



TC04585

Appeal number:TC/2015/01769

*VAT – default surcharge – late payment of VAT – trader’s belief that
cheques paid in at local branch would clear on the day they were paid in –
whether reasonable excuse for late payment – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VISUAL VERIFICATION LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MR PETER SHEPPARD FCIS FCIB
 CTA AITT**

Sitting in public in Manchester on 23 June 2015

Mr Robert Lazare, director appeared for the Appellant

Mr Phil Jones of HM Revenue & Customs appeared for the Respondents

DECISION

Introduction

5 1. This is an appeal against default surcharges in respect of VAT accounting
periods 06/11 and 03/12. The VAT due for period 06/11 was £27,147 and it was due
to be paid electronically on or before 5 August 2011. Funds cleared into HMRC's
account on 9 August 2011. The VAT due for period 03/12 was £41,773 and it was due
10 to be paid electronically on or before 4 May 2012. Funds cleared into HMRC's
account on 8 May 2012.

2. The appellant had a prior default in relation to period 09/10 which caused the
two defaults identified above to fall within a surcharge period for the purposes of the
default surcharge regime in *section 59 Value Added Tax Act 1994* ("VATA 1994").
15 The rate of default surcharge for 06/11 was 2% giving rise to a default surcharge of
£542.94. The rate of default surcharge for 03/12 was 5% giving rise to a default
surcharge of £2,088.68.

3. *Section 59(7) VATA 1994* provides as follows:

20 " (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—*

(a) ...

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

he shall not be liable to the surcharge ..."

4. The meaning of reasonable excuse in this context is well established. In *The
30 Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234 HH Judge Medd
QC said:

35 "*It has been said before in cases arising from default surcharges that the test of
whether or not there is a reasonable excuse is an objective one. In my judgment
it is an objective test in this sense. One must ask oneself: was what the taxpayer
did a reasonable thing for a responsible trader conscious of and intending to
comply with his obligations regarding tax, but having the experience and other
relevant attributes of the taxpayer and placed in the situation that the taxpayer
found himself at the relevant time, a reasonable thing to do?"*

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5. The issue on this appeal is whether the appellant had a reasonable excuse for not paying the VAT by the due date. There is no power for HMRC or for this tribunal to reduce a default surcharge based on any other form of mitigation.

6. Strictly the appeal was out of time but Mr Jones did not object to a late appeal and we grant permission accordingly. In correspondence following submission of its notice of appeal the appellant sought to appeal against assessments to VAT in periods 07/04 and 01/07. Mr Jones was not in a position to deal with any appeal against the assessments and in the circumstances the appellant did not pursue those appeals. If the appellant wishes to pursue such appeals it must lodge a separate notice of appeal as soon as possible and seek permission to make a late appeal.

Findings and Reasons

7. There was no dispute that three defaults occurred as described above. We heard submissions and evidence from Mr Lazare, a director of the appellant, as to the circumstances in which the defaults occurred. Based on his evidence and the documentary evidence before us we make the following findings of fact.

8. The default for period 09/10 put the appellant into the default surcharge regime. The due date for payment of VAT for that period was Friday 5 November 2010 but payment was not received by HMRC until Monday 8 November 2010. There was no evidence before us as to the circumstances in which that default occurred.

9. In relation to periods 06/11 and 03/12 the returns were submitted electronically and payments were made by cheque, paid in at the appellant's local bank branch. The cheque was accompanied by a pre-printed HMRC bank giro credit slip. Mr Lazare understood that cheques payable to HMRC paid into the bank in this way cleared into HMRC's account on the same day. He had previous experience of cheques clearing in this way when he used to import goods from the Far East. Cheques for payments of customs duties and import VAT cleared on the same date as they were paid into the bank.

10. For period 06/11 the cheque was paid in at the appellant's branch on Friday 5 August 2011 which was the due date for payment. The funds did not clear into HMRC's account until Tuesday 9 August 2011.

11. For period 03/12 the cheque was paid in at the appellant's branch on Thursday 3 May 2012. The due date for payment was Friday 4 May 2012. Monday 7 May 2012 was a bank holiday. The funds did not clear into HMRC's account until Tuesday 8 May 2012.

12. We are satisfied that Mr Lazare had an honest belief that the cheques would clear on the day they were paid into the bank. However we do not consider that it was reasonable for Mr Lazare to expect that to be the case. HMRC publications make clear that traders should check with their bank how long it will take for the various electronic payment methods to clear. A VAT payment calculator available online states in relation to payment by bank giro credit at a trader's own branch: "*please allow at least three bank working days for your payment to reach HMRC*". The appellant did not confirm with its bank how long it would take to for a cheque to clear into HMRC's account when paid in at the local branch with a bank giro credit slip.

13. Mr Lazare suggested that he could not realistically confirm with the appellant's bank how long a cheque would take to clear. He said that it was impossible to get through to the bank's call centre. Mr Lazare was not suggesting that he had tried to contact the bank. It was not clear why he could not simply ask at his local branch. If the bank had told him that cheques to HMRC would clear on the day they were paid in at a local branch then that might have supported the existence of a reasonable excuse on the first occasion it did not happen. However that was not Mr Lazare's case. We are not satisfied that he could reasonably believe a cheque would clear on the same day it was paid in.

14. Further, it would have been obvious to the appellant that the cheque for period 06/11 had taken several days to clear. When the appellant came to pay VAT for the 03/12 return it should have been aware that cheques might not clear on the same day.

15. Taking all the circumstances into account we are not satisfied that the appellant had a reasonable excuse for late payment of the VAT due for periods 06/11 and 03/12.

16. Mr Lazare also sought to argue that the penalties themselves were disproportionate and unfair. In particular, in the context of payments which were late only by one or two working days and in circumstances where the appellant had always intended to pay on time. Apart from the three VAT periods mentioned above the appellant had always paid on time.

17. We have had regard to the principles outlined by the Upper Tribunal in *Total Technology (Engineering) Limited v Commissioners for HM Revenue & Customs [2012] UKUT 418 (TCC)* and most recently in *Commissioners for HM Revenue & Customs v Trinity Mirror [2015] UKUT 0421 (TCC)*. In the light of those principles and on the facts of the present case we do not consider that the default surcharge in this case was in any way disproportionate.

18. In all the circumstances we must dismiss the appeal.

19. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 13 AUGUST 2015