



TC01575

Appeal number: TC/2011/5499

VAT – reasonable excuse – Faster Payments System (FPS) – service of surcharge liability notice

FIRST-TIER TRIBUNAL

TAX

PALMUN LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ROGER BERNER
JOHN WHITING (Member)**

Sitting in public at 45 Bedford Square, London WC1 13 October 2011

Paawan Munjal, Director, the Appellant

David Linneker, HM Revenue and Customs, for the Respondents

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DECISION

1. Palmun Limited (“the Appellant”) appeals against a default surcharge for late payment of VAT for the 12/10 and 03/11 quarterly accounting periods. No surcharge amount was assessed in respect of 12/10, but there was an assessment for £1,928.36 for 03/11.
2. The issues for the Tribunal were, firstly whether the surcharge period was correctly extended by a surcharge liability extension notice issued on 11 February 2011, extending the surcharge period to 31 December 2011, and secondly whether, in the circumstances of this case, the Appellant had a reasonable excuse for either or both of the defaults for the periods 12/10 and 03/11.
3. We heard submissions and evidence from Mr Munjal on behalf of the Appellant, and submissions from Mr Linneker for HMRC.

The facts

4. From the documentary and oral evidence we find the following material facts.
5. The Appellant is a small company, founded about eight years ago. Mr Munjal accepted that the Appellant’s filing and payments history as contained in the documents before us was accurately recorded. In consequence of late payments for the 06/09 and 12/09 quarters the Appellant was within the surcharge regime in respect of the 12/10 period, and any default in relation to that period would give rise in principle to a surcharge and, on service of a surcharge liability notice, the surcharge liability period would be extended to 31 December 2011.
6. In relation to another potential default in relation to the 06/09 period, which was cancelled by HMRC, HMRC wrote to the Appellant on 1 November 2010 advising that, having regard to the 06/09 default, the surcharge liability period would be extended to 31 December 2010. The letter, which Mr Munjal accepted he had received, also advised the company to check with its bank how long its chosen method of electronic payment took to reach HMRC, given that in relation to the payment for 06/10, it had been received two days late. Similar advice had been given earlier as well, in a letter dated 8 July 2009 following a previous default, in relation to the 03/09 period (which was also cancelled).
7. Attached to the November 2010 letter, and referred to in that letter, was an information sheet headed “Advice to help you avoid a Default Surcharge”. Included in that sheet was information concerning electronic payments, including advice that up to 7 extra days could be given from the due date for payment, but that if the 7th day falls on a weekend or bank holiday, payment must reach HMRC’s account by the last working day beforehand. The section emphasised in bold type “Please note: HMRC is currently unable to accept Faster Payments.”
8. Mr Munjal told us that, although he had received the letter of 1 November 2010, he could not recall having seen the attachment. We find that, on the balance of

probabilities, the information sheet was attached to the letter, and so was received by the Appellant.

5 9. Mr Munjal told us that the company used the Faster Payments System (FPS), essentially a system that guarantees payments will be credited on the same day before
10 a certain time. He also explained, in answer to questions from the Tribunal, that he had contacted the Appellant's bank to check the position of its electronic payments, as he knew that the FPS was being rolled out in stages. He asked the bank generally whether the Faster Payments system would result in same-day payment to all UK banks, and had been told that it would. He did not ask any specific question regarding payments to HMRC.

10. In respect of the 12/10 period, the payment was made through the Faster Payments system on 4 February 2011. The payment was received on 8 February, and was therefore (allowing for the 7-day extension for electronic payments) one day late.

15 11. A surcharge notice was issued on 11 February 2011 in relation to the late payment for the 12/10 period, although because the amount of the surcharge was less than £400 no charge was levied. Mr Munjal's evidence was that the Appellant had not received this notice. He explained that the Appellant operated from serviced business premises. The post was not delivered directly to the Appellant's own business unit, but to a central area in which it was handled by the service providers,
20 and then delivered to the individual businesses. He told us that there had been occasions – he numbered them at 4 over the previous 2 years - when post had reached the central processing area, but then been mislaid. He also suggested that the notice might not have been delivered to the business address at all. However, Mr Linneker told us, and we accept, that he had checked HMRC's records, and the notice had not
25 been received back as returned mail

12. In this respect we find that the surcharge notice was issued by HMRC on 11 February 2011. We find, on the balance of probabilities, that it was delivered to the Appellant's business address into central processing, but we accept Mr Munjal's evidence that neither he, nor the company, received it.

30 13. In respect of the 03/11 period, the payment was also made through Faster Payments on 5 May 2011, the day before the due date of 6 May 2011 (7 May being a Saturday). It was received late on 9 May 2011. The surcharge notice was issued on 13 May 2011 in the amount of £1,928.36. This notice was received by the Appellant.

Discussion

35 14. We first consider whether the surcharge period was validly extended by the notice of 11 February 2011, which the Appellant did not receive. That notice was sent to the business address of the Appellant, and we have found that it was delivered to the central processing area of those premises, but thereafter went astray and was not received by the Appellant.

15. The significance of the surcharge liability notice is that it is the service of that notice on the taxable person that gives rise to the surcharge period ending on the first anniversary of the accounting period for which the taxable person is in default: s 59(2) Value Added Tax Act 1994 (“VATA”). Liability to a surcharge depends on a surcharge liability notice having been served on the taxable person: s 59(4).

16. By s 98 VATA, a notice may be served on a person by sending it by post in a letter addressed to that person at the last or usual place of business of that person. If a business address for postal purposes is the central processing area for a number of serviced offices, a notice is effectively served if it is sent by post and delivered to that address. The fact that, by reason of internal distribution arrangements within those serviced offices, the notice does not reach the particular unit occupied by the taxable person does not prevent the notice from having been served for this purpose.

17. It follows that we conclude that the surcharge liability notice issued on 11 February 2011 was duly served, and that – subject to our consideration of whether the Appellant had a reasonable excuse in relation to the 12/10 default – the surcharge period was extended so as to encompass the 03/11 late payment.

18. We turn therefore to the question of reasonable excuse. If the Tribunal is satisfied that there is a reasonable excuse for the VAT not having been despatched so that it would be received by HMRC within the appropriate time limit, the Appellant will not be treated as having been in default in respect of the prescribed accounting period, and accordingly any surcharge liability notice the service of which depended upon that default will be deemed not to have been served: s 59(7) VATA.

19. Mr Munjal’s case was that he had at the relevant times not been aware that HMRC did not accept payments through the Faster Payments system. Having not received the surcharge liability notice of 11 February 2011, the Appellant was unaware that HMRC had received the payment for 12/10 late and that the surcharge period had been extended. Both the defaults had been caused by the Appellant relying on the Faster Payments system. The Appellant regretted the late payments. As a small business it took its filing responsibilities seriously and worked diligently to fulfil them. The Appellant did not profit from or in any way benefit from the late payments. Both payments were made in the full expectation that they would reach HMRC before the payment deadline.

20. Mr Linneker argued that the Appellant was well aware of the consequences of default and the action necessary to ensure payment was received on time. He referred us to guidance issued with the surcharge liability notices which advises of the need to ensure that returns and payments must reach HMRC by the due date and that if there are difficulties HMRC may be contacted. He reminded us of the letters the Appellant had received on 8 July 2009 and 1 November 2010 in which advice was given on the due dates for payment by electronic means and that the Appellant should check with its bank to see how long it takes them to complete any necessary transaction. He submitted that the Appellant did not take reasonable steps to check that its payment method would result in payment by the due date. Finally, he drew attention to the

information sheet sent with the 1 November 2010, in particular the note that Faster Payments were not accepted.

21. In considering the question of reasonable excuse, we take as our benchmark a reasonable man of business, dealing with his VAT affairs with reasonable diligence, and being reasonably aware of his filing and payment obligations in respect of VAT. Taking this as the yardstick, we conclude that such a person would have been aware, at the time of making the payment for the 12/10 period, of the contents of the letter of 1 November 2010 and the information sheet, including the note that Faster Payments were not accepted. We also consider that the reasonable businessman would have made a more specific enquiry of his bank about payments to HMRC (as the advice had suggested), and would have become aware that the Faster Payments system would not be credited on the same day.

22. On this basis we conclude that the Appellant did not have a reasonable excuse for the late payment in respect of the 12/10 period. It follows that the surcharge liability notice of 11 February 2011, validly served, was effective to extend the surcharge period. The late payment in respect of the 03/11 period accordingly comes within the surcharge period specified by that notice, and – subject again to whether there is a reasonable excuse – gives rise to liability to a surcharge.

23. We apply the same test to the late payment for the 03/11 period as we applied earlier in relation to 12/10. Thus, we again consider that the reasonable businessman would have become aware of the information in the letter of 1 November 2010, and would have known of the limitations at that time of the Faster Payments system. But the position of the Appellant at the time of the 03/11 default was different to its position in relation to the 12/10 period. The Appellant had made the payment in relation to the 12/10 period, and had not been made aware, because it had not received the surcharge liability notice in that respect, that its payment had been received late. We consider that it was reasonable for the Appellant to assume from the absence of any notice that its payment had been made on time, and accordingly it was reasonably entitled to consider that if it made a payment in similar circumstances for the 03/11 period, that too would be received by HMRC by the due date.

24. The reasonable businessman in the shoes of the Appellant would, as we have described, know that in the information sheet that accompanied the letter of 11 November 2010 HMRC had explicitly stated that HMRC was “currently” unable to accept Faster Payments. But in view of the use of the word “currently” as indicating that this was a state of affairs that was liable to change, and in light of the reasonable apprehension that such a payment some three months later (the payment on 6 February 2011 in respect of the 12/10 period) had been made on time, we have concluded that a reasonable businessman would reasonably have been entitled to assume – as the Appellant did – that a payment on 6 May 2011 in respect of the 03/11 period would likewise be on time.

25. Accordingly, we conclude that the Appellant had a reasonable excuse for the late payment in respect of the 03/11 period.

Decision

26. We decide:

- (1) The appeal against the default in respect of the 12/10 accounting period is dismissed.
- 5 (2) The appeal against the default in respect of the 03/11 accounting period is allowed.

Application for permission to appeal

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.

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ROGER BERNER

TRIBUNAL JUDGE

RELEASE DATE: 14 November 2011

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