[2017] UKFTT 0835 (TC)

TC05560

Appeal number: TC/2016/04024

VAT – Requirement to provide security – Whether requirement reasonable – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LINWEST LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
REBECCA NEWNS

Sitting in public at Fox Court, Brooke Street, London EC1 on 15 December 2016

Adam Sharer, of Fox Sharer LLP, for the Appellant

Siobhan Brown, of HM Revenue and Customs, for the Respondents

DECISION

1. Linwest Limited ("Linwest") appeals against a Notice of Requirement (the "Notice") issued by HM Revenue and Customs ("HMRC") on 19 May 2016. This required Linwest, as a condition of supplying goods and services under a taxable supply, to provides security in the sum of £75,723.23 if it submitted quarterly VAT returns or £66,323.23 if it made monthly returns. The amount of security was calculated on the basis of a six month liability for quarterly returns (£28,150) and a four month liability for monthly returns (£18,750) plus a payment equivalent to the £47,573.23 VAT outstanding at the time of the Notice was served.

2. Under paragraph 4(2)(a) of schedule 11 to the Value Added Tax Act 1994 HMRC "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 … if they think it necessary for the protection to the revenue."

3. The jurisdiction of the Tribunal in an appeal against a requirement to provide security was summarised in *Southend United Football Club v HMRC* [2013] UKFTT 715 (TC) at [10] as follows:

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

4. Therefore, the appeal can only succeed if we consider that, at the time it was made, HMRC did not reasonably arrive at the decision to issue the Notice. It is not sufficient that we might ourselves have reached a different conclusion.

5. In *Lindasy v Commissioners of Customs and Excise* [2002] STC 508 Lord Phillips of Worth Matravers MR (as he then was) said, at [40]:

> "… the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters."

6. Mr Adam Sharer, representing Linwest, contends that HMRC did just that. He produced a letter from HMRC, dated 24 November 2016, and schedules of Linwest's HMRC "full ledger breakdown" attached to it which showed that for most of the periods in which HMRC contend it was in arrears, Linwest in fact had a credit balance with HMRC. Mr Sharer says that HMRC did not take account of this relevant information but relied on irrelevant matters and, as such, the decision to issue the Notice was flawed.

7. However, Mr Paul Johnson, the officer who made the decision to issue the Notice and who gave evidence before us, explained that he had considered the ledger breakdown, which did not include due dates for payment and had transcribed these onto a spreadsheet setting out the sums due at these dates.

8. In addition, his evidence that he had considered Linwest's compliance and while it had submitted VAT returns on time its payments had consistently been late was not challenged. Neither was the fact that it had failed to comply with a time to pay arrangement or that it was in the default surcharge regime and had been since its 12/12 accounting period and was subject to surcharges at a rate of 15%.

9. In *Southend United* the Tribunal said:

> "13. We have no doubt from the evidence we heard that the appellant has a long history of poor compliance, and that there is, and at the time the decision was taken was, no reason to think that improvement could be expected. We share the view of the VAT and Duties Tribunal in *Lewis Ball* that habitual late payment presents as much of a risk as non-payment, and we also take the view that persistent late payment inevitably justifies the fear that the trader will eventually find itself unable to pay at all. We agree that Mrs Andrews and Mr Pumfrey [of HMRC] were right to be concerned about the long delay in submission of the 04/11 return; it is not so much the magnitude of the excess of the true liability over the centrally assessed amount (significant though that is) which is of importance as the fact that there was (and still is) no satisfactory explanation of the delay.
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> 14. The test, as we have said, is whether the decision was one at which HMRC could reasonably arrive. It is in our view plain that there was a genuine risk of continuing late payment, and of non-payment, and that the decision was eminently reasonable."

10. Having carefully considered the evidence before us we find that HMRC did not take irrelevant matters into account or fail take into account all relevant matters at the time the decision to issue the Notice was made. As such we consider that HMRC did arrive reasonably at the decision to issue the Notice and therefore dismiss the appeal.

11. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 20 DECEMBER 2016