



TC02958

Appeal number: TC/2013/02716

DEFAULT SURCHARGE — whether reasonable excuse — no — whether penalty disproportionate — no — appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OLIVE BUSINESS SOLUTIONS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE COLIN BISHOPP
MR DAVID BATTEN**

Sitting in public in London on 5 September 2013

Mr Liam Henry, of Hillier Hopkins LLP for the appellant

Mr Chris Jacobs, presenting officer, for the Respondents

DECISION

1. This decision relates to an appeal by Olive Business Solutions Limited, formerly known as Olive Fixed Line Services Limited (“Olive”), against a default surcharge imposed following the late payment of the sum shown to be due by its VAT return for the period ended 31 October 2012 (10/12). The return was received by HMRC on the due date, 30 November 2012. Payment should have been made (electronically) by 7 December, but it was in fact made by three instalments, on 11 December, 24 December and 4 January 2013. Those facts are undisputed.

2. Unfortunately this was not the first occasion on which Olive had defaulted. A penalty of £32,674.56, representing 10% of the tax, was imposed, but it was later reduced to £16,337.28, or 5% of the tax, when HMRC accepted that an earlier apparent default had not in fact been a default. There are two questions now before us: whether there was a reasonable excuse for this default; and whether the penalty imposed is disproportionate.

3. Olive was represented before us by Mr Liam Henry, of its accountants, and HMRC by a presenting officer, Mr Chris Jacobs.

4. It was common ground that, like many companies, Olive has suffered from cash flow problems. Shortly before the due date for payment of the tax shown to be due by Olive’s 07/11 return it agreed with HMRC that it could pay the tax in instalments. This, a “time to pay” agreement, is authorised by section 108 of the Finance Act 2008 and has the effect that the taxpayer concerned is not liable to a penalty for late payment, provided that he has contacted HMRC, with a view to making a time to pay agreement, in advance of the due date for payment. On that occasion, the default was recorded and a penalty imposed, but later removed when HMRC accepted that a time to pay agreement had been made before the due date. It was the removal of this default from Olive’s record which led to the reduction in the penalty we have mentioned.

5. An attempt was made to reach a further such agreement in respect of the payment due for period 10/12. However, it is clear that the approach was not made by Olive until about 12 December 2012, after the due date for payment, and too late if section 108 was to be engaged. In the notice of appeal it is said that the managing director, who made the approach, thought he had done so before the due date but in a letter of 4 January 2013 to HMRC Olive’s head of finance wrote that “our Managing Director contacted HMRC to agree a payment plan on 12th December 2012”. HMRC’s telephone records, which were produced to us, show an initial approach on 11 December and agreement to instalments the following day. We are satisfied from this evidence that, whether one takes 11 or 12 December, the approach was made after the due date, and that section 108 cannot assist Olive.

6. Mr Henry told us that the company’s financial director had at the time been suffering from a serious illness which had later prompted his early retirement. We had a letter from the managing director by way of confirmation, and although it was not supported by medical evidence we are willing to accept what is said. The illness, Mr Henry said, compromised the former director’s ability to deal with his work and, he suggested, this amounted to a reasonable excuse: had the former

director not been ill he might have been able to call HMRC sooner, and thus avoid the surcharge.

7. It is, as far as we know, an undecided point whether a taxable person who reaches a late time to pay agreement, but has a reasonable excuse for that lateness, has also a reasonable excuse for the default which has occurred in the interim, but we do not need to decide that point since it is clear to us that what Mr Henry urged on us cannot amount to a reasonable excuse as that phrase has been interpreted by this tribunal and its predecessor, as well as the courts, over many years. A taxable person advancing such an excuse, in the more common case of late payment, must show if he is to succeed that despite the exercise by him of reasonable foresight and due diligence, with proper regard for the fact that the payment was due, he was prevented from making the payment on time: see *Customs and Excise Commissioners v Steptoe* [1992] STC 757. The question, moreover, is not whether the former director has a reasonable excuse, but whether Olive has such an excuse. The director's illness, serious though we accept it to have been, was not one of sudden onset; both he and Olive should have been well aware of the fact that it was compromising his ability to work, and Olive should have put alternative arrangements in place. There was no evidence before us that could lead us to the conclusion that Olive was unable to do so, and the test set out in *Steptoe* is not satisfied.

8. This is not, in addition, a case in which a defaulting trader might be able to claim lack of awareness of the default surcharge régime or of its detail; Olive had been in the régime for some time, and had been corresponding with HMRC not only about time to pay agreements but also about the earlier surcharge which was removed as we have said. It is, on the contrary, a case in which Olive should have been acutely aware of the risk of a further default.

9. The notice of appeal additionally complains that the managing director was not told during the course of the calls in which a time to pay agreement was reached that a surcharge would be imposed. It does not seem to us that HMRC were under any duty to mention that fact, but even if they were we do not see how the omission can undermine the validity of a surcharge which had already been correctly imposed.

10. The question of proportionality of a default surcharge was considered by the Upper Tribunal in *Revenue and Customs Commissioners v Total Technology (Engineering) Ltd* [2013] STC 681. The tribunal (in which the present judge happened to be sitting) decided that the default surcharge régime was not itself disproportionate, while leaving open the possibility that the penalty in an individual case might be disproportionate. What is said in this case is that it is disproportionate to impose a penalty of 5% of the relevant tax when an approach to agree on time to pay was made only a few days late.

11. In our view that argument cannot succeed. A taxable person's lack of funds cannot amount to a reasonable excuse: see the Value Added Tax Act 1994 section 71(1)(a). But he is afforded, by section 108 of the Finance Act 2008, the opportunity of avoiding a penalty by making a timely approach to HMRC to agree on time to pay. Olive knew of that mechanism because it had used it before. We do not see how it can be said to be disproportionate to impose the penalty

prescribed by a régime which is not itself disproportionate in circumstances where the person penalised has simply failed to avail himself of the mechanism by which he could have escaped the penalty.

12. For those reasons the appeal is dismissed.

5 13. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply, pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for permission to appeal against it on a point of law to the Upper Tribunal. The application must be received by this Tribunal not later than 56 days after this
10 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.

15

COLIN BISHOPP
TRIBUNAL JUDGE

20

RELEASE DATE: 15 October 2013