recruitment agency which has been trading in the UK since 2015. It has appealed against four default surcharges imposed under section 59 of the Value Added Tax Act 1994. The surcharges relate to four VAT quarters: (using the format indicating the last month and the year of each quarter) 09/20, 12/20, 03/21 and 03/22. According to HMRC's statement of reasons, the total amount assessed over those four quarters was £12,021.59 although that statement also suggested that the total amount assessed was £12,469.30. For the reasons that follow, we did not resolve that discrepancy at the hearing and nor did we need to address it.

6. Furthermore, we did not need to consider and we therefore make no findings as to whether the defaults alleged by HMRC to have occurred did actually occur. Similarly, we make no findings as to whether (if those alleged defaults did occur) the Appellant had a reasonable excuse for some or all of them.

THE LEGISLATIVE BACKGROUND

7. The default surcharge was introduced as section 19 of the Finance Act 1985, which was later consolidated as section 59 of the Value Added Tax Act 1994. It has subsequently been repealed but only in relation to periods after those applicable to this case.

8. In summary, and so far as is potentially relevant to this case, section 59 operated as follows:

   (1) A taxpayer is "in default" if, in respect of a VAT period, the taxpayer is late in submitting the return for the period and/or in paying the VAT due for that period as shown on that return (subsection (1)).

   (2) Subject to certain exceptions that were not considered to be relevant in the present case, HMRC may serve a notice on the Appellant known as a surcharge liability notice (SLN) if a taxpayer is in default in relation to a VAT period. That SLN must specify a period (the surcharge period) which commences on the date of the notice and which ends on the first anniversary of the end of the VAT period for which the Appellant is in default (subsection (2)).

(3) A surcharge period will be extended if a further SLN is served by reason of a further default in relation to a VAT period that ends at or before the last day of the surcharge period stated in an existing SLN (subsection (3)).

(4) For any VAT period within the surcharge period, where there is a default and the taxpayer has outstanding VAT for that period, then the Appellant becomes liable for a surcharge equal to the higher of:

(a) £30; and

(b) a percentage of the outstanding VAT for that period (subsection (4)).

(5) The percentage for these purposes is 2% for the first such period; 5% for the second; 10% for the third; and 15% for the fourth and any subsequent periods (subsection (5)).

(6) The meaning of outstanding VAT is given by subsection (6).

(7) A default can be treated as not occurring if, for example, the taxpayer can show reasonable excuse for the default (subsections (7) and (8)).

THE HEARING

9. At the beginning of his submissions, Mr Nyoni identified four issues that he considered to be pertinent to the present appeal. These were:

(1) Whether the surcharges had been correctly assessed.

(2) Whether the Appellant had a reasonable excuse for the defaults alleged.

(3) Whether the surcharges were disproportionate.

(4) Delivery of the surcharge liability notices.

10. Mr Nyoni also summarised the effect of the default surcharge legislation. In doing so, he made reference to the guidance from Macpherson J in *Customs & Excise Commissioners v Medway Draughting and Technical Services Ltd* [1989] STC 346. That was a case that considered the (then relatively new) default surcharge provisions.

11. In a passage cited by Mr Nyoni (and also included in HMRC's written submissions), the learned judge said (at 351):

> 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. And thus I agree with His Honour Judge Medd's first conclusion. As a matter of construction of s 19 [of Finance Act 1985], the whole scheme of default surcharge is dependent on service of the surcharge liability notice.

12. We asked Mr Nyoni what evidence there was that any surcharge liability notice had been issued to the Appellant. We also asked Mr Nyoni what evidence there was that the actual surcharges had been notified.

13. Mr Nyoni responded by saying that the Appellant had not raised any questions as to non-delivery of the relevant notices and therefore by virtue of section 7 of the Interpretation Act 1978 there was a statutory deeming that the notices had been properly served. Section 7 reads as follows:

> 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.

14. We asked Mr Nyoni to point us to any evidence that the notices had been posted so as to create the statutory presumption. He referred us to HMRC's written submissions which asserted that notices had been sent to the appropriate addresses and, on that basis, how this meant that it was for the Appellant to prove non-delivery. However, as has been pointed out before (for example, by the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) at [51]):

> "An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate."

15. Mr Nyoni also sought to rely on the twenty pages in the documents bundle that show the specimen notices that he says HMRC sent to the Appellant.

16. We explained that we were looking for something in the evidence that would give us a basis to conclude that these documents had in fact been sent to the Appellant. Mr Nyoni proceeded to explain that the actual sending of these documents is outsourced to third parties who then send the documents on HMRC's behalf. He explained his understanding that HMRC do not request confirmatory evidence of postage from these third parties unless and until a taxpayer has alleged non-receipt (as was the case in the *Medway* case).

17. Mr Nyoni explained that he had not prepared HMRC's written submissions and interpreted the documents as suggesting that the Appellant had not alleged non-receipt. Therefore, in accordance with his understanding of HMRC's standard practice, he said he saw no reason to seek any additional evidence showing service of the relevant documents.

18. We referred Mr Nyoni to the following passage in HMRC's written submissions:

> 56. In this appeal, the Appellant contends that they did not receive Surcharge Liability Notices served to them by the Respondents in relation to Periods 09/20, 12/20, 03/21, 03/22.

19. Mr Nyoni said that he did see that sentence in his preparation for the hearing. However, as it did not correspond with his own reading of the file, he said that he assumed that sentence to be "a typo". We did not ask Mr Nyoni to explain why he, himself, towards the beginning of the hearing had identified the fourth issue in the case to be "Delivery of the surcharge liability notices" (see paragraph 9 above).

20. We indicated to Mr Nyoni that, irrespective of whether the Appellant had challenged the delivery of the relevant notices, we were uncomfortable proceeding on the assumption that the relevant notices had been posted. Mr Nyoni asked us, if that was the case, whether we would adjourn the hearing to allow HMRC to obtain the evidence from those third parties.

DISCUSSION

21. For the reasons that follow, we decided:

(1) The evidence before the Tribunal was insufficient to demonstrate service of the relevant notices.

(2) It was not in accordance with the overriding objective to adjourn the case to give HMRC a chance to obtain further evidence.

(3) HMRC's adjournment application was therefore refused.

(4) The Appellant's appeal was allowed.

22. As Macpherson J stated, "the whole scheme of default surcharge is dependent on service of the surcharge liability notice". Thus, in any case where a default surcharge is under appeal, we consider it essential that it be shown (at least, if not expressly conceded by the Appellant) that the relevant surcharge liability notice (or notices) has (or have) been served.

23. We are comforted in our decision by reference to two decisions of the Upper Tribunal, albeit in different contexts.

24. In *Michael Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC), the Upper Tribunal had to consider the extent to which HMRC needed to prove the validity of an assessment under the Taxes Management Act 1970, s. 29 (a discovery assessment) when the statutory conditions for such an assessment had not been raised by the taxpayer in the grounds of appeal. The Upper Tribunal held (with emphasis added):

> 43. In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of Mr Burgess or Brimheath to raise those issues. As Henderson J said in *Household Estate Agents*, in the absence of relevant evidence there is nothing to displace the general rule that discovery assessments (and we would add assessments outside the normal four-year time limit) may not be made. The provisions of s 50(6) TMA that have the effect that an assessment stands good unless the tribunal decides that an appellant has been overcharged by it, which leads to the burden being on an appellant to displace an assessment that has been validly made, do not affect this general rule as to the validity of the assessment.
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> 44. HMRC did, in their statement of case, make a positive case with respect to both the competence and time limit issues. However, it was not open to them to seek to discharge the burden that lay upon them of proving those cases by purporting to limit the issues before the FTT to the substantive issues. **Nor can HMRC's assertion that there had been no appeal made by the appellants on the competence and time limit issues serve to shift the onus of making a positive case** onto Mr Burgess or Brimheath. Any concession or waiver by the appellants on those issues would have to have been clearly given, and HMRC could not assume that silence implied any such concession or waiver. It was not incumbent upon the appellants to respond to HMRC's assumption as to what they would, and would not, be required to prove.

25. More recently, in *HMRC v Rogers* [2019] UKUT 406 (TCC), the Upper Tribunal had to consider the evidence needed to prove service of a statutory notice (in that case, a notice under the Taxes Management Act 1970, s. 8 requiring the taxpayer to file an income tax return). At [49], the Upper Tribunal agreed with the view that, in order for HMRC to subsequently impose a penalty for late filing of a tax return, they must prove that a notice under s. 8 had in fact been served. The Upper Tribunal then continued (with the underlining as per the original):

> 50. It follows that, if HMRC fail to provide any evidence at all to the effect that a s8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice.
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> 51. Where HMRC have given some evidence that a s8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s8 notice. Evidence to the effect that HMRC's systems record a s8 notice as having been sent is, on its own,

> relatively weak evidence (since it does not itself demonstrate that a s8 notice was actually sent, and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) if the taxpayer is disputing having received a notice, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s8 notice was actually sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so.
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> 52. Where HMRC have adduced some evidence that a s8 notice was served, they do not need to anticipate every conceivable challenge that a taxpayer might make to the validity of such a notice and produce evidence to rebut all such potential arguments in advance. Such a requirement would be unworkable and disproportionate. Rather, where HMRC have given some evidence that a s8 notice was served, and there is no suggestion from the taxpayer that such notices are invalid, HMRC are entitled to proceed on the basis that no challenge is being made to the validity of those notices. If the FTT identifies its own concerns on the validity of a s8 notice, the proper course is for the FTT to write to the parties, before releasing its decision, to explain the nature of those concerns and to invite the parties to make submissions on the point and, if they wish, to apply for permission to adduce further evidence as necessary.

26. We consider that this case falls squarely within the circumstance outlined in paragraph [50] of *Rogers*. We do not see any material difference between a penalty for the late submission of an income tax return and a surcharge following a default in relation to a VAT return or VAT payment. In both cases, liability to the imposition depends on relevant notices being sent to the taxpayer. Adopting the words of the Upper Tribunal and adapting them for the present case, HMRC have failed "to provide any evidence at all to the effect that [surcharge liability] notice[s] w[ere] served". Thus, "they … have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the [surcharges]".

27. We recognise that HMRC have chosen to outsource part of the process for the service of SLNs and this means that HMRC might not have ready access to all the evidence that might be necessary to clearly demonstrate that notices were issued (so as to engage the statutory presumption under the Interpretation Act 1978). However, in a case where service is not disputed, it is clear that the Tribunal can consider weak evidence (such as a record from HMRC's own systems to indicate that a notice has been sent) as sufficient for these purposes (see *Rogers* at [51], [52]).

28. Mr Nyoni sought to impress upon us that the Tribunal has previously been content to rely on the specimen notices together with a copy of HMRC's record of the taxpayer's correspondence addresses. That might or might not be the case and we make no finding in that regard. What we take from *Rogers* at [51] is that different compositions of the Tribunal can (subject to the overriding objective) ultimately decide for themselves whether a party has adduced sufficient evidence to discharge the burden of proof. However, this is a case where there is no evidence at all to suggest that anything was sent at the relevant time to the addresses on HMRC's records. We interpret the *Rogers* decision as compelling a Tribunal to set aside

the SLNs (as per [50]), subject to any application to adjourn to allow further evidence to be adduced.

29. As for Mr Nyoni's adjournment application:

(1) We acknowledge that Mr Nyoni believed that the Tribunal did not usually insist on seeing some evidence of service in cases involving default surcharges. However, even if he is correct in that, we consider that that suggests a previous indulgence by the Tribunal rather than a practice that we should perpetuate or even condone.

(2) Whilst insisting upon some evidence (rather than relying on an unsupported assertion) could be said to be imposing some formality in the proceedings, we do not consider that such formality is unnecessary. Quite the opposite. This is, in our view, a small but necessary formality.

(3) We also acknowledge that to refuse to adjourn the hearing to give HMRC an opportunity to provide evidence amounts to imposing some inflexibility in the proceedings. However, whilst flexibility is something that the Tribunal should promote (Tribunal Procedure Rules, rule 2(1), (2)(b)), we consider that other factors outweighed that and, for those reasons, we refused the adjournment application. In particular:

(a) We recognised that the sums sought by HMRC are significant from the perspective of the Appellant which is a small business with limited resources. If (as suggested in *Rogers*) a basic level of evidence is considered necessary in cases involving £100 penalties, HMRC should be even more prepared to provide the requisite evidence in a case where over 120 times that sum is being demanded.

(b) Mr van der Westhuizen's submissions demonstrated that this matter has been the cause of stress and worry for him and his co-director. We did not consider it appropriate to extend the Appellant's uncertainty by delaying proceedings to allow HMRC to do what we consider they should have done (and should have known to have done) prior to this hearing. Although not a part of our reasoning, we do note the irony of HMRC seeking to penalise a taxpayer for being late with its VAT returns and/or payments, yet HMRC seeking the indulgence of the Tribunal when they have been late with complying with a standard requirement of the Tribunal (viz. to produce some basic evidence).

(c) We also bore in mind the oft-repeated guidance laid down by Lewison LJ in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5 at [114]. That guidance was in the context of a challenge to a finding of facts made by a court or tribunal sitting at first instance in the course of a subsequent appeal. One proposition within that guidance was: "The trial is not a dress rehearsal. It is the first and last night of the show." We consider that to be equally apposite in a case such as this.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

Release date: 08th APRIL 2025