



**TC04402**

**Appeal number: TC/2014/05710**

*VAT default surcharge - VAT paid late - temporary cash flow shortage - whether reasonable excuse for late payment - no - whether time to pay had been agreed - no - whether illness of family member contributed to default - no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRAND INTERIORS LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MICHAEL CONNELL  
                  MEMBER ALBAN HOLDEN**

**Sitting in public at Alexandra House, 14 – 22 The Parsonage, Manchester on 17  
December 2014**

**Paul Mayson of Maysons Solicitors for the Appellant  
Mr Phillip Jones Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### **The Appeal**

- 5 1. Brand Interiors Limited (“the Appellant”) appeals against a default surcharge of £3,057.18, for its failure to submit, in respect of its VAT period ended 30 June 2014, by the due date, payment of the VAT due. The surcharge was calculated at 5% of the amount due of £61,143.66.
2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### 10 **Background**

- 15 3. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date or if he makes his return by that due date but does not pay by that due date the amount of VAT shown on the return. The Commissioners may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates.
- 20 4. The specified percentage rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first default the specified percentage is 2%. The percentage ascends to 5%, 10% and 15% for the second, third and fourth default.
- 25 5. Section 59 of VATA requires a VAT return and payment of VAT due on or before the end of the month following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].
- 30 6. The Appellant paid VAT on a quarterly basis and usually paid its VAT by a BACS payment. HMRC may allow additional time for payment when made by electronic means and pursuant to Regulation 40 (4) of the VAT Regulations 1995 allows an additional seven days after the end of the calendar month when payment would normally fall due (together with a further three days when the VAT is collected by direct debit). Limitations apply if the due date falls on a weekend or a bank holiday in which event the due date defaults to the last previous working day.
- 35 7. The Appellant had previously defaulted on VAT payments in period 12/13 when a VAT default SLN was issued. As it was a first default, no penalty was imposed. The Appellant defaulted again in period 03/14, as a result of which a VAT default surcharge was issued at 2% of the amount due. The surcharge payable was £648.56.

5 8. The Appellant submitted its 06/14 VAT return electronically on 30 July 2014 and was therefore on time. Payment of the VAT, if made electronically, was due no later than 7 August 2014, but was paid late in four instalments between 8 August 2014 and 18 August 2014

9. A surcharge liability notice was issued for £3,057.18 on 15 August 2014.

10. HMRC say that the Appellant would have been aware of the potential financial consequences of a further default having defaulted on previous occasions.

11. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). Section 59 (7) VATA 1994 sets out the relevant provisions : -

15 ‘(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

20 (a) the return or as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the commissioners within the appropriate time limit, or

25 (b) there is a reasonable excuse for the return or VAT not having been so despatched then he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question ..’

12. Section 108 Finance Act 2009 contains provisions under which surcharges are not imposed if deferred payment plans are requested and agreed before the due date and adhered to.

30 13. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

### **Appellant’s Case**

35 14. In its Notice of Appeal to the Tribunal dated 25th August 2014, the Company explained that all the Directors were away on holiday at the time payment was due, so payment could not be made as a signature was needed. The bank also had a daily limit of £20,000 so four payments had to be made.

15. In a further letter dated 21 October 2014 the Appellant added that it was following the illness of one of the director's (Mrs Smith's father) that they took the holiday and that this had seriously impacted upon the business.

5 16. At the hearing the Appellant's representative Mr Mayson said that there was a further reason which contributed to the VAT being paid late, which was that rent of £16,800 payable to the Company's landlord had inadvertently been paid twice. On 5 August 2014, shortly before the VAT payment was due, £16,800 was paid to the landlord and then on the following day a further payment of £16,631.14 was also made to the landlord. Mr Mayson could not explain why the two rental payments  
10 were different but said that this significantly depleted the Appellant's available cash resources, to the extent that there was insufficient money in the Appellant's account to pay the VAT in full.

15 17. Included with the Appellant's bundle of evidence was a statement by Mrs Justine Smith the finance director of the Company. In the statement Mrs Smith explained that she encountered personal difficulties during the latter part of 2013 and more particularly during 2014, as a direct consequence of her father's illness, which subsequently developed into a serious heart condition. She said that during the May half term holiday the family decided to try and get away for a short break to Spain and took a flight from Liverpool landing in Spain at approximately 10:00 pm. At midnight  
20 they received a call to say that Mrs Smith's father had taken a turn for the worse and as a consequence she located and booked flights which left Spain at 5:30 am the very next morning.

25 18. Mrs Smith says in a statement that her father's condition caused the family considerable distress, which in turn had a significant bearing on her own emotional state and ability to properly concentrate and devote adequate time to duties at work. On 25 May 2014 her father developed community acquired pneumonia. He was in critical care, put on a ventilator and in intensive care for six weeks.

19. Mrs Smith says in her statement:

30 "In August 2014 whilst the situation prevailed my husband and I decided to take the children away for a small break simply as an escape from the pressures and upsetting environment at home. This was possible as my sister agreed to cover the care requirements of our father. The break took place at the time when the VAT payment for period 06/14 was due. The days weeks and months were all merging together but I was maintaining all relevant records and was aware that the payment had to be made."

35 20. Mrs Smith goes on to say in a statement that it was because of totally unforeseen events, firstly the duplication of the rent payment to the landlord and secondly the £20,000 restriction by the bank on money transfers, that the default occurred, exacerbated by the fact that the only other person who could have authorised payments was also on holiday. Her husband had contacted HMRC on 8 August 2014  
40 and explained the difficulties, HMRC agreeing to take payment by way of four instalments. The default occurred simply because of a combination of unfortunate and unforeseen factors

21. Mr Mayson referred to a number of cases where appeals to the Tribunal in respect of VAT default surcharges or other penalties had been allowed. Two of these were on the grounds of serious illness or other significant and unforeseen personal circumstances which had contributed towards a default. The cases were *Purple Chameleon Ltd v HMRC*, where a director of the Appellant company had suffered a serious illness at the time of default, and *Breen and Redmires Nursery and Pre-school (Partnership) v HMRC* where a number of factors had contributed to the default and in particular the Appellant and another family member had both suffered serious illnesses at around the time of the default. In the latter case it was argued on behalf of the Appellant that although the events, if looked at individually would not amount to a reasonable excuse, viewed together and as a whole it was the accumulation which gave rise to a reasonable excuse. The Tribunal observed that whilst they agreed with that as a concept it is still necessary to look at the individual elements because the circumstances may be so within the control of an individual that they should be taken out of the reckoning.

### **HMRC's Case**

22. At the hearing Mr Philip Jones for HMRC said that the potential financial consequences attached to the risk of a further defaults would have been known to the Appellant after issue of the Surcharge Liability Notice for period 12/13. The information contained on the reverse of the Default Notice states:

‘Please remember your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.’

23. The requirements for submitting timely electronic payments can also be found -

- In notice 700 “the VAT guide” paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

24. Also the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5). The notices urge the trader to contact HMRC National Helpline Service (telephone number provided) if they are experiencing difficulty in meeting the due date for payment. The Appellant did not make contact with HMRC until 8 August 2014, by which time it was too late to agree a time to pay arrangement.

25. The Appellant submitted the VAT return on time on 30 July 2014. This would have reminded the directors of the due date for payment. It was the responsibility of the directors to ensure they were aware of due dates, and the consequences of late payment.

26. The Appellant Company has admitted that all three directors were on holiday at the same time but this was the choice of the directors. Whilst the desire for a holiday is perfectly understandable, arrangements must be made to ensure that the taxes of the Company are paid on time. The choice to take a holiday was a conscious one and was  
5 therefore foreseeable and capable of being planned around. If they were going to all be on holiday on the due date, then arrangements should have been made beforehand to ensure payment was made on time.

27. With regard to the duplication of the rental payment to the landlord, whilst this may have been unforeseeable, the amount represented only a quarter, or thereabouts,  
10 of the amount of VAT due. The Appellant should have paid what it could, thereby at least reducing the amount of surcharge.

28. The VAT return showed net VAT due to HMRC of £61,143.66. The VAT belongs to the Crown at all times and must be paid over as the law requires. It is not HMRC that make the rules and sets the amount of the surcharge, it is statute, it is what  
15 Parliament has asked to be done. When a VAT payment is late the legislation does not differentiate between the payment which is one day late or ten days late. The legislation is clear as to its intention and when a VAT payment is late statute provides for how the surcharge is to be calculated by reference to a percentage of unpaid VAT by the due date.

29. Therefore, HMRC say that the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).  
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### **Conclusion**

30. In considering whether the Appellant had a reasonable excuse for the late payment of VAT due in period 06/14, although the primary cause was an insufficiency of funds  
25 which is specifically excluded by s 71 VATA as being a reasonable excuse, it is necessary to consider the underlying causes of the insufficiency of funds.

31. In the Court of Appeal decision of *Customs and Excise Commissioners v Steptoe* [1992] STC 757 (“*Steptoe*”) Lord Donaldson MR said:

30 “if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds”

35 He went on to disapprove of a narrower test put forward by Scott LJ and emphasised the importance of whether the late payment of VAT arose because of reasons which were inescapable or reasonably avoidable:

40 “Scott LJ.... Is of the opinion that the underlying cause of the insufficiency of funds must be an ‘unforeseeable or inescapable event’. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness

5 and (b) it treats foreseeability as relevant in its own right, whereas I think that ‘foreseeability’ or as I would say ‘reasonable foreseeability’ is only relevant in the context of whether the cash flow problem was ‘inescapable’ or as I would say, ‘reasonably avoidable’. It is more difficult to escape from the unforeseeable than from the foreseeable.”

32. As Mrs Smith says in her witness statement, she was fully aware that the Appellant Company’s VAT period 06/14 would fall due for payment on 7 August 2014. She and her husband co-director would have also been aware that the only other person who could authorise the VAT payment would also be on holiday on that date.  
10 The fact that there was no-one available in the UK to authorise payment of the VAT was the primary reason it was not paid on the due date. The directors with a reasonable degree of foresight could have requested a time to pay arrangement with HMRC.

33. The duplicated rental payment to the landlord added to the problems and was  
15 unforeseeable. Nonetheless, as HMRC say, a substantial payment on account could be made, thereby reducing the amount of surcharge.

34. It is clear that Mrs Smith and the family were going through a very difficult time in the weeks and months prior to the default. Despite that, Mrs Smith was able to maintain all necessary records and lodge the Appellant Company’s VAT return for  
20 period 06/14 on time. It is therefore difficult to understand why, in those circumstances, she had not made prior arrangements for the VAT to be paid when it fell due, whether by direct debit or a specific mandate to the Company’s bank. It is also difficult to understand why Mr Smith left it until 8 August 2014 before contacting HMRC, by which time it was not possible to agree a time to pay  
25 arrangement.

35. We have to conclude that the directors of the Company did not take all the steps that could reasonably have been expected of individuals in their position, to avoid the late payment of VAT. There was we accept an unusual combination of events which contributed to the late payment, but individually nothing which could be said to be  
30 reasonable excuse. The illness of Mrs Smith’s father would clearly have impacted on her and her husband’s management of the Company’s affairs, but in all the circumstances not to the extent of preventing them from organising matters better than they did.

36. We therefore further conclude that the Appellant has not shown a reasonable  
35 excuse for late payment of VAT for the 06/14 period. The appeal is accordingly dismissed and the VAT default surcharge of £3,057.18 is upheld.

37. 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  
40 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: 12 MAY 2015**

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