TC01922

Appeal number: TC/2011/3021

HARDSHIP – Excise Duty- Appellant unable to account for substantial credits and debits to his bank account - Respondents contending that without adequate explanation hardship claim should be disallowed - not required – must look at financial position of Appellant at the time claim is considered – Appellant's assets insignificant in the context of the amount of duty assessed – hardship found

FIRST-TIER TRIBUNAL
TAX

JOHN COZENS **Appellant**

- and –

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

TRIBUNAL: JUDGE ROGER BERNER (Chairman)
JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 13 February 2012

The Appellant in person

Jeremy Bamford, counsel, instructed by Howes Percival LLP, for the Respondents

DECISION

Background

1. This decision concerns a hardship application in respect of an appeal made by John Cozens ("the Appellant") against a notification given to him of joint and several liabilities for an assessment raised by the Commissioners for Her Majesty's Revenue and Customs ("the Respondents") for Excise Duty in the sum of £6,128,138.68.

2. The Assessment ("the Assessment") was raised under the provisions of section 12(1A) of the Finance Act 1994 against STTM Ziegler France in respect of 58 excise duty suspended movements of goods which did not reach their stated destination but were, instead diverted in the United Kingdom. The Respondents allege that these movements were part of an irregular scheme ("the Scheme") to import loads of duty-suspended alcohol into the UK from a bonded warehouse in France, direct the alcohol from the destination bonded warehouse stated on the accompanying documentation, break up or "slaughter" the loads at one or more unknown locations in the UK, thereafter allowing the sale of the alcohol within the UK and thereby avoiding payment of excise duty on those loads. As a consequence, the Respondents sought to assess STTM Ziegler France as the consignor of the goods in respect of the excise duties which became payable in respect of the goods upon the occurrence of each of the diversions. On 17 December 2010 the Respondents wrote to the Appellant notifying him that he was to be held jointly and severally liable for the amount of duty assessed with other named persons (hauliers and drivers) on the basis that the Appellant was involved in the movement of the goods. Consequently, it was contended by the Respondents that the Appellant had caused the occurrence of an excise duty point under Regulation 3(2) of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 and in accordance with Regulation 7(2) of those Regulations he was jointly and severally liable to pay the duty with STTM Ziegler France and the hauliers and drivers involved.

3. On 21 December 2010 the Respondents sought and obtained a worldwide freezing order against the Appellant in support of a claim made by the Respondents in the Chancery Division of the High Court against the Appellant for the excise duty which was the subject of the Assessment (the "High Court Proceedings").

4. On 15 April 2011 the Appellant gave notice of appeal to the Tax Chamber of the First-tier Tribunal against the Respondents' decision to hold him jointly and severally liable for the Assessment. In his notice of appeal the Appellant denied any liability in respect of the Assessment.

5. The appeal cannot be entertained unless the excise duty in dispute is paid to or deposited with the Respondents (or payment has been adequately secured) unless the Appellant is able to satisfy the Respondents (or the Tribunal) that he would suffer hardship if he were required to provide security for the relevant amount. The notice of appeal indicated that the Appellant had applied to the Respondents for their agreement that the appeal may proceed on the grounds of hardship.

6. On 27 April 2011 the Respondents wrote to the Appellant's solicitors stating that in order to consider the hardship application the Appellant needed to provide details and evidence of his incomings and outgoings, as well as further information and supporting evidence concerning his self-employed business, his business and personal bank, building society and National Savings accounts, any insurance policies he held land details of any other assets or liabilities not mentioned in his statement of assets.

7. On 27 May 2011, not having received a response to this letter, the Respondents wrote to the Tribunal requesting that a direction be issued instructing the Appellant to either pay the tax in dispute or submit the requested information within a specified time period. In response to a request for representations on this letter the Appellant's solicitors wrote to the tribunal on 14 June 2011 requesting that the appeal be stood over pending the outcome of the High Court Proceedings. The letter also enclosed a copy of the affidavit sworn by the Appellant in late January 2011 listing all his assets above £1,000 value. This affidavit disclosed balances in bank accounts in an amount of £5,334.58 and shareholding interests in two private companies, Globel Travel Ltd and JJ Taxis Folkestone Ltd, which the Appellant indicated he was unable to value with any precision, but he did indicate that his shareholding in JJ Taxis Folkestone Ltd was unlikely to have any value. This affidavit had been prepared in response to the worldwide freezing order issued in the High Court Proceedings.

8. On 6 October 2011 the High Court heard the Appellant's application to discharge the worldwide freezing order. On 14 October 2011 the Tribunal made directions in relation to the Appellant's hardship application requiring the Appellant to serve on the Respondents and file with the Tribunal list of documents on which he seeks to rely in his hardship application and made further directions in relation to a hearing of the application.

9. On 8 November 2011 Floyd J dismissed the Appellant's application to discharge the worldwide freezing order. For the reasons set out in his judgment of 8 November 2011. Floyd J found that the Appellant did have assets, and in particular mentioned his interest in Globel Travel and possible interests in two further businesses, namely ProCars and Pussy Cats. In that context Floyd J said:

> "I accept that the picture which emerges from all this is not of someone surviving only on his earnings as a taxi driver. Moreover, whilst I am plainly not in a position to reject them out of hand, some of Mr Cozens' explanations about his involvement in the businesses of ProCars and PussyCats seem, to put it at its lowest, open to challenge. There is very little in the way of documentary evidence to corroborate Mr Cozens' account of events, and where there are documents, such as documents filed at Companies House, they appear to contradict his account of things."

10. On 11 November 2011 the Appellant's solicitors wrote to the Respondents seeking clarification as to whether the Respondents still wished to contest the hardship application in circumstances where the Appellant had provided extensive financial disclosure in the High Court Proceedings in the context of the application to discharge the worldwide freezing order, including the core financial documentation that the Respondents had previously requested of him, such as copies of all his bank and credit card statements and legal demands served on him in relation to his bank and credit card accounts. The Appellant's solicitors stated that the hardship application would simply involve him disclosing this very same documentation (and no more) for a second time.

11. On 20 December 2011 the Respondents wrote to the Appellant's solicitors stating that in the light of Floyd J's findings it could be reasonably inferred that the Appellant had further undisclosed assets and accordingly the hardship application remained contested. The Respondents set out in this letter a number of areas where the Respondents remained concerned as to complete disclosure and invited the Appellant's solicitors to provide documentation and representations in relation to each of them. These items formed the focus of the hearing on the hardship application referred to below.

12. The Appellant's solicitors did not respond to this letter. In a subsequent letter to the Tribunal they indicated that they had not been able to resolve funding issues to enable them to represent the Appellant in relation to the Tribunal proceedings and that the Appellant was now unrepresented. In the meantime at the request of the Respondents a hearing had been listed in relation to the hardship application.

13. Whilst the hearing had been listed to hear the substance of the application, in its skeleton argument filed with the Tribunal the Respondents invited the Tribunal only to consider the issue of further directions to the effect that unless the Appellant served a witness statement answering the questions and exhibiting the documentation requested in the Respondents' letters dated 27 April 2011 and 20 December 2011 referred to above and by a specified time, his hardship application be dismissed, and if he failed to comply with that direction and he did not deposit or pay the amount raised by the Assessment by the same time his notice of appeal should not be entertained and should be struck out.

14. The Appellant attended the hearing and he made it clear to the Tribunal that as he no longer had the benefit of legal advice to assist him he did not intend to submit any further written material in relation to the Respondents' letters dated 27 April 2011 and 20 December 2011. Consequently, with the consent of the parties, the hearing proceeded as a substantive hearing of the hardship application.

The Law

15. Section 16(3) of the Finance Act 1994 provides:

> "An appeal which relates to a relevant decision falling within any of paragraphs (a) to (h) of section 13A(2), or which relates to a decision on a review of any such relevant decision, shall not be entertained if the amount of relevant duty which HMRC have determined to be payable in relation to that decision has not been paid or deposited with them unless:-
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> (a) the Commissioners have, on the application of the appellant, issued a certificate stating either –
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> (i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or
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> (ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;
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> or
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> (b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners."

16. The appeal is against an assessment to which paragraph (b) of section 13A(2) applies, namely an assessment under section 12 of the Finance Act 1994 in respect of excise duty.

17. As we decided that the application should be determined on the basis of the material available at the time of the hearing on 13 February 2012, we are proceeding on the basis that the Respondents have refused to accept the Appellant's hardship

claim on the basis of that material. The issue in this application is therefore whether we are satisfied that the Respondents should not have refused to issue a certificate stating that on the grounds of hardship that would be suffered by the Appellant it is not reasonable that security should be required from the Appellant for the payment of the amount of duty due in respect of assessment.

18. We consider that we must take the position as we find it today as regards the Appellant's financial position and that the burden of proof is on him to establish hardship: see *Buyco Ltd and Sell Co Ltd v HMRC* [2006] VTD 19752. Although this was a decision in respect of the corresponding provisions for VAT contained in section 83(3) of the Value Added Tax Act 1994 which are differently worded in some respects, there is no significant difference on this point.Consequently, the matter should be determined on the basis of the material available at the time of the hearing on 13 February 2012. We are proceeding on the basis that the Respondents have refused to accept the Appellant's hardship claim on the basis of that material.

19. If therefore we find on the facts that as of today the Appellant has satisfied us that he has no assets which it would be reasonable for him to provide as security for the purpose of the amount of duty due in respect of the assessment we should allow this application. The fact that the Appellant may have disposed of assets which if he had retained them might have been available as security is not to be taken into account unless it can be shown that the transactions were outside the ordinary course with the purpose of enabling him to avoid paying the tax in dispute. See again *Buyco Ltd and Sell Co Ltd* at page 9, lines 15-19. We therefore turn to the evidence as to the Appellant's current financial position.

The Evidence

20. The Appellant had submitted no further written evidence in support of his application beyond the copy of his affidavit filed in the High Court Proceedings referred to in paragraph 7 above. The Respondents relied on Floyd J's judgment in the High Court Proceedings and the evidence submitted (in the form of affidavits and exhibits thereto) in those proceedings. The Appellant gave live evidence and was cross-examined by Mr Bamford.

21. The Appellant contended that he had no material assets other than his 50% shareholding in Globel Travel Ltd. He said that he owned no real property and currently lived in rented accommodation. He said that he currently worked as a taxi driver earning approximately £300 per week which was his only source of income at the present time. He stated that he had insufficient resources to pay for legal representation in relation to his appeal; his lawyers had asked him for a sum of £6,000 on account to represent him at the hearing on this application which he was unable to raise.

22. The Respondents relied heavily on the conclusions of Floyd J in his judgment of 8 November 2011. Mr Bamford stated that the Respondents did not accept in the High Court Proceedings that the Appellant had made full and frank disclosure of his financial position as regards assets or income. The Respondents had set out in substantial detail in the High Court, their concerns over the financial disclosure made by the Appellant, and in particular the £141,593.40 cash deposits and bank transfers into the Appellant's bank account in the period between 1 January and 31 December 2010 which they contended was entirely at odds with the Appellant's stated income of approximately £300 per week as a taxi driver. Mr Bamford referred to Floyd J's conclusions on these issues as follows:

> "He has his admitted interest in Globel Travel, and it appears more than plausible that he retains an interest in other businesses. Moreover unless one accepts without question all Mr Cozens' explanations for the sums of money passing through his bank accounts, he does appear to have sources of income which go well beyond those of an average taxi driver. The successive explanations put forward by Mr Cozens as to the monies passing through his bank accounts themselves raise further unexplained questions.
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> … There is actual evidence of assets, such as the interest in Globel Travel, and a reasonable inference of further assets, either in the form of an interest in ProCars and PussyCats, or in other undisclosed assets which are producing the levels of income seen in Mr Cozens' bank accounts."

23. Mr Bamford submitted that until the Appellant produced the evidence, explanations and supporting documentation requested by the Appellants in their letters of 27 April 2011 and 20 December 2011 the Respondents could not be satisfied that the Appellant had made out his claim for hardship. The letters referred to above sought further information in particular as to the large number of significant cash deposits and transfers into his bank account, amounting to over £141,000 in 2010, as well as significant debits to that account in the same period to pay for foreign travel (including a month's holiday in New Zealand and many visits to European countries) and luxury items all of which was inconsistent with the picture the Appellant drew of himself as someone who was down-at-heel and virtually living on the breadline.
In addition, the Respondents sought further information in relation to other businesses with which they suspected the Appellant still retained an interest as well as information concerning a property in New Zealand in which he previously had an interest.

24. The Respondents also had a concern regarding a sequence of seven monthly payments each in an amount of £720 from the Appellant's main bank account which were described on his bank statement as "Faster Payment – J Cozens". The

Respondents submitted that these suggested that the Appellant had another bank account which he had not disclosed as none of his other disclosed accounts showed corresponding receipts in the same period.

25. There were two businesses in which the Respondents were concerned the Appellant still maintained an interest. The first was a taxi business called Pro Cars. The second was a sauna business called Pussy Cats. The Respondents were also not satisfied with the Appellant's explanation regarding a property in New Zealand which was sold on 29 June 2006 for NZ $750,000. The Appellant had stated in his affidavit evidence in the High Court Proceedings that although he was shown as the owner he had merely lent his name to enable his sister and her husband to obtain a higher mortgage than would otherwise be possible. He stated that he had taken out a mortgage jointly with them but had received none of the proceeds when the property was sold.

26. The Appellant was cross-examined by Mr Bamford, the line of questioning focusing on the details of the payments into and out of the Appellant's main bank account during 2010 and the other businesses and property detailed above in which the Respondents suspected that the Appellant may have an interest.

27. The Appellant contended that the receipts into his bank account during the period in question were largely derived from four sources as follows.

28. First, the Appellant stated that he made significant use of an unauthorised moneylender in the relevant period. The Appellant explained that he would borrow up to £5,000 at a time under a revolving credit arrangement. He stated that the loans advanced carried interest at a rate of 10% per month, and he worked very long hours at this time as a taxi driver to enable himself to keep up the repayments, perhaps earning up to £800 to £900 a week.

29. Secondly, the Appellant stated that he was working for ProCars during that period and a Mr Brian Kenny-Levick, the owner of ProCars, whom the Appellant stated he had known for many years, asked him to collect from ProCars' drivers the monies due from them to ProCars for the rental of their cars. The Appellant stated that the monies collected (which amounted to between £1,000 to £3,000 per week) would be paid into his own bank account before being transferred to ProCars. When it was put to him that this was an unusual arrangement and it seemed strange that Mr Kenny-Levick would not have performed this task himself, or at least provided the Appellant with 'Payslips for ProCars' bank account to save the need for the Appellant to route the payments through his own account the Appellant replied that Mr Kenny-Levick was a busy man and had known the Appellant since 1979 and trusted him.

30. Thirdly, the Appellant had allowed his bank account to be used by a Lisa Joy for the purposes of the PussyCats business for a short period after she took it over from the Appellant in August 2010. In that regard, the Appellant paid in some of the receipts for PussyCats and made payment of various bills on Lisa Joy's behalf. The Appellant's explanation for this in the High Court Proceedings had been that at that stage Lisa Joy did not have an account of her own. It later transpired that Lisa Joy did have her own bank account and when it was put to him that he had been untruthful about that he responded that his understanding at the time he was asked to help Lisa Joy was that she had no account of her own, but in fact the true position was that she did have an account but did not wish to use it because it was overdrawn and any credits to the account would be set off against her overdraft and not be able to be used in the business.

31. Fourthly, the Appellant stated that he had sold a car for cash, which he used towards repaying the loans obtained from the moneylender referred to in paragraph 28 above.

32. Turning to the suggestion by the Respondents that he maintained an interest in ProCars and that the payments in and out of his own bank account relating to that business could be explained on that basis, the Appellant explained that it had originally been intended that ProCars be owned jointly by himself and Mr Kenny-Levick, with each holding one share, but due to his financial difficulties at the time the company was formed he was unable to provide his share of the finance required, and it was therefore agreed that Mr Kenny-Levick would be the sole shareholder. The Appellant stated that due to an error by Julie Baker, the accountant engaged to establish the company, only one share was issued instead of the two envisaged. This share was inadvertently issued to the Appellant rather than Mr Kenny-Levick. When his mistake was discovered the Appellant executed a stock transfer form (dated 1 May 2010) transferring the share for nil consideration to Mr Kenny-Levick. The Respondents submitted that as the reverse of the form (requiring a certificate to be completed where the transfer is not liable to ad valorem stamp duty) and the company's onward return filed in June 2011 still showed the Appellant as the shareholder, the transfer was ineffective and the Appellant retained his interest in the company. The Appellant denied that he had any continuing interest and that as far as he was concerned he had disposed of his interest correctly to Mr Kenny-Levick and could not be responsible for Ms Baker's mistakes.

33. With respect to PussyCats ,the Appellant explained that he had transferred this business to Lisa Joy during 2010 who now ran it as a sole proprietor. There was no contemporaneous documentation relating to the transfer (although a letter from Lisa Joy confirming the transfer had been exhibited to the Appellant's affidavit in the High Court Proceedings) and no consideration had been paid. It was put to the Appellant that the absence of any contemporaneous documents relating to the transfer of PussyCats to Lisa Joy and the continuing use of his bank account for the various payments for the account of this business indicated that the Appellant retained an

interest in the business. The Appellant confirmed his previous account as set out in his affidavit in the High Court Proceedings that in August 2010 he had determined that the business (which was then conducted through a company wholly owned by him, M J Entertainments Ltd) was no longer viable but at the request of Lisa Joy, who managed the four staff there, he allowed her to continue to run it as a sole proprietor rather than close it down.

34. With respect to the sale of the New Zealand property in 2006, the Appellant stated that he could not produce any documentation showing who received the proceeds of sale and his sister, for whose benefit he said he became a joint owner of the property, was not currently on good terms with him and had declined to cooperate in responding to requests from the Appellant's former lawyers for documentation in relation to the sale.

35. As far as the seven faster payments identified as having been paid to "J Cozens" was concerned, the Appellant explained that he had wrongly put his own name in the narrative required to identify the recipient of the payments when initially setting the payments up. The payments were to complete the finance payments due to a company called Fleetline Finance on the Mercedes car he sold to help reduce his debt to the Moneylender (see paragraph 31 above).

36. The Appellant was cross-examined on 23 of the debt transactions shown on his bank statements during 2009 and 2010 which in the Respondents' contention showed a level of expenditure inconsistent with the Appellant's professed lifestyle. The majority of these transactions concerned expenditure on hotel and travel related matters in the UK, Ireland, France, Belgium, Italy and the Netherlands, but a number related to other items such as payment to a ski school and for flowers and theatre tickets.

37. The Appellant was not able to recall the reason for a number of these payments but the majority of them he attributed to payments made on behalf of Globel Travel Ltd, whose business involved taxi and chauffeuring services for international clients such that overseas marketing trips were necessary which incurred expenditure abroad and sometimes the client would have a hotel in the UK arranged for him which Globel Travel would pay for or as a disbursement. On a few occasions the Appellant stated that he had allowed two friends (who he did not feel he could name without their consent) to use his debit card when they were abroad without the Appellant being present. The payment to the ski school fell into this category. In addition some payments related to holidays the Appellant had taken in Europe and New Zealand.

Findings of Fact and our assessment of the Appellant

38. The Appellant is not a well educated man. He clearly has difficulty with the written word and is not used to documenting his business dealings. Hence his

difficulty in providing documentation of the sort the Respondents have sought from him to allay their concerns about whether the Appellant has assets beyond those he has declared.

39. The Respondents criticised the Appellant for his failure to answer the detailed questions about his assets that were set out in the letter of 20 December 2011 to the Appellant's former solicitors and which formed much of the material for the Appellant's cross-examination. The Appellant's answer to that was that it had not been answered because it was addressed not to him but his solicitors. Those solicitors were no longer acting for him because of a lack of funding and we do not believe that the Appellant himself would have been capable of constructing a coherent reply to that detailed letter supported by documentary evidence, as would have been expected from a more financially astute businessman.

40. Therefore we find that the Appellant has not deliberately sought to evade providing the requested information. He was at the outset of the hearing extremely reluctant to submit himself for cross-examination. This was understandable in the light of the fact that he had been trying up to the last minute to obtain legal representation for the hearing and was reluctant to proceed without legal advice. He did not at the outset understand the limited purpose of the hearing (that is just dealing with the hardship application) and may have thought that he was being put in a position where he would be questioned on the outcome of his involvement with the Scheme, a position he understandably did not wish to be placed in without the benefit of legal assistance.

41. Nonetheless, once the limited nature of the hearing was explained to him, he agreed to submit himself to cross-examination. Except in one respect mentioned below, the answers he gave to the questions put to him were consistent with the answers that the Appellant gave in his affidavit evidence in the High Court Proceedings. In addition, the answers that the Appellant gave to the questions put to him by Mr Bamford revealed no contradictions in circumstances when he came to the hearing he had not anticipated being questioned on these matters. The Appellant did not have explanations for all the items shown on his bank statements and had no documentary evidence to corroborate his answers, nevertheless by reference to the pattern of payments into and out of his bank account in the period concentrated on by Mr Bamford in his cross-examination, taken against the background of the Appellant's business activities at the time and such documentary evidence that is available we found his version of events to be plausible and more likely than not to be the truth.

42. Our assessment of the Appellant is therefore at odds with the impression given to Floyd J in the High Court Proceedings as indicated in the passages from his judgment in paragraphs 9 and 21 above. However, we have had the benefit of hearing

from the Appellant in person and he has been cross-examined before us, whereas there was no live evidence in the High Court Proceedings.

43. We find that the Appellant used his bank accounts to make payments and receive credits on behalf of the various businesses that he was interested in or connected with as well as for his own personal expenditure. Consequently, we also find that it is likely that the Appellant would allow his debit card to be used by trusted friends on isolated occasions as he maintained in respect of a number of the transactions questioned by the Respondents. This is of course not good or normal business practice and without careful records which can show how the payments can be properly allocated the arrangements can descend into chaos. This may help to explain why the Appellant has not filed any tax returns for the past four years.

44. The evidence that leads us to our conclusion on this point is a number of payments shown on the Appellant's 2010 bank statements to and from M J Entertainments Ltd, the company that previously operated PussyCats, a significant number of payments to and from ProCars (our findings on which are analysed in paragraph 46 below), and a number of payments and from Globel Travel Ltd. This conclusion also lends credence to the Appellant's explanation that a number of the payments in respect of hotel and travel related matters referred to in paragraphs 36 and 37 above were made for the account of Globel Travel Ltd. In addition the annual accounts for Globel Travel Ltd for the year ended 28 February 2010 which were exhibited to the Appellant's witness statement in the High Court Proceedings, showed that the directors had provided loans to the company of £15,808, which would be the correct accounting treatment where the directors (of which the Appellant was one) had made payments on the company's behalf. In the light of this we find that it is more likely than not that at least some of the payments referred to by the Appellant were disbursements made on behalf of Globel Travel Ltd.

45. In the light of those findings we turn to the issues as to whether the Appellant has a continuing interest in either ProCars or PussyCats.

46. As far as ProCars is concerned, we accept that the Appellant retains no interest in this company. The Appellant explained the fact that he had only been a shareholder in the first place because of an error by Ms Baker. It would appear that errors have also been made in respect of the returns to Globel Travel Ltd, in that at one point (in June 2010) the records at Companies House showed that both directors (the Appellant and Mr David Newgrosh) had resigned leaving the company without directors but with Ms Baker as company secretary, whereas the Appellant's evidence is that he and Mr Newgrosh continue to run the company. We therefore find the explanation given by the Appellant as to him having been made a shareholder in error to be plausible and the execution of the stock transfer form on 1 May 2010

transferring the share to Mr Kenny-Levick can be explained as a correction of that mistake.

47. The Respondents made much of the fact that this stock transfer had not been properly stamped and as such could not legally have been registered in the company's books.. The execution and delivery of the stock transfer form to the company for registration would be sufficient to transfer beneficial ownership in the share and it does seem that registration of the transfer in the books of the company has taken place as the company's annual return dated 3 March 2011 shows Mr Kenny-Levick as the sole shareholder. The fact that the transfer may have been registered in breach of section 17 of the Stamp Act 1891 (on which we have no evidence) would not in itself affect the validity of the transfer and subsequent registration.

48. As a consequence, we accept the Appellant's evidence that the payments into and out of his bank account which related to ProCars are as a result of the arrangements he described he had with Mr Kenny-Levick to receive monies from ProCars drivers and pass them on, as well as the payments he himself received when acting as a driver for ProCars.

49. In relation to PussyCats, we accept the evidence of the Appellant that he ceased to have an interest in PussyCats during 2010. This is consistent with the fact that in the first half of 2010 the Appellant's bank account shows receipts and payments in relation to M J Entertainments Ltd (the previous operator of PussyCats) but there are no such entries so identified after 29 May 2010 and in July, August and September 2010 there are a number of debits that the Appellant identified as ones that he paid on Lisa Joy's behalf whilst she was experiencing difficulties with her bank account. That leaves the relevance of the issue as to whether the fact that the Appellant changed his story on the reason Lisa Joy asked him to make the payments on his behalf, from the fact that she had no bank account at all (in the evidence he submitted in the High Court Proceedings) to the fact that she did not wish to use her bank account because it was overdrawn. This is something which the Appellant says he was not aware of and that he took her original reason at face value. We think it would be wrong to make anything out of that discrepancy; either explanation is consistent with the rationale for the Appellant allowing the use of his account. The other evidence is consistent with the Appellant's bank account being used to make payments for the account of the PussyCats business whilst it was operated by M J Entertainments and then being used for payments on behalf of Lisa Joy for the account of that business around the time that Lisa Joy stated that she took over the running of the business.

50. As far as the proceeds of sale of the New Zealand property is concerned, this sale was completed nearly six years ago. Whilst there is no evidence to corroborate the Appellant's statement that he received none of the proceeds and was never a

beneficial owner of the property, there is no evidence that those proceeds can be traced into any other asset that the Appellant currently owns, so insofar as he might have received any of the proceeds, there is no evidence that he has any of them now either in cash or in another asset that has been purchased with them.

51. We accept the Appellant's explanation regarding the seven faster payments identified as having been paid to "J Cozens". The payments concerned amount to £3,640 in total and were made over two years ago. They were each for the same precise amount of £720. Even these payments were, as suggested by the Respondents, made to another account belonging to the Appellant which had not been disclosed, the fact that they were for a specific amount over a relatively short period suggests that they were made to acquire a specific asset or meet a specific known liability. If that is the case then the payments are consistent with the Appellant's explanation that they were to meet an outstanding finance obligation in relation to a motor vehicle.

52. We accept the Respondents' submissions that even if we accept the Appellant's explanations regarding the credits and transfers into his bank account during 2010 they do not account for the bulk of the monies credited. By the Respondents' calculations this leaves some £110,000 unaccounted for. Whilst some of that might be represented by payments made on behalf of Globel Travel we accept that such payments are unlikely to account for a large proportion of it bearing in mind that from its published accounts Globel Travel is a relatively small business. The Appellant seeks to bridge the gap by referring to the loans that he received from the unauthorised moneylender. He had a revolving credit facility and stated that he raised some £50-60,000 in that way during the period in question. We understand why, if that were the case, the Appellant would have been reluctant to divulge the name of the moneylender as he was to us when asked the question during the hearing of this application. Likewise, it is not to be unexpected that such loans are not documented, it is inherent in the nature of such arrangements that the moneylender's own understanding of the amount owed will prevail.

53. We think that it is more likely than not that in circumstances where the Appellant had required borrowings to make ends meet that he would have had to resort to the series of an unauthorised moneylender. The Appellant's circumstances at the relevant time would have made it unlikely that he would have been able to access conventional means of finance. Consequently, we find that some of the credits would be represented by loans from the unauthorised moneylender.

54. On the assumption that the loans from the moneylender would not bridge the entire gap, the question that we have to answer is whether, determining the matter on the basis of the available evidence today, the unanswered questions with regard to the

operation of the Appellant's bank accounts during 2010 indicate that the might have other assets that are sufficient to preclude him from claiming hardship. Although the burden is on the Appellant to satisfy us on this point, a hardship enquiry should be directed to the ability of the Appellant to pay or secure the tax from resources immediately or readily available and not to a lengthy investigation of an appellant's assets and liabilities and his ability to pay at some date in the future. The fact that the Appellant cannot explain all the entries in his bank accounts that took place during 2010 does not mean that we should take it that as of today he has undisclosed assets that may be continuing to provide him with an income beyond his stated earnings as a taxi driver.

55. Unless the Appellant's current circumstances indicate that there may be such assets we should not require him to prove a negative. We should also take account of the fact that the duty assessed is a very substantial sum of money and any security required in order to be meaningful should be capable of securing a significant amount of the duty that has been assessed. From our assessment of the Appellant and his financial skills it is unlikely that if the Appellant has other business assets they are likely to have a value that will be significant in this context. His current and previous business interests have centred around small privately owned businesses which are not in a sector that typically generates high levels of return. In terms of the cash resources currently available to him, he was unrepresented before us because he cannot afford legal fees. His initial reluctance to participate in the hearing without legal advice has satisfied us that had he had the resources to do so he would have paid for legal representation.

Conclusion

56. Our conclusion is that the only significant asset available to the Appellant to provide as security is his share in Globel Travel Ltd. This is a share in a small private company and is not a marketable asset. Its value is likely to be insignificant when compared to the amount of duty the payment of which it might be offered as security. Accordingly we find that there are no assets that the Appellant might reasonably be asked to give as security for the payment of the duty of £6,128,138.68 assessed on him and accordingly his hardship claim succeeds with the result that his appeal against the Assessment may now proceed.

ROGER BERNER

TRIBUNAL JUDGE

RELEASE DATE: 29 March 2012