



**TC04275**

**Appeal number: TC/2014/01871**

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

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**AXIOM NDT LTD**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE KENNETH MURE, QC  
                  MR PETER R SHEPPARD, FCIS, FCIB, CTA**

**Sitting in public at Glasgow on Tuesday 16 December 2014**

**Appellant:- Kenneth McAllister CA**

**Respondents:- Mrs E McIntyre, Officer of HMRC**

## DECISION

- 5 1. This appeal relates to a VAT default surcharge of £16,248.38 (as reduced) in respect of late payment of tax for the period 10/13.
2. Having explained to Mr McAllister that the burden of proof rested on his clients it was agreed that it would be helpful for Mrs McIntyre to outline her arguments first, so setting out the matters on which Mr McAllister should respond.
- 10 3. Mrs McIntyre referred us to the Schedule of Defaults (p21/22 of the Bundle). There had been a succession of late payments from the period 01/12, with in relation to certain payments, the penalties incurred being removed because of “Time to Pay” agreements. While the Return in respect of period 10/13 was submitted timeously, payment was made late. It was due on 1 December 2013 but was paid in two instalments, paid on 11 and 27 December 2013.
- 15 4. HMRC’s stance as to the absence of a *reasonable excuse* is set out in its letters of 6 March and 24 April 2014 (p31/32 and 36).
- 20 5. In reply Mr McAllister confirmed the accuracy of the terms of the Schedule. The issue, he acknowledged, was of whether a *reasonable excuse* was available. He explained that he was a chartered accountant in private practice and had acted for the Appellant company for about 20 years. He undertook its corporate and personal tax work. The Appellant had an internal book-keeper too, Ms Logan, whose name appears in the correspondence. The work of the Appellant was structural testing for the oil industry. The initials “NDT” in its name denoted “non-destructive testing”. It checked as a rolling programme oil rigs and other metal structures for safety, some at sea and others on-shore. The Appellant had a staff of 18 and also engaged sub-  
25 contractors.
- 30 6. During 2013 there had been a substantial growth in turnover. It was now over £4M, producing a net profit after tax of about £250,000. About 60% of turnover related to the months from April to October, when weather conditions were more favourable.
- 35 7. Mr McAllister stressed that delays in payment by the Appellant were never over a month, most being about 8 to 14 days. The sum due for Period 10/13 was somewhat skewed because of the growth in turnover and the extra work carried out in the more favourable summer conditions. There was a corresponding increase in the amount of VAT due.
8. Mr McAllister explained further that the Appellant’s main customer paid late – usually after about 90 days. That customer provided 75% of the company’s work. The level of turnover was in excess of the limit qualifying for cash accounting.
- 40 9. The running of the Appellant’s finances was more complicated because its internal book-keeper, Ms Logan, was at the material time caring for her ailing mother,

5 who died in about July 2014. Sub-contractors had to be paid immediately. While arrangements had now been made with the Appellant's bank for an appropriate level of accommodation, the negotiations had been protracted and not concluded as at the material time. This penalty, Mr McAllister noted, was about 5% of the company's net profit.

10 10. In a brief cross-examination by Mrs McIntyre, Mr McAllister emphasised that the delay in payment by the main customer could have exceeded 90 days on occasions. The growth in business was unexpected. Ms Logan had attended to book-keeping and accounts, relieving both directors of this, but her involvement was disrupted over an extended period because of her caring duties. Mr McAllister considered that the directors may have been unaware of the state of the business' finances from day to day: they both concentrated on contract management.

15 11. The foregoing narrative of the Appellant company's circumstances as set out in our summary of Mr McAllister's evidence was not seriously challenged as to its credibility, and we found Mr McAllister an impressive witness. Accordingly that narrative may be taken as representing our **Findings in Fact**.

20 12. In her concluding submissions Mrs McIntyre referred us to Section 59 VATA which sets out the penalty regime. The penalties could not be mitigated under Section 70. The sense of *reasonable excuse* was very restricted. Section 71(1)(a) excluded insufficiency of funds and reliance on third parties. The events as narrated by Mr McAllister, she considered, were ordinary hazards of the running of any business. There was nothing unexpected or exceptional in her view. Finally, she referred us to the decision of the Upper Tribunal in *Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) in support of her arguments that there was no *reasonable excuse*.

25 13. Accordingly, she invited us to dismiss the Appeal.

30 14. In his concluding remarks Mr McAllister argued that the Appellant company had not been confronted with merely the normal hazards of trading. It had faced not only late payments but also an increase in activity generating an increased VAT liability before payment of the relative receipts. The Bank had delayed in extending the Appellant's credit facilities. The company had to cope with Ms Logan's being unable to devote as much time as previously to the company's book-keeping and general administration because of her caring duties. Payment of the VAT due had been made, and that after a relatively short delay.

35 15. For all of these reasons he invited us to allow the Appeal.

### **Conclusion**

40 16. While the Appellant's Return for 10/13 was submitted in time, payment was late. That delay triggered the penalty. Section 71(1)(a) as noted *supra* excludes "an insufficiency of funds to pay any VAT due" as a *reasonable excuse*. Accordingly no relief can be given for cash-flow difficulties unless, perhaps, where there are exceptional and/or unforeseeable causes present.

17. We agree with Mr McAllister that the Appellant company here was confronted with a difficult financial situation. Period 10/03 fell into the busier months of the company's business year. The overall volume of business was increasing also. But both of these factors should have been known to the directors. They were involved in the negotiation and performance of its contracts. Although they did not maintain the company's day-to-day financial records, they should, we consider, have had a broad appreciation of the financial trends affecting it. Ms Logan, we accept, was unable to devote the same attention to daily book-keeping and accounting, but that should not have affected the directors' appreciation of the company's financial circumstances in a broad sense. The increased pattern of trading was not in our view an exceptional factor, and increasing turnover as a result should have been anticipated, and that irrespective of Ms Logan's diminished involvement. There was, it seems, a delay on the part of the company's bank in negotiating an increased credit level, but that in itself is not sufficient to justify a *reasonable excuse*.

18. While we are not unsympathetic to the Appellant company (it pays all taxes due: there has been no instance of a default) we do not consider that there is a *reasonable excuse* for late payment. That was caused by cash-flow difficulties which could and should have been anticipated.

19. For these reasons we dismiss the Appeal.

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 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**KENNETH MURE  
TRIBUNAL JUDGE**

**RELEASE DATE: 10 February 2015**