TC04270

Appeal number: TC/2014/02617

VAT – Requirement of security for VAT – HMRC took account of VAT debt arising from assessment on connected company - significance of HMRC not considering reasons for withdrawal of appeal against VAT assessment for previous connected company – HMRC's decision not unreasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

REPRO-FM LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MRS CATHERINE FARQUHARSON

Sitting in public at Bedford Square, London on 9 October 2014

Liban Ahmed of Controlled Tax Management Limited for the Appellant

Phil Nicholls, HMRC Officer, for the Respondents

DECISION

1. The appellant appeals against HMRC's decision contained in a letter of 14 February 2014 to issue a Notice of Requirement to give Security (the "Security Notice") under paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 ("VATA").

2. The amount of security required was £28,400 (if making quarterly returns) or £18,940 (if making monthly returns). The decision was upheld on review on 9 April 2014 without variation.

3. In addition to the bundle of documents provided by HMRC we heard oral evidence on behalf of the appellant from Mr Keith Buchan, who has a 50% shareholding in the appellant and is the husband of the director of the appellant, Mrs Elaine Buchan. Mr Buchan's evidence referred to a statement he had prepared which exhibited various pieces of correspondence between an HMRC officer, Mr Flatt, and Mr Buchan relating to the VAT affairs of Reprographics Facilities Management Ltd ("RFML") a previous company he and Mrs Buchan had been involved with.

4. We also heard evidence from the Mrs Janice Uzzell, the HMRC Officer who decided to impose the Security Notice on the appellant on 14 February 2014 and Mrs Siobhan Brown, the HMRC Officer who carried out the review of that decision. All three witnesses were credible and in addition to being subject to cross examination by the other party also answered the Tribunal's questions.

Facts

5. The appellant, which is based in Thatcham, Berkshire, provides printing and production of advertising and marketing materials for numerous clients of varying sizes. It sells copiers and provides reprographics services to its customers by locating operatives at the customer's site. The appellant was incorporated on 7 November 2013 and was registered for VAT with effect from 15 November 2013. In its application for VAT registration its business activities are described as being "Printer Sales and Support" and "Repair and maintenance of printers."

6. The appellant's director is Mrs Elaine Buchan who was appointed on 7 November 2013. She also holds a 50% shareholding in the appellant. The appellant's principal place of business as noted on its VAT registration form is at her private address.

7. Mr and Mrs Buchan were previously directors of RFML (Mr Buchan from 1 September 2003 until 18 July 2003 when he was disqualified and Mrs Buchan from 18 July 2013). In its application for VAT registration dated 1 September 2003 its business activities are described as "Sale and support of reprographics + provision of experienced personnel to operate them."

8. RFML's major clients included the National Lottery and the Televsion production company Endemol. The company was a small one, consisting of Mr and Mrs Buchan and one operative.

9. RFML went into administration on 22 November 2013. As of the date of the Security Notice which was imposed on the appellant, the sum of £85,944.79, being the tax shown as due by RFML on various returns and notices of assessment VAT was unpaid. This included a large assessment of £50,118 issued on RFML on 26 October 2009. The appellant disputes the amount of VAT RFML was liable for. We deal with this issue in the discussion section of our decision below.

10. In September 2013 RFML made appeals in relation to assessments of VAT but then withdrew the appeal on 21 January 2014. Mr Buchan and his wife chose not to embark on what they thought would be a costly and time-consuming programme of litigation and chose not pursue the appeal in order to put the VAT matter behind them and to get back to operating a business as quickly as possible. Both he and his wife wanted to continue to operate in the trade sector that RFML was operating in. The reasons for this included wanting to maintain continuity with customers.

11. Mr Buchan had been prohibited from holding a directorship as a result of his failure to render accounts to Companies House in a timely manner. Mr Buchan had believed he could not sign off on the accounts and file them on time when there was an amount in dispute in the accounts. He now understands he could have filed the accounts by putting a rider on them explaining the disputed amount.

Mrs Uzzell's decision and the information available to her

12. Mrs Uzzell considered what was termed a "chain schedule" (a table setting out corporate information and VAT compliance details in relation to the appellant and RFML) and the compliance records of the appellant and RFML. This document was prepared by clerical officer colleagues.

13. In her evidence she explained various matters that she had noted and what she had considered. She noted RFML's VAT debt of £85,944 and that the business activity of the appellant and RFML appeared to be similar. She looked at the information on the VAT account. She had access to the compliance records of the appellant and RFML. She had access to an electronic folder with details of the correspondence from RFML.

14. She was aware of information from the insolvency practitioner handling the administration of RFML namely that RFML had been subject to a "pre-pack" sale of £45,500 to Mrs Buchan. In relation to RFML's compliance record she noted there had been late payment and non compliance from 2005, that default surcharges had been issued and that there was a large Corporation Tax (CT) debt outstanding (shown on schedule of £12,450.41 for CT 10/11).

15. She noted appeals by RFML had come in in September 2013 but had been withdrawn on 21 January 2014. She did not consider the circumstances of the dispute

giving rise to the appeal or the circumstances of withdrawal to be relevant. She did not consider the grounds of appeal relating to the VAT assessment.

16. The amount of security in the Security Notice served on the appellant was calculated by taking the average monthly VAT liability figures of RFML (£4,739.06) for the period in the 12 months preceding June 2013 and rounding these down to derive a quarterly return amount of £28,400 (six months worth of VAT) and a monthly return amount of £18,950 (four months worth of VAT).

17. Mrs Uzzell considered there was a risk to the protection of the revenue. In accordance with the department's standard form letter her letter imposing the Notice of Requirement did not set out the reasons.

18. The Notice of Requirement was validly served at the appellant's primary place of business.

Mrs Brown's review

19. Mrs Brown's letter gave the following reasons for upholding the decision.

20. After noting the similar activities and links in directorships and shareholdings, that RFML was sold as a pre-pack to Mrs Buchan and that RFML "went into administration on 22 November 2013 with a VAT debt of £85,944.79 plus surcharge debt, interest, PAYE and CT debt", Mrs Brown stated in her letter of 9 April 2014:

> "There is nothing I have seen, from the information supplied to indicate that this new company will be anymore compliant than the previous company associated with Elaine and Keith Buchan. Repro-FM Ltd is a "phoenix" fo Reprographics Facilities Management Ltd in that the same business is being carried on with a similar trading name as the previous company which has failed leaving unpaid VAT. There is also a close association with the company director, Elaine Buchan. It was therefore reasonable to drawn the conclusion that you represented a risk of failing to declare and/or pay VAT. At the date of this review the first VAT return due for Repro-FM Ltd for the period to 01/14 is still outstanding. A VAT assessment for this period was raised on 14 March 2014 in the amount of £454. I therefore deem that this business is a risk to future revenue collection and maintain the decision to require security."

21. Mrs Brown told us that she too had considered the chain schedule, and the links between the appellant and RFML in terms of their directors, similar trade and similar name. She noted RFML's VAT debt of approximately £95,000 which included default surcharges and interest. She also noted there was a PAYE debt of £599.78 and CT debt of £68,000. The appellant had a return outstanding and there was a computer generated assessment of £454. (The assessment was paid on 31 March 2014). She noted two further payments of VAT the appellant had made of £10,178.71 on 31 March 2014 and £10,000 on 1 April 2014. (No VAT returns had been submitted). She also reviewed the quantum and considered it was reasonable and proportionate to use the last four VAT returns for RFML as a basis for the calculation. In terms of the

information she considered she told us that she was interested in the position at the time the Notice of Requirement had been served.

22. She could not recall what information in the electronic folder she looked at and could not recall the 25 February 2009 letter Mr Buchan had exhibited to his witness statement (which was from Mr Flatt of HMRC to Mr Buchan setting out various details and what Mr Flatt described as a "schedule error" which was to form the basis of an assessment). She did not take into account the ground of appeal or the reasons why the appeal was withdrawn because she considered this was not relevant.

Law

23. The following provisions set out the statutory basis upon which HMRC are able impose Security Notices.

24. Paragraph 4(2) of schedule 11 to VATA provides:

> "If they think it necessary for the protection of the revenue the Commissioners 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 from [him]..."

25. Paragraph 4(4) provides that:

> "Security under sub-paragraph (2) above shall be of such amount, and shall be in such manner, as the Commissioners may determine."

26. One of the issues in this appeal relates to the significance of an appeal against a VAT assessment being withdrawn. Section 85(4) VATA provides that:

> "Where—
>
> (a) a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal; and
>
> (b) 30 days have elapsed since the giving of the notification without HMRC giving to the appellant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn,
>
> the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and HMRC had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation."

27. The "preceding provisions" referred are subsections (1) to (3) which are as follows:

> "(1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated—

(a) as upheld without variation…

the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement ….

(2) Subsection (1) above shall not apply where, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to HMRC that he desires to repudiate or resile from the agreement.

(3) Where an agreement is not in writing—

(a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by HMRC to the appellant or by the appellant to HMRC, and

(b) references in those provisions to the time when the agreement was come to shall be construed as references to the time of the giving of that notice of confirmation."

Discussion

28. The issue as set out in the relevant case law (*John Dee Ltd v CCE* [1995] STC 941 and *CCE v Peachtree Enterprises Ltd* [1994] STC 747) for the Tribunal is whether the decision to impose security was one that could not reasonably be arrived at. This includes consideration of whether irrelevant matters have been taken account of and whether relevant matters have been disregarded. The Tribunal is limited to considering the facts and matters known at the time the disputed decision was made.

29. The appellant disputes the level of RFML's indebtedness that HMRC rely on. According to Mr Buchan a substantial proportion of the amount relates to HMRC's incorrect view that output tax had not been declared on numerous sale invoices issued by the company. The view is incorrect, the appellant says, because the invoices were actually pro-forma ones submitted as part of the tendering process in operation at the time with government connected clients such as the National Lottery. It did not mean supplies had actually been made. Also Mr Buchan who was responsible for issuing the invoices believed he was on cash accounting (so tax would only be due when money came in). He thought HMRC accepted this too. This was all explained in correspondence. Also the appellant says much of the debt has arisen because of HMRC's failure to allocate VAT payments made by RFML against current returns, giving rise to new penalties and additional interest. The appeal was withdrawn not because the appellant agreed the figure but because the cost of litigating the matter and the winding up orders coming in meant it was not commercial to litigate the matter. Mr Buchan regards the correct amount of VAT due as being £37,400.

30. The appellant's case is essentially that even if the appeal had been withdrawn, the circumstances of the appellant's dispute over the assessment were a relevant matter that ought to have been considered. The assessment was wrong. The use of evidence from a previously concluded appeal can be used in subsequent appeals and

there is no authority which precludes this. Mr Buchan was operating a cash accounting system at the time. The assessment was also not plausible – the company would have had to have received hundreds and thousands of pounds to have generated the additional VAT liability. Had Mr Buchan continued the dispute the business would have failed in any case.

31. The appellant argues that other than the VAT assessment the other compliance issues were minor. Also the appellant draws attention to the fact that the Commissioners considered compliance in relation to PAYE and CT were considered. These are irrelevant they say to VAT security requirements.

32. Having considered the matter our view is that the way HMRC approached the matter was not at all unreasonable. It was not unreasonable having seen that the dispute had been withdrawn by the appellant to not then have gone into the background to the dispute. The legal consequence of the appeal against the assessment having been withdrawn (s85(4) VATA 1994) was that it was to be treated as having been upheld without variation. The same consequences ensue "for all purposes" as would have ensued if the Tribunal had upheld the assessment. It was not unreasonable on that basis to regard the VAT amount stated as due under the assessment as the correct amount. The appellant had an opportunity to challenge the figures. The reasons for not pursuing that may well have been for good commercial reasons from RFML's perspective but the decision not to pursue is not without consequences one of which is that the figure is then the amount of VAT which was legally due. Similarly if as the appellant suggests HMRC's details of VAT debt, penalties (default surcharges) were thought to be incorrect because of failures to allocate, misallocations then these matters ought to have been pursued, and if appropriate appealed and resolved then.

33. Mr Ahmed points out that Mr Buchan's evidence is largely unchallenged. From HMRC's evidence the correspondence and circumstances of the appeal would have been in the electronic folder but were not considered. But in our view it was not unreasonable to not explore the arguments on the assessment given the appeal against the assessment had been withdrawn and given the legal effect of that was that VAT in the assessed sum was upheld without variation.

34. In any case while we accept that Mr Buchan recollects putting his explanations to HMRC as to why the large assessment was wrong in his view that does not mean any appeal that would have proceeded had it not been withdrawn would have been successful. The issue of the correct output tax liability would have needed to have been considered in the light of all the relevant evidence if the appeal had been pursued (which to the extent it was relevant might include that of the Revenue officer (Mr J Flatt) who Mr Buchan dealt with, if there was a dispute over what Mr Flatt had or had not said.)

35. The fact remains the appeal was withdrawn and was not pursued. The amount of the assessment stands good. Mr Buchan's beliefs the assessment was incorrect do not change the fact that there was a final assessment for £85,944 of VAT.

36. In relation to Mr Ahmed's point that the Tribunal is not precluded from referring to evidence from previously concluded appeals in subsequent appeals the issue is not so much that such evidence is precluded but that it is not relevant given that as a matter of law the assessment of VAT became final once the appeal against it was withdrawn.

37. We note in passing that even on the appellant's view of the correct amount there is still a significant amount of VAT left unpaid of £37,400. Even if it were correct for HMRC to have taken account only of this amount of VAT debt taking this into account along with the other factors on the compliance record of RFML and the links between the business of RFML and the business of the appellant we think it would be inevitable that HMRC would have reached the same decision.

38. We also note that s85(2) VATA 1994 provides for a 30 day period in which the appellant may "repudiate or resile from" the deemed agreement under s85(4) VATA 1994. It was not made clear to us whether when Mrs Uzzell noted that the appeal had been withdrawn on 21 January 2014 whether this was the date the appellant notified withdrawal or whether this was the date HMRC regarded the appeal as having been withdrawn no repudiation having been received. Assuming 21 January 2014 was the date of withdrawal and that therefore RFML was still within the period in which it could repudiate when the Security Notice was served on 14 February 2014 we have considered whether this means a relevant factor was not taken into account. In our view it is a factor that ought to have been taken account of. It could not safely be assumed the assessment under appeal was final for all purposes until the necessary time period had expired. However there is no dispute that RFML's appeal was withdrawn and nothing to suggest any such repudiation was sent within the requisite 30 day period. We think that if HMRC were directed to make the decision correctly by allowing for the 30 day period the decision would inevitably be the same.

39. The appellant also argues the sum demanded must be reasonable and proportionate and not such that it would effectively prevent the company from trading at all.

40. We agree with HMRC 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 the 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.

41. We also agree with HMRC that it was reasonable to have regard to PAYE and CT debts. Although paragraph 4(2) Schedule 11 VATA refers to security "for the payment of VAT" the legislation does not refer simply to protection of VAT but protection "of revenue". In any case even if protection of revenue were to be understood purely in terms of VAT it is not be unreasonable to at least take account of the fact that if there had been compliance issues with PAYE and with CT there could also be concerns with compliance in relation to other matters of revenue such as VAT.

42. In relation to Mr Buchan's disqualification as a director we do not think it unreasonable of HMRC to have taken this fact into account. It was we think relevant in building up a picture of the compliance risk of the appellant which was running a similar small business with similar personnel. Neither Mrs Uzzell nor Mrs Brown had information before them relating to the circumstances of the disqualification at the time they made their decisions and we do not think they could in the circumstances have reasonably been expected to explore the background to the disqualification before making their decisions.

43. The appellant makes various points about HMRC being wrong to characterise there being something untoward about the links between RFML and the appellant and highlights that the appellant did not in any way seek to hide the connection. This misinterprets in our view the significance of such common links. The common directors / shareholders, similar trading name and similarity of business activities, the pre-pack sale of RFML do not give rise to increased risk in and of themselves. They provide the link by which it became relevant to look at the affairs and compliance of RFML.

44. The appellant also suggested that it might have plans to branch out into new activities beyond provision of printers and reprographic services such as human resource and facilities management and data destruction. There is nothing to suggest this information would have been apparent to the officer at the time the decision or the review decision was made or that even if it had that it would have been relevant to HMRC's considerations as to protection of revenue. There was no reason in any case to think that RFML's issues on tax compliance would be assuaged by proposals to branch out into new areas of business.

45. In our view HMRC did (putting aside the point made at [38] above) take into account all relevant matters and did not take into account irrelevant matters at the time the decision was made. The decision appears to us to have hinged primarily on the VAT debts left by RFML and to a lesser extent PAYE and CT compliance issues. We think it was reasonable for HMRC to have had regard to the tax affairs of this company given its connections to the appellant. To the extent non-compliance issues were noted for the appellant these were we think rightly not given too much weight. In relation to the amount of security there was nothing in the way this had been calculated (using the average monthly liability declared at 20% from the VAT returns of RFML in the 12 month period to June 2013) which suggested the amount was an unreasonable one.

46. Subject to the point made at [38] above (in relation to which if the matter had been considered correctly the decision would inevitably have been the same as the appeal having been withdrawn the assessment is to be treated as upheld without variation pursuant to s85(4) VATA), we consider that HMRC's decision to impose security in the amount that it did was well within the bounds of the range of reasonable decisions it was entitled to make. We therefore dismiss the appeal.

47. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 4 February 2015