



TC02984

Appeal number: TC/2013/00111

VAT – Default Surcharge – Whether claim under s 80 Value Added Tax Act 1994 made before or after due date – Whether reasonable excuse on facts

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DUNN AND DYER (ELECTRICAL) LIMITED **Appellant**

- and -

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

**TRIBUNAL: JUDGE JOHN BROOKS
IAN PERRY**

**Sitting in public at Eastgate House, Newport Road, Cardiff on 27 August 2013
with further written submissions submitted on behalf of the appellant on 20
September 2013 and by the respondents on 23 September 2013**

David Thomas of HAASCO Limited Chartered Accountants for the Appellant

Jane Ashworth of HM Revenue and Customs, for the Respondents

DECISION

1. Dunn and Dyer (Electrical) Limited (the “Company) appeals against two VAT default surcharges imposed for the late submission of its VAT returns and late payment of VAT.

2. The first default surcharge is in the sum of £3,575.20 for the Company’s VAT accounting period ended 30 September 2011 (“09/11”) and the second, in the sum of £8,031.20, for its VAT accounting period ended 31 December 2011 (“12/11”). As these were the Company’s seventh and eighth defaults the penalty was charged at 15% of the outstanding VAT for that VAT accounting period in accordance with s 59 of the Value Added Tax Act 1994 (“VATA”).

Facts

3. The Company is an electrical contractor employing 25 people. It has traded since 1950 and has been VAT registered since the introduction of VAT in 1973.

4. However, the recent economic downturn led to the Company experiencing the most difficult time in its history recording losses in the years ended 30 June 2010 and 2011. Also during this time the Company’s bookkeeper lost control of its accounting system and failed to submit its VAT returns and payments by the due date for its 03/10, 06/10, 09/10, 12/10, 03/11, 06/11, 09/11 and 12/11 VAT accounting periods. It was issued with a Surcharge Liability Notice on 14 May 2010 and, due to further defaults, the surcharge period has been extended seven times.

5. To address the situation the Company commissioned a full independent audit of its tax affairs to ascertain and settle its outstanding liabilities.

6. On 2 November 2011 the Company’s accountants, Walter Hunter & Co Ltd, wrote to HMRC in the following terms:

Following extensive work by our firm, our client wishes to amend the filed returns for the four quarters ended 30 June 2011 to the following:-

VAT due on sales	264,387.93
VAT reclaimed on purchases	<u>119,574.20</u>
Net VAT to be paid	<u>144,813.64</u>
Total value of sales	1,475,892.71
Total value of purchases	619,094.64

Based on what has been paid already, this amounts to a refund due of £17,629.44 for the year (see attached). We trust that VAT returns can be amended and the refund issued to our client as soon as possible

The following schedule was attached to that letter:

DUNN AND DYER (ELECTRICAL) LIMITED
YEAR ENDED 30 JUNE 2011
FILED RETURNS AT HMRC

	July – September 2010	38,100.41	18,296.62	19,803.79	217,715.00	106,644.00
	October – Dec 2010	56,162.51	16,076.48	40,086.03	321,640.00	93,156.00
	January – March 2010*	-	-	-	-	-
	April – June 2010*	<u>225,537.68</u>	<u>102,702.16</u>	<u>122,835.50</u>	<u>1,252,076.00</u>	<u>532,193.00</u>
5		319,800.60	137,075.28	182,725.32	1,791,431.00	731,993.00

**CORRECT VAT
FOR YEAR**

264,387.94 119,574.29 144,813.64 1,475,829.71 619,094.64

Amendment required 55,412.67 17,500.99 37,911.68 315,538.29 112,898.36

BALANCE OUTSTANDING

10	Total VAT for year		144,813.64
	Less payments		
	Cheque	11/03/2011	-19,803.79
	DD	10/03/2011	-19,803.79
	DD	01/11/2011	<u>-122,835.50</u>
15	Refund due		<u>-17,629.44</u>

*Although the schedule refers to the periods “January – March 2010” and “April – June 2010” as the schedule is in relation to the “year ended 30 June 2011” we have assumed that the references to 2010 in these periods is a typographical error and that the periods concerned are January – March 2011 and April – June 2011.

20 7. As stated in the schedule attached to the letter of 2 November 2011 from Walter Hunter, the Company had made a direct debit payment to HMRC of £122,835.50 although this had been made on 25 October 2011 and not 1 November 2011 as stated in the schedule. HMRC had treated this payment as being in respect of the 06/11 VAT return which had been submitted on 25 October 2011 and which showed VAT due of
25 £122,835.50.

8. In the absence of the Company’s 09/11 VAT return, on 11 November 2011 HMRC issued an assessment for that period in the sum of £125,267 and issued a default surcharge of £18,970.05, 15% of this amount. However, this was reduced to 3,575.20 following receipt of the return which showed VAT due of £23,834.73 and
30 payment of the VAT by direct debit on 22 November 2011.

9. On 23 November 2011 Walter Hunter wrote again to HMRC. This letter included the following:

Following our audit into [the Company] our client wishes to amend the VAT quarters from 1 July 2010 to 30 September 2011.

35 The amended figures are enclosed (attachment 1)

It is extremely important that revised assessments are issued for these quarters as soon as possible as our client is about to be put into liquidation by HMRC for a debt which it simply does not owe

The following information was provided in the attachment to the letter:

40 **DUNN AND DYER (ELECTRICAL) LIMITED**
VAT QUARTERS FROM 1 JULY 2010 TO 30 SEPTEMBER 2011

AMENDED RETURNS AT HMRC

	<u>VAT on Outputs</u>	<u>VAT on purchases</u>	<u>Net VAT payable</u>	<u>Total sales</u>	<u>Total purchases</u>
July – September 2010	38,100.41	18,296.62	19,803.79	217,715	106,644
5 October – Dec 2010	56,162.51	16,076.48	40,086.03	321,640	93,156
January – March 2011	78,257.50	39,192.55	39,064.95	430,807	192,876
April – June 2011	91,867.51	46,008.64	45,858.87	505,731	226,419
July – Sept 2011	57,850.70	34,015.97	23,834.73	289,371	172,322
	322,283.63	153,590.26	168,648.37	1,765,264	791,417

10 These amendments, when compared to the VAT returns as originally submitted to HMRC, showed that the Company had made an error in 06/11 VAT return and had made an overpayment of £76,976.

10. Following the processing of the claim, HMRC credited the Company with £76,976 on 5 January 2012. £20,282.24 of this amount was set off against VAT due for the 12/10 accounting period which was outstanding on 5 January 2012; £39,064.98 was set off against VAT due for the 03/11 accounting period which was also which was outstanding on 5 January 2012; and the balance of £17,628.81 was held as a credit on the Company's account.

11. On 9 January 2012 HMRC sent the Company "Notice of Error Correction" (Form VAT 657), "Notice of Voluntary Disclosure" (Form VAT 657), "Notice of Voluntary Disclosure Default Surcharge" (Form VAT 665) which reduced the surcharge for 06/11 by £11,546.40 to £6,878.92, and a "Statement of Account" (Form VAT 667). All of these forms were sent together with the first document being the Notice of Error Correction and the Statement of Account the last.

12. The "Notice of Error Correction" and "Notice of Voluntary Disclosure" are written in almost identical terms, the material parts of which state:

Further to you notifying HM Revenue & Customs of your tax liability, the following assessment(s) of tax and, where appropriate, interest have been made along with any adjustment required for overdeclarations for the period(s) shown. Any changes to surcharge are shown on a separate form (VAT 665). A Statement of Account (Form VAT667) incorporating all these elements is shown at the final enclosure.

It continues by clearly setting out, albeit in table form, that the net amount due to Customs and Excise is £0.00 and the net amount due from Customs and Excise (sic) is £76,976.00.

13. The "Statement of Account" reads:

The Commissioners of Customs and Excise have made assessment(s) of tax, surcharge, penalty and interest, where appropriate, and/or adjusted for overdeclaration of tax.

As a result your VAT account at 05.01.12 shows the following: –

Tax	£14443.98CR
Surcharge	£16041.77
Penalties	£0.00
Interest	£0.00

5 The total balance is now £1597.79

 You should pay any amount due to Customs and Excise immediately

14. On 27 January 2012, shortly before the filing date of its 12/11 VAT return and after giving only one weeks notice, the bookkeeper who had been with Company for over years left. This resulted in the late submission of the VAT return on 9 February 10 2012 which showed VAT due of £71,170.33. This sum was due to be paid by direct debit on 14 February 2012 but, having received the Notice of Error Correct etc. on 16 January 2012, which showed that the net amount due from Customs and Excise was £76,976.00, on the advice of its accountants the Company cancelled the direct debit payment.

15 15. HMRC issued a default surcharge for 12/11 in the sum of £10,675.54 being 15% of £76,976. However, the credit of £17,628, allocated to the Company on 5 January 2012 was subsequently allocated against the VAT for this period reducing the outstanding balance to £53,541.52. The surcharge was reduced accordingly to £8,031.22. Payment of £53,540.89 was made by the Company on 9 May 2012.

20 **Law**

16. Insofar as it applies to the present case s 59 VATA provides:

(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–

25 (a) the Commissioners have not received that return, or

(b) the Commissioners have received that return but not received the amount of VAT shown on that return as payable by him in respect of that period

30 Then that person shall be regarded for the purposes of this section as being in default in respect of that period.

...

(4) ... if a taxable person on whom a surcharge liability notice has been served–

35 (a) is in default in respect of a prescribed accounting period ending with the surcharge period specified (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

He shall be liable to a surcharge equal to ... the specified percentage of his outstanding VAT for that prescribed accounting period ...

...

5 (6) ...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 ... 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 so much of the VAT for which he is so liable as has not been paid by that day.

10 (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—

15 (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,

20 he shall not be liable to the surcharge ... and shall be treated as not having been in default in respect of the 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).

25 17. Although the legislation does not provide a definition of a “reasonable excuse” which is “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2008] STC (SCD) 536), s 71(1)(a) VATA provides:

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.

18. Insofar as it applies to the present case s 80 VATA provides:

30 (1) Where a person—

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

35 the Commissioners shall be liable to credit the person with that amount.

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

...

40 (6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

19. Regulation 37 of the Value Added Tax Regulations 1995 provides:

5 Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated.

20. In *Reed Employment v HMRC* [2013] STC 1286, in which s 80 VATA was considered in the context of whether there had been a new claim or an amendment to an existing claim, Roth J said, at [30]:

10 “There is no statutory definition of “claim” for the purpose of s 80 that would provide a basis for distinguishing an amendment to an existing claim from a new claim. ...”

He continued, at [31]:

15 “... I consider that “claim” here should be given its ordinary meaning. In this context it means a demand for repayment of overpaid tax. It may relate to one accounting period or many, to one particular supply or many, and to a part of a taxpayer’s business or the whole of its business. There is no reason, in my view, why any of these cannot constitute a self-standing claim.

21. However, as Lightman J noted in *R (on the application of UK Tradecorp Ltd) v Customs and Excise* [2004] EWHC 2515 (Admin), at [18]:

25 “The Commissioners are under a duty to conduct a reasonable and proportionate investigation into the validity of claims for a refund and repayment and a duty to act proportionately both in respect of the investigation and in dealing with the taxable person’s claims generally. see *R (oao Deluni Mobile Limited) v. CCE* [2004] EWHC 1030 (“Deluni”). The duty to investigate is applicable both to the claim to the refund and repayment and to the question whether there is a right to set-off (or indeed a claim for a further payment from the taxable person). The duty embraces an obligation to keep all investigations under review. The Commissioners are entitled to take a reasonable time to investigate claims prior to authorising deductions and repayments and what is a reasonable time within which to complete an investigation must depend on the particular facts: *Strangewood* at 505. The availability and proper exercise of the Commissioners’ powers of investigation are essential to maintain the fiscal neutrality of VAT and prevent refunds being made to parties not entitled to them. The postponement of repayment of input tax pending the outcome of the investigation is, as a matter of principle and subject to questions of proportionality, entirely compatible with the Sixth Directive. Whilst the burden of proof is upon the taxable person to establish that the investigation of his unadmitted and unadjudicated claim and the failure to make a part or interim payment is unreasonable or disproportionate, the burden is on the Commissioners to justify non-payment of it once the claim is admitted or established and the period of investigation of any cross-claim.”

45

Discussion

22. On behalf of the Company Mr Thomas contends that although the amount declared on the 09/11 VAT return as payable was £23,834.73, as a result of the payment of £122,835.50 made to HMRC on 25 October 2011 there has been an overpayment of £17,629.44. As such, the amount outstanding at the date of the surcharge was £6,205.29. Accordingly the surcharge should therefore be reduced to £930.79.

23. With regard to the 12/11 return Mr Thomas submits that the Company has a reasonable excuse as a result of the misleading and confusing calculations received from HMRC and the fact that the Company's bookkeeper of 10 years resigned with only one weeks notice at the time the VAT return was due.

24. For HMRC, Mrs Ashworth contends that the surcharges for the Company's 09/11 and 12/11 VAT accounting periods were properly imposed. She pointed out that credit had been given for the overpayment of £17,628.81 and that as this had been allocated against the VAT due for the Company's 12/11 accounting period the surcharge for that period had been reduced.

VAT Period 09/11

25. We first consider the Company's 09/11 VAT accounting period.

26. As this appeared to raise the issue of what constitutes a "claim" for purposes of s 80 VATA we directed that the parties could make further written submissions in relation whether to the letter dated 2 November 2011, from Walter Hunter & Co Ltd, Chartered Accountants to HMRC (see paragraph 6, above) or the letter dated 23 November 2011 from Walter Hunter & Co Ltd, Chartered Accountants to HMRC (see paragraph 9, above) was a "claim" for the purposes of s 80 VATA.

27. Both parties availed themselves of this opportunity.

28. In her further submissions Mrs Ashworth contended that the letter of 2 November 2011 was not a valid claim as HMRC would have been unable to effect any repayment of overpaid tax as only a global figure of overpaid VAT was shown and it was not known which accounting periods were to be repaid. However, she submitted, that this was not the case with the 23 November 2011 letter which included the amount claimed, the prescribed accounting period and method by which the claim had been calculated.

29. She further submitted that whilst the date of the claim was material, until the claim was accepted there can be no overpayment. Also HMRC cannot make an immediate repayment without checking the validity of the claim. Accordingly she contended that the claim was not accepted or established until 5 January 2012 and therefore, as this was after the due date for the 09/11 period, the surcharge should be upheld.

30. Mr Thomas submitted that as the present case was not about VAT payable or repayable s 80 VATA, which related to the point at which a VAT claim is payable, was wholly irrelevant.

5 31. He contended that as the issue concerned the quantum of a surcharge the relevant provisions were ss 59(4) and (6) VATA which provide for the calculation of the amount of a surcharge on the “outstanding VAT for that prescribed accounting period” which is the VAT which “has not been paid by the last day on which he is required to make a return for that period.”

10 32. For the Company’s 09/11 VAT accounting period, as it submitted its returns electronically the due date was 7 November 2011. Accordingly, Mr Thomas argued, so long as it can be shown that on this date the VAT outstanding was, as a result of the correction of the error in the Company’s 06/11 VAT return, £6,205.29 and not £23,834.73 and therefore surcharge should be calculated on the lower amount.

15 33. Mr Thomas referred to HMRC’s practice of re-calculating a surcharge when a later payment or credit had been made or given after the due date which is in accordance with the final sentence of paragraph 4.3 HMRC’s Notice 700/50, “Default Surcharge”, which states:

We will normally recalculate a surcharge assessment if the amount on which the surcharge is based changes.

20 Indeed this is what happened in this case as the quantum of the original surcharge for 09/11 was calculated on the basis of an estimated assessment but was subsequently reduced on receipt of the return and payment of VAT on 22 November 2011. Mr Thomas contends that HMRC is seeking to overturn the law and its recognised practice by advancing the argument it has in the present case.

25 34. We agree with Mr Thomas that there is a difference between a claim under s 80 VATA and the calculation of the quantum of a surcharge.

30 35. However, it is clear from decisions of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TC) and *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) that we do not have the jurisdiction to consider the conduct of HMRC or whether the Notice gives rise to a legitimate expectation that the surcharge will be recalculated if there is a payment of VAT after the due date for that accounting period has passed. As the Tribunal (Warren J and Judge Bishopp) said in *Hok*, at [56]:

35 “... the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, ...It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC’s conduct.”

40 36. We therefore turn to the legislation and it is clear from ss 59(4) and (6) VATA that in order to calculate the quantum of a default surcharge it is first necessary to ascertain the taxable person’s VAT for that prescribed accounting period, which will

be as stated in his VAT return. It is then necessary to determine whether there is any “outstanding VAT for that prescribed accounting period”. As this is “so much of the VAT for which he liable as has not been paid by the last day on which it is required to make a return for that period”, by subtracting from the VAT, as shown in the return,
5 any payment made by the due date, the quantum of the surcharge, if any, payable is then determined applying the “appropriate percentage”.

37. In carrying out this exercise in respect of the Company’s 09/11 VAT accounting period it is not disputed that the VAT shown in its return was £23,834.73 and no actual payment was made by 7 November 2011 which, as we have already noted, was
10 the Company’s due date for payment.

38. While there had been a payment of £122,835.50 to HMRC on 25 October 2011, which had been allocated to the Company’s 06/11 return which had shown that this amount of VAT was payable to HMRC, in view of the declaration on a VAT return (which requires the person submitting the return to confirm that “the data shown
15 above [ie in the return] is correct”), we find that this could not have become an overpayment of VAT until HMRC were notified of the error in the 06/11 return and a claim made under s 80 VATA.

39. It is therefore necessary to determine the date that the claim was made.

40. If the letter of 2 November 2011 constitutes the claim then the overpayment of VAT for 09/11 would have arisen before the due date and at that time the amount of
20 outstanding VAT would have been £6,205.29 and not £23,834.73 and surcharge should have been calculated on lower amount. However, if the claim was made in the letter of 23 November 2011 as this is after the due date the surcharge falls to be calculated on the higher amount.

41. Having carefully considered both letters and the comments of Roth J at [31] of *Reed Employment v HMRC* we find that the letter of 2 November 2011 does constitute a claim for the purposes of s 80 VATA. Although we accept, as Lightman J recognised in *UK Tradecorp Ltd*, that HMRC are under a duty to conduct a reasonable and proportionate investigation into the validity of a claim, we consider
30 that there is no reason why once it has been verified the claim, and therefore overpayment of VAT, should not apply from the date of the claim.

42. We therefore find the surcharge should have been calculated on the lower amount of VAT and should be reduced from £6,205.29 to £930.79.

VAT Period 12/11

35 43. With regard to the Company’s 12/11 VAT accounting period Mr Thomas contends that the confusion caused by the letters received from HMRC coupled with the departure of the Company’s bookkeeper on 27 January 2012 having given only a weeks notice amounts to a reasonable excuse especially as it was advised by its accountants that a payment of VAT was not required as the Company was owed a
40 refund from HMRC.

44. Mrs Ashworth accepts that while the bookkeeper leaving the Company may be a reasonable excuse for the late submission of the 12/11 VAT return it cannot be a reasonable excuse for the late payment of VAT which was due on 7 February 2012, if paid electronically, but received by HMRC as a payment by cheque on 9 May 2012. She points to the Notice of Voluntary Disclosure (Form VAT 657), Notice of Voluntary Disclosure Default Surcharge (Form VAT 665), and the Statement of Account (Form VAT 667) sent to the Company on 5 January 2012 contending that it was clear from these documents that VAT was owed by the Company before the due date and it therefore does not have a reasonable excuse for its late payment.

45. However, it is not immediately obvious to us from these documents that the Company owed VAT of £1,597.79. The credit of £14,443.98 shown on the "Statement of Account" does not appear to relate to the £76,976 shown as being due to the Company on the "Notice of Voluntary Disclosure" sent by HMRC to the Company despite it stating (as we have set out in paragraph 12, above) that "a Statement of Account (Form VAT 667) incorporating all these elements is shown at the final enclosure.

46. Therefore, irrespective of any advice the Company received from its accountants and whether this is precluded from being a reasonable excuse by s 71 VATA, we find that the ambiguous nature of the documents did lead to the confusion described by Mr Thomas and, as such coupled with the departure of the bookkeeper, find that the Company did have a reasonable excuse for the late submission of its 12/11 return and the late payment of VAT for this period.

Decision

47. For the above reasons the appeal against the default surcharge for the Company's accounting period for 09/11 allowed to the extent that the surcharge is reduced to £930.79 and the appeal against the default surcharge for the Company's 12/11 accounting period is allowed in full.

Right to Apply for Permission to Appeal

48. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 25 October 2013