[2016] UKFTT 726 (TC)

TC05455

Appeal numbers: TC/2015/04973
TC/2015/04975

VAT and excise duty – hardship applications – whether adequate information available to determine that appellant would suffer hardship- relevance of alleged lack of access to or absence of information- relevance of amounts assessed and merits of appeal- applications dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SINTRA GLOBAL INC. **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
DAVID E WILLIAMS CTA (Fellow)

Sitting in public at the Royal Court of Justice, The Strand, London WC2A 2LL on 13 and 14 October 2016

Timothy Brown, Counsel, instructed by SKS (GB) Limited, for the Appellant

Ben Hayhurst, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant has been subject to the following assessments:

(a) an assessment to VAT under s 73(1) Value Added Tax Act 1994 ("VATA") in the amount of £8,921,062.64 on the basis that the appellant was required to be registered for VAT for the period from 1 April 2012 to 30 June 2015;

(b) an assessment to excise duty under s 12(1) Finance Act 1994 ("FA 1994") in the amount of £14,184,948; and

(c) an assessment to a penalty in the amount of £8,698,035.42 in respect of failure to register for VAT.

2. None of the tax or duty in dispute has been paid. As discussed below, neither the VAT nor excise duty assessment appeals ((a) and (b) above) may proceed unless the appellant establishes that payment, or in the case of excise duty the provision of security, would cause hardship. This does not affect either the penalty appeal, or the appellant's appeal against the requirement to be VAT registered under s 83(1)(a) VATA. HMRC has refused the appellant's applications for hardship in respect of both the VAT and excise duty assessments, and that is the subject matter of this decision.

3. Shortly prior to the hearing HMRC had also made an application to strike out the appeal against the VAT assessment. This was on the basis that no appeal was possible under s 83(1)(p) VATA in the absence of VAT returns having been filed. Clearly there would be no question of a hardship application in respect of the VAT assessment in those circumstances. On the day before the hearing started a single page return was produced in respect of the period in dispute stating that no taxable supplies had been made. During the hearing HMRC accepted that this was a valid return and on that basis withdrew its strike out application.

Background

4. HMRC's substantive case against the appellant is one of VAT and excise duty evasion. It claims that it held and made supplies of alcohol in the UK between 2012 and 2015 without accounting for VAT and excise duty. The appellant claims that it has never traded in the UK.

5. The assessments on the appellant reflect only part of a much wider ranging HMRC investigation into the business dealings of the appellant's witness in these applications, Parul Malde. Broadly, HMRC's investigation led them to reach the view that Mr Malde operated behind a façade of businesses aimed at facilitating alcohol smuggling. The appellant is one of the companies through which HMRC allege that Mr Malde operated. In addition to the assessments against the appellant assessments were also made against what HMRC allege is a predecessor company in the fraud, Sintra SA.

6. As well as assessing the appellant to a penalty for failure to register for VAT HMRC have issued a personal liability notice against Mr Malde in respect of 100% of that penalty, under paragraph 22 Schedule 41 Finance Act 2008. In order to establish liability under this provision HMRC will need to demonstrate that Mr Malde is a director, shadow director, manager or secretary of the appellant. Since the penalty is tax geared Mr Malde obviously has some potential personal interest in the outcome of any appeal against the VAT assessment. The question of his degree of control over the appellant, which was a key focus of the evidence and submissions made to us, is also clearly of potential relevance.

7. On 24 July 2015 HMRC obtained a worldwide freezing order against Mr Malde, which is still in place. The order applies to assets up to the value of £8,800,000, representing the amount of the personal liability notice plus an additional amount in respect of costs. In support of the application for that order HMRC provided very detailed evidence in the form of a lengthy affidavit by Dean Foster, an HMRC Officer. Reference was made to the affidavit before us although we should of course note that the order was obtained on an ex parte basis and that Dean Foster was neither cross examined for the purposes of that order, nor did he appear before us as a witness.

8. A final point to mention at this stage is that Mr Malde made reference in his witness statement and again in oral evidence to his understanding that the appellant no longer existed. HMRC produced results of searches which indicated to us that it does, in fact, continue to exist, and we therefore proceeded on that basis.

Hardship- the legal tests

9. The appeal against the VAT assessment is made under s 83(1)(p) VATA. Section 84(3) and (3B) VATA provide so far as relevant:

> "(3) Subject to subsections (3B)… where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)… (p)…, it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.
>
> (3B) In a case where the amount determined to be payable as VAT … has not been paid or deposited an appeal shall be entertained if—
>
> (a) HMRC are satisfied (on the application of the appellant), or
>
> (b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant),
>
> that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship."

10. The excise duty assessment is made under s 12 FA 1994 and is a "relevant decision" within s 13A(2)(b) of that Act. Section 16(3) FA 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—
>
> (a) the Commissioners have, on the application of the appellant, issued a certificate stating either—
>
> (i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or
>
> (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; or
>
> (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."

11. The leading case law authorities in relation to hardship in a VAT context are *R (on the application of ToTel Ltd) v First-tier Tribunal (Tax Chamber) and another* [2011] EWHC 652 (Admin) (Simon J) ("*ToTel 1*") and *ToTel Ltd v HMRC* [2014] UKUT 485 (TCC) (Nugee J) ("*ToTel 2*"). Other cases include *Buyco Ltd & Sellco Ltd v HMRC* [2006] UKVAT V19752, *Peter & Linda Kemp v HMRC* [2005] UKVAT V19479, *Seymour Limousines Ltd v HMRC* [2009] VAT Decision 20966, *Tricell (UK) Ltd v CCE* [2003] VATTR 18127 and *DGM UK Limited v HMRC* TC/2011/04619 (apparently not reported).

12. Both parties referred to, and subject to one potential issue about the different approaches taken in relation to borrowing capacity in *Kemp* and *Buyco*, did not disagree with the summary of the case law authorities on the hardship test for VAT purposes set out in the First-tier Tribunal decision in *Elbrook Cash & Carry Ltd v HMRC* [2016] UKFTT 191 (TC) at [25]:

> "The principles that we see as governing the case (with our observations if any) are:
>
> (1) Decisions on hardship should not stifle meritorious appeals. (*ToTel 1* at [82(i)])
>
> (2) The test is one of capacity to pay without financial hardship, not just capacity to pay. (*ToTel 1* at [82(ii)], *ToTel 2* at [55] approving *Seymour* at [57])
>
> (3) The time at which the question is to be asked is the time of the hearing. (*ToTel 1* at [77] approving *Buyco* at [6], *ToTel 2* at [37]).
>
> This may be qualified if the appellant has put themselves in a current position of hardship deliberately (eg by extraction of funds otherwise readily available from a company by way of dividend), or if there is significant delay on the part of the appellant (*ToTel 1* at [78], *ToTel 2* at [44-47], *Buyco* at [6]).

(4) The question should be capable of decision promptly from readily available material. (*ToTel 1* at [82(iii)],

(5) The enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available. (ToTel *1* at [82(iii)], *Buyco* at [8])

A corollary of this is that a business is not expected to look outside its normal sources for funding, nor is it required to sell assets, especially if to do so would take time. (*Buyco* at 6, *Tricell* at [55, 56] – to the contrary *Kemp*.)

(6) The test is all or nothing: ability to pay part of the VAT without hardship does not matter. (*Buyco* at [6])

(7) If the tribunal has fixed a cut off point for the admission of material, it is not an error of law for the Tribunal to ignore any later furnished evidence. (*ToTel 1* at [86])

(8) The absence of contemporaneous accounting information is a justification for the tribunal to conclude that it can place little if any weight on the appellant's assertion that it is unable to afford to pay. (*ToTel 2* at [79]).”

13. The test for excise duty purposes is somewhat different. The main relevant cases are *Commissioners of Customs and Excise v Mitsui & Co Plc and H.T. Walker* [2000] 1 C.M.L.R 85 and, at the First-tier Tribunal level, *John Cozens v HMRC* [2012] UKFTT 228 (TC) and *Tradium Limited* v HMRC [2012] UKFTT 421 (TC). The key distinguishing features are that the excise duty test is not “all or nothing”, so criterion (6) in *Elbrook* does not apply, and the focus is on the question of security, not payment. As explained in *Mitsui* at [9], the Commissioners are both entitled and bound to require security in lieu of immediate payment, subject to hardship being established.

14. There was no dispute that the burden of proof is on the appellant to establish hardship for both VAT and excise duty purposes- see for example *John Cozens* at [18], referring to *Buyco*.

The evidence

15. A number of applications were made by both parties in the months leading up to the hearing, including failed applications by both parties for disclosure of information and an application by HMRC for the appellant’s witness Mr Malde to provide a witness statement. That application was granted but the Tribunal did not accede to HMRC’s request that the witness statement should contain specified information relevant to its disclosure request, instead indicating that the proper course was to deal with those matters in cross examination and submissions. In accordance with the Tribunal’s directions Mr Malde did provide a witness statement and was subject to a lengthy cross examination by Mr Hayhurst for HMRC. On the view we have taken much of the cross examination might be regarded as irrelevant or at least of marginal relevance, but it was nonetheless appropriate to permit it to proceed for a number of reasons. Apart from the approach taken in the earlier directions, the most significant of these was that HMRC were addressing a key part of the appellant’s case as put in

its skeleton argument and opening submissions, relating to the degree of Mr Malde's control over and access to information about the appellant. If we had concluded that this was relevant to our decision then that line of questioning would clearly have been appropriate. In addition, Mr Brown for the appellant at no stage questioned the scope of Mr Hayhurst's cross examination, and as discussed below made closing submissions about the non-existence of records which relied on statements made by Mr Malde in cross examination.

16. A voluminous amount of documentary evidence was provided and we were referred to much of it during the cross examination. In addition to Officer Foster's affidavit in support of the freezing order this included certain bank statements of the appellant obtained by HMRC from the Cypriot authorities, correspondence, two affidavits from employees of Turner Little Limited, the Yorkshire based company formation agents used by Mr Malde, a significant amount of paperwork obtained from Turner Little both in relation to offshore company formation and administration and in relation to the opening of various offshore bank accounts, and records of police and HMRC interviews.

The appellant's submissions

17. The appellant's submissions as put in Mr Brown's skeleton argument and in opening submissions can be summarised as follows:

(1) Unlike normal hardship applications where HMRC would have little information about the appellant's financial position and it was clearly up to the appellant to provide that information, in this case HMRC already had a great deal of information about the appellant's affairs.

(2) The appeals were meritorious because HMRC's calculations were derived from records of dealings between 2004 and 2007 that the appellant's predecessor company Sintra SA had with a supplier called York Wines Limited, the directors of which were later convicted of excise duty fraud. HMRC had used York Wines' records plus bank account information for Sintra SA to calculate that only 34% of Sintra SA's payments were by bank transfer and that therefore 66% must be in cash. They had then applied the same percentage to debits from the appellant's bank account to determine the scale of its purchases. The clear inference was that York Wines' records must have been false and so they could not provide a basis for HMRC's approach. They were in any event years out of date and related to a different company. The number of movements of goods that would be needed to achieve HMRC's numbers was unrealistically high: at an average value of £26,000 per consignment 1,721 movements would be required. There was no evidence at all of any such movements (a proportion of which would have been intercepted, given a huge crackdown on alcohol smuggling), or any other evidence that the appellant illegally held alcohol or otherwise traded in the UK.

(3) It was clear that the appellant could not pay VAT and excise duty assessments totalling in excess of £23m: even on HMRC's figures the assumed profit made by the appellant of £8.77m was less than the VAT assessment

alone, and the information obtained by HMRC indicated assets significantly lower than that. HMRC had made extensive enquiries and the clear inference was that there were no assets or funds in bank accounts that they had not already discovered. Very few companies would not suffer hardship if required to pay more than £23m.

(4) Mr Malde had nothing to do with the appellant's business apart from receiving commission for referrals. He had set up the company at the request and for the benefit of a Ms Pat Sounumpol, who was based in Thailand. He had provided her contact details to HMRC and they should have pursued their enquiries with her through proper legal channels as had been requested. Mr Malde was in the difficult position of having to prove a negative, namely that a company in which he had had no involvement other than setting it up and referring business to it for commission did not have sufficient funds or assets to pay the VAT or provide security for the duty. Mr Malde had no access to the appellant's records.

(5) Sintra SA had been a supplier to Mr Malde's UK company, Corkteck Limited (now in liquidation). Corkteck had brought a judicial review case against HMRC over an alleged oral assurance about the correct VAT treatment of sales made by Corkteck to Sintra SA that were delivered direct to one of Sintra SA's customers in Poland (*R(Corkteck Limited) v HMRC* [2009] EWHC 785 (Admin)). Mr Malde would not have done that if a smuggling operation was going on.

18. In closing submissions Mr Brown did not focus on Mr Malde's alleged lack of access to information. He accepted that that was not a relevant test in relation to the question of hardship in respect of the appellant company, whose information it was. Instead Mr Brown focussed on the evidence that he submitted established that there were no records in existence which had not already been uncovered by HMRC, and on the appellant's case that it simply did not have over £23m. The question of hardship turned on the appellant's ability to pay or provide security from immediately or readily available resources and, unless the appellant's current circumstances indicated that there may be such assets, the appellant was not required to prove a negative (*John Cozens* at [54] and [55]). The only asset available was an amount of around £2.7m of which HMRC was aware and which was frozen in Cyprus following the forced closure of the bank in question, FBME Bank in Cyprus ("FBME").

Our approach to this decision

19. In our view Mr Brown was correct to recognise in his closing submissions that whether or not Mr Malde personally had access to information about the appellant was not relevant. The question we have to decide is whether the appellant, namely Sintra Global Inc., has shown that it would suffer hardship. It is not open to the appellant to submit that it need not produce information about its own affairs because the person who is effectively representing it in bringing the proceedings cannot obtain it from the appellant.

20. Mr Malde's evidence, and the documentary evidence we were referred to in cross examination, is therefore relevant only to the extent that it has a bearing on the question whether the appellant would in fact suffer hardship. In particular, the evidence is relevant to the extent that it indicates that assets or funds exist, may exist or do not exist. It is also potentially relevant in demonstrating the nature of the appellant's activities, insofar as that is pertinent to the question of whether hardship would be suffered. And it may be relevant to the question of whether the appeals are meritorious, insofar as that must be borne in mind in deciding whether to allow the application.

21. We have accordingly limited our findings of fact to those we consider are relevant to our decision. To go beyond this would in our view not only make this decision unnecessarily lengthy but would risk prejudging issues that are properly dealt with elsewhere. In particular, we are conscious- and Mr Hayhurst correctly pointed out- that the question of Mr Malde's degree of control over the appellant is likely to be highly relevant to the appeal against the personal liability notice served on him.

Mr Malde's evidence

22. What follows is a summary of Mr Malde's evidence, including that given during cross examination. We have not covered all the points, or noted all the areas where there appeared to us to be discrepancies. Our findings in respect of it are set out in the following section, followed by our findings on the appellant's financial position.

23. Mr Malde is a director and 100% shareholder of a number of UK based companies, including a company that owns and leases private and commercial vehicles and a haulage company operating in the UK and Europe. He is VAT registered in a personal capacity in relation to a property rental business. Until it was placed in liquidation in 2014 he was also a director and owner of Corkteck Limited. Corkteck's business involved importing alcohol products from suppliers in other EU Member States and selling them in the UK. Corkteck was approved as a registered consignee, which allowed it to declare and pay excise duty on a monthly basis. Mr Malde was clearly familiar with both import and export procedures, including the documentation required where excise goods are moved between warehouses in duty suspense. He also explained in evidence that, before returning to the UK in 1999 to get married, he was in business in the alcohol industry in continental Europe, based in Calais. It was during that period that he became acquainted with Ms Sounumpol.

24. Corkteck's status as a registered consignee was subject to having an appropriate financial guarantee in place. It went into liquidation in 2014 after its bank became dissatisfied with the level and type of security required to support the guarantee.

Sintra SA

25. The appellant's predecessor company, Sintra SA, was established in June 2004. Mr Malde's evidence was that he was asked to set it up on behalf of business associates he had worked with while trading in continental Europe. The particular business associate who made the request was Ms Sounumpol. He was not at liberty to

name the other associates (either in relation to Sintra SA or the appellant), it appears partly because they may have changed from time to time. He said that Ms Sounumpol is based in Thailand but intended to operate the business from an office in Poland. She asked Mr Malde to set up a non EU incorporated company.

26. Mr Malde's evidence was that he was prepared to help out because there was an ongoing business relationship and he benefitted from business referred to and by Ms Sounumpol and her other associates. The relationship was based on trust and much of it was conducted by phone. Any records he had of their dealings from 2004 would have been destroyed because he only kept records for seven years.

27. Mr Malde found a UK based company formation agent, Turner Little. They suggested a company incorporated in Belize, and Sintra SA was duly established there. Turner Little dealt with the formalities and also dealt with bank account opening, working with banks with whom they had relationships. A bank account was set up at FBME. Mr Malde was the sole shareholder on formation and was appointed as a director and secretary. He was also named as a director on the bank account application, where he was also listed as sole signatory. His UK business address was used. Mr Malde said that Turner Little had said that the bank required him to be stated as a director, but that it meant nothing and once the company was up and running he had no further involvement. As far as he was concerned he "signed everything over" to Ms Sounumpol and passed on the internet banking access details. He did not believe he remained as a director: he thought that had been signed over as well by him. There was however no documentary evidence available to the Tribunal of his having passed anything on, and it appears that Turner Little were not asked to deal with any formalities.

28. Mr Malde said that Corkteck did business with Sintra SA, buying alcohol products from it (originating from bonded warehouses in continental Europe) and also selling some products to it. Sintra SA was Corkteck's sole European supplier of beer and wine. Mr Malde also referred business to Sintra SA and received commission. Since the commission was non UK source income and Mr Malde maintains non domiciled status the commission was paid to accounts in Dubai. Mr Malde's evidence was that the business was done through Sintra SA's Polish office.

29. Mr Malde accepted that during a police interview he informed officers that Sintra SA was a Polish company and that he did not know who owned it. He did not think this was wrong. He dealt with it in Poland and did not know who were the ultimate beneficial owners: that was dealt with by Ms Sounumpol. His advisers had advised him only to answer the questions put. He repeated that comment about his advisers in relation to the records of a meeting with HMRC in December 2013 where he again indicated that Sintra SA was Polish and said he did not know who the directors were. Similarly, he said it was not relevant to the judicial review proceedings brought against HMRC in 2009 (see [17(5)] above) to inform the judge of his connection with Sintra SA, and the impression given that there was an arm's length relationship between Corkteck and Sintra SA was correct. If Sintra SA had belonged to Mr Malde he could have cut them out and dealt directly with Sintra SA's Polish customer, which would have avoided the VAT problem that was the subject of that case.

Sintra Global Inc.

30. In early 2011 Mr Malde was told by his contact at Turner Little that new regulations in Belize meant that it was advisable to close Sintra SA and create a new entity in Panama. Mr Malde said he informed Ms Sounumpol, and after she and her associates made their own enquiries the proposal was agreed and Mr Malde was asked to organise a new entity. Turner Little again dealt with all the formalities and the appellant was formed in February 2011. This time a Panamanian foundation was set up to own the company, called the Allardice Foundation. Mr Malde was appointed as the "protector" of the foundation. He initially described this in evidence as similar to a trusteeship but on questioning indicated that he understood that the key role was to appoint the beneficiaries, rather than having the kind of duties in relation to ongoing affairs that a trustee might be expected to have. He understood that the structure meant that at no stage would he be required to be appointed as a director.

31. One of the documents produced in February 2011 was a power of attorney under which the appellant granted full power to Mr Malde to conduct its affairs. The terms of the power of attorney provide for Mr Malde to be the appellant's "Attorneys-in-Fact" so that he "may undertake the general interests of the Corporation in any country of the world and may bind the Corporation in its relations with third parties". It goes on to give non exhaustive examples of this which include transactions in the ordinary course of business, representing the appellant in legal proceedings, signing documents, opening and closing bank accounts and withdrawing funds, and acquiring and disposing of property and other investments. It is stated to be permanent in duration. Mr Malde's evidence in response to a question from the Tribunal was that he understood that he held the power of attorney only in his capacity as protector of the Allardice Foundation.

32. A bank account was established for the appellant at FBME in September 2011. Separate facilities were provided for sterling, Euro and US dollars. The application to FBME in August 2011 states Mr Malde's home address as the appellant's business address and location of Board meetings and describes its business as wholesale of general products, including beverages, plastics and bags within Europe, the goods being purchased from the Far East. Mr Malde is listed as the sole signatory, although he said that he did not believe he would have remained the sole signatory. Mr Malde also said that he believed he had signed a blank form so had not seen the details filled in. Paperwork was also prepared by Turner Little for a Swiss bank account at CIM Banque SA ("CIM"). It appears that the account was opened and the papers suggest that there was at least an initial deposit, but Mr Malde's evidence was that he did not know whether it was used and that it was later closed at Ms Sounumpol's request. Again Mr Malde was named as the sole signatory. There appeared to be no mention of a Polish office.

33. Apart from remaining as the protector of the Allardice Foundation, Mr Malde said that he "signed everything over" in relation to the appellant to Ms Sounumpol, and forwarded any correspondence or passed it to her when she travelled to Europe. In relation to the Allardice Foundation we understood Mr Malde to be saying that he effectively appointed Ms Sounumpol as the beneficiary, leaving her to deal with any onward allocation of beneficial interests among the other business associates. Mr

Malde said that he had no access to any trading records of the appellant and was not involved in the day to day operations. He had no involvement in payments in and out of the appellant's bank accounts, save for the transfer described below and apart from being asked once or twice to sign a payment request. He understood that he had to remain a signatory on the accounts given his role as protector. He had no record of the appointment of any beneficiary of the Allardice Foundation- that would all be with the Foundation and Ms Sounumpol. Bank internet access details were passed on to her and he was never sent bank statements. Some emails might exist but they were not readily available. He had seen no need to request bank statements or financial information since the beneficiaries of the Allardice Foundation were the same people who were running the company.

34. It was unclear from the evidence we heard where the appellant was trading from, although in cross examination Mr Malde said that it had trading address in Malaysia. His evidence was that Corkteck did not trade with the appellant apart from purchasing some soft drinks from it over a short period. However, Mr Malde did receive commission for business referred to the appellant, in the same way as for Sintra SA. There was no formal agreement in relation to the commission and the level of trust was such that Mr Malde relied on Ms Sounumpol and her associates to calculate and pay an appropriate amount. The broad understanding was that Mr Malde would refer continental Europe related opportunities to Ms Sounumpol and UK related opportunities would be referred to Mr Malde. Although he is non domiciled the commission earned was properly disclosed to HMRC.

Amirantes

35. HMRC raised questions about the two Sintra companies at a meeting with Mr Malde in December 2013. Mr Malde said that following the meeting he discussed his role in relation to the companies with his tax advisers and was advised that he should distance himself from them and not have access to their bank accounts if he was not controlling them. He explained this to Ms Sounumpol who understood his position but asked him to hold on while matters were rearranged. However, he was being chased by his advisers who wanted to confirm the position to HMRC. Mr Malde said that he then took matters into his own hands to try to resolve the position. He said that Turner Little told him that funds in the appellant could not be held directly by the Allardice Foundation so he would need to set up another company. Turner Little recommended the Seychelles and a new company, Amirantes International Trading Inc. ("Amirantes"), was set up there in February 2014 owned by the Allardice Foundation. Mr Malde used his power as signatory on the appellant's FBME account to instruct FBME in May 2014 to transfer the funds held by the appellant at FBME to a bank account set up by Turner Little for Amirantes at Euro Pacific Bank Limited in St Vincent and The Grenadines ("Euro Pacific"). He said he checked this with Ms Sounumpol before he did it and she agreed that he should do what he needed to. He gave her the account details as soon as they were available.

36. The application to Euro Pacific describes Amirantes' business as being located in Malaysia, and as comprising the wholesale of food and beverages in Europe and globally, stating that the company traded in branded items both duty paid and in

bonded warehouses, with most deals in Western Europe and occasional imports from the Middle and Far East. These details were completed in Mr Malde's handwriting. Another form has similar details in Mr Malde's handwriting and refers to there being two employees in Malaysia, although a later version of this form has corrections not in Mr Malde's hand to refer to there also being a UK employee. Mr Malde's evidence was that Turner Little must have decided to make these corrections. He said they must also have added some other details to the form, relating to countries the business would operate in and the expected origin and destination of payments and receipts. He had just stated that the initial payment would come from Cyprus and, when Turner Little said that more detail was needed, he told them to use the same details as for the appellant. The locations the company would operate in were listed by Turner Little as the UK, Malaysia, Belgium, France, Germany and Poland. Mr Malde said the reference to the UK might be explained by the fact that Corkteck had briefly traded with the appellant. Because of his business relationship with the appellant he did know what the company dealt in and where. He also said that email correspondence from Euro Pacific to Turner Little reporting that he had said he was the beneficial owner of the appellant was not an accurate report. Similarly, an entry in his schedule of assets for the purposes of the freezing order that said he was the beneficial owner of Amirantes was included on the advice of his solicitors, despite his explanation of the position.

Amirantes' banking problems

37. Around £2.7m was transferred from FBME to Euro Pacific, but Euro Pacific returned the funds to FBME and closed the account in June 2014. A Suspicious Activity Report filed by Turner Little with the National Crime Agency reported that Euro Pacific had explained to Turner Little that the reason for this was that Mr Malde had mentioned on the phone that he "had to get his money out of his existing bank as the UK authorities are after him". Mr Malde's evidence was that he was not disputing that he wanted to close the account because of questions raised by HMRC. He also said he knew nothing about a query in email correspondence (apparently from Amirantes to Turner Little) about an additional amount of nearly £800,000 received by Euro Pacific from a company called Adrena. He said he had heard of Adrena but not sent the email: he had set up an email account for Amirantes but had passed all the details to Ms Sounumpol.

38. In July 2014 the central bank in Cyprus assumed control of FBME, suspending all activities. This followed an investigation by an agency of the US Treasury. There followed around 12 months of at least three further attempts by Turner Little to set up bank accounts in various different locations to take the funds, all with Mr Malde as signatory, at least in some cases being described as the beneficial owner and with some different details about the business (for example, apparently not mentioning Malaysia). All the attempts failed and the funds remain frozen in Cyprus in a suspense account. Mr Malde confirmed that he had not attempted to access the funds to pay HMRC. It was not for him to do that on behalf of the company. In any event HMRC wanted full payment. Mr Malde had been told by Ms Sounumpol that the appellant had no other assets apart from the £2.7m frozen in FBME.

39. Whilst we initially got the impression from Mr Malde's evidence that new banking arrangements might have been needed to allow Amirantes to take over the appellant's trading arrangements (consistent with statements in the banking applications), we were left with the understanding that Mr Malde's evidence was that Amirantes was simply intended as a home for funds in the appellant which could not be transferred direct to the Allardice Foundation. He understood that Ms Sounumpol had made alternative arrangements to allow trading operations to continue.

Status of Sintra Global Inc. and company records

40. In February 2014 Mr Malde instructed Turner Little to arrange for the appellant to be struck off in Panama. It appears from one of the Turner Little affidavits that their practice was simply not to pay the annual renewal fee rather than apply to strike off a company, relying on it being closed on non-payment of the fee. (As previously discussed it appears that the company does in fact still exist.)

41. Mr Malde's evidence was that he had assisted HMRC by providing the name and contact details of Ms Sounumpol, and subsequently the contact name of another individual in Thailand. He had also sent emails to FBME and CIM asking for copies of all bank statements and correspondence in relation to accounts identified by HMRC in respect of the appellant and Sintra SA. No replies had been received. He also said that he had requested company records from Ms Sounumpol. However, he had been told by her that there were none because the appellant had been closed. He indicated that it was not necessary for records to be kept for a Panamanian company that was closed down.

42. As far as Turner Little was concerned Mr Malde accepted that he was and remained the sole client, but said that any fees he has paid them have generally been reimbursed by Ms Sounumpol, and he passed paperwork on to her. He did not accept that all the fees charged by Turner Little (apparently totalling over £40,000 between 2006 and 2014) had been paid by him even initially. A number of charges, such as annual renewal fees, would have been passed to the relevant company to pay.

Findings on Mr Malde's evidence

43. In many respects Mr Malde's evidence appeared to fit with the documentary evidence we saw. However, we found large parts of what he said by way of explanation of that evidence unconvincing. We were also left with no clear picture of what the appellant's business was or where it operated from: we were told that Sintra SA operated from a Polish office but there is little mention of Poland in relation to the appellant. Instead, Malaysia is mentioned in connection with Amirantes and we were told that this was because the appellant had an office there.

44. Our findings on Mr Malde's evidence, so far as relevant to the hardship applications, are:

(1) The appellant was formed, a power of attorney was granted and bank accounts opened as described at [30] to [32] above, save that we make no

finding about whether Mr Malde discussed the company formation with Ms Sounumpol, whether he signed a blank bank account application form, or what Mr Malde's state of knowledge was about the CIM account. We also note that the power of attorney was used to demonstrate Mr Malde's authority to file the notices of appeal against the various assessments to the Tribunal, and was presumably used again to sign the VAT return referred to at [3] above.

(2) The appellant currently has no business, and we have significant doubts as to what business it previously carried on. There is no single description. As successor to Sintra SA it might have been expected to take over the Polish office that Sintra SA was said to have had, but there was no real suggestion that that occurred. We were told that the descriptions given on Amirantes' application to Euro Pacific bank, including the reference to employees in Malyasia, was intended to reflect what the appellant did, but this differs from other descriptions, including the one given to FBME when the appellant's account was opened there. We were also told that Sintra SA was a key supplier to Corkteck but that the appellant made no such supplies. Again, if it was the intended successor of Sintra SA that is somewhat surprising.

(3) There is no evidence that any business that the appellant did carry on was carried on legitimately. Any legitimate business, whether based in Poland, Malaysia or elsewhere, would need some form of trading records and accounting information, both for its own purposes and (unless located in a tax haven with no relevant tax system and not trading in any country with such a system) for tax purposes. If the business operated in the alcohol industry the level of regulation, and duties, that apply to that industry might be expected to generate its own record keeping requirements.

(4) The events around the formation of Amirantes also cast doubt on the activities carried on by the appellant. If there was a legitimate trading operation then it might be expected that there would be more involved in shutting it down than simply transferring funds from FBME.

(5) Even if it were correct that there is no requirement in Panama to retain records for a company that has closed down, the evidence available indicates that the appellant still exists. In any event a legitimate business would need to retain records for the purposes of the jurisdictions in which it operated, and for example in case of disputes with customers or suppliers. Even a business not carrying on legitimate activities would usually generate some form of documentation, not least to record where funds generated were paid on to. Electronic communications and records have also made destruction of records practically harder and less likely. We therefore do not accept that the appellant has no records either in respect of its business activities or in respect of funds that were disbursed from it, including in respect of loans and investments apparently made by it (see further below).

(6) Mr Malde has made no real attempt to obtain information beyond that already obtained by HMRC. Sending emails to FBME and CIM asking for statements is clearly inadequate since at the very least the bank would need to see his signature. Given Mr Malde's evident business experience we consider

that he would have been aware of that. No attempt has been made to make proper use of his powers as authorised signatory, or the powers he has under his power of attorney, to obtain information. We were unconvinced by Mr Malde's explanation that he believed that he held the power of attorney for use only in his role as protector of the Allardice Foundation. It seems to us that he has used it when it has suited his purposes, including to file appeals and a VAT return on behalf of the appellant, and we do not accept that he somehow did so merely in his role as protector, even if that was the original reason that he was granted the power of attorney.

Findings on the appellant's financial position

45. HMRC has obtained bank statements for the period from October 2011 (the date of account opening) to 31 December 2013 in respect of the appellant's sterling and Euro accounts (or probably strictly sub-accounts) at FBME from the Cypriot authorities. The balances at the end of that period total in excess of £4.1m. HMRC has no other relevant bank account statements. As a result it is clearly missing statements, and therefore any details of payments out or receipts, for the period from 1 January 2014 up to the transfer of funds from FBME in mid 2014, as well as any statements for the US dollar account (if activated). There are also no statements for the account at CIM. However, the FBME statements show an amount of around £212,000 transferred to FBME in December 2012, and the account details shown include an identical series of digits to the CIM account number. Although other numbers are also shown it is most likely that the CIM account was the source of the funds. HMRC also believe that there may have been a further Swiss account.

46. Based on the information available HMRC performed a detailed analysis which formed the basis of a list of specific requests for information in respect of the hardship applications. In addition, they set out a more generic list of the information they would need, including company accounts, cash flow forecasts, bank statements, details of investments held and so on.

47. The specific requests made by HMRC refer to a number of sums paid from the appellant's FBME account described as loans, totalling around £800,000, and to amounts that appear to be property related or other investments apparently totalling over £450,000. Details were also requested of various other payments made from the account totalling in excess of £550,000. Separately, HMRC identified "commission" paid to Mr Malde by the appellant of around £2m. We also note the reference to another amount of nearly £800,000 received by Euro Pacific Bank which (assuming that Amirantes never traded) probably related to the appellant's activities (see [37] above).

48. It is clear to us that, whilst HMRC has done what it can with the information obtained from the Cypriot authorities, there is nothing like enough information for a proper assessment to be made of the appellant's financial position. Bank statements are clearly incomplete and there are indications of other bank accounts for which no statements are available. The statements that are available are nearly three years out of date. There is no accounting information for the appellant at all, for any period. There

is no clear information about the company's business or where the business was operated from, although it is reasonably clear that there are no current business operations. There are indications that significant funds have been disbursed from the appellant and no evidence to indicate that it has no call on any of the funds paid out or investments made, either on the basis that the funds were invested by or on behalf of the appellant or on the basis that the sums were not lawfully distributed, for example by a legal dividend, and therefore could be recoverable by the appellant. (This is without regard to the further point referred to in the list of criteria set out in *Elbrook* that even if distributions were lawfully made the amount distributed might remain relevant to determining hardship in some circumstances.)

Discussion

49. As already discussed, the question we have to decide is whether the appellant, namely Sintra Global Inc., has shown that it would suffer hardship. It is not open to the appellant to submit that it need not produce information about its own affairs because Mr Malde cannot obtain it. The fact that Mr Malde may have an interest in the outcome of the appeals because of the personal liability notice against him is also not relevant: there is a separate appeal against that which will need to be determined on its own merits.

50. It is also not relevant, as was suggested in the appellant's hardship application, that Mr Malde would not personally have been able to pay the disputed amounts. Whether or not that is correct does not affect whether the appellant would suffer hardship. The only possible qualification would be if account needed to be taken in determining hardship of resources available to persons associated with the appellant, which was suggested in *DGM* at [31] as potentially sometimes required where there is a free flow of resources between persons under common control. However, Mr Malde maintains that he is not the beneficial owner of the appellant, and in any event the only effect of taking Mr Malde's assets into account would be to increase the resources potentially available.

51. We have not accepted that no records exist in relation to the appellant apart from the information already held by HMRC (a point that was first raised by Mr Malde in cross examination). As already discussed, there are a number of reasons why a legitimate business, or even a business that is not legitimate, would need to keep records. It is no answer to say that HMRC has a lot of information about the appellant: what it has largely comprises some bank statements that are significantly out of date. There is no contemporaneous information at all (see *ToTel 2* at [79]). There is also no obligation on HMRC to seek any such information: to repeat, this is the appellant's application and the burden of proof is on it, not HMRC.

52. The appellant's submission that the appeals are meritorious appeared to come close to elevating that question to a self-standing test under which we should allow the application simply because the appeals are meritorious. There is no such test. The sole question is whether the appellant would suffer hardship, and whilst the merits or otherwise of the case should be borne in mind in reaching a decision, they cannot by themselves determine the question.

53. In any event it is not obvious to us that the appeals are meritorious. The burden of proof would be on the appellant to show that the assessments, which HMRC have made on a "best of judgment" basis, are wrongly made or excessive. This would normally require some evidence to be produced to persuade the Tribunal that that is the case. Apart from Mr Malde's own evidence we have seen little indication of any evidence of the appellant's activities such as might be used to demonstrate that the appellant was not trading or holding alcohol in the UK, or indeed any real evidence of business activities (legitimate or otherwise) in any jurisdiction. Instead HMRC has made detailed allegations about the nature of the fraud it alleges that the appellant engaged in, which do not appear to us to be obviously unjustified.

54. We recognise that a number of points can be made about the potential relevance of the York Wines records and the number of consignments needed (see [17](2)] above). However, we accept submissions for HMRC that those arguments assume that the nature of the fraud involved goods both leaving and returning to the UK, whereas in relation to the appellant HMRC's allegation is that the form of evasion involved was generally straight smuggling into the UK. In addition, we accept the submission that it was not necessarily the case that York Wines' records were incorrect in circumstances where, as HMRC allege, the type of fraud engaged in by Sintra SA involved goods being moved out of the UK and then smuggled back in, or diverted within the UK rather than exported as the paperwork suggested. It is not obvious to us that it was inappropriate to use information relating to Sintra SA's dealings with York Wines to estimate the proportion of the appellant's business that was done in cash, in circumstances where other information was not available and an assessment was being made on a "best of judgment" basis. We note in this context the comments made by Woolf J in *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 at 292 to 293 about the basis on which a valid "best of judgment" assessment can be made.

55. We accept that the total amount assessed is significant and that many companies would not have sufficient readily available resources to pay it, but we have nothing like sufficient information about the appellant's financial position to determine what its resources are. We do not know exactly what bank accounts it has or had, we have no accounting information and no information about payments it made that may have been by way of investment or distribution. We also have no evidence about business that may have been done in cash, which was either not banked or banked in an account or accounts that have not been identified. It appears that the appellant does not trade now but we have no clear evidence from the appellant about what its business was. As the Tribunal said in *Tradium* at [58], referring to comments of Judge Bishopp in *ToTel*, the appellant "may" be put to financial hardship but we simply don't know. We do not accept that the comments in *John Cozens* at [54] and [55] affect this. The facts are completely different: this is not a case of the appellant failing to explain some entries on his bank statement. The appellant has failed to provide any explanation, or any up to date documentation, at all.

56. We note the appellant's submission that the VAT assessment alone is greater than the profit assumed by HMRC. However, there is no evidence of what the actual profit margin was. There is no evidence of when any sales took place or at what prices. We

understood HMRC's assumed profit margin to be based on an industry average, but that average would presumably have been determined on the basis that VAT and duties were accounted for on the sales.

57. It is also of some relevance that, on the appellant's own case, the appellant no longer conducts business. We note the comment in *Buyco* at [8] where hardship is interpreted as meaning that the business would be harmed if tax was paid. Whilst we do not think that the test of hardship has no application to a company without an active business, the statement in *Buyco* does put an appropriate focus on the requirement for the appellant to show that payment (or the provision of security for excise duty purposes) would actually harm it.

58. We have also considered the differences between the VAT and excise duty hardship rules. We accept that HMRC has refused the appellant's hardship applications on grounds that referred only to not paying or depositing the (full) amount, and that their decision did not expressly refer to the provision of security for all or part of the amount as contemplated for excise duty purposes. However, we do not think that that affects our jurisdiction to determine the matter under s 16(3)(b) FA 1994, and Mr Brown did not argue otherwise. The appellant also did not offer any security at all, so must be treated as having asked that no security should be required. We find that it is not the case that it would have been reasonable in the circumstances for the Commissioners to accept no security, and therefore the appellant has not satisfied the test in s 16(3)(b).

Disposition

59. The hardship applications are dismissed.

60. This document contains full findings of fact and reasons for the decision. We note in connection with the VAT assessment that the Court of Appeal in *R (on the application of ToTel Limited) v First-tier Tribunal (Tax Chamber) (HM Treasury, interested party)* [2012] EWCA Civ 1401 has confirmed that a right of appeal to the Upper Tribunal is not precluded by s 84(3C) VATA. Accordingly, 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 26 OCTOBER 2016