



**TC03722**

**Appeal number: TC/2014/01352**

*VAT default surcharge - whether a time to pay arrangement had been agreed - on the facts  
yes - appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PRINCI LONDON LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL S CONNELL  
MR NICHOLAS DEE**

**Sitting in public at 45 Bedford Square, London WC1 on 22 April 2014**

**Mr Marc Voulters of SRLV Accountants for the Appellant**

**Ms Rita Pavely, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

1. Princi London Limited ('the Appellant') appeals against a default surcharge of  
5 £13,378.23 imposed in respect of the VAT period ended 26 October 2013 for its failure to submit, by the due date, payment of the VAT due. The surcharge was calculated at 10% of the VAT due of £133,782.30.

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### 10 Background

3. The Appellant had previously defaulted on VAT payments in periods 07/11, 07/12, 10/12, 04/13 and 07/13 prior to the default under appeal, those of 04/13 and 07/13 having subsequently been removed by HMRC.

15 4. Section 59 VATA 1994 provides for default surcharges. All VAT registered businesses are required by law to send to HMRC both their return and payment of the VAT by the due date, which is normally one calendar month after the end of the accounting period covered by the return.

20 5. The Appellant paid VAT quarterly to Non Standard Tax Periods. Therefore its VAT return and the related payment was due on or before the corresponding date in the month following each quarter period.

25 6. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs. 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for electronic filing and payment. The Appellant's VAT for period 10/13 was due to be paid no later than 3 December 2013.

30 7. The period 10/13 had a due date of 3 December 2013 for electronic VAT Payments and Returns. The VAT Return was received electronically by HMRC on 3 December 2013. The Company paid its VAT by way of two FPS transactions, as received by HMRC on 13 December 2013.

8. Section 71 (1) VATA, 1994 - Reasonable Excuse provides:

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

35 (a) an insufficiency of funds to pay any VAT due 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.

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### Appellant's contentions

9. The Appellant does not dispute that its VAT payment for the period 10/13 was late. It is also agreed that the payment, if made electronically, was due no later than 3  
5 December 2013, but did not reach HMRC until 13 December 2013.

10. The Appellant says that it had agreed a time to pay arrangement with HMRC. Mr Tan, the Appellant's in-house accountant gave evidence to the Tribunal and said that on 3 December 2013 he telephoned HMRC to request time to pay. He did not take the name of the officer with whom he spoke, but the request was in any event refused. He  
10 says that he reported back to the company directors who instructed him to telephone HMRC again, which he did at 14.21 pm. He says that he spoke to Ms Kyne and explained that the company was awaiting a payment of £300,000 or thereabouts relating to alterations and a refurbishment of its restaurant in Soho, London. He explained that the payment had been delayed but that it was imminent and that the  
15 Appellant Company would be able to pay in full by 13 December. Mr Tan says that Ms Kyne agreed a time to pay, and said that if the Appellant received a surcharge he should telephone HMRC to explain that a time to pay arrangement had been agreed and the surcharge would then be cancelled. Mr Tan produced a copy of the Appellant Company's telephone records, which confirmed that two calls were made from the  
20 Appellant Company's telephone number on 3 December 2013, one timed at 11.21 and another timed at 14.21.

11. Mr Voulters for the Appellant said that a valid request for time to pay had been made and agreed with HMRC in time, prior to the due date for payment, and that the Appellant had complied with the arrangement, making payment in full by means of  
25 two FPS payments on 13 December 2013.

12. Mr Voulters also argued that the surcharge of £13,378.23 is, in any event, unfair and entirely disproportionate to the ten day delay in payment.

### HMRC's contentions

13. HMRC deny that any time to pay arrangement was agreed with the Appellant.

30 14. Ms Pavely, for HMRC, said that as the payment was late and there was no time to pay arrangement in place, the surcharge was correctly imposed in accordance with the VAT Act 1994 s 59(4), unless the Appellant has shown a reasonable excuse.

15. Ms Pavely said that the Reviewing officer from HMRC's Appeals and Reviews department spoke to Ms Kyne who said that she could not recollect speaking to the Appellant; furthermore she said that due to the size of the VAT return in question, she would not have been authorised to discuss a time to pay agreement; she would have referred the Appellant to a different section within the department. However, regrettably, she did not make a note of receiving the call and passing it on to the other  
35 team.

16. HMRC records show that a telephone conversation took place between Mr Tan and another HMRC employee (Ms L MacDonald) on 3 December 2013, but no time is recorded for this telephone conversation. The note clearly states that Mr Tan was advised that the surcharge would not be cancelled as a TTP was not agreed.

5 17. Ms Pavely submitted that the Appellant had been advised of the default surcharge regime previously and therefore must have been aware of the consequences of not paying its VAT by the due date. The first default was recorded for period 07/11 and the company entered the Default Surcharge regime. The potential financial consequences attached to the risk of further default should have been known to the  
10 Appellant from this point on, given the information printed on the Surcharge Liability Notice.

18. The Appellant says that the surcharge is entirely disproportionate to the modest delay which occurred. Ms Pavely for HMRC said that the case of *Total Technology (Engineering) Limited v HMRC* which was heard in the Upper Tribunal held that:

15 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.  
2) The Tribunal found that the DS penalty does not breach EU law on the principle of proportionality.  
3) In order to determine whether or not a penalty is disproportionate,  
20 the Upper Tier Tribunal decision in the case of case of *Total Technology* addressed the following factors:

- 25 (a) The number of days of the default  
(b) The absolute amount of the penalty  
(c) The 'inexact correlation of turnover and penalty'  
(d) The 'absence of any power to mitigate'

The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp  
30 decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality.

### Conclusion

35 19. Included with HMRC's evidence was a copy of HMRC's telephone record (the Taxpayer Designatory Data Record, known as the 'DTR') of conversations with representatives of the Appellant, including a telephone conversation with Mr Tan on 3 December 2013. This clearly showed that a conversation took place with Mr Tan, and that no time to pay arrangement was agreed. However the time of the conversation is not recorded. We conclude however that this was the conversation which Mr Tan had  
40 with Ms L MacDonald at 11.21am. There was however no record in the DTR of any conversation with Mr Tan later in the day.

20. Also included with HMRC's evidence was a copy of its IDMS records which records events on a taxpayer's file including telephone conversations. Unfortunately,

although these records included periods before and after 3 December 2013, the page for that date was missing.

21. It is clear to us that Mr Tan made a second telephone call to HMRC on 3 December 2013. He produced a copy of the manuscript note he had made of his conversation with Ms Kyne at 14.21 on that date. The fact that he knew the officer's name confirms that he must have spoken to Ms Kyne. Unfortunately Ms Kyne cannot recall the conversation, and in any event says that she was on a separate section that day and would not have been able to deal with a time to pay request for a liability which exceeded £100,000. The fact that a telephone conversation took place between Ms Kyne and Mr Tan, but was not recorded on either of HMRC's telephone records systems, is unfortunate.

22. However, on the available evidence we find that a time to pay arrangement was agreed between HMRC and the Appellant Company. The Appellant has therefore shown a reasonable excuse for its late 10/13 VAT payment.

23. For the above reasons the appeal is allowed and the surcharge for period 10/13 is discharged.

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.

**MICHAEL S CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 11 June 2014**