[2020] UKFTT 0447 (TC)

TC07923

VALUE ADDED TAX – VAT Mini One Stop Shop (MOSS) Scheme – Cancellation of registration –whether the appellant had persistently failed to comply with its obligations – paragraph 7(e) Schedule 3BA Value Added Tax Act 1994 – whether HMRC had issued reminders in relation to late VAT returns in accordance with Article 58b(2)(a) and Article 60a of EU Regulation 282/2011 – whether HMRC entitled or obliged to cancel registration

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04549

BETWEEN

KRYSTAL HOSTING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS
MRS HELEN MYERSCOUGH

The hearing took place on 21 October 2020 by way of a video hearing using the Tribunal's video platform.

David Watson of GrowFactor Limited for the Appellant

Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The VAT Mini One Stop Shop ("MOSS") scheme was introduced on an EU wide basis to simplify VAT compliance for businesses supplying certain digital services in EU Member States other than the one in which they are established. Instead of having to register in all of the EU countries in which supplies are made, the business may instead register only in the country in which it is established.

2. The Appellant, Krystal Hosting Limited ("Krystal") provides web-hosting services across the EU. Through its agent, GrowFactor, it registered for the VAT MOSS scheme in July 2017.

3. Unfortunately, it did not submit its first three MOSS returns on time and so HMRC cancelled Krystal's registration under the MOSS scheme in May 2018.

4. Once a registration has been cancelled, a business cannot re-join the scheme for two years. In fact, that two year period has now passed and Krystal has, once again, become registered under the MOSS scheme. However, it is appealing against the cancellation of its registration in order to enable it to account for the VAT due (estimated to be about £25,000) for the two-year period between the date its registration was cancelled and the date it re-joined the scheme.

5. If the appeal is unsuccessful, Krystal will have to account for VAT in each of the EU Member States in which it has made supplies. Mr Watson, representing Krystal, estimated that this could cost up to £50,000.

6. The main basis for the appeal is that the reminder notices issued by HMRC prior to the cancellation of Krystal's registration were inadequate and did not therefore entitle or require HMRC to cancel the registration. We note that, in its notice of appeal to the Tribunal and in correspondence with HMRC, a key part of Krystal's case was that it did not receive any notification of its de-registration. However, this was not a point which pursued before us at the hearing.

THE REQUIREMENTS OF THE MOSS SCHEME

7. The domestic law requirements relating to the MOSS scheme are set out in schedule 3BA Value Added Tax Act 1994 ("schedule 3BA"). The key provisions which are relevant to this appeal can be summarised as follows:

(1) a return must be made for each calendar quarter (paragraph 9);

(2) the return must be filed electronically within 20 days after the end of the relevant quarter (paragraph 10(3));

(3) the taxpayer is liable to pay HMRC the amount of VAT charged on all of the relevant supplies (paragraph 8);

(4) the VAT must be paid no later than the deadline for submitting the relevant return (paragraph 11(1));

(5) HMRC must cancel a person's registration under the MOSS scheme in certain circumstances. One of these circumstances is where HMRC "determine that the person has persistently failed to comply with the person's obligations under the Schedule or the Implementing Regulation" (paragraph 7(e)).

8. The Implementing Regulation is EU Regulation no. 282/2011. Article 58b(2) of the Implementing Regulation sets out certain circumstances in which a person is to be regarded as having persistently failed to comply with their obligations. This includes:

> "(a) where reminders pursuant to Article 60a have been issued to him by the Member State of identification, for three immediately preceding calendar quarters and the VAT return has not been submitted for each and every one of these calendar quarters within ten days after the reminder has been sent;"

9. Article 60a provides as follows:

> "**60a** the Member State of identification shall remind, by electronic means, taxable persons who have failed to submit a VAT return under Article 364 or Article 369f of Directive 2006/112/EC, of their obligation to submit such a return. The Member State of identification shall issue the reminder on the tenth day following that on which the return should have been submitted, and shall inform the other Member States by electronic means that a reminder has been issued."

10. Paragraph 36 of schedule 3BA gives a taxpayer a right of appeal against the cancellation of their registration under the MOSS scheme. The normal rules relating to VAT appeals apply to an appeal under paragraph 36.

11. Mr Marks, appearing on behalf of HMRC, suggested that HMRC had the burden of showing that the requirements for the cancellation of Krystal's registration under the MOSS scheme were satisfied. We express no view on whether that is correct, as it makes no practical difference in this particular case.

FACTUAL BACKGROUND

12. The evidence consisted of a bundle of documents and correspondence. There was no oral evidence. There is no significant difference between the parties as to the material facts, which are set out below.

13. At all material times, GrowFactor has acted as Krystal's agent in respect of its tax compliance, as they do for many other clients.

14. Krystal was registered for the MOSS scheme by GrowFactor with effect from 1 July 2017. The first return was due for the quarter ended 30 September 2017.

15. The registration process is electronic. As part of the registration process, an email address has to be linked to the account, which is then verified by HMRC.

16. If the taxpayer logs on to its online account, it will be presented with a screen which gives it the option to view any electronic communications, which have been received. When an electronic communication is sent, HMRC also send a generic email to the verified email address notifying the recipient that a message has been sent. The email does not however say what the message relates to.

17. A taxpayer's agent (in this case, GrowFactor) is able to access the taxpayer's online account. However, there is no facility for the agent to view the HMRC communications.

18. Krystal's VAT MOSS returns for the 09/17, 12/17 and 03/18 quarters were not submitted on time. On 30 April 2018, HMRC issued an electronic reminder in respect of the return for the 03/18 quarter. HMRC have stated in correspondence that they also issued electronic reminders in respect of the returns due in relation to the 09/17 and 12/17 quarters.

19. We were referred by Mr Marks to a printout of HMRC's electronic communications to Krystal which was produced on 16 April 2019. This makes it clear that any messages which have been read will be deleted after 30 days and any messages which have not been read are deleted after 360 days. The reminders in respect of the two quarters in 2017 do not therefore appear on this printout (being more than 360 days before the date when the printout was produced). However, Mr Marks invited the Tribunal to infer that the reminders for these earlier quarters were duly sent.

20. Based on the fact that the electronic reminder for the 03/18 quarter was duly sent on the correct date (ten days after the deadline for the return), we find as a fact that the electronic reminders for the 09/17 and 12/17 periods were sent on 30 October 2017 and 30 January 2018 respectively. Mr Watson did not seek to argue to the contrary.

21. In early 2018, GrowFactor changed their computer systems. This resulted in problems with MOSS jobs not being imported into the new system. Mr Watson said this would have been identified and rectified if they had received the reminders.

22. On 11 May 2018, HMRC issued an electronic communication notifying Krystal that its registration under the MOSS scheme would be cancelled with effect from 1 July 2018 as a result of its failure to submit three consecutive MOSS returns. Although, in the correspondence we have seen, Krystal denies having received any such communication and it does not appear in the printout of HMRC's messages which was produced on 16 April 2019, we are satisfied on the balance of probabilities that such a message was sent by HMRC and received by Krystal.

23. Krystal's VAT returns for the three relevant quarters were submitted on 15 June 2018 (in respect of the two quarters in 2017) and on 25 June 2018 in respect of the 03/18 period. There is nothing in the evidence to explain what prompted Krystal to submit these returns. In the absence of any other explanation and based on HMRC's evidence that such a message was sent on 11 May 2018, our inference from these facts is that the 11 May 2018 message was indeed sent and was seen by Krystal and/or GrowFactor, thus prompting the filing of the relevant returns in June 2018. The fact that the message had been read is consistent with the fact that it does not appear in the printout of messages produced in April 2019 as the message would have been deleted after 30 days.

THE PARTIES' SUBMISSIONS

24. On behalf of HMRC, Mr Marks' primary submission is that, once the conditions for the cancellation of a person's registration in paragraph 7 of schedule 3BA are satisfied, that person's registration must be cancelled. He says HMRC have no discretion in relation to this.

25. As far as the conditions are concerned, Mr Marks focuses on paragraph 7(e). As mentioned above, this applies if HMRC determine that a person has persistently failed to comply with their obligations under schedule 3BA or under the Implementing Regulation.

26. Again, Mr Marks submits that HMRC have no discretion in relation to this given the provisions of Article 58b(2)(a) of the Implementing Regulation which provides that a person is to be regarded as having persistently failed to comply with their obligations if reminders have been issued for the three prior calendar quarters and the VAT returns have not been submitted within ten days of the reminder being sent.

27. Mr Marks notes that, in accordance with Article 60a of the Implementing Regulation, the reminder must be sent electronically on the tenth day following that on which the return should have been submitted. He referred us to the clear evidence that a reminder was sent on 30 April 2018 in relation to the 03/18 quarter and invited us to infer that similar reminders

would have been sent on 30 January 2018 in respect of the 12/17 quarter and on 30 October 2017 in respect of the 09/17 quarter.

28. As there is no dispute that the returns were not submitted within ten days of any such reminders, Mr Marks submits that Krystal is to be regarded as having persistently failed to comply with its obligations with the result that HMRC had no choice but to cancel its registration under the MOSS scheme.

29. In this context, Mr Marks explained that HMRC's systems are automated. Electronic reminders are automatically generated and sent. Similarly, where there is a failure to submit returns within ten days of any reminders for three consecutive quarters, the system automatically cancels the taxpayer's registration and generates an electronic communication notifying the taxpayer that the registration has been cancelled.

30. Mr Watson approached the issue from a rather different direction. He did not suggest that, assuming the conditions for cancellation are satisfied, HMRC have any discretion in relation to the cancellation. Instead, his focus was on whether the conditions had in fact been satisfied.

31. In this respect, he submits that it is implicit in the requirement contained in Article 58b(2)(a) of the Implementing Regulation that, in order for a taxpayer to be treated as having persistently failed to comply with their obligations as a result of being issued with reminders, the taxpayer must have been given a reasonable opportunity to read those reminders and therefore to act upon them in order to remedy any default.

32. By way of example, Mr Watson suggested that if HMRC set up a system whereby an electronic communication was sent to a taxpayer but that communication was then deleted almost immediately (rather than after 360 days which is how the system currently functions), HMRC would not have discharged its obligation to issue a reminder for the purposes of the Implementing Regulation.

33. Building on this, Mr Watson identified a number of factors in support of his submission that the electronic communication sent by HMRC was not a sufficient reminder for the purposes of the Implementing Regulation.

34. The first point is that the electronic communications sent by HMRC are only visible to the taxpayer, in this case Krystal. They cannot be viewed by a taxpayer's agent. Indeed, the taxpayer's agent has no way of knowing that an electronic communication has been sent. Both Mr Watson and Mr Marks referred us to a number of screenshots from HMRC's online system. We cannot say for certain on the basis of these screenshots whether Mr Watson is correct that the communications cannot be viewed by a taxpayer's agent. However, Mr Marks did not seek to argue to the contrary and so, based on the evidence available, we accept that GrowFactor were not able to view any electronic communications sent by HMRC to Krystal.

35. Based on this, Mr Watson submits that, where Krystal had entrusted compliance to GrowFactor, Krystal could not be expected to log into HMRC's online system itself on a regular basis just to check for messages. This, he says, was not part of Krystal's business.

36. Mr Watson accepts that Krystal may well have received generic email notifications to tell them that they had been sent electronic communications. However, he submits that a business such as Krystal would receive numerous such emails in relation to all sorts of different taxes and that, in circumstances where the taxpayer has delegated all of their tax compliance to an agent such as GrowFactor, such a generic email is not sufficient to alert Krystal to the existence of an important message such as a reminder in relation to the submission of the MOSS returns and the possible cancellation of its registration.

37. Mr Watson also drew attention to the fact that, in the case of other taxes (such as corporation tax), HMRC will not only send electronic reminders but will also send letters in the post both to a taxpayer and its agent reminding them of their obligations. Given the serious consequences of the cancellation of a taxpayer's registration under the MOSS scheme, he submits that it would be appropriate for HMRC to send reminders not only by way of electronic communication but also by way of a hard copy letter in the post. He accepts that Article 60a of the Implementing Regulation requires only that an electronic reminder is sent. However he submits that this does not mean that HMRC could not also send a reminder in the post.

38. Mr Watson also took issue with the wording of the electronic reminder which was sent by HMRC. This states that:

> "Failure to meet the requirements for using the MOSS service may result in your removal from the scheme."

39. Mr Watson's complaint about this is that the warning is inadequate in circumstances where HMRC have no discretion as to whether to cancel a taxpayer's registration. He suggests that the warning should say that a failure to meet the relevant requirements "will" result in removal from the scheme rather than "may" result in such removal.

40. Finally, at a more general level, Mr Watson argues that, if everything is to be done electronically, HMRC should make this absolutely clear to a taxpayer when they register for the scheme. In this case, he says that no such warning was provided.

41. Mr Marks' response to Mr Watson's submissions is straightforward. He points out that the Implementing Regulation only requires reminders to be issued; it does not require them to have been read. He submits that it is clear that the reminders were received, even though they may not have been read and that Krystal had a reasonable opportunity to read the electronic communications had it chosen to do so, particularly given the fact that Krystal would have received an email notifying them that a communication had been sent.

42. Mr Marks also makes the point that, ultimately, the taxpayer is responsible for compliance. They cannot simply appoint an agent and abdicate all responsibility.

43. As far as postal reminders are concerned, Mr Marks' view is that this is not a requirement of the legislation. If Krystal feels that HMRC have not done all that they could have done to help Krystal avoid the failures, its remedy would be to make a complaint. It cannot however affect the question as to whether, under the terms of the relevant legislation, HMRC were right to cancel Krystal's registration.

DECISION

44. In our view, HMRC were right to cancel Krystal's registration under the MOSS scheme in accordance with paragraph 7(e) of schedule 3BA as a result of its persistent failure to comply with its obligations.

45. The Implementing Regulation is clear that, where a taxpayer is sent an electronic reminder but still fails to file its MOSS returns within ten days of that reminder for three consecutive quarters, they are to be treated as having persistently failed to comply with their obligations.

46. We have found as a fact that the relevant reminders were sent on the correct dates. It is accepted that the returns were not submitted within ten days of those reminders being sent.

47. We do not accept Mr Watson's submissions that more should have been done to draw Krystal's attention to the electronic reminders and that, as a result of this, the reminders were insufficient for the purposes of the Implementing Regulation.

48. It is clear, looking at the provisions relating to the MOSS scheme as a whole that it was intended to be entirely electronic. This is apparent from the EU Directive 2008/8/EC which introduced the MOSS scheme. In paragraph 8 of the preamble, it states that:

> "To simplify the obligations on businesses engaging in activities in Member States where they are not established, a scheme should be set up enabling them to have a single point of electronic contact for VAT identification and declaration."

49. This is then reflected in the terms of the Directive itself which require for example information and returns to be provided by the taxpayer by electronic means. Likewise, the Implementing Regulation requires information to be provided by a taxpayer by electronic means and, as we have seen, requires reminders to be sent electronically by the relevant tax authority.

50. This is not surprising. The purpose of the MOSS scheme is to simplify matters for taxpayers who are providing certain digital services in other EU Member States and where any VAT would normally have to be collected by the taxpayer registering for VAT in each of those Member States. Although we were not addressed on the issue, no doubt such a scheme is only viable on the basis that it is wholly electronic.

51. Whilst it may well be helpful if agents could view any electronic communications sent by HMRC to the agent's clients, the fact that this is not possible does not, in our view, mean that the reminders which were sent to Krystal were insufficient for the purposes of the Implementing Regulation. Krystal had the ability to read the reminders if it decided to log on to HMRC's online system. In addition, Krystal will have received emails telling them that they have received a message. Krystal therefore had a reasonable opportunity to read the messages.

52. There was no evidence as to whether GrowFactor told Krystal that it would not be able to read any electronic communications received from HMRC and that Krystal would have to do this itself. However, even if Krystal were not aware of this, this cannot mean that Krystal did not have an adequate opportunity to read the messages which had been sent by HMRC. In our view, HMRC are entitled to expect that a taxpayer who has signed up electronically for the MOSS scheme will read electronic communications which are sent to them.

53. We note in passing that it would be very surprising if Krystal were not aware of the fact that there was a problem with the submission of the MOSS returns. Although they may have been relying on GrowFactor to submit those returns, presumably Krystal would have been expecting to pay VAT on a quarterly basis. However, they did not make any VAT payments until July 2018 after the MOSS returns were submitted. We would expect this to have alerted Krystal to the fact that there was an issue which needed to be investigated and, at the very least, to get in touch with GrowFactor to find out whether there was a problem.

54. In a sense, this point is not relevant to our conclusion as the question is not whether Krystal has some sort of reason or excuse as to why it did not submit the MOSS returns. The issue is only whether the reminders were sufficient to engage paragraph 7(e) of schedule 3BA and, in turn, the provisions of the Implementing Regulation. It does however provide another reason why it might have been expected that, in this particular case, Krystal would have accessed and read the messages which HMRC had sent.

55. As Mr Marks has said, it is up to Krystal to ensure that it meets its tax compliance obligations and it cannot in our view complain about the consequences if it fails to read the messages which are sent by HMRC, particularly in circumstances where they have received a

separate email notifying them that a message has been sent (even if the email does not reveal the nature of the message).

56. Mr Watson's submission in relation to the wording of HMRC's reminder messages is not relevant to the question which we have to answer which is whether a reminder was sent in circumstances where the taxpayer had a reasonable opportunity to read the reminder. Whether the reminder states that failure to comply "may" lead to the taxpayer's removal from the scheme or "will" lead to their removal from the scheme makes no difference to this question. In any event, the warning is accurate given that a taxpayer will only be removed if they fail to submit their return within ten days of the reminder for three consecutive quarters.

57. We should mention that Mr Marks put forward alternative submissions relating to the fact that Krystal not only failed to submit its MOSS returns but also failed to pay any VAT which was due within the relevant timescale. Whilst this may also have been a persistent failure to comply with its obligations under schedule 3BA, we do not need to consider this point given our conclusion that Krystal had persistently failed to comply with its obligations as a result of its failure to submit returns for three consecutive quarters.

58. Although it is not a point which was challenged by Mr Watson, we agree with Mr Marks that, once the conditions for cancellation of a taxpayer's registration are met, HMRC have no discretion as to whether to deregister a taxpayer. This follows from the fact that paragraph 7e of schedule 3BA provides that HMRC "must" cancel the registration. It is also consistent with Article 369e of Directive 2006/112/EC which states that a Member State "shall" exclude a taxpayer if the relevant conditions are satisfied. There may be circumstances where HMRC have to make a judgment as to whether the conditions have in fact been met (for example whether there has been a persistent failure in circumstances not covered by the Implementing Regulation) but that is a different matter.

59. It is perhaps for this reason that Mr Watson did not pursue before us the issue as to whether or not Krystal had received the electronic notice issued by HMRC on 11 May 2018 notifying it of the cancellation of its MOSS registration. There is nothing in schedule 3BA nor in the Implementing Regulation which requires a notice of the cancellation of a taxpayer's registration to be sent to the taxpayer. No doubt it makes good sense to do so but once the conditions for de-registration have been met, the cancellation is automatic. In any event, as mentioned above, we have concluded that Krystal did in fact receive notice of cancellation of its registration.

CONCLUSION

60. Krystal persistently failed to comply with its obligations under schedule 3BA within the meaning of the Implementing Regulation. HMRC were therefore right to cancel its registration under the MOSS scheme with effect from 1 July 2018.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. This document contains full findings of fact and reasons for the decision. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 04 NOVEMBER 2020