



TC06283

Appeal number: TC/2017/05029
TC/2017/05034

*INCOME TAX, NATIONAL INSURANCE CONTRIBUTIONS (NICs)
AND VAT – security for payment of income tax, NICs and VAT –
reasonableness of decisions that security required – application of appellate
jurisdiction in relation to notice requiring security for PAYE and NICs –
appeals dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SCHOOL ESTATES CONSULTANCY LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE VICTORIA NICHOLL
DAVID BATTEN**

Sitting in public at Taylor House, London on 22 November 2017

Mr Thomas Morris, company director, for the Appellant

**Siobhán Brown, HMRC Officer, Solicitor's Office and Legal Services, Appeals
and Reviews Team for the Respondents**

DECISION

5 1. On 26 January 2016 the Respondent (“HMRC”) issued notices of requirement for the Appellant to give security on the following terms:

1.1 a notice to require security for £31,500 in respect of VAT under paragraph 4(2)(a) Schedule 11 Value Added Tax Act 1994 (“VATA”) for the protection of the revenue. The amount was later reduced to £28,100; and

10 1.2 a notice to require security for £14,457 in respect of PAYE under Part 4A Income Tax (Pay as You Earn) Regulations 2003 (“PAYE Regulations”) and security for £21,343 in respect of National Insurance Contributions (“NICs”) under Part 3B Schedule 4 Social Security (Contributions) Regulations 2001 (“NICs Regulations”), both for a period of 24 months.

15 This decision notice sets out our reasons for refusing the two appeals by the Appellant against HMRC’s decisions to impose these requirements in respect of VAT and PAYE and NICs.

Background and facts found

20 2. We found the following facts and those in paragraph 37 from the evidence in the Tribunal’s bundle and the evidence given at the hearing by Mr Morris on behalf of the Appellant, School Estates Consultancy Limited (“School Estates”), and Mrs Linda Andrews of HMRC.

25 3. School Estates was incorporated on 18 February 2014 with the name Grounds Consultancy Limited. Mr Robert Andrew Bailey (“Mr Bailey”) was the sole director and shareholder of the company on incorporation, and he is still the sole shareholder in the company. The company’s name was changed to School Estates Consultancy Limited on 15 December 2016. The company has been registered as an employer since 14 March 2014. It was registered for VAT from 25 March 2014 to 10 June 2015 and has been registered again since 1 December 2016. The company’s business is grounds maintenance and consultancy for schools. School Estates has no working capital and no loan or overdraft facility. It owns a number of commercial vehicles and equipment.

30 4. Mr Bailey has operated a number of companies, as sole director and shareholder, from his home address in Dunsfold for some years. HMRC have produced a ‘chain chart’ that summarises the history of seven companies owned and operated by Mr Bailey. This shows that one of his companies, Bailey Grounds Management Ltd, went into insolvency on 29 July 2014 owing a VAT debt of £155,749.53 plus surcharge debt of £14,283.13, and a PAYE/NICs debt of £76,910.14. The company had operated a trade similar to that of School Estates. It had a history of late submission of VAT returns and failed time to pay arrangements, such that HMRC had taken security action against it in July 2014.

5. Another company owned and operated by Mr Bailey, Grounds Contracts Ltd, purchased the assets of Bailey Grounds Management Ltd in 2014. Its turnover is noted to be £755,000 in HMRC's chain chart. It was required to give HMRC security for VAT in July 2014. This security was subsequently set off against its debts and so
5 new security action was commenced by HMRC in July 2016, but the company ceased to trade and sold its assets and contracts to School Estates in October 2016. Grounds Contracts Ltd went into liquidation on 6 January 2017 with a VAT debt of £145,026.94 and a PAYE/NICs debt of £102,699.08.

6. On 14 December 2016 Mr Bailey resigned as a director of all of his companies
10 because he had been subject to disqualification proceedings. The proceedings were compromised by Mr Bailey giving a disqualification undertaking which prevents him from acting as a company director or being involved (directly or indirectly) in the management of a company without permission of the High Court for three and a half years from 15 December 2016. Mr Thomas John Morris ("Mr Morris") was appointed
15 to act as a sole director of School Estates and other companies owned by Mr Bailey on or around 13 December 2016.

7. Mr Morris is an accountant. He accepts that Mr Bailey is not a suitable person to be involved in financial management, but he took the role as sole director of companies owned by Mr Bailey on the basis that he would ensure that the companies
20 were compliant and up to date with their tax affairs. Mr Morris had previously acted as a bookkeeper for the company and has been the company secretary of a large business before he retired. He does not have experience in the trade of grounds maintenance or landscape gardening and he has not made an investment in the company. Mr Morris has been responsible for the financial management of School
25 Estates since his appointment as sole director in December 2016 on a salary of £12,000. He attends the company's business premises in Dunsfold one day a week to enter the purchase and sales invoices in SAGE and to authorise payments.

8. The business recruited another manager to manage the grounds and landscape contracts and workers in December 2016, but Mr Bailey claimed that he needed to
30 continue to participate in the management of the company. On 19 December 2016 he was given interim permission by the High Court to undertake the following management activities in the company until the final determination on 17 April 2017:

- 6.1 Dealing with prospective enquiries for services and providing advice to clients;
- 35 6.2 Sourcing new clients;
- 6.3 Marketing and advertising services;
- 6.4 Negotiating and entering into contracts with clients and suppliers;
- 6.5 Providing advice and consultancy services to clients;
- 6.6 Overseeing the grounds management and maintenance services;
- 40 6.7 Dealing with recruitment and training of employees and with employee issues;

6.8 Ensuring compliance with health and safety regulation;

6.9 Ensuring and arranging insurance cover; and

6.10 Raising invoices to clients.

9. Mr Bailey withdrew his final application for the continuation of this permission before the hearing in April 2017, but he continues to work in the business as an employee. School Estates paid the invoices for the legal work in relation to Mr Bailey's disqualification. Mr Bailey is now employed as a 'Contracts Supervisor' and his duties include preparing and printing off invoices for the schools for the approval of Mr Morris, collecting timesheets from employees and collating and forwarding wages sheets to a payroll agency. At the hearing it was established that Mr Bailey also continues to provide supervision and advice to both employees and clients and that his salary of £36,000 has not been reduced. As Mr Bailey is no longer a director of the company he set up a new business (as a sole trader on the advice of his solicitor) to source work for his companies on a commission basis. There have been no new contracts in School Estates in 2017 and Mr Bailey's other sources of income and capital were not disclosed to the Tribunal as he chose not to attend the hearing.

10. On 30 January 2017 HMRC served the Notices on Mr Bailey requiring School Estates to provide security for VAT, PAYE and NICs. Mr Bailey confirmed to the HMRC officers that he was a manager and "the one running the business on a day to day basis".

11. The amount of security required by the notice relating to VAT was £31,500, by cash deposit or a guarantee in the form of a performance bond. The notice states that "if this security is not given to HM Revenue and Customs you may render yourselves liable to prosecution under section 72(11) of the Value Added Tax Act 1994 if you make any supply of goods or services under a taxable supply." The amount required was later reduced to £28,100 on the basis of VAT returns made by School Estates for 01/17 and 02/17.

12. The amount of security required by the notice relating to PAYE and NICs is an estimate of the amounts due to be paid for a four month period, calculated by reference to the company's RTI returns. It is required to be given by making a payment, providing a guarantee in the form of a performance bond or opening a joint bank account with HMRC. Notices of requirement to give security for PAYE and NICs were also served on Mr Bailey and Mr Morris as persons in a position to influence the payment of PAYE and NICs, such that School Estates, Mr Bailey and Mr Morris are jointly and severally liable to give security of £14,457 relating to PAYE and £21,343 relating to NICs, making a total of £35,800. The notice advised the recipients that "it is criminal offence not to give security when required to do so".

13. School Estates' solicitor provided HMRC with further information in response to the Notices by letter of 23 February 2017. It also asked for the amount of the security required to be reduced to £10,000 for VAT and £10,000 for PAYE and NICs, representing approximately one month's liability for each. A request was then made for HMRC's decisions to be reviewed.

14. HMRC replied, by letter dated 21 April 2017, that the decision in relation to PAYE and NICs remained unchanged and that, while the amount of security would have been higher taking account of more recent returns, the amount of security required for PAYE and NICs would remain unchanged. A letter written on the same
5 date in relation to VAT concluded that the decision to require security was correct, but the amount required was reduced to £28,100. The company had begun to account for VAT monthly.

15. The independent reviews of the decision in relation to PAYE, NICs and VAT concluded by letters dated 26 May 2017 that the decisions to require security were
10 correct and the amounts required are in line with the guidance. HMRC's decisions were based on the facts that included (1) Mr Bailey's involvement in previous businesses that had gone into liquidation with considerable tax liabilities, (2) School Estates' business is the same type of trade as the failed businesses; and (3) the business is carried on from the same premises. These three facts are accepted by
15 School Estates. The reviews also questioned Mr Bailey's ongoing role.

16. School Estates submitted its appeal to the Tribunal on 23 June 2017. HMRC advised School Estates on 6 July 2017 that the appeal does not affect the ongoing liability to prosecution should it continue to make taxable supplies without providing security. School Estates applied to have the matter considered under the ADR process.
20 This was rejected on 12 July 2017. Mr Morris has offered to provide a personal guarantee for the security required, but this offer was rejected by HMRC as it does not meet the requirements of the notices. Mr Morris advised the Tribunal that he would be willing to invest £20,000 in the company if this is the amount of security required.

17. At the hearing it was established that School Estates has continued to trade from
25 Mr Bailey's premises throughout 2017. It has approximately ten school maintenance contracts that have been in place since it acquired the business and assets of Grounds Contracts Ltd. It is now trading at a loss, but Mr Morris is hopeful that the winter grounds services receipts will assist its financial position. The invoicing for the trade was through School Estates until the company received the VAT review letter which
30 advised that it would be a criminal offence for School Estates to invoice for services unless or until the security for VAT was paid or found not to be required. Following receipt of this letter Mr Bailey and Mr Morris decided to invoice School Estates's services through another company that they had recently established, School Estates Management Ltd ("Management").

35 18. Mr Morris is the sole director of Management and he registered it for VAT on 1 May 2017. It had been intended that School Estates would provide consultancy services to clients and that Management would carry out the maintenance work, but both activities have remained in School Estates to date, even though Management has invoiced the supplies made by School Estates. The figures Mr Morris produced for
40 October 2017 show receipts in Management of approximately £476,000, but Consultancy shows a loss of approximately £492,000. Mr Morris intends to raise inter-company charges.

19. School Estates has filed its VAT and PAYE returns and made all payments on time in 2017, other than one payment of PAYE and NICs in the summer. This was late because the school bursars were away over the summer holidays and so the payments not received in time to fund the tax payments. As School Estates was reclaiming input tax but was not declaring any sales HMRC carried out a recent ‘pre-credibility’ check. This established that all invoices for School Estate’s services have been issued by Management since May 2017, but the payments from customers are paid into School Estates’s bank account. HMRC advised School Estates that it should have invoiced customers for the supplies that it has made.

10 **The law**

20. Paragraph 4(2) Schedule 11 VATA 1994 gives HMRC power to require security in the following terms:

15 “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 and services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due from [the taxable person].”

21. The provisions under which HMRC may require security for PAYE are set out in Part 4A Income Tax (Pay as You Earn) Regulations 2003 (“the PAYE regulations”), and the equivalent provisions for NICs are in Part 3B Schedule 4 Social Security (Contributions) Regulations 2001 (“the NICs regulations”). The relevant provisions broadly reflect each other and only the PAYE regulations are cited below in the interests of brevity. These provide that “in circumstances where an [HMRC officer] considers it necessary for the protection of [the revenue or Class 1 NICs contributions]”, the officer may give notice of a requirement for security for the payment of amounts for which the employer is or may be accountable to HMRC under PAYE and or liable to pay under NICs regulations.

22. Regulation 97Q sets out the matters that must be specified in the notice (value of security to be given, manner in which it is to be given, date on or before which it is to be given and period of time for which it is required). Regulation 97P of the PAYE regulations provides that security may be required from the employer, and in relation to the employer, a director, company secretary or other similar officer or any person purporting to act in such a capacity.

23. Regulation 97 V of the PAYE regulations provides that on an appeal the tribunal may:

- 35 (1) Confirm the requirements in the notice,
(2) Vary the requirements in the notice, or
(3) Set aside the notice.

24. Section 684(4A) Income Tax (Earnings and Pensions) Act 2003 provides that a person who fails to comply with a notice requiring security is guilty of an offence of strict liability and liable on summary conviction to a fine.

Submissions

25. Mr Morris submits that School Estates has been compliant with its VAT, PAYE and NICs throughout 2017 and that security is not therefore required “to influence positive behaviour and drive up compliance”. Mr Morris accepts that there has been financial mismanagement of other companies operated by Mr Bailey but, as he is now the sole director with responsibility for financial management, he has worked to assure the timely filing and payments of VAT, PAYE and NICs. The company has only made one late payment in 2017, and this was because the company relies on payments from the schools to fund the tax payments.
26. Mr Morris submits that School Estates is not a risk to HMRC and that the amount of security required should be reduced to one month of VAT and one month of PAYE and NICs. It is claimed in the appeal to the Tribunal that if HMRC’s decision is upheld the company will be unable to continue to trade and is likely go into liquidation.
27. HMRC submits that School Estates is a risk to the revenue and to the collection of Class 1 NICs due to its links to other companies that have failed leaving large debts to HMRC; it has the same original director and sole shareholder, Mr Bailey, and the principal place of business is his home address. It carries on the same type of trade as Grounds Contracts Ltd and Bailey Grounds Management Ltd. HMRC is satisfied that it has given regard to the information available at the time the decisions were made and that the notices meet the legal requirements. The quantum has been calculated in a fair and reasonable manner. It is HMRC’s practice to require security based on four months for prospective liabilities because the VAT, PAYE and NICs are paid over monthly, and so there is always one month at risk, plus HMRC is also at risk for the estimated three months that it would take HMRC to wind up a business.
28. HMRC submit that Mr Morris and Mr Bailey have a controlling influence in the company and they have been made jointly and severally liable to give the full amount of security as they are in a position within the company to influence the payment of PAYE and NICs to HMRC.
29. HMRC submit that inability to pay a security deposit is not a matter that the Tribunal may take into account. It regularly reviews the requirement for security and will return it when it considers that there is no longer a risk to the collection of revenue and Class 1 NICs.

Discussion

30. We considered the jurisdiction of the Tribunal on these appeals with guidance from the case law cited by Ms Brown. Our jurisdiction is supervisory in relation to HMRC’s decision to require security for VAT for the protection of the revenue. The Court of Appeal in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 (“*John Dee*”) confirmed that a tribunal should consider “whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they have taken into account some irrelevant matter or

disregarded something to which they should have given weight”. In the exercise of our supervisory jurisdiction we must consider “the facts and matters existing at the time” HMRC’s decisions were made in accordance with the guidance of Judge Dyson in *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747 (“*Peachtree*”). The Tribunal does not have jurisdiction to exercise a fresh discretion.

31. The Tribunal’s jurisdiction in relation to the review of HMRC’s decision to require security required for PAYE and NICs for the protection of the revenue is similarly supervisory. This has been accepted by this Tribunal in the cases of both *D-Media Communications Limited v Revenue and Customs Commissioners* [2016] UKFTT 0430 (TC) (“*D-Media*”) and *Highlake Ltd v Revenue and Customs Commissioners* [2016] UKFTT 0808 (TC). However, as Judge Berner noted in *D-Media*, the power given to the Tribunal to vary the requirements of the requirements of the notice indicates that it has an appellate jurisdiction insofar as the requirements of the notice are concerned and this must by reference to the evidence available at the time of the hearing.

32. Applying this guidance to the facts of this case we have concluded that HMRC’s decisions to require the security were reasonable. Both the VAT and the PAYE and NICs decisions took account of the relevant history of the failed companies controlled by Mr Bailey and the fact that the business is the same type of trade, which similarly operates from his home address. Mr Bailey was, by his own admission and on account of his duties in the business at the date of the decisions, the person running the business on a day to day basis. HMRC’s review decisions note the company’s good PAYE and NICs compliance record from November 2016, and VAT compliance from registration in December 2017, but this did not carry sufficient weight to outweigh the risks to HMRC and the security required for its protection. HMRC took account of the information provided by the appellant’s solicitor and reduced the amount of security required for VAT, choosing not to increase the amount required for PAYE and NICs. We conclude that HMRC did not fail to take account of relevant information available to it or have regard to irrelevant matters.

33. We then considered our jurisdiction to set aside or vary the requirements of the notice in relation to PAYE and NICs. In this respect we noted the more recent evidence of the company’s good compliance record in 2017, its ability to pay the security from its own funds or those of Mr Bailey and Mr Morris, Mr Bailey’s reduced role in the business and the offer of reduced security from Mr Morris.

34. In *D-Media* the Tribunal took account of the company’s ability to pay and the serious criminal law consequences for the appellant if the security is not provided, and concluded that if the only likely result of the level of security required is that the recipient will inevitably fail to provide it and thus be liable to a criminal penalty, this cannot have been the purpose of Parliament. The ideal is that “the security required should be calculated so as to give a realistic possibility that the security will be capable of being given, so that the revenue to that extent will be protected”. In this case, given that HMRC is only seeking to secure prospective liabilities, the size of the tax debts of the failed companies (noted in paragraphs 4 and 5 above) notwithstanding HMRC’s security requirements, and the more recent attempt to continue invoicing

through Management, we consider that this is a situation in which security is required for the protection of the revenue even if this company may cease to trade. As HMRC noted, allowing the business to trade without giving security could also put the employees at risk of a further loss to their pension records if their employer fails to pay over withheld PAYE and NICs to HMRC in the same way as the failed companies.

35. We considered the financial evidence produced by Mr Morris in order to determine the amount of the security. The company is operating the same trading model as the failed companies operated by Mr Bailey and is similarly loss making. Mr Bailey and Mr Morris have allowed it to trade without regard to its need for working capital or a loan facility to pay its tax without delay when receipts are delayed, but we concluded that Mr Morris is in a position to put financial arrangements in place to provide security. We do not accept that reducing the amount of security to one month's PAYE and NICs, as offered by Mr Morris, will address the underlying risks to the revenue or other creditors, especially if the company ceases trading. Taking account of the risk and the financial information available we have concluded that the total amount of security required is reasonable, both on the basis that it represents four months' PAYE and NICs and by reference to the turnover of the business, Mr Bailey's unreduced salary and legal fees and the offer of funding from Mr Morris.

36. As the company has no working capital or loan facility we consider that the requirements of the notices as regards the manner in which the security may be provided (paragraphs 11 and 12 above) are reasonable.

37. The appeals to the Tribunal in respect of VAT, PAYE and NICs argue that Mr Bailey has had no involvement in the management of the company for some time. We found that the business operates from Mr Bailey's home address and that his supervision of the day to day running of the business reflects the controlling role of a director. In Mr Bailey's application to the High Court for permission to be involved in the management of the business he stated that "it will be difficult for me to carry out any other role...particularly when consideration is given to the size of the business leaving me in a position where it could be very easy to stray into management". In contrast, Mr Morris lives in London and he is only available one day a week, but his duties are to control the company's financial management. In our view both recipients of the PAYE and NICs notice are therefore purporting to act in the capacity of a director and their joint liability is appropriate.

38. In accordance with Regulation 97V of the PAYE regulations and Regulation 29V of the NICs regulations the security to be given is due on the 30th day after date of release of this decision, subject to any appeal. The period of two years for which the security is required is reasonable given the trading history of the failed companies. As HMRC noted in its review decision, if the company's circumstances change, or on the grounds of hardship, it can apply for the security requirement to be reduced.

Decision

39. The requirements of the notices are confirmed and the appeals are dismissed.

40. 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.

**VICTORIA NICHOLL
TRIBUNAL JUDGE**

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RELEASE DATE: 29 DECEMBER 2017