



TC04066

Appeal number: TC/2014/01910

VAT – default surcharge – reasonable excuse – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SELECT WINDOWS (HOME IMPROVEMENTS) LTD Appellant

-and-

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

**TRIBUNAL: JUDGE KEVIN POOLE
 MR MICHAEL SHARP FCA**

Sitting in public in Priory Court, Bull Street, Birmingham on 28 August 2014

Gary Wylde, Director, for the Appellant

Pat Checkley, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns a default surcharge of £8,029.28 imposed in respect of
5 the late payment of VAT by the Appellant for VAT accounting period 11/13.

The facts

2. We heard evidence from Mr Wylde, a director of the Appellant. We also received a bundle of documents which were not in dispute. We find the following facts.

10 3. The Appellant manufactures, sells and installs double glazed doors and windows and related products. Historically its business has involved three limbs, described as “retail” (involving manufacture, supply and installation of double glazing, including conservatories, direct to private buyers), “trade” (involving the manufacture and supply to small installation companies of similar products) and
15 “commercial” (involving the manufacture, supply and installation of similar products for large customers).

4. Up to 2008, the Appellant’s main commercial customer was Walsall Housing but its contract with that organisation expired in that year and the Appellant decided, rather than shutting down that activity (in which a large number of employees were
20 engaged) to try to diversify this activity into other social housing companies. It has been successful in doing so, supplying a number of contractors in that sector.

5. Mr Wylde impressed us as a witness. He was clearly very knowledgeable about his business and its customers, and responsible about the management of its financial affairs. He is clearly an able businessman, having turned around a
25 potentially difficult situation in 2008, when it might have been easier to reduce the size of the company significantly to take account of the loss of the Walsall Housing contract, or shut it down altogether in the face of the overall recession which was taking hold in the building industry as a whole at that time. Through his efforts he has kept 50 employees in work, many of whom might otherwise have ended up
30 unemployed. As part of the restructuring of the business in 2008-09, the earlier overdraft facility of £1.1 million was reduced to £250,000 plus £50,000 reserve (on a group basis) in 2009, at which time the owners injected some £750,000 into the Appellant, secured on personal assets.

6. There have never been any particular problems with payment of sums due
35 from retail or trade customers. For commercial customers, however, the picture is different. In the year to November 2012, commercial customers represented some 55% of the Appellant’s turnover.

7. Obtaining payment from commercial customers has always required more
40 monitoring and chasing work. Margins were also tighter. This has led to financial stresses within the business. As the business was struggling to survive the recession,

various time to pay arrangements had been agreed (formally or verbally) with HMRC, support for which Mr Wylde was grateful. This had enabled the business to survive.

5 8. The process of obtaining payment from commercial customers typically involves monthly requests for payment, some kind of approval process at the customer and, after continued chasing and monitoring, eventual payment around 7 days after the end of the following month. This has been a reasonably consistent pattern, though there have been occasional problems.

10 9. In relation to the VAT quarter ended 30 November 2013, payment of the VAT was due by 31 December 2013 (or 7 days later, if paid electronically). For various reasons (see below), Mr Wylde took the view that it would not be possible to pay the £80,292.81 VAT on the due date and he wrote to HMRC on 20 December 2013, explaining the cash flow problem and proposing a payment schedule of one third payment on each of 8, 18 and 31 January 2014. He did not receive a reply. In the event, the payments were in fact received by HMRC on 10 and 30 January and 4 February 2014. On 17 January 2014 HMRC issued a notice of assessment of surcharge in respect of the late payment, in the sum of £8,029.28 (10% of the VAT due, this being the fourth default in the current cycle following earlier defaults in relation to periods 02/12, 02/13 and 05/13).

20 10. In essence, the payment was not made on the due date because Mr Wylde took the view that the funds were not available to him to make it, bearing in mind the need to pay the Appellant's essential suppliers and employees in order to keep the business going at all. The immediate problem was caused by the fact that there were some sudden and unexpected cash flow issues caused by a number of late payments from commercial customers.

25 11. We were satisfied that there were a number of sudden and unforeseeable failures by commercial customers to pay the amounts which were due. Whilst some degree of late payment had become an ordinary feature of the day to day trading of the Appellant, we are satisfied that the particular non-payments went significantly beyond the normal hazards of trade. An expected payment of over £60,000 was not received from a customer Hardyman (a large player in the social housing market, formerly called Robert Bruce, for whom the Appellant had done one previous job, for a payment of around £2,000, which was paid without problem). There were also late payments totalling some £15,000 from Mansells, some £13,000 from Harpers and some £47,000 from Kiers. These were all good customers with whom there had not
35 been previous problems of this type.

40 12. Whilst we were prepared in principle to accept that a large part of these outstanding sums might have given rise to unforeseeable cash flow issues, we were not however satisfied that they placed the Appellant in a position in which it was simply unable to pay its VAT as a result of them. We were provided with two bank statements for the Appellant, one covering the period 24 to 27 December 2013 and one covering the period 8 to 10 January 2014.

13. As at close of business on 27 December 2013, the Appellant’s bank account was approximately £100,000 overdrawn (against a facility limit of £250,000 plus £50,000 reserve). By 8 January 2014, the overdraft was down to £16,000. Mr Wylde was not able to demonstrate to our satisfaction that, in the light of these figures, the Appellant was unable to pay its VAT liability on time, even in the light of the commercial customer late payments it was experiencing. Mr Wylde was, we have no doubt, exercising what he regarded as prudent cash management in withholding the VAT payment, but that is not sufficient to justify the late payment.

The law

10 14. Section 59(7) Value Added Tax Act 1994 provides as follows:

“(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge –

15 (a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

20 (b) there is a reasonable excuse for the return or VAT not having been so despatched,

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question...”

25 15. Section 71(1) of the same Act provides as follows:

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

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

30 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.”

35 16. Nonetheless, it was established by the Court of Appeal in the case of *Customs & Excise Commissioners v Steptoe* [1992] STC 757 that:

“...if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-

payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.”

Discussion and decision

5 17. However, the decision in *Stepto* proceeded on the basis that the appellant in that case was unable to pay his VAT on time, and was concerned with examining whether a reasonable excuse could be found for that non-payment which was not rendered invalid by the predecessor provision to section 71(1) referred to above. In the present case, we do not reach that point because we are not satisfied that the
10 Appellant was, in fact, unable to pay its VAT on time.

18. For these reasons, with some regret we do not feel able to find that the Appellant had a reasonable excuse for the late payment of the VAT due on 31 December 2013 (or, for electronic payment, 7 January 2014) and therefore the appeal must be DISMISSED.

15 19. In his letter requesting full findings and reasons for our decision, Mr Wylde raised certain further points. To the extent they are “new”, these cannot be taken into account for the purposes of our decision, but we can say that they would not affect our decision in any event, because of the basis upon which we reached the decision as set out at [17] above.

20 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
25 “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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**KEVIN POOLE
TRIBUNAL JUDGE**

RELEASE DATE: 14 October 2014