[2016] UKFTT 45 (TC)

TC04845

Appeal number: TC/2015/03015

VAT – security – review by HMRC under s83F VATA 1994 excluded potential sale of business from consideration - whether tribunal has supervisory jurisdiction over review decision by HMRC – yes - whether potential sale of business was a relevant matter – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HALF PENNY ACCOUNTANTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON
MS ELIZABETH BRIDGE

Sitting in public at Fox Court, London on 3 September 2015

Mr Dario Garcia of Mishcon de Reya, Solicitors, for the Appellant

Ms Siobhan Brown, Officer of HMRC, for the Respondents

DECISION

1. This case concerned a decision by HMRC to require the appellant to give security for VAT. The question before the Tribunal was whether the decision was flawed and, if it was, whether HMRC would inevitably had arrived at the same conclusion if HMRC had approached the matter correctly.

The appeal

2. By letter dated 6 February 2015 from Mrs Linda Andrews, HMRC served notice on the appellant of a requirement to give security under paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 (the "Act"), in the sum of £92,567. The letter offered an alternative of security in the sum of £84,617 if monthly returns were submitted.

3. By letter dated 4 March 2015, the appellant requested a review of the decision to require security by an officer of HMRC not previously involved in the matter.

4. By letter dated 9 April 2015 from Mr Ian Littlewood, HMRC informed the appellant that it had completed its review of the decision to require security and concluded that the notice to require security should be maintained.

5. By notice of appeal dated 5 May 2015, the appellant appealed against the requirement to provide security.

Application to postpone

6. At the outset of the hearing, Mr Garcia, acting for the appellant, made an application for the hearing to be postponed on grounds that he had only very recently been instructed by the appellant and was therefore not as prepared as he would ideally have been, and that the appeal may raise novel points of law which the parties may have wished to have more time to consider. Ms Brown for HMRC objected to the application for adjournment on the grounds that it was it was nearly four months since the appeal was made and so unreasonable for the appellant to have only just appointed a legal representative. Ms Brown further noted that an application for postponement had been made to the Tribunal on 27 August (a week before the hearing) and refused.

7. We decided that the overriding objective of the Tribunal's rules, to deal with cases fairly and justly (including avoiding delay, so far as compatible with proper consideration of the issues), was better served by proceeding with the hearing: the appellant offered no good reason for waiting until a few days before the hearing to appoint a legal representative, and the prospect of a possibility of a novel point of law was not, in the circumstances, and on balance, sufficient in our view to justify the inconvenience and expense of delaying the hearing.

Evidence

8. We received a bundle of documents. We heard evidence on oath from Mr Stephen Yeomans, director of, and 50% shareholder in, the appellant, and from Mrs Andrews of HMRC.

9. The facts, as set out in the following paragraphs, were not in dispute.

Facts

10. The appellant, incorporated on 19 March 2001, is a small general accountancy practice. It registered for VAT in 2003 and its VAT returns and payments were due within one month of the end of three-monthly periods ending on 31 July, 31 October, 31 January and 30 April.

11. As at 6 February 2015, according to certificates of HMRC, the appellant had not paid

(1) £68,717 of VAT shown as due on its VAT returns, and

(2) £8,963.79 due by way of default surcharges.

The appellant was up to date with its VAT returns as at that date.

12. HMRC's "Record of Compliance and Statement of Account" in respect of the appellant as at 5 February 2015 indicated that:

(1) the last amount of VAT paid by the appellant had been on 6 December 2013, 14 months previously, in respect of the VAT period ended 31 October 2013; and

(2) for the 12 VAT periods prior to the period ended 31 October 2013, the delay in payment on the part of the appellant had ranged from 98 days up to 562 days.

13. In his evidence, Mr Yeomans accepted that the appellant's VAT compliance had been poor. He attributed this to cash flow problems in the business (in part linked to poor hiring decisions). The deteriorating situation led to a sense of paralysis on the part of Mr Yeomans. He emphasised that the appellant had never not (eventually) met its VAT obligations.

14. Mrs Andrews, a specialist in notices of requirement of provide security at HMRC, told us that the appellant's poor compliance record was a matter she took into account in deciding to require security. Other matters that featured in her decision were:

(1) the fact that the appellant used VAT "cash accounting", indicating that VAT collected from the appellant's customers was being used for cashflow in its business;

(2) the fact that, as accountants, the appellant was expected to be aware of its VAT obligations;

(3) the risk to the revenue going forward. She referred us to a document entitled "Quantum Calculation Based on Recent VAT Returns" indicating that the amount of security required was based on the appellant's average monthly liability multiplied by six (if making quarterly returns) and four (if making monthly returns), plus the tax debt.

15. Towards the end of her letter of 6 February 2015 serving notice of requirement to provide security, Mrs Andrews stated under the heading "What to do if you disagree with this notice":

> "If you do not agree with my decision, you can
>
> - immediately send me any further information that you want me to consider,
> - ask for my decision to be reviewed by an HM Revenue & Customs officer not previously involved in the matter, or
> - appeal to an independent tribunal
>
> If you opt for a review you can still appeal to the tribunal after the review has finished."

16. The appellant's letter of 4 March 2015, as well as requesting a review of Mrs Andrews' decision, provided further information, including the fact that the appellant was speaking to another firm of accountants (the "potential buyers") about selling part or all of its practice to them. The letter said that the sale of part of the practice would be for "circa £125,000 to £150,000. These monies would be used to clear the arrears of VAT etc and would allow us to move forward." The letter said that if the whole practice were sold, this would "generate around £300,000 which again would be used to settle the debts". The letter then said: "However, if you insist on the security, this business would have to cease to trade which wold significantly affect the sale." In its conclusion, the letter said: "What we would ask you to consider is deferring the decision [to require security] until say May 2015 to allow us time to finalise the sale (we hope to have it completed a lot earlier; however, history would show that these matters always take longer than first anticipated)".

17. Mr Littlewood's "review decision" letter of 9 April 2015 first set out why he considered that Mrs Andrews' "original decision" was reasonable, citing the appellant's "ongoing poor compliance". Then, under the heading "Is it reasonable to maintain the decision?", he stated as follows:

> "When the security was served, this was based on the poor compliance record of the [appellant]. Whilst I note your comment about the potential sale of the business and further time is required for this, this is not a factor we can take into consideration as it would give an unfair advantage over other taxpayers.
>
> Based on the facts highlighted above, I still think it is entirely reasonable to request a security and therefore uphold the decision.
>
> This concludes my review."

18. The letter further stated that "if you do not agree with my decision, you can appeal to an independent tribunal."

19. We were told that Mr Littlewood was unable to attend the hearing due to illness. Ms Brown instead produced Mr Littlewood's "Reviewers Notes", a one-page document with 13 short points, the last being the conclusion to uphold the notice requiring security. The points included these:

(1) "There is a proposed sale of the practice to [the potential buyers] not yet concluded "

(2) "A ["time to pay"] plan had been drawn up but abandoned as [the appellant] had failed to follow plan"

(3) "There has been 35 periods of default surcharges since 07/07"

(4) "The impact of security in future sale of business is not relevant to the serving of [a notice requiring security]"

The law - relevant provisions of the Act

20. Paragraph 4(2) of Schedule 11 states:

> "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 –
>
> (a) the taxable person …"

21. Section 83(1) provides that, subject to provisions that are not relevant here, an appeal shall lie to this tribunal with respect to certain matters, including (at sub-section 83(1)(l)), the requirement of any security under paragraph 2 of Schedule 11 (amongst other provisions).

22. Section 83A provides:

> "(1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.
>
> (2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P.
>
> (3) This section does not apply to the notification of the conclusions of a review."

23. Section 83C provides (so far as relevant to this appeal):

> "(1) HMRC must review a decision if--
>
> (a) they have offered a review of the decision under section 83A, and

(b) P notifies HMRC accepting the offer within 30 days from the date of the document containing the notification of the offer.

(2) But P may not notify acceptance of the offer if P has already appealed to the tribunal under section 83G.

(3) ….

(4) HMRC shall not review a decision if P, or another person, has appealed to the tribunal under section 83G in respect of the decision."

24. Section 83F provides (so far as relevant to this appeal):

"(1) This section applies if HMRC are required to undertake a review under section 83C or 83E.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review--

(a) by HMRC in reaching the decision, and

(b) by any person in seeking to resolve disagreement about the decision.

(4) The review must take account of any representations made by P, or the other person, at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that the decision is to be--

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must give P, or the other person, notice of the conclusions of the review and their reasoning within--

(a) a period of 45 days beginning with the relevant date, or

(b) such other period as HMRC and P, or the other person, may agree.

(7) In subsection (6) "relevant date" means--

(a) the date HMRC received P's notification accepting the offer of a review (in a case falling within section 83A) ….

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld.

(9) If subsection (8) applies, HMRC must notify P or the other person of the conclusion which the review is treated as having reached."

25. Section 83G provides (so far as relevant to this appeal):

"(1) An appeal under section 83 is to be made to the tribunal before--

(a) the end of the period of 30 days beginning with--

(i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or

(ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision….

(2) But that is subject to subsections (3) to (5).

(3) In a case where HMRC are required to undertake a review under section 83C--

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(4) ….

(5) In a case where section 83F(8) applies, an appeal may be made at any time from the end of the period specified in section 83F(6) to the date 30 days after the conclusion date.

(6) ….

(7) In this section 'conclusion date' means the date of the document notifying the conclusions of the review."

Appellant's arguments

26. Both Mr Yeomans and Mr Garcia advanced arguments as to why the appellant should not be considered a risk to the revenue, and therefore HMRC should not have required security. These arguments were based on the potential sale of the appellant's business to the potential buyers (which had not occurred at the time of the hearing, but was still being negotiated). They submitted that such sale would provide funds to the appellant to pay its outstanding VAT debts; that requiring security would damage the prospects of such sale (by causing he appellant to cease to trade) and thereby diminish the funds available to the appellant to pay its outstanding VAT debts; and that the appellant's past record had been (eventually) to pay its VAT obligations.

27. Mr Garcia however acknowledged that, due to this tribunal's supervisory jurisdiction in this matter, the appeal would only succeed if the appellant were able to show that HMRC's decision to require security was one that no reasonable body could have reached.

28. In Mr Garcia's submission, the appeal was against both the notice issued on 6 February 2015, and the subsequent decision (of 9 April 2015) to uphold the original decision.

29. Mr Garcia did not wish to argue that the February decision did not take account of all relevant circumstances – at that stage, Mr Garcia accepted, HMRC did not know of the planned sale of the appellant's business.

30. Mr Garcia submitted that there were two errors of law in the paragraph headed "Is it reasonable to maintain the decision?" in the review letter of 9 April 2015 from Mr Littlewood:

(1) First, it was incorrect to leave out of consideration the potential sale of the business. He noted that, in cross examination, Mrs Andrews had accepted that a planned sale of the business was something she would look at in deciding whether to issue a notice to require security (but not necessarily give weight to, unless accompanied by a solicitor's undertaking and a clear time frame).

(2) Second, it was incorrect to take into consideration whether there would be an unfair advantage over other taxpayers. The only matter that ought to have been considered was – is there a risk to the revenue from the appellant? As authority for this argument, Mr Garcia invoked the principle that another taxpayer has no locus standi to complain of how the revenue authority treated the first taxpayer (*R (on the application of Freeserve.com plc) v Customs & Excise Commissioners (America Online Inc, interested party)* [2004] STC 187) – unless the second taxpayer has a peculiar interest (*R v A-G, ex p ICI plc* (1984) 60 TC 1).

31. Mr Garcia accepted that the Tribunal's jurisdiction is limited to that set out in s83(1)(l) of the Act – but that must be interpreted realistically in the light of the revised appeal procedure since 2009. He noted in particular the following requirements of that review process:

(1) HMRC must have regard to certain steps taken before the beginning of the review (s83F(3))

(2) HMRC must take account of any representations made by the taxpayer at a stage which gives HMRC reasonable opportunity to consider them (s83F(4))

(3) HMRC must give notice of their conclusions and their reasoning (s83F(6))

(4) No appeal may be made until the conclusion of the review (s83G).

32. In Mr Garcia's submission, the scheme of legislation is that the original decision and the review become conjoined, and the outcome is subject to the jurisdiction of the Tribunal. In this case, in Mr Garcia's submission, the review process was flawed.

Respondent's arguments

33. Ms Brown submitted that the appeal was against the February notice made under paragraph 4 of Schedule 11 to the Act, not the April review letter. In her

submission, it was reasonable to issue the notice to require security in light of the information held by HMRC at the time the notice was issued: the appellant was clearly non compliant, and previous tribunal decisions indicate that late payment is a risk to the revenue: *Lewis Ball & Company Ltd v HMRC* (2006) VAT Decision 19592 and *The Southend United Football Club Ltd v HMRC* [2013] UKFTT 715 (TC)

34. Ms Brown also made the point that there was no guarantee that proposed sale would actually take place.

Discussion

35. The supervisory jurisdiction of this tribunal with respect to HMRC's powers to require security under paragraph 2 of Schedule 11 is well established. It was summarised in the decision of this tribunal in *Southend United Football Club* at [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 judgements of Farquharson J in *Mr Wishmore Ltd v Customs & Excise Commissioners* [1988] STC 723, of Dyson J in *Peachtree Enterprises Ltd* [1994] STC 747 and of the Court of Appeal in *John Dee Ltd v Customs & 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."

36. We are satisfied that the decision made in the letter of 6 February 2015 from Mrs Andrews requiring security meets the test of reasonableness. In particular, this tribunal has ruled (and we respectfully agree) that persistent late-payment of VAT liability is a reasonable ground for requiring security. To quote once again from *Southend United Football Club Ltd* (at [13]):

> "We share the view of the VAT and Duties Tribunal in *Lewis Ball & Company Ltd v HMRC* (2006) VAT Decision 19592, 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."

37. This appeal therefore turns on two questions:

(1) is the (supervisory) jurisdiction of this tribunal over the original decision to require security (Mrs Andrews' letter of 6 February 2015) (the "original decision"), or is it over the decision to conclude the review by upholding the

original decision (letter of 9 April 2015 from Mr Littlewood) (the "review decision"); and, if it is the latter,

(2) was the review decision unreasonable?

Do we have jurisdiction over the review decision?

38. This tribunal's jurisdiction is limited to those matters provided for by statute and such matters include, under s83(1) of the Act, the requirement of any security under paragraph 2 of Schedule 11 to the Act. The question before us is to identify the decision that gives rise to that "requirement". Whilst service of the notice requiring security is clearly a necessary step to creating that requirement, it seems equally clear to us that, if the review procedure is initiated under s83C of the Act, such that HMRC "must" undertake a review, that first step becomes insufficient in and of itself since, under s83F(5)(c), that original decision can be cancelled on conclusion of the review. Once a review becomes compulsory under s83C, it seems to us that the original decision goes into a state of suspension; the decision that truly establishes the "requirement" is therefore that taken under s83F(5)(a) at conclusion of the review to uphold the original decision. It is thus over the latter decision, the review decision, that our supervisory jurisdiction rests.

39. We are fortified in this view by the following aspects of the review process:

(1) Once the review process is initiated, no appeal can be made to this tribunal until it has concluded.

(2) HMRC must give their reasoning when notifying the conclusions of the review.

(3) The review decision is a different decision from the decision originally taken, as HMRC are required, upon review, to "have regard to" and "take into account" matters which were not before the original decision-maker (see sub-sections 83F(3) and (4)). Furthermore, the nature and extent of the review are matters for HMRC's discretion (s83F(2)): in this case, it is clear to us that Mr Littlewood considered the matter afresh.

40. We therefore are of the view that our jurisdiction is over the review decision, as this was the decision that established the requirement to provide security.

Was the review decision reasonable?

41. One of the hallmarks of an unreasonable decision is that the decision-makers take into account some irrelevant matter or disregard something to which they should have given weight: see for example *John Dee v Customs & Excise Commissioners* [1995] STC 941 at 952. In one sentence in his letter of 9 April 2015, Mr Littlewood expressly excluded the potential sale of the appellant's business (in part or in whole) from the matters he took into consideration, and provided a reason for so doing:

> "Whilst I note your comment about the potential sale of the business and further time is required for this, this is not a factor we can take into

> consideration as it would give an unfair advantage over other taxpayers".

42. The letter does not explain precisely why Mr Littlewood considered that taking the business sale into account would give "unfair advantage." The context was that he was responding to the suggestion made by the appellant, in its letter of 4 March 2015, that HMRC "defer" its decision as to whether to take security to a later date (31 May 2015 was proposed), by which time the sale to the potential buyers would have been agreed. Mr Littlewood appeared to be saying that by giving the appellant "extra time" in this way, it would be treated more favourably than other taxpayers (who were not negotiating the sale of their businesses). Whether or not this was precisely what Mr Littlewood meant, it seems to us that by excluding the potential business sale from his considerations, Mr Littlewood was ignoring something that was potentially relevant to the protection of the revenue: if the sale went ahead on the terms described by the appellant, it would have improved the ability of the appellant to meet its VAT obligations. Of course, the weight to be placed by HMRC on the business sale, given that, at the time of their review decision, the sale was still being negotiated, was a matter for their discretion and judgement; but to exclude it from consideration altogether seems to us to be an error. By the same token, the unfairness to other taxpayers, which concerned Mr Littlewood, seems to us to be misconceived: if, in HMRC's judgement, the potential sale reduced the risk to the revenue from the appellant as compared to another taxpayer with no such potential sale (but otherwise comparable to the appellant in terms of risk to the revenue), to a degree that HMRC decided against requiring security from the appellant but in favour of requiring security from the second taxpayer, that does not appear to us a matter of unfairness to the second taxpayer; rather, it is a consequence of HMRC making different decisions in the light of different facts.

43. As our jurisdiction is supervisory, it is not for us to decide or even to speculate, how consideration of the potential sale of the appellant's would have affected the review decision, had it been taken into account. But it does not appear to us "inevitable" that HMRC's decision would have been the same, had it taken the business sale into account – as we have said, deciding what weight to put on a potential sale as regards the overall risk to the revenue is a matter for the discretion and judgement of HMRC.

44. It follows from our findings at paragraphs 40, 42 and 43 above that we shall allow the appeal and so quash the decision to require security from the appellant upheld by the review decision. It is of course a matter for HMRC if they now wish to make a fresh decision with regard to the appellant under their powers in paragraph 4 of Schedule 11 to the Act.

Conclusion

45. The appeal is allowed.

46. 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.

ZACHARY CITRON

TRIBUNAL JUDGE
RELEASE DATE: 26 JANUARY