TC03950

Appeal number: TC/2014/02149

VAT – Notice of Requirement to provide security - protection of Revenue - connection with businesses which failed to honour VAT obligations - cash business with collection of VAT not paid - Whether Respondents actions in seeking security and the quantum thereof reasonable – yes - Appeal dismissed - VATA 1994 Sch 11 para 4

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRANGE RESTAURANTS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MRS GILL HUNTER

Sitting in public at Bedford Square, London on Monday 11 August 2014

Mr D Doshi of Doshi & Co for the Appellant

Ms H Jones, Officer of HMRC, for the Respondents

DECISION

Preliminary matter

1. The appeal in this case related to the decision of HMRC to issue a Notice of Requirement to provide security ("the Notice"). The Notice was served on the appellant on 6 September 2012. The appeal was only lodged in April 2014 following the commencement of a prosecution for failure to provide the security. HMRC intimated that they did not object to the late appeal. Accordingly, the late appeal is admitted.

The Issue

2. In summary, the appellant argued that the decision to issue the Notice was unreasonable and that, even if that were not the case, the quantum was excessive.

The law

3. There was no dispute between the parties as to the relevant law. The legislation is to be found at paragraph 4(2) (a) and 4(4) of Schedule 11 of the Value Added Tax Act 1994. Those paragraphs read as follows:-

"4(2) 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…

4(4) Security under sub-paragraph (2) above shall be of such amount, and shall be in such manner, as the Commissioners may determine."

4. The relevant case law is to be found in two cases. The first is *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 which is authority for the proposition that the Tribunal must consider whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. Further, of course, the Tribunal should also consider whether the Commissioners had erred on a point of law.

5. The second case is *Customs and Excise Commissioners v Peachtree Enterprises* [1994] STC 74 which is authority for the proposition that the Tribunal's jurisdiction is supervisory only and in the exercise thereof the Tribunal must limit itself to considering facts and matters which were known when the disputed decision was made.

Background

6. At the outset Mr Doshi agreed that the management accounts for the year to 31 January 2014 that he had lodged therefore fell to be disregarded.

7. It was freely conceded by Ms Jones that there was an unfortunate lack of clarity in the bundle as to precisely how the quantum of the security had been calculated and

for that she apologised. Fortunately, however, the officer, Mrs Andrews, who had made the decision in question was present and gave detailed, credible and precise evidence. The Notice of Assessment(s) and the Notice of Amendment of Assessment(s) which she described orally were lodged at the end of the Hearing.

The Facts

The appellant company

8. Mr B B Patel ("BBP") was appointed as a director of Grange Restaurants Limited trading as The Grange Restaurant on 16 December 2011. That company commenced trading on 12 January 2012. He resigned on 29 February 2012. He was disqualified as a director for a period of four years from 11 October 2013 (see paragraph 28 below). That is, of course, after the date with which we are concerned but was founded upon by the appellant.

9. Mrs Varshaben Patel, also known as Mrs Varsha Bharat Patel ("VP"), was appointed as a director on the same day as her husband, BPP, resigned. She is, and always has been, the sole shareholder.

10. On 10 January 2012, the appellant applied for VAT registration indicating an estimated turnover of £100,000 per annum. Registration was effective from 12 January 2012 and remains extant. The first quarterly VAT return was lodged late, six days after the due date of 31 March 2012, and was a nil return. The return for 05/12, due on 30 June 2012 was not lodged. An assessment in the sum of £735, based on the estimated turnover of £100,000, was issued on 6 September 2012.

11. Companies House records that the appellant is in a corporate group with another company. Mr Doshi confirmed that that is V and B News Limited.

V and B News Limited

12. Mr Doshi confirmed that this entity had previously been a partnership. The company has been trading since 1 January 2011. Although BBP signed the VAT application for registration, VP, who was appointed as a director on 14 December 2010, is apparently the only director. That company had been in the default surcharge regime for the periods 06/11, 09/11, 12/11, 03/12 and 06/12. As at 6 September 2012 the company had neither paid the centrally issued assessments of VAT amounting to £1,180 nor £118 being the tax due on notices of assessment of default surcharge.

Sevkru Ltd

13. This company commenced trading as The Grange Restaurant on 27 March 2007. Originally there were five directors of whom one was BBP. The other four resigned in the autumn of 2009 and BBP had purchased their shareholdings. He became the sole shareholder. VP was appointed as the company secretary on 15 October 2009. The company was in the default surcharge regime from the first eligible period. There were numerous missing returns. Administrators were appointed in or about July 2011. The company ceased trading because it was insolvent on 22 September 2011 and was dissolved on 27 November 2012. The VAT debt due was £130,486.42. In addition there was unpaid PAYE and NIC. The total loss to the public purse was £233,008.61.

14. In December 2011, the administrators sold the assets of the company, including the goodwill and stock, to VP. The lease was also assigned to her.

Sutton Dining Catering Limited

15. Sutton Dining Catering Limited ("Sutton") traded as The Grange Restaurant from 15 December 2010. Mr Doshi stated that the sole director, Chirag Patel, was no relation to BBP and VP.

16. We accepted the evidence of Mrs Andrews that HMRC had ascertained that at all relevant dates Chirag Patel was in both full and part-time employment elsewhere (see paragraph 34 below).

17. Mr Doshi stated, and we accepted that, that Sutton had effectively "rented" the restaurant business firstly from Sevkru and then, from December 2011, from VP once she had acquired the goodwill, assets and lease from the administrators. Sutton had paid a monthly fee.

18. Sutton has never submitted any VAT returns or paid any VAT. HMRC issued assessments on 23 February 2012 for the periods 03/11, 06/11, 09/11 and 12/11. Each was in the sum of £17,992. Those assessments were not appealed. Therefore the total outstanding tax when the decision, with which we are concerned, was made was £71,968 and interest was accruing thereon at 3%. The company became insolvent at some point in 2012 and an amended assessment was issued to The Insolvency Service on 19 December 2012. That is, of course, after the dates with which we are concerned and therefore cannot be taken into account.

19. HMRC had attempted to visit Sutton and were denied access. No records were ever produced. The assessments referred to in the previous paragraph were what HMRC describe as "inflated assessments". In the absence of any information, the HMRC officer concerned made a "best estimate" of what the likely turnover for a large restaurant of that size might be and that in the context of the known returns of the previous proprietor.

20. The total loss to the public purse because of non-payment of tax by Sutton was £173,803.52.

21. We accepted Mrs Andrew's evidence that the website and telephone number for both this company and the appellant remained unchanged and both companies, like Sevkru before them, traded as The Grange Restaurant.

Sweets

22. This partnership consisting of VP and BPP has been trading since 18 March 1988. It had been in the default surcharge regime and as at 6 September 2012, five VAT returns were outstanding. As at that date, the company had neither paid centrally issued assessments of VAT amounting to £9,066 nor £2,463.29 being the tax due on notices of assessment of default surcharge.

The Notice of Requirement

23. Mrs Andrews was asked to look at this case after the appellant failed to lodge the 05/12 return timeously. We accepted her evidence that she accessed the records of

all of the taxpayers referred to above (and others who were believed to be linked with the appellant) and that she looked at other information about the trading potential and the trading record of the restaurant. She made the decision in this matter on 29 August 2012. The Notice was served timeously on 6 September 2012 and a further copy issued on 8 September 2012. The covering letter on the latter date explicitly stated that the appellant had 30 days to "write to the above address providing any further information that you wish the original decision maker to consider".

24. The only information provided was by letter dated 19 September 2012 from Doshi & Co. That confirmed that VP was the director and shareholder of the appellant. It went on to state that they did not believe that she had been

"A: Involved in past VAT failures.

B: Failed to comply with VAT obligations in previous businesses.

C: Disqualified as director or is a discharged bankrupt.

D: Prosecuted for a VAT offence."

25. Correspondence ensued and Doshi & Co argued that although VP had been company secretary of Sevkru she had been neither a director nor a shareholder. She had not been involved with the management of the company so it was unreasonable to say that she had been involved in previous VAT failures.

26. An independent review of the decision was conducted and the original decision was upheld in a letter dated 5 November 2012. On 13 February 2013, management accounts for the financial year ended 31 January 2014 were sent to the review officer. Other than that a prosecution was commenced, nothing further happened (and in particular no security was lodged), until the Notice of Appeal was lodged at the end of April 2014.

Discussion and reasons for decision

27. Mr Doshi advanced a number of eclectic arguments. He stated that the main thrust of his argument was that it seemed that HMRC had decided that the repeated failure by all of the companies which had tried to operate the business in the previous five years meant that whoever tried to run the business would fail. Therefore security would be required and that was wholly unreasonable; on that basis no one would ever buy a failing business. We agree that that would be an unreasonable view if looked at in isolation. However, it is clear to us that Mrs Andrews had looked at far more than simply the failure of the two previous companies that had traded as The Grange Restaurant.

28. Mr Doshi reiterated the points made at A-D in paragraph 25 above. He then tried to expand thereon to argue that the fact that VP had not been disqualified as a director, unlike her husband, meant that she had been found to be innocent of any involvement in Sevkru. We do not accept that. There are many and varied reasons why people are, or are not, disqualified as directors. We had no evidence at all as to the extent of her involvement in that company other than a copy of a publication outlining some of the duties of a company secretary and Mr Doshi's assertion that she had no role in the company, she was not paid and she had no equity stake.

29. As far as Sevkru is concerned, and it clearly was a past VAT failure, we do not accept that she was not involved. She was the company secretary. Of course that did not mean that she did the VAT returns but one of the primary obligations of a company secretary is to ensure good corporate governance. She was an officer of the company and therefore she had responsibilities that exposed her to a range of potential civil and criminal liabilities. We find that she most certainly was connected to and involved with this company.

30. There are numerous failures to comply with VAT obligations in a number of businesses with which she was involved all as outlined above.

31. Mr Doshi advanced the unusual argument that it was unreasonable of HMRC to have imposed the Notice on the appellant where the tax outstanding as at the relevant date was only £735 whereas they had not taken similar action in regard to Sweets or V and B News Limited where the outstanding liabilities were in excess of 10 times that amount. Whether HMRC should have taken such action in regard to those entities is not a matter for this Tribunal. In any event Mrs Andrews explained that she had endeavoured to act proportionately when making the disputed decision and in her view it would have been disproportionate to have also made decisions about the other businesses.

32. The only relevance of those outstanding liabilities is in regard to HMRC's assessment as to the risk to the public purse if there was not a Notice of Requirement for security in place in relation to the appellant given VP's clear association with the other entities and their poor compliance records. We find that it is wholly proper that Mrs Andrews carefully considered those entities. It would have been unreasonable had she not done so.

33. We accept that there is no apparent link in terms of directorial personnel with Sutton. It appears that the only formally appointed director would not apparently have had the time to work in the business, which is a substantial business. That remains a mystery. Sutton paid monies to both Sevkru and VP, as an individual, apparently to enable it to run the business. We had no evidence on that at all other than Mr Doshi's assertion that a monthly fee was paid. Mr Doshi's firm acted for every entity referred to in this appeal (other than, of course for HMRC!).

34. We accepted the very clear evidence from Mrs Andrews that Sevkru and the appellant and Sutton used the same trading name, premises, staff and other assets. Mr Doshi did not challenge that. The same web site and telephone number were certainly used by Sutton and the appellant. To all intents and purposes, to the outside observer, there was continuity between the three businesses and it seemed that in reality the core business did not change. It is wholly proper that Mrs Andrews should have looked at all three businesses. She explained that in her view the link between the businesses was the fact that all three used the same premises and that that posed a potential risk. We agree that as she was concerned about potential risk then it was reasonable for her to look at the three companies. Mr Doshi argued that the management changed and therefore it was not reasonable. We disagree. Any change in management is only one factor. The use of the same premises etc as outlined above outweigh that. All risks require to be assessed. That is particularly the case in a cash business, such as this, where the trader has the use of the VAT paid by the customers until such time as, and if, the trader pays the VAT to HMRC.

35. The next and final issue is quantum. As at the date of the decision the assessments for Sutton for the calendar year 2011, which were at that juncture final as they had not been appealed, showed tax due of £71,968 which is £17,992 per quarter. That suggests a turnover of £359,840. Accordingly, since the appellant was apparently intending to turn around a failing or failed business the estimated turnover in the VAT 1 for the appellant of £100,000 was clearly very significantly understated. Further, since the objective was to have a successful business the turnover would be expected to increase. The core business seemed to change not at all, just the ostensible management.

36. Mr Doshi argued that HMRC did not have tax returns from Sutton to verify turnover and they had not visited and obtained the records. That is true but only because Sutton were non-compliant and had not permitted a visit. The simple fact is that the assessments had not been appealed and therefore the tax was due and payable. They were arrears of VAT. It was the best evidence available. There was no other information available.

37. In the absence of any return other than a nil return from the appellant, Mrs Andrews decided that the figure of VAT derived from the centrally issued assessment (based on the £100,000) should be added to the £17,992 of VAT due for each quarter in the previous year and used as the estimate of the VAT which was likely to fall due. In our view, in the particular circumstances of this case, that was the most accurate information available to HMRC.

38. Accordingly, the outcome of the calculation was for 06/11 - £18,676 (£684 + £17,992), 09/11 – £18,743 (£751 + £17,992) and 12/11 – £18,727 (£735 + £17,992). The total estimated VAT due for a period of nine months, based on the outstanding tax due by Sutton for the previous year, was a total of £56,146. The estimated average monthly liability is £6,238.44. If paying quarterly HMRC look for security in the equivalent to the estimated six months liability. In this case that would be £37,430.64. Therefore, the quantum of £34,135 cited in the Notice is less than HMRC could have reasonably insisted upon. The quantum, if paying monthly, is normally the equivalent of four months liability and that has been correctly calculated at £24,950 plus the tax debt of £735 coming to a total of £25,685.

39. The issue for the Tribunal was whether in making the decision to issue the Notice, and assessing the quantum thereof, Mrs Andrews had acted in a way that no reasonable panel of Commissioners would have acted. In our view she carefully weighed in the balance all of the evidence available to her. She was very clear that if she had been provided with any new evidence, even at the Tribunal, then she would have reviewed her decision. Nothing relevant had been produced since the independent review. It is very clear that in the period before the decision was made and in particular the year before, the sole director and shareholder of the appellant, in her various business ventures, had consistently been associated with failure to honour obligations in terms of the VAT legislation. The appellant was in default almost immediately it commenced trading. On the balance of probabilities, given the size of the business which was apparent from the website (and it seemed that the trading pattern for the business had not changed despite the changes in trading entity), the turnover stated in the VAT 1 for the appellant was significantly understated. There was an apparent risk of loss of revenue. Mrs Andrews did not take into account anything irrelevant or disregard anything. She acted proportionately. The calculation was correctly made on the basis of the available evidence.

40. For all these reasons the appeal is dismissed and the decision to issue the Notice is upheld.

41. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 20 August 2014