



**TC02939**

**Appeal number: TC/2012/10728, 10871, 10872, 10855, 10966 and TC/2013/00091**

*EXCISE DUTY – non compliance with unless order – failure to satisfy the tribunal of its address – appeals struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MALT BEVERAGES BVBA**

**Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: JUDGE BARBARA MOSEDALE**

**Sitting in public at Bedford Square, London on 1 October 2013**

**Mrs R Hudson, solicitor, of Altion Law Ltd, for the Appellant**

**Mr R Jones, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### *Chronological order of events*

5 1. The appellant has lodged some 12 appeals in 2012 and 2013 with the Tribunal against review decisions issued by UKBA refusing to restore to the appellant goods which have been seized.

2. The appeals were lodged by Ms R Hudson of Altion Ltd (later of Altion Law Ltd) as representative of the appellant. The Tribunal, in around November 2012,  
10 pointed out that the Tribunal's Rules required the appellant itself to give written notice of the appointment of a representative (unless the representative was a legal representative, which Altion Ltd was not).

3. On 7 December 2012 an email from a person with the domain name "maltbeverages" was received by the Tribunal with consents for Altion Ltd to act as  
15 the representative of Malt Beverages BVBA and signed by a name which appeared to be "Tom Michiels".

4. On 4 February 2013 the Tribunal received a strike out application on most of the 12 appeals, and including the 6 the subject of this decision, from the UKBA on the grounds that (it said) the UKBA did not have any evidence that the appellant was a  
20 legitimate company which had instructed Altion Ltd to act on its behalf. Attached to the application was a witness statement from an UKBA officer, Mr B Rayden, in which he said that the postal address in Potterstraat, Belgium, which the company had given to UKBA (and used on some of its appeal notices) could not be found on GoogleMaps. It also said that the address which the appellant has used on other  
25 Notices of Appeal to the Tribunal, which I shall refer to as the Bonheiden address, was residential and not commercial. The statement said that the officer had made contact by phone and email with a Ms Martine Vermalen but the appellant had not replied to a letter sent to the Bonheiden address.

5. On 26 February 2013 the Tribunal wrote to the appellant in respect of 7 of the  
30 appeals at the Bonheiden address. It referred to HMRC's strike out application. It asked the appellant to do the following:

35 "1. An officer of the appellant company should countersign one of the two identical letters in this envelope and return it to us by post; the signatory should also (a) state his or her name legibly; (b) state his position in the company; and (c) state the company's full postal address.

2. Provide the company's certificate of incorporation;

3. Provide the official copy of the signatory's appointment as officer of the company.

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Please may we have from you in 14 days. A failure to respond in 14 days may lead to an unless order (the effect of failing to comply with which may be that your appeals may be struck out in any event).”

6. A copy of this letter was sent to Altion Ltd as well as to UKBA.

5 7. Altion Ltd acknowledged receipt of the copy of this letter but no reply to it was received by the Tribunal from the appellant and in particular the appellant did not countersign and return the letter. On 13 March 2013 the Tribunal issued the unless order referred to above:

10 In view of the appellant’s failure to respond to the letter from the Tribunal dated 26 February 2013; and taking into account that the Tribunal needs to be satisfied that the named appellant company exists and has provided the Tribunal with its proper address for correspondence

15 IT IS DIRECTED THAT UNLESS by no later than 9 April 2013 the appellant has carried out the instructions contained in the letter dated 26 February 2013 THEN these proceedings MAY be STRUCK OUT without further notice to either party.

8. On 21 March 2013 Ms Hudson of Altion Ltd took down a witness statement from Ms Martine Vermeylen. HMRC received a copy of this.

20 9. On 4 April 2013 the Tribunal received a letter from Altion Law Limited. It stated that it had been appointed by the appellant to represent it in the seven appeals and as regulated by the Solicitors’ Regulation Authority, did not need to present to the Tribunal written authority from its client. The letter asked the Tribunal to confirm that the appellant no longer had to provide its company documentation as requested.

25 10. On 10 April 2013 the Tribunal replied stating that the Tribunal would not provide confirmation that it was no longer necessary to comply with the unless order and that a hearing would be called to consider whether to grant HMRC’s strike out application and to consider whether to strike out the appeals for non-compliance with the unless order.

30 11. At the same time the Tribunal issued directions for the hearing. Amongst other things this asked for dates to avoid and directed skeleton arguments to be exchanged 14 days before the hearing. I note in passing that only UKBA provided a skeleton argument.

35 12. On 29 May 2013 the Tribunal received an email from Altion Law Limited. The letter queried whether the Tribunal needed to hold a hearing to determine the legitimacy of the appellant and enclosed some 9 documents which it asked the Judge to read before deciding that the hearing was to go ahead. I will revert to these documents below, but in the meantime I will continue the timeline of events.

40 13. On 10 June 2013, in reply to a request from the Tribunal, Altion Law Limited wrote to the Tribunal with a hard copy of the enclosures mentioned in the paragraph above.

14. Today's hearing was notified to the parties on 8 August.

15. On 5 September UKBA notified the appellant and the Tribunal that following the receipt of further information from the appellant it was withdrawing its strike out application but considered that the hearing should proceed to deal with the question of the appellant's non compliance with the unless order. On the same day UKBA wrote to Altion Law Limited asking for an explanation of why UKBA's letters to the appellant had never met with a reply. UKBA asked Altion to provide evidence from a director of the appellant.

16. On 13 September both parties were notified by the Tribunal that the hearing of 1 October 2013 would remain listed to consider the non-compliance with the unless order on the six files named at the top of this decision notice. The letter went on to say:

“In the meantime, if the appellant considers that it did, or has now, complied with that order it should notify this to the Tribunal with an explanation.”

17. On 20 September a letter on the appellant's headed notepaper was sent to the Tribunal (although not put in front of me until the hearing) which gave an address in Heist o/d Berg as the company's "full postal" address but not the same Heist o/d Berg address as its registered office (see below). I will refer to this as the "Bosweg" address. It said:

“...when a director of a company changes in Belgium, it is (sic) takes a long time to get formal documents signed off and we were not in a position to provide any documents at the time requested....”

In relation to your request to sign and return a letter to the tribunal, we can confirm that we did sign and return one letter to you. We then later received another letter asking again that this was signed and returned. We thought that this second letter had crossed with our first letter to you and therefore didn't respond again...”

*The documents provided by the appellant*

18. The documents referred to in §12-13 above included official documents in what I presume is Flemish. The appellant provided a translation of most. They show as follows:

(1) The company was registered in 2003 with an address in Nijlen and two directors Mr Gustaaf and Mr Garardus.

(2) On 31-12-12 Mr Tom Michiels, living at the Bonheiden address, resigned as director.

(3) On 1-1-13 Mr Michel Frans Clement Wierinckx, living in Holsbeek, was appointed as director. The registered officer of the company which had been the Bonheiden address now became an address in Heist o/d Berg (the "Berg" address). The document which recorded this was dated 4 March 2013.

19. The appellant also provided a document on its headed notepaper dated 8 March 2013 addressed to “all suppliers and customers” records that “from today” the address of the company was the Berg address. It was signed by Mr Wierinckx.

*Ms M Vermeyleen’s witness statement*

5 20. The appellant called no witnesses, but had, as recorded above, provided HMRC with a witness statement dated 21 March 2013 signed by Ms M Vermeyleen. Mrs Hudson said that she had personally taken the instructions from Ms M Vermeyleen to draw up the statement which Ms Vermeyleen signed.

10 21. HMRC did not suggest that the Tribunal should exclude the statement in the absence of the witness; on the contrary Mr Jones drew the Tribunal’s attention what they perceived to be discrepancies. Ms Vermeyleen said, amongst other matters:

(1) she was of “Malt Beverages” giving the Bonheiden address. Later in the same statement she said the current registered address of the office was the Bonheiden address;

15 (2) she was assistant to “the director, Tom Micheils”

(3) presumably in response to a comment in Mr Rayden’s witness statement, that “The company office itself is not situated in an industrial area and does not need to be, given the way that the company conducts its business. In Belgium it is very common for offices and homes to be located in similar areas.”

20 She attached official documents showing Mr T Michiels as director and that the Bonheiden address was the company’s registered office.

22. The inconsistencies identified by HMRC were:

25 (1) As at 21 March 2013, not only was the registered office changed from Bonheiden to the Berg address, but the company’s headed notepaper (see § 19 above) showed that it had changed its trading address to the Berg address;

(2) As at 21 March 2013 there was only one director and that was Mr Wierinckx.

30 (3) Other documents show that up to 31-12-12 the Bonheiden address was both the registered office of the company and the private address of Mr Michiels. Ms Vermeyleen’s statement clearly implies it was still the company’s trading address. Yet she says “it is common for offices and homes to be located in similar areas” rather than saying that the company traded from the (former) director’s home address.

35 23. Her statement read as if she did not know the Bonheiden address was Mr Michiels’ home address. Her statement read as if she did not know that the company had changed address. Her statement read as if she did not know that Mr Michiels was no longer its director. The appellant did not call her to give evidence so she was unable to explain these inconsistencies.

24. Ms Hudson expressed the view that the Tribunal should not read too much into these discrepancies as (she suggested) that Ms Vermeylan had known the true position but, due to the length of time it took to get official documents registered in Belgium, had chosen to make a witness statement referring to the out-dated documents which the company actually possessed rather than the current position for which the company might not have then been in possession of the official documentation.

25. Rather oddly, therefore, the appellant's position was that the Tribunal should not rely upon the evidence contained in Ms Vermeylan's statement. HMRC did not consider it reliable either. In view of the inconsistencies, I am certainly very wary about putting any weight at all on it. Is Ms Vermeylan's statement wrong or is the information which contradicts it wrong? What is the company's address?

*What is the company's address?*

26. The rules require the company to provide its address to the tribunal. There is evidence that its current registered office is the Berg address.

27. On the other hand I find it difficult to be sure this is an address genuinely belonging to the company. It has put forward evidence that on 8 March it told its suppliers and customers that the Berg address was the new address. Yet a few weeks after this date it presented to UKBA a witness statement which stated that the Bonheiden address was its trading address and makes no mention of the changes which took place on 1 January 2013 or 8 March. And now the company writes from the Bosweg address which it describes as its postal address with no mention of the Berg address.

28. Ms Hudson's case was that there was nothing wrong with a company frequently changing its address, and that is true as far as it goes. (It should of course notify the Tribunal of its changes, but has not done so.)

29. But I am not satisfied that this is merely a case of a quick succession of changes of address. The company itself is making inconsistent representations of its address at any particular point in time: while the Berg address shows as its registered office on official documentation, the company (via Ms Vermeylan's witness statement) put forward the case that Bonheiden was actually its postal address.

30. There is of course no reason why a company's postal or trading address could not differ from its registered office; but in this case it represented that the Berg address was its trading as well as its registered address. Was this representation reliable when a few weeks later Ms Vermeylan's witness statement makes no mention of it? And now, as I have said, its current headed notepaper does not show the Berg address even as a registered office.

31. In conclusion I do not know which if any of these addresses are or were addresses at which the company could be contacted. I am unable to find any of the contradictory evidence put forward by the company as reliable evidence of its address. Persons representing the appellant can be, it seems, easily contacted by

email and phone. The problem is with contacting them by post. Am I satisfied that it has a postal address and that the Tribunal knows what it is? No.

*Was there compliance with the unless order?*

5 32. The Unless order required the terms of the Tribunal's letter of 26 February to be complied with as set out in § 7 above.

33. HMRC did not suggest that the certificate of incorporation (required at point 2) was false: indeed the withdrawal of the strike out application means that they accepted it as genuine. The appellant provided company searches which recorded the company's existence. I find that there was compliance with point 2.

10 34. I find that there was no compliance with either point 1 or 3, Point 3 could not be complied with as it depended on compliance with point 1. The tribunal never did receive back one of the letters sent to the Bonheiden address countersigned by the director so neither points 1 nor 3 were complied with.

*Why was the Tribunal's letter not actioned?*

15 35. The Tribunal has not received back a signed copy of the letter sent on the 26 February. The appellant does not suggest that it did sign and return it.

20 36. Can I accept its explanation proffered in its letter of 20 September of why it did not do as the Tribunal instructed? The explanation is that the Tribunal's letter crossed with earlier compliance. An analysis of the files show that the only document to which Mr Wierinckx could be referring was the form appointing Altion signed by Mr Michiels on 7 December (see § 3 above). This was done by email and no one could be under the mistaken impression it had crossed with a letter from the Tribunal dated 26 February, two and half months later.

25 37. Further, the February letter was categoric in its instructions. The letter was also copied to Altion who similarly should have been in no doubt about what the company was required to do. The letter contained a warning that a failure to comply could ultimately lead to a striking out.

30 38. Mr Wierinckx appears to claim the company did receive the letter (see § 17). But if the company received the letter, it is odd it did not action it. Ms Hudson says only Ms Vermeylen at her client's is fluent in English: nevertheless one person fluent in English is enough to understand the letter. And this hearing has been listed for a long time: if the appellant had received the letter, why has it still not done what it was asked to do and signed and returned a copy of it, even if late?

35 39. Mr Wierinckx did not attend the hearing so UKBA were denied the opportunity to cross examine him. I am cautious about attaching weight to the statement in the letter of 20 September that the company received the 26 February letter. It may not have done so.

40. The letter may have gone astray in the post. This is always a risk, and perhaps a slightly larger than normal risk in this case as I note that there was a small misspelling in the address the Tribunal used. Nevertheless, I do not accept that this is the explanation of why the letter was not signed and returned. If Bonheiden was the company's genuine address, they would be aware that the letter had not arrived (as a copy was sent to their representative apart from the terms of the unless order). They would have contacted the Tribunal to say no letter had arrived and asked for it to be sent again.

41. There is the possibility that the letter arrived, but at a time when the Bonheiden address had ceased to be the company's genuine address. Again the response to this would be to ask the Tribunal to send it again to the right address.

42. The remaining possibility is that Bonheiden never was the company's postal address but the appellant does not wish to explain this to the Tribunal.

43. I asked why no director of the appellant had attended the hearing to give evidence. Ms Hudson's answer was that he was "not available". She mentioned that until very recently she thought that the hearing would not go ahead but I find that she and her clients could not have been any doubt that the hearing was going ahead – and this was in any event confirmed by the Tribunal on 13 September. The effect was that no one from the company was available to explain the discrepancies in the information the Tribunal has about the company's address.

44. I am not satisfied that the letter of 20 September contains a reliable explanation of why the appellant failed to do as it was asked. There is another possible explanation as set out above. I am not satisfied that the appellant actually received the letter of 26 February as I am not satisfied that at that time the Bonheiden address was the company's address. I have not been satisfied that any of the various addresses provided by the company are or were its postal address. The appellant does not appear to want to be contactable by post. The poor impression created by its contradictory evidence may have been alleviated by evidence from a director but he chose not to attend.

30 *Should the appeal be struck out?*

45. Does it matter that the appellant has not provided what the Tribunal is satisfied is its actual postal address, being an address at which it can be contacted by post?

46. The company's case is that it doesn't need much more than an office to conduct its business of buying and selling drinks as the stock is all held in bonded warehouses. That office could be someone's home address.

47. But it does need an office, and offices have postal addresses. It should have been a simple matter to satisfy this Tribunal of a postal address and yet the company's contradictory evidence has left me uncertain whether they have a trading address and whether the registered address is actually an address that can be used to contact them.

48. Ms Hudson's position is that the appellant had gone to great lengths to satisfy both the Tribunal and HMRC of its legitimacy, obtaining both copies of official documents and translations of them. But I find that the evidence it has provided is contradictory and therefore none of it can be relied upon. It should have been simple to comply with the unless order but it has not done so.

49. Its failure to attend the proceedings is all the more surprising as it should have been in no doubt about the seriousness of the Unless order. Certainly Ms Hudson who represents the appellant cannot have been in any illusion as to the likely consequence of a failure to satisfy the Tribunal of the identity and address of an appellant: Altion Ltd (for which she worked) and/or Altion Law Ltd of which she is now principal have had a number of clients whose appeals have been struck out because the appellants failed to comply with a direction which had been issued to satisfy the Tribunal of the genuineness of their address and/or identity.

50. Rule 20(2)(a) requires the appellant to inform the Tribunal of its name and address. There are good reasons for this rule. The Tribunal and the respondent need to be able to identify the appellant.

51. It goes beyond the need to have a method of contacting the tribunal to a question of identity. In all court cases, and particularly those where a payment is sought from the other party (as is ultimately the aim sought by the appellant in this case) the Tribunal needs to know that it is dealing with the true appellant, and not someone who is purporting to be the appellant. An email address and telephone number is insufficient for this purpose.

52. The Tribunal must be satisfied that an appellant has a postal address: a physical presence. I have not been satisfied in this case that the Tribunal has been given the appellant's postal address at all: even if the company does have a postal address, I cannot be satisfied which of the numerous addresses provided would be the right one.

53. A strike out for non compliance with an order of the Tribunal is normally because the party could have complied but did not: in this case I recognise that the appellant may well not have been able to comply because they did not receive the letter. But that is the point. It is obliged by the Tribunal's rules to provide its address and it has not done so.

54. In these circumstances I strike out the six appeals under Rule 8(3)(a).

#### *Reinstatement*

55. As the six appeals are struck out under Rule 8(3)(a) I notify the appellant that it has the right to apply for reinstatement of the appeal within 28 days of the date of this decision.

*Why are only six appeals struck out?*

56. The text of the unless order did not refer to the appeals by number. It merely referred to “these proceedings”. The top right hand corner of the order recorded six appeals by number. Those six numbers are the same as appear on the top right hand corner of this decision.

57. It was HMRC’s contention that this was merely a typographical error in the unless order and the unless order actually applied to seven appeals lodged by the appellant: by mistake appeal TC/2012/10870 was omitted from the unless order.

58. The unless order was issued because the appellant had (it seemed) failed to comply with instructions contained in the Tribunal’s letter of 26 February 2013. That letter referred to all seven appeals: ie the six listed at the top of this decision notice plus TC/2012/10870. There was no reason for this seventh file to have been excluded from the subsequent unless order.

59. I ruled that even if it was no more than a clerical error, as it appeared to be, nevertheless technically the unless order was only issued on six of the appeals and therefore a strike out under Rule 8(3)(a) could only be considered on those six appeals.

*The remaining appeals*

60. That leaves some 6 appeals remaining before the Tribunal but obviously the Tribunal has the same concerns over whether the notified address is a valid address.

61. In respect of those six appeals the appellant will be asked to state to the Tribunal its postal address. A letter will be sent to that address, in respect of those 6 remaining appeals, with a request to sign and return the letter. Failure to comply is likely to lead to another unless order, with striking out as the ultimate sanction.

62. In so far as any application for reinstatement of the six appeals hereby struck out are concerned, the appellant is warned that it is unlikely to be successful unless the Tribunal is satisfied of a valid postal address and in particular unless the appellant carries out the instructions in the immediately preceding paragraph.

*Email correspondence with the Tribunal*

63. There is nothing wrong in principle with communications by or to the Tribunal by email. The issue in this case was not the appellant’s obvious preference for email communications, but its failure to satisfy the Tribunal that it actually has a postal address at which it could be contacted. That goes to its identity.

64. And it is only in rare cases where the Tribunal has been given cause to be concerned about the identity of an appellant that it would ask the appellant to satisfy the Tribunal that its postal address is genuine.

65. 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.

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**BARBARA MOSEDALE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 8 October 2013**