



**TC07189**

**Appeal number: TC/2016/03387**

*VAT default surcharge - temporary cash flow shortage - whether reasonable excuse for late payment - no - Appellant previously paid electronically and allowed an additional seven days - changed to making payment by cheque but unaware that he would no longer be entitled to additional seven days whether reasonable excuse - no - Appellant's assertion that he had not been notified of earlier defaults not accepted - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**SHANE BROWN T/A MONKEY PINE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER MOHAMMED FAROOQ**

**Sitting in public at Nottingham Justice Centre, Carrington Street, Nottingham on 15  
February 2017**

**The Appellant in person**

**Mr Colin Smithson, Officer of HMRC, for the Respondents**

## DECISION

### **The Appeal**

- 5 1. Shane Paul Brown t/a Monkey Pine (“the Appellant”) appeals against default surcharges of £271.24, £285.37 and £406.87 imposed by HMRC, in respect of the consecutive VAT periods ended 31 August 2015, 30 November 2015 and 28 February 2016 (“the default periods”) for his failure to submit, by the due date, payment of the VAT due.
- 10 2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### **Background**

- 15 3. The Appellant operates a business making bespoke and reclaimed pine furniture. The business registered for VAT in December 2005.
- 15 4. The Appellant has been in the default surcharge regime from Period 11/14 onwards. Since December 2014 every quarterly VAT payment has been late.
- 20 5. Section 59 VATA 1994 provides for default surcharges. All VAT registered businesses are required by law to send to HMRC both their return and payment of the VAT by the due date, which is normally one calendar month after the end of the accounting period covered by the return.
6. The Appellant was on a quarterly basis for VAT, and therefore its VAT returns and the related payment was due on or before the end of the month following each calendar quarter. Reg. 25(1) and Reg 40(1) VAT Regulations 1995.
- 25 7. HMRC have discretion to allow extra time for both filing and payment, when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs. 25A (20), 40(2). Under that discretion, HMRC allow a further seven days for electronic filing and payment.
- 30 8. The Appellant has been mandated to submit his VAT returns and payments electronically under VAT Regulations 1995 Regulation 25A from Period 02/10 onwards.
9. Prior to the Period 11/14 the Appellant’s preferred method of payment was by Direct Debit. From Period 11/14 the Appellant’s preferred method of payment has consistently been by cheque, as used for the default periods 08/15, 12/15 and 03/16.
- 35 10. Period 11/14 had a due date of 7 January 2015 for electronic VAT returns and payments. The VAT return was received before the due date on 3 December 2014. The VAT cheque payment was received late on 20 January 2015. As a result of the late payment a Surcharge Liability Notice was issued.

11. Period 02/15 had a due date of 7 April 2015 for electronic VAT returns and payments. The VAT return was received before the due date on 12 March 2015. The VAT cheque payment was received late on 15 April 2015. As a result of the late payment a Surcharge Liability Notice Extension was issued. The penalty resulting from the 2% default surcharge fell below HMRC's de Minimis threshold of £400 and therefore HMRC collected no penalty.

12. Period 05/15 had a due date of 7 June 2015 for electronic VAT returns and payments. The VAT return was received late on 9 June 2015. The VAT cheque payment was received late on 8 July 2015. As a result of the late payment a Surcharge Liability Notice Extension was issued. Again the penalty resulting from the 5% default surcharge fell below HMRC's de minimis threshold of £400 and therefore HMRC collected no penalty.

13. Period 08/15 had a due date of 7 October 2015 for electronic VAT returns and payments. The VAT return was received before the due date on 9 September 2015. However the VAT cheque payment was received late on 21 October 2015. A Vat default surcharge of £271.24 was levied, representing 10% of the amount of VAT paid late. A Surcharge Liability Notice Extension was issued.

14. On 5 November 2015 the Appellant wrote to HMRC apologising for the late payment of VAT for period of 08/15. He said that he had been awaiting funds from a customer. He said that he felt the penalty of 10% was:

“a bit harsh given this is the only penalty I have had. The cheque would have been received by yourselves on 12 October 2015 in line with the deadline. The delay of being cleared from my bank account would have been made at your end. The reason I am no longer set up on direct debit is because I need a bit of flexibility due to bad debtors.”

15. Period 11/15 had a due date of 7 January 2016 for electronic VAT returns and payments. The VAT return was received before the due date on 1 December 2015. The VAT cheque payment was again received late on 11 January 2016. A VAT default surcharge of £285.37 was levied representing 15% of the amount of VAT paid late. A Surcharge Liability Notice Extension was issued.

16. Period 02/16 had a due date of 7 April 2016 for electronic VAT returns and payments. The VAT return was received before the due date on 29 March 2016. The VAT cheque payment was received late on 14 April 2015. A VAT default surcharge of £406.87 was levied representing 15% of the amount of VAT paid late. A Surcharge Liability Notice Extension was issued.

17. On 9 April 2016 the Appellant wrote to HMRC saying:

“After a phone call with yourselves on Friday 8th April, I would like to appeal against any penalties with relation to VAT. Your letter dated 26th November 2015 states that you have written warning myself of surcharges for paying VAT late in the future I would therefore like all penalties waived as no contact has been made by yourselves via post or telephone. The only

5 contact been made from yourselves is the phone calls to my ex-wife (5 years) trying to contact me, after a distressing phone call with her I am now aware. This was the last letter received from you. I am struggling to have faith in the HMRC communications system when you have my correct address yet you still fail to contact me directly.

10 I have always submitted my VAT returns on time and have always ensured you have received a cheque by the 10th of the following month. The next VAT return due for the period March, April and May will be paid via direct debit or by telephone payment on or before 7th of July. As per the telephone call with yourselves on Friday I am now aware that all payments need to be made by the 7.

15 Going forward I will try ensure that all payments are made on time and no further delay. You have to understand that my income has decreased over the last 12 months and most of my customers pay via cheque on 28day invoice.

Please can you update all contact details to myself and not the ex-wife, my address and telephone are below.”

20 18. Section 71 (1) VATA, 1994 - Reasonable Excuse provides:

- 25 (1) For the purpose of any provision of sections 59-70 which refers to a reasonable excuse for any conduct:-  
(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and  
(b) 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.

### **Appellant’s Contention**

30 19. The Appellant does not dispute that his VAT payment for the default periods were late.

20. In his Notice of Appeal the Appellant says:

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- “No communication until penalty letter received. All VAT returns were submitted on time and paid. Twice payment was made 2 days late via cheque. Unfair to charge a penalty when no other form of communication was made. Correct address, telephone number etc. on file so no excuse.
  - Turnover has decreased and the business is struggling - with post-dated cheques from customers.
  - I am currently paying £826.54 per month to clear my self-assessment tax and in the middle of claiming income support due to illness and an operation on my shoulder. (Doctors sick notes can be provided along with proof of operation).
  - I have written a few times to appeal the penalty and only had one response. No advice given to prevent this from happening again.”
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21. At the hearing the Appellant maintained that he had received nothing from HMRC and was unaware of the VAT default surcharges for periods for 08/15 and 11/15 until speaking to his ex-wife in early April 2016.

5 22. He accepted that when paying by cheque cleared funds had to be received by HMRC no later than the end of the calendar month following the VAT quarter end date.

23. The Appellant said that he had always paid the VAT due, albeit sometimes late, but that in total, he had only been 16 days late in a 12 month period.

### **HMRC's Contentions**

10 24. The requirements for submitting timely electronic payments can be found:

- i. In Notice 700 'The VAT Guide' para 21.3.1 (the notice represents HMRC's policy and understanding of the relevant legislation)
- ii. On the HMRC website [www.gov.uk/hmrc](http://www.gov.uk/hmrc)
- iii. In the E-VAT return acknowledgement

15 25. The first default was recorded for Period 11/14 and the Appellant entered the Default Surcharge regime, as shown on the Schedule of Defaults. The potential financial consequences attached to the risk of further default would have been known to the Appellant from this point onward, given the information printed on the Surcharge Liability Notice issued.

20 26. Included within the notes on the reverse of Surcharge Liability Notices(s), issued for the Periods 01/13 onwards, are the following, standard paragraphs:

“Submit your return on time

- Make a note of when your return is due.”

“Pay your VAT on time

25 • Don't rely on HMRC to remind you - go to [www.hmrc.gov.uk/pavinghmrcivat.htm](http://www.hmrc.gov.uk/pavinghmrcivat.htm)”

“Think ahead

- If the person who normally does your VAT return will be absent, make alternative arrangements.

30 If you can't pay the full amount on time, pay as much as you can. By paying as much as you can by the due date, you will reduce the size of any surcharge. It may even prevent you getting a surcharge altogether.”

27. Included within the notes on the reverse of the Surcharge Liability Notices V160 and V161 issued for the Periods 04/15 onwards, is the following advice;

“How you can avoid surcharges

Submit your return and pay your VAT on time.

5 For information about how to complete and submit your return go to [www.gov.uk](http://www.gov.uk) and search for ‘VAT return’.”

“Think ahead

- If the person who normally does your VAT return will be absent, make alternative arrangements.
- 10 • If you can't pay the full amount of VAT due on time, pay as much as you can by contacting the Business Payment Support Service before the due date for payment. Paying as much as you can by the due date will reduce the size of any surcharge or may prevent you getting a surcharge.

Paying HMRC

- 15 • Allow enough time for payment to clear to HMRC's bank account by the due date.

Problems paying your VAT

- If you can't pay the full amount of VAT due on time Contact the Business Payment Support Service before the due date for payment.
- 20 For more information go to [www.gov.uk](http://www.gov.uk) and search for ‘can't pay tax on time’. With effect from the Period 01/13 the Surcharge Liability Notice V160 advised a trader how the surcharges are calculated and the percentages used. Subsequent Surcharge Notices advise the trader of the percentage used to calculate the current surcharge, if one has been issued, and/or the percentage which will be used in calculating the surcharge for any subsequent default.”
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28. With effect from the Period 04/15 each notice issued details on the reverse how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA.59(5).

29. Liability to VAT surcharge is governed by VAT Act 1994 (VATA 1994) s 59 and the reverse of each notice issued, up to and including the Period 02/16, detailed how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with of VATA 1994 s.59(5).

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30. The Periods 11/14, 02/15, 05/15 Surcharge Notices were issued to the Appellant's principal place of business on 16 January 2015, 17 April 2015 and 17 July 201 respectively. In accordance with HMRC procedures and following s 98 VATA 1994 and s 7 Interpretation Act 1978 the Notice is deemed to have been delivered unless the contrary is proved. HMRC contend that the onus of proof in

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relation to this aspect rests with the Appellant and HMRC further contend that this onus has not been met.

5 31. Undelivered correspondence is recorded by HMRC. HMRC contend that as the notices have not been returned by the Royal Mail as undelivered it has not been proved that service has not been effected.

10 32. The fact that the default Surcharge Notices for the Periods 11/14, 02/15 and 05/15 did not contain a financial element may also be relevant. The Appellant may not have realised that they were default Surcharge Notices because of this, whereas he immediately recognised the notices for periods 08/15, 11/15 and 02/16 as they included a default surcharge element.

15 33. The Appellant asserts that the cheques were posted only two days late. That is incorrect but his assertion may be because he did not realise that the due dates for the payments for the periods 08/15, 11/15 and 02/16 would have only been extended by a further seven days if the payments had been made electronically. As the payments were made by cheque no extension was allowed.

34. HMRC VAT payment deadline WEB page calculator for period ending 31 August 2015 advised when paying by cheque:

“You can only pay by cheque if you’re exempt from submitting online VAT returns. If you need to pay by cheque for any other reason, pay by Bank Giro.

20 The last day you can post your cheque is 22 September 2015.

Your cheque must have cleared by 30 September 2015.

The date your cheque clears is the day when your payment reach HRMC's account. It's not the day when they get your cheque in the post.”

25 35. HMRC VAT payment deadline WEB page calculator for period ending 31 August 2015 advised when paying by cheque:

“You can only pay by cheque if you’re exempt from submitting online VAT returns. If you need to pay by cheque for any other reason, pay by Bank Giro.

The last day you can post your cheque is 21 December 2015. Your cheque must have cleared by 31 December 2015.

30 The date your cheque clears is the day when your payment reach HRMC's account. It's not the day when they get your cheque in the post.”

36. HMRC VAT payment deadline WEB page calculator for period ending 28 February 2016 advised when paying by cheque:

35 “You can only pay by cheque if you’re exempt from submitting online VAT returns. If you need to pay by cheque for any other reason, pay by Bank Giro.

The last day you can post your cheque is 21 March 2016.

Your cheque must have cleared by 31 March 2016.

The date your cheque clears is the day when your payment reach HRMC's account. It's not the day when they get your cheque in the post."

- 5 37. The date for receipt of cleared funds when paying by cheque falls under Regulation 40(2B), VAT Regulations 1995 which has a commencement date of 1 April 2010. This amendment means that commencing from 1 April 2010 payments of VAT due made by cheque will be treated as made on the day the funds clear to HMRC's account. Hence an additional two days is required for the payment to clear HMRC's account.
- 10 38. HMRC say that in February 2010, a mandate letter was issued to the Appellant advising him that he was mandated to render returns and payments electronically under VAT Regulations 1995 Regulation 25A.
- 15 39. HMRC maintain when the VAT returns were submitted for Periods 08/15, 11/12 and 02/16 the Appellant would have received acknowledgements which advised each payment's due date.
- 20 40. HMRC say that VAT Act 1994 s 71(1)(a) excludes an insufficiency of funds from being a reasonable excuse for late payment of VAT. The Appellant says that he was awaiting cleared funds from customers. HMRC maintain however that many traders are operating in similar circumstances and in order to maintain the credibility of the surcharge regime, the system must be seen to be equitable.
- 25 41. HMRC say that the Appellant requested a review of the Default Surcharge for the Period 08/15. In the review letter dated 26 November 2015 the Appellant was given full details of when paying by cheque. Also of how to request Time to Pay as well as information on Cash Accounting. Enclosed with the letter was a further information sheet titled 'Top Tips on how to avoid VAT Surcharges' which also gave advice on how and when to pay.
- 30 42. VAT Regulations 1995, at Regulation 40, state that any person required to make a return "shall pay" to HMRC "such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return". There is thus a statutory obligation on a person required to make a return to pay the VAT to HMRC.
- 35 43. HMRC maintain that the lateness of a return or payment is largely a question of fact and once it occurs a surcharge accrues. The length of the delay is immaterial. The surcharge applies even if payment is one day late.
44. HMRC refer to VAT Act 1994 s70, - mitigation of penalties. Section 70 is not engaged in respect of surcharges under s59 - the rates of surcharge are laid down in law and neither HMRC nor the Tribunal have the power to reduce the amount due to mitigating circumstance per VAT Act 1994 s70.



45. There is no statutory definition of reasonable excuse. The only reason the default surcharge can be mitigated is if the Appellant can prove it is a reasonable excuse. VAT Act 1994 s 71(1) has no definition of a reasonable excuse but the law specifies what is not. The onus of proof rests with HMRC to demonstrate that a penalty is due.  
5 Once so established, the onus is then on the Appellant to demonstrate that there is a reasonable excuse for late payment. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

### **Conclusion**

10 46. For the reasons outlined by HMRC above, the Appellant should have been aware of the due date for payments of his VAT and the potential consequences of late payment.

15 47. The Appellant has a poor compliance history and had been in the VAT default surcharge regime for some time. All the more reason why he should have ensured that he knew the deadline for payment and the consequences of late payment.

20 48. The Appellant says that he was not aware that a surcharge had been imposed for the late payment in respect of the 08/15 period. He appears to have been under the impression that although making payments by cheque, he nonetheless had the additional seven day period within which to pay. This extra time in which to pay is only afforded by HMRC when payment is made electronically, and that would have been clear from the surcharge liability notice he received and the other information which was readily available.

25 49. The Appellant says that he did not receive the VAT default surcharge liability notice or the subsequent surcharge liability extension notices. However HMRC's records show that the notices were sent to the Appellant's business address.

30 50. Although the Appellant may regard the penalty as unfair, a surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a Surcharge Liability Notice warning him that he will be liable to surcharge if he defaults again within a year. The taxpayer therefore knows his position and should be able to conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is geared to the amount of outstanding VAT. The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within twelve months of each other.

35 51. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was unforeseen circumstances or events beyond its control. In the Tribunal's view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the default periods.

40 52. For the above reasons the appeal is dismissed and confirm the VAT default surcharges for periods 08/15, 11/15 and 02/15.

53. 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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**MICHAEL CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 07 JUNE 2019**

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