



THE ADMINISTRATIVE REVIEW TRIBUNAL

**MAGISTRATE DR.
GABRIELLA VELLA**

Sitting of the 6 th February, 2014

Rikors Number. 238/2012

XXX

Vs

Commissioner of Value Added Tax

The Tribunal,

After having considered the Application filed by XXX on the 30th May 2011 before the Value Added Tax Appeals Board, subsequently transferred before this Tribunal, by means of which she requests that it be declared that she is not jointly and severally liable with Furnex Trade Limited for tax due by the said company;

After having considered the documents submitted by the Applicant together with the Application;

After having considered the Reply by the Director General (Value Added Tax) by means of which he contests the request put forth by the Applicant and submits that the same should be rejected, with costs against her, on the grounds that: (i) in terms of Section 66 of Chapter 406 of the Laws of Malta the Applicant is responsible for amounts due by Furnex Trading Limited to the Department for the period during which she held the position of Company Secretary of the said company until she resigned from that position; (ii) by means of a letter dated 2nd July 2009 the Applicant informed the Commissioner of Value Added Tax that she was submitting tax returns for the periods 01.09.06 – 30.08.06 and 01.09.06 – 30.11.06 in her capacity as Company Secretary of Furnex Trading Limited; (iii) even though the Applicant claims to have submitted tax returns for the period 01.09.06 – 30.08.06 and for the period 01.09.06 – 30.11.06, in reality the latter tax return has never been submitted; and (iv) during the period 01.09.06 – 30.11.06 the Applicant still held the position of Company Secretary of Furnex Trading Limited and therefore is still responsible to submit the relative tax return;

After having considered that in his Reply the Director General (Value Added Tax) further submits that: (i) in terms of Act XXII of 2011 the title “Commissioner of Value Added Tax” has now been replaced with the title “Director General, Value Added Tax” and therefore this change must be duly reflected in the “occhio” of the proceedings; and (ii) the “occhio” of the proceedings should be further corrected in the light of the fact that the Applicant in these proceedings is not Furnex Trading Limited but XXX;

After having considered the documents submitted together with the Reply of the Director General (Value Added Tax) marked as Dok. “A” and Dok. “B” at folio 13 and 14 of the records of the proceedings;

After having considered that by virtue of a Decree dated 2nd October 2012 the Tribunal ordered that in the “occhio” of the proceedings and wherever necessary in the records of these proceedings the Applicant be indicated as XXX;

After having considered that the parties to these proceedings recorded their agreement regarding the fact that the Applicant resigned from her position as Company Secretary of Furnex Trading Limited with effect from the 15th January 2007;

After having heard and considered the testimony given by Roderick Sultana, as a representative of the Director General (Value Added Tax) during the sitting held on the 2nd October 2012¹, after having considered the affidavit filed by the Applicant marked as Doc. "ACV01" at folio 29 and 30 of the records of the proceedings and the documents submitted together with the said affidavit marked as Annex A to Annex G at folio 32 to 125 of the records of the proceedings and Doc. "ACV02" and Doc. "ACV03" at folio 128 to 130 of the records of the proceedings, and after having heard and considered the Applicant's testimony under cross-examination during the sitting held on the 8th April 2013²;

After having heard and considered oral submissions by the parties to the proceedings;

After having considered all the records of the proceedings;

Considers:

By means of an Application filed on the 30th May 2011, the Applicant requests that it be declared that she is not jointly and severally liable with Furnex Trading Limited for the tax due by the said company to the Department of Value Added Tax. The Applicant is acting on the basis of Section 44(i) and (j) of Chapter 406 of the Laws of Malta and founds her request on the grounds that: (i) she resigned from her position as Company Secretary of Furnex Trading Limited with effect from the 15th January 2007, and this as was notified by her to the Commissioner of Value Added Tax; (ii) she always acted in good faith

¹ Folio 19 to 26 of the records of the proceedings.

² Folio 132 to 134 of the records of the proceedings.

and did not knowingly breach Section 66(4) of Chapter 406 of the Laws of Malta; and that (iii) she did not have under her management and control any funds belonging to Furnex Trading Limited.

The Director General (Value Added Tax) contests the request put forth by the Applicant and submits that the same should be rejected since: (i) in terms of Section 66 of Chapter 406 of the Laws of Malta the Applicant is to be held responsible for amounts due by Furnex Trading Limited to the Department for the period during which she held the position of Company Secretary of the said until she resigned from such position; (ii) by means of a letter dated 2nd July 2009 the Applicant informed the Commissioner of Value Added Tax that she was submitting tax returns for the periods 01.09.06 – 30.08.06 and 01.09.06 – 30.11.06 in her capacity as Company Secretary of Furnex Trading Limited; (iii) even though the Applicant claims to have submitted tax returns for the period 01.09.06 – 30.08.06 and for the period 01.09.06 – 30.11.06, in reality the latter tax return has never been submitted; and (iv) during the period 01.09.06 – 30.11.06 the Applicant still held the position of Company Secretary of Furnex Trading Limited and therefore is still responsible to submit the relative tax return.

The Director General (Value Added Tax) further submits that: (i) in terms of Act XXII of 2011 the title “Commissioner of Value Added Tax” has now been replaced with the title “Director General, Value Added Tax” and therefore this change must be duly reflected in the “occhio” of the proceedings; and (ii) that the “occhio” of the proceedings should be further corrected in the light of the fact that the Applicant in these proceedings is not Furnex Trading Limited but XXX.

In so far as concerns this latter submission the same has been dealt with by means of the Decree dated 2nd October 2011 by virtue of which the Tribunal ordered that in the “occhio” of the proceedings and wherever necessary in the records of the proceedings the Applicant be indicated

as “XXX”. Therefore the Tribunal does not need to take any further cognizance of the said submission.

In so far as concerns the other submission put forth by the Director General (Value Added Tax), that is that in terms of Act XXII of 2011 the Respondent in these proceedings should be designated as Director General (Value Added Tax) and no longer as Commissioner of Value Added Tax, the Tribunal makes reference to Regulation 2 of the Revenue Department Posts (Equivalence of Certain References) Regulations, Legal Notice 173 of 2012, which provides that *the words listed in the first column of the Schedule [which include the Commissioner of Value Added Tax] shall, in any judicial act or judicial action and in any communication notified or addressed to any department of revenue and in any communication sent from any department of revenue, be deemed to be equivalent and shall have the same meaning and legal effect as the words listed in the same item of the second column of the Schedule [which includes the Director General (Value Added Tax)] and in such a way that the words used in the two columns of the same item shall have the same meaning and effect for all purposes of law*³. In the light of this Regulation it is clear that the title Commissioner of Value Added Tax is to be deemed equivalent to the title Director General (Value Added Tax) and therefore no correction need be affected to the “occhio” of these proceedings in this regard.

As already pointed out above the Applicant is acting on the basis of Section 44(i) and (j) of Chapter 406 of the Laws of Malta which provides that *if any question arises, other than on an assessment, relating to – (i) any question of law not falling within the foregoing provisions of this article; (j) any matter which, in terms of any provision of this Act, or of any regulations made under this Act, may be referred to appeal, that question may be referred to the Tribunal by any person who shows to the satisfaction of the Tribunal that he has a direct interest in that question*⁴ or by the Commissioner. In the light of this

³ Emphasis by the Tribunal.

⁴ Emphasis by the Tribunal.

particular provision of the Law the Tribunal deems it necessary to establish first and foremost whether the Applicant has a direct interest in the question being referred by her to this Tribunal.

The Applicant is essentially requesting a declaration that for reasons given in her Application and further supported during the hearing of these proceedings, she is not to be held jointly and severally responsible with Furnex Trading Limited for tax due by the said company to the Commissioner of Value Added Tax, today known as Director General (Value Added Tax). She has referred this matter to the Tribunal on the grounds that from date of incorporation of Furnex Trading Limited, namely the 7th April 2006, up until the 15th January 2007, she held the position of Company Secretary of the said company and in terms of Section 66 of Chapter 406 of the Laws of Malta, in particular subsection (1) and (5) a Company Secretary can be held jointly and severally liable together with the company for tax due to the Commissioner of Value Added Tax: *(1) Any secretary, manager, director, liquidator or other principal officer of an entity or of a body of persons, any heir and any testamentary executor or any curator of the vacant inheritance of a deceased person, and any person who is a tutor, curator, administrator or trustee of any other person or of any trust, fund or other entity shall, for the purposes of this Act, be a representative⁵ of that body of persons, deceased person, other person, trust, fund or other entity, as the case may be; and (5) a representative shall be jointly and severally liable with the person of whom he is a representative for the tax due by that person⁶: provided that where the representative has acted in good faith and is not knowingly in breach of subarticle (4) or of any other obligation under this Act, his liability under this subarticle shall be limited to the funds or to the value of any property under his management or control which belongs or is due to the person of whom he is a representative.*

⁵ Emphasis by the Tribunal.

⁶ Emphasis by the Tribunal.

From the records of the proceedings it results that the Applicant was indeed Company Secretary of Furnex Trading Limited from date of incorporation of the said company⁷ and that she resigned from the said position with effect from the 15th January 2007⁸, a fact regarding which there is also agreement between the parties to these proceedings⁹. It also results that tax due by Furnex Trading Limited to the Director General (Value Added Tax) amounts to €1,107,758.04¹⁰ and that on the 6th February 2009¹¹ and again on the 3rd June 2010¹², the Commissioner of Value Added Tax issued two payment notices in terms of Section 59 of Chapter 406 of the Laws of Malta against Furnex Trading Limited and is threatening further legal action should payment of tax due not be effected. Furthermore Roderick Sultana, as a representative of the Director General (Value Added Tax), declared that *the department reserves criminal actions against Mrs. Vassallo not only civil actions, let's put it this way, and does not exclude any actions against Mrs. Vassallo. Till now the department did not take any action*¹³.

From the above it clearly results that the Applicant, who between the 7th April 2006 and the 15th January 2007 held the position of Company Secretary of Furnex Trading Limited which to date owes a hefty sum of money to the Department of Value Added Tax, does indeed have a direct interest in the question referred by her to this Tribunal in terms of Section 44 of Chapter 406 of the Laws of Malta, and therefore the Tribunal will proceed to examine and determine the matter so referred to it.

Once the parties agree that the Applicant effectively resigned from her position as Company Secretary of Furnex Trading Limited with effect from the 15th January 2007 and the Director General (Value Added Tax)

⁷ Annex A at folio 32 to 45 of the records of the proceedings.

⁸ Annex E at folio 106 of the records of the proceedings.

⁹ Minutes of the sitting held on the 2nd October 2012.

¹⁰ Dok. "A" at folio 13 of the records of the proceedings.

¹¹ Folio 118 of the records of the proceedings.

¹² Folio 112 of the records of the proceedings.

¹³ Sitting held on the 2nd October 2012, folio 19 to 26 of the records of the proceedings.

acknowledges that in terms of Section 66 of Chapter 406 of the Laws of Malta *s-Sinjorina Camilleri Vassallo kellha r-responsabilità saz-zmien sa' meta hija rriżenjat minn segretarja tal-Kumpanija Furnex Trading Ltd*¹⁴, it is clear that the Tribunal's considerations, observations and ultimate decision on the Applicant's liability or otherwise as Company Secretary of Furnex Trading Limited **must focus on and be limited to the period when she held such a position, that is the period 7th April 2006 to 15th January 2007, and no further.**

The Applicant claims that she always acted in good faith and that she did not knowingly breach Section 66(4) of Chapter 406 of the Laws of Malta. She further claims that she did not have under her management and control any funds belonging to Furnex Trading Limited. The Applicant is putting forward these claims in the light of that provided for under Section 66(4) and (5) of Chapter 406 of the Laws of Malta which undoubtedly constitute the crux of the merits of this reference.

From evidence submitted by the Applicant it results that as Company Secretary of Furnex Trading Limited she did not have under her management and control funds or other property belonging to the said Company. In fact in terms of the Memorandum & Articles of Association of Furnex Trading Limited *the business and affairs of the company shall be managed by a Board of Directors which shall be composed of not less than one and not more than five directors*¹⁵ and *that legal and judicial representation of the company shall be vested in any director or in addition and without prejudice to the aforesaid, the Board of Directors may, from time to time appoint any other person or persons to represent the company in a particular case or cases or classes of cases. Any Power of Attorney issued by the company shall be executed by any director or any person authorized by the Board of Directors for the purpose and such power of attorney shall be considered*

¹⁴ Reply by the Director General (Value Added Tax) at folio 9 to 11 of the records of the proceedings.

¹⁵ Clause 7 of the Memorandum & Articles of Association at folio 37 of the records of the proceedings.

*as executed by the company*¹⁶. Furthermore, in terms of the Articles of Association of the Company the Powers and Duties of Directors are those set out in Part I of the First Schedule of the Act, with the exception of Clause 54 and Clause 62 thereof, and *decisions of the directors shall also be deemed to have been validly carried if a Directors' resolution in writing is signed by at least a majority of the Directors of the Company. Provided that all transfers of money exceeding the amount of Euro 5,000 or the equivalent in any other currency requires the consent of any two directors and any decision related to the acquisition of immovable property and the subscription to shares in other companies requires a resolution signed by all the shareholders of the company.*

Even though it results that Furnex Trading Limited held bank accounts with HSBC Bank Malta p.l.c., the only person who was an authorized signatory with reference to the said accounts was a certain Dr. Gergely Andrasi and this as results from documents submitted by the Applicant at folio 47 to 65 of the records of the proceedings. From the evidence submitted by the Applicant it does not result that she was in any way responsible for the management and control of funds or immovable property of Furnex Trading Limited together with or in substitution of the mentioned Dr. Gergely Andrasi or of any other director of the said company during the period when she held the position of Company Secretary and the Director General (Value Added Tax) did not submit any form of evidence which either contradicts this fact or which shows and proves a situation different to that put forth by the Applicant.

Therefore, once the Applicant did not have under her management and control funds or other immovable property belonging to Furnex Trading Limited she could have never disposed of such funds or property without making adequate provision for any tax due under the Value Added Tax, which potential disposal in any case does not result from the records of these proceedings

¹⁶ Clause 10 of the Memorandum & Articles of Association at folio 38 of the records of the proceedings.

since no evidence in this regard has been produced, particularly by the Director General (Value Added Tax). This further means that the Applicant could have never breached, let alone knowingly breached Section 66(4) of Chapter 406 of the Laws of Malta. In fact from the testimony given by Roderick Sultana during the sitting held on the 2nd October 2012¹⁷, it transpires that the main breach for which the Director General (Value Added Tax) is holding the Applicant responsible as Company Secretary for Furnex Trading Limited is the failure to submit the tax return for the period 01.09.06 – 30.11.06, which matter will be dealt with and discussed further down in this decision.

From evidence submitted by the Applicant, namely an exchange of e-mails between Francis J. Vassallo & Associates Limited, the company engaged to maintain accounting records and provide book keeping services for Furnex Trading Limited and within which the Applicant is a Director, and representatives of Furnex¹⁸, it transpires that as soon as Francis J. Vassallo & Associates Limited – and therefore also the Applicant – became aware of the tax periods for the company as set out by the Department of Value Added Tax they immediately started asking for the relative and relevant information from the representatives of Furnex Trading Limited which information however was not forthcoming or so easily forthcoming. The Tribunal is of the opinion that these e-mails clearly show that the Applicant, through Francis J. Vassallo & Associates Limited of which it must be reiterated she is a Director, always acted in good faith and tried to exercise her functions as Company Secretary of Furnex Trading Limited in so far as concerns the collection of necessary information for the drawing up and ultimate submission of relative tax returns, to the best of her possibilities in the circumstances with which she was faced. As a matter of fact it must be pointed out that the Director General (Value Added Tax) himself is not questioning the Applicant's good faith and Roderick Sultana in his testimony given during the sitting held on

¹⁷ Folio 19 to 26 of the records of the proceedings.

¹⁸ Annex C at folio 68 to 101 of the records of the proceedings.

the 2nd October 2012¹⁹, upon being asked by the Tribunal *what is the claim of the department. Is there an allegation of bad faith from the department with regard to Mrs. Camilleri Vassallo?* without hesitation replied *No*.

Another element which must be examined by this Tribunal within the context of the matter referred to it by the Applicant is whether the Applicant knowingly breached any other obligation arising from the Value Added Tax Act, which element is directly linked with the tax return which had to be submitted for the tax period 01.09.06 – 30.11.06.

Even though the Applicant claims to have submitted the tax return for the period 01.09.06 – 30.11.06 together with the tax return for the period 01.04.06 – 31.08.06 it transpired, both from submissions put forth by the Director General (Value Added Tax) and evidence submitted by the Applicant herself, namely the tax returns submitted to the Department of Value Added Tax on the 13th July 1999²⁰, that this particular tax return has not been submitted. In fact the Applicant submitted a tax return for the period 01.09.07 – 30.11.07, which quite obviously is not the tax period 01.09.06 – 30.11.06, and never effected a correction with regard to the said tax period.

The Applicant claims that this tax return was *due to a human inputting error, completed on a form relating to a different period than that to which it actually related. This refers to the VAT return for the period 01.09.06 – 30.11.06 which was completed in error on the VAT return relating to the period 01.09.07 – 30.11.07*²¹. The Director General (Value Added Tax), through his representative Roderick Sultana²², claims that as far as the Department is concerned the tax return for the period 01.09.06 – 30.11.06 is still pending and consequently an estimated tax assessment has been issued for which the Applicant

¹⁹ Folio 19 to 26 of the records of the proceedings.

²⁰ Folio 103 and 104 of the records of the proceedings.

²¹ Applicant's affidavit marked as Doc. "ACV01" at folio 29 and 30 of the records of the proceedings.

²² Testimony given during the sitting held on the 2nd October 2012, at folio 22 of the records of the proceedings.

could in future be held responsible as Company Secretary of Furnex Trading Limited during that period.

The fact that the tax return in issue, that is the tax return for the period 01.09.06 – 30.11.06, is still pending is an undisputed fact but the Tribunal is firmly convinced that the Applicant genuinely mistakenly submitted the tax return for the period 01.09.07 – 30.11.07 instead of for the period 01.09.06 – 30.11.06 when in reality she wanted to file the latter and not the former, and that therefore she did not knowingly breach her obligation to submit the said tax return. It is also true and undisputed that the Applicant never requested a correction of the said tax return but it must be pointed out that by the time she became aware of this mistake, that is during the course of these proceedings²³, her relations with Furnex Trading Limited and the relations of Francis J. Vassallo & Associates Limited with the said company, were not at all good, if not totally inexistent. Therefore it was and still is very difficult, if not impossible, for her to submit the required correction. Therefore the Tribunal reiterates that it satisfactorily results that the Applicant did not knowingly breach her obligation under the Value Added Tax Act to submit the tax return for the period 01.09.06 – 30.11.06.

When all these facts and considerations are examined under the provision set out in Section 66 of Chapter 406 of the Laws of Malta it transpires that: (i) for the period when the Applicant held the position of Company Secretary of Furnex Trading Limited she could technically be held jointly and severally liable with the said company for tax due by Furnex Trading Limited to the Department of Value Added Tax; **but** (ii) since it satisfactorily results that the Applicant acted in good faith and did not knowingly breach Section 66(4) or any other obligation under the Value Added Tax Act, the limitation of liability as set out under the proviso to Section 66(5) of Chapter 406 of the Laws of Malta applies in her case - which conclusions in practice exonerate the Applicant from any form of tangible liability for the reason set out below.

²³ Vide her testimony under cross-examination during the sitting held on the 8th April 2013, folio 132 to 134 of the records of the proceedings.

Section 66(5) of Chapter 406 of the Laws of Malta provides that *a representative shall be jointly and severally liable with the person of whom he is a representative for the tax due by that person: **provided that where the representative has acted in good faith and is not knowingly in breach of subarticle (4) or of any other obligation under this Act, his liability under this subarticle shall be limited to the funds or to the value of any property under his management or control which belongs or is due to the person of whom he is representative***²⁴.

From the said proviso it clearly results that in the specific circumstances set out therein, the liability of the representative is limited to the funds or to the value of any property under his management or control which belongs to or is due to the person he represents. When this limitation is transposed onto the facts pertinent to this case, and particularly onto the fact that the Applicant does not manage or control and has never managed or controlled funds or property belonging to Furnex Trading Limited, the only conclusion which can be drawn is that in practical terms there is no tangible liability on the part of the Applicant vis-vis any value added tax due by Furnex Trading Limited for the period she was Company Secretary of the said company.

Therefore in spite of and without prejudice to the general principle which emerges from Section 66 of Chapter 406 of the Laws of Malta, due to the particular circumstances of this case, the Applicant is correct and justified – on a practical and factual level – in asserting that she cannot be held liable together with Furnex Trading Limited for tax due to the Department of Value Added Tax.

For the said reasons the Tribunal upholds the request put forth by the Applicant and declares that in spite of and without prejudice to the general principle of the joint and several liability of the representative set out under Section

²⁴ Emphasis and underlining by the Tribunal.

Informal Copy of Judgement

66 of Chapter 406 of the Laws of Malta, in the particular circumstances of this case the Applicant is not tangibly liable with Furnex Trading Limited for tax due by the said company to the Department of Value Added Tax.

In the particular circumstances of this case, the Tribunal declares that each party is to bear his own costs pertinent to these proceedings.

< Final Judgement >

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