



TC02891

Appeal number: TC /2013/00655 & 00656

Value Added Tax - Notification of requirement for security - Both Appeals dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**JAXIM LIMITED
MAHUX LIMITED**

Appellants

-and-

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

Respondents

**TRIBUNAL: JUDGE HOWARD M. NOWLAN
JULIAN STAFFORD**

**Sitting in public at The Old Bakery, Norwich on 5 September 2013
Adam Hook of Aston Shaw Ltd on behalf of both Appellants
Ms Harry Jones of HMRC on behalf of the Respondents in both Appeals**

DECISIONS

Introduction

1. The Decisions recorded in this document are our decisions in two related cases. The Appellants were distinct companies so that the Appeals were not technically consolidated, but both parties requested us to deal with the two Appeals together. There are some material distinctions in the facts between the two cases, that we will of course refer to, but in many respects the facts, and certainly the relevant law to be applied, were identical. Since we are dealing with the decisions in relation to both Appellants together, we will refer to Jaxim Limited as Jaxim, and to Mahux Limited as Mahux, rather than describing them as the first and second Appellants.
2. The Appeals were against requirements by HMRC for both companies to provide security for the payment of their VAT liabilities. No witnesses gave any evidence on behalf of either Appellant but the same accountant represented both Appellants. The HMRC officer who made the decisions to require security in both cases, Ms. Caroline Barfield, and the HMRC officer who reviewed those decisions, Mr. Danny Outram, gave evidence before us.
3. It was contended by the Respondents, and not disputed by the Appellants, that our jurisdiction in these cases just extended to deciding whether the decisions made to require security had been reasonable, and whether the officers making the decisions and then reviewing them had taken into account all the relevant facts and not been influenced by facts that should have been ignored. Were we to conclude that any of those requirements had been breached, we should allow the appeals, and could not, for instance, substitute our own decision, for example adjusting the amount of security required. It was also common ground that we had to reach our decisions in both cases on the basis of the facts prevailing at the time of the decisions, so that we were unconcerned with whatever may have happened in the 12-month period that had followed the requirement to provide security.
4. Our decisions in both cases are that the decisions made, and the reviews of those decisions, were both impeccable and we confirm them. We will make one strictly irrelevant comment in paragraph 35 below, as regards the later efforts by Jaxim Limited to improve its standard of compliance, but this has no bearing on the actual decisions.

The background and the facts

5. Jaxim and Mahux commenced business in January 2012, the business being that of operating nightclubs and restaurants at venues in Prince of Wales Road, Norwich. Jaxim runs a nightclub called Roccas from 82-88 Prince of Wales Road, and Mahux runs clubs called Pulse and Lace from premises at 75 Prince of Wales Road. We were told by the Appellants' accountant that the clubs are in fact opposite each other, across the road in question.
6. All the businesses had been operated as family businesses for a considerable period by various members of the Peri family.
7. The business (certainly that at the Rocco club) had initially been conducted, on a sole tradership basis, by Ibrahim Mehmed Peri, referred to by the Appellants' accountant, and by ourselves in these decisions, as "Peri senior". Peri senior had

conducted business from April 1985 from 86-88 Prince of Wales Road, and it appears that some business, involving retail sales and “non-specialised stores”, was still conducted by Peri senior. The original sole tradership business had generally complied with all its VAT liabilities, though a small outstanding VAT liability of £1,619.20 apparently existed at 10 September 2012 when the HMRC officer, Ms. Barfield, was compiling some details of earlier compliance records when considering whether to require the then current trading companies, Jaxim and Mahux, to provide security for their VAT liabilities.

8. The Appellants’ accountant told us that Peri senior was married to Dawn, and that they had three children, two sons, Nidayi and Dogan, and a daughter, Pervin.

9. The detail of the following background facts is not particularly material but it seems that various of the members of the Peri family, i.e. Peri senior and his wife and the three children, have from October 2010 onwards been the directors of family companies that have run one or more of the night clubs or conducted some related activity. The various companies were called Vixway Ltd (later called VL Assets Ltd), Zonebond Ltd, the two present Appellants and Trade White Ltd. We were given no information about the respective shareholdings in the various companies.

10. We understand that Zonebond conducted the Rocco business from October 2010 until the date (January 2012) when Jaxim appears to have taken over the business. The directors of Zonebond were Peri senior and his wife Dawn. The company got into some relatively modest difficulty in keeping up to date with its VAT liabilities and still owed £21,133.28 when Ms. Barfield was conducting her review in relation to whether to require security from Jaxim. The more relevant fact is that Dawn Peri had communicated with HMRC about the difficulties in keeping up to date with its VAT liabilities, and had specifically explained that trading conditions had become very difficult. This was attributed to the effects of the recession, the way in which supermarkets were selling alcohol so cheaply, and the fact that many other bars had been opened in the Prince of Wales area, such that the various Peri clubs were encountering much more competition.

11. VL Assets Ltd was the company that had conducted the businesses at the Pulse and Lace clubs (and in fact one other called Qube) from October 2010 until Mahux took over the business in January 2012. VL Assets was de-registered for VAT purposes in February 2012. The director of VL Assets had been Nidayi Peri, and the trading record of this company managed by Nidayi Peri had been markedly less successful. When placed into liquidation, it had outstanding VAT liabilities of roughly £290,000, an outstanding liability for direct tax of roughly £6,000, and it owed £13,000 to its accountants, who apparently had some form of personal guarantee of their fee claims.

12. When, in January 2012, the business at Rocco’s was transferred to Jaxim, and the business at Pulse and Lace to Mahux, Ms. Barfield said that she noted that she would need to keep a constant watch on whether these two companies duly complied with their VAT liabilities. She said to us, and we accept, that this was principally because the trading difficulties that Dawn Peri had explained to HMRC in relation to Zonebond’s trading all still subsisted, and she was therefore concerned that the new trading companies might well find it equally difficult to satisfy all their VAT liabilities..

13. Pervin Peri was the named director of Jaxim, following the resignation in September 2011 of Dogan Peri and Dawn Peri. Ms. Barfield said that she noted that

Dawn Peri was the director of Mahux, and she was encouraged by this because it was Dawn Peri who had spoken to HMRC about the trading difficulties encountered by Zonebond. She recalled that Dawn Peri had certainly been endeavouring to agree a basis with HMRC for discharging Zonebond's outstanding VAT debt in instalments.

14. Both of the present Appellants failed to file their first VAT returns on time, and accordingly Ms. Barfield notified them both that they would be put on monthly returns. She indicated that the following VAT period would, for some administrative reason, still remain a two-month period but that after that the companies would both be on monthly returns.

The early VAT compliance record of Jaxim, the Notice requiring the provision of security and the review decision

15. Without giving the full detail, it is sufficient to say that there was no VAT period by August 2012 in which Jaxim had duly complied with its full VAT liabilities. It had generally been late with its returns, and had generally failed to pay its VAT liability either at all or at least in full. By August, therefore, Ms. Barfield sent a warning letter to Jaxim indicating that it was at risk of being required to provide security for its VAT liabilities. The level of security mentioned in the warning letter was suggested to be likely to be either the amount of £69,829 or £56,379.

16. We understand that the level of that security was calculated in the normal manner adopted by HMRC, namely that HMRC added together the then outstanding VAT debt, and the estimated VAT liabilities (for a trader on monthly returns) for the next four months. The outstanding VAT debt at the time of the warning letter in August was approximately £29,000, and that was obviously therefore one of the figures taken into account in calculating the figures mentioned in the previous paragraph.

17. Ms. Barfield received no response from Jaxim to the August warning letter. The outstanding indebtedness was in fact reduced in the following month by roughly £4,000 but since the debt remained at £25,621.74, Ms. Barfield considered that she should issue a formal Notice requiring security. She reached this decision in mid-September (in fact two days after the outstanding debt had been further reduced by £5,647.27 which was not shown up on the computer that Ms. Barfield used in preparing her Notice). In fact the Notice was issued on 2 October, the delay resulting from administrative formalities within HMRC. The security called for was in the amount of £53,571.74, reflecting the fact that the outstanding VAT debt was known by Ms. Barfield to have been reduced by the figure of roughly £4,000. Seemingly no change was made to the second calculation dealing with the estimated VAT liabilities for the next four months.

18. Jaxim requested a review of Ms. Barfield's decision, and the responsibility for undertaking this review was assigned to Mr. Outram. Mr. Outram commenced this process by writing to Jaxim, saying that he would be responsible for the review, and asking whether there was any further information that Jaxim would like Mr. Outram to take into account. He received no reply to this letter.

19. By the time Mr. Outram conducted the review in November 2012, the outstanding debt had been considerably further reduced from the £25,621.74 that Ms. Barfield had taken into account in her calculations, and was down to approximately £2,000. Mr. Outram accordingly reduced the level of the required security to £29,976.69, that adjustment simply reflecting the amount by which the outstanding

debt had been reduced. He chose to make no change to the other element of the calculation geared to the estimated VAT liabilities in the next four monthly return periods. He said in evidence to us that there had been other delays in filing returns in the period between the original decision and the date of his review. The compliance record of Jaxim had certainly improved, but the Respondents contended that that was the common result, and the intended result, of the practice of requiring security, and there was no logic in withdrawing the requirement for security merely because it seemed that the notification of the requirement to provide security was having its desired effect.

20. Jaxim appealed to the First-tier Tribunal against the resultant obligation to provide security in the amended figure, following Mr. Outram's reduction, and the question for us is whether Jaxim has established that there was anything unreasonable in the decision or the review, or whether HMRC took into account factors that it should have ignored, or failed to take into account factors that should have been considered.

The early VAT compliance record of Mahux, the Notice requiring the provision of security and the review decision

21. Certain of the facts in relation to Mahux were identical to those in relation to Jaxim. Mahux failed to deliver its first VAT return, and was accordingly put onto monthly return periods in exactly the same manner as Jaxim. Mahux's VAT compliance record was also poor and so Ms. Barfield sent out her security warning letter in August, exactly as for Jaxim. No reply was received to that so that the decision was taken on 14 September to issue the Notice to require security, the formal notice being issued on 2 October. The required level of security in the case of Mahux was set at £58,835. This represented the calculated outstanding tax debt at the time of the decision of £21,035.94, and the estimated VAT liabilities for the following four monthly periods. Again a review was requested and provided in the same way by Mr. Outram. On this occasion, however, Mr. Outram simply confirmed the decision and did not adjust the figure of required security.

22. The manner in which Mahux's VAT compliance was unsatisfactory was quite different from that for Jaxim. Mahux never filed a VAT return on time. Indeed for all the months shown to us, down to December 2012, returns were only ever filed for two of those periods, that for the period 02/12 being filed 150 days late on 4 September 2012, and that for the period 04/12, registering turnover and VAT outputs and inputs all of Nil, 122 days late on 7 October 2010.

23. The result of the failure to have filed any returns until 4 September was that HMRC inserted very low figures of assumed VAT liability in respect of all the periods. We were told that these figures were simply computer-generated figures and not figures based on either any information or best judgment. The figure for the initial 2-month period was £1,759.00 and the figures for later months were at roughly that level, increasing by modest amounts from month to month.

24. When the return was eventually provided for the period 02/12 on 4 September it disclosed a VAT liability not in the region of the estimated £1,759 but in the amount of £18,919.94. When the return for the next period was filed, it declared that there had been no trading, and no VAT liability or reclaim. No explanation was given as to why there had been no trading. It may be that HMRC were unaware of the following point until the hearing before us, but it was suggested in that hearing that Mahux's clubs might have been closed for refurbishment. No evidence was

given as to which company might have effected the refurbishment, though since no input VAT was claimed by Mahux in the period when there was said to have been no trading, it rather appeared that Mahux itself would not have undertaken the refurbishment work, even if the vague indication that the club had been closed for refurbishment was correct.

25. By the time Ms. Barfield issued her August warning letter, and then the formal Notice to provide security, it appears that no VAT had been paid at all. The actual return for the 02/12 period had been received and this was obviously taken into account in calculating the required level of security.

26. By the time Mr. Outram conducted his review, various small payments had been made in respect of VAT. All these related, however, to the periods for which no actual returns had been furnished, and so the payments were simply of the VAT calculated on the computer-generated basis, which the actual return for the period 02/12 suggested was a very significant under-estimate of the actual liability. Further, and very confusingly, although the return for the period 04/12 had indicated that there had been no trading and no output liability or input recovery claims in that period, Mahux did pay the VAT assessed for that period on the computer-calculated basis.

27. In evidence before us, Mr. Outram indicated that he chose not to reduce the figure of required security demanded from Mahux because, although some payments had by that stage been made, all those payments had related to the very low estimates, and the return for the 02/12 period suggested that if the full facts were known both the outstanding VAT debt and quite possibly the estimated VAT liability for the following four monthly periods would all have been higher than the figures used in Ms. Barfield's original calculations. Accordingly he left the figure of required security unchanged.

The Appellants' contentions

28. It was contended for the Appellants that no account should have been taken of the very substantial VAT default made by VL Assets Limited, of which Nadayi Peri had been the director because he had had no involvement with either of the current Appellants. The amounts of security required were also too high and would involve hardship for the companies. And in the case of Mahux it was unfair and inaccurate to base all the calculations on the figures for a two-month period, i.e. the only months for which a return had been made when the trade had been conducted.

Our decision

29. We accept Ms. Barfield's evidence to the effect that her initial caution in dealing with the two new trading companies from 1 January 2012 resulted not from the fact that any Peri companies would be infected by the somewhat disastrous trading experience of VL Assets Limited, when run by Nadayi Peri, but simply by the fact that the difficult trading conditions that had given Zonebond the trading difficulties that Dawn Peri had explained to HMRC all appeared still to subsist. We do not therefore consider that Ms. Barfield took account of any factor that she should have ignored.

30. We consider that Ms. Barfield's original decision was amply justified by the actual VAT compliance record of the two companies in the period up to August and September when she issued first her warning letters and then her formal Notices

requiring security. Jaxim had by that stage substantial outstanding VAT liabilities, and Mahux had filed only two returns, the second giving no indication of what was going on, or not going on.

31. We consider that the feature that companies might suffer some hardship in providing security is not a factor that HMRC need to take into account, or indeed should take into account when considering whether to issue Notices to require security. HMRC officers are required to consider whether there is a material risk of the tax not being paid, and if they consider that there is such a risk, and they then calculate the required level of security in a fair manner, their decision should not be challenged, and should certainly not be challenged because of possible hardship to the company being required to furnish the security.

32. The contention, finally, that in the case of Mahux, it was inappropriate to base a requirement for security and the calculation of the required level of that security on the figures for just one 2-month period of trading is a somewhat bewildering contention. It cannot be advanced when the reason why HMRC had only one period on which to base any calculations was that no returns had been made for other periods, save for the 04/12 period for which there was the further confusing feature that the tax on HMRC's estimate was paid, notwithstanding that the eventual return declared that there had been no trading.

33. In general, we consider that the approach followed by both Ms. Barfield in her dealings with the two companies, and in issuing her decisions and Notices, and the review decisions made by Mr. Outram, have all been exemplary.

34. The decisions in both Appeals are accordingly that they are dismissed and that the HMRC decisions, followed by the two reviews, are all confirmed.

One other observation

35. We entirely accept that our jurisdiction requires us simply to address the facts and circumstances prevailing at the times the decision and the review decisions were made. It does seem, however, at least in the case of Jaxim, that very serious efforts were being made to improve the compliance record, by the time of the review. We have no information as to whether Jaxim has managed, in the intervening eight or nine months up to the date of the hearing, to satisfy all its VAT liabilities. Equally we do not know within what time periods HMRC are accustomed to review whether security, once required, is later re-considered to see whether it is excessive or totally unnecessary. Were the position now to be that the amounts of security that we have confirmed (obviously at the levels of the HMRC decisions) could be reduced, we simply make the obvious point that it would be unfortunate for a business that was trading in challenging times and circumstances to have to provide a level of security that might not now be so appropriate. We simply express the hope that, were these improvements to have been made, HMRC might in some way take them into account.

Right of Appeal

36. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

**HOWARD M. NOWLAN
TRIBUNAL JUDGE**

RELEASE DATE: 16 September 2013