[2016] UKFTT 0657 (TC)

TC05400

Appeal number: TC/2016/00902

VALUE ADDED TAX – notice of requirement to provide security – whether decision was flawed – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASHLEY DAVID TRANSFERS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

Sitting in public at Centre City Tower, Birmingham on 15 August 2016

Mr Holden, tax consultant, for the Appellant

Ms Brown, presenting officer, for the Respondents

DECISION

Introduction

1. The Appellant's appeal is made against the requirement, imposed upon it by a Notice served on 18 February 2015, to provide security to the Respondents in the sum of £46,760.65 (or £43,560.65 if the Appellant filed monthly VAT returns). The Respondents' notice was served under Paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 ("VATA 1994").

This Tribunal's jurisdiction on appeal

2. In an appeal against the imposition of a Notice of Requirement to provide security, the Tribunal's jurisdiction is to assess whether it was reasonable for the Respondents to consider it was requisite for the Appellant to provide security. That jurisdiction was clearly set out in *John Dee Limited v Customs & Excise Commissioners* [1995] STC 941 where Neill LJ held (at page 952):

> It seems to me that the statutory condition (as Mr Richards termed it) which the Tribunal has to examine in an appeal under s 40(1)(n) is whether it appeared to the commissioners requisite to require security. In examining whether that statutory condition is satisfied the tribunal will, to adopt the language of Lord Lane, 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. The tribunal may also have to consider whether the commissioners have erred on a point of law. I am quite satisfied however, that the tribunal cannot exercise a fresh discretion on the lines indicated by Lord Diplock in *Hadmor*. The protection of the revenue is not a responsibility of the tribunal or of a court.

3. In considering the reasonableness of the Respondents, I do not take into account events which have happened subsequent to the issue of the Notice of Requirement to provide security. As Dyson J set out in *Customs and Excise Commissioners v Peachtree Enterprises Limited* [1994] STC 747 (at page 751):

> 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 it was effected.

4. The original decision to require security was taken on 18 February 2015. This decision was affirmed by a review decision taken on 21 January 2016. As the original decision was affirmed I focus primarily upon that decision but I also refer to the review decision where necessary.

The issues to be determined

5. Therefore the issues for me to determine are whether, on 18 February 2015 and then on 21 January 2016, it was reasonable of the Respondents to require the Appellant to provide security in the sum of £46,760.65 (or £43,560.65 if the Appellant filed monthly returns).

Appellant's submissions

6. Mr Holden, on behalf of the Appellant, prepared a Summary of the Appellant's Case which was, in his words, "an attempt to sort the wood from the trees". The Appellant's Summary set out three strands of argument, which can be summarised as follows:

A. The original decision to serve the Notice requiring security was flawed because the Respondents had not entered into any prior consultation with the Appellant;

B. The Notice was unreasonable in view of the Appellant's level of profit, and in light of the Government's policy with regard to small businesses; and

C. The review decisions could not be fair because they had been undertaken by employees of the Respondents.

7. I set out these submissions in greater depth when discussing them below. In his Reply, Mr Holden referred to the authorities set out in the Respondents' Statement of Case and argued that the Appellant's case could be distinguished. Mr Holden contrasted the history of failures in the factual background to *John Dee Limited* with the management changes which had taken place in the Appellant and the positive financial forecasts. Referring to *Rosebronze Limited v Commissioners of Customs & Excise* (1984) LON/84/154, Mr Holden argued that in the Appellant's case the Respondents had failed to take something into account so their decision was flawed. Finally Mr Holden referred to *The Southend United Football Club Limited v HMRC* [2013] UKFTT 715 and argued that this case could not assist the Respondents as Southend Football Club had a long history of default, stretching over several years whereas the Appellant had only been trading for 22 months and so did not have that history of default. The Appellant submitted that the appeal should be allowed.

Respondents' submissions

8. The Respondents' submission was that it was reasonable for the Respondents to require security in the light of the information available at the time of the decision.

9. Ms Brown submitted that when the original decision was taken to require security, the Appellant was seriously non-compliant in its own right: four of the previous six returns had been submitted late, a Time To Pay ("TTP") arrangement had failed, the amount of VAT outstanding was £37,210.65 and the Appellant also owed approximately £18,000 of PAYE and NICs.

10. Although the Appellant argued that it had new accountants in 2012 and new systems in 2013, Ms Brown submitted that when the original decision was taken, in 2015, the only visible changes were that the debt to the Respondents had increased. The amounts outstanding had increased further by the date of the review decision.

11. At the date of the hearing the VAT debt had increased again to £80,000 and the PAYE and NICs debt stood at £25,000. The Respondents referred to the legal principles set out in *John Dee Limited, Peachtree, Rosebronze, Lewis Ball & Company Limited v The Commissioners of Customs & Excise* (2006) LON/05/1129 and *Southend United*, and sought the dismissal of the appeal.

Facts found

12. I heard evidence from two witnesses: Ms Partridge, the original decision maker, and Mr Hunter, a director of the Appellant. I consider both witnesses to be truthful. On the basis of the witness evidence and the documents in the bundle before me, I find the following facts:

a) Ashley David Transport Limited ("ADT") was incorporated on 25 April 2002 and registered for VAT from 1 July 2003. ADT traded as a taxi company. Its directors were Mr Ashley Butcher and Mr David Hunter. ADT entered into several TTP arrangements with the Respondents but each was cancelled by the Respondents when ADT defaulted on the agreed terms.

b) The Appellant was incorporated on 12 April 2012. It was registered for VAT from 1 October 2012. Its directors are Mr Butcher and Mr Hunter, the directors of ADT. The Appellant has the same place of business as ADT. The original trade of the Appellant was the maintenance and repair of motor vehicles but on 16 January 2013 the name of the Appellant was changed (to its current name) and its trade was changed to include airport transportation and transfer services. In his evidence Mr Hunter described the Appellant's business now as a private hire and taxi operation.

c) In a witness statement filed at Leicester County Court on 18 December 2013, Mr Hunter explained that at the beginning of 2013 he and Mr Butcher became concerned about ADT's ability to continue trading. Mr Hunter noted that there had been a recent increase in competition from other taxi companies and that there had been a reduction in the disposable income of students on the Loughborough University campus (where ADT was based) when tuition fees rose to £9,000 per annum in September 2012. Mr Hunter identified these facts as the major contributors to ADT's failure.

d) On 1 March 2013 Mr Butcher and Mr Hunter entered into an agreement with ADT to buy its assets, primarily the taxi fleet, under an eighteen month instalment arrangement. On 29 April 2013 ADT began the winding up process.

e) On 2 August 2013 ADT went into administration owing the Respondents VAT of £65,328.09.

f) In his 18 December 2013 witness statement Mr Hunter stated that the Appellant was profitable and that he believed the Appellant would continue to be viable and profitable. However, as at 18 December 2013, the Appellant had failed to file the VAT returns due for the periods ended 07/13 and 10/13, and had not paid any of the VAT due to the Respondents in respect of these two quarters.

g) On 10 January 2014 the Appellant belatedly filed its VAT returns for the periods ended 07/13 and 10/13. These showed that a total of £27,913.57 was due in respect of VAT for these two quarters. On 10 and 12 February 2014 the Appellant made payments (of £4,986.81 and £5,000) towards the VAT due for the period ended 07/13. On 6 March 2014 a credit of £106.28 in respect of the period ended 10/12 was put towards the VAT outstanding for the period ended 07/13.

h) On 7 March 2014 the Appellant filed (in time) its VAT return for the period ended 01/14. This was a repayment return and the £2,095.98 due to the Appellant was credited to the amount outstanding for the period ended 07/13.

i) On 9 June 2014 the Appellant was two days late in filing its VAT return for the period ended 04/14. The return showed VAT due of £10,330.96. No VAT was paid.

j) On 26 August 2014 the Appellant requested a TTP arrangement. This request followed a visit by a member of the Respondents' Debt Management team to the Appellant's offices. On 3 September 2014 the Appellant filed (in time) its VAT return for the period ended 07/14. The return showed VAT due of £7,256.24. No VAT was paid.

k) On 4 September 2014 a TTP arrangement was agreed between the Appellant and the Respondents. Under this agreement the Appellant was to pay £1,000 each week and to pay the VAT due under the next two returns on time. This arrangement was cancelled on 1 November 2014 due to the Appellant's default.

l) On 8 December 2014 the Appellant was one day late in filing its VAT return for the period ended 10/14. The return showed VAT due of £3,621.95. No VAT was paid.

m) Ms Partridge was the officer who took the decision to issue a Notice requiring security to the Appellant. In considering whether security was required Ms Partridge considered all the records which were available to her in order to build up a picture of the Appellant and its indebtedness. The information considered by Ms Partridge included:

i. the VAT returns submitted by the Appellant;

ii. the compliance record of the Appellant, including the fact that four of the previous six returns had been submitted late;

iii. the amount of VAT outstanding – as at 18 February 2015 the Appellant's VAT ledger debt was £37,210.65 – and the fact that the debt was outstanding from period 07/13 onwards;

iv. the history of the Appellant, any relevant linked company and the history of the directors involvement with other companies – including the liquidation of ADT and its VAT debt of £65,328.09;

v. the notes and records on the Respondents' systems, such as the notes made by members of the Respondents' Debt Management team when visiting the Appellant, and the correspondence sent out by that team;

vi. the number of TTP requests and the outcome of any TTP arrangements, including whether any had previously failed, and

vii. The Appellant's record in relation to VAT default surcharges, PAYE and NICs (as at 18 February 2015 the Appellant owed approximately £18,500 in PAYE and NICs), CT and the directors' personal Self Assessment records.

n) On the basis of all of this information, Ms Partridge concluded that it was requisite to require security from the Appellant for the protection of the revenue. On 18 February 2015, the Respondents issued the Appellant with a Notice of requirement to give security under Paragraph 4(2)(a) of Schedule 11.

o) Although there had been discussions between the Respondents' Debt Management team and the Appellant's directors, Ms Partridge did not enter into dialogue with the Appellant prior to service of the Notice. Ms Partridge did monitor the position after the Appellant had been served with the Notice.

p) Mr Hunter considered that the Appellant's business was picking up in February 2015 and that the Appellant was just beginning to make a profit. Mr Hunter had been surprised by the Notice and he considered it unfair that there had been no prior consultation. Mr Hunter considered that if the Respondents had spoken to him then he could have explained why ADT had failed, and he could have provided forecasts of the Appellant's prospects. Mr Hunter said that he felt let down and that he was trying to create jobs but the Notice acted as a discouragement. Mr Hunter had initially felt there was no point in continuing when he became aware of the Notice.

q) On 1 April 2015 the Appellant notified the Respondents that it was preparing to enter a Company Voluntary Arrangement. On 10 April 2015 the Appellant's current agent sought more time to provide information to the Respondents with regard to the Notice.

r) On 7 May 2015 the Appellant provided the Respondents with the Management Accounts for the year ended 31 March 2015, showing a profit before tax of £135,745, and the December 2013 witness statement of Mr Hunter which was filed in the insolvency of ADT. On behalf of the Appellant Mr Holden stated that financial forecasts for the next 12 months had been prepared

and that these showed a profit before tax for the year ended March 2016 of £176,735.33. The Appellant requested that the Notice be withdrawn.

s) On 24 July 2015 a TTP arrangement was requested for payment of the outstanding VAT and PAYE over an 18 month period. This request included cash flow for the year up to 30 June 2015, and projections for the next two years. The Respondents refused to agree to a TTP arrangement which lasted more than 12 months. Mr Hunter's evidence was that the Appellant would not be able to meet its liabilities over 12 months but could meet them over 18 months.

t) On 31 July 2015 the Respondent reminded the Appellant of the requirement to provide security. On 6 August 2015 the Appellant sought a response to its earlier letters and request that the Notice be withdrawn. By letter dated 11 November 2015 the Respondents refused to withdraw the Notice. In concluding that the Notice should not be withdrawn the Respondents took into account the additional information supplied by the Appellant, and noted the increasing indebtedness of the Appellant.

u) On 8 December 2015 the Appellant sought an independent review of the original decision. On 21 January 2016 the Respondents issued their review decision, which affirmed the original decision. As at 21 January 2016 the Appellant's VAT debt was £68,184.88. The Appellant appealed to the Tribunal.

v) As at the date of the hearing before me, the Appellant was trading from the same address and in the same business as ADT. The Appellant's business has seasonal fluctuations, with 36 weeks of business from students during term time and with conferencing work outside the university teaching terms. Some months are buoyant and some are slow. The Appellant faces the same competition and trading conditions that ADT did. Mr Hunter's evidence was that the Appellant had app technology to compete with competitors such as Uber, and that the Appellant also diversified its business with different brands for different markets.

w) Further amounts of VAT had been paid in the two weeks prior to the hearing before me. Mr Hunter explained that the Appellant had not paid all of the VAT becoming due for periods since the Notice had been served due to the Appellant's poor cash flow and, latterly, due to the restructuring of the Appellant's factoring agent. Mr Hunter accepted that the Appellant's VAT debt had increased. Although 18 months had passed since the Notice had been served (the period over which the Appellant had sought a TTP arrangement) the Appellant had not made payments to the Respondents to pay down the VAT outstanding as there was a significant amount owing to other creditors and the Appellant could not prefer the Respondents over those other creditors.

x) Mr Hunter agreed that it looked like the Appellant was using the VAT due to the Respondents to support its business.

Conclusions reached

13. The burden of proof in this appeal is upon the Appellant. Given the nature of the jurisdiction, I consider whether the Appellant has established that either the original decision or the review decision was a decision which no reasonable decision-maker could have reached or was flawed in the sense that irrelevant matters were taken into account or relevant matters were not taken into account.

The first strand of the Appellant's argument

14. The Appellant's first strand of argument, challenging the original decision that it was requisite to require security, was that this decision was flawed because before reaching this decision, the Respondents did not enter into a dialogue which would have given the Appellant the opportunity to provide further information, specifically:

a) The reasons for the failure of the Appellant's directors' previous company

b) The appointment of new accountants, and

c) The Appellant's forecast of improved performance over the next 18 months.

15. There is no obligation upon the Respondents to seek further information from a taxable person before making a decision. Therefore I consider that the Respondents did not make an error of law in failing to enter into dialogue specific to the security requirement with the Appellant prior to the issue of the Notice. It is clear from *Peachtree* that if the taxpayer considers there is further relevant material then the correct course of action is to submit that material to the Respondents and to seek a re-consideration. As Dyson J said at p 752:

> If after a requirement has been made under para 5(2) fresh material comes to light or into existence which the taxpayer considers justifies a modification of the requirement, the taxpayer may ask the commissioners to reconsider the matter. The commissioners have a duty to reconsider in the light of the fresh material in those circumstances.

16. As set out above, in this case the Appellant sought both an internal and an independent review of the original decision to issue a Notice requiring security. Mr Holden submitted that if a dialogue had been opened then the information which the Appellant would have submitted to Ms Partridge would have been sufficiently convincing that the Respondents would not have considered it requisite to issue a Notice requiring security.

17. However, it seems to me clear that, as a matter of fact, Mr Holden's submission is not well founded. When the Appellant's further information was submitted to the Respondents after the original decision had been taken, the Respondents did not change their mind. The officers undertaking the internal review and the independent review, which culminated in the decisions set out in letters dated 11 November 2015 and 21 January 2016, both had the benefit of the additional material which the

Appellant wished to have taken into account, and in both cases the original decision was affirmed.

18. Therefore, if (contrary to my conclusion above) it was an error of law for the Respondents to fail to enter into further dialogue with the Appellant, I consider it inevitable that the Respondents would have reached the same decision if they had taken into account any part, or all, of the further information outlined by the Appellant. That further information would have been outweighed by the information which was already available to Ms Partridge on 18 February 2015 (set out in sub-paragraphs (12)(m)(i)-(vii) above) and which was taken into account by her in making the original decision. I base my conclusion that it was inevitable that the same decision would have been reached upon the fact that the Respondents' review decision – taken with the benefit of the Appellant's further material – reaffirmed the original decision to require security. Therefore I reject this strand of argument put forward by the Appellant.

Second strand of Appellant's argument

19. As its second strand, the Appellant argued that the sum of £46,760.65 (or £43,560.65 if the Appellant filed monthly returns) was an unreasonable amount in light of the Appellant's profit after tax of £11,095 for its financial year ended 30 April 2014. (I take this submission to be in the alternative to the submission that the Respondents should have taken account of the Appellant's growing profitability as set out in the financial forecasts and the amended accounts for the year ended 30 April 2015 which Mr Holden handed up at the beginning of the hearing before me.)

20. The Respondents' explanation for the amount of security sought was that it had been calculated on the basis of the likely amount of VAT due over the next six months (estimated from an average of the VAT due under the most recent four returns filed by the Appellant), plus the amount of VAT ledger debt outstanding at the date of the original decision.

21. I remind myself that the legislation enables the Respondents to seek security for the payment of any VAT that is, or may be, due. Given the legislative purpose of protection of the revenue, I do not consider the amount sought or the Respondents' method of calculation to be unreasonable. In my opinion it was not only appropriate but necessary for the decision-maker to have regard to the likely amount of VAT which would be lost to the revenue if the Appellant continued not to pay over the VAT which it had collected.

22. The Appellant's profit level is not relevant to the amount of VAT which it is, or may be, due to pay the Respondents. As is obvious, VAT is a turnover tax, not a tax based upon profitability.

23. Therefore I consider the original decision-maker was right to base her decision upon the likely amount of VAT to be due based upon the returns which had been submitted and not upon the Appellant's level of profit. It follows that I reject the Appellant's second strand of argument.

The third strand of the Appellant's argument

24. Finally, the Appellant sought to argue that the statutory review process was flawed because the review decision (affirming the original decision) was taken by an employee of the Respondents and such an employee would inevitably be prejudiced in favour of the Respondents.

25. For the avoidance of doubt there was no evidence before me that the reviews which took place in this case were flawed, biased or in any other way unfair. The Appellant's submission was based solely upon the principle that an employee of the Respondents could not be unbiased in reviewing the correctness of a decision reached by another employee of the Respondents.

26. As I set out above, it is clear from *Peachtree* that in reviewing the decision taken, I should not take into account matters which have arisen since the date of the decision. As is obvious, the Respondent's reviews of the decision to require security took place after the original decision had been taken to require security. Therefore, I do not see how any flaw, either in this specific case or in the nature of the process as laid down by Parliament, could affect the reasonableness of the original decision. Although, at the time she made her decision Ms Partridge might have anticipated the possibility of a review being requested, she would also be aware that the Appellant would have the right to appeal to this Tribunal if it was not satisfied either with her decision or with the review outcome. It stretches credibility to suggest (as Mr Holden appears to) that the original decision is unfair because the Appellant has a statutory right to a review, conducted by the Respondents, in addition to a statutory right to appeal to this Tribunal. I do not accept this argument.

27. Similarly, I do not agree that the review decision is unfair simply because it was undertaken by an employee of the Respondents. The review decision-maker would also be aware that the Appellant could appeal to this tribunal if dissatisfied with the outcome of the review.

28. The Appellant has failed to demonstrate that, in making the original decision to issue a Notice requiring security or in affirming that decision upon review, the Respondents made an error of law or reached a decision that no reasonable decision-maker, properly directed, could have made. I conclude that neither the original decision, nor the review decision, on the information before each of the decision-makers at the date of the decision, was a decision which no reasonable decision-maker could reach.

29. The Appellant also made submissions as to the effect of the Notice of Requirement upon the Appellant and its directors and the difficulties that ensued. Much of Mr Hunter's evidence consisted of his explanation of the despair he felt when the Appellant received the Notice of Requirement, and how he considered the lack of consultation to be unfair. I do not disagree that being served with a Notice of Requirement to provide security can result in difficulties for a trader. But those difficulties do not make it unreasonable for the Respondents to seek security in order to protect the revenue in cases where they consider such protection is required.

30. The Appellant has failed to satisfy me that the Respondents' decision to require security from the Appellant contained an error of law or was so unreasonable that no commissioners, properly directed, could have reached that decision.

31. Therefore the Appellant's appeal is dismissed.

Conclusion

32. My decision was communicated verbally to the parties at the conclusion of the hearing on 15 August 2016 and a written summary of that decision was released to the parties on 24 August 2016. On 6 September 2016 the Appellant made a request under Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 for a written document containing full findings of facts and reasons for the decision.

33. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 4 October 2016