



**TC04021**

**Appeal number: TC/2013/01265**

*VAT --default surcharge – late payment – payment on account regime – no seven day grace period for online payment –discriminatory- funds held in account charged by bank – late payment due to issue with bank – held- Tribunal no jurisdiction to consider concessionary treatment applied by HMRC – no evidence that late payment only due to late release of funds by bank – no reasonable excuse - appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KUIG PROPERTY INVESTMENTS LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE RACHEL SHORT  
MRS JO NEILL**

**Sitting in public at 45 Bedford Square, London WC1B 3DN on 20 January and 3 July 2014**

**Mr Cudlipp and Mr Lawson of JTC Group and Mr Anthony Ashby of Helix Property Group representing the Appellant**

**Mrs Lynne Ratnett and Mr Rowe instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents**

## DECISION

1. This is an appeal against a VAT default surcharge of £36,817 at the 5% rate for  
5 the 03/12 VAT period of the Appellant, Kuig Property Investments Limited (“Kuig  
Property”). The VAT was due to be paid for this period on 30 April 2012 but was not  
paid until 2 May 2012. The VAT due for that period was £736,346.

2. This appeal was adjourned by the Tribunal on 20 January 2014 in order to allow  
the Appellant to provide further information about the instructions given to and  
10 payments made by their bank, Allied Irish Bank, between 26 April and 3 May 2012.  
The adjourned appeal was heard before the same Tribunal on 3 July 2014.

### Agreed Facts

3. The Appellant had been in the “Payment On Account” (POA) regime  
15 intermittently since 2009 and HMRC had issued a Notice of Direction on 28 February  
2011 to bring them into the POA regime from the 06/11 VAT period. The  
concessionary seven day time extension to the due date for making VAT payments  
online was not therefore available. This was stated in HMRC’s Letter of Direction of  
28 February 2011 which said

20 *“Due dates for Payment; Please note that businesses in the Payments on  
Account regime are not entitled to the seven day extension to the due date for  
payments made electronically. If your company was previously granted the  
seven day extension, this concession is now withdrawn”.*

4. Under the POA regime the Appellant was required to pay advance instalments  
25 of their VAT liability by the last working day of each month. HMRC’s letter of 28  
February 2011 set out the due dates for their monthly payments on account including  
for the 03/12 period. In response to a request from Kuig Property, it was agreed that  
payments for the first and second months of the 03/12 period would be nil, however a  
balancing payment was due for the final month. The due date for that payment was 30  
30 April 2012. Payment of the VAT was made by Kuig Property on 2 May 2012 by  
CHAPS, 2 days late.

5. HMRC issued a default surcharge notice on the Appellant on 22 May 2012 for  
the late payment of the 03/12 VAT amount. HMRC reviewed and confirmed their  
decision to impose this default surcharge by letters to Kuig Property on 24 August and  
35 28 September 2012. The Appellant appealed against this decision on 13 February  
2013. HMRC agreed to extend the time period for the making of the appeal and the  
appeal has therefore been treated as made in time.

6. The Appellant is a property development company whose main source of  
income is rental payments. At the relevant time this rental income was paid into a  
40 secured account of the Appellant’s bank, Allied Irish Bank (“AIB”). Loan and interest  
payments were remitted from this account and any balance was paid into an AIB  
Channel Islands account, from which payments, including VAT payments, were  
made. Any access by the Appellant to this income was therefore dependant on sums  
being released by AIB. AIB notified Kuig Property on Thurs 26 April that funds  
45 would be released to make the VAT payment on Friday 27 April. The funds were  
released by AIB on Friday 27 April at 17.09 pm.

## Law

7. The relevant legislation is set out at s 28(2) Value Added Tax Act 1994 (“VATA 1994”) which deals with the payment on account regime (POA):

5           “An order under this section may provide that a taxable person of a description specified in the order shall be under a duty-

          (a) to pay, on account of any VAT he may become liable to pay in respect of a prescribed accounting period, amounts determined in accordance with the order, and

          (b) to do so at such times as are so determined”

10   8. Late payments under the POA regime are dealt with by s 59A VATA 1994:

          “*For the purposes of this section a taxable person shall be regarded as in default in respect of any prescribed accounting period if the period is one in respect of which he is required, by virtue of an order under section 28, to make any payment of account of VAT and either-*

15           (a) a payment which he is so required to make in respect of that period has not been received in full by the Commissioners by the day on which it became due; or

          (b) he would, but for section 59(1A), be in default in respect of that period for the purposes of section 59”

20   9. S 71 VATA 1994 gives some guidance on the construction of a “reasonable excuse” for the purpose of s 59A:

          (1) *For the purpose of any provision of sections 59 – 70 which refers to a reasonable excuse for any conduct-*

25           (a) *An insufficiency of funds to pay VAT due is not a reasonable excuse.....*

## Appellant’s Arguments

### *The loss of the seven day grace period*

10. The Appellant argued that imposing the POA regime and the resultant loss of the additional seven day time window for making VAT payments online was to the particular disadvantage of companies like Kuig Property, who were dependant on the receipt of rental payments towards the end of a quarter and the release of funds from their bank and therefore always had to operate on a very tight timetable to make payments on time. HMRC should not have been allowed to refuse this additional seven day’s payment period to the Appellant. It was discriminatory for HMRC to remove the concessionary seven day payment window for POA traders which would otherwise be available for payments made online. HMRC’s lack of prior notice and consultation on the imposition of the POA regime was arbitrary and placed undue pressure on companies like Kuig Property.

### *Reasons for late payment*

11. In respect of the payment which was due on 30 April 2012, the funds to make the VAT payment were not released by AIB until after close of business on Friday 27 April before the Monday due date for payment. Any payments made on Monday had

to be processed by AIB before midday and therefore the Appellant had a very short turnaround time to process this payment. On Monday 30 April the Appellant's payment administrator was in a board meeting all morning and so was not able to process the payment on time, as a result instructions were not sent to AIB to make the payment until 1.37pm on Tuesday 1 May. The late notification of the release of funds from AIB on Friday 27 April and the unavailability of the administrator were the reasons for the late payment and this should be treated as a "reasonable excuse" for late payment.

## 10 **HMRC's Arguments**

### *Reasons for late payment*

12. For HMRC Mr Rowe argued that the onus of proof was on the Appellant to demonstrate that there was a reasonable excuse for making this payment late. In this instance the Appellant was aware in advance of the deadline for making the VAT payment and knew of the time required by AIB to release funds and to make the payment on time. HMRC had notified the Appellant in February 2011 that it was in the payments on account regime, that the seven day extension for making payments online did not apply and provided the Appellant with a schedule setting out when payments were due. The late payment had actually be caused by a lack of funds and this could not be treated as a reasonable excuse by reference to s 59A (8) Value Added Tax Act 1994.

### *Loss of the seven day grace period*

13. On behalf of HMRC Mr Rowe did not provide any specific response to the Appellant's arguments about the fairness or otherwise of HMRC removing the seven day payment extension period for traders in the payments on account regime. Mr Rowe said that he was not able to provide an explanation for HMRC's policy for removing the payment extension period. Mr Rowe did point out that HMRC had agreed that Kuig Property could use the "actuals" scheme meaning that its monthly POA amounts for the first and second months of the 03/12 period were nil. The only payment which was due for the 03/12 period was the final month's balancing payment, which had been made late.

## **Decision**

14. The onus of proof is on the Appellant to demonstrate that it has a reasonable excuse for late payment of the VAT for this period. It was not disputed that Kuig Property were brought within the payments on account regime under s 28(2) VATA 1994 by reason of their VAT liability exceeding £2 million for the 2009/10 year. It was not disputed that the VAT payment due on 30 April 2012 had been made two days late.

15. Kuig Property raised a number of points concerning the fairness or otherwise of HMRC imposing the POA regime and as a corollary refusing the seven day grace period for making payments online, to which HMRC did not provide a response. In considering these arguments the Tribunal has first to decide whether these are issues which fall within its jurisdiction. On the basis of the decisions in *HMRC v Hok* ([2012] UKUT 363 (TCC)) and *Prince & Others v HMRC* ([2012] UKFTT 157

(TCC)) it is clear that the Tribunal has no general supervisory jurisdiction in relation to the conduct of HMRC, including its application or otherwise of its discretion. Therefore the Tribunal has no jurisdiction to consider the fairness or otherwise of HMRC's decisions to apply the payments on account regime or to remove the concessionary seven day time extension for making VAT payments from those in the payments on account regime, which can only be dealt with through judicial review proceedings in the administrative court.

16. However, this Tribunal can remove the Appellant's liability to this surcharge if the Appellant can demonstrate that it has a reasonable excuse for late payment as provided at s 59A (8) VATA 1994. There is no statutory definition of what amounts to a reasonable excuse but the VAT legislation does state that lack of funds is not a reasonable excuse (s 71 VATA 1994). Tax tribunal decisions on what amounts to a reasonable excuse have often considered whether a taxpayer has acted in the way in which a reasonably prudent business person could be expected to act in similar circumstances and we have adopted this test.

17. The Tribunal accepts that the loss of the additional seven day period for making payments online by taxpayers in the POA regime does put additional pressure on companies such as Kuig Property who have cash flow management issues but the Tribunal is not convinced that it was either the lack of this seven day extension or the failure by AIB to release funds in a timely manner which was the main cause of the late payment in this case.

18. The Tribunal has concluded on the basis of the evidence provided by Kuig Property's representatives that Kuig Property simply failed to prioritise the making of this VAT payment on Monday 30 April, despite having all the relevant staff available to process the payment. Kuig Property knew when the VAT payment was due and funds to make that payment were available from the start of business on Monday 30 April. Our view is that payment instructions could have been arranged despite the board meeting which was being held on that day. A reasonably prudent business person would have ensured that the VAT payment was processed early on Monday morning and Kuig Property has not convinced us that there is any reason why they could not have done this.

19. The Tribunal has concluded that Kuig Property does not have a reasonable excuse for late payment of VAT for the 03/12 VAT period, this appeal is therefore dismissed and the default surcharge is confirmed.

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.

**RACHEL SHORT  
TRIBUNAL JUDGE**

**RELEASE DATE: 19 September 2014**