



TC01787

Appeal number: TC/2011/05408

Notice of Requirement to give security; trader involved in similar failed businesses leaving tax substantial debts; trader's poor compliance record; VATA 1994 Schedule 11, paragraph 4(2)(a); whether Respondents entitled to require the Appellant to give security;-Yes; Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

BERT D'AGOSTINO

Appellant

- and -

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

Respondents

TRIBUNAL JUDGE: J. GORDON REID Q.C., F.C.I.Arb.

**Sitting in public at George House, 126 George Street, Edinburgh on Wednesday 25
January 2012**

No appearance by or for the Appellant

Mrs E McIntyre, for the Respondents

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DECISION

Introduction

1. This is an appeal against the decision by the Respondent (the “Revenue”) to issue
5 a Notice of Requirement, dated 16 June 2011, to the Appellant to give security under
paragraph 4(2)(a) of Schedule 11 to VATA 1994.

2. A Hearing Notice was sent to the Appellant on or about 7 December 2011. When
the case called for a Hearing at Edinburgh on 25 January 2012, Mrs E McIntyre, a
Higher Officer with the Revenue Appeals and Review Unit at Glasgow, appeared on
10 behalf of the Revenue. However, there was no appearance by or on behalf of the
Appellant. The Appellant had telephoned the Tribunal on 24 January 2012 to say that
he would not attend the Hearing on 25 January but would be represented by a Mr
David Logan.

3. At about 10.15am on 25 January 2012, the Tribunal secretariat attempted to
15 contact the Appellant by telephone. They telephoned his business land line number
and his mobile telephone number. Only an answering machine responded and a
message was left for the Appellant that Mr Logan was not present.

4. With the assistance of Mrs McIntyre, a telephone number was obtained for Mr
Logan. He was contacted by the Tribunal secretariat shortly before 10.30am. He said
20 that he was aware of the case, having discussed it with the Appellant, but had not
reached any agreement that he (Mr Logan) would appear on the Appellant’s behalf
and had no intention of doing so.

5. By about 11am, the Appellant had neither appeared nor responded to the
telephone messages left for him. In those circumstances, the Tribunal sat and Mrs
25 McIntyre moved under Tribunal Rule 33 that the Tribunal proceed with the Hearing
in the Appellant’s absence.

6. The Tribunal was satisfied that the Appellant had been notified of the Hearing
and that it was in the interests of justice to proceed with it. If a party does not intend
to support and present his appeal by attending personally, he must make adequate
30 arrangements to secure proper representation. On the information before the
Tribunal, that had not been done. The Tribunal therefore decided to proceed in the
absence of the Appellant.

7. Mrs McIntyre led the evidence of Paul Russell, a Higher Officer with the
Revenue specialising in VAT security matters. A bundle of documents was also
35 produced.

Grounds of Appeal

8. These are that (i) the Notice is unnecessary, (ii) the Notice is punitive to a small
trader, (iii) enforcement would place the Appellant’s business in jeopardy and lead to
redundancies at a time of continuing economic hardship.

Facts

9. The Appellant is a sole trader. He carries on business under the name *The Castle Inn, Direlton*. He was registered for VAT on 4 October 2010. Since then, only one quarterly return has been rendered. The VAT due according to that return has not
5 been paid in full. As at 16 June 2011, there was about £19,600 of VAT outstanding.

10. In 2011, the Revenue carried out investigations which led to the giving of a Notice dated 16 June 2011 (signed by Mr Russell) to the Appellant requiring him to give security in the sum of £88,415 or £65,465 if monthly returns were submitted instead of the existing arrangement of submitting quarterly returns.

10 11. These investigations revealed that the Appellant had been involved in about nineteen hotel or restaurant businesses over the last fifteen years or thereby, either as sole proprietor or director or in conjunction with a family member who was either owner or director, most of which businesses had become insolvent at some stage leaving substantial unpaid VAT liabilities. The amounts ranged between about
15 £13,000 and £155,000. Mr Russell spoke to a table or chart setting out the details, which the Tribunal accepts as accurate as at 16 June 2011.

12. By way of illustration, the Appellant was the director of Castlenorth Restaurants Ltd which traded as *Topolino's & Umberto's* at Edinburgh. The company was registered for VAT in 1995 and de-registered in 2001. The Appellant was the
20 director. The company became insolvent in 2001 leaving VAT liabilities of some £82,000.

13. The Appellant was a director of Dynamic Duo Ltd. It was registered for VAT in December 2000 and de-registered in November 2004. There were VAT liabilities of about £13,600 as at 16 June 2010. During the period of registration nine default
25 surcharges were imposed out of thirteen return periods.

14. The Appellant was the director of Bonnington Restaurants Ltd. It was registered for VAT in 2001 and de-registered in 2004, when it became insolvent leaving VAT liabilities of some £41,000. No returns were ever submitted and no VAT was ever paid.

30 15. The sums referred to in paragraphs 12-14 as well as the other sums referred to in the table or chart described in paragraph 11 above were all outstanding immediately before the decision was made to require security.

16. In relation to his current business, some £19,600 of VAT was, as already noted above, outstanding as at June 2011 prior to the service of the Notice. Since then,
35 about £4,200 has been paid but a further assessment (in the absence of returns) in the sum of £11,152 has been issued and it too remains unpaid. The Appellant has submitted only one return since registration.

17. The Appellant was sequestrated 2009 and obtained his discharge in 2010. In 2006, he was disqualified from holding the office of director until 2013.

18. Mr Russell said in evidence, and the Tribunal accepts, that he took into account the Appellant's previous failures, his poor compliance record, his sequestration and discharge and his disqualification in deciding to require security which he said was required for the protection of the revenue.

5 19. Mr Russell also spoke to how the amount of security required was calculated. He said it was based on the Appellant's anticipated turnover and a standard formula used to calculate input tax based on extensive statistical information held by the Revenue about the relationship between output and input tax in various sectors of business including the hotel and restaurant trade.

10 **Discussion**

20. Mrs McIntyre submitted that the decision to require the Appellant to give security for payment of VAT was one which any reasonable body of Commissioners was, in the circumstances, entitled to make. The Grounds of Appeal were unsound. It would be unfair to other traders who do comply with their statutory obligations to account
15 for VAT if the Appellant were allowed to trade in disregard of these obligations. The Revenue had various schemes in place to assist traders in these difficult economic conditions.

21. The Tribunal agrees with those submissions. There was an abundance of evidence available to the Revenue in June 2011 to justify the giving of the Notice.
20 The amount of security demanded was, in the circumstances, reasonable and appropriate.

22. There is no merit whatsoever in any of the grounds of appeal. The decision to require security was neither irrational nor unreasonable. The matters taken into account as at 16 June 2011 were relevant. The material before the Revenue was
25 amply sufficient (if not overwhelming) to justify their decision. The Appellant seems to think he should be allowed trade in complete disregard of his fiscal and administrative obligations relating to VAT. In that view, he is mistaken. The Revenue was plainly entitled to decide that the giving of security was necessary for the protection of the revenue.

30 **Result**

23. The appeal is dismissed.

24. The Hearing having taken place in the absence of the Appellant, the Appellant has a right to apply for this decision to be set aside pursuant to Rule 38 of the Tribunal Procedure (First-tier) Tribunal (Tax Chamber) Rules 2009.

35 25. 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.

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TRIBUNAL JUDGE
RELEASE DATE: 27 January 2012.

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