[2019] UKFTT 0333 (TC)

TC07161

VAT – hardship application - £2.2 million VAT assessment – whether the requirement to pay or deposit that amount would cause appellant to suffer hardship – appellant's immediate cash resources insufficient – whether appellant had put itself into the position of being unable to pay without suffering hardship – yes – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/05693

BETWEEN

NT ADA LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public at Taylor House, Rosebery Avenue, London on 15 April 2019

Keith Gordon, counsel, for the Appellant

Rebecca Murray, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision concerns what is commonly called a "hardship application", that is to say it deals with the Appellant's application for a decision of the Tribunal that its appeal against an assessment for some £2.2 million of VAT should be entertained without the Appellant ("NTA") being required to pay or deposit the amount of the assessment, on the grounds that such requirement would cause NTA to suffer hardship.

2. NTA does not itself have the cash to pay the amount concerned. The key underlying question, in broad terms, is the extent to which any hardship arising from the requirement to pay would be caused by its own actions.

THE FACTS

3. I received a small bundle of documents and a witness statement of John Anthony Mehigan, who described himself as "an employee (or consultant)" of NTA. Mr Mehigan also gave oral testimony.

4. Mr Mehigan's written witness statement (served shortly before the hearing on a voluntary basis) was just two pages long and read as follows:

> 1. I make this statement from facts and matters within my own knowledge and from my review of documents relevant to these appeals which are within the bundle prepared for the Tribunal hearing.
>
> 2. I am an employee (or consultant) of NT ADA Ltd ("the Company") and have been since 2007. I am not a director of the Company and never have been.
>
> 3. I have owned the Company since 2007 (indirectly since early 2017).
>
> 4. The Company disputes the HMRC claim that VAT is due on its historic fee income because the Company was based in Jersey and had no nexus with the UK that might give rise to such a "VAT" liability.
>
> 5. The Company has insufficient resources to make a cash payment to HMRC in an amount equivalent to the claimed VAT (or any amount approximating to it) [see Bundle, page 20].
>
> 6. The Company was re-domiciled from Jersey to Anguilla in May 2016 under terms agreed with the States of Jersey.
>
> 7. The Company's clients have in the main now settled tax claims with HMRC because after recent decisions of the Supreme Court it was concluded that there was no prospect of success for the Company's tax plans.
>
> 8. Given the factors in paragraphs 6 and 7 the Directors of the Company decided to effect a reorganisation in early 2017 to reflect the changed circumstances of the Company [Bundle, 121 and 122].
>
> 9. I repaid the Company sums I owed it on "loan accounts", totalling approximately £3 Million. The Company had already committed to pay a large dividend to its new parent company, DAA Limited and so the Company was obliged to make that payment when I repaid my loans.
>
> 10. The Company was at no time capable of paying the "VAT" shown in the assessment dated 13 January 2017 [Bundle, pages 1 to 5] after the assessment was issued.
>
> 11. Any enforcement of that assessment will place the company in insolvent liquidation and so the company will suffer hardship.

5. At the hearing, Mr Mehigan expanded significantly on this witness statement whilst giving oral evidence. Ms Murray objected to this new evidence being admitted at all, since HMRC had no opportunity to respond properly to it. I refused to disregard the oral evidence altogether, but indicated that I would assess very carefully the weight that I would give to it bearing in mind the circumstances. I have subsequently established that the Tribunal had followed its normal practice in "hardship" cases and had not issued any direction requiring service of witness statements in advance of the hearing, only requiring advance disclosure of documents intended to be relied on. Therefore no criticism can attach to NTA in respect of the way Mr Mehigan gave his evidence and I do not regard it as any less reliable due to the fact that much of it only came out at the hearing.

6. After the hearing, various communications were received at the Tribunal with further documents which NTA wished me to consider in support of their application. I understood this to have followed from an abortive discussion during a break in the hearing when NTA asked HMRC to agree to an adjournment to enable further documents to be put in evidence. HMRC objected, both to the original proposal and to the attempt to submit further evidence after the hearing. I note that in the Tribunal's directions leading up to the hearing, both parties were required to deliver lists of the documents they intended to refer to at the hearing, and to provide copies to the other side on request. In the circumstances, I have refused to consider the further communications received from NTA. The argument put forward was that the need for the further evidence had only become apparent as a result of the delivery of HMRC's skeleton argument on the business day before the hearing. As the law in this area is not particular complex or doubtful and no directions had been issued by the Tribunal to require service of skeleton arguments in any event, I did not consider it appropriate to allow late admission of evidence which could and should have been submitted earlier in accordance with the Tribunal's directions.

7. I find the following facts.

8. NTA was formed under Jersey law as a registered private company on 17 April 2007. Mr Mehigan owned NTA (by which I take him to mean he was the beneficial owner of all its issued shares) from 2007 up to March 2017, at which time he became (as a result of the reorganisation referred to below) the indirect owner of NTA through another company which he owned call DAA Limited.

9. From at least June 2008, NTA was involved in a contractual relationship with NT Advisers 2009 LLP (formerly called NT Advisers LLP) ("LLP"), a UK limited liability partnership in which Mr Mehigan was a designated member, under which NTA was involved in the provision of advice, predominantly to UK resident persons, as to how they might reduce their UK tax liabilities.

10. Included in the bundle before me were letters, in similar form, sent by HMRC to NTA and LLP on 29 October 2012, in which HMRC set out in some detail the understanding they had formed of the arrangements involving NTA and LLP and stated two conclusions (expressed as "decisions") which they had reached. In broad terms, the first decision was that NTA had a fixed establishment in the UK (in the form of its associate LLP), from which it was making its supplies of tax advice services to UK clients; and the second decision was that NTA received supplies of services relating to its provision of tax advisory services from LLP and other suppliers at that UK fixed establishment.

11. As a result, HMRC went on to state the consequences which they considered arose. In relation to NTA, these were (broadly) that it had been making taxable supplies in the UK above the VAT registration threshold and was therefore liable (a) to compulsory VAT registration with retrospective effect, (b) to output VAT on the supplies of services it had made, and (c) to

a belated notification penalty. They also considered that the supplies made to NTA at its UK fixed establishment by LLP ought to have been subject to VAT, for which NTA would be entitled to claim credit "subject to normal rules". They requested a schedule of all NTA's income from UK clients in order to establish the position definitively.

12. The detail of the subsequent chain of events was not before me, but crucially it culminated in HMRC raising an assessment for VAT against NTA in respect of the period from 1 May 2008 to 31 July 2016 in the amount of £2,204,580 and notifying that assessment to NTA by a notice dated 13 January 2017. This is the assessment which, following its confirmation in a statutory review letter dated 16 June 2017, is the subject of this appeal.

13. In the meantime, NTA had been affected by the increasingly hostile environment for tax avoidance, and it marketed its last scheme in early 2013, from which the clients "exited" in early 2014.

14. Under pressure from the authorities in Jersey due to the nature of its activities, it finally responded to that pressure by "redomiciling" from Jersey to Anguilla under The International Business Companies Act 2000 in the latter jurisdiction which I infer allowed for it to be recognised as a continuation of the same legal entity albeit within a different legal jurisdiction. This took place on 18 May 2016 and on the same date it changed its name from "NT Jersey Limited" to its current name.

15. Unsigned unaudited accounts for NTA were included in my bundle for the year ended 30 April 2015 and the subsequent period ended 18 May 2016 (which appear to run on from the 30 April 2015 accounts without any break, as the prior year comparison figures contained in them for 2015 are the same as the current year figures shown in the 2015 accounts). The April 2015 accounts recited that they had been approved by the Directors on 4 December 2015 but no date of approval was recited in the 18 May 2016 accounts.

16. In addition, partially signed but undated unaudited accounts for "the period ended 31 December 2016" were also included in my bundle; these accounts included separate trading and profit and loss accounts and expenses schedules stated to relate to the two periods 1 January to 18 May 2016 and 19 May to 31 December 2016, together with balance sheets at both 18 May 2016 and 31 December 2016. The profit and loss/expense figures contained in these accounts for the period 1 January to 18 May 2016 are exactly the same as the equivalent figures in the undated accounts apparently covering the entire period from 1 May 2015 to 18 May 2016. In the notes to these accounts, where there are comparative figures for two different periods, the relevant columns are headed "2017" and "2016". None of these inconsistencies were explored or explained at the hearing.

17. Finally, unsigned and undated accounts of NTA purportedly covering the "period ended 9 March 2018" were also included in my bundle. These accounts included, as prior period comparison figures for both profit and loss/expenses and balance sheet items, the figures contained in the 31 December 2016 accounts for the period from 19 May to 31 December 2016. They appear therefore to run on from the 31 December 2016 accounts without any break. Most crucially, they include two key entries, one credit to the profit and loss account of £2,964,128 reflecting in large part the release of the £2,973,240 provision previously made for funding the costs of litigation in defence of NTA's tax planning arrangements (which had been included in all previous accounts back to 30 April 2015). It was stated in a note that:

> The Tax Courts in the UK have recently started to take a very hard line against tax avoidance and it is now virtually certain that none of the company's tax schemes will succeed. Continuing with tax litigation in this climate is futile and so during the period the company began a process of liaison and consultation with HMRC and the clients which has resulted in a settlement

> process ensuring litigation will not now take place. This renders the provision for legal costs, relating to that HMRC litigation process, unnecessary and so the provision has been released in this set of accounts.

18. The effect of the release of this provision was to generate an "operating profit" of £3,025,024, which would only have been £51,784 if it had not taken place.

19. The second key item in the 9 March 2018 accounts was a debit of £3 million in respect of "dividend paid". Mr Mehigan explained (and I accept) that this related to a payment of a dividend of that amount in March 2017, immediately following (but linked to) a restructuring transaction in which his beneficial interest in the shares of NTA was transferred to what he described as "another of my companies" called DAA Limited. As described in an email dated 16 May 2018 from Mr Mehigan to HMRC, "The present position is that the company has been completely reorganised and indeed had a change of immediate owner The bulk of the loans were repaid and then the company paid a large dividend to its new corporate parent company".

20. All of the various accounts contained an accountant's report stating they had been prepared (but not audited) by Baker Homyard, Chartered Accountants of Jersey, but none of those reports was signed or (except for the April 2015 accounts) dated on the copies in my bundle. Mr Mehigan gave evidence that the accounts had been signed in this form, and signed copies could easily be provided, though he had no explanation for why signed copies had not in fact been provided in the first place. Whilst some of the accounts contain obvious inconsistencies, to the point where I have significant doubts that a firm of chartered accountants could have prepared them, they represent the only financial information available to me and I am prepared to accept that they largely afford a true and fair view of NTA's financial position at each relevant date.

21. In the notes to the various accounts, it was explained that the £2,973,240 provision for litigation costs amounted to "15% of fees received", implying total fees received of some £19.8 million.

22. No accounts were provided for any period prior to the year ended 30 April 2015, so no indication was given as to how NTA reached that date with overall net assets of £937,147.

23. The 30 April 2015 accounts showed NTA as being owed unsecured, interest-free debts, with no specified date of repayment, by (amongst others) Mr Mehigan (of £2,150,692, up from £2,049,012 the previous year), by "NT Advisors LLP" (of £427,661, up from £423,860 the previous year) and "NT Advisors 2009 LLP" (of £79,612, down from £84,729 the previous year). The 18 May 2016 accounts showed similar loans of £2,347,729 (due from Mr Mehigan), £456,912 (due from NT Advisors LLP) and £97,152 (due from NT Advisors 2009 LLP). The 31 December 2016 accounts showed similar loans of £2,359,328 (due from Mr Mehigan), £462,652 (due from NT Advisors LLP) and £100,152 (due from NT Advisors 2009 LLP). The 9 March 2018 accounts showed the debts owed by Mr Mehigan, NT Advisors LLP and NT Advisors 2009 LLP all as being nil. The aggregate reduction in these three debts from the previous accounts was £2,922,132, which I infer represented the bulk of the £3 million dividend paid in March 2017.

24. In response to a question from Mr Gordon as to the extent to which NTA would have been in a position to pay the disputed assessment at any time since October 2012, Mr Mehigan referred to the 18 May 2016 balance sheet of NTA contained in the document bundle, showing it as having £259,648 of cash as at that date, and said that NTA had previously had funds "off and on", possibly as much as £1 million, but it would also have had a liability for commissions of some £700,000 up to 2016. As no evidence in the form of accounts of NTA or bank statements was produced to verify this somewhat vague statement, I do not regard it as reliable.

25. Three bank statements were also included in the bundle before me. They showed that NTA cash balances a little below £245,000 as at the end of February 2017 (at the time when they were supplied to HMRC in response to their initial request for evidence in support of NTA's hardship application).

26. The broad sequence of events appears to have been as follows.

(1) HMRC issued a decision to NTA in October 2012, from which it was clear that they regarded NTA as being liable for significant amounts of VAT.

(2) Over the following three and a half years, information was obtained by HMRC such that by 4 April 2016 they assessed NTA to a belated notification penalty based on a calculation which clearly showed they considered NTA's VAT liability to be well in excess of £2 million.

(3) HMRC issued an amended penalty notice on 19 October 2016, from which it was apparent that their calculation of NTA's net VAT liability had reduced to £2,204,580.

(4) On 13 January 2017, HMRC notified a VAT assessment in that amount to NTA.

(5) By letter dated 2 February 2017 signed by Mr Mehigan, NTA informed HMRC that they wished an internal review to be carried out in relation to the assessment. It also requested that "payment of any tax be postponed pending the resolution of the appeal on grounds of the company's hardship, being on the grounds that the company will suffer hardship as it is currently near insolvent and will definitely be made so if made to pay in advance".

(6) HMRC took Mr Mehigan's letter dated 2 February 2017 as an application for hardship, and sent a letter dated 21 March 2017 to Mr Mehigan at NTA, setting out a list of the information which HMRC required in order to consider the application.

(7) I accept Mr Mehigan's evidence that it was around this time that NTA released the provision of just under £3 million in respect of litigation costs and distributed the resultant profit in large part by way of dividend to DAA Limited, Mr Mehigan's company. Mr Mehigan explained that this was done by way of a series of separate transactions rather than in a single payment because he only had approximately £200,000 of immediately available cash. This was used to repay his loan in part, with the money being paid up to DAA Limited by way of dividend, paid over to Mr Mehigan by that company as part consideration for the sale to it of the shares he had beneficially owned in NTA, then recycled in the same way until his entire loan had been repaid and the full amount of the dividend paid up to DAA Limited. This explanation was at odds with that given in his email to HMRC dated 16 May 2018 referred to at [19] above, and not entirely consistent with the content of his witness statement set out at [4] above. I accept that the dividend was in fact paid in stages in this way, but Mr Mehigan's failure to disclose the full facts in his earlier email (or indeed in his witness statement) provides a clear example of him being less than fully frank and open in his dealings with HMRC, leading me to doubt the completeness of some of his other evidence. It is also clear from the above sequence of events that Mr Mehigan's statement to HMRC on 2 February 2017 that NTA was "near insolvent and will definitely be made so if made to pay in advance" was made just weeks before NTA felt able to release the near £3 million provision in its accounts for litigation costs, based on the perceived attitude of the UK courts to tax avoidance, in respect of which there would have been no material change during that short period.

(8) In providing an initial response by email dated 17 April 2017 to HMRC's request for information on the hardship issue, Mr Mehigan sent HMRC a copy of NTA's April

2015 accounts and made no mention of the fundamental restructuring which had taken place just a few weeks previously, again displaying a lack of candour in his dealings with HMRC.

(9) At that stage, HMRC took matters no further on the hardship application, explaining by letter dated 8 June 2017 that it would be held in abeyance unless and until the £2.2 million VAT assessment had been upheld on review and appealed to the Tribunal.

(10) HMRC picked up the hardship issue again in a letter to NTA dated 6 February 2018, raising a series of questions on what had been supplied in response to their initial request for information. Mr Mehigan replied by email dated 9 March 2018, in which he said this in reply to questions about the loans shown on the April 2015 accounts as due to NTA:

> Please note that as regards the loans owing to the company there is no means of enforcing repayment as there is no security as regards the loans
>
> There is also a legal question as to whether the 'loans' are indeed loans in law (albeit the accounts refer to them as such)
>
> There are no loan agreements etc confirming the advances as loans
>
> We are preparing accounts for the company up 31 December *[sic]* which should be availabe *[sic]* by the end on *[sic]* next month, April 2018

(11) At the time this email was sent, on his own evidence the "loans" referred to had been repaid for approximately a year, and still no mention was made of the various transactions of March 2017.

(12) On 16 May 2018, Mr Mehigan emailed HMRC in response to a further letter dated 3 April 2018, in which they had sought clarification on a number of points in Mr Meghigan's email of 9 March 2018. This email (referred to at [19] above) contained the first reference to the dividend and repayment of loans which had been communicated to HMRC.

27. It is clear that although Mr Mehigan does not hold (and has never held) the office of director of NTA, he has corresponded on its behalf with full knowledge of its financial and other affairs and has felt able to conduct these proceedings on its behalf without feeling the need to involve any director of the company to give evidence on its behalf. When asked why no director of NTA had given evidence, he said that they could have done so, but were "aware of my role". From this (and the conduct of HMRC's enquiries and the appeal generally) I infer that the directors of NTA have been content to leave the management of NTA's affairs in Mr Mehigan's hands.

28. Mr Mehigan stated in evidence that if called upon to repay his loan in full, he would not have had the cash resources to do so and would have been forced to realise other assets in order to do so. There was no evidence that any request for payment had ever been made to him, further reinforcing the general impression that NTA was effectively entirely under his day to day control. Even if he may not have had over £2.3 million of cash immediately available, he gave no explanation of what payments had been made out of NTA to him (or to his order) out of the large amounts of client fees it had received up to 2014, or what he had done with those payments. Nor did he provide any information about DAA Limited, which he described as "his" company.

29. I accept that NTA does not have cash balances of the necessary amount to allow it to pay or deposit the amount of the disputed assessment.

30. In the circumstances, it is clear that Mr Mehigan regarded NTA and DAA Limited as creatures under his own control. Whilst I accept his evidence that he did not have sufficient cash to repay his debt to NTA, he also said he "could have raised" it by selling assets available to him, and he did not provide any indication as to how readily realisable those assets were. Given his general lack of candour on such matters, as seen in his conduct of the discussions with HMRC, I have no hesitation in inferring that he would have been well able to raise the necessary funds at reasonably short notice if required to do so, and that the transactions in March 2017 were orchestrated by him in an attempt to arrange matters so that he would not be called upon to repay the loan due to NTA.

THE LAW

31. The relevant statutory provisions are contained in section 84 Value Added Tax Act 1994 ("VATA"), which provides, in relevant part, as follows:

> "**84 Further provisions relating to appeals**
>
> (1) References in this section to an appeal are references to an appeal under section 83.
>
> (2) …
>
> (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)… (p)…, it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.
>
> (3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.
>
> (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."

32. The Tribunal is therefore required to decide whether "the requirement to pay or deposit" some £2.2 million "would cause the appellant to suffer hardship".

33. In *HMRC v Elbrook (Cash & Carry) Limited* [2017] UKUT 181 (TCC) at [16] to [31], the Upper Tribunal recently provided a useful review of the legal principles in this area. From it, I derive the following points (references are to paragraphs in the Upper Tribunal's decision):

(1) The purpose of the provisions is to strike a balance between the abuse of the appeals mechanism by employing it to delay paying disputed tax and the stricture of having to pay or deposit the disputed sum as the price of entering the appeal process; the relief afforded by the "hardship" provisions should not be applied so as to operate as a fetter on the right of appeal ([19]).

(2) The Tribunal should not concern itself with the merits of the underlying appeal ([20]).

(3) The test is an "all or nothing" one, in which it is not relevant that the appellant might be able to pay or deposit some amount less than the whole disputed sum ([31]).

(4) The test is to be applied to the position at the date of the hearing ([26]). This means that the Tribunal should not "speculate as to what might become available to the appellant in the future" ([22] & [26]). It should focus on "immediately or readily available resources" ([21]).

(5) The fact that the appellant may have the necessary cash or other readily available resources may not be determinative, if hardship would result from using it (or them) in paying the disputed sum ([22]).

(6) Available borrowing resources may be considered, but generally only from existing sources, e.g. unused facilities or new facilities immediately available with minimal formality ([23]).

(7) Potentially available borrowing from new sources, for example if the appellant owns property capable as acting as security for a new loan, will only exceptionally be considered as "immediately or readily available", for example where arrangements for borrowing are at an advanced stage ([24]).

(8) The potential sale, outside the ordinary course of business, of assets properly purchased for the purposes of the appellant's business, might cause hardship even if the assets are not currently being used in the business ([25]).

(9) There is no hard and fast rule that "regard can never be had to the resources of connected (but legally independent) entities where… there is common control and the evidence suggests a free flow of resources to meet the needs or requirements of any one entity at the expense of the other or others of them from time to time" ([25]).

(10) Although the test is to be applied by reference to the circumstances at the date of the hearing (see [33(4)] above), that does not mean that events leading up to that time are necessarily ignored. The Tribunal can take into account "whether the appellant is himself responsible for putting himself in a position where he cannot pay…, and that would include by delaying the hearing so that at the time of the hearing he cannot pay… without hardship" ([27], endorsed at [28]). The basis for this is that the "real cause" of the appellant's inability to pay without hardship may be his own prior actions.

(11) The Tribunal should make its assessment on the basis of the most up-to-date available information. The burden lies on the appellant to establish hardship, so it is normally incumbent on the appellant to adduce the necessary evidence to satisfy the Tribunal ([29]). Absence of contemporaneous accounting evidence may justify the Tribunal in placing little, if any, weight on an oral assertion that the appellant is unable to afford to pay.

(12) Within the above parameters, the decision of the Tribunal is a value judgment on the basis of the evidence before it ([16]).

SUBMISSIONS

34. The Tribunal had made no direction for delivery of skeleton arguments prior to the hearing; that is not its general practice in relation to hardship applications. Nonetheless, HMRC delivered a skeleton argument on 12 April 2019, the Friday before the hearing (which was listed for Monday 15 April).

35. In her skeleton argument, Ms Murray submitted that NTA must have been aware, from (at the latest) 4 April 2016, that HMRC were contending it was liable for VAT and were

intending to issue an assessment for over £2 million. On the basis of the material they had received from NTA, its accounts showed that at 31 December 2016 it had net current assets (in fact, she incorrectly referred to "net assets") of nearly £3.3 million, including debtors of over £3 million (most of which was owing from Mr Mehigan), cash of over £200,000 and liabilities of just over £100,000. The same accounts also contained a provision of almost £3 million, stated to be the likely cost of defending NTA's tax planning strategies up to the Supreme Court. When this provision was released and used to justify the payment of a £3 million dividend, that was the operative cause of any hardship which would now be suffered if NTA had to pay or deposit the disputed £2.2 million of VAT. Effectively, NTA had deliberately put itself into the position of being unable to pay and accordingly hardship should be refused.

36. Mr Gordon accepted that NTA was well aware of an impending assessment for over £2 million of VAT, and it had never suggested otherwise. However, that awareness dated back to HMRC's original decisions in 2012, so NTA could quite justifiably say that by 2016 any time limit for assessment had passed and it was therefore at liberty to carry out the transactions which it had, without being exposed to the accusation that it had deliberately taken steps to render itself unable to pay. In the final analysis, however, the crucial point was that on Mr Mehigan's evidence NTA would never have been in a position to pay the amount claimed and it had not taken any steps to avoid payment.

DISCUSSION AND DECISION

37. As set out above, I am satisfied that as at the date of the hearing, NTA did not have the cash to pay or deposit the amount claimed.

38. From the evidence Mr Mehigan gave about his ownership of NTA and DAA Limited, I am satisfied that there was a free flow of resources between all of them to meet the needs of any one of them at the expense of the other or others of them at all material times. Irrespective of that, Mr Mehigan owed NTA significantly more than the amount of the disputed VAT at all relevant times up to March 2017.

39. Mr Mehigan, through his control of NTA, arranged matters so that he was never called upon to repay his debt to it. I accept his evidence that he would not have been able to repay in full out of spare cash immediately available, but he has indicated he would have been able to pay by realising assets and he has not satisfied me that there would have been any difficulty or delay in doing so. He was quite simply never asked. I am satisfied that NTA could, without suffering any hardship, have obtained the necessary cash to pay but at Mr Mehigan's behest it put itself, by means of the transactions which occurred in March 2017, into the position where it could no longer do so.

40. The burden of establishing hardship lies on NTA as the appellant. In the light of my findings, I consider it has failed to discharge that burden. I am satisfied that NTA is responsible for putting itself into the position of being unable to pay or deposit the disputed VAT. It follows that any hardship in having to make payment is caused not by the requirement to pay or deposit the sum of £2,204,580 but by the actions of NTA in putting itself into that position.

41. I do not consider (nor indeed did Mr Gordon argue) that the operation of the hardship provisions in this case would, in the light of the facts as I have found them, operate as an unjustified fetter on NTA's right of appeal.

42. Therefore, the requirement to pay or deposit the amount in question would not cause NTA hardship and the application for hardship is accordingly REFUSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. This document contains full findings of fact and reasons for the decision. I note that, notwithstanding the clear terms of section 84(3C) VATA, the Court of Appeal in *R (on the application of Totel Limited) v First-tier Tribunal (Tax Chamber) (HM Treasury, interested party) [2012]* EWCA Civ 1401 has confirmed that a right of appeal to the Upper Tribunal exists in relation to this decision. Accordingly, any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 20 MAY 2019