[2019] UKFTT 45 (TC)

TC06941

Appeal number: TC/2018/03131

VALUE ADDED TAX – notice of requirement to give security – whether or not HMRC decision took into account irrelevant issues or ignored relevant issues – held yes but considered would have come to same conclusion even if they had ignored the irrelevant issues – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CNM ESTATES (TOLWORTH) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
DUNCAN MCBRIDE

Sitting in public at Taylor House, London on 10 January 2019

Wahid Samady, director, for the Appellant

Siobhan Brown, officer of HMRC, for the Respondents

DECISION

1. Before the hearing, Mr Samady requested an adjournment on the grounds that he and his advisers had been unaware of the hearing date until 19 December 2018 and neither his preferred counsel nor an alternative was available on the appointed day.

2. Mr Samady accepted that notice of the hearing had been sent to his tax advisers, inTAX LLP, and himself, by email, on 19 November 2018, but the notice to inTAX had inexplicably been diverted to their spam box and Mr Samady had not seen the notice sent to him because it had been sent to his personal email address, which he said he did not monitor. This email address was however the email address given on the notice of appeal, which Mr Samady had signed.

3. An application for an adjournment had been sent to the tribunal on 21 December 2018 but this had been refused.

4. The Tribunal had received a letter from inTAX the day before the hearing explaining that they would not be present at the hearing because they had "not received instructions or resources", which we took to mean that they had not been paid. Mr Samady said that inTAX had decided not to attend the hearing because they considered that they did not have the necessary skills to present the case at a tribunal, but, in our view, the statement of case which inTAX had prepared on behalf of the appellant showed a high degree of knowledge in this area.

5. We noted that at an earlier stage in proceedings this appeal had been struck out for failure to comply with the Tribunal's directions, but had then been reinstated. This indicated to us a somewhat relaxed approach to administrative matters.

6. This appeal concerns a Notice of Requirement ("NoR") to give security in respect of unpaid VAT liabilities which HMRC consider to represent a serious risk of loss to the Exchequer. Time is therefore of the essence and the original NoR was served on 16 June 2017. We also had the benefit of an extensive statement of case prepared by inTAX on behalf of the appellant, setting out their arguments in full.

7. Given the nature of the hearing and the documentary evidence before us, and that, in accordance with Rule 2(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 we are required to deal with cases "in ways which are proportionate to the importance of the case, the complexity of the issues, and the anticipated costs and the resources of the parties;" we decided that it was in the interests of justice and fairness to proceed with the hearing.

Background

8. This was an appeal against a decision of HMRC to issue a NoR to provide security under para 4(2)(a) Sch 11 Value Added Tax Act 1994.

9. The NoR was served on 16 June 2017 and the documents were sent to the last known place of business, Kingstons House, 15 Coombe Road, Kingston upon Thames, and copies were sent on the same date to the company directors at Aissela, 46 High Street, Esher and to Coombe Walls, West Road, Kingston upon Thames.

10. The amount of security requested was £146,988.33 or £127,888.33 if the appellant chose to submit monthly VAT returns.

The Facts

11. We received evidence from Mrs Sue Ogburn, who was the decision making officer, and Mr Samady made a number of factual representations which we have taken to be his evidence.

12. Mr Samady expressed surprise that Mrs Ogburn introduced herself as the decision maker because Mr Samady was under the impression that the decision maker was a Mr Watts, with whom he had spoken, but Mrs Ogburn explained that Mr Watts was a member of her team and we noted that she had signed the letter requiring the security so we therefore accepted that she was the decision maker.

13. We find the following as matters of fact.

14. The appellant is 100% owned by Mr Samady and has been registered for VAT since 19 June 2007. Its trading activity is noted as being buying and selling real estate.

15. Mrs Ogburn considered that the appellant represented a risk to the Exchequer due to a number of factors:

(1) The company had VAT debts of £103,070.78, which included default surcharges of £13,382.45, and a PAYE debt of £96,760.39.

(2) The VAT debt related to the periods 08/16, 11/16 and 02/17. There had been 10 default periods and the default surcharge rate had been at the 15% rate since 11/16.

(3) A related company, 37 Victoria Road Ltd, which was previously known as CNM Estates Ltd, and which is also owned 100% by Mr Samady, had a VAT debt of £411,695.51, of which £629.76 was default surcharges and £45,077.75 was interest.

(4) Another related company, CNM Estates (Ewell Road) Ltd had a VAT debt of £14,988.54.

(5) The company had been served with a NoR in respect of PAYE liabilities in 2016, but this had been withdrawn due to procedural issues during the operation of what was at that time a relatively new security regime.

(6) Mr Samady was at the time the subject of a COP 9 enquiry.

16. The appellant was warned in July and August 2017 that continuing to trade without having provided security was an offence.

17. In April 2017 an error was discovered during a control visit, and although this was a single error the company discovered that this same error had been repeated back to 2011. This resulted in further undeclared VAT of £104,000. This was paid off in March and May 2018, but did not affect the liabilities considered by Mrs Ogburn as part of her original decision.

18. On 16 January 2018 the appellant's representative, SKS(GB) Ltd wrote to HMRC to request that the decision to issue the NoR should be reconsidered, but this was rejected on the basis that the appellant had previously promised to pay the amounts outstanding within 28 days on more than one occasion but had not done so. A formal review of the decision was requested on 16 February 2018.

19. The review conclusion letter was issued on 10 April 2018. The review officer concluded that the decision to require the security was correct and that the amount was calculated in line with HMRC internal guidance and that HMRC had acted reasonably and correctly. Specifically the review officer stated:

> "The documentation and information which I have considered shows that the company, CNM Estates (Tolworth) Ltd, is linked to a number of non-compliant businesses involving the same people with similar trading styles which owe HMRC varying amounts of VAT and PAYE."

20. On 5 May 2018 inTAX LLP submitted an appeal to the tribunal on behalf of the appellant.

21. For his part, Mr Samady submitted that it was totally wrong for HMRC to consider the links to non-compliant businesses in that the companies considered by HMRC were only three companies out of a group of 43 companies owned and managed by Mr Samady. The debt owed by CNM Estates (Ewell Road) Ltd was very small and that owed by 37 Victoria Road had not been pursued by HMRC for many years and it was therefore unlikely that this was a genuine debt. On cross-examination, Mrs Ogburn agreed that the debt owed by 37 Victoria Road Ltd was still outstanding at the date of the hearing and that there was no record of HMRC pursuing it. She also accepted that she knew nothing about that debt.

22. Given the evidence before us it seemed very likely that the stated debt owed by 37 Victoria Road Ltd was either substantially overstated or non-existent, and Mrs Ogburn agreed that she had not looked at the validity of this debt in any great depth.

23. Mr Samady also said that the COP 9 enquiry was now effectively closed and was a minor matter which should not have been considered. Mrs Ogburn stated that she had spoken to the HMRC officers involved with this enquiry immediately prior to the hearing and they had confirmed that there had been a meeting in December 2018 but that they were now awaiting further information from Mr Samady. We also noted that papers provided to the tribunal showed that there was an Outline Disclosure Form relating to the COP 9 enquiry dated 9 March 2016, which had been signed by Mr Samady, which disclosed that he had failed to disclose any income from a consultancy contract with the UAE Academy in Abu Dhabi amounting to approximately $50,000

per annum since January 2013, and that he had also failed to disclose rental income from two rental properties. We did not have any other details of the COP 9 enquiry but the fact that the Outline Disclosure had been made on 9 March 2016 but that the enquiry had still not been completed over two years later implies that there were additional issues of which we were not made aware.

24. Mr Samady emphasised repeatedly that he was an honest businessman and that the damage which would be done to his reputation by having a criminal charge brought against him would be extremely serious.

Grounds of Appeal

25. The notice of appeal stated the grounds of appeal as follows:

> (1) The company has insufficient funds to meet the NoR in a single payment and believes the NoR was issued on a flawed basis. The company is focussed on paying down the existing VAT liability and having to pay the NoR would put the financial position of the company in peril.
>
> (2) The company identified VAT irregularities dating back to 2011 in the sum of £104,000. Rather than notify the voluntary disclosure to HMRC under more favourable terms the company simply included the historic debt on a subsequent VAT return. This created a large liability, especially when penalties totalling £18,000 and interest of £8,000 were added.
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> (3) Despite [the appellant] making the voluntary disclosure and attempting to put matters right as quickly as possible HMRC saw the opportunity to crystallise ongoing VAT liabilities and to issue the NoR.
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> (4) The company is being treated unfairly for trying to put matters right. The proportionate response from HMRC would have been to acknowledge the disclosure and to offer a time to pay arrangement, rather than issue a NoR.

26. Mr Samady also argued strongly that HMRC had erred by putting too much weight on the links with other companies, such as CNM Estates (Ewell Road) Ltd and 37 Victoria Road Ltd, whose debts were small, in the case of CNM Estates (Ewell Road) Ltd, and possibly incorrect in the case of 37 Victoria Road Ltd.

The Law

27. Paragraphs 4(2) and 4(4) Sch 11 VATA 1994 give HMRC the power to require security as set out below:

> "(2) 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, or
>
> (b) any person by or to whom relevant goods or services are supplied.

(3) In sub-paragraph (2) above "relevant goods or services" means goods or services supplied by or to the taxable person.

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

28. Importantly, the powers of the tribunal in such appeals are limited to what is normally referred to as a supervisory jurisdiction. The consequences of this were very clearly summarised by Judge Bishopp in *Southend Football Club v HMRC* [2013] UKFTT 715 (TC) as set out below.

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

Discussion

29. As set out above, we are only able to consider the reasonableness of HMRC's decision and can only interfere with it if we find that it was flawed. This is generally taken to mean that we can only interfere with it if we believe that HMRC took into account irrelevant information, ignored relevant information, or reached a conclusion that no reasonable officer, if properly directed, could have reached on the facts before them.

30. Importantly, it is not relevant whether or not we would have come to the same conclusions as HMRC. We can only consider whether or not HMRC's decision was reasonable.

31. In addition, it is well established that we can only consider the facts as they were at the time the decision was taken. We cannot take into account subsequent events. We can consider facts which existed at the time the decision was taken but which were ignored by HMRC, either at the time of the decision or at the time of the subsequent review, but we cannot take into account new facts.

32. We have examined HMRC's calculations of the amounts of security required and consider that these are in accordance with HMRC's normal practice and are reasonable.

33. The appellant's grounds of appeal are set out above and we will consider them in turn.

34. The first ground of appeal is that the provision of security would cause financial hardship and would threaten the financial security of the company.

35. There are no specific provisions in the legislation relating to the giving of security which provide relief for hardship. We were however referred to the case of *Aria Technology Ltd v HMRC* [2014] UKFTT 271 and specifically to comments made by the tribunal in that case at [38]:

> "No proper consideration appears to have been given to the very serious consequences for the appellant's business of issuing the notice. Mr Reeves whilst having agreed that he was aware of the importance of working capital to a business appears to the tribunal to have followed a somewhat mechanistic approach in the assessment of the sum required by HMRC as security. In particular he followed what is understood by the tribunal to be a fairly standard calculation for the amount of the security with little or no regard to the particular circumstances of this matter."

36. This was a somewhat unusual case and was of course a decision of the First-tier Tribunal, which is not binding on us. In addition, there were other factors which led the tribunal to question the reasonableness of HMRC's decision. In that case the tribunal did come to the conclusion that the taxpayer's appeal should be allowed on the basis that, in the circumstances of that particular case, HMRC's decision was flawed.

37. In this appeal, however, there were no unusual circumstances surrounding the case. Paragraph 4 Sch 11 allows HMRC to require such an amount of security as they consider necessary for the protection of the revenue. It may be correct to say that the imposition of security might threaten the financial security of the company, as Mr Samady and inTAX argued but all HMRC were asking for was, as a condition of the company being allowed to continue trading, security for the outstanding debt of £89,688.33, being the total debt of £103,070.78 referred to above, less the default surcharges of £13,382.45 included in that number, plus an average of four months ongoing VAT liabilities. In our view this is not unreasonable in the circumstances of this case.

38. The more relevant point in our view is that Mrs Ogburn, and especially the review officer, Rose McKenna, seemed to have placed significant weight on the links to other companies under Mr Samady's control. In her evidence, Mrs Ogburn played down the weight she had put on the existence of the debts owed by CNM Estates (Ewell Road) Ltd and 37 Victoria Road Ltd but clearly these had been picked up as matters of significance by the review officer.

39. Given the evidence before us it seems very likely that the stated debt owed by 37 Victoria Road Ltd was either substantially overstated or non-existent, and in her

verbal evidence, Mrs Ogburn agreed that she had not looked at the validity of this debt in any great depth.

40. In our view, to the extent that HMRC relied on the existence of the debt due from 37 Victoria Road Ltd, their decision took into account irrelevant information, or at least information about which they knew very little. To this extent therefore we find that HMRC's decision was flawed.

41. That is not however the end of the matter. As Judge Bishopp stated, in *Southend United Football Club*:

> "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."

42. In this case, we consider that even if HMRC had ignored the existence of the debts due from CNM Estates (Ewell Road) Ltd and 37 Victoria Road Ltd, they would still have come to the same conclusion because of:

(1) The non-payment of the underlying debt of £89,688.33,

(2) The serious history of non-payment of VAT by the appellant,

(3) The history of non-compliance on PAYE issues, which had resulted in the issuance of a NoR for security for a PAYE debt in 2016, and

(4) The ongoing COP 9 enquiry, which was not in our view a trivial matter, as suggested by Mr Samady, but did in fact evidence a willingness on Mr Samady's part not to disclose income on his tax return.

Decision

43. For the above reasons therefore we decided that the appeal should be DISMISSED.

44. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 22 JANUARY 2019