



TC05619

Appeal number: TC/2016/002403

VAT – Entitlement to repayment supplement – Whether written instruction directing refund issued within the “relevant period” – Yes – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TARN-PURE AG LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Eastgate House, Newport Road, Cardiff on 18 January 2017

Robert Collins, director of Tarn-Pure AG Limited, for the Appellant

Jane Ashworth, of HM Revenue and Customs, for the Respondents

DECISION

1. If a person is entitled to a VAT repayment, HM Revenue and Customs (“HMRC”) are required, under s 79 of the Value Added Tax Act 1994 (“VATA”), to add to the amount to be repaid either a supplement of 5% or £50, whichever the greater, if:

(a) the requisite return or claim is received by HMRC not later than the last day on which it is required to be made:

(b) a written instruction directing the repayment is not issued by HMRC within the relevant period; and

(c) the amount shown on the return as due by way of repayment does not exceed the payment by 5% or £250, whichever greater.

(see s 79(2) VATA)

2. The “relevant period” referred to in condition (b) is 30 days beginning with the later of the day after last day of the prescribed accounting period to which the return relates or the date of the receipt by HMRC of the return (see s 79(2A) VATA). Section 79(3) VATA provides that, in accordance with the regulations (Regulations 198 and 199 of the Value Added Tax Regulations 1995) when computing the 30 days, any periods referable to the raising of any reasonable enquiry relating to the return and the correction of errors by HMRC in that return shall be left out of account.

3. In this case, Tarn-Pure AG Limited, (the “Company”) claimed a repayment of £18,322.62 in its VAT return for its 01/16 VAT accounting period. It filed the return on 1 February 2016. On 29 February 2016 HMRC contacted Mr Robert Collins, the Company’s director, by telephone and email, requesting further information before the VAT repayment could be released. Mr Collins subsequently provided HMRC with the information sought. On 1 March 2016, in an email to Mr Collins, HMRC confirmed that the enquiry was concluded and that the repayment had been forwarded for authorisation.

4. The 30 day period therefore commenced on 1 February 2016 when the return was received by HMRC and, as the enquiry into the return lasted two days which are not to be taken into account, it concluded on 3 March 2016.

5. On 3 March 2016, HMRC issued an internal instruction, on form VOPS 240, to make a VAT repayment in the sum of £19,238.84, the £18,322.52 plus a repayment supplement of £916.12 which were “authorised by the computer processing system scheduled for 3 March 2016”. The £19,238.84 was received into the Company’s bank account on Tuesday 8 March 2016 via a Bacs direct credit.

6. On 10 March 2016 HMRC issued the Company with a Notice of Assessment of Overpaid Repayment Supplement on the basis that the £916.12 repayment supplement had been paid “in error” as the time taken to authorise the repayment had been 30 not 31 days. The assessment was upheld on 30 March 2016 following a review.

7. On 28 April 2016 the Company appealed to the Tribunal on the grounds that as the repayment had been received into the Company's bank account on Tuesday 8 March 2016 the written instruction directing the repayment could not have been given until Friday 4 March 2016, outside the 30 day period. In support, Mr Collins produced a document published by Bacs Payment Schemes Limited in 2015, *BACS DIRECT CREDIT*. This document, which was accepted as accurate by Mrs Ashworth of HMRC, sets out the processing cycle for a Bacs payment as follows:

Input – day 1

Input day is the latest day a business user/bureau may submit a payment file to Bacs for a processing cycle. Payment files must be transmitted to Bacs between 07.00 and 22.30.

Processing – day 2

Files are delivered to the recipient banks which then process each payment.

Entry – day 3

Payments are simultaneously credited to the recipient's accounts and debited from your account

As the payer, you remain in control of the process at all times. You decide when each payment will be made. ...

8. The sole issue between the parties is whether the written instruction directing the repayment was, as HMRC contend, the VOPS 240 issued on 3 March or, as the Company contends, the subsequent instruction by HMRC (acting in accordance with the VOPS 240) to its bank submitting a payment file for a Bacs processing cycle on Friday 4 March 2016. Mr Collins accepts that if the VOPS 240 is the written instruction directing repayment the Company's appeal cannot succeed.

9. In *Vogrie Farms v HMRC* [2015] UKFTT 531 (TC) the Tribunal (Judge Reid QC and Mr Presho) noted that:

“30. It is pertinent to begin with what s 79(2)(b) [VATA] does not say. It does not refer to a cheque or payable order. It does not say to whom the written instructions have to be issued; and, in particular, it does not say they have to be issued to a third party. It does not require a cheque to be issued. It does not require payment to be made by a specified date. It does not require payment or written instructions to be made or issued by any particular method such as recorded delivery. Any one or more of these matters could have been stipulated in the legislation, primary or secondary, but this has not been done. None of these matters needs to be read into the legislation even if it were legitimate to do so.

...

33. In our view, the phrase *written instructions* means just that and can take any written form. There is no legislative restriction on the form of writing. Accordingly, instructions in electronic form must be regarded as *written instructions*. Any other conclusion in this modern age would be absurd.

34. The phrase *directing the making of the payment* seems to us to be equally straightforward. While it is true that a payable order or a cheque may be a written instruction which directs the making of a payment, it is equally possible that the cheque or payable order is the consequence of the issue of written instructions directing the making of a payment. ...

...

36. “*Issuing* instructions does not therefore mean making payment or delivering a cheque or payable order or securing the transfer of funds through the Bacs system.

37. Nor does *issuing* necessarily mean communicating with a *third party*, although it may include it. ...”

10. However, in *Marlico Limited v HMRC* [2015] UKFTT 528 (TC), released the same day as *Vogrie Farms*, the Tribunal (Judge Short and Mr Haarer) observed, at [92]:

“... the time, from HMRC’s perspective, stops at the point when they take the last action necessary by them to make the payment.”

11. If this is correct then the issue of a VOPS 240 clearly cannot be the “last action” necessary for payment to be made. Such a view is consistent with the decision of the Tribunal (Judge Hellier) in *Beast in the Heart Films (UK) Limited v HMRC* [2009] UKFTT 230 (TC) who, at [28], concluded that the VOPS 240 was not the issue of written instruction directing payment.

12. The *Beast in the Heart Films* case was considered by the Tribunal (Judge Barlow and Ms Stott) in *Megantic Services Limited v HMRC* [2010] UKFTT 125 (TC) who said, at [41]:

“With respect to the Tribunal that decided the *Beast in the Heart Films* case, we do not agree that the written instruction must be to a third party (the bank), provided that there is an internal written instruction which does in fact lead to the making of the payment. The VOPS 240 form therefore does amount to an instruction to make the payment albeit that there is then a further necessary step before the payment is actually initiated, being the computer message sent to the bank’s computer.”

13. Earlier decisions of the VAT and Duties Tribunal, eg *Aston v Commissioners of Customs and Excise* (MAN/90/0499 – TC5955) supports the Company’s argument whereas others, eg *Watford Timber Company Limited v Commissioners of Customs and Excise* (LON/96/1223 – TC14756) and *Thornfield Redditch Limited Partnership v Commissioners of Customs and Excise* (MAN/02/0456 – TC00180), suggests that HMRC’s view that the VOPS 240 is the instruction to make the payment is correct.

14. As Judge Reid QC observed in *Vogrie Farms*, s 79(2)(b) VATA does not specify to whom the written instructions have to be issued and does not say they have to be issued to a third party. It merely sets out one of the conditions which must be satisfied for an entitlement to repayment supplement to arise, namely, that “a written

instruction directing the making of the payment or refund is not issued by the Commissioners [HMRC] within the relevant period.”

15. Having considered its terms, the VOPS 240 in this case is clearly a written instruction directing the making of a payment or refund. As this instruction was issued on 3 March 2016, within the relevant period, the qualifying condition in s 79(2)(b) VATA has not been satisfied.

16. It therefore follows that the Company was not entitled to repayment supplement and its appeal must be dismissed.

17. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 24 January 2017