



**TC05421**

**Appeal number: TC/2016/02211**

*VALUE ADDED TAX – late payment of VAT due on Return –whether  
reasonable excuse for late payment – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Gelato Gelato Ltd**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE K KHAN**

**The Tribunal determined this appeal on 15 August 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 26 April 2016 and HMRC's Statement of Case dated 18 May 2016.**

## DECISION

### Introduction

- 5 1. This is an appeal against a Default Surcharge for the period 07/15 late payment  
of VAT. The Surcharge was levied at 15% of the tax due with the amount being  
£1697.77. The period 07/15 had a due date of 7 September 2015 for electronic VAT  
Returns and Payments. The VAT Return was received before the due date of 2  
10 (FPS) transaction which reached HMRC's bank account after the due date on 8  
September 2015. As a result of the late payment a Surcharge Liability Notice  
Extension was issued at 15%.
2. The Appellant has been in the Default Surcharge Regime since the period 04/11  
and there have been eleven defaults in the period over four years.

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### Legislation

3. VATA 1994 S.59 (4); 59(5); Section 70; Section 71(1).

VAT Regulations 1995 Reg 25A; and Reg 40

4. The legislation lays out provisions whereby a Default Surcharge may be levied  
20 where HMRC have not received a VAT Return for a prescribed accounting period by  
the due date, or have received the Return but have not received by the due date the  
amount of VAT shown on the Return as payable.
5. The first default does not give rise to a Penalty but the Trader is brought within  
the Default Surcharge Regime. A second default within a twelve month period leads  
25 to a Penalty of 2% of the tax due. Further defaults within the following year result in a  
5% Penalty which with further defaults can increase to 15%.
6. A Trader will escape a Penalty if a reasonable excuse can be established.

### Appellant's submission

- 30 7. The Appellant states in its Notice of Appeal dated 26 April 2016:

35 "As we mentioned in our appeal the payment was made on 8 September to  
reach the account by the 10<sup>th</sup>. This was a last Return to be made as the  
premises has now been sold and is no longer trading. The Company is  
now dormant and has no money or assets, so would hope you would  
consider this surcharge".

## **Respondent's submission**

8. The Respondents say that the Appellant does not have a reasonable excuse for the late payment. They say that the Surcharge in respect of the period 07/15 has been  
5 correctly issued in accordance with VATA 1994 S. 59(4).

## **Conclusion**

9. The Appellant made their VAT Returns and Payment electronically. When the VAT Return was submitted for the period 07/15 on 2 September 2015, the Appellant  
10 would have received an acknowledgement which advises both the Payment due date and for the Appellant to check with their bank as to the times for making payment by way of the FPS.

10. The HMRC web pages provide a VAT Payment calculator which advises the last day for payment by FPS as being 7 September 2015.

15 11. The Appellant did not enter into a Time To Pay arrangement which would have allowed a more sympathetic timetable for payment in cases where business suffers short term financial difficulty.

12. The Appellant, pursuant to Reg. 40 of VAT Regulations 1995, is required to pay to HMRC "such amount of VAT that is payable by him in respect of the period to  
20 which the Return relates not later than the last day on which he is required to make that Return". There is therefore a statutory obligation on a person required to make a Return to pay the VAT to HMRC. The Appellant in their letter of 7 December 2015 refers to "business being very slow we have now sold the business to pay off debts that have amalgamated". The business traded as a licensed restaurant therefore the  
25 VAT would have been calculated at the point of sale and prior to the due date. The monies would therefore be available to the business to meet its tax obligations on time. Where the company has cash flow difficulties this does not constitute a reasonable excuse pursuant to section 71(1)(a) VATA 1994.

13. It appears that the Appellant continued to trade after the period 07/15 and submitted a VAT Return for the period 10/15 which had total value sales and all  
30 output excluding VAT as £36,308.00. The Default Surcharge of £1,697.77 for the period 07/15 is less than 2.15% of the total value of sales net of VAT which is £79,676.00.

14. The Company House record presented shows that the company is still active as  
35 at 18 May 2016.

15. In the Tribunal's view the Appellant has provided no grounds on which a reasonable excuse for late payment of the VAT for the period 07/15 can be established. The Appellant did not take appropriate and sufficient steps to ensure that

the company met its VAT obligations. The Appellant's failure to prioritise the submission of the VAT is not an acceptable practice. The directors are ultimately responsible for the timely submission of the VAT Return and any tax due thereon.

5 16. The Respondents drew the Tribunal's attention to the fact that pursuant to Section 70 VATA 1994, mitigation of penalties is not engaged with respect to the surcharges under Section 59 VATA 1994. The rates of surcharges are laid down by law the Tribunal has no power to reduce the amount due to mitigating circumstances.

17. The appeal is therefore dismissed and the Penalty is upheld.

10 18. 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)" 15 which accompanies and forms part of this decision notice.

**DR K KHAN**  
**TRIBUNAL JUDGE**

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**RELEASE DATE: 18 OCTOBER 2016**