



**TC03442**

**Appeal number: TC/2013/06730**

*VALUE ADDED TAX – requirement to provide security – whether reasonably required – whether amount reasonable or excessive – matters taken into account in imposing requirement and calculating amount – held, decisions reasonably arrived at – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WHYTE HARTE HOTEL BLETCHINGLEY LIMITED      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN CLARK  
MRS GILL HUNTER**

**Sitting in public at 45 Bedford Square London WC1B 3DN on 30 January 2014**

**The Appellant did not appear and was not represented**

**Ms Harry Jones, Specialist Investigations, Appeals and Reviews, HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellant (“WHHB”) appeals against a decision by the Respondents (“HMRC”) to issue a Notice of Requirement to provide security under paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 (“VATA 1994”).

2. As no representative of WHHB had arrived in advance of the hearing, we asked our clerk to make contact with Mr Stephen Hall, the director who had signed the Notice of Appeal. Mr Hall indicated that he was intending to appear, but was delayed in heavy traffic. We agreed to start the hearing at a later time. As a result of a later telephone call made to him, we were informed that he did not think that he could reach the hearing centre until long after the proposed new hearing time, and indicated that he would not appear; he would accept the decision of the Tribunal, and would contact the Tribunal office the next day to find out the result of the appeal.

3. We concluded that it was in the interests of justice for the hearing to proceed in the absence of any representative of WHHB.

4. As Mr Hall had indicated that he would be asking the next day about the result of the appeal, we adjourned at the end of the hearing to consider our decision. We returned to announce the result, which was that we dismissed WHHB’s appeal. We indicated that we would set out our reasons in this decision.

### *The background facts*

5. The evidence consisted of a bundle of documents. In addition, we heard oral evidence from Mrs Janice Uzzell, a Higher Officer of HMRC’s Southampton Securities Team, and Mr Philip Nichols of HMRC Specialist Investigations. From the evidence we make the following findings of fact. (We consider other issues of fact later in this decision.)

6. WHHB was registered for VAT purposes with effect 21 June 2012. Its trade is that of a public house.

7. As mentioned later below, other Notices of Requirement were issued to WHHB. As these were not subject to appeal, we refer at this point only to the matters within the scope of the appeal.

8. On 10 April 2013 an officer of HMRC served a Notice of Requirement on WHHB at its registered address. Mr Hall replied on 7 May 2013, explaining that WHHB was completing monthly returns and that returns for the six monthly periods up to and including 3/13 had all been submitted on time.

9. By his letter dated 9 May 2013, Mr Stone of HMRC explained why a security had been required. He indicated that if WHHB wanted the decision to be reviewed, it should contact Mrs Uzzell. By a fax dated 15 May 2013, Mr Hall requested a review of the decision to require a £31,550 security deposit.

10. The review was allocated to Mr Nichols. On 22 May 2013, Mr Nichols sent a fax to Mr Hall asking about WHHB's appeal. Mr Hall replied by letter, questioning HMRC's use of the fax number having regard to the confidential nature of the correspondence. Mr Hall confirmed that a review was being requested. In his letter  
5 dated 30 May 2013, Mr Nichols explained that it was necessary to establish whether WHHB wanted the review to be carried out by the decision maker or by an independent reviewer. He had used the fax because once an appeal had been made, there was only a limited time to complete a review.

11. On 21 June 2013, HMRC officer Mrs L Andrews wrote to WHHB. HMRC had  
10 considered the further information put forward by WHHB. They were still of the view that an amount of security was required, but now considered that an amount of £24,150 was necessary for the protection of the revenue, based on the submission of monthly returns. HMRC had allowed for the reduced level of tax at risk, having regard to the monthly submission of returns, by requiring security based on an  
15 estimate of four months VAT being due. Mrs Andrews explained that HMRC had demonstrably allowed for the fact that WHHB was already making monthly returns in the original decision to require security. It had been on 21 September 2012 that HMRC's Specialist Investigations Security Team had directed WHHB to make monthly returns.

12. As there had been no new information, Mrs Andrews was unable to reconsider  
20 the decision to require security from WHHB. However, she had reduced the level of security required. This reduction was in line with payments made on account and effectively removed the 'current debt' element of the security. She explained the appeal rights, and the option of a review.

13. On 8 July 2013, Mr Hall wrote requesting a review of the decision in the letter  
25 dated 21 June 2013.

14. Mr Stone wrote to WHHB on 22 July 2013. He referred to the history of the  
30 correspondence. He explained that whilst WHHB's request for an independent review was out of time, HMRC had decided to allow the review and the matter had been referred back to Mr Nichols to allow him to conclude his deliberations. Mr Stone explained that if WHHB had any specific information which might impact on the level of security required, it should address this to the review officer, Mr Nichols. Mr Stone set out an explanation of the way in which the amount of security required was calculated, applying a 'rule of thumb'.

15. In his fax to Mr Stone sent on the same date, Mr Hall included the following  
35 final paragraph:

"As notified my co-director has resigned to save costs, and it is hoped that this will make the business more viable. Would it be possible for you to accept a lesser deposit or should the tribunal decide this."

16. On 6 August 2013, Mr Nichols wrote to WHHB, for Mr Hall's attention, setting  
40 out the results of his review. He gave details of the history of the correspondence. He had already considered the process used by the decision-maker, and found that this

was administratively correct. He had also looked at the facts on which the decision to seek a security had been based. The ‘negative factors’ were (i) that this business (The Whyte Harte) had previously been run by two other companies of which Mr Hall had been a director and both had failed owing substantial amounts of VAT, (ii) that Mr Hall had also been a director of other companies, which ran businesses from three other sites, all of which had failed owing significant amounts of VAT, and (iii) official accounting records showed that WHHB had current VAT debt amounting to £19,765.86.

17. The ‘positive factors’ were (a) that monthly VAT returns were up to date and had been rendered on time, and (b) that payments of £1,500 had been received, although these had either not been frequent enough or not of sufficient amount to prevent the level of debt from rising.

18. In Mr Nichols’ opinion the decision to seek security from WHHB had been correct. He saw no point in further correspondence on the matter. He referred to the right to appeal to the Tribunal.

19. With the exception of one further letter from Mr Nichols, considered below, the subsequent correspondence between WHHB and HMRC has no effect on the results of the review, and we therefore omit the details from this decision.

20. On 18 September 2013 WHHB gave Notice of Appeal to HM Courts & Tribunals Service. It explained that the reason for giving notice outside the time limit was that it had been waiting for a reply to outstanding correspondence from HMRC. No objection was raised to the late notification.

#### *Arguments for WHHB*

21. In the grounds for appeal, Mr Hall for WHHB indicated its view that the requirement of the £24,150 VAT security deposit was excessive. The previous requirement of a deposit of £7,900 had been a manageable amount and had been paid when requested.

#### *Arguments for HMRC*

22. Ms Harry Jones referred to the factual background. HMRC’s case was that the amount of security required was reasonable. WHHB’s request for a reduction in the amount of security required implied acceptance by it that the decision to raise the security in the first place had been reasonable.

23. The relevant legislation was paragraphs 4(2) and 4(4) Schedule 11 VATA 1994. Under s 83(1)(l) VATA 1994, an appeal could be made against the imposition of a security. However, the matter of directing monthly returns was not appealable.

24. HMRC referred to the Court of Appeal decision in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941, and submitted that the Tribunal could not

exercise a fresh discretion when considering the imposition of a security. The legal test on appeal was one of reasonableness:

- (1) had HMRC acted in a way in which no reasonable panel of commissioners could have acted, or
- 5 (2) had HMRC taken into account some irrelevant matter, or
- (3) had HMRC disregarded something to which they should have given weight?

If HMRC's decision was found to be reasonable, then the appeal must be dismissed.

10 Should the Tribunal find that inappropriate consideration had been given to the relevant facts at the relevant time, then the appeal could still be dismissed if it was found that (with the relevant considerations) HMRC's decision would inevitably have been the same.

15 25. HMRC wished to draw attention to the decision of the High Court in *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747, and to observe that in the exercise of its statutory jurisdiction the Tribunal had to limit itself to considering facts and matters which were known when the disputed decision was made.

26. Ms Harry Jones made the following general submissions on the facts:

- 20 (1) The decision to issue a notice of requirement in the first instance had been reasonable in the light of information available at that time;
- (2) The decision to uphold the notice of requirement at internal review had been reasonable;
- 25 (3) HMRC had given regard and appropriate weight to all relevant matters and had disregarded those which were irrelevant. HMRC argued that it had been reasonable to conclude that WHHB represented a risk against which the revenue had to be protected by way of a notice of requirement. HMRC's understanding was that the director of WHHB accepted that a security deposit should be made and sought only to challenge the amount;
- 30 (4) The amount required was reasonable and had been calculated with regard to all relevant factors. Furthermore, the amount had been reduced where appropriate to reflect WHHB's changing tax liability. If the Tribunal found that the amount was not reasonable, then the appeal had to be allowed; the amount of the security could not be varied on appeal. The deposit amount had been calculated using a tried, tested and well-reasoned formula;
- 35 (5) HMRC regularly reviewed the requirement for security and would return it when they considered that there was no longer a risk to the collection of VAT;
- (6) HMRC respectfully asked for the appeal to be dismissed.

*Discussion and conclusions*

27. We accept as correct HMRC's submissions as to the law. It is not open to us to vary the decision to require security or the amount of that security; as stated by Neill LJ in *John Dee* at 952, the tribunal cannot exercise a fresh discretion. We can only  
5 examine whether, under paragraph 4(2)(a) Sch 11 VATA 1994, HMRC (through the officers involved) thought it "necessary for the protection of the revenue" to require security from WHHB. The reasonableness test which we are required to apply is as correctly stated by Ms Harry Jones in her submissions.

28. One practical effect of the High Court's decision in *Peachtree Enterprises* is  
10 that information given by Mr Hall in his telephone conversation with our clerk has no effect on our consideration of the decision to require security, as confirmed on review by Mr Nichols. Mr Hall informed our clerk that WHHB was about to cease trading. That information on its own would not have amounted to evidence, as some form of corroboration of Mr Hall's statement would have been necessary, but in any event, we  
15 are precluded from taking the information into account.

29. In her evidence, Mrs Uzzell explained that the amount required in the original Notice of Requirement issued to WHHB, dated 1 August 2012, had been arrived at by reference to the turnover declared on form VAT 1. Following a request by WHHB, HMRC had agreed that the sum could be paid by three monthly instalments from 15  
20 November 2012 onwards. On 29 November 2012, Mr Stone of HMRC had written to WHHB to inform it that the first instalment had not been paid, and unless this sum was received within seven days, the instalment agreement would be deemed to have failed, and the security deposit would be required in full immediately.

30. On 25 March 2013, Mr Stone had written to WHHB informing it that the sum of  
25 £7,019.95 had been set off against its outstanding VAT liability of that amount. The sum had been taken from the amount of £7,900 which WHHB had provided in respect of a Notice of Requirement dated 18 February 2013. Mr Stone had previously informed WHHB that the case was being referred to HMRC's criminal prosecution team. In his letter dated 25 March 2013, Mr Stone also indicated that HMRC were  
30 likely to require further security, as they had used the security previously provided. The amount of the new security would be based on an estimate of four months' VAT liability calculated using WHHB's recent VAT returns.

31. In considering the proposal to give the Notice of Requirement dated 10 April  
35 2013, Mrs Uzzell took into account the information contained in a "chain chart" prepared by HMRC's Southern Security Team. This chart showed that Mr Hall and his co-director Mr Couch had been involved in the management of various companies which had traded and failed, owing various amounts in VAT and/or PAYE to HMRC.

32. The original calculation of the amount required as security at that stage was  
40 arrived at by totalling the VAT liability for the nine months to period 02.13 and dividing the resultant figure by nine to obtain the monthly average VAT liability. As the security was required to cover four months' VAT liability, the monthly average figure was multiplied by four. The VAT owing at 10 April 2013 was added, producing a total of £32,418.49. The balance of £880 from the previous security

deposit was subtracted from the total, which was rounded to the nearest £50. The required amount was therefore £31,550.

5 33. Mrs Uzzell explained that the calculation took into account the amount of VAT shown in the trader's own returns, and that the four-month security requirement was based on the fact that it would be two months before HMRC's Debt Management team would start acting in any particular case.

10 34. On 21 June 2013, Mrs Andrews (a Higher Officer in the same team as Mrs Uzzell) had written on Mrs Uzzell's behalf in her absence to WHHB to notify it that the amount required as security had been reduced to £24,150 if monthly returns were submitted. Mrs Andrews indicated that this reduction was in line with payments made on account, and effectively removed the 'current debt' element of the security.

15 35. In her evidence, Mrs Uzzell referred to a "compliance chart" which showed a VAT liability as at 10 April 2013 of £7,584.09. She indicated that the security requirement calculated as at 20 June 2013 of £24,150 was a lower figure than HMRC could have charged WHHB for a security deposit.

36. In his evidence, Mr Nichols confirmed that his letter dated 1 August 2013 had stated his belief that the decision to issue the Notice of Requirement had been correct. In his subsequent letter dated 6 August 2013, he had tried to explain the position more fully than in his earlier "standard" letter.

20 37. In carrying out his review, he had looked at all the facts available to Mrs Uzzell as the decision maker when she had made her original decision. He had reviewed everything which Mrs Uzzell had looked at. He had looked at WHHB, which was the third company in sequence operating the same trade; it and the two previous companies all ran pubs, a cash trade, and Mr Couch and Mr Hall had been the directors. He had looked at the chain chart, which showed their other associations. His view had been that they had been associated with three other sites, run by two companies on each site or three companies on each site. In each case the company had been liquidated leaving substantial VAT debts. His view had been that WHHB posed a serious danger to the collection of VAT revenue.

30 38. He had correspondence from Mr Hall; this had not shed great light on the position. Mr Hall had seemed to disagree with the decision but did not want to miss out on any appeal possibilities. The amount required as security had been recalculated. Mr Nichols had sought to see liquidators' reports for each of the "Couch and Hall" companies. The same liquidator had been involved for all of the companies. 35 The "theme" had been a disappointing level of business in each case. The reports were in the public domain; the companies had been largely unsuccessful. Mr Nichols indicated that if he had not had sight of the liquidator's reports, his decision would have been the same in any event; reading the reports had not added to or subtracted anything from the process.

40 39. He had examined the calculations of the amount required; these had been in exactly the form that the relevant HMRC department would normally follow, and

were arithmetically correct. This was also the case for the later calculation of the reduced security amount. It had been within the decision maker's discretion not to add the amount of arrears to the amount required; the only effect had been to make the decision more reasonable.

5 40. In his explanatory letter dated 5 August 2013, he had set out the negative factors and the positive factors on which the decision to seek a security had been based. An additional negative factor which he had mentioned was that HMRC's official accounting records showed the level of WHHB's current VAT debt. He had acknowledged the points in WHHB's favour.

10 41. Having considered the evidence of Mrs Uzzell and Mr Nichols, we accept it as a true account of the basis on which they arrived at their respective decisions. We are satisfied on the basis of that evidence that they took into account all relevant considerations, and did not take any irrelevant matters into account. In terms of Lord Lane's guidance in *Customs and Excise Commissioners v JH Corbitt (Numismatists)*  
15 *Ltd* [1980] STC 231 at 239, set out in *John Dee* at 950, we do not consider that they

“ . . . acted in a way in which no reasonable panel of commissioners could have acted”.

42. It follows, as Ms Harry Jones submitted, that WHHB's appeal must be dismissed.

20 *Right to apply for permission to appeal*

43. 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  
25 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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**JOHN CLARK  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 March 2014**

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