TC04317

Appeal number: TC/2013/06585

VAT – Requirement of security for VAT – VAT debt and non-compliance of company carrying out similar business whose director was also director of the appellant – decision flawed for lack of reasons and for failure to consider whether appeal against assessment against previous company had been withdrawn - decision not otherwise unreasonable–if further decision were to be directed requiring the flaws to be corrected inevitable that security would still be required - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MISTRAL PROMOTIONS & MARKETING (UK) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MRS SHAMEEEM AKHTAR

Sitting in public at 45 Bedford Square, London on 1 August 2014

The appellant did not appear

Siobhán Brown, HMRC Officer, for the Respondents

DECISION

Introduction

1. The appellant appeals against HMRC's decision contained in a letter of 3 September 2013 to issue a Notice of Requirement to give Security (the "Security Notice") under paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 ("VATA").

2. The amount of security required was £26,900 if submitting quarterly VAT returns or £17,950 if submitting monthly VAT returns.

Proceeding in the absence of the appellant

3. The day before the hearing the appellant's representative e-mailed a skeleton argument to the Tribunal in which it was stated that due to funding the appellant's representative would not be able to attend the hearing to present the case and cross-examine HMRC's witness. The document stated that the appellant did not feel capable of dealing with the hearing; that it would like the Tribunal to reach a decision without anyone being present for the appellant, and that it would like the Tribunal to carefully consider each of its points.

4. We were satisfied from the document received above that the appellant had been notified of the hearing. Taking into account the particular circumstances of the case including variously the particular jurisdiction of appeals against VAT security notices where the focus is on what information was before the officer who made the decision and the reasonableness of the decision; that the hearing had been postponed before; and that both the appellant and HMRC were agreeable to the hearing going ahead in the absence of the appellant we agreed it was in the interests of justice for the hearing to proceed in the absence of the appellant.

Evidence and Facts

5. We heard oral evidence from the officer who had imposed the security requirement, Mrs Janice Uzzell. She also answered the Tribunal's questions. We found her to be a credible witness. From her evidence and the documentary evidence before us we found the following facts.

6. The appellant is a supplier of electronic and telecommunications equipment. It was registered for VAT purposes with effect from 1 May 2011. It carries on business from an address in Tunbridge Wells, Kent.

7. On 3 September 2013 HMRC served the Notice of Requirement which is the subject of this appeal on the appellant.

8. On 23 September 2013 in response to a letter received from the appellant's representative asking for reasons for the decision to impose security, Mrs Uzzell, who was the officer who imposed the security requirement, stated the following:

> "The reason for requiring security is that the business is deemed to pose a risk to future VAT revenue. This is as a result of previous failures and the non-compliance of the current and previous businesses that the current director had involvement."

9. The letter includes a table which sets out various company names, the company's status (whether the company was "live", "insolvent" or "Missing Trader") and various amounts of VAT debt.

Information before Mrs Uzzell

10. Mrs Uzzell told us about the information she considered. She received an internal document which was termed a "chain chart" dated 16 August 2013 and which was produced by clerical staff within HMRC setting out various pieces of information about the trader, the type of business, its address, the owners, directors, shareholders, liability to tax and additional information. She checked this information herself on Companies House records and on HMRC's internal systems to see if the amounts and returns reported as being outstanding were correct.

11. She checked the appellant's VAT account which showed when VAT returns had been made. She checked HMRC's systems (vision and FAME) to see whether the figures were correct. In relation to the appellant there was a VAT debt of £100 and a default surcharge amount of £114.25. Mr Plunkett was appointed as a director on 1 April 2013. She noted the appellant had changed its name from Property Samurai Limited and then to Warriorr Limited.

12. The chain chart noted various pieces of information in relation to other companies with which there was a connection to Mr Plunkett.

13. In relation to Mistral Marketing Ltd. the company was insolvent on 19 July 2013 with a VAT debt of £516,421.78 and a default surcharge of £34,070.95. Mr Plunkett was appointed as director on 29 October 2008. He was also the sole shareholder. The company has the same Tunbridge Wells address as the appellant.

14. Mrs Uzzell confirmed she looked at the compliance record and statement of account of Mistral Marketing Limited which showed a breakdown of the various default surcharges, tax due on returns and officer assessments to tax.

15. In relation to Kent Parking Solutions Ltd, the table lists this company as a missing trader with the date 1 September 2004 and a VAT debt of £6,536.34 and £798.18 default surcharge. Mr Plunkett was appointed as director and company secretary on 31 August 2008. The company had the same Tunbridge Wells address as the appellant. Mrs Uzzell said this was a missing trader in the sense that it had not replied to any enquiries from HMRC that had been made of it.

16. In relation to Gatestone UK limited this is stated to be insolvent from 23 September 2009 to 15 March 2006 with a VAT debt of £41,377. Mr Plunkett was appointed director from 12 August 2002 to 12 December 2003 and stated to be a 50% shareholder. The address of the company was in Orpington, Kent.

17. In relation to a company called Greens of Tunbridge Wells Ltd. Mr Plunkett was a director of this from 2 March 2003 to 12 August 2008. His wife, Tanya Plunkett, then became a director. This became insolvent on 2 March 2012 leaving a VAT debt of £4675.93 VAT and a default surcharge amount of £166.30.

18. The picture that Mrs Uzzell built up from the above was that Mr Plunkett had been a director in businesses that had become insolvent and de-registered for VAT and which had left behind VAT debts. She did not enquire into the particular role the director played in that but assumed directors had control of the business and were responsible for making returns and rendering payments.

19. She accepted that when the Security Notice went out to the appellant the appellant did not have any arrears of VAT apart from £100. But she was concerned given the compliance history of the companies the director of the appellant, Mr Plunkett, had been involved with that there would be further defaults and that she considered the risk to revenue to be high.

20. In relation to the calculation of the amount of security the figures were based on the returns for Mistral Marketing Ltd rather than the earlier returns of the appellant company given Mrs Uzzell's view that the appellant had taken over the business of Mistral Marketing Ltd. Mrs Uzzell showed us a table in the bundle which referred to the VAT liability for four three month VAT periods 05/12 (this was incorrectly stated on the table to be for "12-Mar"), 08/12, 11/12 and 02/13. From these an average monthly rate of £4,468.97 was calculated and this in turn was used to generate the quarterly return (6 month pro-rata) and monthly return (4 month pro-rata) figures.

21. On 18 March 2013 the appellant company changed its names from Warriorr Limited to Mistral Promotions and Marketing (UK) Ltd.

22. It continued to trade from the same address as Mistral Marketing Ltd. The trade classification in the chain chart is described as "wholesale of electronic and telecommunication equipment" and that of Mistral Marketing was "Retail, Mail order house of internet". She explained the appellant had previously been described as a letting company.

23. The Tribunal asked Mrs Uzzell to comment on the appellant's reference in its written submissions to having adopted a different business model and to it having started trade with the company Apple in mobile phones which involved the reverse charge. She was not aware of this from the information that had been given to her. She said she had no information about this or any information on the appellant being subject to a reverse charge. She said she was not an MTIC officer and just looked at the bare facts on the VAT record.

24. In responding to the Tribunal's questions Mrs Uzzell asked if she could refer to some further documents that were not in the bundle which had been prepared by HMRC for the hearing. As these documents were not on HMRC's list of documents they would need permission to rely on them. The first document was a "security referral form" which we considered to be relevant to be admitted before the Tribunal because it contained information Mrs Uzzell had access to before she made her decision. However the other document she referred to which was entitled "post-registration summary of MTIC assurance activity dated 21 November 2013" was not relevant in our view. It post-dated Mrs Uzzell's decision and was not before her when she made her decision on 3 September 2013 or provided reasons for that decision on 23 September 2013. We have not therefore considered this document.

25. Around about the beginning of August 2013 Mrs Uzzell received a security referral form dated 17 July from Susan Williams East Croydon Team 1 MTIC in relation to the appellant. This set out the appellant's previous company names, and its trading address. The current VAT debt of the appellant was stated as £1809.78, default surcharges were listed for 09/11, 03/12, 06/12, 12/12 and 03/13, and there was some information about the appellant's direct tax position (loss showed on return of £24,497 and the Trading address). There was a section on "Associated Persons: Current Directors" which included Mr Plunkett and "Associated Business…Insolvent companies where RM Plunkett had personal involvement" (Mistral Marketing Ltd, Greens of Tunbridge Wells, Kent Parking Solutions Ltd, Gatestone UK Ltd, The Senseware Company Ltd and Senseware Retail Ltd). Under the section "Live companies" the memo mentions Mistral Marketing (Ireland) Ltd. and two companies with Mistral in their name which were not VAT registered.

26. In the section "reasons for recommendation" the form mentioned that Mistral Marketing Ltd had been the subject of continuous monitoring by "SI MTIC" since December 2011 and gave details of disallowed input tax claimed "re purchases from a Hijacked company and output tax assessed for lack of dispatch evidence for a total of £354,247. Unpaid" and "Output tax assessed for lack of dispatch evidence for a total of £105,941". It reports HMRC's suspicions of Mistral Marketing Ltd's transactions being linked to fraud and of no evidence having been provided by Mistral to substantiate their sales outside the UK. The note reports that the assessment was being appealed, that the company was being put in liquidation but that it was not clear whether the liquidator wanted to take the appeal forward.

27. The referral concludes with the following:

> "I believe that Mr R M Plunkett presents a real risk to the revenue. His previous history suggests that any company in which he is involved is likely to result in further debts to HMRC, I therefore recommend that security is imposed on Mistral Promotions and Marketing (UK) Ltd."

28. Mrs Uzzell contacted the officer making the assessment Susan Williams by phone on 22 August 2013 to verify information relating to Mistral Marketing Ltd as she could not access this on the systems that were accessible to her as non-MTIC officer. It appeared Mrs Uzzell that the business had transferred from Mistral Marketing Ltd to the appellant as the appellant's name changed to include Mistral on

18 March 2013, there was a similarity in business and trading address and as Mr Plunkett became a director on 1 April 2013.

29. Mrs Uzzell was satisfied there was a connection between the company Mistral Marketing Limited and the appellant. She shared the concerns raised by the MTIC officer in that she was concerned about the large debts left behind. Mrs Uzzell was not able to comment on what happened to Mistral Marketing Ltd's appeal to the tribunal. She just noticed that substantial assessments had been raised and the company Mistral Marketing Ltd was insolvent and the assessments had not been paid.

Law

30. Paragraph 4(2) of schedule 11 to VATA provides:

> "If they think it necessary for the protection of the revenue [HMRC] may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due from [him]."

31. Paragraph 4(4) provides that:

> "security under sub-paragraph (2) above shall be of such amount, and shall be in such manner, as the Commissioners may determine."

Parties' submissions

32. The appellant argues that in relying solely on the history of other businesses, the officer failed to take into account relevant matters. In particular at the time of the decision the appellant's trading style had completely changed. Agreement had been reached with Apple to supply the appellant directly with mobile phones that were in any case subject to reverse charge. The appellant argues that with no VAT applying and with purchases made direct from Apple there was zero chance of any revenue loss. The requirement for security was unreasonable as there was no potential for tax loss. The officer had had no regard to the business activity or model of the new company. The decision letter did not provide any reasons. Also the appellant argues there was no evidence to substantiate the loss of revenue and whether this was attributable to the actions of the director. The appellant disputes that it knew or should have known of the alleged connection to fraud that resulted in the large Mistral Marketing Limited assessment. The appeal was withdrawn due to lack of funds not through admission of knowledge. This was not taken into account.

33. HMRC argue the decision to issue the notice was reasonable in the light of the information available at the time, that the relevant matters were considered, and no irrelevant matters were considered. They also argue the amount in the notice is reasonable.

Discussion

34. We do not understand there to be any dispute between the parties as to the jurisdiction of the tribunal over appeals against decisions to impose security for VAT. The case-law (*John Dee Ltd v CCE* [1995] STC 941 and *CCE v Peachtree Enterprises Ltd* [1994] STC 747) establishes the issue for the Tribunal is whether the decision to impose security was one that could not reasonably be arrived at. This includes consideration of whether irrelevant matters have been taken account of and whether relevant matters have been disregarded. The Tribunal is limited to considering the facts and matters known at the time the disputed decision was made.

35. If we are persuaded the decision was flawed but that, had HMRC approached the matter correctly, they would inevitably have arrived at the same conclusion we should dismiss the appeal.

Failure to have regard to new business model / activity

36. The appellant refers to two Tribunal cases by way of support for its argument that all factors need to be taken into consideration to identify whether they are relevant are not.

37. The appellant refers to [42] of the First-tier Tribunal case of *Aria Technology v HMRC* [2014] UKFTT 271 (TC) where the officer was criticised for not making relevant enquiries into the:

> "…substance of the appellant and its creditworthiness so as to enable him to form a view as to the risk, if any, it might pose to the revenue."

38. The appellant also refers to the VAT Tribunal case of *Mushtaq's Food Factory Limited* VAT Tribunal decision (2007) 20496 at [24] where the officer was criticised for basing his decision on incorrect information and for disregarding the appellant's letter which indicated it had ceased trading which went to the heart of whether the appellant in that case posed a significant risk to the revenue.

39. However in *Aria Technology* while we note the Tribunal criticised HMRC's approach as being "extraordinary" this was "in the particular circumstances of [the] appellant who had gone to some trouble to explain what it was doing and why." In *Mushtaq* the criticism related to a letter the appellant had sent in but which had been disregarded. Those cases, which can only be of persuasive value, can be distinguished from this case as there is no evidence which supports a finding that the appellant pointed to relevant information that the appellant sent in which was disregarded. It is not clear on what basis therefore HMRC might be expected to know that the appellant had reached any agreement with Apple.

40. We should also note that as no evidence has been put forward to support the appellant's point we are unable to make a finding that the change in business model was indeed the new activity or business model of the appellant.

41. Mrs Uzzell could, in our view, have quite reasonably reached the view that a similar business was being carried on by the appellant to that which had been carried out by Mistral Marketing Ltd. In the absence of information from the appellant, or indications from elsewhere suggesting the business was different it was not incumbent on her to make enquiries as to whether the business model had changed.

Failure to consider reason for withdrawal of appeal which gave rise to tax debt

42. The appellant argues the officer overlooked points in its favour namely that the appeal against the assessment by Mistral Marketing Ltd was dropped for reasons of costs. It also points to the fact there is no evidence before the Tribunal of any knowledge (of the sort relevant in MTIC cases) on the part of the appellant's director.

43. The officer simply had regard to the fact an assessment had arisen and had not been paid.

44. The appellant referred to [4] and [5] of the First-tier Tribunal's decision in *Aria Technology* which recorded that the Tribunal found it important for it to note that there were extant proceedings in which it was contended by HMRC that the appellant there knew or should have known its trading activities were related to transactions which were fraudulent and that the appellant in that case denied such knowledge or means of knowledge. The appellant in the current appeal argues that the Tribunal in *Aria Technology* clearly found that the facts of a "means of knowledge" case were something which an officer should consider.

45. But, we disagree that this proposition is something which can be drawn from the decision in *Aria Technology*. The particular facts of that case concerned a situation where the appellant had an appeal against HMRC's denial of input tax. As set out at [27] of the decision the appellant had organised its subsequent VAT payments in such a way that there was an outstanding balance due to HMRC which approximated to the disputed input tax denial. It continued to pay VAT on its ongoing trading account. In adopting this approach the appellant relied on certain correspondence from another HMRC officer foregoing action on the outstanding VAT balance while the appeal was pending. At [31] the Tribunal explained that this other correspondence with the appellant was relevant to the decision to impose security and the amount of security because it explained why the appellant in that case was making retentions of VAT and because it should have alerted the officer imposing security to the fact that it was only the amount of denied input tax that was ever at risk. There is no suggestion that the officer, ought, as the appellant argues, to have considered the facts of the appellant's case in its MTIC appeal. The Tribunal simply needed to refer to the MTIC appeal in order to explain the context of the particular correspondence which explained the appellant's approach in making retentions of VAT which approximated to the disputed input tax.

46. In this case the officer's decision that VAT was due was not based on any finding as to knowledge or means of knowledge on the part of the director. That no finding on such points was made is entirely reasonable in our view. It was enough for the purpose of HMRC's discretion as to the issue of protection of the revenue that the

director was a director of a company which had become insolvent leaving a large tax debt. If there were concerns about whether the assessment was correct then the proper route to challenge that would have been for Mistral Marketing Ltd, or its liquidator once it was in liquidation, to pursue an appeal to the Tribunal against the assessment.

47. The appellant's claim that it was compliant with its tax obligations as at the time of its skeleton argument was disputed by HMRC and is not supported by evidence but in any event it is irrelevant to the reasonableness of the decision to impose security at the time it was made.

48. We have considered the documents in the hearing bundle setting out the information available to Mrs Uzzell at the time she made her decision and have also as discussed above considered the security referral document HMRC sent in but which was not in the bundle.

49. The chain chart Mrs Uzzell referred to was produced on 16 August 2013. She also had the security referral document before her which amongst factual matters contained factual allegations relating to Mistral Marketing Ltd's involvement in MTIC chains.

50. In contrast to matters of company record, and VAT debts and defaults the factual allegations in relation to MTIC involvement were not matters that Mrs Uzzell would have been able to verify. It would seem to us that if Mrs Uzzell had given any such unsubstantiated factual allegations weight in her decision then that might very well call into question the reasonableness of her decision.

51. We have therefore specifically considered whether some of the allegations made in the security referral memo relating to the involvement in MTIC chains featured in Mrs Uzzell's consideration but are satisfied that what weighed in her mind was the fact that multiple previous companies which had connections though the appellant's director had left behind VAT debts. Mrs Uzzell freely admitted she was no expert in MTIC matters and we accept her evidence that it was the information in the chain chart which was the main basis upon which she made her decision.

52. However one point which we cannot see was clearly explored and considered was whether Mistral Marketing Ltd's appeal against the large assessment was still ongoing. Having been told in the security referral from the MTIC officer that an appeal had been lodged that was in our view a relevant factor to have considered in the context of protection of revenue because if the appeal was being pursued there was the potential for the assessment to be varied downwards or cancelled upon appeal to the Tribunal. The fact an appeal was ongoing would not necessarily mean it was wrong to impose security but the fact the assessment was not final would be a relevant factor to consider amongst all the other information.

53. We are not persuaded though that the appellant's argument that the officer should have had regard to the *reasons* for why the appeal was withdrawn has any merit. Once the appeal is withdrawn under the terms of the relevant legislation the assessment is final. From the point of view of revenue protection it is not

unreasonable to take the view that what matters is the fact that a tax debt is left unpaid rather than the reason for the liability becoming final. Further we can see that it would defeat the object of having finality in tax proceedings if parties were able to pick over the circumstances surrounding an assessment to tax liability despite it having become final.

54. However it being accepted in the appellant's skeleton argument that Mistral Marketing Limit's appeal was withdrawn, if we were to require a new decision to be made taking into account that an appeal had been lodged (but that it had then been withdrawn with the effect the assessment was final) then we think the decision to impose security would inevitably be the same.

Failure to give reasons

55. The Security Notice imposed on the appellant gave no reasons for why the security was being imposed. The failure to give reasons (which was in accordance with what we understood to be the practice of the Commissioners rather than any particular conscious omission unique to Mrs Uzzell) renders the decision one that in our view no reasonable body of commissioners could have arrived at. We are satisfied Mrs Uzzell applied her own judgment to the issue of whether or not security should be imposed and did so on a reasoned basis which was clear to her. But, having done that there was no reason why some kind of indication of the basis upon which the decision was made was not then disclosed to the appellant. Knowing what the reasons are for a decision which has important and serious consequences for the appellant but not then disclosing the nature of those to the person who is subject to that decision amounts to a flaw in the way the decision was reached. Our review of the decision under appeal does not stop short at the point in time where the internal monologue in the mind of the officer reached a conclusion on the issue of security but encompasses the decision as it is expressed to the subject of the decision (the letter of 3 September 2013). The fact that there was the opportunity later for the appellant to obtain reasons does not get away from the fact that the initial decision to impose the security requirement was made without disclosing reasons and was flawed. If the Commissioners had approached the matter correctly reasons would have been given at the outset.

56. However having heard Mrs Uzzell's evidence we were satisfied that the subsequent reasons she gave on 23 September 2013 fairly reflected the actual reasons she had for the decision on 3 September 2013. The reasons in the letter of 23 September 2013 are stated adequately in our view.

Conclusion

57. From our analysis above the decision to impose security was one that the officer could reasonably reach. The poor tax compliance record of companies connected with the director of the appellant was we think a relevant factor for Mrs Uzzell to consider.

58. Given the date of the name change, the same trading address and the business activity description we do not think it was unreasonable of her to have come to the

view that a similar business to that carried out by Mistral Marketing Ltd was then being carried out in the appellant and therefore for her to have used the Mistral Marketing Ltd figures rather than the appellant's prior figures to calculate the security amount. The basis for calculation and accordingly the amount of security were not unreasonable.

59. While some of the points in the VAT security referral echoed Mrs Uzzell's concerns as to protection of revenue we are satisfied that the factual allegations made in the security referral memo by the MTIC officer relating to involvement in MTIC chains did not feature in Mrs Uzzell's decision making. We are satisfied she reached her own decision taking account of the relevant factors but disregarding the irrelevant factors. She would in our view have been amply entitled to have reached the decision she did on the basis of the poor record of the companies of which Mr Plunkett had previously been a director having left VAT unpaid.

60. On the information available to her we cannot say that her conclusion that the appellant presented a risk to the protection of revenue was one that was unreasonable. The decision to impose security was in our view well within the range of reasonable decisions that could be reached.

61. Although HMRC's decision was flawed (in that no reasons were given and in that no clear consideration appears to have been given to whether an appeal which had been made against the substantial assessment against Mistral Marketing Ltd. was still proceeding), if HMRC had approached the matter correctly and had given its reasons in its decision letter and also had taken account of the appeal status (in relation to which there appears to be no dispute that the appeal by Mistral Marketing Ltd was withdrawn) we think the decision to impose security on the appellant would inevitably be the same.

62. The appellant's appeal is therefore dismissed.

63. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 11 March 2015