TC03095

Appeal number: TC/2012/09775

VAT — security — taxable person persistently paying late — no apparent arrears at date of decision but outstanding return — whether requirement justified — yes — appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE SOUTHEND UNITED FOOTBALL CLUB LIMITED **Appellant**

- and –

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

TRIBUNAL: JUDGE COLIN BISHOPP
MRS REBECCA NEWNS

Sitting in public in London on 30 September 2013

Mr Timothy Brown, counsel, directly instructed, for the appellant

Mr Michael Jones, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents

DECISION

1. The appellant, Southend United Football Club Limited, has been registered for VAT since 1973. It has a history of tardy compliance with its obligations relating to its accounting for its VAT liabilities, sending in many, though not all, of its returns late, and frequently paying the amount shown by the return to be due after the proper date for payment. Since December 1999 as many as 76 default surcharges have been imposed on it and its poor compliance record has led to its being required, since 2004, to submit monthly returns. In addition on several occasions the respondents, HMRC, have taken enforcement action, including the service of statutory demands and the commencement of winding up proceedings. That brief summary of the appellant's history is undisputed.

2. On 13 July 2012 HMRC exercised the powers conferred on them by para 4(2) of Sch 11 to the Value Added Tax Act 1994, by serving on the appellant a notice requiring it to provide security for its VAT liabilities. That paragraph provides, so far as relevant, that

> "If they think it necessary for the protection of the revenue, the Commissioners may require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due from—
>
> (a) the taxable person …."

3. In accordance with their usual practice when a taxable person required to provide security makes monthly returns, HMRC have determined the amount of the security as the equivalent of four months' net VAT liability. That period comprises the month to which each return relates, the month which is allowed for the submission of the return, and a further two months for any necessary enforcement action to be taken. In this case the amount of the security required, on that basis, is £104,700. There is no challenge to the calculation as a matter of arithmetic; the appellant's argument is that there is no good reason for a requirement of security and that, even if there is, the amount demanded is so unreasonably high that the decision to require security is itself rendered unreasonable.

4. We heard the evidence of Mrs Linda Andrews, the officer who made the decision, and of Mr Ian Pumfrey, the officer who upheld it when the Appellant asked for a statutory review. We did not have any evidence from the appellant, though we have considered what is said in various letters sent by it to HMRC in which the appellant sought to dissuade HMRC from demanding security, and have naturally taken into account the submissions of Mr Timothy Brown, counsel for the appellant. HMRC were represented before us by Mr Michael Jones, also of counsel.

5. Mrs Andrews' evidence was that, although there was no tax outstanding at the time the decision was taken, the appellant's poor compliance record led her to the view that there was a risk of non-payment, rather than merely late payment, in the future. Moreover, late payment was as much a threat to the revenue as non-

payment. She took into account the fact that a significant proportion of the appellant's receipts, particularly in respect of ticket sales, were in cash yet VAT payments were persistently late, from which it followed that the appellant was using the VAT it had received for other purposes. The appellant had also agreed with HMRC on payment plans, but it had not always honoured them.

6. In addition, there were two returns outstanding, for period 04/11 and for period 05/12. The former was by then very late, despite promises that it would be submitted, and Mrs Andrews was concerned that the amount due for the period would be substantially more than the amount which had been centrally assessed in the absence of the return, and which the appellant had paid. That was because the assessment was based on the annual turnover, while the appellant's receipts in the spring were generally high since it was then that season tickets were sold. In fact, as emerged later, the liability for 04/11 was more than £80,000 greater than the assessed amount.

7. Mrs Andrews added that although she had taken some account of the 76 default surcharges, she had concentrated her attention on the latest two years, during which half of the appellant's VAT returns were late. She agreed with Mr Brown that HMRC's internal guidance was to the effect that security should be demanded only if the outstanding debt exceeded £10,000 but, she said, that was only guidance and each case had to be considered on its merits. She did not accept Mr Brown's suggestion that the default surcharge régime addressed late payment and that security should be demanded only in the case of non-payment; the primary question, in her view, was whether there was a future risk of non-payment, which she was satisfied was the case.

8. Mr Pumfrey told us that he had looked for himself at the appellant's compliance record, and had come to the conclusion that it was deteriorating. The appellant had very large arrears in 2008 and 2009, which had been cleared by the end of 2009, and there had been a period of 11 months, from late 2010 into 2011, during which the appellant had kept up to date. But since then arrears had re-appeared, and at the time he conducted his review there was a tax debt of over £13,000, as well as two outstanding returns, for 04/11 and 07/12. The 04/11 return, by now well over a year late, was of particular concern; he shared Mrs Andrews' suspicion that the true liability was substantially in excess of that assessed.

9. He accepted that the appellant had, ultimately, always paid its liability, but came to the conclusion that the combination of its late payment history, the deterioration he had perceived, the past failure to comply with agreed payment plans and the fact that the 04/11 return was still outstanding presented a risk to the revenue sufficient to warrant the security requirement. He could see no basis on which he should not apply the standard practice of fixing the security at four months' average liability and accordingly upheld Mrs Andrews' decision. The purpose of security, he believed, was to ensure that tax does not remain unpaid; default surcharges are designed to encourage prompt payment. Thus although they have a link, they serve different ends.

10. It is undisputed that our jurisdiction is supervisory only. That is, if we are to allow the appeal we must be satisfied that the decision was one at which the

Commissioners could not reasonably have arrived. That understanding of the law derives from the judgments of Farquharson J in *Mr Wishmore Limited v Customs and Excise Commissioners* [1988] STC 723, of Dyson J in *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747 and of the Court of Appeal in *John Dee Limited v Customs and Excise Commissioners* [1995] STC 941. The cases show that we must limit ourselves to a consideration of the facts and matters which were known when the disputed decision was made, so cannot take account of developments since that time, and that we may not exercise a fresh discretion. In other words, if the decision was flawed we must allow the appeal and leave HMRC to make a further determination if they so choose. If we are persuaded the decision was flawed but that, had HMRC approached the matter correctly, they would inevitably have arrived at the same conclusion we should dismiss the appeal.

11. For the appellant, Mr Brown argued that, as there were no arrears of declared tax at the date of the decision, there was no immediate risk to the revenue. It was true that the appellant had a long history of late returns and late payments, but lateness was the target of the default surcharge régime, which represented adequate protection for HMRC. The more common circumstance in which security is required is that of the "phoenix" company, a reincarnation of a company which has failed with large tax debts, and when the directors are in reality carrying on the same business again. That was not this case; the appellant may have been late in making its payments, even persistently late, but it had always paid and there was no reason to think it would not pay in the future. There was only one case in which a security requirement which had been imposed for persistent late payment had been upheld by this tribunal or its predecessor, namely *Lewis Ball & Company Ltd v HMRC* (2006) VAT Decision 19592, a case which Mr Brown argued was incorrectly decided and which could in any event be distinguished as the taxpayer there was on annual rather than monthly accounting. Even if there was *some* risk of non-payment, the amount of the security required had to be reasonable, and not simply an amount arrived at by the mechanical application of a formula.

12. For HMRC Mr Jones argued that they should not be expected to tolerate persistent late payment, and be obliged to take enforcement action repeatedly, as had been the case in respect of this appellant. Mr Brown's attempt to distinguish this case from the "phoenix" companies, when properly analysed, showed that the appellant is in a worse position since it is its *own* compliance record which is poor. It is nothing to the point that default surcharges punish late payment; the cumulative effect of multiple default surcharges is that they make it more difficult for the trader to comply with its obligations, and increase the risk of non-payment of the underlying tax liability. The VAT and Duties Tribunal was quite correct to say, in *Lewis Ball* at para 19, that "a person who habitually pays late can properly be regarded as a risk to the revenue from whom [HMRC] need protection. Late payment deprives [HMRC] of the tax due to them, just as non-payment does." It is reasonable to conclude that persistent lateness, as in this case, casts doubt on the trader's ability to pay its debts as they fall due, and that a requirement for security is a proportionate response. The amount required was not simply a sum calculated

by automatic application of a policy but one which reflected, as nearly as practicable, the measure of the risk.

13. We have no doubt from the evidence we heard that the appellant has a long history of poor compliance, and that there is, and at the time the decision was taken was, no reason to think that improvement could be expected. We share the view of the VAT and Duties Tribunal in *Lewis Ball* that habitual late payment presents as much of a risk as non-payment, and we also take the view that persistent late payment inevitably justifies the fear that the trader will eventually find itself unable to pay at all. We agree that Mrs Andrews and Mr Pumfrey were right to be concerned about the long delay in submission of the 04/11 return; it is not so much the magnitude of the excess of the true liability over the centrally assessed amount (significant though that is) which is of importance as the fact that there was (and still is) no satisfactory explanation of the delay.

14. The test, as we have said, is whether the decision was one at which HMRC could reasonably arrive. It is in our view plain that there was a genuine risk of continuing late payment, and of non-payment, and that the decision was eminently reasonable. The manner in which the amount required is calculated is, in our judgment, fair. The reasons for it given to us are rational, and it cannot realistically be argued in this case that a requirement of about £105,000 is excessive against the background of a liability for a single month of more than £80,000 which was undeclared for well over a year.

15. For those reasons the appeal is dismissed.

16. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply, pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for permission to appeal against it on a point of law to the Upper Tribunal. 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.

COLIN BISHOPP

CHAMBER PRESIDENT

RELEASE DATE: 23 October 2013