[2013] UKFTT 407 (TC)

TC02803

Appeal number: TC/2012/11097

VAT – security deposit – reasonable decision – information about employee fraud at predecessor company not taken into account in initial decision – no impact on final decision – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CAPITAL CLEANING 2012 LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
Mr PETER LAING FCIB

Sitting in public at Eastgate House, Newport Road, Cardiff on 23 April 2013

Mr John Lamb for the Appellant

Mr Leslie Bingham, representing HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against a requirement to provide security under paragraph 4(2)(a) Schedule 11 Value Added Tax Act 1994. ("VATA 1994")

2. Notice to provide security was issued to Capital Cleaning 2012 Ltd ("Capital Cleaning") on 18 September 2012 in an amount of £40,950.00 (reduced to £27,300.00 if Capital Cleaning submitted monthly returns).

3. Capital Cleaning registered for VAT on 15 August 2012, having been incorporated on 16 July 2012. It took over the business premises, part of the business and all of the directors and officers of Capital Maintenance Services Ltd ("CMS"). CMS ceased trading on 31 July 2012.

4. CMS was the victim of an employee fraud, which was perpetrated in 2008 but not discovered until 2012. The fraud entailed falsification of invoices. CMS had a good compliance history until late 2009. At the date when the security notice was issued to Capital Cleaning, CMS had VAT debts outstanding of £103,358.96.

5. The security notice was approved and signed by Mrs Cradle of HMRC. Mrs Cradle reviewed this decision on receipt of information from Capital Cleaning about the employee fraud at CMS (letter of 11 October 2012 and HMRC response of 26 October 2012). Mrs Cradle remained of the view that security should be requested from Capital Cleaning. An independent review of her decision was undertaken in response to Capital Cleaning's request (letter of 21 November 2012) by Mr Bishop of HMRC which concluded that the security notice should be maintained (letter of 5 December 2012).

6. At the date when the original notice was issued (18 September 2012) Mrs Cradle was not aware of the facts concerning the fraud at CMS. Mr Dayes of HMRC visited Capital Cleaning on 14 August 2012 and was made aware of the CMS fraud. At the time when Mrs Cradle reviewed her decision (26 October 2012) she was aware of the CMS fraud.

7. At the time when the Notice was issued, Capital Cleaning had no compliance history and had not completed any VAT returns. The security sum requested in the security notice was based on the turnover figures provided in Capital Cleaning's VAT 1.

The Evidence

8. Mrs Cradle, witness for HMRC, explained that in coming to her decision to issue the security notice on 18 September 2012, she took account of the fact that Capital Cleaning had the same address as CMS, the same company officers and carried on the same trade. CMS had a poor VAT compliance record from 2009 with £96,017.95

currently owing in VAT. She confirmed that she was not aware of the CMS fraud in September 2012, but by the time of her review of that notice on 26 October, she was aware of the CMS fraud. She explained that she took account of the fraud as part of this review but had concluded that, even taking account of the invoices lost through fraud, CMS still had a substantial VAT debt due. In her view while the fraud had impacted CMS' cash flow, there were other reasons for CMS' non compliance. She was concerned with CMS' financial controls and compliance over and above the fraud issue. She based her decision about Capital Cleaning on CMS' compliance record since she no compliance record for Capital Cleaning.

9. In response to Mr Lamb's questions, Mrs Cradle said that she was not aware of Mr Daye's visit to Capital Cleaning on 14 August or his subsequent correspondence (29 August and 5 September 2012 letters).

Appellant's arguments

10. Mr Lamb referred us to the Sched 11 paragraph 4 VATA provisions and related decisions, (including the recent *Distinctive Pub Company (Stratford) Limited* (TC/2011/06877)) and argued that the relevant question was whether HMRC's decision to issue the security notice was reasonable on the basis of the facts which they considered, or ought to have considered at the time (as made clear in the *Lindsay* decision (*Lindsay v Commissioners of Customs and Excise* [2002] STC 508) and supported in *Distinctive Pub Company*).

11. In his view HMRC had made it decision before Capital Cleaning had a chance to exhibit any compliance history and in taking account of CMS' compliance history had failed to take account of the CMS fraud.

12. This had had a significant impact on CMS's compliance record because of its impact on CMS' cash flow. HMRC should have been aware of this, because this had been disclosed to Mr Daye in his meeting of 14 August and in later correspondence. On that basis HMRC had failed to take account of all relevant matters and therefore their decision was not reasonable.

13. In addition, HRMC could, under Schedule 11, request security from Capital Cleaning at any time and it would have been open to HMRC to wait and consider all the relevant facts (including the CMS fraud) before issuing the security notice.

HMRC arguments

14. On behalf of HMRC Mr Bingham, relying on Mrs Cradle's evidence, stated that HMRC had taken account of all relevant matters. The decision on the issuance of the security notice had been considered three times by HMRC (twice by Mrs Cradle and once by Mr Bishop). Only on the first of those had the CMS fraud not been considered. Mrs Cradle had confirmed that, had it been considered on 18 September, the decision would have been the same. (HMRC had estimated that the fraud had only impacted 7.7% of CMS' quarterly output VAT).

15. HMRC had based its decision on the information which they had from Capital Cleaning's VAT 1 and its knowledge of CMS' compliance history. On that basis they believed that there was a risk to future revenue. All relevant facts had been taken into account.

Decision

16. There was no dispute between the parties that the jurisdiction of the Tribunal, on the basis of *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 is supervisory only and that:

> (1) "In exercising its supervisory jurisdictions the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of the commissioners was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time it was effected."

17. On behalf of the Appellant, Mr Lamb's argument was that the decision could not have been reasonable, because, at least in the first instance, it failed to take account of a relevant matter, namely the employee fraud.

18. We recognise that HMRC's obligation to act reasonably entails both taking account of relevant matters (see *Lindsay)* and not taking account of irrelevant matters. As regards the general relevance of CMS' compliance history to Capital Cleaning's VAT risk profile, we have concluded that on the basis of the similarities between the two businesses, including personnel and business activities, it was reasonable for HMRC to consider CMS' past history in coming to a decision about requesting security from Capital Cleaning.

19. In response to Mr Lamb's point that HMRC failed to take account of all relevant matters because they failed to take account of the CMS fraud, the Tribunal does not accept Mr Lamb's argument that there was any such failure. HMRC considered their decision to request security on three separate occasions (twice by Mrs Cradle and once by Mr Bishop) and it was only in respect of the first of these decisions that the CMS fraud was not taken into account.

20. Secondly, the Tribunal does not agree with Mr Lamb that the failure to take account of the employee fraud when the case was first reviewed automatically means that HMRC has acted unreasonably. The failure of the internal communications (between Mrs Cradle and Mr Daye) might suggest some administrative shortcomings, but that in itself is not enough to colour the "reasonableness" of HMRC's decision. HMRC might have come to a better informed decision had they been aware of the fraud at the time of the original review, but this is not the same as saying that their decision was unreasonable.

21. On the evidence of Mrs Cradle, her decision would have been the same even if she had been aware of the employee fraud on the date of her first decision. She was aware and did take account of the employee fraud on the review of her original decision, as did Mr Bishop, but it did not effect the decision in either case.

22. On that basis, while the employee fraud might have been a relevant matter, it was not determinative and we cannot see show we can conclude that HMRC's initial failure to take account of this has led them to make an unreasonable decision. Mrs Cradle's witness evidence was very clear that there were other elements of Capital Cleaning and CMS' history which determined her decision.

23. Second, as stressed by HMRC, while the fraud might not have been taken account of in the first decision it was considered both by Mrs Cradle and Mr Bishop in their later reviews and to this extent we do not consider it is correct to say that HMRC's decision was unreasonable.

24. We would add that while we do not believe this is relevant to the decision we have considered whether HMRC should be treated as "aware of" the employee fraud as at the date when Mr Daye was notified of the fraud by Mr Lamb. We have concluded that HMRC should be treated as aware of this as from 14 August 2012.

25. Having considered the evidence we have concluded that HMRC did not fail to take all relevant matters into account at the time the decision to issue the security notice was made. We have concluded that HMRC did act reasonably in coming to the decision to issue the security notice. For these reason this appeal is dismissed.

26. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 26 July 2013