



**TC04717**

**Appeal number: TC/2015/03485**

**Value added tax- default surcharge – whether a reasonable excuse – No – Appeal dismissed.**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

	<b>ETB (214) LTD</b>	<b>Appellant</b>
	<b>- and -</b>	
	<b>HER MAJESTY'S REVENUE AND CUSTOMS</b>	<b>Respondents</b>

**TRIBUNAL: JUDGE DR K KHAN**

**Matters heard on 6 October 2015.**

**The Tribunal determined this appeal on 6 October 2015 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (Default Paper Cases) having first read the Notice of Appeal dated 30 May 2015 and HMRC's Statement of Case dated 10 July 2015.**

## DECISION

### **Introduction**

5 1. This is an appeal against a Default Surcharge for the period 12/14 in the sum of £972.11 calculated at 5% of the tax due being £19442.26.

2. The Appellant has been registered for VAT since 1 April 1973 prior to changing to a group registration on 1 July 2013.

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3. The Appellant has been in the Default Surcharge Regime from period 12/13 onwards.

### **Background facts**

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(1) The Appellant requested a review of the surcharge in a letter dated 25 February 2015 and presented further information to assist their

deliberations in a letter dated 18 March 2015. The Respondents upheld the surcharge by letter on 2 April 2015.

(2) The Appellant sent additional information by letter dated 7 April 2015 which the Respondents considered and sent a reply maintaining the surcharge on 13 April 2015.

(3) There was yet further information provided by the Appellant on 24 April 2015 which the Respondents considered and maintained the Surcharge Penalty.

(4) The Appellant acknowledges that the payment for the period 12/14 was rendered late and as a result a default occurred.

15 **The Appellant's submission**

(1) The Appellant has traded through a number of businesses over a twenty year period during which time they collected substantial VAT from customers and paid this to HMRC without penalty.

5 (2) They sold the assets and goodwill of the business on 31 December 2014 and as a consequence had to crystallize all the debt and work in progress within the company. This had the effect of inflating the VAT due for the period subject to appeal.

10 (3) On 1 January 2015, the Appellant no longer directly employed any staff since the business had effectively been sold.

(4) In the period December 2014, the Appellant was taken ill with viruses and towards the end of 2015 it became clear that the cash  
15 flow within the business would prevent payment of VAT being made on time. The required funds were immediately raised through

another common company and the VAT payment was made thirteen days late.

(5) The Appellant has always been diligent and timely in their payment of their tax liability.

### **HMRC'S submissions**

(1) HMRC say that the surcharge was correctly levied in accordance with the law and given the history of the Appellant's surcharge liability they would have known the date for the submission of the return and payment of VAT. Further they would have had the necessary HMRC contacts to assist if there were problems with the timely payment of the VAT. The Surcharge Liability Notice VAT 160 would have assisted the Appellant in understanding how the

surcharges are calculated and the percentages used in those calculations

(2) The Respondents say that since the director Edward Thackray, who

5 had ultimate responsibility for the timely submission of the VAT return and payment, resigned on 31 December 2014 there was reliance on a third party to submit the return and to pay the VAT due. Such reliance on a third party precluded there being a reasonable excuse under the provisions of VATA 1994 Section  
10 71(1) (b).

(3) The sale of the business and its consequential effect on the liability

to VAT was known by the directors at the time and therefore a foreseeable event. It would be reasonable to expect a prudent  
15 businessman to make provision for such liability and to allocate funds from the sale to meet the tax liability.

(4) The Respondents say that since the Appellant explained that they were waiting for funds to be received to pay the VAT and in such case an insufficiency of funds at the due date is not a reasonable excuse. A better course of action would have been for the Appellant to contact the Respondents before the due date to explain the lack of funds and to make arrangements for payment.

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(5) Section 71(1) (a) VATA 1994 specifically excludes an insufficiency of funds as providing a reasonable excuse for late payment and the removal of the surcharge.

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(6) HMRC say that the Appellant sought to raise funds by selling shares held in an associated company and did not allow sufficient time for cleared funds to be received by the Appellant's bank account to enable them to pay the VAT on time. It is clear that the Appellant

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did not obtain an overdraft facility which would have facilitated an earlier payment.

## **Conclusion**

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(1) There is no question that the Appellant was late in making the payment. This is acknowledged and appears to be the result of an insufficiency of funds at the due date.

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(2) The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal's view, this burden has not been discharged and there is no reasonable excuse for the Appellant's late payment of VAT. It is

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sensible for traders in a difficult situation to enter into negotiations with HMRC before the due date for the payment of tax. The default

surcharge is levied if payment is made late but not in cases where Appellant had negotiated a time to pay arrangement and agreed a payment schedule. Sadly this was not done,

(3) It is clear to the Tribunal that the Appellant through the Director

5 dealing with this matter had a history of dealing with the Company's tax affairs in a diligent and timely fashion. There is no question that they would have wanted to do the right thing. This is quite clear from the correspondence between the parties. However, the Tribunal has very limited discretion in dealing with these

10 matters. If a taxpayer is late with the payment of their tax then a penalty is applied. In this case, the penalty was applied in accordance with the law and the payment was late. There are no grounds for holding that there is a reasonable excuse and the appeal is accordingly dismissed and the surcharge in the sum of £972.11 is

15 upheld.

4. This document contains full findings of facts 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

5 received by the Tribunal no later than fifty six days after the 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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**TRIBUNAL JUDGE  
K KHAN  
RELEASE DATE: 17 NOVEMBER 2015**

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