



**TC03954**

**Appeal number: TC/2014/02702**

*Value dismissed Added Tax - Default Surcharge - Appeal*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BOBBY WATKINS LTD**

**Appellant**

**-and-**

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

**Respondents**

**Tribunal: JUDGE HOWARD M. NOWLAN  
MS AMANDA DARLEY**

**Sitting in public at 30-31, Friar Street in Reading on 12 August 2014**

**Robert Walkins, director of the Appellant, on behalf of the Appellant**

**F. Ojo and B. Robinson, both of HMRC, on behalf of the Respondents**

## DECISION

1. This was a relatively simple default surcharge appeal in which the Appellant was charged a surcharge at the 10% rate for late payment of VAT for its 3-month period ending 31 January 2014.
2. The case was admittedly unfortunate for the not uncommon reason that the Appellant's director believed that there had been no earlier defaults. In actual fact, there had been three earlier defaults, in the first and third of which payment was received by HMRC only 2 or 3 days late. In the second, payment had been received about 11 days late. None of the earlier defaults had resulted in any imposition of surcharge, however, for the familiar reasons that the first was anyway not subjected to surcharge, and the second and third, with the rate of surcharge being at the levels of 2% and 5%, occasioned theoretical liabilities of less than £400 such that HMRC waived the surcharges. The unfortunate consequence of this was that the director in question must have paid little attention to the formal letters that would have explained that there had been defaults, and indeed that the rate of surcharge for any further default, following the third default, would be at the 10% rate. The amount of surcharge for the period ending 31 January 2014 was also considerably increased by the fact that the VAT for the relevant period was 2 ½ times that in the next highest period, and approaching 4 times the average VAT liability for the previous three periods for which we were shown figures.
3. The Appellant claimed that the delay in paying the VAT for the period ending 31 January 2014 was largely attributable to a delay in payment by its major customer.
4. The Appellant was conducting a relatively new business, and we accept that for some period its main customer had been a company called Gemini Devices. The Appellant said that Gemini Devices had always paid the Appellant's invoices on time, and had indeed confirmed, presumably towards the end of February 2014, that it would pay the current invoice of £25,000 in due time to enable the Appellant to pay its VAT liability on time. In the event, it paid £10,000 on time, but did not pay the remaining £15,000 until some time in late March. Mr. Watkins could not remember the exact date of payment.
5. While Gemini Devices did clearly fail to pay its full invoice amount on time, we are unable to reach the conclusion that this case surmounts the test laid down by the Court of Appeal in *HM C & E v. Steptoe*, [1992] STC 757, and unable therefore to conclude that the Appellant had a reasonable excuse for the late payment of VAT in the relevant period, such that we could discharge the liability for surcharge.
6. While the turnover had fallen away in the post-Christmas period, we note that in the totality of the three month period, Selfridges had actually been the Appellant's largest customer. Admittedly the bulk of the turnover related to sales to Gemini Devices and Selfridges, with turnover in two other categories (described as "Online" and "Other") being relatively modest, but it was not realistic to conclude that Gemini Devices accounted for the great majority of the Appellant's turnover, or that the delay in paying £15,000 represented that major a proportion of the total turnover for the entire period of just short of £280,000.
7. Addressing the level of the credit balance in the Appellant's bank account on 7 March, i.e. the due date for paying the VAT liability of approximately £25,000, there was roughly £30,000 on the account, but we accept that the bank statement omitted a reference to a cheque already drawn for roughly £12,000, such that the credit balance might more realistically have been put at £18,000. As we have also indicated, Gemini Devices did pay the balance of £15,000 owed to the Appellant presumably within 2 or 3 weeks of the due date for the payment of the VAT, so that although there was a delay in payment, neither the delay nor the outstanding amount of the debt were that dramatic. In any event, the Appellant could still

have paid £18,000 in VAT on the due date for the payment of the VAT, and had it done that, the surcharge would have related merely to the missing balance of £7,000 rather than the full £25,000.

5 8. We must compliment Mr. Watkins for having been very frank during the hearing  
because he did not seek to conceal the various other contributory factors that led to the late  
payment of the whole of the VAT. As he conceded, he had no idea that there might be a  
penalty for late payment of the VAT, and indeed a very significant penalty. He also  
accepted that the business had no borrowings, and had not sought any overdraft facility from  
10 its bank because Mr. Watkins said that he did not like borrowings. He also gave the  
impression that, being oblivious to the possible consequences of being late in paying the  
VAT liability, it would be better to conserve the cash at the bank for other periodic outlays,  
and catch up in paying the VAT as quickly as possible, rather than treat the liability to pay  
the VAT as an urgent priority. Had he realised that by paying £18,000 towards the VAT  
15 liability he could have considerably diminished the surcharge, then naturally he would have  
paid the £18,000.

9. Mr. Watkins also explained that at the relevant time, the business had some cash flow  
problems because it paid for its supplies in advance, yet gave customers 30 days credit. We  
20 were unclear whether the suppliers were insisting on advance payment with a relatively new  
business, but Mr. Watkins certainly said that its practice had now changed and that it was no  
longer paying for supplies in advance. He also said that following the early March VAT  
default, the business had negotiated a bank overdraft.

10. The overall impression that we gained was that the business was a relatively new  
business where the VAT default resulted partly from very understandable ignorance, partly  
from a failure to anticipate fairly normal modest delays in settling invoices by customers, and  
partly the failure to negotiate any bank overdraft. We accept that the late payment by  
Gemini Devices was a factor, but it was a modest delay in paying a relatively small sum, and  
30 something that business should plan to accommodate.

11. We appreciate that the high turnover in the period, and the fact that the surcharge rate  
had reached 10% without the Appellant or Mr. Watkins being aware of this, meant that the  
surcharge was a significant and serious charge for the company to bear. We have no  
35 jurisdiction of any sort to reduce it, however, and only jurisdiction to discharge it where we  
are satisfied that the Appellant had a reasonable excuse for late payment.

12. This Appeal is accordingly dismissed because our decision is that the modest late  
payment of £15,000 by Gemini Devices out of its total invoice debt of £25,000 did not  
40 constitute the sort of unmanageable major default by a dominant customer that can constitute  
a reasonable excuse for late payment.

13. This document contains full findings of fact and the reasons for our decision in relation  
to the appeal. Any party dissatisfied with the decision relevant to it has a right to apply for  
45 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**

**RELEASED: 21 August 2014**

