



**TC03133**

**Appeal number: TC/2012/02872**

*VAT – Default Surcharge – whether reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**VIP BANQUETS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE DR K KHAN**

**Sitting in Bedford Square, London on 28 September 2013.**

**The Appellant was not represented nor did they appear in person.**

**Alison McHugh, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

## DECISION

### Introduction

1. This is an appeal against a VAT Default Surcharge for the period ending 30  
5 September 2011 (09/11) in the sum of £1,966.10 being 10% of the tax outstanding of  
£19,661.07.
2. The VAT returns and the VAT thereon were due by 7 November 2011. The  
VAT return was received on 29 October which was on time. The payment of VAT  
was received on 6 and 7 December 2011 which was one month late.
- 10 3. The issue for the Tribunal is whether there was a reasonable excuse for the late  
payment.

### Legislation

#### VAT Added Tax Act 1994 (VATA 1994)

##### Section 59 – The default surcharge

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- Under Section 59(1) (a) a taxable person is in default if payment of VAT is made late.
  - Under Section 59(4) if a taxable person is in default for a prescribed accounting period he is liable to a surcharge in the amount of a prescribed percentage.
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- Section 59(7) provides for the Commissioners or on appeal the Tribunal, setting aside the surcharge if the VAT shown on the return was dispatched at such a time and in such a manner that it was reasonable to expect that it would be received at the appropriate time or the Appellant had a reasonable excuse for late payment.
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- Section 71 sets out the provisions of section 59 which refers to reasonable excuse with s71 (1) (b) stating where reliance is based on any other person to perform task is not a reasonable excuse.

### Onus of Proof

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- The onus of proof is on the Respondents to show that the Appellant has incurred the default surcharge and that it has been correctly charged.
  - The onus then falls on the Appellant to demonstrate that they have a reasonable excuse for making the payment of VAT late, or that they had reason to expect that payment would be received on time.

### **The Evidence**

4. The Tribunal was presented with correspondence between the parties together with the Surcharge Liability Notices and a copy of the Notice of Appeal of the Appellant.

### **5 The Appellant's Contention**

5. The Appellant contends in their Notice of Appeal dated 9 February 2012 as follows:

- 10 (1) The VAT is normally taken by Direct Debit following the submission of the return. The Appellant deposited money in the bank to ensure there was enough cleared funds to make the payment. They say that they normally receive a telephone call from the bank if there are insufficient funds to make the payment.
- 15 (2) The director's son is the only person in the company with access to the online banking account and authorisation. He was away from 7 November 2011 until 7 December 2011. It was noticed on his return that the VAT had not been paid. The Appellant say that the company was struggling to keep the business afloat and needed help.

### **The Respondents' Contention**

- 20 (1) The payment of VAT using the CHAPS system was received late which is to say 6 and 7 December 2012. As the Appellant was within the Default Surcharge Period, a surcharge penalty was charged pursuant to section 59(4) VATA 1994.
- 25 (2) Given that the Appellant was within the default surcharge regime, they would have been aware of the notice informing them of the consequences of future defaults and details of how surcharges are calculated and the percentages used in determining any financial surcharge.
- 30 (3) While the law allows for a reasonable excuse, the Respondents say it is the directors' responsibility to make sure that the returns are submitted on time and payment made and not to rely on a third party to do so. In the circumstances therefore there is no reasonable excuse.
- (4) The Appellant was only aware of the non-payment of the VAT when the employee returned. The directors in abrogating their responsibility to a third party means that they do not have a reasonable excuse.
- 35 (5) The Respondents say that reliance on the bank to provide information of payment is a faulty and undesirable practise. It is for the Appellant to ensure that they have adequate procedures and plans in place to ensure that payments are made and their statutory obligations are met. Given that the employee's substantial leave period of one month was foreseeable

arrangements should have been put in place to ensure that the payment was made on time.

- (6) The lack of funds by the Appellant is not a reasonable.

### **Discussion and conclusion**

- 5 (1) The only consideration for the Tribunal is whether or not the Appellant has a reasonable excuse for their failure to make payment on time.
- (2) The Appellant does not dispute that the payments were made late. The finance director, Mr Sudeep Bhamra, accepted that it was his ultimate responsibility for ensuring compliance with the statutory obligations to make payments on time. It was his understanding that he had made all the necessary arrangements for payments to be made on time before he went on his paternity leave. Due to some clients not paying their invoices on time, when HMRC made their direct debit demand on the account, there were insufficient funds in the account to make the payment which resulted in the late payment of tax. Mr Bhamra only realised this to be the position on his return from paternity leave on 6 December when the payment was already out of time and the penalties had accrued.
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- (3) It is understandable that, if all necessary arrangements had been made, that a reasonable taxpayer would assume that the payments would be made on time. The difficulty with this position is that there was not put in place a mechanism for checking that the payments had been made on time. The Appellant Company knew that the finance director would be away on leave for one month. In the circumstances therefore it was not an unforeseeable or an exceptional circumstance which caused the oversight and therefore there is no reasonable excuse.
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- (4) The Tribunal would have expected the Appellant to have arrangements in place for when important employees are away. In particular where the employee deals with the payment of tax it would have been necessary for the taxpayer to speak to the bank or to HMRC to confirm that the payments had been made. This would have been a simple arrangement which could have been made before Mr Bhamra went on his one month leave.
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- (5) This can only be considered an oversight which was not in the circumstances reasonable. The Tribunal sympathises with the Appellant Company. However, the law requires the taxpayer to act in a manner which suggests that they are responsible in meeting their obligations in law. This would be part of the day to day management of the business so it is normal to expect a person to manage their affairs and make arrangements for the short term absence of the finance director or other important employees. Sadly this was not done. In the circumstances the appeal would be dismissed.
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6. 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

5 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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**DR K KHAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 11 December 2013**

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