



Neutral Citation: [2022] UKFTT 196 (TC)

Case Number: TC08521

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2021/12379

*VAT – default surcharge – whether reasonable excuse*

**Heard on:** 8 June 2022  
**Judgment date:** 9 June 2022

**Before**

**TRIBUNAL JUDGE HOWARD WATKINSON  
REBECCA NEWNS**

**Between**

**LONDON CLEAN LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: **Mr. Adam Englander**, Director of the Appellant

For the Respondents: **Mr. Panagiotis Diamantis**, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This is an appeal by London Clean Ltd against a VAT default surcharge of £604.81 for VAT period 06/21.

2. Mr. Englander, the Appellant's Managing Director, represented the Appellant. Mr. Diamantis, a litigator from HMRC's Solicitor's Office, represented the Respondents. We had before us a bundle of documents running to 86 pps., and a bundle of legislation and authorities.

### BACKGROUND

3. The Appellant has been registered for VAT since 1 April 2017. Ordinarily the Appellant would have been required to submit a VAT return, and any payment due, not later than the last day of the month following the period to which the return related (Regulation 25(1) of the VAT Regulations 1995 ("VATR")), however, the Appellant filed VAT returns electronically and was therefore permitted a further seven days to submit a VAT return, and make any payment due (by a direction made under Regulations 25, 25A(20) and 40(3)-(4) VATR).

4. The Appellant entered the default surcharge regime because its payment for the 09/20 quarterly VAT period was paid late, on 23 November 2020. As this was the first default no surcharge payable but a surcharge liability notice was issued on 13 November 2020.

5. The Appellant's VAT payment for the 03/21 quarterly VAT period was then paid late, on 26 May 2021. The Appellant therefore became liable to a surcharge at 2%. However, since the surcharge was less than £400 no financial penalty was levied, and the Appellant was notified that the surcharge period was extended to 31 March 2022.

6. The Appellant's VAT return for the quarterly 06/21 period was submitted on 5 August 2021, however, the payment for the VAT due on the return was not made until 11 August 2021 when it was made by faster payment service. The payment was therefore made four days late, and the Appellant became liable to a surcharge at 5%

7. As confirmed with Mr. Englander during the hearing, the history of returns and payments set out above is not in dispute, nor is it in dispute that the Appellant received the various surcharge documents. The Respondents have therefore established that the surcharge was properly imposed, and the issue for the Tribunal is whether the Appellant can show that it has a reasonable excuse for the failure to make the payment for the 06/21 quarterly VAT period on time.

### THE RELEVANT LAW

8. The VAT default surcharge is imposed by Section 59 Value Added Tax Act 1994 ("VATA"). Under Section 59(7)(b) VATA, if the Appellant satisfies the Tribunal that there is a reasonable excuse for the default in question then it will not be liable to the surcharge. Section 71(1) VATA provides that for the purpose of any provision of Sections 59-70 of VATA which refers to a reasonable excuse (a) an insufficiency of funds 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.

9. The Respondents having established that the surcharge is due it is for the Appellant to demonstrate a reasonable excuse to the ordinary civil standard, the balance of probabilities.

10. There is no statutory definition of “reasonable excuse”. The Respondents referred the Tribunal to *Rowland v Revenue & Customs Commissioners* [2006] STC (SCD) 536 where the Tribunal noted at [19] that the issue was to be considered in the light of all the circumstances of the particular case. The Respondents also referred the Tribunal to *The Clean Car Company Ltd v The Commissioners of Customs and Excise* [1991] VATTR 234 in which Judge Medd QC set out that the test is an objective one, where the Tribunal must ask itself: “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?”

11. Finally, the Respondents referred the Tribunal to *Christin Perrin v The Commissioners for Her Majesty’s Revenue and Customs* [2018] UKUT 156 (TC) where at [81] the Upper Tribunal set out a useful approach that the First-tier Tribunal can take in considering the issue of reasonable excuse.

“81. When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer’s own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

#### **THE APPELLANT’S CASE**

12. Mr. Englander had set out the Appellant’s case in two documents. Firstly, in a letter to the Respondents dated 2 September 2021 requesting a statutory review of the decision to issue the surcharge Mr. Englander said:

“...In general everything is very difficult at the moment because of the coronavirus.

We have three times the work to do to try and juggle our customers’ schedules, many of whom are not in their offices, and it is office cleaning that we carry out.

We have many of our cleaners that have either got Covid or have been pinged and so not been able to come to work which has made our business very difficult and time-consuming which has all contributed to a very heavy workload, on top of which some of our staff are still under furlough that work in our accounts department which has put us under pressure.

Our accounting firm that we use to prepare our accounts and VAT et cetera has had similar issues and not only was the lead accountant requested for jury duty for two weeks, on top of that around the period of time when we would normally prepare our VAT he also contracted Covid and was out of action for two weeks which made it impossible for us to file our accounts (tax VAT) on time.

Through the use of our own prudent reserves and our savings we managed to salvage our business and keep it going, while supporting the majority of our cleaners with our own personal finances, as some of these people were ineligible, because of their self-employment status to claim Covid relief benefits from the government.

Like so many companies have, we have not drawn down on large government backed loans to keep our business afloat and we have not been a burden on the government.

To then on top of this, have the government charge us £604.81 whilst we are already under great stress, both physically and financially I think is extremely unwarranted, unfair, mean-spirited, and certainly not something that helps our small business thrive or survive.

We are an honest company that pays our fair share of corporation tax, VAT, and we are not employing companies to dramatically reduce or avoid taxation, like larger companies and corporations.

I believe you sent us a letter earlier this year when we may have been a couple of days late but we were under the same pressures then whilst in the middle of coming out of lockdowns, but nevertheless all taxes have been paid and will continue to be paid.

I would kindly ask you to review this penalty due to all the compounded pressures that we have found ourselves under due to coronavirus over the last few months, as described above.

...”

13. The Respondents’ review conclusion letter dated 20 October 2021 said, amongst other things: “You told us that your payment was late because of cashflow issues which were brought about by COVID19 disruptions and argued that payment was only a few days late.” However, the Tribunal agrees with Mr. Englander that the Appellant was not putting forward “cashflow issues” as an excuse.

14. The Appellant’s Grounds of Appeal relied on the contents of its letter of 2 September 2021, specifically took exception to the “cashflow issues” point, but otherwise added nothing substantial to the Appellant’s case.

15. The Appellant did not produce any contemporaneous documents showing communications with its accountant in early August 2021 and we had nothing from the Appellant’s accountant by way of explanation for the late payment.

16. There was no witness statement from the Appellant (of which we make absolutely no criticism) and we therefore invited Mr. Englander to explain to us what had happened in relation to the late payment. In essence Mr. Englander said:

- (1) The Appellant didn't have cashflow issues, but its turnover was down to around 10% of what it had been, and the staff were contracting Covid;
- (2) The Appellant had trouble reaching its accountant, it had a query about the 06/21 VAT return, the accountant was unavailable a few days later, it was a stressful time and those at the Appellant were under pressure, distracted (a description that Mr. Englander used of the Appellant several times in his evidence) and business was very tough, it was a difficult time, and that was a reasonable excuse for "taking his eye off the ball"; and
- (3) The Appellant's accountant had issues with Covid, the lead accountant was requested for jury duty, and was sick around the time, the accountant was able to produce the VAT return but the Appellant had some queries about it, the accountant was then not around, and this led to the late payment.

17. In response to question from Mr. Diamantis, Mr. Englander confirmed that he was the sole director of the Appellant, there were three employees, and that his wife dealt with the majority of the Appellant's administrative work including making VAT payments. Mr. Englander also accepted that the accountant had submitted the Appellant's 06/21 period VAT return on time, and that it might have been that he was unavailable in a later period, that he did not know specifically when the accountant had Covid and did not believe the accountant to have been on jury service on the date when the VAT payment was due. Mr. Englander said that those at the Appellant were distracted for many reasons, the late payment was an oversight, and it was related to Covid. Mr. Englander said that the Appellant had discovered something was not right in the VAT return and had queried it.

18. In answer to questions from the Tribunal Mr. Englander said that from recollection he believed that the accountant would have provided the Appellant with a draft of the 06/21 period VAT return, that would have then been agreed and submitted, and that the Appellant then wanted to check something before paying the amount shown on the return.

#### **THE RESPONDENTS' CASE**

19. The Respondents' case was that the Appellant had provided no reasons why payment could not be made on time, nor had it taken reasonable steps to ensure that payment was made on time, and that the Appellant had not proved that there was a reasonable excuse for the late payment.

#### **FINDINGS OF FACT**

20. It is not in dispute, and we find, that the Appellant has been registered for VAT since April 2017 and has the default surcharge regime history set out at [4] – [6] above.

21. It is not in dispute, and we find, that the Appellant's 06/21 period VAT return was submitted within the permitted time period on 5 August 2021, that the payment of the sum due on that return of £12,096.22 was made by faster payment on 11 August 2021 and it was therefore four days late.

22. We find, on the balance of probabilities, that at some point around August 2021 the Appellant's accountant was on jury service. However, we find, on Mr. Englander's evidence, that the Appellant's accountant was not on jury service when the payment fell due.

23. We find that at some point around August 2021 the Appellant's lead accountant was ill with Covid. We are not able to make more precise findings due to the only evidential basis being Mr. Englander's recollection, and his acceptance that he did not specifically know when the accountant had Covid.

24. We find that whatever the effect of Covid on the Appellant's accountant it did not prevent the accountant from providing the Appellant with a draft of the 06/21 period VAT return, which the Appellant approved, and which the accountant then submitted on 5 August 2021 on the basis that it was accurate.

25. We find that some query arose in relation to the 06/21 VAT return after it had been submitted. We are unable to make findings on the nature of that query. However, we find that in fact the query did not result in the 06/21 VAT return being amended, because there is no evidence that it was so amended. We find that it is more likely than not that the Appellant generally had difficulty in contacting its accountant, but we do not have the evidence of what specific attempts were made to contact the accountant, and when they were made, on which to make any more specific findings of fact.

26. We find that the main factor that led to the Appellant making the payment late was that the Appellant was distracted by the general business situation that it found itself in due to the Covid-19 pandemic.

#### **DISCUSSION**

27. The Appellant asserts that a combination of the: general Covid situation, the pressure on the business as a result, and issues with the accountant's availability amount to a reasonable excuse.

28. We have set out the facts we find proved above.

29. Applying the test in *Perrin*, even at their highest and viewed objectively, the Tribunal does not accept that those facts it has found proven amount to a reasonable excuse. The accountant had been able to draft the 06/21 period VAT return and provide it to the Appellant, the Appellant had been able to approve it, and the Appellant had been able to submit it within the permitted time period as an accurate return. In the Tribunal's view the objectively reasonable taxpayer, mindful of the need to comply with his obligations, and having approved the VAT return as accurate, would have paid the sum due on time, rather than delaying payment in relation to queries that ultimately had no impact on the return.

30. The Tribunal does not accept that being distracted as a result of business pressures amounts, objectively, to a reasonable excuse for not making the payment. Further, the Appellant was on notice of the need to make its VAT payment within time from the previous surcharge notice.

#### **DECISION**

31. For the above reasons the appeal is therefore dismissed and the surcharge is upheld.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

32. 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.

**HOWARD WATKINSON**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 9 JUNE 2022**

- 1.
2. With the consent of the parties, the form of the hearing was video. Mr. Englander and Mr. Diamantis attended remotely over the Tribunal video hearing system. This is an appeal by London Clean Ltd against a VAT default surcharge of £604.81 for VAT period 06/21.
3. The documents to which we were referred were a bundle of documents running to 86 pps., and a bundle of legislation and authorities.
4. 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.
- 5.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

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**HOWARD WATKINSON**  
**TRIBUNAL JUDGE**

**Release date: 15 JUNE 2022**