



Neutral Citation: [2023] UKFTT 00 (TC)

Case Number: TC08722

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/01502

*VAT – default surcharge – payment two days late – bank job failed – COVID affected business and director – whether reasonable excuse – no – whether disproportionate – no – appeal dismissed*

**Heard on:** 12 October 2022

**Judgment date:** 02 February 2023

**Before**

**TRIBUNAL JUDGE ANNE FAIRPO  
SONIA GABLE**

**Between**

**DIAMOND BODYCRAFT LTD**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mrs Mitchell, director

For the Respondents: Ms Clark, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

1. The hearing was held using the Tribunal video hearing platform. 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.

### Introduction

2. This is an appeal against a VAT default surcharge issued under s59 VAT Act 1994 for the period 10/21. It was not disputed that there had been prior defaults and the surcharge rate of 10% was not disputed. The appellant appealed on the basis that they considered that they had a reasonable excuse and that the surcharge is disproportionate.

3. The due date for the relevant VAT period, 10/21, was 7 December 2021 for both the return and payment. The return was received by HMRC on 5 December 2021. The payment was received on 9 December 2021 via the Faster Payment Service.

4. Following a review, the appellant appealed to this Tribunal on 27 February 2022.

5. The appellant did not dispute the validity of the penalty and considering the evidence put forward to us by HMRC we consider that the penalty was due in accordance with the provisions of the legislation. The question therefore is whether the appellants can show that they have a reasonable excuse such that, in accordance with s59(7)(b) VATA 1994, the penalty does not arise.

### Evidence and submissions

6. Mrs Mitchell explained that the payment had been made late because the online banking fob used by the business had stopped working when she attempted to make the VAT payment. The bank sent a replacement on request, but it took two days before it arrived. The payment was made as soon as the fob arrived.

7. Mrs Mitchell also explained that she had been unwell with COVID and had long COVID, which meant that she was running late with everything. The business was badly affected by the pandemic as there was little demand for car repairs during the lockdowns. Payments were therefore made late during the period. Mrs Mitchell accepted that the business could have taken advantage of the VAT holiday but had tried to pay bills as they went along rather than be faced with it later. There were also very low VAT returns during the period due to the lack of work.

8. Mrs Mitchell could not recall whether it had occurred to her to call HMRC when she could not make the payment on time. She suggested that she would probably have thought that it would all be ok, as it would be paid straight from the bank and other businesses had been able to take advantage of a VAT holiday.

9. Mrs Mitchell considered that it was unfair that the business was being charged a large amount for a payment that was only two days late.

10. HMRC contended that the principles in *The Clean Car Company Limited* [1991] VATTR 234 and *Perrin* [2018] UKUT 156 (TCC) should be applied. The appellants were aware of the need to make payment by the due date, and the consequences of failure, as they had received previous surcharge liability notices.

11. HMRC submitted that the appellants could have contacted HMRC when they became aware that they could not pay by the due date. No surcharge would have arisen if deferment had been agreed.

12. With regard to the submissions as to COVID, it was submitted that the cashflow issues were not a reasonable excuse for the late payment of the VAT. Although HMRC had sympathy

with Mrs Mitchell's health, she was able to attempt the payment at the relevant time and had submitted the return on time. As such her health issues could not have been a hinderance to the payment being made on time.

13. With regard to the question of proportionality, HMRC submitted that the Upper Tribunal decision of *Trinity Mirror* [2015] UKUT 421 is binding upon this tribunal, and that decision found that the default surcharge regime as a whole is a rational scheme and only in exceptional circumstances would a challenge to a default surcharge on the grounds of proportionality succeed. HMRC submitted that no such exceptional circumstances existed in this case.

### **Discussion**

14. The term "reasonable excuse" is not defined in the legislation, but the decision in *The Clean Car Company Limited* [1991] VATTR 234 noted that the relevant test is to ask oneself whether "what the taxpayer did [was] 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", to do. The Upper Tribunal in *Perrin* [2018] UKUT 156 (TCC) held that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account" (at [75]).

15. The circumstances in this case are the the business attempted to make payment and discovered that it was unable to do so due to a technical problem with the fob, such that they could not log onto their online banking account.

16. Mrs Mitchell was asked why the payment was not made by telephone when the business was unable to access the online banking system. She replied that she did not know why it had not been paid by phone, although no-one had offered. She was not sure how the replacement fob had been requested, although she thought it might have been an online request. She explained that she had been unable to get through to the bank.

17. On balance we consider that it is more likely than not that no thought was given to contacting the relevant telephone banking system to make the payment. We note that Mrs Mitchell said she could not get through to the bank, but there was no clear evidence that she had tried to contact the telephone banking system rather than a general branch or central bank telephone number.

18. Considering the tests in *Clean Car* and *Perrin*, we find that the excuse is not objectively reasonable as we consider that a reasonable trader in the same position would have attempted to make payment by telephone or attempted to contact HMRC when it became clear that the payment could not be made on time.

19. With regard to Mrs Mitchell's explanation as to her health and the difficulties faced by the business, we have sympathy with her situation. However, we note that the business was able to make the payment once a fob was received. The business was not prevented from filing its return on time and attempting to make the payment on time, so that any delays relating to COVID cannot be a reasonable excuse in respect of the delay in making payment.

20. We therefore conclude that the appellant has not established that it had a reasonable excuse with regard to the late payment

### *Proportionality*

21. We are bound by the decision of the Upper Tribunal in *Trinity Mirror*. That decision held (inter alia) that the objective "of the default surcharge regime is to impose a penalty for failing to pay VAT on time, and not to penalise further for any subsequent delay in payment ... It

would not be possible, therefore, in our view, for the fact that the payment was only one day late to render an otherwise proportionate penalty disproportionate” (at §68).

22. Although the Upper Tribunal acknowledged in *Trinity Mirror* that there might be exceptional circumstances in which a default surcharge could be disproportionate, we do not consider that there are any exceptional circumstances in this case which would make the default surcharge inappropriate. If, as in *Trinity Mirror*, a delay of one day is not enough to form special circumstances it cannot be the case that a delay of two days could be special circumstances which would make the penalty disproportionate.

### **Decision**

23. As we have concluded that the penalty was due and that there was no reasonable excuse, and the surcharge is not disproportionate, the appeal is dismissed and the penalty upheld in full.

### **Right to apply for permission to appeal**

24. 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.

**ANNE FAIRPO  
TRIBUNAL JUDGE**

**Release date: 02<sup>nd</sup> FEBRUARY 2023**