



TC04045

Appeal number: TC/2014/00166

Value Added Tax - Default surcharge - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KITCHENS & BATHROOMS (LONDON) LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HOWARD M. NOWLAN
MR CHARLES S. BAKER**

Sitting in public at 45 Bedford Square in London on 18 August 2014

The Appellant was neither present, nor represented

Mark Ratcliff of HMRC on behalf of the Respondents

DECISION

1. This was a default surcharge appeal in which we were expecting Mr. David Beskins to appear on behalf of the Appellant. When the clerk telephoned Mr. Beskins to ascertain whether he intended to appear when nobody had arrived on behalf of the Appellant, Mr. Beskins apparently said that he had forgotten the hearing, now worked for another company, and he requested a postponement.
2. In view of the fact that in many default surcharge cases the appellants' contentions are clearly recorded in the documentation, and that for this Appeal HMRC had prepared for the hearing and were in attendance, we decided to proceed with the hearing in Mr. Beskins' absence. Since we have now heard the case in his absence, we should mention that the Appellant can request a re-hearing. There is no automatic right to a re-hearing, and when the Appellant has seen the basis of our decision on the information that we did have, the Appellant will have some further basis for deciding whether it would be productive to request a re-hearing or not.
3. The Appellant had suffered several surcharges for late payment of VAT prior to the one that we were concerned with, namely that for the period ending on 03/12. The amount of the surcharge for the late payment of the VAT for the period 03/12 was £606.40. The explanation for most of the earlier defaults was that the business had suffered a downturn during the recession, and it was clear that it had struggled to pay its VAT on time. On at least one occasion when HMRC had assumed that they would be able to take the VAT owing by direct debit, it proved that there were not the funds on the account, so that the direct debit facility was cancelled. Notwithstanding this, it certainly appeared that the Appellant had been doing its best to catch up with various debts to HMRC, and certainly at least one default surcharge had been cancelled because HMRC accepted that there had been in force a relevant time to pay agreement.
4. The immediate circumstances surrounding the default for the period 03/12 were that payment was paid electronically, but it was paid one day late on 8 May, rather than on or before 7 May, the last day for paying the VAT electronically for the period 03/12 on time.
5. The Appellant had advanced three grounds on which it suggested that the relevant surcharge should be withdrawn.
6. The first was irrelevant. HMRC had at one time said that the VAT return was filed late and that payment was also made late, and the Appellant had said that because the return was filed on 30 April 2012, it was wrong to assert that it had been filed late. HMRC accepted that this was so, and they apologised for having said that the return was filed late. This, however, had no bearing on whether the VAT itself had been paid late, as it had been, and so this first ground can really be ignored.
7. The second ground advanced was that as the Appellant claimed that it paid its VAT by direct debit, and it was up to HMRC to decide when to take the VAT, if the VAT had been taken late, then this was HMRC's fault. This seems to us to have been a rather strange contention in that the Appellant must in fact have known that the contention was wrong. The Appellant had been told in both February and April 2012 that because direct debit payments had not been made, on account of there being inadequate moneys on the account,

the direct debit facility had been cancelled, and it was up to the Appellant to put a replacement facility in place, and to ensure that this was done in due time to enable HMRC to take the payment for the VAT for period 03/12 by 7 May. On 8 May, Mr. Beskins phoned HMRC, and presumably ascertained that, contrary to the contention in the first sentence of this paragraph, the new direct debit facility was not yet operative, and was indeed not to be operative until 11 May. Accordingly Mr. Beskins paid the VAT, on the phone on 8 May, by debit card payment.

8. The fact that Mr. Beskins paid the VAT on 8 May by debit card appears to undermine any claim that the late receipt of the VAT by HMRC was HMRC's fault because HMRC was late in taking the VAT by direct debit. It would have been impossible to take the VAT on 7 May, or indeed before 11 May, by direct debit. We have given some thought to whether Mr. Beskins might complain in the alternative that HMRC had somehow led Mr. Beskins to believe that HMRC would be able to take the payment by direct debit by the due date. However we failed to see any basis on which that could be asserted since HMRC had twice informed the Appellant that the facility had been closed, and that it was up to the Appellant to arrange a replacement direct debit facility that had to be operative in time to pay the VAT by 7 May. The Appellant had failed to do that and could hardly blame HMRC for that failure.

9. The third ground advanced as to why the surcharge should be withdrawn was that the Appellant was "a small company and struggling to pay". When HMRC responded to this claim by saying that shortage of funds was no reasonable excuse for the late payment of VAT, the Appellant complained that HMRC was ignoring its various contentions, and that there was no point in advancing points in relation to hardship and cash flow problems if HMRC was simply going to respond by saying that the very fact of late payment automatically occasioned a liability to surcharge, once the Appellant was fully in the surcharge regime, unless the statutory definition of reasonable excuse could be established.

10. We have to confirm that the law in relation to default surcharge is very strict, and that the circumstances where "reasonable excuse" can be established are tightly defined. It is expressly stated that shortage of funds cannot rank as a reasonable excuse though case law authority has clarified that where the shortage of funds results from very delayed payment by a dominant customer, that late payment (as distinct just from the shortage of funds) might occasion a reasonable excuse. In the present case, there is no suggestion of any such late payment by a dominant customer. Furthermore, contentions in relation to "struggling to pay" seem irrelevant in this case because it was the confusion in relation to the direct debit facility on the part of the Appellant that occasioned the late payment. Indeed the Appellant was able to pay by debit card payment anyway on 8 May. The only material struggle that the Appellant might thus have suffered would relate to paying the surcharge itself, which is an even more remote, and irrelevant, factor. In other words if the company unable through shortage of funds to pay its actual VAT on time is deemed to have no reasonable excuse for late payment, it must be far more obvious that the company that could have paid its VAT one day earlier, and whose struggle can logically relate only to paying the surcharge can certainly not establish any sort of reasonable excuse for late payment of the VAT.

11. We accordingly dismiss the Appellant's appeal, but remind the Appellant that it might apply for a re-hearing at which it appears in person or is represented.

Right of Appeal

12. This document contains full findings of fact and the reasons for our decision in relation to this appeal. Any party dissatisfied with the decision relevant to it 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.

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**HOWARD M. NOWLAN
TRIBUNAL JUDGE**

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RELEASE DATE: 29 September 2014

