



TC05533

Appeal number: TC/2016/02684

Income Tax and National Insurance Contributions (NICs) – security for payment of PAYE and NICs – Income Tax Pay as You Earn Regulations 2003, Part 4a – Social Security (Contributions) Regulations 2001, Sch 4 – Value Added Tax – security for payment of VAT - para 4 Sch 11 Value added Tax act 1994-no arrears at date of decision – whether requirement justified – whether supervisory or appellate jurisdiction – supervisory – reasonableness of decision - information available at date of decision only - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HIGHLAKE LTD

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

**Sitting in public at George House, 126 George Street, Edinburgh on Monday
21 November 2016**

Mr McLaughlin for the Appellant

Ms S Brown, Officer of HMRC, for the Respondents

DECISION

5 1. This is the appeal of Highlake Limited (“Highlake”) against the decisions of HMRC to issue to it

(a) a Notice of Requirement to require security to be given for PAYE and National Insurance Contributions (NICs) in accordance with Part 4A of the Income Tax (Pay as You Earn) Regulations 2003 (“PAYE Regulations”) and Part 3B of Schedule 4 to the Social Security (Contributions) Regulations 2001 (“NICs Regulations”); and
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(b) a Notice of Requirement to provide security under paragraph 4(2)(a) of Schedule 11 of the Value Added Tax Act 1994 (“VATA”) for the protection of the Revenue.

15 2. We had an extensive bundle of documents produced by HMRC which included various authorities. On the morning of the hearing Mr McLaughlin lodged a bundle extending to some 50 pages. Items C-H were dated and/or related to periods after the dates of the decisions with which I am concerned and are therefore not relevant.

3. We heard evidence from Officer Watt whose evidence was entirely credible and straightforward.

20 **Background**

4. Highlake was incorporated on 31 March 2014 and the sole director and shareholder is Carlo Binanti (“CB”). The trading activity is as a licensed restaurant.

25 5. CB is the son of Giuliano Binanti (“GB”). GB and three others were partners in the Giuliano’s Restaurant Partnership (“the Partnership”). The Partnership operated three restaurants. No payments had been made to the PAYE scheme for 2015/16 and only eight months paid in full for 2014/15. The partnership had in place a time to pay arrangement but that failed because they failed to maintain their current liabilities. A further application for time to pay was rejected as a result. The Partnership’s principal place of business was 18-19 Union Place, Edinburgh.

30 6. On 22 December 2015 Notices of Requirement were served on two of the four partners including GB. One of the partners had returned to Italy.

7. When those Notices were served the partners made no mention of there being any new business.

35 8. However, the following day, on 23 December 2015, HMRC received a VAT1 form for registration of Highlake for VAT. It indicated that Highlake’s principal place of business was 18-19 Union Place, Edinburgh and it had taken over a business as a going concern with effect from 1 November 2015 and the VAT number for that business was that for the Partnership. The estimated turnover for the following 12 months was £1,200,000.

9. Highlake had also registered with HMRC as an employer from 28 November 2015 and the PAYE for all the employees of the Partnership was included within the PAYE returns for Highlake.

5 10. When the Notices of Requirement were served on the partners, the Partnership had a VAT debt of in excess of £388,000 and a PAYE/NIC debt in excess of £113,000. By the time the Notices of Requirement were served on Highlake the VAT debt had risen to a figure in excess of £500,000.

10 11. On or about 22 January 2016, Officer McGee contacted CB to make enquiries about Highlake. She was informed that Highlake was his father's business and that HMRC should speak to his father, that he worked for the business and that he intended to run it in the future but meanwhile it was a continuation of the previous businesses.

15 12. On 10 February 2016, Officers Watt and McGee attended the principal place of business for Highlake. They served the Notices of Requirement for Highlake and a copy of the PAYE/NIC notice was also served on CB, as he was considered to be jointly and severally liable in accordance with the relevant PAYE and Social Security Regulations. The taxpayers' options in terms of the notices were discussed. CB, personally has not appealed. CB and his tax adviser were present at all material times.

20 13. Highlake's stance was that it was an independent new company with no ties to the Partnership. The Officers made it clear that HMRC's view was that there appeared to be obvious links between the two entities.

25 14. At that meeting it was confirmed that two of the three restaurants operated by the partnership had been transferred to Highlake as a going concern and there had been no break in trading. The trading names of those two restaurants had remained the same. CB "had the leases". He argued that he was the sole decision maker. On being asked, after a pause for reflection, CB told the Officers that he was the sole signatory for the bank accounts.

30 15. Officer Watt has seen no evidence that CB is the only signatory for the bank accounts. Similarly no evidence in the form of contracts for the transfer of the business has been provided. Officer Watt understands that no payment had been made for the transfer of assets and goodwill. As far as the leases for the two restaurants operated by Highlake were concerned, Officer Ward asked for copies of the leases but the assignments were not produced until days before this hearing. They are dated 20 January 2016 (albeit the landlords' signatures are dated March 2016) and are for no
35 consideration.

16. On arrival at the relevant premises GB had also been present but he remained in the restaurant during the meeting. When his son and his advisor left the meeting, GB joined the Officers.

40 17. He confirmed that all of the employees of the Partnership (including those operating the third restaurant) were accounted for through the PAYE scheme operated by Highlake. The remaining partners were included in that PAYE scheme. It was

indicated that the Partnership was not trading at that point because of a problem with the lease for the third restaurant, albeit GB was operating the third restaurant “as a separate entity”. He did not know the VAT status.

5 18. At the time of the issue of the Notices of Requirement to Highlake, Highlake’s first VAT return was not yet due. Therefore, Highlake had no outstanding VAT liability and no VAT compliance failure had arisen at that time. As far as PAYE was concerned there had been full compliance with the first three returns (and indeed thereafter). Those returns were used as the basis for the Notice of Requirement for Security for PAYE purposes.

10 19. On 16 February 2016, Highlake’s representative wrote to HMRC, challenged the need for security and suggested that “at worst” it should be based on one month’s PAYE and one quarter’s VAT. However he added the caveat they would probably be unable to obtain such credit within a short time scale.

Notices of Requirement

15 *PAYE*

20 20. The Notice of Requirement was issued on 10 February 2016 in the total sum of £37,511.14 being the estimated PAYE of £12,952 and NIC of £24,559.14 due to be paid for a four month period. The rationale for the Notice was stated to be that HMRC believed that there was a risk that Highlake would default on payment and that more
20 than one person in Highlake was in a position to influence payment, or not.

21. On 3 March 2016, Officer Watt advised Highlake that he had considered the information available to him, but remained of the opinion that security was required. However, he was prepared to reduce it to £34,618 based on the actual PAYE returns rendered (PAYE -£11,010.91 and NIC- £23,607.09).

25 *VAT*

22. The Notice of Requirement was also issued on 10 February 2016 and sought either a guarantee in the form of a performance bond or a cash deposit in the sum of £131,200 or alternatively £87,450 if monthly returns were submitted. The Notice was issued for the protection of the revenue.

30 23. On 3 March 2016, Officer Watt advised Highlake that he had considered the information available to him but remained of the opinion that a VAT security was required but was prepared to reduce it to £87,466 or £58,300 if monthly returns were submitted. The figures were recalculated from the original figures and reduced by a
35 third to take into account the fact that the Officer now knew that only two of the restaurants had been transferred to Highlake.

24. The letters of 3 March 2016 were in very similar terms but the core point was that the officer’s view was that Highlake was a direct continuation of the Partnership. He cited as his reasons:

- “Carlo Binanti is the son of Giuliano Binanti the main partner in Giulianos Restaurant Partnership and 3 of the previous partners are now employees of Highlake.
 - 5 • The business was transferred as a going concern and there does not appear to have been a break in trading.
 - The trading names of the 2 restaurants (Giulianos and Alfrescos) have remained the same.
 - The employees do not appear to have changed.
 - I have seen no evidence that there has been any payment made regarding the transfer of the assets and goodwill of the previous entity.
 - 10 • Although I have been advised that Highlake Ltd only operate 2 of the restaurants previously traded by the partnership, it appears as if the employees of the remaining restaurant are accounted for through the PAYE scheme operated by Highlake.
 - During a telephone call between Officer Loraine McGee and Carlo Binanti on 15 21st January 2016, Mr Binanti stated that he was working in the restaurant but it was his father’s business. He went on to say that his father would have to be at any subsequent meeting to answer any questions asked.
 - I have seen no evidence that Carlo Binanti has full control of the business, specifically being the sole signatory to the business bank account or being the current leaseholder to the premises.”
25. On 28 April 2016 HMRC issued the conclusion of review decision upholding the
20 position in respect of PAYE and NIC and a similar letter was issued for VAT on 29 April 2016.
26. On 13 May 2016 an appeal was submitted to the Tribunal arguing that the quantum of the securities was too high.

Discussion

25 *Highlake’s arguments*

27. It was argued that the decision was flawed in that too much emphasis had been placed on the fact that CB was the son of GB, that HMRC should have waited until the first VAT Return had been lodged in order to see whether the trading was in fact similar to that of the partnership, that the fact that HMRC had enquired whether or not
30 CB was the sole signatory for cheques was an irrelevance and it was unreasonable to phone a taxpayer during business hours when that taxpayer might be in a public place. The accountant who had prepared the VAT1 stated in an email dated 18 November 2016, that “I now understand that no transfer as a going concern took place” and he now considered that it had been an error to have said so in the VAT1. The requirement to
35 provide security would inhibit Highlake’s trading capacity since they would be unable to raise those sums. Lastly, all tax liabilities since commencement of trading had been met.

HMRC's arguments

28. The Officer had carefully considered all of the information that was made available to him, he had revised the Notices in light thereof and that his decision was entirely reasonable.

5 **Discussion**

29. Both parties referred to *Southend United Football Club Ltd v HMRC* 2013 UKFTT 715 (TC) where Judge Bishopp stated at paragraph 10:-

10 “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 is 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 Ltd v Customs and Excise Commissioners* [1988] STC 723 of Dyson J in *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747 and the Court of Appeal in *John Dee Ltd 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
15 when the disputed decision was made, so we cannot take account of developments since that time, and that we may not exercise a fresh discussion. 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 have inevitably arrived at the same conclusion we should dismiss
20 the appeal”.

30. It was not in dispute that HMRC had the power to require security.

31. There is no doubt that the Tribunal's jurisdiction is supervisory. I have excluded all evidence that was not available to the Officer. In that regard I certainly exclude the email from the accountant referred to in paragraph 27 above and produced in
25 Highlake's bundle at Document 50. The VAT1 stated unequivocally that the business had been transferred as a going concern and that was confirmed orally by both father and son separately and by the tax advisor.

32. I find that the question of the signatory on the bank accounts is a neutral factor. No evidence, as to whether or not he was, had been produced to the officer at the time
30 and there is only a record of CB stating that that was the case. What is far more relevant is that the three remaining partners became employees of Highlake, as did the employees of the third restaurant, and CB told HMRC that it was his father's business. I do not accept that that telephone call should be ignored because it was made in business hours. CB could have offered to telephone back, he could have been
35 in a private place or moved to one. If it was his business it makes no sense to state in public that it was not.

33. In summary, there was what seems to be a seamless transition of the two restaurants and all of the employees from the Partnership to Highlake. The difference is that CB became a Director instead of an employee of the partnership. The reality is
40 that he continued to work in the same premises, with the same people, including his father. Furthermore, Highlake paid the employees working in the third restaurant and met their PAYE and NIC liability. The leases were assigned to a company apparently owned by CB for no consideration but the partners were facing major problems with

HMRC and I was told that the father has since been sequestrated. The reality is that there was little discernible difference between the operations of the Partnership and Highlake in respect of the two restaurants.

5 34. Looking at that evidence I find it wholly reasonable for any officer to form the view that as at 10 February 2016 and 3 March 2016, Highlake presented a risk to past and future revenue.

10 35. Officer Watt did look at all relevant matters. I do not accept that he should have waited for the first VAT return to be submitted and that in not doing so he had overlooked a relevant matter. The estimated turnover in the VAT1, at £1.2m for two restaurants, is broadly in line with declared output tax of £353,528.40 for the three restaurants in the previous four quarters.

15 36. Standing the level of debt due to the public purse by the Partnership, who were now employees of Highlake, it was not unreasonable for HMRC to decide that relatively swift action should be taken for the protection of the revenue and that the information they had at that time sufficed as a prudent basis for determining the amount of security required.

20 37. I have noted that apparently Highlake could not afford the level of security demanded. My view is that this is not a relevant consideration in relation to considering whether security is required for the protection of revenue or the amount of security. Whether a company is able to trade or not in view of the security requirement or amount is a consequence of the security requirement. The legislation is concerned with protection of 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.

25 **Decision**

30 38. I take the view that it is quite impossible to say that Officer Watt's decision was unreasonable. In reality, Highlake had succeeded to the greater part of the business of the Partnership which owed HMRC a significant debt, and the same parties were working in the business. It was controlled by the same individuals. There was no evidence available to HMRC from which they might conclude that the finances of the business had been transformed, and there was an obvious risk in Spring 2016, even if in the event it has not materialised, that Highlake too would encounter financial difficulties and become unable to pay its debts to HMRC as they fell due. For those reasons the appeal is dismissed.

35 39. If Highlake has built up a good compliance record since it began trading it can, of course, ask HMRC to withdraw the requirement or reduce the amounts demanded, but for the reasons quoted in paragraph 29. I can take no account of events which have occurred after 3 March 2016.

40 40. 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.

10 **ANNE SCOTT**
TRIBUNAL JUDGE
RELEASE DATE: 6 December 2016

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules on 26 January 2017.