



TC05055

Appeal number:TC/2015/04519

*VAT – default surcharge – late payment of VAT – whether reasonable
excuse for late payment – whether disproportionate – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NICOLA KELLETT

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MRS BEVERLEY TANNER**

Sitting in public in Manchester on 18 April 2016

The Appellant did not appear

Mr Craig Butler of HM Revenue & Customs appeared for the Respondents

DECISION

1. This is a consolidated appeal against default surcharges in respect of VAT accounting periods 01/15, 04/15 and 07/15. The amounts of VAT due and the due dates for electronic payment for those periods are as set out in the table below. The table also includes relevant details of how payments were made:

VAT Period	Amount Due £	Due Date	Payments
01/15	16,321	7.03.15	12 instalments between 8 April 2015 and 14 August 2015
04/15	13,551	7.06.15	4 instalments between 24 August 2015 and 28 September 2015
07/15	15,062	7.09.15	Unpaid as at 3 December 2015

2. When the appeal was called on for hearing there was no appearance by the Appellant. We were satisfied that the Appellant's representative Mr Ken Shaw had been given reasonable notice of the hearing in a letter dated 17 February 2016. In an email dated 4 April 2016 Mr Shaw requested a postponement of the hearing. That application was refused and we understand Mr Shaw was notified of that refusal in writing and by telephone on 14 April 2016. We were satisfied pursuant to Tribunal Rule 33 that it was in the interests of justice to proceed with the hearing.

3. The Appellant trades as the Oil Can Café from premises in Hepworth near Huddersfield. She registered for VAT in May 2013. Since then she has had a history of defaults in relation to the payment of VAT. She has been within a surcharge period for the purposes of *section 59 Value Added Tax Act 1994* ("VATA 1994") following a default in payment of the VAT due for period 10/13. The Appellant's previous history of defaults meant that the default for period 01/15 was calculated at the rate of 10%, giving rise to a default surcharge of £1,632. For periods 04/15 and 07/15 the rate was 15% giving rise to default surcharges of £2,032 and £2,259 respectively.

4. *Section 59(7) VATA 1994* provides as follows:
- " (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) ...
- (b) *there is a reasonable excuse for the return or VAT not having been so despatched,*

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

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

10 “ *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?*”

15 6. The Appellant’s grounds of appeal may be summarised as follows:

(1) She operates a small business and exercised due diligence and proper regard to the fact that tax becomes due on particular dates.

(2) She has to manage her cashflow and strives to maintain payments to suppliers and employees to ensure the business survives.

20 (3) Mr Shaw had been in regular communication with HMRC to establish a payment plan.

(4) The surcharges will cause the Appellant additional pressure and hardship.

25 7. We were satisfied on the material produced by HMRC that the defaults described above occurred, and that subject to any reasonable excuse the Appellant was liable to the default surcharges imposed for the relevant periods. The Appellant has not suggested either in her grounds of appeal or in correspondence that the payments were not late or that there was no default.

30 8. There was a reference in the grounds of appeal to payment plans having been agreed. We accept that there was a payment plan in place for period 07/14 and for that reason HMRC did not consider there to be a default in relation to that period. *Section 108 Finance Act 2009* provides that a taxpayer will not be liable to a default surcharge if the default arises between the date on which the taxpayer requests a deferral of the payment and the end of any agreed deferral period. However the request for a deferral
35 must be made prior to the default taking place. There was no material before us from which we could conclude that there was any payment plan in place for the relevant periods prior to the defaults taking place.

9. We have taken the grounds of appeal as principally comprising a submission that there was a reasonable excuse for non-payment.

10. Section 71 VATA 1994 provides that an insufficiency of funds to pay the VAT due is not a reasonable excuse. Having said we are entitled to find that the underlying cause of an insufficiency of funds may amount to a reasonable excuse in appropriate circumstances (see *Customs and Excise Commissioners v Steptoe [1992] STC 757*). In the absence of any reasons as to why the Appellant managed her cashflow in the way she did for the relevant periods we cannot be satisfied that there was any reasonable excuse for late payment.

11. Mr Shaw had provided certain documents which the Appellant apparently intended to rely on in the appeal. We have had regard to that documentation but we can discern no basis upon which it might be said to be relevant to or to support the present appeal.

12. We have also considered whether there might be any argument that the default surcharges are disproportionate. This is in the light of the reference in the grounds of appeal to the additional pressure and hardship that the default surcharges will cause.

13. 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 surcharges in this case are in any sense disproportionate.

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

15. Any application to set aside this decision pursuant to Rule 38 of the Tribunal Rules on the basis that the Appellant was not present or represented should be made in writing within 28 days from the date on which the decision is released and setting out all facts and matters relied upon.

16. 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: 25 APRIL 2016