



TC05239

Appeal number: TC/2015/07294

***VALUE ADDED TAX – late payment – whether reasonable excuse – no –
appeal dismissed***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Rossway Ltd.

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE DR K KHAN

The Tribunal determined this appeal on 20 June 2016 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 19 December 2015 and HMRC's Statement of Case of 14 January 2016.

DECISION

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Introduction

1. This is an appeal against a Default Surcharge for the late payment of VAT for the period 08/15 which had a due date of 7 October 2015. While the return was received by the due date, the payment was received on 9 October 2015, which is two days after the extended due date.

2. The penalty was levied at a rate of 2% of the tax due £36,625.82 which gave a penalty of £732.51.

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Legislation

3. VATA, 1994; S. 59 and 71

VAT registered businesses are required by law to submit their return and make sure that payment of the VAT due has cleared to HM Revenue and Customs (HMRC's) bank account by the due date. The due date is shown on your VAT Return and is normally one calendar month after the end of the accounting period covered by the return.

Background facts

4. The Appellant has been in the Default Surcharge Regime since the period 05/15. For all periods from 05/15 onwards, the Appellant's method of payment has been using the Faster Payment Service (FPS).

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5. The Appellant has a limited liability company which was registered for VAT on 9 June 2014.

6. The Appellant's business is the construction of commercial property and the development of building projects. The sole director of the company is Mr B Dowd. The Appellant is advised by an accountant on taxation matters.

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Appellant's submissions

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7. The Appellant, through their Director, Mr B Dowd, stated that the VAT return was submitted by the due date but the payment of the tax was two days late. He explained that such a late payment in the commercial environment would be “a perfectly acceptable practice and only attract interest plus a late payment fee”. For this reason, the present penalty being imposed was not just and reasonable.

8. His accountant had advised him that if paid by Direct Debit his payment would have been one day earlier than the due date.

9. The imposition of the penalty would impose financial hardship and cash flow difficulties on the company.

10. The Appellant had not received any warning of the surcharge when a letter would have “highlighted the payment date issue and we would have rectified the situation”.

HMRC’s submissions

11. The payment was in fact made late which was two days after the due date. The Appellant would have known of the financial consequence attached to a late payment having previously received information on the Surcharge Liability Notice, which details how surcharges are calculated and the percentages used in determining any financial surcharges pursuant to Section 59(5) VATA 1994.

12. HMRC says they have been compliant with all legislative requirements for the issue, calculation and service of the Default Surcharge Notice. The HMRC website has adequate information on the penalty as well as clear details of online banking using electronic payments. The information clearly separates the payment by Direct Debit from FPS, which are two different forms of payment. They contend that the Appellant would have used the VAT Payment Deadline Calculator, which is a tool available to assist all traders and it would have clearly shown that the last date for payment using FPS, which was the Appellant’s chosen method of payment, was 7 October 2015.

13. On submission of the VAT return, the Appellant would have received an acknowledgement stating that the tax must be paid electronically and that if the Appellant had been paying using the Direct Debit system then a different acknowledgement would have been presented at the time of submission. The only way that a payment would be due by 10 October 2015 is where the payment was made by Direct Debit. The Appellant does not and has never made payment using that method. HMRC acknowledge that Mr Dowd is the director of another company which makes payments using the Direct Debit Mandate and possibly has confused the payment method for the two companies.

14. HMRC contends that it is no excuse for the Appellant to say that they relied on the third party advice of their accountant. Directors of the company have the ultimate responsibility for the timely submission of VAT returns and payment.

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Conclusion

10 15. The Appellant has confirmed that the payment of the VAT was made late. There is no issue regarding the service of the Surcharge Liability Notice which advises on how the surcharges are calculated and the percentages used. These documents are computer generated and HMRC have provided copies which would have been served on the Appellant.

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16. The legislation is quite clear that surcharges are penalty based solely on the amount of the VAT paid after the due date, no matter the length of delay, and should not therefore be held in comparison to interest rates which may be payable in respect of other heads of duty or money loaned by financial institutions or other commercial institutions. The penalty is imposed by law for the late payment of VAT and the Appellant would have a defence for such a penalty if there is a reasonable excuse. While a reasonable excuse is not defined in law it is an excuse which, when viewed objectively, would be reasonable in the context of the delay that has triggered the penalty. While HMRC have provided guidance on what is a reasonable excuse and have used the term “unforeseeable and exceptional event” beyond the Taxpayer’s control the Tribunal takes a broader view than this interpretation.

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17. The Appellant does not have a reasonable excuse on the grounds that they relied on the advice of their accountant. It is quite clear in the legislation at Section 71 VATA 1994 that reliance on any other person or third party does not provide a reasonable excuse for a late payment. Further, the Appellant has stated that a Direct Debit payment would have provided a payment date of 10 October 2015 but this was not the chosen method of payment for the Appellant. Rather they paid by the FPS and therefore the rules relating to Direct Debit payments would not be applicable in this case.

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18. The Appellant stated that they had not received advance warning of the surcharge and if such a warning had been issued then this would have highlighted an issue which could have been rectified. Each time HMRC send out a Surcharge Liability Notice they will warn the party that they may be liable to a Surcharge Penalty. There is no surcharge issued the first time a business is late but rather the Notice acts as a warning to the Taxpayer. Subsequent defaults within a twelvemonth period, the surcharge period, may result in a surcharge assessment. Each time a default occurs the surcharge period will be extended. There is no liability to a surcharge if a nil or repayment return is submitted late, or the VAT due is paid on time but the return is submitted late (although default is still recorded). In the circumstances therefore the

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Appellant did receive a warning letter from HMRC but the Notice which was received would have sufficient information to indicate the due date for the payment.

5 19. A director has the ultimate responsibility for the timely submission of the VAT Return and any tax due thereon. This cannot be passed to a third party. There is nothing in this case that indicates that the Appellant has a reasonable excuse and therefore the appeal is dismissed and the surcharge in respect of the period 08/15 is upheld.

10 20. 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
15 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

20 **DR K KHAN**
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2016