



TC01969

Appeal number: TC/2011/05689

Time to pay arrangement. Agreement or no agreement.

FIRST-TIER TRIBUNAL

TAX

MR G KOFTEROS

Appellant

- and -

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

Respondents

TRIBUNAL: GERAINT JONES Q. C. (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 21 November 2011 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 21 July 2011 and HMRC's Statement of Case submitted on 8 September 2011.

DECISION

1. By his Notice of Appeal the appellant, Mr Kofteros, appeals against a surcharge of £25,166.39 imposed upon him by the respondent in respect of the late payment of self assessed income tax for the fiscal year ended 5 April 2010, which needed to be paid by 31 January 2011.
2. The appellant, by his accountant, has indicated that he did not have the funds with which to pay income tax of just over £500,000 because that liability arose from the payment of a company dividend to him, which he had not received it in cash but, rather, had received by way of his other indebtedness to that company being reduced or extinguished. The respondent points out that a lack of funds or general impecuniosity does not amount to a "reasonable excuse" for non-payment of tax. The appellant does not contend otherwise.
3. In one sense this appeal has been billed as an appeal based upon the appellant having a reasonable excuse for non-payment. That is a misnomer. The reality of this appeal is that it has been put on the basis that the appellant negotiated a "time to pay" arrangement with the respondent and that because such an arrangement was successfully negotiated, no penalty or surcharge is due, notwithstanding that interest may remain view.
4. This appeal requires a close analysis of the facts and the correspondence that has taken place because of the respondent contends, in its Statement of Case, that an arrangement that was eventually notified to the appellant in writing, does not come within its published policies set out in DMBM803600 and DMBM803610.
5. The appellant contends that upon a proper analysis of the correspondence an appropriate arrangement has been entered into with the effect that no penalty or surcharge is due.
6. DMBM803610 can be summarised by saying that in self assessment cases both an initial and a further surcharge can be avoided if the taxpayer :
- (1) prior to the due date for payment, submits proposals that lead to an acceptable time to pay arrangements being made,
 - (2) makes the payments as agreed, and
 - (3) adheres to the terms of the arrangement.
7. The surcharge trigger date is 28 days after the due date for payment, in this case being 31 January 2011.
8. The expression "time to pay arrangement" is not statutorily defined. In those circumstances that expression must be given its ordinary and natural meaning, bearing in mind the words used by Parliament. It must be a matter of construction of the events that have taken place between the taxpayer and the respondent as to whether such an arrangement did or did not come into being.

9. It is not in dispute between the parties that on 27 January 2011 accountants acting for the appellant put forward a time to pay proposal. I have seen a copy of it. There can be no doubt that it was a written application for a time to pay arrangement in respect of a liability of £503,000. The letter also dealt with a different liability with which I am not presently concerned. The proposal put forward in the letter was for payment over 36 months at a rate of £15,000 per month.
10. The respondent responded to that request almost four weeks later by its letter of the 21 February 2011 and requested further information from the taxpayer. The appellant, by his accountant, replied on the 10 March 2011 comprehensively providing the information that had been requested by the respondent in its letter of 21 February 2011.
11. On 23 March 2011 the respondent declined to agree the terms of the time to pay arrangement requested and put forward by the appellant. However, the respondent said in that letter : *"However, an extensive revised proposal may be considered."* The door had not been slammed in the appellant's face; it remained ajar.
12. The appellant's accountant replied by its letter of 5 April 2011 and in numbered paragraph 6 of that letter put forward a revised proposal. In addition, perhaps to show good faith, a payment of £25,000 was enclosed with that letter. The revised proposal was for payment at the rate of £25,000 a month.
13. On 7 April 2011, notwithstanding that the time to pay negotiations were still on foot, the respondent issued a surcharge notice in the sum of £25,166.39.
14. On the 19 April 2011 the appellant appealed that surcharge notice, referring to the fact that there were ongoing negotiations for a time to pay arrangement.
15. The next letter from the respondent is dated 6 May 2011 and refers to a telephone conversation on 3 May 2011 between Mr Moody at the firm of accountants acting for the appellant and the letter writer, Mrs Dore. The letter acknowledged that a second payment on account of £25,000 had also been made. The letter goes on to say that the proposal for payment at £25,000 per month, if accepted, would mean that it would take far too long for the entire debt to be paid in full. The letter also commented *"There is no question of negotiating a timescale for paying tax arrears or simply accepting payment on whatever terms a taxpayer is prepared or able to offer."* I do not know why that comment was made given that there had been no suggestion to that effect in any written communication sent to the respondent by or on the half of the appellant. The letter then contains this paragraph : *"I am aware that Mr Kofteros is ultimately hoping to be able to pay his debt in full but is not yet sure of the timescale. I suggest that you update me on the position regarding this before the 21 days expire so that I can consider my next course of action."*
16. As the appellant had appealed against the surcharge the HMRC review procedure then took place.
17. Notwithstanding that the request had been made for a review, the appellant's accountants continued the time to pay negotiations. By their letter of 3 June 2011 they

set out further detailed information for the consideration of the respondent before putting forward a further revised proposal in the penultimate paragraph of that letter. The revised proposal was that there should be further payments of £25,000 in May, June, July and August 2011 with the balance being paid by 30 September 2011.

5 18. 30 September 2011 has come and gone. I do not know whether full payment was or was not made by that date.

10 19. It is clear that there was further telephone discussion between Mr Moody and Mrs Dore because in Mr Moody's letter of the 15 June 2011 he refers to telephone conversations on 8 June and 15 June 2011. He records that Mrs Dore had asked for evidence of the offer that had been made by a purchaser to purchase shares in a specified company. Plainly, she wanted to know whether a commercial transaction was about to take place that would allow the tax liability to be paid in full by the end of September 2011. The penultimate paragraph of the letter asked that the appellant's revised proposal should be considered in the light of the further information provided
15 by Mr Moody.

20 20. Mrs Dore was based in Worthing and her position was shown as a "Debt Manager". On 23 June 2011 a "Higher Debt Manager", Mrs Burke, wrote to the appellant's accountants. The second paragraph of her letter says "*As discussed, I confirm that now that your client has been served with a Statutory Demands, I am prepared to defer further action until 30 September 2011 as requested. If full payment is not received by that date, arrangements will be made to file the bankruptcy petition.*"

25 21. Mr Moody's understanding of that letter is clear from his fax to Mr De Benedictis of 27 June 2011, where he said that he had received a letter from the Debt Management section in Worthing "*which confirms that our client now has until the end of September 2011 to pay the 2009/2010 liability.*"

30 22. In my judgement that was a perfectly proper and sensible conclusion for Mr Moody to draw. The letter from Mrs Burke was the culmination of a time to pay negotiation that had taken place since 27 January 2011. The Statement of Case submitted by the respondent proceeds on the erroneous basis that a time to pay arrangement "*is in effect an instalment arrangement which has to be proposed by the debtor and formally agreed by HMRC*". That is wrong. There is no necessity for a time to pay arrangement to involve the payment of instalments. A perfectly lawful time to pay arrangement could, for example, simply provide for a full and final lump
35 sum payment by an agreed date and which does not involve the payment of any instalments in the meantime. I do not know whether that erroneous view has played any part in the construction that the respondent has placed upon the sequence of events and the content of the various letters to which I have referred above. In any event, it matters not because it now falls to me to consider the proper construction to
40 be placed upon the events that have happened, as mainly evidenced in writing.

23. I am left in no doubt that upon the true and proper construction of the events that have happened as set out in the correspondence to which I have referred, a time to pay negotiation culminated in Mrs Burke agreeing that the appellant had until 30 September 2011 to pay in full, bearing in mind the on account payments of £25,000 that he had made. Upon its true and proper construction Mrs Burke's letter rejected the proposal for payment at £25,000 per month until such time as full payment had been made (which was the appellant's second proposal) but accepted his proposal that there should be a time to pay arrangement on the basis that full payment would be made by 30 September 2011 (effectively the appellant's third proposal).

24. Whether or not my construction of what took place assists the appellant, I do not know. That is because I do not know whether full payment was or was not made by 30 September 2011. That is important because a surcharge is not payable if a time to pay arrangement has been entered into and complied with. If it is not complied with, then the surcharge is payable.

25. Accordingly, the outcome of this appeal is as follows. If the full tax liability was paid, as envisaged, by 30 September 2011 the appeal is allowed and the surcharge is set aside. If, as a matter of fact, the full tax liability was not paid by 30 September 2011, the appeal is dismissed and the surcharge is upheld.

26. 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.

Decision.

As set out in paragraph 25 above.

TRIBUNAL JUDGE

RELEASE DATE: 16 April 2012

