



TC 04951

Appeal no: TC/2015/04367

Value Added Tax - Default surcharge case in which Appellant had suffered from numerous substantial delays on the part of Hospital Trusts in paying the Appellant's invoices – Failure by HMRC to permit the Appellant to adopt cash accounting when the conditions for cash accounting were satisfied - no indication by HMRC that the Appellant should be claiming bad debt relief when debts had been outstanding for in excess of six months - uncertainties as to when Time to Pay arrangements were in force - various mistakes in drawing moneys under direct debit arrangements - general breakdown in good communications between HMRC and the Appellant - Appeal allowed

FIRST-TIER TRIBUNAL

TAX CHAMBER

HOSPITAL TELECOMMUNICATIONS SERVICES LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: JUDGE HOWARD M. NOWLAN

SHEILA CHEESMAN

Sitting in public at Fox Court, Brooke Street in London on 4 March 2016

Michael Wilkinson, director of Hospital Telecommunications Services Limited on behalf of the Appellant

Rita Pavely of HMRC on behalf of the Respondents

DECISION

1. This was a default surcharge case in which there were defaults in a considerable number of VAT periods. It is unnecessary to record the amounts of the various penalties and the VAT periods in which the penalties were imposed because the basis on which we decided this Appeal, and indeed decided it unequivocally, had nothing to do with these details.
2. We had been presented with a very long and full witness statement by Mr. Wilkinson, the managing director of the Appellant. This witness statement was most certainly not a rant, straying into irrelevant matters, but a full statement of every step in a dispute commencing in 2010 (albeit that the first default was in 2012), in which each individual problem was cross-referred to letters and other documents illustrating the detail to which points in the witness statement referred.
3. We both had no doubt that it would be almost impossible to dissect the long description in the witness statement and analyse, point by point, precisely what had gone wrong at every step. A short description of the general tone of the excellent witness statement was that something had led to a fairly chaotic relationship between HMRC and the Appellant and more relevantly one where Mr. Wilkinson had lost all faith in the HMRC officers with whom he was dealing. He said that he only took over the handling, as a non-expert, of the Appellant's VAT affairs when the person originally responsible for this matter in the Appellant had given up in despair. After we had announced that we were going to allow the Appeal on the basis that the Appellant had a reasonable excuse for all the delays, such that Mr. Wilkinson's later remark was not made in the context of trying to persuade us to favour the Appellant's case, Mr. Wilkinson said that he had never encountered, in a 40-year career in the same industry, quite such abuse and hostility.
4. The points made in the previous paragraph are not particularly material to our actual decisions. The only point that we draw from the previous paragraph is that the only way to decide this Appeal is to look back to the start of the troubles in 2010 and seek to ascertain why matters had so clearly gone off the rails.
5. In the period preceding 2010 the Appellant had been suffering from many Hospital Trusts taking many months to pay their debts. Mr. Wilkinson said that substantial debts were outstanding for well over six months and naturally this put considerable pressure on the Appellant.
6. We did not consider the *Steptoe* line of authority which indicates that the factor that leads to shortage of funds can itself in appropriate circumstances constitute a reasonable excuse for the late payment of VAT and thus a defence against a default surcharge. It appeared that the Appellant was suffering late payment by numerous customers, rather than a major default by a dominant customer. While these facts would have made reliance on the *Steptoe* principle somewhat difficult, there was nevertheless a far more obvious basis on which we might conclude that the Appellant did have a reasonable excuse that indeed constituted a defence in relation to all the various defaults.
7. When Mr. Wilkinson himself took over the handling of VAT affairs in early 2010, he enquired of HMRC whether he could pay VAT in respect of receivables only when he actually received payment. In other words he asked to go over to the cash accounting basis for dealing with the Appellant's VAT liability. He described the considerable difficulties being encountered with many of the Appellant's customers. At this time, as the Respondents' representative helpfully and honestly drew to our attention, there was in fact no

indebtedness to HMRC in respect of VAT, the Appellant's turnover was also below the figure beyond which cash accounting could not be conceded, and so we are clear that the Appellant could have been put onto cash accounting in order to mitigate the difficulties being encountered with numerous late payments. Mr. Wilkinson was, however, told by HMRC that he could not go on to the cash accounting basis for accounting for VAT. This statement was not disputed in the hearing and we accept it. Mr. Wilkinson may indeed not have realised how critical it was to the Appellant's case because he referred to this episode in part simply to say how perverse it was that some years later HMRC told Mr. Wilkinson that most of the problems were of his making and that he should have gone over to cash accounting in the first place.

8. We have no doubt that the failure to accept that the Appellant should be able to account for its VAT on a cash accounting basis is the dominant reason for all the problems that have arisen since. The Appellant's continuing cash flow problems might indeed have rendered it impossible for the Appellant to go over to cash accounting at some later date because it would often then have been in the position of owing HMRC money, but that was not the case when the initial request was made and that therefore was the crucial error.

9. Mr. Wilkinson conceded that he was not remotely a VAT specialist and he accepted that he had indeed never made a claim for bad debt relief for VAT purposes. The Respondents' representative had again carefully examined all evidence in the file and she said that she could not locate any occasion when any VAT officer had sought to help the Appellant by suggesting that the Appellant might make bad debt relief claims. Rather than make such claims, the Appellant had certainly in one case been driven to commence legal action to recover a substantial debt from a Hospital Trust, which resulted in the Appellant losing the client and a considerable level of turnover.

10. The Appellant's ongoing problems led to other issues. In many periods the Appellant had Time to Pay agreements in force and that indeed minimised some of the problems. There was sometimes doubt as to whether such arrangements applied in later periods; there was an occasion when HMRC wrongly took, by direct debit, both the instalment payment under the Time to Pay arrangement and the total debt at the same time, and there was another occasion when HMRC's failure to take a direct debit payment that it could and should have taken led to a further allegation by HMRC of the Appellant breaching the Time to Pay conditions.

11. Our decision is accordingly that the Appellant does have a reasonable excuse for all the late payments that have occasioned default surcharges. The combination of the severe late payments by clients; the refusal by HMRC to allow the Appellant to go on to the cash accounting basis of account for VAT when the Appellant was entitled to change its basis for accounting for VAT in that way; the failure to suggest that the Appellant should consider making bad debt claims, as well as other individual errors on the part of HMRC lead to the clear picture that this sorry story is one in which the Appellant plainly has a reasonable excuse for the late payment of VAT.

12. The last point that was discussed in this hearing is a somewhat perverse one, namely that, far from the Appellant being liable to pay reasonably significant amounts by way of surcharge for late payment of VAT, it may be the case that were the Appellant now to make bad debt claims for VAT purposes, and furthermore were HMRC ready to consider any such claims that might strictly be out of time, it might well follow that the true position is that HMRC owes the Appellant repayments, rather than the Appellant's surcharge liability being confirmed. Any issue concerning bad debt claims was not relevant in this Appeal, but the

Respondents' representative was asked to see whether, should the Appellant make such claims, and should any be strictly out of time, HMRC might consider meeting any claims shown to be valid.

Right of Appeal

13. This document contains full findings of fact and the reasons for our decision in relation to each 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 8 MARCH 2016