[2019] UKFTT 0705 (TC)

TC07477

VAT, PAYE and NIC – Requirement to give security – Whether decisions ones that could not reasonably have been arrived at – No – Appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03902
TC/2018/04216

BETWEEN

BLUECHIPWORLD SALES & MARKETING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM
TERRY BAYLISS

Sitting in public at Centre City Tower, Birmingham on 30 September 2019

John Barton, director, for the Appellant

Siobhan Brown for the Respondents

DECISION

INTRODUCTION

1. By notices dated 12 March 2018, HMRC required the Appellant to give security:

   (1) in relation to VAT in the amount of £74,158 (or £55,458 if the Appellant submitted monthly returns) pursuant to paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 ("VATA 1994");

   (2) in relation to PAYE in the amount of £12,636 pursuant to Part 4A of the Income Tax (Pay As You Earn) Regulations 2003 ("PAYE Regulations 2003"); and

   (3) in relation to National Insurance Contributions ("NIC") in the amount of £19,277 pursuant to Part 3B of the Social Security (Contributions) Regulations 2001 ("NIC Regulations").

   These notices were issued by HMRC Officer Partridge.

2. On 23 March 2018, the Appellant requested a review of the 12 March 2018 notices.

3. On 4 May 2018, HMRC Officer Johnstone notified the Appellant that the decision to require security in relation to VAT was upheld.

4. On 17 May 2018, HMRC Officer Shields notified the Appellant that the decision to require security in relation to PAYE and NIC was upheld.

5. On 4 June 2018, the Appellant appealed to this Tribunal.

EVIDENCE AND FINDINGS OF FACT

6. The 12 March 2018 notices referred to the relevant legislation and stated that security was required (and the amount). However, no reasons for requiring security were given.

7. Officer Partridge gave the following evidence:

   (1) the Appellant was incorporated on 2 June 2017 under the name BCW Sales Ltd;

   (2) the Appellant's directors were at all material times John Barton, Simon Hassell, Jason Bisseker and Aik-Ee Yee ("the Directors");

   (3) the Directors were also directors of a company, Bluechipworld Sales & Marketing Ltd, that went into administration on 31 August 2017;

   (4) on 4 September 2017, Bluechipworld Sales & Marketing Ltd changed its name to BCW Realisations Ltd and the Appellant changed its name to Bluechipworld Sales & Marketing Ltd;

   (5) the Appellant operates from the same business premises and has the same trade (electronic and telecommunication parts) as had the company that went into administration;

   (6) the previous company had debts to HMRC in excess of £91,000 in relation to PAYE and NIC and £69,000 in relation to VAT;

   (7) in view of the debts owed by the previous company to HMRC and given the connections between the Appellant and the previous company, a "warning letter" (saying that, in the absence of further information, security for VAT might be required) was issued to the Appellant on 19 September 2017;

   (8) no reply was received from the Appellant to the 19 September 2017 warning letter;

(9) as at 12 March 2018, the Appellant's VAT returns for monthly periods October 2017, November 2017 and December 2017 were overdue which had led to a central assessment in the sum of £18,008 being issued to the Appellant (which assessment had not been paid);

(10) the following factors led to the conclusion that security for VAT and PAYE/NIC should be required:

(a) the previous company went into administration with significant PAYE, NIC and VAT debts to HMRC;

(b) the Appellant "took over" from the previous company operating largely the same business with the same directors;

(c) the Appellant was sent a warning letter in relation to VAT security and yet provided no further information that allayed HMRC's concerns; and

(d) the Appellant was late in filing three VAT returns leading to a central assessment in excess of £18,000.

(11) the amount of security for PAYE/NIC requested was calculated by reference to the amount of PAYE/NIC that would likely be due from the Appellant over a four month period based on the PAYE/NIC submissions previously made by the Appellant;

(12) the amount of security for VAT requested was calculated by reference to the amount of VAT that would likely be due from the Appellant over a six month period (or a four month period if the Appellant submitted monthly returns) based on the 09/16 return and the central assessment raised;

(13) setting the level of security at an amount equivalent to four months of VAT and PAYE/NIC gives HMRC a sufficient "buffer" in which to take other action (such as commencing insolvency proceedings) if they form the view that there is going to be loss to the revenue;

(14) the reasons for the failure of the previous company were not known to Officer Partridge when the 12 March 2018 notices were prepared; and

(15) Officer Partridge delivered the notices to the Appellant on 12 March 2018. The Appellant's accountant, Kamran Mumtaz, explained that the previous business had failed as a result of a combination of Brexit, exchange rate movements and Tesco (who were a major customer) deciding to no longer purchase from it.

8. The HMRC officers who conducted the reviews did not give evidence.

9. The VAT review decision makes clear that as well as the factors taken into account by Officer Partridge, consideration was also given to the explanation provided by the Appellant in relation to the failure of the previous business. Nonetheless, Officer Johnstone concluded that in view of the previous failing and the failure of the Appellant to file VAT returns by the due date, he was of the view that there might well be future non-compliance such as to mean that requiring security was appropriate.

10. The PAYE/NIC decision makes clear that regard has been had to the failure of the previous business which, we find, included the Appellant's explanation for that failure (which explanation had been given in correspondence accompanying and following the request for a review).

11. On behalf of the Appellant, evidence was given by John Barton as follows:

(1) He is a director of the Appellant;

(2) He was a director of the previous company;

(3) The Appellant's business is the wholesale of mobile phone accessories imported from China. The previous company's business was broadly the same as the Appellant's business albeit the previous company's largest customer was Tesco;

(4) The previous company got into financial difficulty because of Brexit and the subsequent impact on exchange rates and because Tesco refused to re-negotiate contracts despite currency movements making those contracts uneconomical for the previous company. Tesco then decided to acquire accessories direct from China.

(5) When the previous company went into administration, the Appellant purchased the name and brand;

(6) The Appellant has attempted to mitigate risk by having a broader customer base and taking on distribution work for established manufacturers;

(7) The Appellant has experienced delays in VAT repayments and R&D Credits being made to it by HMRC; and

(8) If the Appellant is required to provide the security there is a significant risk of the Appellant becoming insolvent.

12. On behalf of the Appellant, evidence was given by Kamran Mumtaz as follows:

(1) He is partner at Sinclair & Co;

(2) He has been professionally involved with the Appellant since its incorporation. He had no involvement with the previous company;

(3) He prepares and files the Appellant's VAT returns using information recorded by the Appellant on Sage;

(4) The VAT returns for October, November and December 2017 were not filed by the due date because the Appellant did not at that time have anyone within its finance function to keep the Sage records up to date (and therefore the information required to prepare the VAT returns was not available to Sinclair & Co);

(5) The outstanding returns were eventually filed in March 2018 (after the security notices had been issued to the Appellant);

(6) The Appellant now employs a competent person in its finance function who is clearing a backlog of finance related issues;

(7) The week before the hearing of this appeal, the VAT returns for May, June and July 2018 (which were overdue) were filed. The delay in filing those returns was due to some "reconciliation issues" caused by a member of staff not properly inputting information on Sage; and

(8) The Appellant is currently in the VAT default surcharge regime.

13. On behalf of the Appellant, evidence was given by Simon Hassell as follows:

(1) He is a director of the Appellant;

(2) He was a director of the previous company;

(3) PAYE is currently 100% up to date albeit he accepted payments were typically "a few days late" every month.

14. We accept all of the evidence given to us as summarised above and make finding of fact accordingly.

THE LAW

15. Paragraph of Schedule 11 to VATA 1994 provides:

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

16. Part 4A of the PAYE Regulations 2003 and Part 3B of the NIC Regulations allow HMRC to require security for PAYE and NIC.

17. In *John Dee Limited v Customs and Excise Commissioners* [1995] STC 941, the Court of Appeal stated the Tribunal's role in a security appeal is to:

> "…consider whether the commissioners have 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 something to which they should have given weight."

The Court of appeal went on to say that even if a decision was unreasonably arrived at, the Tribunal can properly dismiss the appeal if it reaches the view that the same conclusion will inevitably be reached if the decision is taken again.

18. In *C&E Commissioners v Peachtree Enterprises Ltd* [1994] STC 747, Dyson J stated:

> "In my judgment, in exercising its supervisory jurisdiction 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 that it was effected…"

19. In *Southend United Football Club v HMRC* [2013] UKFTT 715 (TC), an appeal against a requirement to provide for VAT, Judge Bishopp stated:

> "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 we cannot take account of developments sine that time, and 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."

20. In some subsequent decisions, the observations of Judge Bishopp in *Southend United* appear to have been relied on to support that in exercising its supervisory function in relation to a requirement to give security, the Tribunal can only consider facts that were known to the decision maker (see for example, *Mistral Promotions and Marketing (UK) Ltd v HMRC* [2015] UKFTT 0112 (TC)). In other decisions, however, the Tribunal has held that in exercising its supervisory function in relation to a requirement to give security, the Tribunal can consider facts that were not known to the decision maker provided that those facts existed as at the date of the decision (see for example, *CNM Estates (Tolworth) Ltd v. HMRC* [2019] UKFTT 0045 (TC)).

21. In *Pachangas Mexican Restaurant Ltd v HMRC* [2019] UKFTT 0436 (TC), the Tribunal held that in circumstances where the appellant had not been told what facts HMRC had taken into account in deciding that security was required, the decision to require security was unlawful and therefore unreasonable.

22. Section 83(1)(l) VATA 1994 provides for a right of appeal in relation to a requirement to give security for VAT.

23. Pursuant to s 83A VATA 1994, HMRC must offer a review of a decision if that decision is one against which a right of appeal lies under s 83 VATA 1994. Section 83C provides that HMRC must review a decision if they have offered a review under s 83A and if, within 30 days of that offer, the offer was accepted.

24. Section 83F(4) VATA 1994 provides that a review "must take account of any representations made…at a stage which gives HMRC a reasonable opportunity to consider them".

25. Section 83G VATA 1994 then provides that where a review is conducted pursuant to s83C VATA 1994, an appeal to the FTT is to be made within 30 days of the conclusion of that review.

26. A right of appeal in relation to security requirements for PAYE and NIC is provided for by Regulation 97V of the PAYE Regulations and Regulation 29V of the NIC Regulations respectively.

SUBMISSIONS ON BEHALF OF HMRC

27. HMRC submitted as follows:

(1) even where there has been a review of a decision to require security, the appeal is against, and the Tribunal must focus on, the decision as originally made;

(2) in determining whether a decision to require security is one that could not reasonably have been arrived at, the Tribunal is not permitted to take into account facts that were unknown to the decision maker (even if those facts existed at the time of the decision);

(3) the facts of the present appeal are different to those in *Pachangas* because here the reasons for requiring security were explained orally when the notices were served;

(4) the test to be applied by the FTT is whether the decision to require security was reasonable;

(5) the consequence/effect of a requirement to provide security on a business is not a relevant consideration;

(6) the decisions to require security were reasonable in circumstances where:

(a) the previous company went into administration with large debts to HMRC;

(b) the Appellant "took over" from the previous company operating largely the same business with the same directors;

(c) the Appellant was sent a warning letter in relation to VAT security and yet provided no further information to allay HMRC's concerns; and

(d) the Appellant was late in filing its VAT returns.

SUBMISSIONS ON BEHALF OF THE APPELLANT

28. The Appellant submitted that HMRC had failed to have due regard to the reasons why the previous business had failed (which events were unlikely to be repeated). Further, the Appellant submitted that whilst, at the time the security requirements were imposed, there were outstanding VAT returns, things had now moved on. The Appellant was up to date with its payments and was keeping on top of its compliance obligations. In addition, if required to provide the security, there was a real of risk of the Appellant's insolvency.

DISCUSSION AND DECISION

29. We reject HMRC's submission that, even where there has been a review of a decision to require security, the relevant decision for the purpose of an appeal remains the decision as originally made. Such an approach is not consistent with the statutory provisions (certainly in relation to VAT) which provide that on review any further representations provided since the original decision should be considered and that the deadline for an appeal is 30 days after the review has been concluded. Further, such an approach as contended for by HMRC is illogical in that it is the review decision that is HMRC's "last word" and it may be that HMRC's position/reasoning on review is considerably different to that expressed originally – in those circumstances it would be nonsensical for an appeal to focus solely on the original decision. In our view, the Tribunal needs to consider the decision as it stands following the review. In some cases the review decision will in effect have superseded the original decision, in other cases the original decision and the review decision will need to be considered cumulatively (this was the approach adopted by Lady Mitting in *Sanleo Ltd & Zonin Restaurants Ltd v HMRC* [2010] UKFTT 266 (TC)).

30. We note that on the facts of this case, if the approach in *Pachangas* is correct, the original decision (considered on its own) would arguably be flawed by reason of it not containing any reasons for the decision (albeit the Tribunal would still have dismissed this appeal on the basis that it is inevitable that the same conclusion would be reached if the decision was taken again). However, we are of the view that any defect caused by the initial failure to give reasons was cured by the giving of reasons in the review letters.

31. We reject HMRC's submission that in exercising its supervisory function, the Tribunal is able to take into account only those facts known to the decision maker. In our view, the Tribunal can take into account all facts that existed as at the date of the decision under appeal (regardless of whether or not they were known to the decision maker). Such an approach is consistent with:

(1) the language used by Dyson J in *Peachtree* ("limit itself to to considering facts and matter *which existed* at the time the challenged decision of the commissioners was taken"); and

(2) the approach adopted in other appeals where a supervisory function is exercised (see *Grzegorz Sczcepaniak t/a Phu Greg-Car v The Director of Border Revenue* [2019] UKUT 0295 (TCC)).

32. We accept HMRC's submission that the fact that an appellant is unable to pay security is not a relevant consideration in assessing whether a decision to require security was one that could not reasonably have been made. As was observed by Judge Anne Scott in *Highlake Limited v HMRC* [2016] UKFTT 808 (TC) :

> "the legislation is concerned with protection of the revenue. It does not suggest that this objective is intended to be balanced against, or subject to, the objective of enabling the person upon whom the requirement is imposed to continue trading."

33. We note here that in *D-Media Communications Ltd v HMRC* [2016] UKFTT 430 (TC), Judge Berner held that the amount of the security required "should be calculated so as to give a realistic possibility that the security will be capable of being given" (and, if it has not been so calculated, the decision may be one that was not reasonably arrived at). We respectfully disagree with that approach. If security is reasonably required for protection of the revenue, that (otherwise reasonable and proportionate) requirement will not be rendered unreasonable merely by the fact that the person from whom security is required does not have the means to satisfy that requirement.

34. We reject the Appellant's submission that the decisions to require it to provide security for VAT and PAYE/NIC were ones that could not reasonably have been arrived at given:

(1) In reaching the decisions, HMRC took into account the following relevant matters which were more than adequate to support a requirement to give security, specifically:

(a) the previous company went into administration with significant debts to HMRC;

(b) the Appellant had the same directors as the previous company;

(c) the Appellant carried on broadly the same business as the previous company;

(d) the Appellant was sent a warning letter in relation to VAT security and yet provided no further information to allay HMRC's concerns; and

(e) the Appellant was late in filing its VAT returns leading to a central assessment being raised.

(2) HMRC did not fail to take into account relevant matters or take into account irrelevant matters. The only submission made by the Appellant in this regard was that HMRC failed to take into account the reasons why the previous company had failed. However, we have found that the officers conducting the reviews did take this into account but decided, nonetheless, that security was required. In view of the facts and matters set out a (1) above, that conclusion cannot be impeached.

(3) There was a logical and coherent explanation of how the amount of security required had been calculated. We find that requiring security in this amount is proportionate to the risk to the revenue posed by the Appellant.

35. For the avoidance of doubt, even if HMRC had not given consideration to the explanation for the failure of the previous company, we would have dismissed the appeals on the basis that it is inevitable that the same conclusion (i.e. that security should be provided) would be reached if HMRC was required to take the decisions again taking into account that explanation. Even accepting the stated reasons for the failure of the previous company, the fact remains that it did

fail with significant debts to HMRC. When coupled with the Appellant's compliance failures in relation to its tax obligations (late returns and late payments) we are satisfied that security should and would properly be required from the Appellant.

36. Accordingly, these appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

RELEASE DATE: 22 NOVEMBER 2019