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Contents

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LEGISLATION

EU – Directive (EU) 2019/520 of the European Parliament and of the Council of 19 March 2019 on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union

DIRECTIVE (EU) 2019/520 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 19 March 2019

on the interoperability of electronic road toll systems and facilitating cross-border exchange of information on the failure to pay road fees in the Union

(recast) *OJ* L 91/45 of 29.3.2019

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee (1),

Having regard to the opinion of the Committee of the Regions (2),

Acting in accordance with the ordinary legislative procedure (3),

Whereas:

(1) Directive 2004/52/EC of the European Parliament and of the Council (4) has been substantially amended. Since further amendments are to be made, that Directive should be recast in the interests of clarity.

(2) It is desirable to achieve widespread deployment of electronic road toll systems in the Member States and in the neighbouring countries, and to have, as far as possible, reliable, user friendly, and cost-efficient systems suited to the future development of road-charging policy at Union level and to future technical developments. Therefore, it is necessary to make electronic road toll systems interoperable to reduce the cost of, and the burdens linked to, the payment of tolls across the Union.

(3) Interoperable electronic road toll systems contribute to achieving the objectives laid down by Union law on road tolls.

(4) The lack of interoperability is a significant problem in electronic road toll systems where the road fee due is linked to the distance covered by the vehicle (distance-based tolls) or to the vehicle passing a specific point (for example, cordon pricing). The provisions regarding the interoperability of electronic road toll systems should therefore apply only to those systems and should not apply to systems where the road fee due is linked to the time spent by the vehicle on the tolled infrastructure (for example, time-based systems such as vignettes).

(5) Cross-border enforcement of the obligation to pay road fees in the Union is a significant problem in all kind of systems, whether distance-based, cordon-based or time-based, electronic or manual. To deal with the problem of cross-border enforcement following a failure to pay a road fee, the provisions regarding the cross-border exchange of information should therefore apply to all those systems.

(6) In national law, the offence of failing to pay a road fee can be classified as an administrative offence or as a criminal offence. This Directive should apply regardless of the classification of the offence.

(7) Due to the lack of consistent classification across the Union, and their indirect link to the use of the infrastructure, parking fees should be left outside the scope of this Directive.

(8) The interoperability of electronic road toll systems requires harmonisation of the technology used and of the interfaces between interoperability constituents.

(9) The harmonisation of technologies and interfaces should be supported by the development and maintenance of appropriate open and public standards, available on a non-discriminatory basis to all system suppliers.

(10) For the purpose of covering, with their on-board equipment (OBE), the required communication technologies, European Electronic Toll Service (EETS) providers should be allowed to make use of, and link to, other hardware and software systems already present in the vehicle, such as satellite navigation systems or handheld devices.

(11) The specific characteristics of electronic road toll systems which are currently applied to light-duty vehicles should be taken into account. Since no such electronic road toll systems currently use satellite positioning or mobile communications, EETS providers should be allowed, for a limited

period of time, to provide users of light-duty vehicles with OBE suitable for use with 5,8 GHz microwave technology only. This derogation should be without prejudice to the right of Member States to implement satellite-based tolling for light-duty vehicles.

(12) Toll systems based on automatic number plate recognition (ANPR) technology require more manual checks of toll transactions in the back office than systems using OBE. Systems using OBE are more efficient for large electronic toll domains, and systems using ANPR technology are more suitable for small domains, such as city tolls, where the use of OBE would generate disproportionate costs or administrative burdens. ANPR technology can be useful in particular when combined with other technologies.

(13) In view of technical developments connected with solutions based on ANPR technology, the standardisation bodies should be encouraged to define the necessary technical standards.

(14) The specific rights and obligations of EETS providers should apply to entities which prove that they have fulfilled certain requirements and have obtained registration as EETS providers in their Member State of establishment.

(15) The rights and obligations of the main EETS actors, that is to say, the EETS providers, toll chargers and EETS users, should be clearly defined to ensure that the market functions in a fair and efficient manner.

(16) It is particularly important to safeguard certain rights of the EETS providers, such as the right to the protection of commercially sensitive data, and to do so without negatively impacting the quality of the services provided to the toll chargers and EETS users. In particular, the toll charger should be required not to disclose commercially sensitive data to any of the EETS provider's competitors. The amount and type of data which EETS providers communicate to toll chargers, for the purpose of calculating and applying tolls or of verifying the calculation of applied toll on the vehicles of EETS users by the EETS providers, should be kept to a strict minimum.

(17) EETS providers should be required to fully cooperate with toll chargers in their enforcement efforts, so as to increase the overall efficiency of electronic road toll systems. Therefore, toll chargers should be allowed to request from the EETS provider, where a failure to pay a road fee is suspected, data relating to the vehicle and to the owner or holder of the vehicle who is the EETS provider's client, provided that those data are not used for any purpose other than enforcement.

(18) In order to enable EETS providers to compete, in a non-discriminatory manner, for all clients in a given EETS domain, it is important that the possibility is given to them to become accredited to that domain sufficiently early so that they are able to offer services to the users as of the first day of operation of the toll system.

(19) Toll chargers should give access to their EETS domain to EETS providers on a non-discriminatory basis.

(20) To ensure transparency and non-discriminatory access to EETS domains for all EETS providers, toll chargers should publish all the necessary information relating to access rights in an EETS domain statement.

(21) All OBE user rebates or discounts on tolls offered by a Member State or by a toll charger should be transparent, publicly announced and available under the same conditions to clients of EETS providers.

(22) EETS providers should be entitled to fair remuneration, calculated based on a transparent, non-discriminatory and identical methodology.

(23) Toll chargers should be allowed to deduct from the remuneration of EETS providers the appropriate costs incurred to provide, operate and maintain the EETS-specific elements of the electronic road toll system.

(24) EETS providers should pay to the toll charger all tolls due by their clients. EETS providers should, however, not be liable for tolls that their clients have not paid, when the latter are equipped with an OBE that has been declared to the toll charger as invalidated.

(25) Where a legal entity that is a toll service provider also plays other roles in an electronic road toll system, or has other activities not directly related to electronic toll collection, it should be required to keep accounting records which make a clear distinction possible between the costs and revenues related to the provision of toll services and the costs and revenues related to other activities, and to provide, upon request, information on those costs and revenues related to the provision of toll services to the relevant Conciliation Body or judicial body. Cross subsidies between the activities performed in the role of toll service provider and other activities should not be allowed.

(26) Users should have the possibility to subscribe to EETS through any EETS provider, regardless of their nationality, Member State of residence or Member State of registration of the vehicle.

(27) To avoid double payment and to give users legal certainty, the payment of a toll to an EETS provider should be considered as fulfilling the user's obligations towards the relevant toll charger.

(28)The contractual relationships between toll chargers and EETS providers should ensure, inter alia, that tolls are paid correctly.

(29)A mediation procedure should be established with a view to settling disputes between toll chargers and EETS providers during contractual negotiations and in their contractual relationships. National Conciliation Bodies should be consulted by toll chargers and EETS providers who are seeking a settlement of a dispute relating to the right to non-discriminatory access to EETS domains.

(30)Conciliation Bodies should have the power to verify that the contractual conditions imposed on any EETS provider are non-discriminatory. In particular, they should have the power to verify that the remuneration offered by the toll charger to the EETS providers respects the principles set out in this Directive.

(31)The traffic data of EETS users constitutes input that is essential for enhancing transport policies of the Member States. Member States should therefore have the possibility to request such data from toll service providers, including EETS providers for the purpose of designing traffic policies and enhancing traffic management or for other non-commercial use by the State, in compliance with applicable data protection rules.

(32)A framework is needed that lays down the procedures for accrediting EETS providers to an EETS domain and that ensures fair access to the market while safeguarding the adequate level of service. The EETS domain statement should set out in detail the procedure for accrediting an EETS provider to the EETS domain, and in particular the procedure for checking conformity to specifications and suitability for use of interoperability constituents. The procedure should be the same for all EETS providers.

(33)To ensure easy access to information by EETS market actors, Member States should be required to compile and publish all important data regarding EETS in publicly available national registers.

(34)To allow for technological progress, it is important that toll chargers have the possibility to test new tolling technologies or concepts. Such tests should however be limited, and EETS providers should not be required to take part in them. The Commission should have the possibility of not authorising such tests if they could prejudice the correct functioning of the regular electronic road toll system or of the EETS.

(35)Large differences in technical specifications of electronic road toll systems might hamper the achievement of EU-wide interoperability of electronic tolls, and thus contribute to the persistence of the current situation where users need several pieces of OBE to pay tolls in the Union. This situation is detrimental to the efficiency of transport operations, to the cost-efficiency of toll systems, and to the achievement of transport policy objectives. The issues underlying this situation should therefore be addressed.

(36)While cross-border interoperability is improving throughout the Union, the mid- to long-term objective is to make it possible to travel across the Union with only one piece of OBE. Therefore, in order to avoid administrative burdens and costs for road users, it is important that the Commission set up a roadmap to achieve this objective, and to facilitate the free movement of people and goods in the Union, without negatively affecting competition on the market.

(37)The EETS is a market-based service and therefore EETS providers should not be obliged to provide their services across the Union. However, in the interest of users, EETS providers should cover all EETS domains in any Member State in which they decide to provide their services. Furthermore, the Commission should assess whether the flexibility given to EETS providers leads to the exclusion from EETS of small or peripheral EETS domains, and, if it finds that it does, take action where necessary.

(38)The EETS domain statement should describe in detail the framework commercial conditions for EETS providers' operations in the EETS domain in question. In particular, it should describe the methodology used for calculating the remuneration of EETS providers.

(39)Where a new electronic road toll system is being launched or an existing system is being substantially modified, the toll charger should publish the new or updated EETS domain statements with sufficient notice to allow EETS providers to be accredited or re-accredited to the system at the latest one month before the day of its operational launch. The toll charger should design and follow the procedure for the accreditation or, respectively, re-accreditation of EETS providers in such a way that the procedure can be concluded at the latest one month before the operational launch of the new or substantially modified system. Toll chargers should respect their part of the planned procedure as defined in the EETS domain statement.

(40)Toll chargers should not request or require from EETS providers any specific technical solutions which could jeopardise interoperability with other EETS domains and with the existing interoperability constituents of the EETS provider.

(41)The EETS has the potential to considerably reduce the administrative costs and burdens of

international road transport operators and drivers.

(42) EETS providers should be allowed to issue invoices to EETS users. However, toll chargers should be allowed to request that invoices are sent on their behalf and in their name, since invoicing directly in the name of the EETS provider can, in certain EETS domains, have adverse administrative and tax implications.

(43) Each Member State with at least two EETS domains should designate a contact office for EETS providers wishing to provide the EETS in its territory in order to facilitate their contacts with the toll chargers.

(44) Electronic tolling and other services, such as cooperative ITS (C-ITS) applications use similar technologies and neighbouring frequency bands for short range vehicle-to-vehicle and vehicle-to-infrastructure communication. In the future, the potential for applying other emerging technologies to electronic tolling merits exploration, after a thorough assessment of the costs, benefits, technical barriers and possible solutions thereto. It is important that measures are implemented to protect existing investments in the 5,8 GHz microwave technology from the interference of other technologies.

(45) Without prejudice to State aid and competition law, Member States should be allowed to develop measures to promote electronic toll collection and billing.

(46) When standards relevant for the EETS are reviewed by the standardisation bodies, there should be appropriate transition arrangements to ensure the continuity of the EETS and the compatibility, with the toll systems, of interoperability constituents already in use at the moment of the revision of the standards.

(47) The EETS should allow intermodality to develop, whilst pursuing compliance with the 'user pays' and 'polluter pays' principles.

(48) Problems with identifying non-resident offenders to electronic road toll systems hamper further deployment of such systems and the wider application of the 'user pays' and 'polluter pays' principles on Union roads and therefore there is a need to find a way to identify such persons and to process their personal data.

(49) For reasons of consistency and efficient use of resources, the system for exchanging information on those who fail to pay a road fee, and on their vehicles, should use the same tools as the system that is used for exchanging information on road-safety-related traffic offences provided for in Directive (EU) 2015/413 of the European Parliament and of the Council (5).

(50) In certain Member States a failure to pay a road fee is established only once the obligation to pay the road fee has been notified to the user. Since this Directive does not harmonise national laws in this regard, Member States should have the possibility to apply this Directive to identify users and vehicles for the purpose of notification. However, such extended application should be allowed only if certain conditions are fulfilled.

(51) Follow-up proceedings initiated after a failure to pay a road fee are not harmonised across the Union. Often, the identified road user is given the possibility of paying the road fee due, or a fixed substitute amount, directly to the entity responsible for levying the road fee, before any further administrative or criminal proceedings are initiated by Member State authorities. It is important that such efficient procedure to put an end to the failure to pay a road fee is available on similar terms to all road users. For this purpose, Member States should be allowed to provide the entity responsible for levying the road fee with the data necessary to identify the vehicle in respect of which there was a failure to pay a road fee and to identify its owner or holder, provided that proper protection of personal data is ensured. In this context, Member States should ensure that compliance with the payment order issued by the entity concerned puts an end to the failure to pay a road fee.

(52) In certain Member States, the absence, or dysfunctioning, of OBE is regarded as a failure to pay a road fee where such fees can only be paid by using OBE.

(53) Member States should provide the Commission with the information and data necessary to evaluate the effectiveness and efficiency of the system for exchanging information on those who fail to pay a road fee. The Commission should assess the data and information obtained, and propose, if necessary, amendments to this Directive.

(54) While analysing possible measures to further facilitate the cross-border enforcement of the obligation to pay road fees in the Union, the Commission should also assess in its report the need for mutual assistance between Member States.

(55) The enforcement of the obligation to pay road fees, the identification of the vehicle and of the owner or holder of the vehicle for which a failure to pay a road fee was established and the collection of information on the user for the purpose of ensuring the compliance of the toll charger with its obligations to tax authorities all entail the processing of personal data. Such processing needs to be carried out in accordance with Union rules, as set out, inter alia, in Regulation (EU) 2016/679 of the European Parliament and of the Council (6), Directive (EU)

2016/680 of the European Parliament and of the Council (7) and Directive 2002/58/EC of the European Parliament and of the Council (8). The right to protection of personal data is explicitly recognised by Article 8 of the Charter of Fundamental Rights of the European Union.

(56) This Directive does not affect the Member States' freedom to lay down rules governing road infrastructure charging and taxation matters.

(57) In order to facilitate the cross-border exchange of information on the vehicles and owners or holders of vehicles for which there was a failure to pay road fees, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of the amendment of Annex I to reflect changes in the Union law. The power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission also in respect of laying down the details for the classification of vehicles for the purposes of establishing the applicable tariff schemes, further defining the obligations of the EETS users regarding the provision of data to the EETS provider and the use and handling of the OBE, laying down the requirements for interoperability constituents regarding safety and health, reliability and availability, environment protection, technical compatibility, security and privacy and operation and management, laying down the general infrastructure requirements for interoperability constituents and laying down the minimum criteria of eligibility for notified bodies. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making (9). In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(58) The implementation of this Directive requires uniform conditions for the application of technical and administrative specifications for the deployment, in the Member States, of procedures that involve EETS actors and the interfaces between them, so as to facilitate interoperability and ensure that national toll collection markets are governed by equivalent rules. In order to ensure uniform conditions for the implementation of this Directive and to define those technical and administrative specifications, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council (10).

(59) This Directive should be without prejudice to the obligations of the Member States relating to the time-limit for the transposition into national law of the Directive set out in Annex III, Part B.

(60) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, notably the protection of personal data.

(61) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council (11),

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down the conditions necessary for the following purposes:

(a) to ensure the interoperability of electronic road toll systems on the entire Union road network, urban and interurban motorways, major and minor roads, and various structures, such as tunnels or bridges, and ferries; and

(b) to facilitate the cross-border exchange of vehicle registration data regarding the vehicles and the owners or holders of vehicles for which there was a failure to pay road fees of any kind in the Union.

In order to respect the principle of subsidiarity, this Directive shall apply without prejudice to the decisions taken by Member States to levy road fees on particular types of vehicles, and to determine the level of those fees and the purpose for which such fees are levied.

2. Articles 3 to 22 do not apply to:

(a) road toll systems which are not electronic within the meaning of point 10 of Article 2; and

(b) small, strictly local road toll systems for which the costs of compliance with the requirements of Articles 3 to 22 would be disproportionate to the benefits.

3. This Directive does not apply to parking fees.

4. The objective of the interoperability of electronic road toll systems in the Union shall be achieved by means of the European Electronic Toll Service (EETS) which shall be complementary to the national electronic toll services of the Member States.

5. Where the national law requires a notification to the user of the obligation to pay before a failure to pay a road fee can be established, Member States may also apply this Directive to identify the owner or the holder of the vehicle and the vehicle itself for notification purposes, only if all the following conditions are fulfilled:

(a) there are no other means to identify the owner or holder of the vehicle; and

(b) the notification to the owner or holder of the vehicle of the obligation to pay is a compulsory stage of the road fee payment procedure under national law.

6. Where a Member State applies paragraph 5, it shall take the measures necessary to ensure that any follow-up proceedings in relation to the obligation to pay the road fee are pursued by public authorities. References to failure to pay a road fee in this Directive shall include cases covered by paragraph 5 if the Member State where the failure to pay takes place, applies that paragraph.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

(1) 'toll service' means the service that enables users to use a vehicle in one or more EETS domains under a single contract and, where necessary, with one piece of on-board equipment (OBE), and which includes:
   (a) where necessary, providing a customised OBE to users and maintaining its functionality;
   (b) guaranteeing that the toll charger is paid the toll due by the user;
   (c) providing to the user the means by which the payment is to be made or accepting an existing one;
   (d) collecting the toll from the user;
   (e) managing customer relations with the user; and
   (f) implementing and adhering to the security and privacy policies for the road toll systems;

(2) 'toll service provider' means a legal entity providing toll services on one or more EETS domains for one or more classes of vehicles;

(3) 'toll charger' means a public or private entity which levies tolls for the circulation of vehicles in an EETS domain;

(4) 'designated toll charger' means a public or private entity which has been appointed as the toll charger in a future EETS domain;

(5) 'European Electronic Toll Service (EETS)' means the toll service provided under a contract on one or more EETS domains by an EETS provider to an EETS user;

(6) 'EETS provider' means an entity which, under a separate contract, grants access to EETS to an EETS user, transfers the tolls to the relevant toll charger, and which is registered by its Member State of establishment;

(7) 'EETS user' means a natural or legal person who has a contract with an EETS provider in order to have access to the EETS;

(8) 'EETS domain' means a road, a road network, a structure, such as a bridge or a tunnel, or a ferry, where tolls are collected using an electronic road toll system;

(9) 'EETS compliant system' means the set of elements of an electronic road toll system which are specifically needed for the integration of EETS providers in the system and for the operation of EETS;

(10) 'electronic road toll system' means a toll collection system in which the obligation, for the user, to pay the toll is exclusively triggered by and linked to the automatic detection of the presence of the vehicle in a certain location through remote communication with OBE in the vehicle or automatic number plate recognition;

(11) 'on-board equipment (OBE)', means the complete set of hardware and software components to be used as part of the toll service which is installed or carried on board a vehicle in order to collect, store, process and remotely receive/transmit data, either as a separate device or embedded in the vehicle;

(12) 'main service provider' means a toll service provider with specific obligations, such as the obligation to sign contracts with all interested users, or specific rights, such as specific remuneration or a guaranteed long term contract, different from the rights and obligations of other service providers;

(13) 'interoperability constituent' means any elementary component, group of components, subassembly or complete assembly of equipment incorporated or intended to be incorporated into EETS upon which the interoperability of the service depends directly or indirectly, including both tangible objects and intangible objects such as software;

(14) 'suitability for use' means the ability of an interoperability constituent to achieve and maintain a specified performance when in service, integrated representatively into EETS in relation with a toll charger's system;

(15) 'toll context data' means the information defined by the responsible toll charger as necessary to establish the toll due for circulating a vehicle on a particular toll domain and conclude the toll transaction;

(16) ‘toll declaration’ means a statement to a toll charger that confirms the presence of a vehicle in an EETS domain in a format agreed between the toll service provider and the toll charger;

(17) ‘vehicle classification parameters’ means the vehicle related information in accordance with which tolls are calculated based on the toll context data;

(18) ‘back office’ means the central electronic system used by the toll charger, a group of toll chargers who have created an interoperability hub, or by the EETS provider to collect, process and send information in the framework of an electronic road toll system;

(19) ‘substantially modified system’ means an existing electronic road toll system that has undergone or undergoes a change which requires EETS providers to make modifications to the interoperability constituents that are in operation, such as reprogramming or adapting the interfaces of their back office, to such an extent that re-accreditation is required;

(20) ‘accreditation’ means the process defined and managed by the toll charger, which an EETS provider must undergo before it is authorised to provide the EETS in an EETS domain;

(21) ‘toll’ or ‘road fee’ means the fee which must be paid by the road user for circulating on a given road, a road network, a structure, such as a bridge or a tunnel, or a ferry;

(22) ‘failure to pay a road fee’ means the offence consisting of the failure by a road user to pay a road fee in a Member State, defined by the relevant national provisions of that Member State;

(23) ‘Member State of registration’ means the Member State where the vehicle which is subject to the payment of the road fee is registered;

(24) ‘national contact point’ means a designated competent authority of a Member State for the cross-border exchange of vehicle registration data;

(25) ‘automated search’ means an online access procedure for consulting the databases of one, more than one, or all of the Member States;

(26) ‘vehicle’ means a motor vehicle, or articulated vehicle combination intended or used for the carriage by road of passengers or goods;

(27) ‘holder of the vehicle’ means the person in whose name the vehicle is registered, as defined in the law of the Member State of registration;

(28) ‘heavy-duty vehicle’ means a vehicle having a maximum permissible mass exceeding 3,5 tonnes;

(29) ‘light-duty vehicle’ means a vehicle having a maximum permissible mass not exceeding 3,5 tonnes.

Article 3

Technological solutions

1. All new electronic road toll systems which require the installation or use of OBE shall, for carrying out electronic toll transactions, use one or more of the following technologies:

(a) satellite positioning;

(b) mobile communications;

(c) 5,8 GHz microwave technology.

Existing electronic road toll systems which require the installation or use of OBE and use other technologies shall comply with the requirements set out in the first subparagraph of this paragraph if substantial technological improvements are carried out.

2. The Commission shall request the relevant standardisation bodies, in accordance with the procedure laid down by Directive (EU) 2015/1535 of the European Parliament and of the Council (12) to swiftly adopt standards applicable to electronic road toll systems with regard to the technologies listed in the first subparagraph of paragraph 1 and the ANPR technology, and to update them where necessary. The Commission shall request that the standardisation bodies ensure the continual compatibility of interoperability constituents.

3. OBE which uses satellite positioning technology and is placed on the market after 19 October 2021 shall be compatible with the positioning services provided by the Galileo and the European Geostationary Navigation Overlay Service (‘EGNOS’) systems.

4. Without prejudice to paragraph 6, EETS providers shall make available to EETS users OBE which is suitable for use, interoperable and capable of communicating with the relevant electronic road toll systems in service in the Member States using the technologies listed in the first subparagraph of paragraph 1.

5. The OBE may use its own hardware and software, use elements of other hardware and software present in the vehicle, or both. For the purpose of communicating with other hardware systems present in the vehicle, the OBE may use technologies other than those listed in the first subparagraph of paragraph 1, provided that security, quality of service and privacy are ensured.

EETS OBE is allowed to facilitate services other than tolling, provided that the operation of such services does not interfere with the toll services in any EETS domain.

6. Without prejudice to the right of Member States to introduce electronic road toll systems for light-duty vehicles based on satellite positioning or mobile communications, EETS providers may until 31 December 2027 provide users of light-duty vehicles with OBE suitable for use with 5,8 GHz

microwave technology only, to be used in EETS domains which do not require satellite positioning or mobile communications technologies.

CHAPTER II

GENERAL PRINCIPLES OF EETS

Article 4

Registration of EETS providers

Each Member State shall establish a procedure for registering EETS providers. It shall grant the registration to entities which are established on its territory, which request registration and which can demonstrate that they fulfil the following requirements:

(a) hold EN ISO 9001 certification or equivalent;

(b) have the technical equipment and the EC declaration or certificate attesting the conformity of the interoperability constituents to specifications;

(c) have competence in the provision of electronic toll services or in other relevant domains;

(d) have appropriate financial standing;

(e) maintain a global risk management plan, which is audited at least every two years; and

(f) are of good repute.

Article 5

Rights and obligations of EETS providers

1. Member States shall take the measures necessary to ensure that EETS providers whom they have registered conclude EETS contracts covering all EETS domains on the territories of at least four Member States within the 36 months following their registration in accordance with Article 4. They shall take the measures necessary to ensure that that those EETS providers conclude contracts covering all EETS domains in a given Member State within the 24 months following the conclusion of the first contract in that Member State, except for those EETS domains in which the responsible toll chargers do not comply with Article 6(3).

2. Member States shall take the measures necessary to ensure that EETS providers whom they have registered maintain at all times the coverage of all EETS domains once they have concluded contracts therefor. They shall take the measures necessary to ensure that, where an EETS provider is not able to maintain coverage of an EETS domain because the toll charger does not comply with this Directive, it re-establishes the coverage of the concerned domain as soon as possible.

3. Member States shall take the measures necessary to ensure that EETS providers whom they have registered publish information on their EETS domains coverage and any changes thereto, as well as, within one month of registration, detailed plans regarding any extension of their service to further EETS domains, with annual updates.

4. Member States shall take the measures necessary to ensure that, where necessary, EETS providers whom they have registered, or who provide the EETS on their territory, provide EETS users with OBE which fulfils the requirements set out in this Directive, as well as in Directives 2014/53/EU (13) and 2014/30/EU (14) of the European Parliament and of the Council. They may request from concerned EETS providers evidence that those requirements are fulfilled.

5. Member States shall take the measures necessary to ensure that EETS providers who provide the EETS on their territory keep lists of invalidated OBE related to their EETS contracts with the EETS users. They shall take the measures necessary to ensure that such lists are maintained in strict compliance with the Union rules on the protection of personal data as set out, inter alia, in Regulation (EU) 2016/679 and Directive 2002/58/EC.

6. Member States shall take the measures necessary to ensure that EETS providers whom they registered make public their contracting policy towards EETS users.

7. Member States shall take the measures necessary to ensure that EETS providers who provide the EETS on their territory provide toll chargers with the information they need to calculate and apply the toll on the vehicles of EETS users or provide toll chargers with all information necessary to allow them to verify the calculation of applied toll on the vehicles of EETS users by the EETS providers.

8. Member States shall take the measures necessary to ensure that EETS providers who provide the EETS on their territory cooperate with toll chargers in their efforts to identify suspected offenders. Member States shall take the measures necessary to ensure that, where a failure to pay a road fee is suspected, the toll charger is able to obtain, from the EETS provider, the data relating to the vehicle involved in the suspected failure to pay a road fee and to the owner or holder of that vehicle who is a client of the EETS provider. Such data shall be made available instantly by the EETS provider.

Member States shall take the measures necessary to ensure that the toll charger does not disclose such data to any other toll service provider. They shall take the measures necessary to ensure that, where the toll charger is integrated with a toll service provider in one entity, the data are used for the sole purpose of identifying suspected offenders, or in accordance with Article 27(3).

9. Member States shall take the measures necessary to ensure that a toll charger responsible for an EETS domain on their territory is able to obtain, from an EETS provider, data relating to all vehicles owned or held by clients of the EETS provider, which have, in a given period of time, driven on the EETS domain for which the toll charger is responsible, as well as data relating to the owners or holders of these vehicles, provided that the toll charger needs this data to comply with its obligations to tax authorities. Member States shall take the measures necessary to ensure that the EETS provider provides the requested data no later than two days after receiving the request. They shall take the measures necessary to ensure that the toll charger does not disclose such data to any other toll service provider. They shall take the measures necessary to ensure that, where the toll charger is integrated with a toll service provider in one entity, the data are used for the sole purpose of compliance by the toll charger with its obligations to tax authorities.

10. The data provided by EETS providers to toll chargers shall be processed in compliance with Union rules on the protection of personal data as set out in Regulation (EU) 2016/679, as well as with the national laws, regulations or administrative provisions transposing Directives 2002/58/EC and (EU) 2016/680.

11. The Commission shall adopt implementing acts, at the latest by 19 October 2019, to further define the obligations of the EETS providers regarding:

(a) monitoring the performance of their service level, and cooperation with toll chargers in verification audits;

(b) cooperation with toll chargers in the performance of toll chargers' systems' tests;

(c) service and technical support to EETS users and personalisation of OBE;

(d) the invoicing of EETS users;

(e) the information which EETS providers must provide to toll chargers and which is referred to in paragraph 7; and

(f) informing the EETS user of a detected toll non-declaration situation.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(2).

Article 6

Rights and obligations of toll chargers

1. Where an EETS domain does not comply with the technical and procedural EETS interoperability conditions provided for in this Directive, the Member State on whose territory the EETS domain lies shall take the measures necessary to ensure that the responsible toll charger assesses the problem with the stakeholders concerned and, if within its sphere of responsibilities, takes remedial actions with a view to ensuring EETS interoperability of the toll system. Where necessary, the Member State shall update the register referred to in Article 21(1) in respect of the information referred to in point (a) thereof.

2. Each Member State shall take the measures necessary to ensure that any toll charger responsible for an EETS domain on the territory of that Member State develops and maintains an EETS domain statement setting out the general conditions for EETS providers for accessing their EETS domains, in accordance with the implementing acts referred to in paragraph 9.

Where a new electronic road toll system is created on the territory of a Member State, that Member State shall take the measures necessary to ensure that the designated toll charger responsible for the system publishes the EETS domain statement with sufficient notice to allow for an accreditation of interested EETS providers at the latest one month before the operational launch of the new system, with due regard to the length of the process of assessment of conformity to specifications and of the suitability for use of interoperability constituents referred to in Article 15(1).

Where an electronic road toll system on the territory of a Member State is substantially modified, that Member State shall take the measures necessary to ensure that the toll charger responsible for the system publishes the updated EETS domain statement with sufficient notice to allow already accredited EETS providers to adapt their interoperability constituents to the new requirements and to obtain re-accreditation at the latest one month before the operational launch of the modified system, giving due regard to the length of the process of assessment of the conformity to specifications and of the suitability for use of interoperability constituents referred to in Article 15(1).

3. Member States shall take the measures necessary to ensure that toll chargers responsible for EETS domains on their territory accept on a non-discriminatory basis any EETS provider requesting to provide EETS on the said EETS domains.

Acceptance of an EETS provider in a EETS domain shall be subject to the provider's compliance with the obligations and general conditions set out in the EETS domain statement.

Member States shall take the measures necessary to ensure that toll chargers do not require EETS providers to use specific technical solutions, or processes, that hinder the interoperability of an EETS provider's interoperability constituents with electronic road toll systems in other EETS domains.

If a toll charger and an EETS provider cannot reach an agreement, the matter may be referred to the

Conciliation Body responsible for the relevant toll domain.

4. Each Member State shall take the measures necessary to ensure that the contracts between the toll charger and the EETS provider, regarding the provision of EETS on the territory of that Member State, permit the invoice for the toll to be issued to the EETS user directly by the EETS provider.

The toll charger may require that the EETS provider invoices the user in the name and on behalf of the toll charger, and the EETS provider shall comply with that request.

5. The toll charged by toll chargers to EETS users shall not exceed the corresponding national or local toll. This is without prejudice to the right of Member States to introduce rebates or discounts to promote the use of electronic toll payments. All OBE user rebates or discounts on tolls offered by a Member State or by a toll charger shall be transparent, publicly announced and available under the same conditions to clients of EETS providers.

6. Member States shall take the measures necessary to ensure that toll chargers accept on their EETS domains any operational OBE from EETS providers with whom they have contractual relationships which have been certified in accordance with the procedure defined in the implementing acts referred to in Article 15(7) and which do not appear on a list of invalidated OBE referred to in Article 5(5).

7. In the event of an EETS dysfunction attributable to the toll charger, the toll charger shall provide for a degraded mode of service enabling vehicles with the equipment referred to in paragraph 6 to circulate safely with a minimum of delay and without being suspected of a failure to pay a road fee.

8. Member States shall take the measures necessary to ensure that toll chargers collaborate in a non-discriminatory way with EETS providers or manufacturers or notified bodies with a view to assessing the suitability for use of interoperability constituents on their EETS domains.

9. The Commission shall adopt implementing acts, at the latest by 19 October 2019, to lay down the minimum content of the EETS domain statement, including:

(a) the requirements for EETS providers;

(b) the procedural conditions, including commercial conditions;

(c) the procedure of accreditation of EETS providers; and

(d) the toll context data.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(2).

Article 7

Remuneration

1. Member States shall take the measures necessary to ensure that EETS providers are entitled to be remunerated by the toll charger.

2. Member States shall take the measures necessary to ensure that the methodology for defining the remuneration of the EETS providers is transparent, non-discriminatory and identical for all EETS providers accredited to a given EETS domain. They shall take the measures necessary to ensure that the methodology is published as part of the commercial conditions in the EETS domain statement.

3. Member States shall take the measures necessary to ensure that in EETS domains with a main service provider, the methodology for calculating the remuneration of EETS providers follows the same structure as the remuneration of comparable services provided by the main service provider. The amount of remuneration of EETS providers may differ from the remuneration of the main service provider provided that it is justified by:

(a) the cost of specific requirements and obligations of the main service provider and not of the EETS providers; and

(b) the need to deduct, from the remuneration of EETS providers, the fixed charges imposed by the toll charger based on the costs, for the toll charger, of providing, operating and maintaining an EETS compliant system in its toll domain, including the costs of accreditation, where such costs are not included in the toll.

Article 8

Tolls

1. Member States shall take the measures necessary to ensure that where, for the purpose of establishing the toll tariff applicable to a given vehicle, there is discrepancy between the vehicle classification used by the EETS provider and the toll charger, the toll charger's classification prevails, unless an error can be demonstrated.

2. Member States shall take the measures necessary to ensure that the toll charger is entitled to require, from an EETS provider, payment for any substantiated toll declaration and any substantiated toll non-declaration relating to any EETS user account managed by that EETS provider.

3. Member States shall take the measures necessary to ensure that, where an EETS provider has sent to a toll charger a list of invalidated OBE referred to in Article 5(5), the EETS provider shall not be held liable for any further toll incurred through the use of such invalidated OBE. The number of entries in the list of invalidated OBE, the list's format and its updating

frequency shall be agreed between toll chargers and EETS providers.

4. Member States shall take the measures necessary to ensure that, in microwave-based toll systems, toll chargers communicate to EETS providers substantiated toll declarations for tolls incurred by their respective EETS users.

5. The Commission shall adopt delegated acts in accordance with Article 30, at the latest by 19 October 2019, to lay down the details for the classification of vehicles for the purposes of establishing the applicable tariff schemes, including any procedures necessary for establishing such schemes. The set of vehicle classification parameters to be supported by EETS shall not restrict the choice of tariff schemes by toll chargers. The Commission shall ensure sufficient flexibility to allow the set of classification parameters to be supported by EETS to evolve according to foreseeable future needs. Those acts shall be without prejudice to the definition, in Directive 1999/62/EC of the European Parliament and of the Council (15), of the parameters according to which tolls shall vary.

Article 9

Accounting

Member States shall take the measures necessary to ensure that legal entities which provide toll services keep accounting records which make a clear distinction possible between the costs and revenues related to the provision of toll services and the costs and revenues related to other activities. The information on the costs and revenues related to the toll service provision shall be provided, upon request, to the relevant Conciliation Body or judicial body. Member States shall also take the measures necessary to ensure that cross subsidies between the activities performed in the role of toll service provider and other activities are not allowed.

Article 10

Rights and obligations of EETS users

1. Member States shall take the measures necessary to allow EETS users to subscribe to EETS through any EETS provider, regardless of their nationality, Member State of residence or the Member State in which the vehicle is registered. When entering into a contract, EETS users shall be duly informed about valid means of payment and, in accordance with Regulation (EU) 2016/679, about the processing of their personal data and the rights stemming from applicable legislation on the protection of personal data.

2. The payment of a toll by an EETS user to its EETS provider shall be deemed to fulfil the EETS user's payment obligations to the relevant toll charger.

If two or more OBE are installed or carried on-board a vehicle, it is the responsibility of the EETS user to use or activate the relevant OBE for the specific EETS domain.

3. The Commission shall adopt delegated acts in accordance with Article 30, at the latest by 19 October 2019, to further define the obligations of the EETS users regarding:

(a) the provision of data to the EETS provider; and

(b) the use and handling of the OBE.

CHAPTER III

CONCILIATION BODY

Article 11

Establishment and functions

1. Each Member State with at least one EETS domain shall designate or establish a Conciliation Body in order to facilitate mediation between toll chargers with an EETS domain located within its territory and EETS providers that have contracts or are in contractual negotiations with those toll chargers.

2. The Conciliation Body shall be empowered, in particular, to verify that the contractual conditions imposed by a toll charger on EETS providers are non-discriminatory. It shall be empowered to verify that the EETS providers are remunerated in accordance with the principles provided for in Article 7.

3. The Member States referred to in paragraph 1 shall take the measures necessary to ensure that their Conciliation Body is independent, in its organisation and legal structure, from the commercial interests of toll chargers and toll service providers.

Article 12

Mediation procedure

1. Each Member State with at least one EETS domain shall lay down a mediation procedure in order to enable a toll charger or an EETS provider to request the relevant Conciliation Body to intervene in any dispute relating to their contractual relations or negotiations.

2. The mediation procedure referred to in paragraph 1 shall require that the Conciliation Body states, within a period of one month following the receipt of a request for it to intervene, whether all documents necessary for the mediation are in its possession.

3. The mediation procedure referred to in paragraph 1 shall require that the Conciliation Body issues its opinion on a dispute no later than six months after receipt of the request for it to intervene.

4. In order to facilitate its tasks, Member States shall give the Conciliation Body the power to request relevant information from toll chargers, EETS providers and any third parties active in the provision of EETS within the Member State concerned.

5. The Member States with at least one EETS domain and the Commission shall take the measures necessary to ensure the exchange of information between the Conciliation Bodies concerning their work, guiding principles and practices.

CHAPTER IV

TECHNICAL PROVISIONS

Article 13

Single continuous service

Member States shall take the measures necessary to ensure that EETS is provided to EETS users as a single continuous service.

This means that:

(a) once the vehicle classification parameters, including the variable ones, have been stored or declared, or both, no further in-vehicle human intervention is required during a journey unless there is a modification to the vehicle's characteristics; and

(b) human interaction with a particular piece of OBE stays the same whatever the EETS domain.

Article 14

Additional elements regarding EETS

1. Member States shall take the measures necessary to ensure that the interaction of EETS users with toll chargers as part of EETS is limited, where applicable, to the invoicing process in accordance with Article 6(4) and to enforcement processes. Interactions between EETS users and EETS providers, or their OBE, may be specific to each EETS provider, without compromising EETS interoperability.

2. Member States may require that toll service providers, including EETS providers, at the request of the Member States authorities, provide traffic data in respect of their clients, subject to compliance with the applicable data protection rules. Such data shall only be used by the Member States for the purpose of traffic policies and enhancing traffic management and the data shall not be used to identify the clients.

3. The Commission shall adopt, at the latest by 19 October 2019, implementing acts laying down the specifications of electronic interfaces between the interoperability constituents of toll chargers, EETS providers and EETS users, including, where applicable, the content of the messages exchanged between the actors through those interfaces. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(2).

Article 15

Interoperability constituents

1. Where a new electronic road toll system is created on the territory of a Member State, that Member State shall take the measures necessary to ensure that the designated toll charger responsible for the system establishes and publishes in the EETS domain statement the detailed planning of the process of assessment of conformity to specifications and of the suitability for use of interoperability constituents, which allows for the accreditation of interested EETS providers at the latest one month before the operational launch of the new system.

Where an electronic road toll system on the territory of a Member State is substantially modified, that Member State shall take the measures necessary to ensure that the toll charger responsible for the system establishes and publishes in the EETS domain statement, in addition to the elements referred to in the first subparagraph, the detailed planning of the re-assessment of conformity to specifications and of the suitability for use of the interoperability constituents of EETS providers already accredited to the system before its substantial modification. The planning shall allow for the re-accreditation of concerned EETS providers at the latest one month before the operational launch of the modified system.

The toll charger shall respect that planning.

2. Member States shall take the measures necessary to ensure that each toll charger responsible for an EETS domain on the territory of that Member States sets up a test environment in which the EETS provider or its authorised representatives can check that its OBE is suitable for use in the toll charger's EETS domain and obtain certification of the successful completion of the respective tests. Member States shall take the measures necessary to allow toll chargers to set up a single test environment for more than one EETS domain, and to allow one authorised representative to check the suitability for use of one type of OBE on behalf of more than one EETS provider.

Member States shall take the measures necessary to allow toll chargers to require EETS providers or their authorised representatives to cover the cost of the respective tests.

3. Member States shall not prohibit, restrict or hinder the placing on the market of interoperability constituents for use in EETS where they bear the CE marking or either a declaration of conformity to specifications or a declaration of suitability for use, or both. In particular, Member States shall not require checks which have already been carried out as part of the procedure for checking conformity to specifications or suitability for use, or both.

4. The Commission shall adopt delegated acts in accordance with Article 30, at the latest by 19 October 2019, to lay down the requirements for interoperability constituents regarding safety and

health, reliability and availability, environment protection, technical compatibility, security and privacy and operation and management.

5. The Commission shall also adopt delegated acts in accordance with Article 30, at the latest by 19 October 2019, to lay down the general infrastructure requirements regarding:

(a) the accuracy of toll declaration data with a view to guaranteeing equality of treatment between EETS users in respect of tolls and charges;

(b) the identification, through the OBE, of the responsible EETS provider;

(c) the use of open standards for the interoperability constituents of the EETS equipment;

(d) the integration of the OBE in the vehicle; and

(e) the signalisation, to the driver, of the requirement to pay a road fee.

6. The Commission shall adopt implementing acts, at the latest by 19 October 2019, to lay down the following specific infrastructure requirements:

(a) requirements on common communication protocols between toll chargers and EETS providers equipment;

(b) requirements on mechanisms for toll chargers to detect whether a vehicle circulating on their EETS domain is equipped with a valid and functioning OBE;

(c) requirements on the human-machine interface in the OBE;

(d) requirements applying specifically to interoperability constituents in microwave technologies-based toll systems; and

(e) requirements applying specifically in Global Navigation Satellite System (GNSS)-based toll systems.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(2).

7. The Commission shall adopt implementing acts, at the latest by 19 October 2019, to lay down the procedure to be applied by the Member States for assessing the conformity to specifications and suitability for use of interoperability constituents, including the content and format of the EC declarations. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(2).

CHAPTER V

SAFEGUARD CLAUSES

Article 16

Safeguard procedure

1. Where a Member State has reason to believe that interoperability constituents bearing a CE marking and placed on the market are unlikely, when used as intended, to meet the relevant requirements, it shall take all necessary steps to restrict their field of application, prohibit their use or withdraw them from the market. The Member State shall immediately inform the Commission of the measures taken and give the reasons for its decision, stating in particular whether failure to conform is due to:

(a) incorrect application of technical specifications; or

(b) inadequacy of technical specifications.

2. The Commission shall consult the concerned Member State, manufacturer, EETS provider or their authorised representatives established within the Union as quickly as possible. Where, following that consultation, the Commission establishes that the measure is justified, it shall immediately inform the Member State concerned as well as the other Member States. However, where, following that consultation, the Commission establishes that the measure is unjustified, it shall immediately inform the Member State concerned, as well as the manufacturer or its authorised representative established within the Union and the other Member States.

3. Where interoperability constituents bearing the CE marking fail to comply with interoperability requirements, the competent Member State shall require the manufacturer or its authorised representative established in the Union to restore the interoperability constituent to a state of conformity to specifications or suitability for use, or both, under the conditions laid down by that Member State and shall inform the Commission and the other Member States thereof.

Article 17

Transparency of assessments

Any decision taken by a Member State or a toll charger concerning the assessment of conformity to specifications or suitability for use of interoperability constituents and any decision taken pursuant to Article 16 shall set out in detail the reasons on which it is based. It shall be notified as soon as possible to the concerned manufacturer, EETS provider or their authorised representatives, together with an indication of the remedies available under the laws in force in the Member State concerned and of the time limits allowed for the exercise of such remedies.

CHAPTER VI

ADMINISTRATIVE ARRANGEMENTS

Article 18

Single contact office

Each Member State with at least two EETS domains on its territory shall designate a single contact office for

EETS providers. The Member State shall make public the contact details of that office, and provide them, upon request, to interested EETS providers. The Member State shall take the measures necessary to ensure that, upon request of the EETS provider, the contact office facilitates and coordinates early administrative contacts between the EETS provider and the toll chargers responsible for the EETS domains on the territory of the Member State. The contact office may be a natural person or a public or a private body.

Article 19

Notified bodies

1. Member States shall notify to the Commission and the other Member States any bodies entitled to carry out or supervise the procedure for the assessment of conformity to specifications or suitability for use referred to in the implementing acts referred to in Article 15(7), indicating each body's area of competence, and the identification numbers obtained in advance from the Commission. The Commission shall publish in the Official Journal of the European Union the list of bodies, their identification numbers and areas of competence, and shall keep the list updated.

2. Member States shall apply the criteria provided for in the delegated acts referred to in paragraph 5 of this Article for the assessment of the bodies to be notified. Bodies meeting the assessment criteria provided for in the relevant European standards shall be deemed to meet the said criteria.

3. A Member State shall withdraw approval from a body which no longer meets the criteria provided for in the delegated acts referred to in paragraph 5 of this Article. It shall immediately inform the Commission and the other Member States thereof.

4. Where a Member State or the Commission considers that a body notified by another Member State does not meet the criteria provided for in the delegated acts referred to in paragraph 5 of this Article, the matter shall be referred to the Electronic Toll Committee referred to in Article 31(1), which shall deliver its opinion within three months. In the light of the opinion of that Committee, the Commission shall inform the Member State which notified the body in question of any changes that are necessary for the notified body to retain the status conferred upon it.

5. The Commission shall adopt delegated acts in accordance with Article 30, at the latest by 19 October 2019, to lay down the minimum criteria of eligibility for notified bodies.

Article 20

Coordination Group

A Coordination Group of the bodies notified under Article 19(1) (the 'Coordination Group') shall be set up as a working group of the Electronic Toll Committee referred to in Article 31(1), in accordance with that Committee's Rules of Procedure.

Article 21

Registers

1. For the purposes of the implementation of this Directive, each Member State shall keep a national electronic register of the following:

(a) the EETS domains within their territory, including information relating to:
   (i) the corresponding toll chargers;
   (ii) the tolling technologies employed;
   (iii) the toll context data;
   (iv) the EETS domain statement; and
   (v) the EETS providers having EETS contracts with the toll chargers active in the territory of that Member State;

(b) the EETS providers to whom it has granted registration in accordance with Article 4; and

(c) the details of the single contact office referred to in Article 18 for EETS including a contact email address and telephone number.

Unless otherwise specified, Member States shall verify at least once a year that the requirements set out in points (a), (d), (e) and (f) of Article 4 are still met, and shall update the register accordingly. The register shall also contain the conclusions of the audit provided for in point (e) of Article 4. A Member State shall not be held liable for the actions of the EETS providers mentioned in its register.

2. Member States shall take the measures necessary to ensure that all the data contained in the national electronic register are kept up-to-date and are accurate.

3. The registers shall be electronically accessible to the public.

4. These registers shall be available as of 19 October 2021.

5. At the end of each calendar year, the Member States authorities in charge of the registers shall communicate, to the Commission, by electronic means, the registers of EETS domains and EETS providers. The Commission shall make the information available to the other Member States. Any inconsistencies with the situation in a Member State shall be brought to the attention of the Member State of registration and of the Commission.

CHAPTER VII
PILOT SYSTEMS

Article 22
Pilot toll systems

1. To allow for EETS technical development, Member States may temporarily authorise, on limited parts of their toll domain and in parallel with the EETS compliant system, pilot toll systems incorporating new technologies or concepts which do not comply with one or more provisions of this Directive.

2. EETS providers shall not be required to participate in pilot toll systems.

3. Before starting a pilot toll system, the Member State concerned shall request the authorisation of the Commission. The Commission shall issue the authorisation or refuse it, in the form of a Decision, within six months from the moment it received the request. The Commission may refuse the authorisation if the pilot toll system could prejudice the correct functioning of the regular electronic road toll system or of the EETS. The initial period of such authorisation shall not exceed three years.

CHAPTER VIII
EXCHANGE OF INFORMATION ON THE FAILURE TO PAY ROAD FEES

Article 23
Procedure for the exchange of information between Member States

1. In order to allow the identification of the vehicle, and the owner or holder of that vehicle, for which a failure to pay a road fee has been established, each Member State shall grant access only to other Member States' national contact points to the following national vehicle registration data, with the power to conduct automated searches thereon:

(a) data relating to vehicles; and

(b) data relating to the owners or holders of the vehicle.

The data elements referred to in points (a) and (b) which are necessary in order to conduct an automated search shall comply with Annex I.

2. For the purposes of the exchange of data referred to in paragraph 1, each Member State shall designate a national contact point. Member States shall take the measures necessary to ensure that the exchange of information between Member States takes place only between the national contact points. The powers of the national contact points shall be governed by the applicable law of the Member State concerned. In that data exchange process, particular attention shall be paid to the proper protection of personal data.

3. When conducting an automated search in the form of an outgoing request, the national contact point of the Member State in whose territory there was a failure to pay a road fee shall use a full registration number.

Those automated searches shall be conducted in compliance with the procedures referred to in points 2 and 3 of Chapter 3 of the Annex to Council Decision 2008/616/JHA (16) and with the requirements of Annex I to this Directive.

The Member State in whose territory there was a failure to pay a road fee shall use the data obtained in order to establish who is liable for the failure to pay that fee.

4. Member States shall take the measures necessary to ensure that the exchange of information is carried out using the European Vehicle and Driving Licence Information System (Eucaris) software application and amended versions of this software, in compliance with Annex I to this Directive and with points 2 and 3 of Chapter 3 of the Annex to Decision 2008/616/JHA.

5. Each Member State shall bear its own costs arising from the administration, use and maintenance of the software applications referred to in paragraph 4.

Article 24
Information letter on the failure to pay a road fee

1. The Member State in whose territory there was a failure to pay a road fee shall decide whether or not to initiate follow-up proceedings in relation to the failure to pay a road fee.

Where the Member State in whose territory there was a failure to pay a road fee decides to initiate such proceedings, that Member State shall, in accordance with its national law, inform the owner, the holder of the vehicle or the otherwise identified person suspected of failing to pay the road fee.

This information shall, as applicable under national law, include the legal consequences thereof within the territory of the Member State in which there was a failure to pay a road fee under the law of that Member State.

2. When sending the information letter to the owner, the holder of the vehicle or to the otherwise identified person suspected of failing to pay the road fee, the Member State in whose territory there was a failure to pay a road fee shall, in accordance with its national law, include any relevant information, notably the nature of the failure to pay the road fee, the place, date and time of the failure to pay the road fee, the title of the texts of the national law infringed, the right to appeal and to have access to information, and the sanction and, where appropriate, data concerning the device used for detecting the failure to pay a road fee. For that purpose, the Member State in whose territory

there was a failure to pay a road fee shall base the information letter on the template set out in Annex II.

3. Where the Member State in whose territory there was a failure to pay a road fee decides to initiate follow-up proceedings in relation to the failure to pay a road fee, it shall, for the purpose of ensuring the respect of fundamental rights, send the information letter in the language of the registration document of the vehicle, if available, or in one of the official languages of the Member State of registration.

Article 25

Follow-up proceedings by the levying entities

1. The Member State on whose territory there was a failure to pay a road fee may provide to the entity responsible for levying the road fee the data obtained through the procedure referred to in Article 23(1) only if the following conditions are met:

(a) the data transferred is limited to what is needed by that entity to obtain the road fee due;

(b) the procedure for obtaining the road fee due complies with the procedure provided for in Article 24;

(c) the entity concerned is responsible for carrying out this procedure; and

(d) compliance with the payment order issued by the entity receiving the data puts an end to the failure to pay a road fee.

2. Member States shall ensure that the data provided to the responsible entity are used solely for the purpose of obtaining the road fee due and is immediately deleted once the road fee is paid or, if the failure to pay persists, within a reasonable period after the transfer of the data, to be set by the Member State.

Article 26

Reporting by Member States to the Commission

Each Member State shall send a comprehensive report to the Commission by 19 April 2023 and every three years thereafter.

The comprehensive report shall indicate the number of automated searches conducted by the Member State in whose territory there was a failure to pay a road fee addressed to the national contact point of the Member State of registration, following failures to pay road fees that occurred on its territory, together with the number of failed requests.

The comprehensive report shall also include a description of the situation at national level in relation to the follow-up concerning the failures to pay road fees, based on the proportion of such failures to pay road fees which have been followed up by information letters.

Article 27

Data protection

1. Regulation (EU) 2016/679 and the national laws, regulations or administrative provisions transposing Directives 2002/58/EC and (EU) 2016/680 shall apply to personal data processed under this Directive.

2. Member States shall, in accordance with applicable data protection legislation, take the measures necessary, to ensure that:

(a) the processing of personal data for the purposes of Articles 23, 24 and 25 is limited to the types of data listed in Annex I to this Directive;

(b) personal data are accurate, kept up-to date and requests for rectification or erasure are handled without undue delay; and

(c) a time limit is established for the storage of personal data.

Member States shall take the measures necessary to ensure that personal data processed under this Directive are used only for the purposes of:

(a) identification of suspected offenders in view of the obligation to pay road fees within the scope of Article 5(8);

(b) ensuring the compliance of the toll charger as regards its obligations to tax authorities within the scope of Article 5(9); and

(c) identification of the vehicle and the owner or holder of the vehicle for which a failure to pay a road fee has been established within the scope of Articles 23 and 24.

Member States shall also take the measures necessary to ensure that the data subjects have the same rights of information, access, rectification, erasure and restriction of processing, and to lodge a complaint with a data protection supervisory authority, compensation and an effective judicial remedy as provided for in Regulation (EU) 2016/679 or, where applicable, Directive (EU) 2016/680.

3. This Article shall not affect the possibility of Member States to restrict the scope of the obligations and rights provided for in certain provisions of Regulation (EU) 2016/679 in accordance with Article 23 of that Regulation for the purposes listed in the first paragraph of that Article.

4. Any person concerned shall have the right to obtain, without undue delay, information on which personal data recorded in the Member State of registration were transmitted to the Member State in which there was a failure to pay a road fee, including the date of the request and the competent authority of the Member State in whose territory there was a failure to pay a road fee.

CHAPTER IX
FINAL PROVISIONS

Article 28
Report

1. By 19 April 2023, the Commission shall present a report to the European Parliament and to the Council on the implementation and effects of this Directive, in particular as regards the advancement and deployment of the EETS and the effectiveness and efficiency of the mechanism for the exchange of data in the framework of the investigation of events of failure to pay road fees.

The report shall analyse in particular the following:

(a) the effect of Article 5(1) and (2) on the deployment of EETS, with a particular focus on the availability of the service in small or peripheral EETS domains;

(b) the effectiveness of Articles 23, 24 and 25 on the reduction in the number of failures to pay road fees in the Union; and

(c) the progress made on interoperability aspects between electronic road toll systems using satellite positioning and 5,8 GHz microwave technology.

2. The report shall be accompanied, if appropriate, by a proposal to the European Parliament and the Council for further revision of this Directive, regarding notably the following elements:

(a) additional measures to ensure that the EETS is available in all EETS domains, including small and peripheral ones;

(b) measures to further facilitate the cross-border enforcement of the obligation to pay road fees in the Union, including mutual assistance arrangements; and

(c) the extension of the provisions facilitating cross-border enforcement to low emission zones, restricted access zones or other urban vehicle access regulation schemes.

Article 29
Delegated acts

The Commission is empowered to adopt delegated acts, in accordance with Article 30, updating Annex I to take into account any relevant amendments to be made to Council Decisions 2008/615/JHA (17) and 2008/616/JHA or where this is required by any other relevant legal acts of the Union.

Article 30
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 8(5), Article 10(3), Article 15(4) and (5), Article 19(5) and Article 29 shall be conferred on the Commission for a period of five years from 18 April 2019. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 8(5), Article 10(3), Article 15(4) and (5), Article 19(5) and Article 29 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.

5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

6. A delegated act adopted pursuant to Article 8(5), Article 10(3), Article 15(4) and (5), Article 19(5) and Article 29 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 31
Committee procedure

1. The Commission shall be assisted by the Electronic Toll Committee.

That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. When reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply. Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

Article 32

Transposition

1. Member States shall adopt and publish, by 19 October 2021, the laws, regulations and administrative provisions necessary to comply with Articles 1 to 27 and Annexes I and II. They shall immediately communicate the text of those measures to the Commission.

They shall apply those measures from 19 October 2021.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 33

Repeal

Directive 2004/52/EC is repealed with effect from 20 October 2021, without prejudice to the obligations of the Member States relating to the time-limit for the transposition into national law of the Directive set out in Annex III, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table set out in Annex IV.

Article 34

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 35

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 19 March 2019.

(…)

(1) OJ C 81, 2.3.2018, p. 181.

(2) OJ C 176, 23.5.2018, p. 66.

(3) Position of the European Parliament of 14 February 2019 (not yet published in the Official Journal) and decision of the Council of 4 March 2019.

(4) Directive 2004/52/EC of the European Parliament and of the Council of 29 April 2004 on the interoperability of electronic road toll systems in the Community (OJ L 166, 30.4.2004, p. 124).

(5) Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences (OJ L 68, 13.3.2015, p. 9).

(6) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

(7) Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

(8) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

(9) OJ L 123, 12.5.2016, p. 1.

(10) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

(11) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

(12) Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).

(13) Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJ L 153, 22.5.2014, p. 62).

(14) Directive 2014/30/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to electromagnetic compatibility (OJ L 96, 29.3.2014, p. 79).

(15) Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ L 187, 20.7.1999, p. 42).

(16) Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210, 6.8.2008, p. 12).

(17) Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210, 6.8.2008, p. 1).

ANNEX I

Data elements necessary to conduct the automated search referred to in Article 23(1)

Item	M/O (1)	Remarks
Data relating to the vehicle	M	
Member State of registration	M	
Registration number	M	(A (2))
Data relating to the failure to pay a road fee	M	
Member State in whose territory there was a failure to pay a road fee	M	
Reference date of the occurrence	M	
Reference time of the occurrence	M	

(1) M = mandatory when available in national register, O = optional.
(2) Harmonised Union code, see Council Directive 1999/37/EC of 29 April 1999 on the registration documents for vehicles (OJ L 138, 1.6.1999, p. 57).

Data elements provided as a result of the automated search conducted pursuant to Article 23(1)

Part I. Data relating to vehicles

Item	M/O (1)	Remarks
Registration number	M	
Chassis number/VIN	M	
Member State of registration	M	
Make	M	(D.1 (2)) e.g. Ford, Opel, Renault
Commercial type of the vehicle	M	(D.3) e.g. Focus, Astra, Megane
EU Category Code	M	(J) e.g. mopeds, motorbikes, cars
Euro emissions class	M	e.g. Euro 4, Euro 6

(1) M = mandatory when available in national register, O = optional.
(2) Harmonised Union code, see Directive 1999/37/EC

Part II. Data relating to owners or holders of the vehicles

Item	M/O (1)	Remarks
Data relating to holders of the vehicle		(C.1 (2)) The data refer to the holder of the specific registration certificate.
Registration holders' (company) name	M	(C.1.1) Separate fields shall be used for surname, infixes, titles, etc., and the name in printable format shall be communicated.
First name	M	(C.1.2) Separate fields for first name(s) and initials shall be used, and the name in printable format shall be communicated.
Address	M	(C.1.3) Separate fields shall be used for street, house number and annex, post code, place of residence, country of residence, etc., and the address in printable format shall be communicated.
Gender	O	Male, female
Date of birth	M	
Legal entity	M	Individual, association, company, firm, etc.
Place of birth	O	
ID Number	O	An identifier that uniquely identifies the person or the company.
Data relating to owners of the vehicle		(C.2) The data refer to the owner of the vehicle.
Owners' (company) name	M	(C.2.1)
First name	M	(C.2.2)
Address	M	(C.2.3)
Gender	O	Male, female
Date of birth	M	
Legal entity	M	Individual, association, company, firm, etc.
Place of birth	O	
ID Number	O	An identifier that uniquely identifies the person or the company.
		In case of scrap vehicles, stolen vehicles or number plates, or outdated vehicle registration no owner/holder information shall be

		provided. Instead, the message 'Information not disclosed' shall be returned.

(1) M = mandatory when available in national register, O = optional.
(2) Harmonised Union code, see Directive 1999/37/EC.

ANNEX II

TEMPLATE FOR THE INFORMATION LETTER

referred to in Article 24

[Cover page]

…
…
[Name, address and telephone number of sender]
…
…
[Name and address of addressee]

INFORMATION LETTER

regarding the failure to pay a road fee occurred in …

[name of the Member State in whose territory there was a failure to pay a road fee]

Page 2

On … a failure to pay a road fee with the vehicle with registration

[date]

number … make … model …

was detected by …

[name of the responsible body]

[Option 1] (1)

You are registered as the holder of the registration certificate of the abovementioned vehicle.

[Option 2] (1)

The holder of the registration certificate of the abovementioned vehicle indicated that you were driving that vehicle when the failure to pay a road fee was committed.

The relevant details of the failure to pay a road fee are described on page 3 below.

The amount of the financial penalty due for the failure to pay a road fee is … EUR/national currency. (1)

The amount of the road fee due to pay is … EUR/national currency. (1)

Deadline for the payment is …

You are advised to complete the attached reply form (page 4) and send it to the address shown, if you do not pay this financial penalty (1)/road fee (1).

This letter shall be processed in accordance with the national law of …

[name of the Member State in whose territory there was a failure to pay a road fee].

Page 3

Relevant details concerning the failure to pay a road fee

(a) Data concerning the vehicle which was used in the failure to pay a road fee:

Registration number: …

Member State of registration: …

Make and model …

(b) Data concerning the failure to pay a road fee:

Place, date and time where the failure to pay a road fee occurred:
…
…
…
…

Nature and legal classification of the failure to pay a road fee:
…
…
…
…

Detailed description of the failure to pay a road fee:
…
…

Reference to the relevant legal provision(s):
…
…

Description of or reference to the evidence regarding the failure to pay a road fee:
…
…

(c) Data concerning the device that was used for detecting the failure to pay a road fee (2):

Specification of the device:
…
…

Identification number of the device:
…
…

Expiry date for the last gauging:
…
…

(1) Delete if not applicable.
(2) Not applicable if no device has been used.

Page 4

Reply form

(please complete using block capitals)

A.Identity of the driver:

— Full name:
…
…

— Place and date of birth:
…

— Number of driving licence: … delivered (date): … and at (place): …

— Address: …
…
…
…

B.List of questions:

1.Is the vehicle, make …, registration number …, registered in your name? … yes/no (1)
If not, the holder of the registration certificate is:
…
(name, first name, address)

2.Do you acknowledge that you failed to pay a road fee? yes/no (1)

3.If you do not acknowledge this, please explain why:
…
…

Please send the completed form within 60 days from the date of this information letter to the following authority or entity: …
at the following address …

INFORMATION

(Where the information letter is sent by the entity responsible for levying the road fee pursuant to Article 25):

If the road fee due is not paid within the deadline set out in this information letter, this case will be forwarded to and examined by the competent authority of …

[name of the Member State in whose territory there was a failure to pay a road fee].

If this case is not pursued, you will be informed within 60 days after receipt of the reply form or the proof of payment. (1)

/

(Where the information letter is sent by the competent authority of the Member State):

This case will be examined by the competent authority of …

[name of the Member State in whose territory there was a failure to pay a road fee].

If this case is not pursued, you will be informed within 60 days after receipt of the reply form or the proof of payment. (1)

(1) Delete if not applicable.

If this case is pursued, the following procedure applies:
…
…
…
…
…
…
…
…
…
…
…
…
…

[to be filled in by the Member State in whose territory there was a failure to pay a road fee – what the further procedure will be, Including details of the possibility and procedure of appeal against the decision to pursue the case. These details shall In any event include: name and address of the authority or entity in charge of pursuing the case; deadline for payment; name and address of the body of appeal concerned; deadline for appeal].

This letter as such does not lead to legal consequences.

Data protection disclaimer

[Where Regulation (EU) 2016/679 is applicable:

In accordance with Regulation (EU) 2016/679, you have the right to request access to, and rectification or erasure of, personal data or restriction of processing of your personal data or to object to the processing, as well as the right to data portability. You also have the right to lodge a complaint with [name and address of the relevant supervisory authority].

[Where Directive (EU) 2016/680 is applicable:

In accordance with [name of the national law applying Directive (EU) 2016/680], you have the right to request from the controller access to and rectification or erasure of personal data and restriction of processing of your personal data. You also have the right to lodge a complaint with [name and address of the relevant supervisory authority].]

ANNEX III

PART A

Repealed Directive with the amendment thereto

(referred to in Article 33)

Directive 2004/52/EC of the European Parliament and of the Council	OJ L 166, 30.4.2004, p. 124.
Regulation (EC) No 219/2009 of the European Parliament and of the Council	OJ L 87, 31.3.2009, p. 109.

PART B

Time-limit for transposition into national law

(referred to in Article 33)

Directive	Time-limit for transposition
Directive 2004/52/EC	20 November 2005

ANNEX IV

Correlation Table

Directive 2004/52/EC	This Directive
Article 1(1)	Article 1(1), first subparagraph (a)
—	Article 1(1), first subparagraph (b)
Article 3(2), first sentence	Article 1(1), second subparagraph
Article 1(2), introductory wording	Article 1(2), introductory wording
Article 1(2)(a)	Article 1(2)(a)
Article 1(2)(b)	—
Article 1(2)(c)	Article 1(2)(b)
—	Article 1(3)
Article 1(3)	Article 1(4)
—	Article 1(5)
—	Article 1(6)
—	Article 2
Article 2(1)	Article 3(1), first subparagraph
—	Article 3(1), second subparagraph
Article 2(2), first sentence	—
Article 4(7)	Article 3(2)
—	Article 3(3)
Article 2(2), second and third sentence	Article 3(4)
Article 2(2), fourth sentence	—
—	Article 3(5)
—	Article 3(6)
Article 2(3)	—
Article 2(4)	—
Article 2(5)	—
Article 2(6)	—
Article 2(7)	Article 27
Article 3(1)	—
Article 3(2), first sentence	Article 1(1), second subparagraph
Article 3(2), second sentence	—
Article 3(2), third sentence	
Article 3(3)	
Article 3(4)	—
Article 4(1)	
Article 4(2)	—
Article 4(3)	
Article 4(4)	—
Article 4(5)	—
Article 4(7)	Article 3(2)
Article 4(8)	Article 5(4)
—	Article 23
—	Article 24
—	Article 26
Article 2(7)	Article 27
—	Article 28
—	Article 29
—	Article 30
Article 5	Article 31
Article 6	Article 32(1)
—	Article 32(2)
—	Article 33
Article 7	Article 34
Article 8	Article 35
Annex	—
—	Annex I
—	Annex II
—	Annex III
—	Annex IV

ACTIVITIES

EU

Fiscalis workshop CLO-Recovery

Vienna

25-27 September 2019

On 25-27 September 2019, the Austrian Federal Ministry of Finance hosted a Fiscalis workshop for Central Liaison Offices (CLO) in the field of tax recovery assistance.

The CLO workshop was co-chaired by Ms Steffl and Mr Radlwimmer, both from the Austrian Ministry of Finance.

Delegates from 27 EU Member States, Norway and several candidate countries participated in this workshop.

Group picture of the participants

The meeting was organised and prepared by the Austrian hosts, together with Mr Vandenberghe (European Commission), Ms Karhusaari (Finnish tax authorities) and Mr Zamfir (Romanian tax authorities).

Members of the steering group

The workshop permitted to have an in-depth discussion on possibilities to improve the functioning of the EU framework for tax recovery assistance and the execution of assistance requests in the Member States. The discussions not only dealt with possibilities to improve the efficiency of recovery assistance under the existing EU Directive, but Member States' representatives also made suggestions for future developments.

The discussions in the working groups focussed on the following topics:

- exchange of information;
- treatment of requests for recovery assistance;
- use of precautionary measures;
- scope of the recovery assistance (see p. 129-130).

View of a plenary meeting session

View of a working group session

EU

Fiscalis Project Group 110 on improving tax recovery assistance within the EU – First meeting

16-17 October 2019

On 18 December 2017, the Commission presented a report to the European Parliament and the Council on the operation of the arrangements established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (report COM(2017)778; published in *EU & Int. Tax Coll. News* 2019/1).

As a follow-up to the above report, it was decided to set up a Fiscalis project group (FPG 110) with the following objectives:

- to collect more precise information about strengths and weaknesses of Member States, from a legal and a practical perspective, in the field of tax recovery assistance, and to make suggestions for improving tax recovery assistance within the EU;
- to reflect on improving the tools and methods to evaluate the efficiency and effectiveness of the mutual recovery assistance, and the administrative burden and costs related to it.

Senior experts from 13 EU Member States (Bulgaria, Germany, Estonia, Greece, Spain, Lithuania, Hungary, Austria, Poland, Romenia, Slovenia, Slovakia, Finland) and the European Commission are participating in the activities of this project group.

The first plenary meeting took place in Brussels on 16-17 October 2019. This meeting mainly dealt with improving the collection of statistical data on Member States' performance in the field of mutual tax recovery assistance.

The next meeting is planned for the second week of January 2020, in Krakau (PL). The project group is expected to present its reports before the end of 2020.

REPORTS

United Kingdom

HM Revenue & Customs report and House of Commons Library Briefing Paper on 'Direct recovery of tax debts'

Direct Recovery of Debts (DRD) came into effect in November 2015 and gives the UK tax authorities the power to recover established debts directly from debtors' bank and building society accounts. This measure targets those debtors who can and should pay, but have repeatedly refused to do so. This legislation is enacted in Section 51 and Schedule 8 of the Finance (No. 2) Act of 2015:

(http://www.legislation.gov.uk/ukpga/2015/33/contents/enacted).

On 16 April 2019, the tax authorities published a report on the use of this measure, concluding that "the DRD intervention has provided HMRC with a crucial lever in tackling those debtors who deliberately choose not to pay their tax debts, while being able to afford to do so" (see point 8 of the report).

(https://www.gov.uk/government/publications/direct-recovery-of-debts-intervention-review/review-of-the-direct-debt-recovery-intervention).

The report emphasizes that legislative requirements were specified to ensure that debtors did not suffer any undue hardship (see point 3 of the report):

- only taking action against those who have finalised tax debts (see Schedule 8, point 2);
- only using DRD to recover money from those debtors with tax and/or tax credits debts of more than £1,000;
- leaving a minimum of £5,000 in the debtor's accounts;
- only taking DRD action when the timetable for appeals has passed;
- a debtor can object directly to HMRC and, if they do not agree with HMRC's decision following their objection/appeal, to a County Court

In addition, other non-legislative safeguards were introduced to protect vulnerable customers and ensure appropriate debtors were being targeted for DRD action. This included:

- ensuring that every debtor would receive a face-to-face visit from an HMRC agent before any DRD recovery action began - this is an opportunity for HMRC to personally identify the taxpayer and confirm it is their debt, explain what they owe and discuss payment;
- where a debtor meets the DRD criteria but is considered vulnerable, or in need of extra support following the face-to-face visit, DRD will not be used and the debtor may be offered help through a specialist team.

A report on the same measure was published by the House of Commons Library on 24 July 2019 (report 7051): This report also concludes that: "The findings demonstrate that DRD has had a significant deterrent effect, leading to improved recovery of tax debts" (see p. 22 of this report).

https://researchbriefings.files.parliament.uk/documents/SN07051/SN07051.pdf

OPINIONS AND ARTICLES

Overview of EU-instruments on mutual recovery assistance besides Directive 2010/24/EU

Daniela Steffl[1]

One of the issues discussed at the Fiscalis Workshop in Vienna on 25-27 September 2019 was the question of a possible extension of the scope of Directive 2010/24/EU to other claims. In this regard, it appears useful to take account of the other EU-instruments already offering cross-border recovery possibilities.

1. „Brussels-Ia"

One of the oldest instruments among legal bases on recovery assistance is Regulation (EU) 1215/2012, also known as „**Brussels-Ia-Regulation**", on jurisdiction and recognition and enforcement of judgements in civil and commercial matters, which is founded on a European Convention (with the same name) of 1968.

Article 1 of this Regulation confirms what is already indicated in the title: the scope of this regulation covers civil and commercial matters dealt with by courts. It does explicitly not apply to revenue, customs or adminstrative matters, neither to insolvency proceedings.

Hence, the Brussels-Ia-Regulation cannot be applied when it comes to cross-border recovery of public claims that result from decisions of administrative authorities – irrespective of whether they are of an administrative or criminal nature.

2. Council Framework Decision 2005/214/JHA

When it comes to the recovery of fines, the application of Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties has to be examined.

It applies to final decisions requiring a financial penalty to be paid by a natural or legal person. This could be a decision

- of a **court** in respect of a criminal offence **or**
- of a **court** having jurisdiction in particular in criminal matters in respect of an infringement **or**
- of an **authority other than a court** in respect of a criminal offence or an infringement if the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters.

Hence, the Framework Decision is **applicable in case of criminal offences and infringements**. Art. 1 lit. b clarifies that financial penalties do not include orders that have a civil nature and fall under the Brussels-Ia-Regulation.

With regard to administrative fines, it is interesting to note the following clarification by the European Court of Justice in relation to the term „**having jurisdiction in particular in criminal matters**". In 2012 the ECJ had to decide in the case C-60/12 concerning a decision of an Austrian administrative authority relating to a road traffic offence by the Czech citizen Marián Baláž. He argued, his appeal against the decision could only be brought before an administrative court (the former Unabhängiger Verwaltungssenat) and not – in his opinion - before a court having jurisdiction in particular in criminal matters. The ECJ stated that the term „court having jurisdiction in particular in criminal matters" must be interpreted as **covering any court or tribunal which applies a procedure that satisfies the essential characteristics of a criminal procedure**. Additionally, a person had the opportunity to have a case tried before a court having jurisdiction in particular in criminal matters **even in the situation** where, prior to bringing his appeal, that **person was required to comply with a prelitigation administrative procedure**. So, according to the ECJ, a court having jurisdiction in particular in criminal matters might also be a higher instance. The essential element is that such a court must have full jurisdiction to examine the case as regards both the legal assessment and the factual circumstances. Besides that, an important statement within this judgement is the following: *„It follows that, in order to ensure that the Framework Decision is effective, it is appropriate to rely on an interpretation of the words „having jurisdiction in particular in criminal matters" in which the classification of offences by the Member States is not conclusive*."

The basic principle of the Framework Decision is that of mutual recognition. Accordingly, Art. 5 lists 39 types of offences which lead to recognition and enforcement of decisions without verification of the double criminality of the act. They only have to be punishable in the issuing State. For criminal offences and infringements that can't be subsumed under one of these catalogue offences the executing State may however make the recognition and execution of a

[1] Legal expert – Tax Procedure and Execution Law, Federal Ministry of Finance, Austria.

decision subject to the condition of double incrimination (Art. 5 par. 3).

The Framework Decision shows – inter alia – two major differences to the Tax Recovery Assistance Directive:

- Art. 7 imposes a threshold of € 70,--.
- Monies obtained from the enforcement of decisions shall accrue to the executing State unless otherwise agreed between the issuing and the executing State.

3. Directive on strengthening the competition authorities

In close connection to the Framework Decision 2005/214/JHA, the new **Directive 2019/1/EU to empower the competion authorities of the Member States** has to be mentioned (see *EU & Int. Tax Coll. News* 2019/1, p. 3). Arts. 101 and 102 of the TFEU aim at ensuring that competition within the internal market is not distorted by unfair practices of enterprises. Up to now, national competion authorities have acted on the basis of Reg. (EC) 1/2003, together with the Commission. Now these powers of national competition authorities shall be strengthened by a new framework that will have to be implemented by Member States by February 2021. This Directive offers mutual assistance, not only for information exchange and notifications but also for recovery assistance concerning imposed sanctions. As these sanctions – in line with the wording of Art. 13 – shall be „fines" imposed for „infringements", this Directive constitutes a *lex specialis* in relation to the Framework Decision 2005/214/JHA.

In accordance with Art. 26 and 27, requested authorities shall recover fines imposed by applicant authorities by means of a uniform instrument. According to Art. 2 (21), the „requested authority" is a „competent public body which has principal responsibility for the enforcement of such decisions under national laws." So it will be up to each Member State to decide which authority shall be responsible for the enforcement of competition fines.

4. Recovery assistance in social security matters

A legal basis for cross border recovery of claims has also been implemented in the field of Social Security. **Regulation (EC) 883/2004** on the coordination of social security systems establishes the framework for the collection of contributions and recovery of benefits. The details of data exchange are to be found in the Implementing **Regulation (EC) 987/2009**.

Art. 84 of Regulation (EC) 883/2004 provides that the collection of contributions due to an institution of one Member State and recovery of benefits provided by the institution of one Member State but not due may be effected in another Member State according to the national legal framework. Enforceable decisions of courts or administrative authorities shall be recognized and enforced under the provisions of the executing State. The Regulation (EC) 883/2004 does not provide for a uniform instrument permitting enforcement. In 2016 a proposal for amendments of the Regulation (EC) 883/2004 and 987/2009 has been launched (2016/0397 (COD)). This proposal has been submitted to the European Parliament, that postponed the debate (PV 18/04/2019). This proposal suggests to establish a uniform instrument permitting enforcement as well as precautionary measures. Concerning the latter, the amended Art. 84 is very much inspired by Art. 16 of Directive 2010/24/EU. The text is however a bit different, as the proposal aims at obliging the requested authority to take precautionary measures „in accordance with its national law and administrative practice", whereas Art. 16 of Directive 2010/24/EU obliges the requested Member State to act „if allowed by its national law and in accordance with its administrative practices".

Besides the discussed amendments, the IT-system for the electronic exchange of social security information (EESSI) is currently implemented in the Member States. This should be a first step to simplify and speed up cross border cooperation in this area.

5. Instruments in the area of traffic policy

Two relatively new legal instruments are to be found in the field of traffic: **Directive 2019/520/EU on the interoperability of electronic road toll systems** (see *EU & Int. Tax Coll. News* 2019/2, p. 104) and **Directive 2015/413/EU facilitating cross-border exchange of information on road-safety-related traffic offences**. They arrange for data exchange via EUCARIS and contain rules for the notification of information about infringements. The Directives are no independent instruments for recovery assistance, they are only linked to it, as it is primarily up to the Member States to decide how to proceed with regard to unpaid fees, tolls etc. Recital 15 of Directive 2015/413/EU indicates that further proceedings are covered by applicable legal instruments, including instruments on mutual assistance and on mutual recognition, for example Council Framework Decision 2005/214/JHA (especially concerning fines for the infringements covered).

CASE LAW

United Kingdom

First-Tier Tribunal, Tax Chamber

Bluechipworld

22 November 2019

Case number: [2019] UKFTT 0705 (TC); TC07477

Guarantees for tax collection – Requirement to give security for the payment of taxes – Whether the decision to require security was reasonable

Summary

Any defect caused by the initial failure to give reasons for the decision to require security may be cured by the giving of reasons in the review letters.

In exercising its supervisory function, the tribunal can take into account all facts that existed as at the date of the decision under appeal, regardless of whether or not they were known to the decision maker.

The fact that an appellant is unable to pay security is not a relevant consideration in assessing whether a decision to require security was one that could not reasonably have been made.

If security is reasonably required for protection of the revenue, that (otherwise reasonable and proportionate) requirement will not be rendered unreasonable merely by the fact that the person from whom security is required does not have the means to satisfy that requirement.

Between

BLUECHIPWORLD SALES & MARKETING Ltd, Appellant

and THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS, Respondents

Tribunal: Judge David Bedenham

Sitting in public at Birmingham on 30 September 2019

John Barton, director, for the Appellant

Siobhan Brown for the Respondents

DECISION

INTRODUCTION

1. By notices dated 12 March 2018, HMRC required the Appellant to give security:

(1) in relation to VAT in the amount of £74,158 (or £55,458 if the Appellant submitted monthly returns) pursuant to paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 ("VATA 1994");

(2) in relation to PAYE in the amount of £12,636 pursuant to Part 4A of the Income Tax (Pay As You Earn) Regulations 2003 ("PAYE Regulations 2003"); and

(3) in relation to National Insurance Contributions ("NIC") in the amount of £19,277 pursuant to Part 3B of the Social Security (Contributions) Regulations 2001 ("NIC Regulations").

These notices were issued by HMRC Officer Partridge.

2. On 23 March 2018, the Appellant requested a review of the 12 March 2018 notices.

3. On 4 May 2018, HMRC Officer Johnstone notified the Appellant that the decision to require security in relation to VAT was upheld.

4. On 17 May 2018, HMRC Officer Shields notified the Appellant that the decision to require security in relation to PAYE and NIC was upheld.

5. On 4 June 2018, the Appellant appealed to this Tribunal.

EVIDENCE AND FINDINGS OF FACT

6. The 12 March 2018 notices referred to the relevant legislation and stated that security was required (and the amount). However, no reasons for requiring security were given.

7. Officer Partridge gave the following evidence:

(1) the Appellant was incorporated on 2 June 2017 under the name BCW Sales Ltd;

(2) the Appellant's directors were at all material times John Barton, Simon Hassell, Jason Bisseker and Aik-Ee Yee ("the Directors");

(3) the Directors were also directors of a company, Bluechipworld Sales & Marketing Ltd, that went into administration on 31 August 2017;

(4) on 4 September 2017, Bluechipworld Sales & Marketing Ltd changed its name to BCW Realisations Ltd and the Appellant changed its name to Bluechipworld Sales & Marketing Ltd;

(5) the Appellant operates from the same business premises and has the same trade (electronic and telecommunication parts) as had the company that went into administration;

(6) the previous company had debts to HMRC in excess of £91,000 in relation to PAYE and NIC and £69,000 in relation to VAT;

(7) in view of the debts owed by the previous company to HMRC and given the connections between the Appellant and the previous company, a "warning letter" (saying that, in the absence of further information, security for VAT might be required) was issued to the Appellant on 19 September 2017;

(8) no reply was received from the Appellant to the 19 September 2017 warning letter;

(9) as at 12 March 2018, the Appellant's VAT returns for monthly periods October 2017, November 2017 and December 2017 were overdue which had led to a central assessment in the sum of £18,008 being issued to the Appellant (which assessment had not been paid);

(10) the following factors led to the conclusion that security for VAT and PAYE/NIC should be required:

(a) the previous company went into administration with significant PAYE, NIC and VAT debts to HMRC;

(b) the Appellant "took over" from the previous company operating largely the same business with the same directors;

(c) the Appellant was sent a warning letter in relation to VAT security and yet provided no further information that allayed HMRC's concerns; and

(d) the Appellant was late in filing three VAT returns leading to a central assessment in excess of £18,000.

(11) the amount of security for PAYE/NIC requested was calculated by reference to the amount of PAYE/NIC that would likely be due from the Appellant over a four month period based on the PAYE/NIC submissions previously made by the Appellant;

(12) the amount of security for VAT requested was calculated by reference to the amount of VAT that would likely be due from the Appellant over a six month period (or a four month period if the Appellant submitted monthly returns) based on the 09/16 return and the central assessment raised;

(13) setting the level of security at an amount equivalent to four months of VAT and PAYE/NIC gives HMRC a sufficient "buffer" in which to take other action (such as commencing insolvency proceedings) if they form the view that there is going to be loss to the revenue;

(14) the reasons for the failure of the previous company were not known to Officer Partridge when the 12 March 2018 notices were prepared; and

(15) Officer Partridge delivered the notices to the Appellant on 12 March 2018. The Appellant's accountant, Kamran Mumtaz, explained that the previous business had failed as a result of a combination of Brexit, exchange rate movements and Tesco (who were a major customer) deciding to no longer purchase from it.

8. The HMRC officers who conducted the reviews did not give evidence.

9. The VAT review decision makes clear that as well as the factors taken into account by Officer Partridge, consideration was also given to the explanation provided by the Appellant in relation to the failure of the previous business. Nonetheless, Officer Johnstone concluded that in view of the previous failing and the failure of the Appellant to file VAT returns by the due date, he was of the view that there might well be future non-compliance such as to mean that requiring security was appropriate.

10. The PAYE/NIC decision makes clear that regard has been had to the failure of the previous business which, we find, included the Appellant's explanation for that failure (which explanation had been given in correspondence accompanying and following the request for a review).

11. On behalf of the Appellant, evidence was given by John Barton as follows:

(1) He is a director of the Appellant;

(2) He was a director of the previous company;

(3) The Appellant's business is the wholesale of mobile phone accessories imported from China. The previous company's business was broadly the same as the Appellant's business albeit the previous company's largest customer was Tesco;

(4) The previous company got into financial difficulty because of Brexit and the subsequent impact on exchange rates and because Tesco refused to re-negotiate contracts despite currency movements making those contracts uneconomical for the previous company. Tesco then decided to acquire accessories direct from China.

(5) When the previous company went into administration, the Appellant purchased the name and brand;

(6) The Appellant has attempted to mitigate risk by having a broader customer base and taking on distribution work for established manufacturers;

(7) The Appellant has experienced delays in VAT repayments and R&D Credits being made to it by HMRC; and

(8) If the Appellant is required to provide the security there is a significant risk of the Appellant becoming insolvent.

12. On behalf of the Appellant, evidence was given by Kamran Mumtaz as follows:

(1) He is partner at Sinclair & Co;

(2) He has been professionally involved with the Appellant since its incorporation. He had no involvement with the previous company;

(3) He prepares and files the Appellant's VAT returns using information recorded by the Appellant on Sage;

(4) The VAT returns for October, November and December 2017 were not filed by the due date because the Appellant did not at that time have anyone within its finance function to keep the Sage records up to date (and therefore the information required to prepare the VAT returns was not available to Sinclair & Co);

(5) The outstanding returns were eventually filed in March 2018 (after the security notices had been issued to the Appellant);

(6) The Appellant now employs a competent person in its finance function who is clearing a backlog of finance related issues;

(7) The week before the hearing of this appeal, the VAT returns for May, June and July 2018 (which were overdue) were filed. The delay in filing those returns was due to some "reconciliation issues" caused by a member of staff not properly inputting information on Sage; and

(8) The Appellant is currently in the VAT default surcharge regime.

13. On behalf of the Appellant, evidence was given by Simon Hassell as follows:

(1) He is a director of the Appellant;

(2) He was a director of the previous company;

(3) PAYE is currently 100% up to date albeit he accepted payments were typically "a few days late" every month.

14. We accept all of the evidence given to us as summarised above and make finding of fact accordingly.

THE LAW

15. Paragraph of Schedule 11 to VATA 1994 provides:

"(2) If they think it necessary for the protection of the revenue, the Commissioners may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due…

…

(4) Security under sub-paragraph (2) above shall be of such amount, and shall be given in such manner, as the Commissioners may determine.

16. Part 4A of the PAYE Regulations 2003 and Part 3B of the NIC Regulations allow HMRC to require security for PAYE and NIC. 17. In *John Dee Limited v Customs and Excise Commissioners* [1995] STC 941, the Court of Appeal stated the Tribunal's role in a security appeal is to:

"…consider whether the commissioners have acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something something to which they should have given weight."

The Court of appeal went on to say that even if a decision was unreasonably arrived at, the Tribunal can properly dismiss the appeal if it reaches the view that the same conclusion will inevitably be reached if the decision is taken again.

18. In *C&E Commissioners v Peachtree Enterprises Ltd* [1994] STC 747, Dyson J stated:

"In my judgment, in exercising its supervisory jurisdiction the tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of the commissioners was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected…"

19. In *Southend United Football Club v HMRC* [2013] UKFTT 715 (TC), an appeal against a requirement to provide for VAT, Judge Bishopp stated:

"It is undisputed that our jurisdiction is supervisory only. That is, if we are to allow the appeal, we must be satisfied that the decision was one at which the Commissioners could not reasonably have arrived. That understanding of the law derives from the judgments of Farquharson J in *Mr Wishmore Limited v Customs and Excise Commissioners* [1988] STC 723, of Dyson J in *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747 and of the Court of Appeal in *John Dee Limited v Customs and Excise Commissioners* [1995] STC 941. The cases show that we must limit ourselves to a consideration of the facts and matters which were known when the disputed decision was made, so we cannot take account of developments sine that time, and we may not exercise a fresh discretion. In other words, if the decision was flawed we must allow the appeal and leave HMRC to make a further determination if they so choose. If we are persuaded the decision was flawed but that, had HMRC approached the matter correctly, they would inevitably have arrived at the same conclusion, we should dismiss the appeal."

20. In some subsequent decisions, the observations of Judge Bishopp in *Southend United* appear to have been relied on to support that in exercising its supervisory function in relation to a requirement to give security, the Tribunal can only consider facts that were known to the decision maker (see for example, *Mistral Promotions and Marketing (UK) Ltd v HMRC* [2015] UKFTT 0112 (TC)). In other decisions, however, the Tribunal has held that in exercising its supervisory function in relation to a requirement to give security, the Tribunal can consider facts that were not known to the decision maker provided that those facts existed as at the date of the decision (see for example, *CNM Estates (Tolworth) Ltd v. HMRC* [2019] UKFTT 0045 (TC)).

21. In *Pachangas Mexican Restaurant Ltd v HMRC* [2019] UKFTT 0436 (TC), the Tribunal held that in circumstances where the appellant had not been told what facts HMRC had taken into account in deciding that security was required, the decision to require security was unlawful and therefore unreasonable.

22. Section 83(1)(l) VATA 1994 provides for a right of appeal in relation to a requirement to give security for VAT.

23. Pursuant to s 83A VATA 1994, HMRC must offer a review of a decision if that decision is one against which a right of appeal lies under s 83 VATA 1994. Section 83C provides that HMRC must review a decision if they have offered a review under s 83A and if, within 30 days of that offer, the offer was accepted.

24. Section 83F(4) VATA 1994 provides that a review "must take account of any representations made…at a stage which gives HMRC a reasonable opportunity to consider them".

25. Section 83G VATA 1994 then provides that where a review is conducted pursuant to s83C VATA 1994, an appeal to the FTT is to be made within 30 days of the conclusion of that review.

26. A right of appeal in relation to security requirements for PAYE and NIC is provided for by Regulation 97V of the PAYE Regulations and Regulation 29V of the NIC Regulations respectively.

SUBMISSIONS ON BEHALF OF HMRC

27. HMRC submitted as follows:

(1) even where there has been a review of a decision to require security, the appeal is against, and the Tribunal must focus on, the decision as originally made;

(2) in determining whether a decision to require security is one that could not reasonably have been arrived at, the Tribunal is not permitted to take into account facts that were unknown to the decision maker (even if those facts existed at the time of the decision);

(3) the facts of the present appeal are different to those in *Pachangas* because here the reasons for requiring security were explained orally when the notices were served;

(4) the test to be applied by the FTT is whether the decision to require security was reasonable;

(5) the consequence/effect of a requirement to provide security on a business is not a relevant consideration;

(6) the decisions to require security were reasonable in circumstances where:

(a) the previous company went into administration with large debts to HMRC;

(b) the Appellant "took over" from the previous company operating largely the same business with the same directors;

(c) the Appellant was sent a warning letter in relation to VAT security and yet provided no further information to allay HMRC's concerns; and

(d) the Appellant was late in filing its VAT returns.

SUBMISSIONS ON BEHALF OF THE APPELLANT

28. The Appellant submitted that HMRC had failed to have due regard to the reasons why the previous business had failed (which events were unlikely to be repeated). Further, the Appellant submitted that whilst, at the time the security requirements were imposed, there were outstanding VAT returns, things had now moved on. The Appellant was up to date with its payments and was keeping on top of its compliance obligations. In addition, if required to provide the security, there was a real of risk of the Appellant's insolvency.

DISCUSSION AND DECISION

29. We reject HMRC's submission that, even where there has been a review of a decision to require security, the relevant decision for the purpose of an appeal remains the decision as originally made. Such an approach is not consistent with the statutory provisions (certainly in relation to VAT) which provide that on review any further representations provided since the original decision should be considered and that the deadline for an appeal is 30 days after the review has been concluded. Further, such an approach as contended for by HMRC is illogical in that it is the review decision that is HMRC's "last word" and it may be that HMRC's position/reasoning on review is considerably different to that expressed originally – in those circumstances it would be nonsensical for an appeal to focus solely on the original decision. In our view, the Tribunal needs to consider the decision as it stands following the

review. In some cases the review decision will in effect have superseded the original decision, in other cases the original decision and the review decision will need to be considered cumulatively (this was the approach adopted by *Lady Mitting in Sanleo Ltd & Zonin Restaurants Ltd v HMRC* [2010] UKFTT 266 (TC)).

30. We note that on the facts of this case, if the approach in *Pachangas* is correct, the original decision (considered on its own) would arguably be flawed by reason of it not containing any reasons for the decision (albeit the Tribunal would still have dismissed this appeal on the basis that it is inevitable that the same conclusion would be reached if the decision was taken again). However, we are of the view that any defect caused by the initial failure to give reasons was cured by the giving of reasons in the review letters.

31. We reject HMRC's submission that in exercising its supervisory function, the Tribunal is able to take into account only those facts known to the decision maker. In our view, the Tribunal can take into account all facts that existed as at the date of the decision under appeal (regardless of whether or not they were known to the decision maker). Such an approach is consistent with:

(1) the language used by Dyson J in *Peachtree* ("limit itself to to considering facts and matter *which existed* at the time the challenged decision of the commissioners was taken"); and

(2) the approach adopted in other appeals where a supervisory function is exercised (see *Grzegorz Sczcepaniak t/a Phu Greg-Car v The Director of Border Revenue* [2019] UKUT 0295 (TCC)).

32. We accept HMRC's submission that the fact that an appellant is unable to pay security is not a relevant consideration in assessing whether a decision to require security was one that could not reasonably have been made. As was observed by Judge Anne Scott in *Highlake Limited v HMRC* [2016] UKFTT 808 (TC) :

"the legislation is concerned with protection of the revenue. It does not suggest that this objective is intended to be balanced against, or subject to, the objective of enabling the person upon whom the requirement is imposed to continue trading."

33. We note here that in *D-Media Communications Ltd v HMRC* [2016] UKFTT 430 (TC), Judge Berner held that the amount of the security required "should be calculated so as to give a realistic possibility that the security will be capable of being given" (and, if it has not been so calculated, the decision may be one that was not reasonably arrived at). We respectfully disagree with that approach. If security is reasonably required for protection of the revenue, that (otherwise reasonable and proportionate) requirement will not be rendered unreasonable merely by the fact that the person from whom security is required does not have the means to satisfy that requirement.

34. We reject the Appellant's submission that the decisions to require it to provide security for VAT and PAYE/NIC were ones that could not reasonably have been arrived at given:

(1) In reaching the decisions, HMRC took into account the following relevant matters which were more than adequate to support a requirement to give security, specifically:

(a) the previous company went into administration with significant debts to HMRC;

(b) the Appellant had the same directors as the previous company;

(c) the Appellant carried on broadly the same business as the previous company;

(d) the Appellant was sent a warning letter in relation to VAT security and yet provided no further information to allay HMRC's concerns; and

(e) the Appellant was late in filing its VAT returns leading to a central assessment being raised.

(2) HMRC did not fail to take into account relevant matters or take into account irrelevant matters. The only submission made by the Appellant in this regard was that HMRC failed to take into account the reasons why the previous company had failed. However, we have found that the officers conducting the reviews did take this into account but decided, nonetheless, that security was required. In view of the facts and matters set out a (1) above, that conclusion cannot be impeached.

(3) There was a logical and coherent explanation of how the amount of security required had been calculated. We find that requiring security in this amount is proportionate to the risk to the revenue posed by the Appellant.

35. For the avoidance of doubt, even if HMRC had not given consideration to the explanation for the failure of the previous company, we would have dismissed the appeals on the basis that it is inevitable that the same conclusion (i.e. that security should be provided) would be reached if HMRC was required to take the decisions again taking into account that explanation. Even accepting the stated reasons for the failure of the previous company, the fact remains that it did fail with significant debts to HMRC. When coupled with the Appellant's compliance failures in relation to its tax obligations (late returns and late payments) we are satisfied that security should and would properly be required from the Appellant.

36. Accordingly, these appeals are dismissed.

(…)

United Kingdom

First-Tier Tribunal, Tax Chamber

Tower Hire & Sales

28 October 2019

Case number: [2019] UKFTT 0648 (TC); TC07423

Guarantees for tax collection – Requirement to give security for payment of taxes – Tax authorities taking into account irrelevant matters – Unreasonable requirement, unless the authorities would inevitably have come to the same decision if they had left out of account the irrelevant matters

Summary

In case of an appeal against a decision requiring security for the payment of taxes, the tribunal has to consider the reasonableness of the whole decision making process.

If the authorities have taken into account irrelevant matters, their decision is unreasonable. However, if the tribunal finds that the authorities would inevitably have come to the same decision if they had left out of account the irrelevant matters, the appeal against their decision can be dismissed.

Between

TOWER HIRE & SALES Ltd, Appellant

and THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS, Respondents

Tribunal: judge Nigel Popplewell

Sitting in public at Cardiff on 19 September 2019

Mr Khandaker Rahman of KRC Chartered Accountants for the Appellant

Miss Siobhan Brown, Officer of HM Revenue & Customs, for the Respondents

DECISION

INTRODUCTION

1. This is the appeal of Tower Hire & Sales Limited (the "Company") against the decisions of the respondents (or "HMRC") to issue to it:

(1) A Notice of Requirement, dated 24 September 2018, to require security to be given for PAYE and National Insurance Contributions (NICs) in accordance with Part 4A of the Income Tax (Pay as You Earn) Regulations 2003 ("PAYE Regulations") and Part 3B of Schedule4 to the Social Security (Contributions) Regulations2001 ("NICs Regulations"); and

(2) A Notice of Requirement, also dated 24 September 2018, to provide security under paragraph 4(2)(a) of Schedule11 of the Value Added Tax Act1994 ("VATA") for the protection of the Revenue.

2. In this decision we shall refer to the foregoing Notices of Requirement as the "Notices".

3. The amount of VAT security required is based on six months liability for quarterly returns and is in the amount of £21,900. The amount of PAYE & NIC security was originally required in an amount of £14,586, but this was subsequently adjusted on review and reduced to £4,800.

4. Security for the PAYE and NICs was not only required from the Company. It was also required, on a joint and several basis, from its director, namely Mr Anthony Mark Davies ("Mr Davies"). The Tribunal has only received an appeal from the Company, and it is with that appeal that this decision is concerned.

THE LAW

5. There was no dispute between the parties as to the relevant law.

VAT

6. For VAT, the legislation is to be found at paragraph 4(2) (a) and 4(4) of Schedule 11 of the Value Added Tax Act 1994. Those paragraphs read as follows:-

"4(2) If they think it necessary for the protection of the revenue, the Commissioners may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the 20 payment of any VAT that is or may become due from – (a) the taxable person…

4(4) Security under sub-paragraph (2) above shall be of such amount, and shall be in such manner, as the Commissioners may determine."

PAYE and NICs

7. For PAYE and NICs the legislation is found in the PAYE Regulations and the NICs Regulations. There is no material difference between the provisions giving HMRC power to require security in the case of PAYE on the one hand and NICs, in the form of Class 1 contributions, on the other. The provisions in the PAYE Regulations and the NICs Regulations effectively mirror one another, with only necessary changes to reflect the different regimes covered by the

provisions. We shall therefore refer primarily to the PAYE Regulations.

8. Regulation 97N of the PAYE Regulations provides that in circumstances where an officer of HMRC "considers it necessary for the protection of the revenue" the officer may require certain persons to give security or further security for the payment of amounts of PAYE tax in respect of which an employer is or may be accountable to HMRC under various of the PAYE Regulations.

9. The persons from whom security may be required are the employer (with certain exceptions not relevant in this case) (see Reg 97O) and, in the case of a company a director, a company secretary, any similar officer and any person purporting to act in such a capacity (Reg 97P).

10. Regulation 97V(1) makes provision for appeals against the Notice or against any requirement in it. So far as material to this appeal, Reg 97V(4) provides:

> "On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may –
>
> (a) confirm the requirements in the notice,
>
> (b) vary the requirements in the notice, or
>
> (c) set aside the notice."

OUR JURISDICTION

11. There is a distinction between our jurisdiction in relation to VAT security on the one hand and PAYE/NIC security on the other. This distinction is neatly set out in the case of *DMedia Communications Limited v HMRC* [2016] UKFTT 430 (TC) in which Judge Berner said the following:

> "18. It is clear that, in relation to security for VAT, the jurisdiction of the Tribunal is supervisory only (*John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941). Thus, on such an appeal, the task of the Tribunal is to consider whether HMRC had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. In doing so, the Tribunal is confined to considering facts and matters which existed at the time HMRC made their decision (*Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] 15 STC 747). The Tribunal might also have to consider whether the Commissioners had erred on a point of law. The Tribunal cannot, however, exercise a fresh discretion; the protection of the revenue is not the responsibility of the Tribunal or the court. If the decision is found to have been flawed, the appeal will be allowed, and HMRC may make a further determination if they so choose.
>
> 19. As Ms Brown fairly acknowledged, whilst the need for protection of the revenue is common to VAT security cases and those with which this appeal is concerned, there is a significant difference in the way the legislation has been drafted in each case. There is nothing in the VAT security provisions corresponding to the powers expressly given to the Tribunal, in Reg 97V(5) of the PAYE Regulations, to vary the requirements in the notice.
>
> 20. Accordingly, although I accept that the Tribunal's jurisdiction in relation to security for PAYE and NICs is to some extent supervisory in nature, it is an appellate jurisdiction. The supervisory approach, that is having regard to the reasonableness of HMRC's decision is, in my view, limited to the matters referred to in Reg 97N, namely whether the giving of security is necessary for the protection of the revenue. It is not for the Tribunal itself to second guess that exercise of judgment, so long as it has been exercised reasonably within the terms expressed in *John Dee*.
>
> 21. All other aspects, on the other hand, are matters on which the Tribunal is entitled to form its own view, and on doing so to confirm, set aside or vary the Notice of Requirement. That includes whether the appellant is a person from whom security may be required, the value of the security to be given, the manner in which it is to be given, the date on which it is to be provided and the period of time for which the security is required. The value of the security and the manner in which it is to be provided are included amongst these matters; in contrast to the VAT security provisions which provide, at para 4(4), that the security is to be of such amount and given in such manner as HMRC shall determine, the PAYE Regulations merely require those matters to be specified in the Notice, and the power of the Tribunal to vary the requirements in the Notice, in my view, renders these matters susceptible to substitution of the Tribunal's own view."

12. There is one further point on this. we can allow the taxpayer's appeal if we find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before them (as per Lord Justice Neill in *John Dee*).

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:

> "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."

I cannot equate a finding "that it is most likely" with a finding of inevitability.

On this narrow ground I would dismiss the appeal."

BACKGROUND TO THE APPEALS

13. The Company was incorporated on 8 October 2013 and changed its name to its current name with effect from 22 March 2017.

14. Its registered office is Room 1, 7 Meadows Bridge, Parc Menter, Cross Hands, Llanelli SA 14 6RA.

15. Its principal place of business is at 61 Black Lion Road, Gorslas, Llanelli, SA14 6RT.

16. Mr Davies was appointed a director of the Company on 23 March 2017. He owns 50% of the shares in the Company, the other 50% being owned by Jodie Louise Davies.

17. The Company leases out security equipment.

18. It has been registered for VAT since 1 July 2018 and that registration remains extant.

19. It has been registered as an employer since 31 August 2018.

20. For the reasons set out below, HMRC considered the Company to be a risk to the revenue and, accordingly, issued the Notices to the Company on 24 September 2018:

(1) On 17 October 2018 the Company's representative, KRC chartered accountants, requested a review of the decision to issue the Notices and sought reasons for their issue.

(2) In letters dated 24 October 2018, the reviewing officer, Officer Ogburn ("Officer Ogburn") who was also the officer who had issued the Notices, replied to the Company's representative. Her decision, following her review, was that the Company was still required to provide security for both the VAT and PAYE/NICs in the amounts originally set out in the Notices.

(3) The Company's representative then sought an independent review on 20 November 2018 and submitted further representations for the purposes of this review on 9 January 2019.

(4) The reviews were carried out by two separate review offices. As regards VAT, the reviewing officer concluded that the decision to require security was correct and confirmed the amount of security at the amount in the original notice.

(5) As regards PAYE/NIC, a separate review officer concluded that the decision to require security was correct, but reduced the amount of security required to £4,800.

(6) On 12 February 2019 the Company appealed to the Tribunal.

THE NOTICES, OFFICER OGBURN AND OFFICER WILD

21. As we have said above, our jurisdiction in these appeals is supervisory. In simple terms we need to put ourselves in the position of the officer who authorised the issue of the Notices, and consider whether she came to a reasonable decision. On reading through the papers prior to the hearing, we were somewhat concerned to see that Officer Ogburn had not submitted a witness statement setting out the basis on which she had come to her decision to issue the Notices, nor did any of the review letters clearly indicate the basis of her decision. The only document which clearly explained the reasons why HMRC considered the Company to be a risk to the revenue was HMRC's statement of case.

22. However the hearing was attended by Officer Julie Wild ("Officer Wild"). Officer Wild has worked for HMRC and before that the Inland Revenue for more than thirty years and is currently a decision maker in the security unit, a role which she has been performing for over six years. Towards the end of 2019 she was asked to take over this case from Officer Ogburn who has now retired from HMRC. She was able to speak briefly to Officer Ogburn about her decision, and the basis of Officer Ogburn's decision is set out in detail in HMRC's electronic case notes. Officer Wild confirmed that the basis of Officer Ogburn's decision was as set out in HMRC's statement of case. This is set out below.

> "Resec Ltd-traded from the same principal place of business and the trading activity is shown as private security activities. The sole director and 50% shareholder is Anthony Mark Davies. Jodie Louise Davies resigned as director on 30 April 2018 and holds a 50% share in the company. The company has a VAT debt of £115,308.73; default surcharge debt of £22,145.52 with an outstanding return for the period to 07/18. The debt relates to unpaid returns for 01/17, 07/17, 10/17, 01/18, 04/18 and the 07/18 assessment. There are also 18 periods of default surcharges at 15% since 04/15. In addition to the VAT there is a PAYE/NIC debt of £27,859.86. The company was subject to two separate security interventions due to non-compliance. These were cancelled as time to pay arrangements were set up though these subsequently failed. The company entered into a creditors voluntary liquidation on 18 October 2018.
>
> Specialist Monitoring Services Ltd-traded from the same principal place of business and the trading activity is shown as security monitoring services.

The sole director and 50% shareholder is Anthony Mark Davies. Jodie Louise Davies resigned as director on 29 January 2018 and holds a 50% share in the company. The company has a VAT debt of £22,846.84 and PAYE debt of £27,558.58. The company has ceased to trade.

Clear Recycling Solutions Ltd-company traded in the collection of non-hazardous waste. Anthony Mark Davies was appointed director on 10 February 2014. The company was wound up on 12 December 2016 with a VAT debt of £7,981 and a PAYE debt of £71,625.18.

Clear Energy UK Ltd-Anthony Mark Davies was appointed director on 10 February 2014. The company was wound up on 30 January 2015 with a VAT debt of £114,401.68 and a PAYE debt of £77,701.18.

Clear Security Ltd-company traded in security systems service activities. Anthony Mark Davies was appointed director on 10 February 2014. The company was wound up on 28 July 2015 and had a VAT debt of £82,320.32 and a PAYE debt of £36,458.25.

Anthony Mark Davies was made bankrupt on 7 February 2013"

23. Officer Wild also gave the following evidence about the decision making process:

(1) The securities team in which Officer Ogburn worked had compiled a chain chart. This was included in the bundle of documents which was given to us by HMRC for the purposes of the hearing. It listed details of the companies with which Mr Davies was connected as well as other details about those (including financial information and details of the owners/directors/shareholders). This chain chart was 99% completed when Officer Wild took over the case. Officer Wild confirmed that Officer Ogburn took into account the information set out in the chain chart.

(2) Resec Ltd ("Resec") traded in a similar way to the Company and went into members voluntary liquidation owing a considerable amount of VAT and PAYE/NICs to HMRC. Mr Davies was the sole director of Resec, which was an habitual late payer of VAT and PAYE/NICs. At the time that the Notices were given to the Company, it had been in the default surcharge regime for 18 periods at the highest rate and five VAT returns and one assessment were unpaid. Furthermore, there were seven unpaid months of PAYE/NICs.

(3) Resec had been subject to 2 previous security interventions, in March 2015 and March 2016. The latter involved the serving of a notice of requirement for security. Time to pay arrangements were agreed with HMRC for both interventions and so no further action was taken at that time. However, even though Resec had been given extensions to those time to pay arrangements, it had failed to keep up its payments under them.

(4) HMRC had been asked to participate in a creditors voluntary arrangement for Resec in August 2018 but it had decided not to do so. But this meant that no notice of requirement for security was given at that time.

(5) HMRC had taken securities action against Specialist Monitoring Services Limited by issuing it with a notice of requirement for security, but that company ceased to trade within the 30 day payment period so HMRC took no further action.

(6) HMRC officers had attended the principal place of business of Clear Recycling Solutions Ltd but had not found any evidence of that company being present at that address.

(7) Officer Ogburn had read in a newspaper that in March 2015 Mr Davies had been charged with being a director of a company whilst bankrupt, without the court's permission. Officer Wild explained, however, that little weight is given by HMRC to such press stories. But it was a factor. It had also come to Officer Ogburn's attention that Mr Davies had been prosecuted by Swansea Trading Standards and had been found guilty of a number of offences. These arose from the trading activities of the Clean Energy group of companies.

(8) Officer Wild took us to a number of compliance charts which had been compiled for the hearing. These set out details of the VAT, PAYE/NICs and other payments owed by the relevant companies at the time the Notices were given to the Company. The information on which these compliance charts were based was used by Officer Ogburn in reaching her decision.

24. The basis of all of the foregoing evidence given by Officer Wild where the electronic case notes. Officer Wild had a copy of these with her at the hearing but was not able to hand a copy up since it needed to be redacted if a copy was to be given to the appellant. And it was too late to do so.

25. However, given that her evidence was given on oath and was repeated, in many cases verbatim, from those notes, we find as a fact that the foregoing matters set out at paragraphs [22] and[23] above formed the basis of Officer Ogburn's decision to issue the Notices to the Company.

THE APPELLANT'S CASE

26. Before turning to the appellant's evidence, we pause to consider the appellant's case. In its pleaded form (in correspondence) it can be summarised as follows:

(1) HMRC have given no reasons for their decision to issue the Notices. If they were issued because of

adverse behaviour by its officers, details of that behaviour should be provided.

(2) The amount requested is excessive.

(3) Resec and Specialist Monitoring Services Limited were both forced to cease trading due to difficult trading conditions. Resec, furthermore, was forced to go into liquidation because HMRC had rejected two company voluntary arrangement proposals.

(4) Mr Davies had personally raised funds to attempt to sustain cash flow. Neither he nor the Company constitutes a serious risk for revenue loss and the amount requested under the Notices were not reasonable and proportionate in comparison to the Company's ongoing monthly liability for VAT.

27. At the hearing, and as set out in Mr Davies witness statement, it was also the Company's case that HMRC should have found out a great deal more about the activities of the various companies, before issuing the Notices. And had they done so, they would have realised that there was justification for each of the issues which had been taken into account by HMRC when coming to its decision to issue the Notices; and that justification would have allowed HMRC to have come to a different decision, namely that there was no need to require security. HMRC would not have issued the Notices if they had undertaken further research.

28. We deal later in this decision with the submissions made by the Company as outlined above. But at this stage, we say that we do not agree with the appellant that the reasonableness of HMRC's decision includes any failure to carry out what the appellant considers to be a more detailed review of the circumstances surrounding the various companies. And by failing to undertake this review and considering the reasons why the various companies failed, or why he was involved in court proceedings, that renders HMRC's decision unreasonable.

29. HMRC must, of course, have sufficient information before them before they can reach a rational decision. And so issue a Notice. But it is clear from the evidence of Officer Wild that HMRC had sufficient information on which to base their decision to issue the Notices. Our role is to decide whether Officer Ogburn's decision to issue the Notices based on that information was a reasonable one. It is in fact for the appellant to show that that decision is, more likely than not, to have been an unreasonable one. And when doing so, it is only the information which was available to Officer Ogburn at the time of her decision, which is relevant. We say this before we go on to review the evidence given by Mr Davies since much of that evidence, although providing helpful background to his various business activities, and those of the companies with which he has been associated over the past six or so years, was not known to Officer Ogburn at the time of making her decision. And so she could not have been expected to have considered it. And so in reviewing Mr Davies evidence, we have only set out below that evidence which we believe to be relevant to the "reasonableness" issue.

THE APELLANT'S EVIDENCE

30. The appellant provided its own bundle of documents, many of which duplicated those which were included with HMRC's bundle. In addition, Mr Davies gave oral evidence. We found him to be an articulate and truthful witness and accepted much of his evidence. His evidence was as follows:

(1) The Company trades in a different way from Resec. The Company rents out security equipment. Resec provided personnel as well as security equipment.

(2) He considered that he kept in constant touch with HMRC regarding Resec's tax debts. HMRC's attitude towards these changed when that company's affairs were taken over by HMRC at Bristol. His view, too, was that some £31,000 of the amount of £111,000 purportedly owed by Resec in May 2018 had been paid to HMRC.

(3) Specialist Monitoring Services Limited failed because it was a creditor of Resec.

(4) The companies in the Clear Group (namely Clear Recycling Solutions Ltd, Clear Energy Ltd and Clear Security Ltd) were set up as special-purpose vehicles for former friends and business associates of his. He had no shareholdings in them. He was not a director of them until, according to him, June 2014. [We note that this appears to be a different date that set out in the chain chart which indicates that Mr Davies was appointed a director of the Clear Group companies on 10 February 2014]. On 30 July 2013 these former associates resigned, as directors, of the companies in the Clear Group taking with them all of the cash in the various companies' bank accounts. He endeavoured to sort this out and in order to do so became a director at a time when he was bankrupt. He had to deal with the fallout from these resignations which resulted in the failure by those companies to fulfil contractual commitments to their customers. It also resulted in the prosecution by Swansea trading standards. He was not convicted at the trial, he pleaded guilty to 6 offences in order to get things "sorted" as the judge had requested.

(5) He was not "made" bankrupt, but petitioned for his own bankruptcy. At the time that he became bankrupt, he owed no tax to HMRC.

(6) Since he did not become a director of the Clear Group companies, until June 2014, and had no knowledge of the way in which those companies were run (since they were run exclusively by his former associates) he should not be criticised for

any tax debts incurred by those companies before the date on which he became a director.

(7) As a director of the various companies with which he was associated, he admitted that he did not fully understand his obligations towards HMRC [we found this to be a strange admission given that it was clear from the written evidence that he had made numerous attempts to discuss Resec's tax issues with HMRC].

(8) The main reason for late or non-payment of tax was because the relevant company had not been paid by its customers.

(9) HMRC should have participated in Resecs' creditors voluntary arrangement and if it had done so, Resec would not have gone down.

(10) The Company has no current tax debts.

(11) No contact was made with the Company by Officer Ogburn before she issued the Notices.

DISCUSSION

31. Before delving into a detailed discussion of the relevant issues, we pause to make two points:

(1) The first concerns the relevant decision or decisions that we need to review. It is clear that the original decision, made by Officer Ogburn to issue the Notices is one which we must review. But Mr Rahman submitted that it extended beyond this, and we are required to consider the reasonableness of the whole decision making process. This includes the reviews by firstly Officer Ogburn of her original decision, and subsequently the "independent" reviews, carried out by Officer Champion (VAT) and Officer Telfer (PAYE/NICs). We accept his submission. A review of other tribunal cases show that this is the approach which they have adopted. It is clear that the review decisions affect the Notices. In this case the PAYE/NIC review resulted in a reduction of the amount of security required. The reviews are part and parcel of the same decision making process. And in reviewing the reviews, we can take into account information which was before the reviewing officers even if it had not been before the original decision maker.

(2) Secondly HMRC's methodology in these cases, namely to establish links between entities which have failed in the past, is a primer facies rational one. In this case the high level justification for the Notices is that Mr Davies has been involved in a number of businesses which have previously failed owing HMRC considerable sums of money. But it is our view that simple linkage is not enough. HMRC also need to show that the individual linking that entities (in this case Mr Davies) exerted an influence over the relevant companies to the extent that their delinquent tax behaviour can, in effect, be attributed to him. This is likely to be the case if the entities are one-man band companies through which the sole shareholder and director conducts what is in essence a sole trade. But less likely if the linked companies have a number of employees, some of whom might be responsible for tax compliance, and those employees are not common to the linked entities. The important point is that the individual at the centre of the web of linked companies must be able to exert influence over the tax behaviours of those companies.

32. Resec was the first company cited by HMRC as being non-compliant and linked to the Company. It is our view that the non-compliance of this company is a wholly justifiable and relevant matter for the decision makers to have taken into account when coming to the decisions in the Notices and on review. Mr Davies was linked to this company as shareholder and director and had been since 2014. He effectively ran the company. It failed owing considerable sums to HMRC. Mr Davies protestations that this was largely due to a more hostile attitude taken by the Bristol HMRC office, and HMRC subsequently failing to participate in the creditors voluntary arrangement do not, we are afraid, cut much ice with us. The reasons given by HMRC to justify Resec's failings are reasonable ones. The evidence shows that Resec owed massive sums to HMRC when it failed and this is entirely consistent with HMRC's view that this reflects failings by Mr Davies which could be repeated with further businesses in which he might become involved (in particular, the Company). HMRC need to decide whether the revenue needs to be protected. For all the reasons given by HMRC we agree that the financial position of the sick is an entirely relevant matter for them to have taken into account.

33. The same is true of Specialist Monitoring Services. We accept Mr Davies' evidence that this company failed because of the failure of Resec which was the sole customer of Specialist Monitoring Services. But the bare fact is that this company failed owing HMRC considerable sums. HMRC had taken securities action only to find that this company had ceased to trade before the payment period expired.

34. We note, and accept, Mr Davies evidence of the reason for the failure of these two companies was that his customers (and by this we mean the customers of Resec) failed to make timely payments of its invoices. But HMRC's concern is only with the protection of the revenue. When considering this, they can consider the tax position of a company. There may be reasons why a company fails to pay tax. But unless it is shown the position of that company has a very different pattern of trading and a greater likelihood of customers paying on time, than the failed company, HMRC's decision is unlikely to be unreasonable. It is true that in making representations for the review, Mr Rahman explained that the risk to the revenue of non-payment of tax by the Company was lower than the risk posed by Resec due to the fact that the Company had fewer staff and a more balanced distribution of customers. But equally, it is telling that, as recorded by officer

Champion in her review letter, the Company had failed to submit its first VAT return on time. To HMRC, it must have appeared at the Company was setting out along the same route as Resec.

35. But the situation in relation to the Clear Group is very different. It is clear (no pun intended) that HMRC have taken into account the tax owed by these companies since the date of their registration for VAT, PAYE/NICs. They have also taken into account compliance failings by those companies. But the chain chart shows that the trading addresses of these companies was different from the trading address of the Company and of Resec and of Specialist Monitoring Services Ltd. Whilst the address for Clear Energy Ltd and Clear Security Ltd is the same, it is the address of Mr Rahman's firm. There is nothing sinister about this. The fact that the registered office of two of these companies is the same and is the same as the Company simply demonstrates that Mr Rahman acted on a professional basis for these companies. The chain chart shows Mr Davies was not a shareholder of any of the Clear Group companies, and only became a director on 10 February 2014 (we prefer HMRC's evidence on this point given that it is culled from documentary records rather than the evidence of Mr Davies who suggested that he became a director in June 2014). So we can see no link between the Clear Group and the Company before Mr Davies became a director in February 2014. And this would have been apparent not only to Officer Ogburn when she decided to issue the Notices, but also to the reviewing officers. The failings of the Clear Group were failings both to submit returns and to pay tax. And some of this tax, arising in periods before February 2014, was substantial. For example, of the £114,401.68 of VAT owed by Clear Energy UK Ltd, £67,815.86 was due in December 2012.

36. Our view is that HMRC's reliance of the tax failings of the Clear Group for periods before February 2014 which they clearly took into consideration in issuing the Notices and on review, is an irrelevant consideration and renders the decision to issue the Notices, and the review decisions, unreasonable ones. HMRC can point to the newspaper report of the Swansea trading standards prosecution of Mr Davies as evidence that he must have been involved with the Clear Group. But Mr Davies does not deny that he had become involved from February 2014, and we cannot see from the evidence that the newspaper report justifies any finding by HMRC that he was involved in those companies before February 2014.

37. We now turn to the relevance of Mr Davies' bankruptcy in 2013. Mr Rahman submits that this is irrelevant. We agree with him. For it to be relevant, HMRC need to show that it supports their view that the Company is linked to other entities which have failed owing HMRC tax, and thus the Company represents a risk to the revenue. If HMRC had evidence that Mr Davies' bankruptcy was caused, for example, by creditors (for example HMRC) calling on personal guarantees because of a failure by a company to pay debts including tax debts, we can see that that bankruptcy might be a relevant factor. But there is nothing to suggest that they had any such evidence. The bankruptcy took place in 2013, some five years before the Notices were issued. Nor can we see the relevance of Mr Davies becoming a director when he was an undischarged bankrupt. It might show that he was prepared to play fast and loose with regulatory requirements relating to company law. But we cannot see how it affects the likelihood of the Company failing to meet its tax obligations.

38. So we also find that Mr Davies' bankruptcy is an irrelevant factor which should not have been taken into account in the decision firstly to issue the Notices and then not to overturn that decision on review.

39. Thus, since HMRC have taken into account irrelevant factors (namely the tax debts and non-compliance of the Clear Group before February 2014, and Mr Davies' bankruptcy in 2013), their decisions to issue the Notices and to leave that decision unaffected on review (save as regards the amount of PAYE/NICs security) are unreasonable ones.

40. But that is not the end of it. If we find that HMRC would inevitably have come to the same decisions if they had left out of account the irrelevant matters, we can dismiss the appeal. Unfortunately for HMRC there is nothing on which we can base a finding of inevitability. The difficulty for HMRC in not having Officer Ogburn present in person to give evidence is that it is very difficult for HMRC to explain the weight that she had given to the various factors on which she based her decision. The only comments about weight of evidence have been made in respect of the newspaper reports which Officer Wild explained were given little weight by Officer Ogburn. So we do not know the weight that Officer Ogburn gave to the bankruptcy or the pre February 2014 tax failings by the Clear Group.

41. HMRC might protest that the tax failings by Resec alone are sufficient to justify their decisions. But if they did so protest, they face some difficulty given the comments made by Officer Telfer in his PAYE/NICs review letter. In that letter, having reviewed the tax position of Resec and Specialist Monitoring Services on which Mr Rahman had made representations, Officer Telfer said this

42. "Had this been the only instance in which a company connected to Mr Davies had encountered difficult trading conditions and then gone out of business owing HMRC PAYE and NIC arrears then I could accept that there would be a case to be made that HMRC was being unreasonable in requiring security in respect of Tower Hire and Sales Ltd. As it is, though, the company's failure and the arrears to HMRC owing when it entered liquidation is a situation

that is on all fours with the failures of several previous companies with which Mr Davies was involved"

43. It is not apparent precisely which "several previous companies" Officer Telfer is referring to. But it seems to us likely, given that the only companies which were taken into account by Officer Ogburn other than the two mentioned above, were those in the Clear Group, that they were the Clear Group companies.

44. So the tax position of these companies is something which was a factor, and perhaps a significant one, which was considered as part of the decision making process.

45. Whilst we think that if HMRC had left out of account the irrelevant matters that we have identified they might well have come to the same conclusion, we cannot say that they would inevitably have come to the same conclusion.

DECISION

46. For the reasons given above it is our view that HMRC have taken into account irrelevant matters and thus their decision to issue the Notices, and to uphold that decision on review (save as regards the amount of security for PAYE/NICs) is flawed. Accordingly we allow the appeal.

United Kingdom

Upper Tribunal – Tax and Chancery Chamber

Snow Factor Ltd

8 March 2019

Case number: [2019]UKUT 0077(TCC); appeal number: UT/2018/0049

Guarantees for tax collection – Disputed VAT – Requirement to pay that disputed VAT where there is a further appeal – Whether financial extremity might be reasonably expected to result from that requirement

Summary

If the taxable person makes a further appeal, following a decision of the First-tier Tribunal in favour of the tax authorities, he may contest the requirement to pay the VAT concerned. The relevant decision of the tax authorities may be replaced, varied or supplemented by the tribunal or court if it decides that financial extremity might be reasonably expected to result from the decision of the tax authorities.

The "financial extremity" test is a more onerous one to satisfy than "hardship".

There must be a causal nexus between the decision of the tax authorities and the financial extremity, but the link must not be direct and immediate.

The financial extremity test may include the impact on a group of companies of which the applicant is a member.

Consideration should be given to the period which can reasonably be expected to fall before the determination of the appeal.

Regard must be had to the steps that might be reasonably expected to be taken to pay some or all of the disputed VAT.

Between:

SNOW FACTOR LIMITED, Applicant

and THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS, Respondent

Tribunal: judge Andrew Scott

Sitting in public at Edinburgh on 21 February 2019

Mr Simpson QC for the Applicant,

Mr Thomson QC for the Respondent,

DECISION

Introduction

1. This is an application concerning the amount of value added tax which the applicant, Snow Factor Limited, is required to pay following a decision made in favour of Her Majesty's Revenue and Customs ("HMRC") by the First-tier Tribunal (Tax Chamber) ("FTT") released on 24 January 2018 (reference number TC/2016/01847) in circumstances where the FTT's decision is subject to an appeal to this tribunal and where there is an issue as to whether payment of some or all of the disputed VAT might be reasonably expected to result in financial extremity.

2. The FTT's decision related to the rate of value added tax applicable to receipts from lift passes sold by the applicant in running its indoor snow dome. Snow Factor Limited had unsuccessfully contended before the FTT that the supplies were liable to value added tax at the reduced rate of 5% as a result of falling within item 1 of Group 13 of Schedule 7A to the Value Added Tax Act 1994 ("VATA 1994"). The FTT agreed with HMRC that the supplies were liable to VAT at the standard rate.

3. The FTT's decision concerned two separate assessments to value added tax: (1) an assessment of £156,160 plus interest for the six accounting periods from 1 June 2013 to 30 November 2014; and (2) an assessment of £138,555 plus interest for the five accounting periods from 1 December 2014 to 29 February 2016. Those two assessments (totalling £294,715 plus interest) were consolidated together in a single appeal before the FTT.

4. Snow Factor Limited applied to the FTT for permission to appeal the FTT's decision on two different grounds (an issue of statutory construction and fiscal neutrality). The FTT refused permission on both of those grounds. Snow Factor Limited then made a successful application to this tribunal for permission to appeal: it was granted permission to appeal on the issue of statutory construction by Judge Timothy Herrington in July 2018 and by myself on the fiscal neutrality ground in September 2018.

5. Snow Factor Limited had not paid any of the disputed VAT before appealing the assessments made by HMRC. HMRC decided (on an application to it) that to require the payment of the VAT would cause hardship to the applicant. However, following the FTT's decision, the effect of section 85A(3) of VATA 1994 is that Snow Factor Limited is now required to pay the amount of VAT that the FTT had determined to be payable.

6. That is not, though, the end of matters. Section 85B of VATA 1994 entitles Snow Factor Limited to apply to HMRC for a decision to exercise one or more of the following powers: to stay the requirement to pay, to require the provision of adequate security or to reduce the amount required to be paid. HMRC was

entitled to grant the application if satisfied that financial extremity might be reasonably expected to result if payment (of the full amount) was required.

7. In a letter of 15 November 2018 to the applicant, HMRC referred to the current assessed debt of £484,521.38 (plus interest) and decided that to pay the whole of that amount may cause financial extremity. But HMRC did consider that a lesser amount should be paid. They decided that it "would not cause 'financial extremity' to SFL [the applicant]" if it was required to pay £300,000 in three equal instalments: the first instalment of £100,000 by 15 December 2018, the second instalment of £100,000 by 15 January 2019 and the final instalment of £100,000 by 15 February 2019.

8. It is not clear to me how HMRC considered that it could require the payment of an amount that appears to exceed the amount of VAT that was the subject of the appeal determined by the FTT. It may be that the amount to which HMRC referred includes further assessments made by HMRC in relation to the same underlying issue (and which may be subject to further appeals that have yet to be determined).

9. HMRC's decision letter referred to the possibility of Snow Factor Ltd bringing an appeal against its decision to the FTT. On 14 December 2018 Snow Factor Ltd made an application to this tribunal (and not to the FTT) under section 85B(5) of VATA 1994 on the ground that financial extremity might be reasonably expected to result from the decision by HMRC of 15 November 2018.

10. The application under section 85B(5) of VATA 1994 is required to be made to the "relevant tribunal or court". That expression is defined in subsection (8) to mean the tribunal or court from which permission or leave to appeal is sought. Permission to bring an appeal against a decision of the FTT must be made in the first instance to the FTT and then to this tribunal.

11. Accordingly, it would appear that, reading the provision literally, both the FTT and the Upper Tribunal qualify as "the relevant tribunal or court": the test is not which tribunal has granted permission to appeal.

12. It would seem to me, however, a strange outcome if the applicant had an unfettered discretion to choose the identity of the tribunal deciding the application, particularly if the discretion were then exercised in favour of the FTT in circumstances where the FTT had refused permission to appeal and where one might otherwise expect the tribunal to play no further part in the litigation.

13. However, in the context of this application, I consider that it is clear that the Upper Tribunal is capable of being "the" relevant tribunal or court even if (an issue about which I say no more) the FTT could also be regarded as "the" relevant tribunal or court for the purposes of section 85B of VATA 1994. Both parties were also of the view that the Upper Tribunal was properly seized of the application.

The relevant legislation

14. An appeal against HMRC's assessments to VAT falls to be made to the FTT under section 83(1)(p) of VATA 1994. Section 84 of that Act makes further provision relating to appeals under section 83. Of most relevance to this application are subsections (3) and (3B) of section 84, which provide as follows:

> "**84 Further provisions relating to appeals**
>
> …
>
> (3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b), (n), (p), (q), (ra)[, (rb)] or (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.
>
> (3A) …
>
> (3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment 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."

15. Section 85A of VATA 1994 sets out the general rule (subject to the operation of section 85B) about the payment of disputed sums following the determination of an appeal by the FTT. So far as relevant to this application, it provides as follows:

> "**85A Payment of tax on determination of appeal**
>
> (1) This section applies where the tribunal has determined an appeal under section 83.
>
> (2) […]
>
> (3) Where on the appeal the tribunal has determined that—
>
> (a) the whole or part of any disputed amount not paid or deposited is due, or
>
> (b) the whole or part of any VAT credit paid was not payable,
>
> so much of that amount, or of that credit, as the tribunal determines to be due or not payable shall be paid or repaid to HMRC with interest at the rate applicable under section 197 of the Finance Act 1996.

(4) […]

(5) […]."

16. The application for relief from payment of the VAT was brought under section 85B of VATA 1994 the provisions of which are central to this appeal. That section provides:

"**85B Payment of tax where there is a further appeal**

(1) Where a party makes a further appeal, notwithstanding that the further appeal is pending, value added tax or VAT credits, or a credit of overstated or overpaid value added tax shall be payable or repayable in accordance with the determination of the tribunal or court against which the further appeal is made.

(2) But if the amount payable or repayable is altered by the order or judgment of the tribunal or court on the further appeal—

(a) if too much value added tax has been paid or the whole or part of any VAT credit due to the appellant has not been paid the amount overpaid or not paid shall be refunded with such interest, if any, as the tribunal or court may allow; and

(b) if too little value added tax has been charged or the whole or part of any VAT credit paid was not payable so much of the amount as the tribunal or court determines to be due or not payable shall be due or repayable, as appropriate, at the expiration of a period of thirty days beginning with the date on which HMRC issue to the other party a notice of the total amount payable in accordance with the order or judgment of that tribunal or court.

(3) If, on the application of HMRC, the relevant tribunal or court considers it necessary for the protection of the revenue, subsection (1) shall not apply and the relevant tribunal or court may—

(a) give permission to withhold any payment or repayment; or

(b) require the provision of adequate security before payment or repayment is made.

(4) If, on the application of the original appellant, HMRC are satisfied that financial extremity might be reasonably expected to result if payment or repayment is required or withheld as appropriate, HMRC may do one or more of the things listed in subsection (6).

(5) If on the application of the original appellant, the relevant tribunal or court decides that—

(a) the original appellant has applied to HMRC under subsection (4),

(b) HMRC have decided that application,

(c) financial extremity might be reasonably expected to result from that decision by HMRC, the relevant tribunal or court may replace, vary or supplement the decision by HMRC by doing one or more of the things listed in subsection (6).

(6) These are the things which HMRC or the relevant tribunal or court may do under subsection (4) or (5)—

(a) decide how much, if any, of the amount under appeal should be paid or repaid as appropriate,

(b) require the provision of adequate security from the original appellant,

(c) stay the requirement to pay or repay under subsection (1).

(7) Subsections (3) to (6) cease to have effect when the further appeal has been determined.

(8) In this section—

"adequate security" means security that is of such amount and given in such manner—

(a) as the tribunal or court may determine (in a case falling within subsection (3) or (5)), or

(b) as HMRC consider adequate to protect the revenue (in a case falling within subsection (4));

"further appeal" means an appeal against—

(a) the tribunal's determination of an appeal under section 83, or

(b) a decision of the Upper Tribunal or a court that arises (directly or indirectly) from that determination;

"original appellant" means the person who made the appeal to the tribunal under section 83;

"relevant tribunal or court" means the tribunal or court from which permission or leave to appeal is sought."

17. It appears that this is the first determination of an application under section 85B(5) of VATA 1994, and, in deciding the application, there is, therefore, no directly relevant case law. Submissions were, however, made in relation to the case law relevant to hardship applications under section 84(3B) of VATA 1994.

18. It was submitted by Mr Simpson QC on behalf of the applicant that, although a test of financial extremity was a harder test to satisfy than one of hardship, the authorities relating to hardship applications were, nonetheless, relevant as showing how the courts approached a similar exercise. By contrast, Mr Thomson QC submitted that the case law had limited (if any) relevance to the application of, in

his submission, the different, more stringent test under section 85B(5) of VATA 1994.

19. There was, though, broad agreement between the parties as to the principles relevant to hardship applications. The principles were reviewed by the Upper Tribunal in *HMRC v Elbrook (Cash & Carry) Limited* [2017] UKUT 181 (TCC) ("*Elbrook*").

20. At [19] and [20] of that decision, the tribunal noted that:

> "it is clear that s.84 VATA is intended to strike a balance between, on the one hand, the desire to prevent abuse of the appeal mechanism by employing it to delay payment of the disputed tax, and on the other to provide relief from the stricture of an appellant having to pay or deposit the disputed sum as the price for entering the appeal process, where to do so would cause hardship. … it has been established that the relief provided by s 84(3B) VATA in cases of hardship should not be applied so as to operate as a fetter."

21. It went on to note at [21] two of the observations of Simon J made in *Regina (ToTel Ltd) v First-tier Tribunal (Tax Chamber) and another* [2012] QB 358 at 380. The first was that the test was one of capacity to pay without financial hardship, a test which fell to be applied in a way which complied with the EU principle of proportionality. The second was that the hardship enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available: it should not involve a lengthy investigation of assets and liabilities, and an ability to pay in the future. That reflected the fact that the issue of hardship ought to be capable of prompt resolution on readily available material.

22. The tribunal noted at [22] that the "requirement that the resources be immediately or readily available is a reflection of the structure of s 84(3B), which looks to the existing financial position of the appellant, and does not require enquiry as to possible future action or any potential resources that might become available in the future". At [26] it observed that "consistently with the need to consider immediately or readily available resources, the normal rule is that the tribunal should look at the position as at the date of the hearing".

23. But the statutory requirement for the payment of VAT to cause hardship allows the tribunal to have regard to facts predating the hearing if those facts are evidence that the causation of the hardship is something other than the payment of the VAT, eg if an appellant could not pay the VAT because it had deliberately paid away a sum which would otherwise have been available: see the consideration at [28] in *Elbrook* of the decision of Nugee J in *ToTel Ltd v HMRC* [2015] STC 610.

Evidence in support of application

24. In making its application for relief, the applicant relied on a spreadsheet drawn up on 14 December 2018 showing the cash flow forecast for the applicant's group for the 12 months ending 30 November 2019. The forecast was prepared by the applicant's finance manager, Mr Scott McLauchlan.

25. The application was also supported by a witness statement given by Mr McLauchlan, who gave oral evidence before the tribunal (and was cross-examined by Mr Thomson QC on behalf of HMRC). I found Mr McLauchlan to be a reliable and credible witness.

26. The December 2018 forecast was an updated forecast from one provided to HMRC in August 2018 for the purpose of the application made by Snow Factor Ltd to HMRC for relief from the requirement to pay the disputed VAT.

27. I make the following findings.

28. The cash flow forecast was prepared on a group basis. It showed accounts for three separate companies: (1) the applicant (Snow Factor Limited); (2) Ice Factor Kinlochleven; and (3) Ice Factor International Limited.

29. Ice Factor International Limited was the holding company of the two other companies. Ice Factor Kinlochleven provided facilities for ice climbing and dry wall climbing.

30. The applicant considered that it was appropriate to draw up a group cash flow forecast because the banking arrangements were made on a group basis. The group had an overdraft facility with HSBC of £50,000.

31. Mr McLauchlan contended that the cash flow was an optimistic prediction of the expected outcomes for the year ahead. He explained that the previous year (2018) had been a difficult one because of the unusually hot summer, which had adversely affected revenues (as people tended in hot weather to prefer outdoor rather than indoor activities). The cash flow had been prepared on the basis that the weather in 2019 would revert to type. Mr McLauchlan accepted in cross-examination that the revenues for the next year could be better or worse than those predicted. Indeed, he noted that the new 'Santa' product range launched in 2018 (for which there would be no material development expenses in 2019) might provide a degree of 'cushioning'.

32. My view is that it would be more accurate to describe the cash flow forecast in more neutral terms. Assuming a repeat of 2018 might be considered to be pessimistic but the reverse is not the case: a forecast to do better than a bad year is not, in my view, the same as being optimistic. I consider that the applicant

has done no more than make a reasonable assumption about future trading conditions. That assumption might be falsified in either direction.

33. So much was, in fact, borne out in evidence given by Mr McLauchlan about the expected accuracy of the cash flow forecast when asked to re-assess it as at the date of the hearing. The hearing was held just over two months after the December 2018 forecast had been prepared. Mr McLauchlan explained that Snow Factor Limited's receipts for January to March 2019 were expected to be lower than forecast (because of the lateness of this year's ski season) but that there would be a corresponding uplift in April and May 2019. The result was that the overall expectation of receipts to the end of May was, in his own words, a "reasonable" one.

34. The cash flow for Snow Factor Limited reveals the cyclical nature of its business. Mr McLauchlan confirmed in cross-examination that this was not expected to change. Cash receipts for the winter months were significantly higher than those for the summer. For example, the receipts for January 2019 were forecast to be £626,285 while those for June 2019 were forecast to be £172,728. This provided the company with cash reserves to enable it to continue to trade through the summer and autumn.

35. Expenditure was also subject to significant variation. For example, expected expenditure for January 2019 was £385,337.76 while for June 2019 it was £265,506.15.

36. The expenditure in the 12 month period included monthly payments of £62,000 in respect of rent and monthly payments of £10,000 in respect of non-domestic rates. Both those payments reflected sums in respect of arrears (£6,000 in the case of rent and £2,000 in the case of rates) which had arisen due to the difficult trading conditions in the summer of 2018.

37. The expenditure in the 12 month period also showed quarterly payments of VAT. Despite the FTT decision, the VAT payments were made by the applicant on the basis that the FTT was wrong in law.

38. The net cash flow for Snow Factor Limited showed a positive figure of £350,836.66. The net cash flow for each month varied in line with the cyclical nature of its business: for example, it was forecast to be a positive figure of £240,947.24 in January 2019 but to be a deficit of £92,778.15 in June 2019.

39. The cash flow for Ice Factor Kinlochleven showed a net cash flow of £23,721.53. The cash receipts were subject to significant variation from one month to the next. The receipts were forecast to be largest in August and September 2019 (£70,437.54 and £79,296.96 respectively) before tailing off to £30,457.91 in November 2019.

40. The cash flow for Ice Factor International Ltd showed a one-off non-cash receipt of £12,000 in December 2018 but for the rest of the 12 month period showed no other receipts. More than half of its recurring expenditure in January 2019 to November 2019 arose from payments in respect of fixed borrowings. The 12 month forecast for Ice Factor International Ltd showed a negative net cash flow of £401,732.64.

41. The cash flow forecast showed, on a group basis, that in the 12 month period there were total receipts of £4,530,864.81. The group net cash flow was a deficit of £27,174.45.

42. The cash flow forecast showed, on a group basis, that in December 2018 immediately available resources to the group stood at £175,369.38. Those resources comprised a group overall balance of £125,369.38 and full use of the £50,000 overdraft facility. The figure for immediately available resources to the group stood at £369,285.85 in January 2019 and £480,436.02 in February 2019.

43. The figure for immediately available resources to the group then peaked at £492,952.48 in March 2019 before reducing to £69,659.79 in July 2019, £56,899.94 in August 2019, £64,860.62 in September 2019 and a low of £56,082.36 in October 2019. The final figure for November 2019 showed an uplift to £81,226.73.

44. Those are the figures that would result on the assumption that the applicant made no steps to pay any part of the amount to HMRC.

45. The applicant also prepared a cash flow forecast for the group on the assumption that it had paid the sums in accordance with HMRC's decision of 15 November 2018.

46. There are two points of significance to note from that forecast.

47. The first is that, if payments of £100,000 had been made to HMRC in each of December 2018, January 2019 and February 2019, the immediately available resources to the group would have stood at £75,369.38 for December 2018, £169,285.85 in January 2019 and £180,436.02 in February 2019. In other words, the group could have afforded to pay those amounts at those times and still end up with a positive figure for immediately available resources to the group.

48. But, as a result of the cyclical nature of the business, the immediately available resources to the group would then decline so that the figure would go into deficit for each of the months from June to November 2019. The figure for June 2019 would become a deficit of £105,230.37 with the figures for the five months from July 2019 to November 2019 ranging from a deficit of £218,773.27 to a deficit of £243,917.64.

49. Mr McLauchlan was asked about the group's overdraft and whether he had asked HSBC for an increase in the amount. His evidence was that he had

not, and nor had he sought alternative financing from any other bank or financial institution. Mr McLauchlan gave evidence that the overdraft facility was increased only once in the past: that was an increase of £30,000 in August 2013 and lasted for one month only. He said that he expected any increase to be similar to the one authorised in August 2013 (£30,000) and to last for no more than six months. He considered that it was unrealistic to expect an overdraft on terms that would enable full payment to HMRC in accordance with their November 2018 decision. Accordingly, he had made no approach to the bank for any increase in the overdraft.

50. Mr McLauchlan was asked in cross-examination why he had given preferential treatment to debts in respect of rent and rates (in relation to which arrears totalling £96,000 would be paid in the 12 month forecast period) rather than arrange to pay any of the VAT subject to the FTT decision. His answer was that he would naturally favour paying operational creditors first: without premises, Snow Factor Ltd could not trade. He also confirmed that, with the exception of HMRC, every other class of creditor was being paid. His evidence was that he regarded the debt due to HMRC as a liability in relation to which there was a doubt as to its ultimate payment: if the applicant's appeal on the substantive issue was successful, the debt would disappear. Consequently, he saw no need to draw up plans to pay a debt which, in the event, might be taken never to have existed.

51. Although he had no particular recollection of the events leading up to HMRC's decision of 15 November 2018, it was put to him in cross-examination that Snow Factor Ltd had been contacted by HMRC about the payment of the VAT and that it was HMRC who had alerted the applicant to the possibility of making a financial extremity application under section 85B of VATA 1994. It was similarly put to him that there had been no response to HMRC's letter of 15 November 2018 until the applicant made an application directly to this tribunal under section 85B(5) of VATA 1994.

52. Although I am not in a position to determine the precise facts leading up to the December 2018 application, I do make a finding that, on the balance of probabilities, the applicant did not take steps to contact HMRC about the payment of the debt and did not respond to the November 2018 letter before making its application to this tribunal.

53. Mr McLauchlan was also asked about the possibility of increasing the prices charged for any of the goods or services that the group supplied in order to fund some or all of the payment of the disputed VAT. He responded that he would need to be careful about uplifting prices across the board. My assessment of Mr McLauchlan's evidence, taken as whole, is that an increase in prices was not a possibility that had been considered at all, even for a temporary period or in relation to only some of the goods or services sold by the group.

Discussion

Meaning of section 85B of VATA 1994

54. The provisions of section 85B of VATA 1994 fall to be construed in their context. The context includes the statutory provisions governing the bringing of appeals and the payment of amounts of disputed VAT pending the resolution of a dispute. In my view it is clear that different considerations apply at different points in the course of the appeal process.

55. In the case of the initial appeal against an assessment to VAT, the general rule is that an appeal is not capable of being heard by the tribunal unless the disputed VAT is paid. That rule is designed to prevent abuse by bringing appeals to delay payment. But the potential harshness of that rule is ameliorated by providing that the VAT need not be paid if to do so would cause hardship to the appellant.

56. Those rules are designed to set "the price for entering the appeal process" (see [20] of *Elbrook*). It is entirely consistent with that objective that the hardship enquiry should not be a lengthy one and should focus on immediately or readily available resources.

57. But once the appeal process has been entered, different considerations come into play. In particular, when the FTT determines a disputed issue in favour of HMRC, the effect of section 85A(3) of VATA 1994 is that the amount of VAT not previously paid to HMRC (because of hardship to the appellant) "shall be paid ... to HMRC". If the appellant is unsuccessful before the FTT, the VAT must be paid in accordance with the judicial determination, which seems to me to be a wholly unsurprising result.

58. But section 85A of VATA 1994 has the potential to operate harshly where an appeal is then brought against the decision of the FTT. It is with that case that section 85B of VATA 1994 is concerned. That section begins by making it clear that the simple fact of making a further appeal does not affect the requirement to pay the VAT in accordance with the determination of the tribunal. This general rule is, however, subject to two exceptions: one designed to protect the public revenue (subsection (3)) and the other operating in favour of the taxpayer (subsections (4) to (6)).

59. Subsection (7) of section 85B of VATA 1994 provides for subsections (3) to (6) to cease to have effect when the further appeal is determined. The operation of the exceptions is, therefore, strictly time-limited. Once the substantive appeal is determined, the position would then be governed by section 85B(2) of VATA 1994 if there is any change in the amount of VAT payable. If the applicant were to succeed on its further appeal on the substantive issue, then any amount required to be paid by this tribunal under section 85B(5) of VATA 1994 would be refunded to the applicant. If the substantive appeal

were dismissed, section 85A(3) of VATA 1994 would then be re-engaged and section 85B would be relevant only if there were a further appeal from the Upper Tribunal.

60. It is with the rule operating in favour of the taxpayer that this application is concerned. The test for relief in this case is whether "financial extremity might be reasonably expected to result" from the payment of the disputed VAT required to be paid by HMRC following its decision on an application to it under section 85B(4) of VATA 1994.

61. That test differs from the one operating before the taxpayer enters the appeal process ("would cause the appellant to suffer hardship") and it is no surprise that it does. There is no reason to suppose that a test designed to police the entry of taxpayers into the appeal process ought to be the same as the test operating once an appeal has been judicially determined (albeit that the determination is then subject to further appeal). Indeed, it would be somewhat surprising, in the light of the provision made by sections 85A(3) and 85B(1) of VATA 1994, if the test in section 85B(5) had replicated the section 84(3B) test. It is, of course, possible that the facts will change since the initial decision on hardship (whether made by HMRC or the FTT) so that the appellant would not suffer hardship if required to pay the VAT following the determination of the appeal. But in a great many cases that would not be the case.

62. Section 85B(5)(c) of VATA 1994 focuses instead on whether "financial extremity might be reasonably expected to result" from HMRC's decision. Although I consider that this phrase must be construed as a compendious whole in the context of the remainder of section 85B and the other provisions of VATA 1994, it is nonetheless helpful to consider in turn the three different elements of that test:

(1) there must be "financial extremity";

(2) the financial extremity must be such as "might be reasonably expected"; and

(3) the financial extremity must "result" from HMRC's decision.

63. It was common ground between the parties that "financial extremity" is a more onerous test to satisfy than "hardship". I agree. It is a matter of law as to what those words mean and, in this context, my judgment is that they must bear their ordinary meaning. The ordinary meaning of that expression takes matters beyond mere hardship. Extremity is just that: it is at the very far end of the spectrum of financial health. Life should not be merely hard. More is required. In addition, it would be inconsistent with the legislative purpose if the test were easier to satisfy than hardship. That is because what needs to be shown is that the result is one which "might be reasonably expected" and not what the result "would" be. If financial extremity were no more than hardship, it would follow that, in many cases, the test in section 85B(5) of VATA 1994 would be easier to meet than the hardship test, which would, in turn, mean that the general rule given by section 85B(1) of VATA 1994 would operate as the exception.

64. Mr Simpson QC submitted that if the applicant (or, more accurately, the group of companies of which it is a member) were insolvent, that would constitute a state of financial extremity. He also submitted that circumstances falling short of insolvency ought, in principle, to be capable of constituting financial extremity. If Parliament had wanted to confine the test to insolvency, it could quite easily have done so. The fact that it had not showed that the test was a wider one.

65. In my view, it is not productive to come up with a list of generic cases which might, or might not, be within the meaning of the statutory words when applied to the particular facts of any given case. To do so would carry with it a real risk of supplying a judicial gloss to a simple expression and would, moreover, divert attention from a consideration of the various elements of the test working harmoniously together. Not all insolvencies are created equal: a momentary time at which the debts of a company cannot be paid as they fall due is very different from a case where a company has permanently lost its only sources of income while its (considerable) liabilities remain unaltered. It by no means follows that, having regard to the particular facts of the case (which may include the likelihood of any steps actually being taken by any person to commence insolvency proceedings), the former case will amount to financial extremity in the ordinary meaning of that expression. However, both cases might reasonably be regarded as ones where a company has become insolvent.

66. The statutory question is more nuanced than what would otherwise be a binary choice of viewing a financial state of affairs (financial extremity or not): the question is whether the circumstances are such that financial extremity "might be reasonably expected" to result from HMRC's decision. There are two aspects of that qualification that are critical to a proper understanding of the test to be applied under section 85B(5) of VATA 1994. The first is that the test is "might" not "would". It is a question of possibilities. The second is that not any old possibility will suffice: it must be "reasonable" in the sense explained below.

67. What might be reasonably expected is something more than a theoretical possibility. There must be some reasonable basis for thinking that the possibility might come to pass. The expectation is a reasonable one, and that is an issue to be decided by reference to what one considers might reasonably happen if payment were made in accordance with HMRC's decision. I consider that the test of reasonableness here is, in essence, an objective one: having regard to the totality of the circumstances, what steps would it be reasonable to expect to be taken to meet the

liability. But the test also has subjective elements: account must be taken of the particular circumstances affecting the taxpayer and the way in which it has chosen to carry on its business.

68. The final element of the test is that the financial extremity must "result" from HMRC's decision. There must be a causative link between the decision to pay some or all of the disputed VAT and the financial extremity. But it was also submitted by Mr Thomson QC on behalf of HMRC that this result must be both direct and, more importantly, immediate.

69. I am unable to accept that submission. There clearly needs to be a causal nexus between the decision and the financial extremity but the directness of the causation is not, in my view, in point. That will be hard (if not impossible) to disentangle from the issue of reasonableness that I have just discussed. There is nothing in the statutory test that leads to an inference that "results" should be impliedly qualified by inserting "directly" before it.

70. As to the question of immediacy, I consider that there is a timeframe within which the financial extremity must result. That timeframe is indicated by section 85B(7) of VATA 1994, which definitively switches off the effect of subsections (4) and (5) once the further appeal is determined. Section 85B of VATA 1994 is focused on who is entitled to hold the disputed VAT pending the determination of the final appeal.

71. If Mr Thomson QC were right, it would produce some very odd outcomes, particularly in relation to the far from unusual case of cyclical businesses. There is no warrant, in my view, for taking such a restrictive approach to the meaning of section 85B(5) of VATA 1994. The reference to the result is unqualified. If it had been intended that the result would be "immediate" that qualification could quite easily have been added. A business might be able to pay the amount in one month and then suffer financial extremity the next (well before the appeal is determined). It is hard to see why that is a state of affairs that falls outside the relief provided for by section 85B(4) or (5) of VATA 1994.

72. In my view section 85B(5) of VATA 1994 has struck a careful balance between, on the one hand, the need to protect the public revenue (and, by extension, the general body of taxpayers) by requiring an amount of VAT judicially determined to be payable to be actually paid to HMRC and, on the other hand, the need to support the rule of law and the integrity of the appellate process by securing that appeals on points of law (for which permission has, by definition, been given) can actually be determined by the higher courts. An element of the test (financial extremity) is harder to satisfy than a section 84(3B) hardship application but that is balanced by the fact that, as the test is looking to the future to some extent (the determination of the final appeal), it requires an assessment of what might (rather than would) happen, itself qualified by reference to reasonable expectations.

73. Unlike section 84(3B) of VATA 1994, section 85B(5)(c) is silent as to the person who must be in a state of financial extremity. The silence is, in my view, meaningful. It contemplates that the impact of the decision might be felt beyond the applicant itself. That is apt to include the impact on a group of companies of which the applicant is a member (such as this case). Equally, the taking of the steps might, in a group context, be by some person other than the applicant (provided it is reasonable to expect that to happen).

74. HMRC's decision letter of 15 November 2018 did not include any reasoning to support its view. It stated the wrong test ("would" cause not "might be reasonably expected to result"). And it purported to require a payment that exceeded the disputed VAT being appealed: see [8] above. None of these observations are, however, relevant to the decision falling to be made in this application: what is required is not a supervisory review of what HMRC has done but a de novo assessment of whether the tests set out in section 85B(5)(a) to (c) of VATA 1994 are met. If they are, then the powers set out in section 85B(6) of VATA 1994 are available for this tribunal to exercise.

Application of law to facts of application

75. How then does section 85B(5)(c) of VATA 1994 apply in relation to HMRC's decision in this case?

76. The facts to which the applicant points in support of its application are that, as a result of HMRC's decision, the immediately available resources available to the group would go into a deficit of £105,230.37 in June 2019 with a deficit continuing until November 2019 of at least £218,773.27: see [48] above.

77. The appeal on the substantive matter was, at the time of HMRC's decision, set for a possible hearing at some time between March and June 2019. Allowing a reasonable period for the making of the determination by the Upper Tribunal, it would seem to me that there is a reasonable prospect that the further appeal would not be determined until the autumn of 2019 (September or October).

78. The critical issue in this application is, in my judgment, the extent to which (if at all) it is reasonable, before the determination of the substantive appeal, to expect steps to be taken so that the applicant is in a position to meet some or all of the liability to pay the disputed VAT without financial extremity resulting. It is not sufficient for the applicant simply to point to the projected cash flow drawn up on the basis that no steps are taken to meet any part of the liability to pay the disputed VAT and leave it at that.

79. In considering what steps might be reasonable I should have regard to all the circumstances. Those circumstances include the following:

(1) even though the disputed VAT became payable in accordance with section 85A(3) of VATA 1994 on 24 January 2018 when the FTT determined the appeal, the applicant has taken no steps to pay any part of that amount;

(2) the applicant did not approach HMRC to discuss payment and did not initiate an application to HMRC under section 85B(4) of VATA 1994;

(3) the applicant did, however, take steps to clear arrears on other debts (see [36] above) and make sure that all other creditors with the exception of HMRC were being paid;

(4) the applicant did not at any time approach its bank to discuss extending its overdraft and nor did it approach any other bank or financial institution for funding; and

(5) the applicant did not consider taking steps, whether by increasing prices or reducing expenses or by any other means, to increase its cash flow for a temporary period so as to be in a position to make any payments to HMRC.

80. The applicant is entitled to continue to account for VAT on the basis that the FTT's decision was wrong in law and then be assessed by HMRC accordingly (and presumably appeal the assessments). But, if it takes that approach, it seems to me only reasonable to hold the applicant to the same approach in relation to the payment of the disputed VAT: on its own view, any payment will be recoverable once the appeal is determined in its favour.

81. What steps would it then be reasonable to expect it to take to meet some or all of the liability for what it considers will be a temporary period?

82. In determining what those steps might be, it is relevant that the projected cash flow was a reasonable one. It was, as I say above, neither optimistic nor pessimistic. In my view, it is therefore reasonable to have expected the applicant to have taken some steps to trade through any temporary cash flow difficulties. I consider that it is reasonable to expect steps to have been taken to increase prices (or advance receipts) or reduce expenses (or delay payments) to at least some extent. And it is reasonable to expect the bank to have been approached for an extension of the overdraft, assessing its likely reaction by reference to its previous conduct.

83. Who should have taken the steps?

84. If it is right to take account of the group position, I also consider that it is relevant to take account of the steps which the applicant's sister company, Ice Factor Kinlochleven, could reasonably be expected to take. Although no evidence was led on this, it seems evident that the expenses of the applicant's holding company (Ice Factor International Ltd) will be funded by distributions made to it by its subsidiary companies. It might reasonably be expected that, in addition to action taken by the applicant, Ice Factor Kinlochleven would pick up some of the slack so that Ice Factor International Ltd was in a position to meet its liabilities.

85. However, different considerations seem to me to be applicable to the action expected to be taken by the holding company itself. Clearly, the applicant is not in a position to control this (the relationship of control is, of course, in the other direction). Furthermore, the majority of the expenses of Ice Factor International Ltd relate to fixed debt in relation to which short-term restructuring is unlikely; and its other expenses are already relatively modest. Accordingly, it seems to me reasonable to take account of possible steps to be taken by Ice Factor Kinlochleven but not by Ice Factor International Ltd.

86. In my judgment it is also reasonable to anticipate that the cash flow might move against the applicant. That factor is relevant in determining the steps which could be reasonably expected to be taken: to push the expected steps to the maximum might itself be unreasonable. It is reasonable to build in a 'cushion' to some degree against the forecast turning out to be worse than expected.

87. In my view the test that I need to apply involves, adapting the words of Lord Hoffman in *Designers Guild v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 WLR 2416, 2423, the application of a not altogether precise standard to a combination of uncertain features. I consider that, having regard to the matters set out above, the applicant could reasonably be expected to have taken a combination of steps: a temporary but modest increase in prices (or advancement of receipts), a temporary but modest decrease in expenses (or delay in their payment) and a temporary increase in its overdraft to £80,000.

88. To determine the level of the increase or decrease in receipts or expenses is a difficult task, particularly as I have relatively limited financial information before me and the determination involves the making of assumptions about future trading operations. Recognising the fact that the applicant operates within relative tight margins, it seems to me to be reasonable to assume that both the applicant and Ice Factor Kinlochleven could have increased their receipts by 2% and reduced expenses falling due by 2%. I consider that a reasonable period for which the increases and decreases have effect would be a temporary period of six months.

89. As I mention above, those steps are premised on the fact that more might be possible; but more would not necessarily be reasonable. In particular, I think that it would not be reasonable to expect a movement in the cash flow of 10% or more. Accordingly, a figure of 2% for both receipts and expenses builds in an element of 'cushion' (and, of course, it may be that the easiest course of action would be to make changes to

either receipts or expenses (rather than both)). In determining this figure of 2%, I have also had regard to the extent to which the applicant had arranged to pay arrears in respect of its rent and rates totalling £96,000 for the 12 month period. As a percentage increase in the rent and rates otherwise falling due, that is significantly more than 2%; but the assumption that I have made is a universal movement in amounts without exception. Clearly, in reality, the actual changes would be likely to be more varied than this.

90. I should also make it clear that any one of these things could reasonably be done to a greater or a lesser extent than others: eg, the overdraft could be bigger or an increase in prices could be more significant or receipts could be increased in other ways (eg, by advancing sales). There is, plainly, a very substantial element of judgment in this.

91. In the course of the hearing, HMRC agreed that, despite the fact that the application was against its decision to require payments in December 2018, January 2019 and February 2019, it would make little sense, if the application were to be dismissed (as they sought), to require payments to be made on dates that had already passed. Instead, they suggested that the payments should be made at the end of February, March and April 2019. In considering the application, however, the statutory question requires the tribunal to consider the effect of the decision that HMRC actually took.

92. In my view, the correct way to proceed is to recalculate the expected cash flow on the assumption that the payments were made to HMRC in accordance with its decision and on the assumption that the applicant takes the step outlined at [87] and [88] above. For this purpose I would assume that, in relation to the applicant and Ice Factor Kinlochleven, receipts were increased by 2%, and expenses were decreased by the same percentage, throughout the six-month period December 2018 to May 2019 and steps were also taken to increase the overdraft to £80,000 so that, before the determination of the substantive appeal, an increased facility were available (ie, the availability of the overdraft would extend beyond May 2019 until the time at which it might be reasonable to expect the appeal to be determined).

93. If the forecast is recalculated on the assumptions set out at [92] above, the result is that the immediately available resources to the group for December 2018 to May 2019 would (to the nearest £1,000) respectively become positive figures of £114,000, £239,000, £268,000, £294,000, £218,000 and £147,000. If the consideration stopped there, there would be no question of financial extremity resulting.

94. However, as I explain above, I do not consider that it would be right to stop there. Consideration also needs to be given to the position in the following months when those months could reasonably be expected to fall before the determination of the appeal (which could be October 2019, although, of course, it could be sooner or later than that).

95. On the above assumptions, the immediately available resources for June 2019 would (to the nearest £1,000) be a positive figure of £21,000 before becoming a deficit for July 2019 to October 2019 of respectively £104,000, £117,000, £109,000 and £118,000.

96. The question then is whether this state of affairs is, within the ordinary meaning of that expression, "financial extremity". I consider that it is. The deficit figures are, in my view, significant: in each case they exceed £100,000. The position lasts for a number of months. The applicant would have to consider taking much more significant action than I have assumed above in order to return the group to a more stable financial footing. Such action would, in my judgment, go beyond what can be reasonably expected.

97. I should point out that, even if the same 2% change in receipts and expenses were continued beyond the assumed six-month period, the deficit figures would still remain significant (with, approximately, a reduction in the deficit of £10,000 to £12,000 for each subsequent month, so that, for example, the deficit for July 2019 would be around £22,000 lower).

98. Accordingly, my decision is that, in relation to HMRC's decision of 15 November 2018, the tests in section 85B(5)(a) to (c) of VATA 1994 are met.

99. It does not, however, necessarily follow that the application succeeds. If the tests are met, the subsection provides that the tribunal "may" replace, vary or supplement HMRC's decision by doing one or more of the things listed in subsection (6). That is a power rather than a duty. In relation to the exercise of this power, there is nothing in terms that directs the tribunal to have regard to any particular factor in considering whether, and (if so) how, to exercise it.

100. In my view, the power available to me should, on first principles, be exercised judicially in the light of the purpose of section 85B of VATA 1994 as I have described it at [72] above. It is clear to me that, in assessing what would be a fair and just disposal of this application, regard must properly be had to the steps that might be reasonably expected to be taken to pay some or all of the disputed VAT.

101. In my view, it is relevant, therefore, to consider, as at the date of the disposal of this application, what would happen if the applicant and Ice Factor Kinlochleven took the steps described at [87] and [88] above in the six-month period from March to August 2019. I recognise that this takes no account of the fact that the applicant (or Ice Factor Kinlochleven) could reasonably have been expected to take steps sooner than that; but, at least in the case of this application, it seems to me to be fair and reasonable to consider only steps that can be taken once the application is disposed of.

102. The result would be that, if no payment of the VAT were required and those steps were taken, the immediately available resources to the group for March 2019 to August 2019 would (to the nearest £1,000) respectively become £537,000, £461,000, £390,000, £274,000, £161,000 and £160,000. The resources for September and October 2019 would then become £168,000 and £159,000 respectively.

103. In those circumstances, it seems to me that, in exercise of the power mentioned in section 85B(6)(a) of VATA 1994, the applicant should pay £155,000 of the disputed VAT to HMRC. Throughout the period beginning with March 2019 and ending with October 2019 the immediately available resources to the group would, if the above steps were taken and if £155,000 were paid to HMRC, be a positive figure. I note that the effect of this decision is that the applicant would be required to pay more than half of the disputed VAT, which, in all the circumstances, seems to me to be a just and reasonable outcome.

104. What those powers do not seem to contemplate is requiring payment in instalments (which is, of course, what HMRC decided to do in its November 2018 decision). Even if that is a possibility, I can see no reason why payment in instalments would be appropriate in this case, bearing in mind the expected resources available to the group in the next few months. The applicant currently has the resources to pay the sum of £155,000 in a single payment.

105. The section is also silent as to when the payment should be made. I note, however, that section 85B(2)(b) of VATA 1994 requires payment within 30 days in a case where a determination of the further appeal results in more VAT becoming payable. That would, in my view, be an appropriate period for the payment to be made in this case.

Disposal

106. For the above reasons, I decide that the tests in section 85B(5)(a) to (c) of VATA 1994 are met. I exercise the power conferred by that subsection (and subsection (6)(a)) to replace HMRC's decision by requiring the payment of £155,000 to HMRC. The payment must be made before the end of the period of 30 days beginning with the day on which this decision is released to the parties.

France

Supreme Court (Cassation)

6 September 2018

Case number: 17-16187

Precautionary measures – VAT – Dispute whether the VAT had to be paid by the taxable person himself or by his customers, under the reverse charge rule – Precautionary garnishments with regard to clients of the taxable person – Payment of the VAT by the customers not taken into account because the taxable person did not prove that payment

Summary

A French tax collector was authorised to carry out garnishments on the claims held by a foreign company against client companies in France, in order to guarantee the payment of its VAT debts, although the company argued that the VAT on the transactions concerned had been paid by its customers, under the reverse charge rule.

The taxable person argued that the judicial decision authorising the garnishments was invalid, since the court concerned decided, inter alia*, that the taxable person had not provided any elements to confirm the payment of that VAT by its customers.*

The Supreme Court decided that it could not interfere with this sovereign assessment of the court authorising the garnishments.

The Supreme Court (Cassation), 2nd civil Chamber

Whereas the judgment under appeal (Lyon, 2 February 2017) indicates that by an order of 5 June 2015, an enforcement judge authorized the tax collector, responsible for the business tax department of Lyon East, to carry out provisional garnishments on the claims held by the company Missao Especial Trabalho Temporario LDA (the company) against its client companies, in order to guarantee the payment of an amount due under the value added tax (VAT); that the company contested these precautionary measures before an enforcement judge and asked to annul and lift these garnishments;

Whereas the company argues that the judgment concerned wrongly confirmed the validity of the precautionary garnishments made by the tax collector in the hands of its client companies and wrongly rejected its request for the nullity and the release of these conservatory garnishments;

That the company invokes the following argument:

1°/ that only a person whose claim appears to be founded in principle can apply to the judge for authorization to apply a precautionary measure on the property of his debtor, without prior order, if he justifies circumstances likely to threaten the recovery;
that in the present case, the tax collector confined himself to affirming that the seat of the company Missao in Portugal was fictitious, so that a permanent establishment was deemed to exist in France, the VAT then having to be declared and paid in France;

that the company relied on numerous documents which showed that its head office in Portugal was real: information from K Bis, temporary employment agency license, contracts for the lease of occupied premises, payslips for the staff employed, bank guarantee for the activity, telephone and electricity bills, Portuguese social security certificates establishing paid contributions, invoices for IT equipment and technical interventions;

that nevertheless confining itself to asserting that the debate initiated by the company on its head office was different from the present dispute and fell within the scope of the substantive tax dispute, within the jurisdiction of the administrative judge, whereas it had to determine whether the claim of the tax collector appeared to be founded in principle, which involved determining, for the sole purposes of the enforcement procedure, whether or not it had its registered office in Portugal in the light of the circumstances invoked by this company for this purpose, the Court of appeal deprived its decision of a legal basis, having regard to Article L. 511-1 of the code of civil enforcement procedures

2°/ that it explained that the tax collector did not justify, as he should, a claim appearing founded in principle since he admitted that the company had not collected the VAT, but that the client companies which were subject to the VAT had collected it and paid it;

that it appeared that the VAT invoiced by the client companies had been paid, so that there was no fraud and no claim which the tax collector could rely on;

that the court of appeal, in order to reject the request for release of the precautionary attachments, only stated that the company only affirmed that the payment was made by its client companies, without providing any elements confirming its allegations concerning these VAT returns;

that in ruling this way, while the company objectively referred – without being contradicted – to the legal provisions relating to the reverse charge system of the VAT applicable in France from which it followed that the tax collector could not have any further claim, the court of appeal based its decision on inoperative reasons relating to the proof of the VAT declarations of the client companies, thus depriving its decision of the legal basis required in accordance with Article L. 511-1 of the code of civil enforcement procedures;

3°/ that finally, the court of appeal, to reject the request for release of the attachments, observed that the company did not have real estate and bank accounts in France, that the debt was high and that the company had not given information about its Portuguese bank accounts;

that ruling by such reasons improper to characterize a threat to the recovery of the debt, and no risk of insolvency or insufficient guarantee or silence in response to the request from the tax collector justifying that request, the court of appeal has deprived its decision of the legal basis required under Article L. 511-1 of the code of civil enforcement procedures;

But considering, first, that the court of appeal held exactly that the question raised by the company on the registered office and the absence of a permanent establishment, which concerned the territoriality of the VAT, constituted a dispute on the substance of the case, which was different from the evaluation of the existence of a claim founded in principle;

And also considering that, the judgment having held that a debt existed in principle at the time of the presentation of the request since the company had carried out on French territory a commercial activity of temporary work subject to VAT, without submitting the corresponding VAT returns for the period from January 2010 to March 2015, the company's argument concerning a lack of legal basis only tends to call into question the sovereign assessment by the court of appeal of the appearance of a claim founded in principle;

And considering, finally, that having noted that the company did not have in France real estate, nor bank accounts capable of guaranteeing the payment and that it did not communicate any information on the bank accounts which it would have had in Portugal, the court of appeal inferred from this, in the exercise of its sovereign discretion, that the tax collector justified threats likely to weigh on the recovery;

Hence it follows that the plea is unfounded;

FOR THESE REASONS :

The Court of Cassation rejects the appeal

Australia

Federal Court

Deputy Commissioner of Taxation v C.H. and J. H.

16 September 2019

Case number: [2019] FCA 1537

1. Precautionary measures – Application for freezing orders against tax debtor and third party following issue of tax assessments – Where good arguable case – whether danger prospective judgement will be wholly or partly unsatisfied because of prospect of removal of assets from Australia or dissipation of assets – Balance of convenience and interests of justice.
2. Notification of tax claims – Service of originating process – Service outside the jurisdiction – Substituted service – Where service in accordance with the Hague Convention estimated to take 3 or 4 months, whether personal service not practicable.

Summary

1. The Court may make a freezing order for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied. A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

What must be demonstrated is a sufficient likelihood of risk which in the circumstances of the case justifies the making of such an order. The interests of justice and the balance of convenience have to be taken into account.

2. An originating application and accompanying affidavit must be served personally on each respondent named in the application. Service of an originating application on a person in a foreign country is only effective: (a) if the court has given leave to do so in accordance with a convention, the Hague Convention or the law of the foreign country before the application is served; or (b) where leave has not been sought, if the Court confirms service; or (c) the person served waives any objection to service.

Where the person to be served is in a foreign country, it is inappropriate for a court to consider an order for substituted service unless an order has first been obtained for service outside Australia.

In this case, substituted service was accepted, since effecting service under the Hague Convention in Hong Kong would take between three and four months. This delay was not practicable in the circumstances of this case. The term "not practicable" implies (a) that inconvenience is not enough, (b) that it is unnecessary to show that personal service is impossible or would be futile.

File number: NSD 1490 of 2019

Judge: Katzmann J

Orders

Between: Deputy Commission of Taxation, applicant,

and: C. H., First Respondent, and J. H., Second Respondent

Date of order: 16 September 2019

THE COURT ORDERS THAT:

1. The application for interlocutory relief be returnable immediately.

2. Upon the usual undertaking as to damages and upon the undertakings given by the applicant set out in schedule A of the document entitled "Penal Notice", a copy of which is **annexure A** to these orders, a freezing order be made against the first respondent in the terms specified in that document.

3. Upon the usual undertaking as to damages and upon the undertakings given by the applicant set out in schedule A of the document entitled "Penal Notice", a copy of which is **annexure B** to these orders, a freezing order be made against the second respondent in the terms specified in that document.

4. Pursuant to rule 10.43 of the *Federal Court Rules 2011* (Cth) (**FCR**), the applicant have leave to serve the respondents in the People's Republic of China in accordance with the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965 with:

(a) the originating application;

(b) the affidavit of Y. D. sworn 16 September 2019;

(c) Exhibit YD-1;

(d) the applicant's outline of submissions dated 16 September 2019; and

(e) these orders;

(the **Initiating Documents**).

5. Pursuant to FCR 10.24, the Initiating Documents be served on the first respondent on or before 5PM on 17 September 2019 by the following means:

(a) by leaving a copy of the Initiating Documents at HWL E. Lawyers at … Street, Sydney NSW 2000;

(b) by leaving a copy of the Initiating Documents at U. Legal at … Street, Sydney NSW 2000, for the attention of T. U.;

(c) by leaving a copy of the Initiating Documents at D. P. Pty Ltd at … Street, Sydney NSW 2000, for the attention of S. K.;

(d) by leaving a copy of the Initiating Documents together with a copy of these orders at K. at … Avenue, Sydney NSW 2000, for the attention of B. M.

6. Pursuant to FCR 10.24, the Initiating Documents be served on the second respondent on or before 5PM on 17 September 2019 by the following means:

(a) by emailing a copy of the Initiating Documents to …..@gmail.com; and

(b) by leaving a copy of the Initiating Documents addressed to the second respondent at … Street, North Sydney.

7. The Court directs that, upon the undertaking of the applicant to provide a paper copy of exhibit YD-1 to the respondents within three business days of any request to do so, service of exhibit YD-1 may be effected by delivering a copy on a USB drive.

8. The proceedings be adjourned for case management at 9.30AM on 20 September 2019.

9. Liberty to apply on 24 hours' notice.

Annexure A

(…)

Annexure B

(…)

REASONS FOR JUDGMENT

KATZMANN J:

1 C.H., also known as H.X., and J.H. are husband and wife. For several years they lived in Australia and, since 1 February 2013, they were tax residents of Australia. On 4 December 2018 Mr C.H. left Australia bound for the People's Republic of China (**PRC**). Mrs J.H. left on 11 September 2019, also bound for the PRC, presumably to join him. At the time of Mr C.H.'s departure, an audit into Mr C.H.'s income tax affairs was under way. On 11 September 2019, as a result of that audit, the Deputy Commissioner of Taxation issued notices of amended assessment and a notice of assessment of shortfall penalty (**the tax assessment notices**) for a total amount of $140,925,953.98. Five days later, on 16 September 2019 the Deputy Commissioner of Taxation filed an originating application in the Court seeking judgment against Mr C.H. in that amount together with interest. The Deputy Commissioner also applied for freezing orders against the respondents, for leave to serve them outside the jurisdiction, and for substituted service. In addition, the Deputy Commissioner sought urgent interim freezing orders to preserve the status quo.

2 The originating application was supported by an affidavit sworn the same day by Y.D. to which 10 lever arch files were exhibited. Mr Y.D. is employed in the Debt section of the Australian Taxation Office (**ATO**) as Senior Technical Leader of Significant Debt Management.

3 The application for urgent interim freezing orders was made at an ex parte hearing that took place on the day the originating application was filed. The orders sought were substantially in the form in which they appear in Annexure A to Federal Court Practice Note GPN-FRZG. The only significant variation was to remove the provision for an undertaking to provide a security bond, which the Deputy Commissioner contended was unnecessary.

4 After considering the evidence in the affidavit and the submissions, both written and oral, made on behalf of the Deputy Commissioner, I determined that the orders should be made. Given the lateness of the hour when the hearing concluded, however, I indicated I would provide my reasons later. These are those reasons.

Section 1.01 The application for freezing orders

(a) The relevant rules

5 The power to make freezing orders is contained in r 7.32 of the *Federal Court Rules 2011* (Cth) (**FCR** or **Rules**). It provides that:

(1) The Court may make an order (a ***freezing order***), with or without notice to a respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.

(2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.

6 The Court may also make ancillary orders: FCR, r 7.33.

7 Rule 7.35 deals with the circumstances in which the Court may make a freezing order against a judgment debtor or a prospective judgment debtor

and a person other than a judgment debtor or a prospective judgment debtor. It relevantly provides as follows:

(1) This rule applies if:

…

(b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in:

(i) the Court; …

…

…

(4) The Court may make a freezing order or an ancillary order or both against a … prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a … prospective judgment will be wholly or partly unsatisfied because any of the following might occur:

…

(b) the assets of the… prospective judgment debtor or another person are:

(i) removed from Australia or from a place inside or outside Australia; or

(ii) disposed of, dealt with or diminished in value.

(5) The Court may make a freezing order or an ancillary order or both against a person other than a… prospective judgment debtor (a ***third party***) if the Court is satisfied, having regard to all the circumstances, that:

(a) there is a danger that a… prospective judgment will be wholly or partly unsatisfied because:

(i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the… prospective judgment debtor; or

(ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the… prospective judgment debtor; or

(b) a process in the Court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.

(6) Nothing in this rule affects the power of the Court to make a freezing order or ancillary order if the Court considers it is in the interests of justice to do so.

8 Although r 7.36 makes it clear that the Court's "inherent, implied or statutory jurisdiction to make a freezing order" is preserved, the Deputy Commissioner relied only on the power in r 7.35.

(b) The issues

9 The following issues therefore arose:

(1) Does the Deputy Commissioner have a good arguable case on a prospective cause of action that is justiciable in the Court?

(2) Is there a danger that the prospective judgment will be wholly or partly unsatisfied because Mr C.H.'s assets are disposed of, dealt with or diminished in value?

(3) Is there such a danger because Mrs J.H. holds, is using, has exercised, or is exercising a power of disposition over assets of her husband?

(4) Do the interests of justice and the balance of convenience favour the making of the orders?

10 Before dealing with these issues, it is necessary to refer to some matters of fact established by the evidence.

(c) Some relevant background facts

11 Mr C.H. is a citizen of the PRC.

12 Mr C.H. has been conducting business in the PRC since the 1980s. The H. family's business focusses on property development and investments in various industries. In 2006 Mr C.H. established the S.Y. group of companies. According to a response to a request for information prepared by K. on his behalf in February 2017, he accumulated "significant personal wealth" in the PRC before moving to Australia in 2013. The K. response indicated that Mr C.H. continued to exercise a significant measure of ownership and/or control over 10 corporate entities in the PRC and owned 100% of three Hong Kong based companies, although he asserted that none of those three entities had ever traded.

13 The evidence disclosed that from April 2011, Mr C.H. was appointed a director of 20 Australian companies. He was also an appointor or beneficiary of a number of Australian resident trusts.

14 The records of the H. Family Trust show that as at 30 June 2018 loans owing to the H. Family Trust exceeded $165 million. While the last recorded creditor is named only as "unitholder", the previous recorded creditor in an amount of over $108 million, is named as Mr C.H.. Information acquired during the course of the audit indicates that that debt was not repaid. The loans appear to have been made to some of those Australian companies and trusts. The financial statements for the A. Family Trust, for example, record a loan from Mr C.H. of nearly $12 million.

15 Mr C.H. has cash in numerous accounts with several Australian and overseas banks. The present

value of those accounts, however, is currently unknown.

16 Mr C.H. also has substantial real estate holdings.

17 On 31 March 2007 he acquired a property in Hong Kong with an estimated value of HKD25,861,500 (approximately AUD3,711,311). On 18 September 2015 he purchased a unit in Chatswood, NSW with an estimated value of $3,428,258. On 14 April 2016 he purchased a house in Chatswood, NSW with an estimated value of $3,275,128. As far as the evidence shows, none of these properties is subject to a mortgage.

18 According to his last income tax return lodged with the ATO on 13 December 2018 he last resided in Australia at a property in … Street Mosman, NSW (**the Mosman property**). The Mosman property was purchased in the name of Mrs J.H. for the sum of $12,800,000. Settlement took place on 29 January 2013. It is unencumbered.

19 In addition to the Mosman property, Mrs J.H. is also the owner of a property in Hong Kong which she purchased in about December 2018 for the amount of HKD520,000,000 (approximately AUD96,000,000). This, too, is apparently unencumbered.

20 In January 2016 the Deputy Commissioner began a comprehensive risk review of Mr C.H.'s taxation affairs, covering the three income years ending 30 June 2013, 30 June 2014 and 30 June 2015. On 4 October 2017 the risk review was escalated to an audit.

21 On 18 March 2016, after the risk review had started, Mr C.H. resigned as a director of one of the Australian companies. On 16 January 2018, after the audit had started, he resigned as a director of another. On 12 November 2018, while the audit was still under way, he resigned as a director of 16 of the Australian companies and on 20 December 2018 he resigned as a director of another. So by 21 December 2018, Mr C.H. had removed himself as a director of all but one of the Australian companies.

22 On 9 March 2019, by consent, Mr C.H. was removed as a beneficiary of the H. Family Trust, the Y. Investment Trust, the A. Family Trust, and the X. Family Trust. The same day he was also removed by consent as the appointor of the last three of those trusts.

23 As I have already noted, Mr C.H. left Australia for the PRC on 4 December 2018. The following day his visa was cancelled pursuant to s 128 of the *Migration Act 1958* (Cth). On 18 December 2018 he withdrew an application he had made for Australian citizenship. The evidence indicates that he has not made any application for the issue of a new visa. It is likely that he now resides in Hong Kong.

24 AUSTRAC records show that between January 2016 and August 2019 Mr C.H. transferred tens of millions of dollars into and out of Australia. That evidence shows a substantial excess of monies going out compared to monies coming in. It also shows that the amount of money transferred out of Australia since December 2018 exceeds the amount coming in by $46,749,253, nearly twice as much as the previous year.

25 The tax assessment notices were issued on 11 September 2019 at the same time the Deputy Commissioner issued reasons for her decisions. The due date for payment is 7 October 2019.

26 On 13 September 2019, a certificate under s 255-45 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**) was issued by the Commissioner through his delegate. The certificate was signed by M.S., Deputy Commissioner of Taxation and delegate of the Commissioner of Taxation. It specified that Mr C.H. had a tax-related liability as a result of a number of amended and other assessments listed in the notice, that certain specified notices were or were taken to have been served on him, and that he has a debt of $140,925,953.98 due to the Commonwealth as a tax related liability. A tax-related liability is defined in the TAA to mean "a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable)".

27 Upon service of the tax assessment notices, the Deputy Commissioner caused 39 notices to be issued under s 260-5 of the TAA. The recipients include Mrs J.H, Ji.H. (the son of Mr C.H. and Mrs J.H.), Australian banks, and Australian companies and trusts with which Mr C.H. was or remains involved. A s 260-5 notice is a statutory garnishee notice issued by the Commissioner to a third party who owes or may later owe money to a debtor.

28 Based on his experience working in this area, Mr D. is concerned that, upon being informed of the substantial amounts of tax, penalties and interest to which Mr C.H. has now become liable, Mr C.H. and his wife may take steps to encumber or otherwise dispose of their assets and thereby frustrate the Deputy Commissioner's proceedings for the recovery of the tax liability. In particular, he is concerned that the capacity of the Deputy Commissioner to recover the amounts due would be compromised for the following reasons.

29 *First*, by "grossly understating" income he received for the 2013 to 2015 income tax years, Mr C.H. has evinced an intention not to pay income tax.

30 *Second*, Mr C.H.'s financial affairs are complex and his assets and those held in the name of his wife "are amenable to being encumbered or disposed of before there could be any real investigation into [the] availability of those assets to satisfy [the Deputy Commissioner's] prospective judgment".

31 *Third*, Mr C.H.'s primary business interests and wealth exist outside Australia and the Commissioner may be delayed or hindered in taking recovery action outside Australia, assuming that course is available.

32 *Fourth*, Mr C.H. has demonstrated an ability to quickly move large sums of money outside Australia.

33 *Fifth*, the substantial size of the tax debt, in combination with the cancellation of Mr C.H.'s visa, gives him and his wife a significant incentive to dissipate assets or encumber them and to remove property from Australia.

34 Mr D. also deposed that a prospective judgment obtained against Mr C.H. was unlikely to be enforceable in either mainland China or Hong Kong. He stated that, although he was aware from the Council of Europe's website that the PRC and Hong Kong were parties to the *Convention on Mutual Administrative Assistance in Tax Matters*, he was also aware that:

> [I]n the instrument of ratification deposited with the Secretary General of the OECD, on 16 October 2015, with respect to Article 30, paragraph 1.b, of the Convention, the People's Republic of China reserved that it shall not provide assistance in the recovery of tax claims, or in conservancy measures, for all taxes. (The period covered is 01/02/2016 - present).

35 Moreover, with respect to Hong Kong, Mr D. said that, by a letter from the Chinese ambassador to France dated 28 May 2018, registered at the Secretariat of the OECD on 29 May 2018, the Government of the PRC declared that the reservation made by the PRC shall apply to Hong Kong.

(d) Does the Deputy Commissioner have a good arguable case on a prospective cause of action that is justiciable in the Court?

36 Without doubt, the Deputy Commissioner has a good arguable case on her prospective cause of action that is justiciable in the Court.

37 "A good arguable case" is one which is "reasonably arguable on legal and factual matters": *Insolvency Guardian Melbourne Pty Ltd v Carlei* (2016) 111 ACSR 236; [2016] FCA 72 at [18] (Edelman J); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [68] (Gaudron, McHugh, Gummow and Callinan JJ).

38 Copies of the tax assessment notices were included in volume 1 of the exhibit to Mr Deng's affidavit. They were summarised in a table in the affidavit:

Income Year:	Amended Taxable Income	Shortfall amount of income tax assessed	Shortfall Penalties	SIC:	Increase in liability following Audit:
2013	$10,863,286	$4,894,867.05	$2,447,433	$1,535,944.20	**$8,878,244.25**
2014	$124,413,338	$57,862,280.25	$28,931,140	$13,984,713.58	**$100,778,133.83**
2015	$38,132,677	$18,472,535.95	$9,236,267	$3,150,416.91	**$30,859,219.86**
TOTAL	**$173,409,301**	**$81,229,683.25**	**$40,614,840**	**$18,671,074.69**	**$140,515,597.94**

"SIC" is an acronym for shortfall interest charges.

39 By Sch 1 s 350-10 item 2 of the TAA, the production of a notice of assessment is conclusive evidence that the assessment was properly made and, except in proceedings under Pt IVC of the TAA on a review or appeal relating to the assessment, it is conclusive evidence that the amounts and particulars of the assessment are correct. The validity of an assessment is not affected by a failure to comply with any provision of the *Income Tax Assessment Act 1936* (Cth) (**ITAA**): ITAA, s 175; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [24], [67] (Gummow, Hayne, Heydon and Crennan JJ). Nor is the validity of an assessment of an assessable amount affected by non-compliance with the TAA or any other taxation law: TAA, s 155-85.

40 Moreover, a certificate signed by the Commissioner, a Second Commissioner or a Deputy Commissioner stating that a person named in it has a tax-related liability is prima facie evidence of the matter in a proceeding to recover the amount of the liability: TAA, s 255-45. The certificate signed by the Deputy Commissioner satisfies the terms of that section.

41 A cause of action in debt accrues to the Commissioner against a taxpayer upon service of a notice of assessment: *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 251–2 (Kitto J). Section 14 of the *Taxation Administration Regulations 2017* (Cth) permits the Commissioner to serve a document on a person for the purposes of the taxation laws by various means, including leaving a copy of the document at a physical address and posting a copy of the document to a postal address if the person has given a preferred address for service, defined in s 15, that answers that description. Service could also be effected by leaving the documents at the residential address last known to the person serving the documents: *Acts Interpretation Act 1901* (Cth), s 28A(1)(a).

42 The evidence is that on 12 September 2019 copies of the tax assessment notices were placed in a sealed envelope, marked with a priority label, and posted to Mr C.H. care of D. P.'s post office box address, which was his preferred address for service within the meaning of the Regulations and left by an employee of the ATO at his last known residential address, being the Mosman property.

43 While due service of a notice of assessment is a condition precedent to the creation of a liability to pay the tax assessed (*Federal Commissioner of Taxation v Naidoo* (1981) 55 FLR 245 at 256 per Everett J), even if service is invalid, the issuing of the tax assessment notices gives the Deputy Commissioner a prospective cause of action in debt against Mr Huang as the prospective judgment debtor: *Deputy Commissioner of Taxation v* ***Hua Wang Bank*** *Berhad* (2010) 273

ALR 194; 80 ATR 449; [2010] FCA 1014 at [18] (Kenny J).

44 Finally, the Commissioner or the Deputy Commissioner may sue in a court of competent jurisdiction to recover any tax liability that is due to the Commonwealth and payable to the Commissioner: TAA, Sch 1, s 255-5. This Court is such a court; it has original jurisdiction, amongst other things, in a matter arising under a law of the Commonwealth Parliament: *Judiciary Act 1903* (Cth), s 39B(1A)(c). Taxation assessments owe their existence to federal law and depend upon federal law for their enforcement: *Deputy Commissioner of Taxation v Vasiliades* (2014) 323 ALR 59; (2014) 99 ATR 799; [2014] FCA 1250 at [42] (Gordon J).

45 It follows that the Deputy Commissioner has a good arguable case and her cause of action is justiciable in this Court.

(e) Is there a danger that the prospective judgment will be wholly or partly unsatisfied because Mr C.H.'s assets might be removed from Australia or disposed of, dealt with or diminished in value?

46 As I observed in *Deputy Commissioner of Taxation v Advanced Holdings Pty Ltd* [2018] FCA 1263 at [23]:

> The purpose of an order of this kind is to prevent an abuse or frustration of the court process by depriving the applicant of the fruits of the action: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625 (Deane J). Something more than a bare assertion is required: *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft and Co KG (The Niedersachsen)* [1983] 1 WLR 1412 at 1419; [1984] 1 All ER 413 at 417 (Kerr LJ). It is "no light matter" to impose a freeze on the assets of a person so courts must be sensitive to the need for caution: *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 324F (Gleeson CJ). Indeed, a freezing order has been aptly described as "a drastic remedy" which should not lightly be granted: *Frigo v Culhaci* (unreported; NSW Court of Appeal, 17 July 1998) at 10–11 (Mason P, Sheller JA and Sheppard AJA), cited with approval by the plurality in *Cardile* at [51].

47 Here, there was no direct evidence that Mr C.H. intends to divest himself of his Australian assets or diminish them in value for the purpose of avoiding his tax liability or frustrating the court process. But direct evidence of such an intention is unnecessary. There may still be a danger that the prospective judgment will be wholly or partly unsatisfied even if intention cannot be established. It is enough that there is a danger that the assets could be dissipated which would have the effect of frustrating the court process: *Hua Wang Bank* at [10]; see also *Deputy Commissioner of Taxation v* ***Chemical Trustee*** *Ltd (No 4)* [2012] 90 ATR 711; FCA 1064 (Perram J) at [23].

48 Nonetheless, the danger must be established by evidence. Depending on the circumstances, however, the interests of justice may support the grant of a freezing order to prevent the dissipation of assets pending the hearing of an action although the risk of dissipation is less probable than not. What must be demonstrated is a sufficient likelihood of risk which in the circumstances of the case justifies the making of such an order. See *Hua Wang Bank* at [9].

49 Based on the evidence given by Mr D., for the following reasons taken together, I was satisfied that there is a danger that the prospective judgment will be wholly or partly unsatisfied because Mr C.H.'s assets might be removed from Australia or disposed of, dealt with or diminished in value.

50 *First*, at over $140 million the size of his tax liability is considerable.

51 *Second*, although there is no direct evidence that he intended to divest himself of his Australian assets or diminish them in value, the results of the audit indicate an intention to avoid paying tax by grossly understating income.

52 *Third*, Mr C.H. is a Chinese national, currently overseas, without an Australian visa who, since November 2018, has taken a number of steps towards severing his ties to Australia.

53 *Fourth*, Mr C.H.'s Australian assets do not seem to be enough to satisfy the tax liability. The problem will be exacerbated if those assets are removed from Australia or sold and the proceeds moved offshore. Although Mr C.H. is owed money by entities with which he was formerly associated, it is unknown when the loans fall due or whether the borrowers will ever repay them.

54 *Fifth*, Mr C.H. is likely to be a person of substantial wealth having regard to the transfers of monies into and out of Australia between January 2016 and August 2019 and the number of foreign companies which he apparently controls. He has significant business interests in the PRC, including Hong Kong, and the structures and operations to allow him to easily move assets between jurisdictions.

55 These circumstances demonstrate that Mr C.H. has both a motive and the means to dissipate his Australian assets. In this respect his position is similar to the position of the respondent in *Chemical Trustee*. These circumstances alone were sufficient to persuade Perram J that there was a danger of dissipation, notwithstanding the absence of evidence of an intention to dissipate and even though earlier freezing orders had been obeyed: *Chemical Trustee* at [24]-[27].

56 *Sixth*, Mr C.H. has already taken steps to divest himself of his interest in Australian companies and trusts. Although he transferred money overseas before he was aware that he was under investigation by the ATO, since the audit began the amount of money transferred offshore increased dramatically.

57 *Seventh*, as the Deputy Commissioner submitted, the issue of the tax assessment notices increases the likelihood of dissipation. What Perry J said of the respondent in *Deputy Commissioner of Taxation v Ghaly* [2016] FCA 707 at [37], might just as well be said of Mr H.:

> [T]he seriousness of his position is now immediate and real given the issue of the assessments, the provision of the Deputy Commissioner's reasons for decision disbelieving his explanations and the size of the liabilities. This suggests that the danger that assets might be dissipated is greater than when the initial review began.

(f) Is there such a danger that the prospective judgment will be wholly or partly unsatisfied because Mrs J.H. holds, is using, has exercised, or is exercising a power of disposition over assets of her husband?

58 A freezing order is also sought against Mrs J.H. under r 7.35(5). It relates only to the Mosman property. The Deputy Commissioner submitted that she has a reasonably arguable case that Mr C.H. has a beneficial interest in the Mosman property on a resulting trust, where there is a proper basis to infer that Mr C.H. contributed a significant part (in excess of $6 million) of the monies used by Mrs J.H. to purchase the Mosman property. The basis for the argument is that the Mosman property was purchased unencumbered in the sum of $12,800,000. Yet Mrs J.H. described her occupation as "housewife" and her declared annual income at the time of purchase was less than $100,000.

59 Where a husband makes a purchase in the name of his wife, there is a presumption that a resulting trust arises in his favour: ***Calverley*** *v Green* (1984) 155 CLR 242 at 247 (Gibbs CJ). Where both husband and wife contribute to the purchase, then in the absence of evidence to the contrary it is presumed that they intended to be joint beneficial owners, regardless of whether the purchase is in their joint names or the name of one only. This is an application of the same principle: see *Pettitt v Pettitt* [1970] AC 777 at 815 (Lord Upjohn), cited with approval by Mason and Brennan JJ in *Calverley* at 259.

60 Furthermore, in *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at [71] the High Court accepted the following proposition:

> Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them.

61 Although it is far from certain that Mr C.H. was the source of any, let alone all of the funds, the evidence raises a prima facie case, at least, that Mr C.H. made a significant financial contribution to the purchase of the property.

62 *First*, the relationship between Mr C.H. and Mrs J.H. as well as Mr C.H.'s capacity to pay indicates that he is a likely, if not the most likely, source of the funds.

63 *Second*, the evidence indicates that on 10 May 2012 a transfer of $1,000,030 was made from an account held by the Bank of Queensland in Mr C.H.'s name, described as "transfer to current acct" into a Bank of Queensland account in Mrs J.H.'s name and withdrawn the same day. The balance in Mrs J.H.'s account remained around $440,000 until 19 October 2012, when a credit transfer of $490,606.43 was recorded in her bank statement. The same day the same amount was debited from Mr C.H.'s account and described as "transfer to current acct". Thereafter, until the day of the settlement of the purchase of the Mosman property, the balance of Mrs J.H.'s account was around $930,000.

64 There is also evidence of other deposits of substantial sums into Mrs J.H.'s Bankwest accounts five days before the settlement, but the source or sources have not yet been identified.

65 On 29 January 2013, the day of the settlement, the amount of $900,010 was withdrawn from Mrs J.H.'s Bank of Queensland account. The transaction is described as "withdrawal property purchase". In addition, Mr C.H.'s ANZ bank account shows three withdrawals on the same day totalling $5,856,808.31. Although the evidence does not indicate a transfer into an account in Mrs J.H.'s name and the description is merely "card entry at Chatswood (382) branch", it would be a remarkable coincidence if this sum was not applied to the settlement of the Mosman property.

66 For these reasons, despite the uncertainty surrounding some of the transfers, I accepted that there is a reasonably arguable case that Mr C.H. contributed to the purchase of the Mosman property and therefore has a substantial beneficial interest in it. It follows that I accepted that the Mosman property is likely to be an asset of both Mr C.H. and his wife. Having regard to all the circumstances, I was satisfied that there is a danger that the prospective judgment will be wholly or partly unsatisfied because Mrs J.H. holds a power of disposition over that property. If not restrained by Court order, there is a real risk that Mrs J.H. could take steps to sell or encumber the

property and thereby diminish the amount of money available to discharge the prospective judgment debt.

(g) Do the interests of justice and the balance of convenience favour the making of the orders?

67 For the following reasons, both the interests of justice and the balance of convenience favoured the making of the orders.

68 In *BGC Contracting Pty Ltd v WA Construction Hire Pty Ltd* [2010] WASC 25 at [22] Le Miere J observed that:

> Having regard to the nature of the remedy, once the other prerequisites are made out and subject to any other discretionary factors, the balance of convenience will almost inevitably lie in favour of the grant of the order, because the potential damage to the plaintiff of being unable to satisfy the judgment will outweigh the inconvenience to the defendant of being subjected to a properly drawn freezing order …

69 In the present case, several factors weighed in favour of the making of the orders.

70 *First,* the Deputy Commissioner appears to have a strong case for final relief.

71 *Second,* the amount of the tax liability is considerable and there is a real danger that, without the freezing orders, assets will be removed from Australia or otherwise dissipated.

72 *Third*, since the prospective judgment is not likely to be enforceable against Mr C.H. in the PRC, including in Hong Kong, it is critical that the Australian assets be preserved.

73 *Fourth*, the orders are limited, in Mr C.H.'s case to the amount of the tax debt and in his wife's case to the amount she could recover from the sale of the Mosman property.

74 *Fifth,* the Deputy Commissioner gave the usual undertaking as to damages as well as all but one of the standard form undertakings in Practice Note GPN-FRZG.

75 On the other hand, the Commissioner has taken steps to collect the tax-related liability by issuing the s 260-5 notices. In circumstances such as the present, where a person has a tax-related liability, s 260-5 imposes an obligation on the third party to pay money to discharge the tax debt. If the third party fails to pay the money to the Commissioner by the time stipulated in the notice, the Commissioner may recover the amount owing from the third party by an action in debt: *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at [51]; *Federal Commissioner of Taxation v Barnes Development Pty Ltd* (2009) 178 FCR 352 (Gilmore J) at [18]–[35]. As the Commissioner acknowledged, the availability of an alternative effective remedy could be a reason for refusing to make a freezing order.

76 Be that as it may, the weight to be attached to this circumstance is limited, given that the Commissioner does not know at this stage what amount of money is held by the recipients of, and which will be caught by, the s 260-5 notices. Further, the Commissioner's searches reveal that several of the respondents to whom s 260-5 notices were issued hold real property and s 260-5 notices do not operate in respect of real property. In any case, as the Deputy Commissioner pointed out, at a future return date, the value of assets caught by the freezing orders against the recipients of the s 260-5 notices can be adjusted to the extent of any recovery under those notices.

77 Finally, I was satisfied that the form of the orders ultimately sought was appropriate. Given the identity of the applicant, I accepted that a security bond was unnecessary. As counsel for the Deputy Commissioner put it, "the Commissioner is good for the money".

78 I should point out that in her originating application the Deputy Commissioner applied for an ancillary order for the disclosure of assets and arguments in support of that application were advanced in the written submissions. Since the proposal was to bring the matter back before the Court within days, counsel fairly acknowledged that it was unreasonable to expect Mr C.H. to be able to comply with the order in the meantime. If the application is pressed, it can be dealt with at the next or a later return date.

Section 1.02 Service of the originating application and supporting documents

(a) Service generally

79 An originating application and accompanying affidavit must be served personally on each respondent named in the application: FCR, r 8.06. The Court may extend or shorten the time for service: FCR, r 1.39.

80 Rule 10.43(1) provides that service of an originating application on a person in a foreign country is only effective:

(a) if the Court has given leave to do so in accordance with a convention, the Hague Convention or the law of the foreign country before the application is served; or

(b) where leave has not been sought, if the Court confirms service; or

(c) the person served waives any objection to service by filing a notice of address for service without also making an application to set aside the originating application or service of that application.

81 Rule 10.24 provides that if it is not practicable to serve a document on a person in a way required by the Rules, amongst other things, a party may apply to the Court without notice for an order substituting another method of service.

82 Rule 1.34 enables the Court to dispense with compliance with any of the Rules.

83 In her written submissions the Deputy Commissioner submitted that the Court should grant leave to serve the documents outside Australia, order that service outside Australia "be deemed"; and make orders for substituted service. Her purpose was to ensure that the Court's orders were brought to the attention of Mr C.H. and Mrs J.H. as soon as possible.

84 The evidence suggests that Mr C.H. and Mrs J.H. now reside in the PRC, probably in Hong Kong. Substituted service was sought on the basis that effecting service, in compliance with the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at The Hague on 15 November 1965 (**Hague Convention**), would cause unnecessary and lengthy delay.

(b) Service outside Australia

85 Notwithstanding the terms of r 10.24 and the Court's general power to dispense with compliance with any of the Rules, I observed in *Commissioner of Taxation v* ***Zeitouni*** [2013] FCA 1011 at [26] that there is a line of authority to the effect that where the person to be served is in a foreign country, it is inappropriate for a court to consider an order for substituted service unless an order has first been obtained for service outside Australia. In *Zeitouni* I followed these authorities and held that the Commissioner was obliged to obtain leave from the Court to serve the respondents outside the jurisdiction before an order for substituted service could be made. There is no need to canvass the reasons here or to refer to those authorities. Counsel for the Deputy Commissioner accepted that this was the correct approach and proceeded to seek leave under Div 10.4 of the Rules.

86 To obtain an order for leave to serve a person in a foreign country, r 10.43(4) requires that the Deputy Commissioner satisfy the Court that:

(a) that the Court has jurisdiction in the proceeding;

(b) that the proceeding is of a kind mentioned in r 10.42; and

(c) the party has a prima facie case for all or any of the relief claimed in the proceeding.

87 The application must be accompanied by an affidavit that includes the name of the relevant foreign country, the proposed method of service and that the proposed method of service is permitted by a convention, the Hague Convention or the law of the foreign country: FCR, r 10.43(3). The evidence adduced by the Deputy Commissioner satisfied these requirements.

88 I granted leave for the following reasons.

89 *First*, for the reasons given at [44] above, this Court had jurisdiction.

90 *Second*, this is a proceeding of a kind mentioned in r 10.42. It falls within several items in the table within the rule. Amongst other things, it is based on a cause of action arising in Australia (item 1) and an injunction is sought ordering a person to do, or to refrain from doing, anything in Australia (item 23).

91 *Third*, for the reasons given at [36]–[45] above, the Deputy Commissioner has a prima facie case for relief.

(c) Substituted service

92 Mr D. deposed that to effect service on the respondents in Hong Kong it would be necessary to serve them in accordance with the requirements of the Hague Convention, to which Australia and the PRC are both signatories.

93 The evidence was that effecting service under the Hague Convention in Hong Kong would take between three and four months. The Deputy Commissioner submitted that a delay of between three or four months to effect service in accordance with the Hague Convention was not practicable in the circumstances. She said the intention of seeking leave for substituted service was to ensure that the orders could be brought to the attention of the respondents as soon as possible. This would minimise the possibility of the respondents being unaware of the proceedings and inadvertently acting in a manner inconsistent with the freezing orders.

94 In *Electrolux Home Products Pty Ltd v Delap Impex Ltd* [2013] FCA 600 at [72]-[78] and *Zeitouni* at [66]–[71] I considered the meaning of "not practicable". In short, while inconvenience is not enough, it is unnecessary to show that personal service is impossible or would be futile. In *Commissioner of Taxation v Regent Pacific Group Limited* [2013] FCA 36 at [26] Siopis J considered that personal service was not practicable, having regard to the "Draconian nature" of freezing and associated interlocutory orders, where it is important that the orders be brought to the attention of the respondents as quickly as possible to give them the chance at the earliest opportunity to oppose the continuation of the orders.

95 The same considerations apply here.

96 The Deputy Commissioner proposed several methods for substituted service designed to ensure that the documents came swiftly to the attention of the respondents. With the exception of one method (leaving the documents at the Mosman property), which, for good reason, was abandoned, all were eminently sensible.

The Netherlands

Council of State

3 April 2019

Case number: 201805065/1/A3;
ECLI:NL:RVS:2019:1040

Deterrent measures – Freedom to travel – Refusal to provide a passport - Justification

Summary

The refusal to provide a passport was justified. The debtor was not sufficiently active in paying and there was no payment arrangement; the appellant did not provide an address on departure abroad; there was a well-founded suspicion that the appellant would withdraw from her tax obligation by staying in the UK; it was not shown that the appellant had attempted to be released from her debt.

There was no violation of the European Convention of Human Rights nor of European Union law.

Facts

By decision of 27 June 2016, the Minister has rejected the Appellant(s request for a Dutch passport.

By decision of 6 November 2017, the Minister declared the Appellant's objection unfounded.

By judgment of 7 May 2018, the court dismissed the appeal by the Appellant as unfounded.

The Appellant appealed against that decision.

The minister has given a written explanation.

This Council of State dealt with the case at the hearing on 11 March 2019 (…)

Introduction

2. The Appellant was born on [..-..- ....] in [City] and has the Dutch nationality. According to the passport application form, she has been living in the United Kingdom since 2005. She was deregistered from the registers of the municipality of Rotterdam on 2 April 2007 due to emigration with unknown destination.

On 23 May 2016, she applied for a Dutch passport at the Dutch embassy in London. In the context of this application, it has been established that the personal data of the Appellant are signaled in the Passport Signals Register of the National Service for Identity Data (hereinafter: RID) at the request of the municipality of Rotterdam, due to the existence of a debt of € 27,467.16.

Decision

3. The minister refused to provide a Dutch passport to the Appellant. The Minister has taken this decision on the basis that the ground for refusal with regard to the Appellant still exists, because the Appellant has not (fully) complied with her payment obligation and that her personal data are still stated in the RID. Within the eight-week period referred to in Article 44 (4) of the Passport Act, the Minister has not received any notification from the municipality of Rotterdam that an agreement has been reached with the Appellant, as referred to in Article 45 (1) of that Act. Finally, according to the Minister, the Appellant is not disproportionately disadvantaged by the refusal.

Appeal

- *Well-founded suspicion*

4. The Appellant argues that the court has disregarded the fact that there is no well-founded suspicion that she will withdraw from the collection of her debt by her stay in the United Kingdom. To that end, she argues that the possibilities for recovery in the United Kingdom are not more limited. She refers in this regard to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

4.1. A refusal of a travel document can only take place on the basis of Article 22 of the Passport Act if there are reasonable grounds for suspecting that a person, by staying outside the boundaries of one of the countries of the Kingdom of the Netherlands, will withdraw from the legal options for recovery of the debts mentioned in Article 22 of the Passport Act. The history of the creation of Article 22 of the Passport Act (Parliamentary Papers II 1987/88, 20 393, no. 3, pages 42-44) also shows that if the person has already established himself abroad, the well-founded suspicion may exist that he will evade the legal options for recovering the debts mentioned in Article 22.

Now that the Appellant lives in the United Kingdom and there are no certainties that she will pay the debt (in full), the court has rightly found no reason to believe that the Minister was not allowed to take the view that such a suspicion was justified. It is taken into account that she has not been sufficiently active in paying and there is no payment arrangement. The argument of the Appellant that is based on the aforementioned Regulation does not lead to a different

conclusion. The decisive factor is that the Appellant did not provide an address on departure abroad.

The argument fails.

- *Disproportionate disadvantage*

5. Furthermore, the Appellant argues that the court wrongly failed to recognize that she is disproportionately disadvantaged by the refusal to provide her with a passport. To that end she argues that the fact that no agreement has been reached with the municipality is not due to her fault. In her view, it is the municipality that did not take account of her attempts to fulfill her payment obligation. According to the Appellant, the municipality has submitted an unrealizable proposal to her. She states that she has insufficient capacity to meet the municipality's request to pay off a substantial part of the debt in one go.

5.1. Now that the Minister has taken the position, as has been considered above, that there is a well-founded suspicion that the Appellant will withdraw from the debt by staying in the United Kingdom, and that the Minister has not received a notification as referred to in Article 45, first paragraph, of the Passport Act, he must, pursuant to article 45, second paragraph, of the Passport Act, refuse to provide a passport, unless he is of the opinion that the Appellant is thereby disproportionately disadvantaged.

There is no basis for the opinion that the Appellant is disproportionately disadvantaged by the rejection of her request to provide a passport. If her financial capacity, as she claims, is an obstacle to reaching an agreement with the municipality on the payment of the debt, she could request the competent court to change her obligations, or to release her from this debt. It has not been shown that she has attempted this. The court has rightly seen no ground for the opinion that the Minister wrongly had the consequences of the lack of agreement with the municipality borne by the Appellant, by refusing to issue the passport. This conclusion is not affected by the fact that the Appellant does wish to fulfill the payment obligation and that she has contacted the municipality to make a payment arrangement. After all, no payment arrangement has yet been reached. The court has therefore rightly found no basis for the opinion that the Minister was not allowed to take the position that the Appellant is not disproportionately disadvantaged by the refusal.

This argument is also unsuccessful.

- *European Convention of Human Rights (ECHR)*

6. The Appellant argues that the court has wrongly considered that the refusal to provide her with a passport did not violate her right to leave the country and her right to respect for private, family and family life, as referred to in Article 2 (4) of the Constitution, Article 2, paragraphs 2 and 3, of the Fourth ECHR Protocol, Article 4 (read: 3), paragraph 1, of the Fourth ECHR Protocol and Article 8 of the ECHR. To that end, she argues that the refusal of a travel document constitutes an interference with those rights. According to the Appellant, this interference does not serve a legitimate purpose and is not necessary in a democratic society. In her opinion, the restriction is also disproportionate in the light of the intended target criterion.

6.1. It follows from the case law of the European Court of Human Rights (Stamose v. Bulgaria, 27 November 2012, no. 29713/05, ECLI: CE: ECHR: 2012: 1127JUD002971305, Riener v. Bulgaria, 23 May 2006, no. 46343/99 , ECLI: CE: ECHR: 2006: 0523JUD004634399, and Gochev v. Bulgaria, November 26, 2009, no. 34383/03, ECLI: CE: ECHR: 2009: 1126JUD003438303) that the right to leave a country can be limited by the law if the restriction has a legitimate purpose, is necessary, proportional and not unlimited in duration and an individual assessment is made when the restriction is imposed. This Council of the State is of the opinion that this condition has been met in the case of the Appellant. In this regard, it is considered important that the alert is reassessed every two years, that the Appellant can always request a passport and that the Minister is not obliged to refuse or that he can issue a passport with a limited (territorial) validity if the Appellant has serious interests legitimating her travel to a certain country. In addition, the Appellant can travel in the EU with her Dutch identity card, as considered in point 7.2. The argument raised by the Appellant in this context does not provide a basis for a different opinion.

6.2. Insofar as the refusal to provide a passport to the Appellant under the given circumstances is already an interference with the right to a family life laid down in Article 8 of the ECHR, that interference is allowed in this case, in accordance with the second paragraph of that article. The possibility of refusal has been created in the Passport Act in the interests of national security, public security or the economic well-being of the country, the prevention of disorderly and criminal offenses, the protection of health or morality or for the protection of the rights and freedoms of others. It has not been shown that it is not possible for the Appellant to have contact with her relatives in Sudan. The Minister was allowed to consider that the interest in refusing the passport outweighed that of the Appellant to be able to maintain contact with her relatives in Sudan in the way she desired. The court has rightly acknowledged this.

The argument fails.

- *Union law*

7. In addition, the Appellant argues that the court has wrongly disregarded that the refusal to provide her with a passport is contrary to EU law, in particular the free movement of persons. The Appellant argues that

the United Kingdom's exit from the European Union is no longer a future uncertain event. This will happen on March 29, 2019. This has disproportionate consequences for her right of residence in the United Kingdom and is therefore contrary to the principle of proportionality. The Appellant suggests that this Council of State Department should refer questions to the Court of Justice for a preliminary ruling in this regard.

7.1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. Under Article 4 (1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of free movement and residence within the territory of the Member States for the Union citizens and their family members, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158), a Union citizen with a valid identity card has the right to leave the territory of a Member State in order to enter another Member State.

7.2. Refusing to provide a passport to the Appellant does not deny her right to move freely within the territory of the Member States of the European Union. The Appellant is in possession of a Dutch identity card that cannot be declared invalid in view of Article 46a of the Passport Act. With that identity card she can reside in the United Kingdom, so her right of residence in the United Kingdom is not at stake. The position taken by the Appellant in the appeal case, that it will be different when the United Kingdom no longer belongs to the European Union, was rightly not followed by the court, because this was a future uncertain event at the time of the decision challenged before the court. The argument raised by the Appellant in the appeal case cannot help her. As the Minister explained at the session of this Council of State, the Appellant will retain the same rights in the United Kingdom until 31 December 2020. It also follows from the rules currently in force in the United Kingdom that before 31 December 2020, with her Dutch identity card, she can apply in the United Kingdom for a status under which she can continue to live and work in the United Kingdom after that date. In view of the judgment of the Court of 6 October 1982, Cilfit, ECLI: EU: C: 1982: 335, paragraph 16, there is no reason to refer questions for a preliminary ruling, as suggested by the Appellant, since there is no reasonable doubt as to how the question on the relevant EU law rule must be answered.

This argument also fails.

Conclusion

The appeal before this Council of State is unfounded.

(…)

Belgium

Supreme Court (Cassation)

D. vs Customs authorities

14 December 2018

Case number: F.14.0057.N.

Interest – Delay in payment of customs duties partly due to the fault of the customs authorities – Default interest not entirely to be charged to the debtor

Summary

If the court finds that the delay in payment is partly due to the fault of the creditor (the customs authorities), the default interest, which compensates the delay in the payment on a flat-rate basis, cannot be entirely charged to the debtor.

(...)

3. Pursuant to Article 1153 (1) of the Civil Code, with regard to obligations that only relate to the payment of a specific sum of money, compensation for delay in implementation never exists in anything other than the statutory interest, subject to the exceptions provided for by law.

Pursuant to Article 1153 (2) of the Civil Code, that compensation is due without the creditor having to prove any loss.

4. The delay referred to in those provisions is that due to the debtor's fault.

If the court finds that the delay in payment is partly due to the fault of the creditor, the default interest, which compensates the delay in the payment on a flat-rate basis, cannot be entirely charged to the debtor.

5. The appeal judges consider that no party has taken any further initiative after the opening of the case to continue the proceedings, although each party can do so; that the case was re-activated in July 2010 at the request of the defendant and that since then it has followed a normal course, so that it cannot be said that the proceedings have been suspended solely as a result of the Belgian State's unjustified inacitivity. They consider that in those circumstances there are no reasons not to grant default interest.

6. By thus charging the claimant the full interest for the entire period, although they implicitly but surely establish that the delay is at least partly due to the defendant's unjustified inactivity, the appeal judges do not validly justify their decision.

Therefore, the Court of Cassation annuls the appeal judgment in so far as it:

- considers that the customs duties are not time-barred;
- order the claimants to pay default interest on the import duties and anti-dumping duties due.

European Court of Human Rights

Homan and Others v Belgium

23 January 2018

Case numbers: 52961/09, 52975/09, 53054/09, 53235/09

Penalties – Joint and several liability for taxes due – No civil claim and no criminal charge in the meaning of Article 6 of the European Convention on Human Rights – No need for a judicial decision in accordance with that provision

Summary

The joint and several liability for income tax or VAT, which applies in accordance with the relevant tax laws, cannot be considered as a civil claim or a criminal charge in the meaning of Article 6 of the European Convention on Human Rights, for which the persons concerned would be entitled to a fair hearing by a tribunal on the basis of that Article 6.

(...)

B. On the argument relating to the joint and several liability for the payment of the tax evaded

19. Invoking Article 6 of the Convention, the applicants complain that they are jointly and severally obliged to pay the taxes evaded under Articles 458 CIR and 73sexies VAT Code. They believe that Article 6 requires that a "sanction" be individually personalized and imposed on each convicted person and therefore that a judge with full jurisdiction should have been able to decide the amounts at which each of the co-accused was held.

20. In its relevant parts, the provision invoked reads:

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair (...) hearing (...) by a (...) tribunal (...)."*

21. Attention must first be paid to the question of the applicability of Article 6 of the Convention to the contested measure.

22. The applicants argue that the joint and several obligation to pay the evaded tax constitutes a "penalty" in view of its preventive and repressive nature, as well as the severity of the penalty, given the size of the amounts claimed to them. They add that while domestic law classifies this measure as a civil consequence, the contested provisions are contained in the "correctional penalties" section of the VAT Code sanctions chapter and in the section "criminal sanctions" of the Income Tax Code.

23. The Court finds that the applications relate to two proceedings in which the applicants got a tax fine, because of various breaches of the VAT Code and the Income Tax Code. The criminal nature of the prosecution of the applicants is thus not in doubt.

24. The Court considers, however, that this is not decisive in this case. Indeed, it notes that the applicants' grievance relates exclusively to a measure which is accessory to the conviction, namely, the joint obligation to pay the evaded tax, provided for by Articles 458 of the Income Tax Code and 73sexies of the VAT Code (*mutatis mutandis*, *Gantzer v. France* (Dec.), no 43604/98, 5 October 1999, and *Maury v. France* (Dec.), No. 36858/97, 7 November 2000).

25. However, since the grievance relates exclusively to the assessment of the taxes due by the applicants, the measure at issue does not fall under the civil component of Article 6 of the Convention (*Ferrazzini v. Italy* [GC], no 44759/98, § 29, ECHR 2001-VII, and *Jussila v. Finland* [GC], no 73053/01, § 29, ECHR 2006 XIV).

26. With regard to the applicability of the criminal component of Article 6, the Court considers that the incidental measure at issue, limited to the payment of evaded tax, was not repressive or punitive but was simply intended to repair the damage suffered by the State (*mutatis mutandis*, *Poniatowski v. France* (Dec.), No. 29494/08, 6 October 2009, and *Oxygène Company v. France* (Dec.), no. 76959/11, § 50, 17 May 2016). The Court has already held that sums limited to the amount of the tax supplement are not criminal in nature, notwithstanding their qualification in domestic law or the size of the sums involved (*Oxygène Plus Company*, aforementioned decision, § 46, and references cited).

27. In light of the above, the Court concludes that the joint and several obligation to pay the evaded tax does not constitute, in this case, a "penalty" and that Article 6 of the Convention does not apply.

28. Accordingly, the Court considers that this part of the application must be declared inadmissible for incompatibility *ratione materiae*, in accordance with Article 35(3) and (4) of the Convention.

Belgium

Court of Appeal, Gent

13 November 2018

Case number: 2017/AR/1765

International tax recovery assistance – Directive 2010/24 – No valid contestation of the claim in the applicant Member State – Validity of the enforcement measures in the requested Member State – Sufficient motivation of the instrument permitting enforcement in the requested Member State

Summary

If the debtor wants to contest the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State, he has to bring his case before the competent body of the applicant Member State, in accordance with the rules applying in that State.

The instrument permitting enforcement in the requested Member State fulfils the motivation requirement.

In the case: Belgian State, Ministry of Finance, vs C.K.,

The Court decides:

(…)

2 Facts

The debtor is registered and identified as a VAT taxable person in Belgium, for commercial activities including the organisation of sales at music festivals.

On 13 February 2014, the Belgian tax authorities received a recovery request from the Austrian tax authorities, which asked for recovery of a VAT claim. This claim relates to commercial activities of the debtor at the N. Rock Festival, where he sold textile products.

On 17 February 2014, the Belgian tax authorities sent a payment order to the debtor, asking for the payment of 2.823,82 euro (2.746,97 euro principal amount and 76,85 euro interest).

On 27 February 2014, the accountant of the debtor has contested this debt. He mentioned that the debtor had submitted a return in Austria and that the debtor had paid the tax on these activities in Austria. He also asked to clarify the content of the payment order.

Following this reply, the Belgian authorities have asked the Austrian authorities to confirm whether the claim concerned was certain and enforceable. The Austrian tax authorities have confirmed this.

Given the non-payment of this claim, the Belgian tax authorities have notified a uniform instrument permitting enforcement. This was followed by a seizure of some assets on 16 May 2014, in view of a public sale of these goods on 21 June 2014.

On 4 June 2014, the debtor has contested this action before the court of first instance in Bruges. He argued that, in the meantime, he had paid the full amount of the debt to Austria and Belgium.

On 30 September 2015, the court of first instance decided that the request for recovery assistance could not be executed, and that court ordered the Belgian tax authorities to reimburse all the amounts that were collected on the basis of the uniform instrument, with interest, in accordance with Art. 91 § 3 of the Belgian VAT code.

The Belgian tax authorities appealed.

3 The claims of both parties

1. The Belgian tax authorities ask to annul the judgment of the court of first instance.

2. The debtor did not submit any document before this court.

4 Decision

1. (…).

2. The tax authorities refer to Directive 2010/24/EU on tax recovery assistance between the EU Member States. This Directive was implemented in Belgium by the Law of 9 January 2012 (Official Gazette of 26 January 2012). This law is the legal basis for recovery assistance between EU Member States, from 1 January 2012. The implementing Commission Regulation 1189/2011 of 18 November 2011 establishes some more detailed implementing rules and contains the uniform notification form and the uniform instrument permitting enforcement measures in the requested Member State.

If the debtor wants to contest the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested State, he has to bring his case before the competent body of the applicant Member State, in accordance with the rules applying in that State.

The Austrian tax authorities have confirmed, in the appropriate form and also in their e-mail, that the debtor did not submit a complaint. They also mentioned that a complaint would not have been

valid, since the debtor refused several times – during his activities in Austria – to submit any records permitting the Austrian authorities to assess the taxable amount in accordance with the Austrian law (§ 184 of the Federal Tax Law). The debtor did not launch any judicial proceedings in Austria to contest the claim. The Austrian authorities also observed that the letters sent by the debtor (or by third parties) always referred to the same arguments, which had no real substance, and that the tax claim could no longer be contested under Austrian law.

The above elements lead to the conclusion that the request for recovery assistance is valid. The Belgian tax authorities also rightly observe that a Belgian court cannot evaluate whether the claim of the other Member State is certain and enforceable, since the law of 9 January 2012 does not provide for such a competence. Such a contestation should be raised in Austria, in accordance with the law of that country. The Austrian tax authorities officially confirmed that the claim is certain and that it cannot be contested anymore in Austria.

The enforcement measures, taken by the Belgian authorities in accordance with the law of 9 January 2012 and the Directive 2010/24, are valid. The recovery assistance procedure has been applied in a correct way. The instrument permitting enforcement fulfils the motivation requirement, since it contains all essential elements. There is no violation of any principle of good administration. It has not been demonstrated that the rights of defence of the debtor were not respected.

The appeal of the Belgian tax authorities is justified.

(…)