



TC04137

Appeal number: TC/2013/04592

*VAT – default surcharge – late payment – whether “reasonable excuse” –
No – Sections 59 and 71 VATA 1994 – Appeal dismissed.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALMA PRODUCTS LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE, QC
 MISS SUSAN STOTT, FCA, CTA**

Sitting in public at Liverpool on 24 October 2014

**Appellants – Mr D Blundell, Financial Director, and Mr S Dick, Managing
Director, both of Appellant company**

Mr O’Grady, Presenting Officer, for the Respondents

DECISION

1. The Appellant company was represented by its Financial Director, Mr Blundell, and its Managing Director, Mr Dick. Both spoke to the company's financial circumstances at about the material time. The Respondents were represented by their Presenting Officer, Mr O'Grady. The appeal relates to a default surcharge of £8,093.69 in respect of late payment of VAT for the period 03/14 calculated at the 5% rate.

2. The Appellant company entered the default regime in Period 03/13. Since then there was a late payment in 06/13, when no surcharge was payable, the amount at 2% rate falling below £400. Thereafter in both periods 09/13 and 12/13 payment was made late. Initially surcharges at 5% fell due but these were removed under Time to Pay and other arrangements concluded with the Respondents. Hence the late payment for 03/14 was treated as a *third* default incurring a surcharge at 5%. All this is set out in the Schedule at p1-2 of the Bundle of documents. (The accuracy of the Schedule's terms, dates etc was accepted on behalf of the Appellant company.)

3. Mr O'Grady spoke to the terms of HMRC's case statement at the start of the bundle. He noted that the essence of the Appellant company's argument was whether a *reasonable excuse* for late payment arose in terms of Section 59(7) VATA by reference particularly to cash-flow problems and generally adverse trading conditions. He noted in particular that the Appellant company received working capital via a factoring system with invoice discounting. The Appellant had indicated (p58) that the discounting system rate was 90%. In effect as soon as invoices were issued by the Appellant for its supplies, it received 90% payment, which was obviously significant in relation to its level of working capital.

4. The statutory definition of *reasonable excuse* is strictly limited. A financial problem which could not reasonably have been foreseen and anticipated could be sufficient. Mr O'Grady noted in this context the decision in *C & E Commissioners v Steptoe* [1992] STC 757, where the taxpayer had been substantially reliant on one customer, a local authority, which paid late regularly. He submitted that the particular difficulties in the present case were not of comparable gravity. He referred to the Appellant company's letter at p22/23. It was asserted there that at the material time there had been a shortfall of sales of about £140,000. Having regard to the 03/14 Return, that represented only about 4.9% of the payment of £2.8M payable under the factoring system.

5. There had been no attempt on behalf of the Appellant to discuss timeously a possible Time to Pay arrangement with HMRC, which might possibly have been available. It seems that subsequent to the default on 16 May 2014 an enquiry had been made belatedly. The Appellant's difficulties seemed to arise, Mr O'Grady submitted, from general hazards of trading, not extreme events. Hence, in his view, a *reasonable excuse* was not available.

6. Both Mr Blundell and Mr Dick spoke on behalf of the Appellant company. It was explained by them that, while the company was late in making payments, it had not defaulted on its tax liabilities. It had lost a major customer, Muller. Another customer had started to provide sales forecasts later, with consequent deferment of its orders for packaging from the Appellant, which affected cash-flow adversely. The

company had after considerable financial outlays negotiated another contract with *Heinz*, but this had fallen through before the Appellant could benefit. Further, the Appellant's parent company had gone into liquidation. Support from the company's bankers had been restricted to a less generous basis. All this, the Directors argued, was beyond "normal hazards of trading". In total they represented a reasonable *reason* for late payment, they said.

7. This account of events on behalf of the Appellant company by its Directors, both in their evidence and in correspondence, was not challenged in cross-examination, and we accept the foregoing narrative as accurate in fact.

10 8. We consider that Mr O'Grady's stance is correct. While we have considerable sympathy for the Appellant company and its trading difficulties, we do not consider that these amount to a *reasonable excuse* in the context of Sections 59 and 71 VATA. They are not sufficiently exceptional or unforeseeable to meet this high test. Crucially in our view the Appellant company has the benefit of a 90% payment via its
15 factoring system, which has obvious cash-flow advantages. We note that the breakdown of the contract with *Heinz* seems to have occurred in about 2012, sometime before the Period in question. The diminished pattern of trading noted at p22/23, while amounting to about £140,000, appears to be a relatively small proportion of turnover.

20 9. For all of these reasons we dismiss this appeal and confirm the terms of the surcharge.

10. 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
25 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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KENNETH MURE, QC
TRIBUNAL JUDGE

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RELEASE DATE: 14 November 2014

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