TC01742

Appeal numbers TC/2010/08439
TC/2010/ 08440

Value added tax - security for the revenue - VATA 1994 Sch 11 para 4(2)(a) - extent required of commissioners' enquiries - whether outcome inevitably the same despite errors – need for fuller disclosure of reasons - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WATERMARGIN (PORTSMOUTH) LIMITED
WATERMARGIN (AT THE O2) LIMITED **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*value added tax*) **Respondents**

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mrs Caroline de Albuquerque

Sitting in public at 45 Bedford Square, London on 6 January 2012

Mr Geoffrey Tack of DLA Piper UK LLP for the Appellants

Mr Hugh O'Leary of the Solicitor's Office of HM Revenue and Customs for the Respondents

DECISION

Introduction

1 These joined appeals are against decision of the commissioners on review upholding notices issued pursuant to paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 requiring security to be given for tax as a condition of supplying or being supplied with goods or services under a taxable supply. The first appellant Watermargin (Portsmouth) Limited we will refer to simply as 'Portsmouth', and the second appellant Watermargin (at the O2) Limited we will refer to as 'O2'; Water Margin Limited, a previous company in liquidation since 28 August 2009 owing £552,565.51 in VAT, from whom the appellants' businesses had been acquired, we refer to as "WML".

2 The jurisdiction of the tribunal is under section 83(1)(l) of the 1994 Act and it was common ground that we are confined to examining whether the commissioners' decisions, when they were made, took into account matters which were relevant and did not take into account matters which were not relevant; in shorthand, whether they were or were not at that time *Wednesbury* unreasonable. The onus of proof was accepted as being upon the respondents.

3 We received oral evidence from the officers who issued the notices, Mrs Janice Uzzell and Mr Paul Johnstone, and from Mr John Waites, a chartered account involved in all the companies. A considerable amount of documentary evidence was also put before us, together with helpful skeletons from both advocates. We find the following facts to be established, at least on the balance of probabilities.

The law

4 Paragraph 4(2) of Schedule 11 to VATA 1994 provides:

> (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.

5 The manner in which the tribunal's jurisdiction is to be approached was pithily set out in a decision of the VAT & Duties Tribunal in *Goldhaven Limited v CEC* LON/96/1348 released on 20 January 1997. At [14] to [15] the tribunal said:

> [14] In considering the submissions of the parties we have first identified the principles we should apply in considering this appeal. These were described by Farquharson J in *Mr Wishmore Limited v CEC* [1988] STC 723 at 728g in the following way:
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> "The tribunal . . . should restrict itself, on the hearing of an appeal, to deciding whether the taxpayer company has established that the decision arrived at by the commissioners was unreasonable, or . . . whether the decision had been arrived at by taking into account matters which are nor relevant or by ignoring matters which are relevant."
>
> [15] The principles were further developed in *CEC v Peachtree Enterprises Ltd* [1994] STC 747 where it was held that the tribunal had to limit itself to considering facts and matters which were known when the disputed decision was made by Customs and Excise. The principles were yet further developed in *John Dee Limited v CEC* [1995] STC 941 where the Court of Appeal held that the tribunal had to consider whether Customs and Excise had acted in a way that no reasonable panel of Commissioners of Customs and Excise could have acted, or whether they had taken into account some irrelevant matter, or had disregarded something to which they should have given weight. The tribunal could not exercise a fresh discretion; the protection of the revenue was not a responsibility of the tribunal or the court. However, if it was shown that the decision of Customs and Excise was erroneous, because they failed to take some relevant material into account, the tribunal could, nevertheless, dismiss the appeal if the decision would *inevitably* have been the same had account been taken of the additional material.

6 Various first instance decisions on paragraph 4(2) or its predecessors were drawn to our attention to indicate the way in which tribunals had, typically, approached the exercise of their functions.

7 Of particular value, we found the remarks made by Sir Stephen Oliver QC in *VSP Marketing Limited v CEC* LON/94/794A where, having allowed the appeal in that case, he added:

> There are several lessons to be learned from this case. The form and content of statements of case in Notice of Requirement appeals need rethinking; they must be capable of presenting fully and accurately all the considerations taken into account by the responsible officer at the time the decision was taken. There must be a risk of both irrelevant and unauthorised considerations being taken into account where the responsible officer is part of the debt management team. Finally, the implications of a Notice of Requirement to a trader are so serious that the most rigorous training should be given to officers with responsibility for the decision to issue them.

8 We were not shown any instance in which there was a clear statement about whether the commissioners have a duty of reasonable enquiry, or whether they are entitled to take the information they actually have at its face value; sometimes the tribunal expects the commissioners to look further, and sometimes not, depending on the circumstances. An example of a finding in this area is *Millennium Catering & Pub Company Ltd v CEC* EDN/96/15, in which the tribunal concluded:

> It is clear to us that [the officer issuing the notice] proceeded largely on the basis of erroneous assumptions concerning the financing and management of both the earlier and the new companies. He made no enquiries whatsoever into the true status of the sisters in the earlier companies, otherwise he would have appreciated that their directorships were non-executive in nature and that they were neither involved in the financing nor the day to day management of these companies.

9 The matter must therefore turn on the facts before us.

The facts- Portsmouth

10 The security notice to Portsmouth was issued on 8 April 2010 by Mrs Janice Uzzell. It required security by cash deposit or guarantee of £106,102.37, or £70,734.91 if monthly returns were made. No reasons were given, but the notice contained an invitation in these terms: "If you have any further

information that you want me to consider, please forward it to me immediately." The taxpayer's right to seek a review of the notice or to appeal to the tribunal was stated. Following this, a letter dated 7 May was sent to the commissioners signed by "John Waites BSc (Econ), FCA", requesting a review by an independent officer and adding:

> "The reason for this is that Watermargin (Portsmouth) Limited ("WPL") is wholly unrelated to Water Margin Limited ("WML"), which previously went into administration. WPL has no common directors or shareholders with WML. Furthermore, WPL purchased the trade and assets only of the Portsmouth branch restaurant, whereas WML traded from two other restaurants.
>
> Please let me know if you require any supporting documentation."

11 On 14 May, Mr Waites confirmed that Portsmouth would be content with a review by the officer who had issued the notice and offering facilities for communicating through him with the four directors of the company, which had been requested by the officer Mr Waites had spoken to. The review decision was issued on 19 May - in fact by an officer other than the one who had issued the notice and not the one Mr Waites had earlier spoken to. The review letter, addressed "for the attention of Mr John Waites", stated that "the further information put forward by you" had been considered, but upheld the issue of the security notice; a copy was sent by the reviewing officer, "for the personal attention of the directors" of Portsmouth, of "my letter issued today to your agent Mr John Waites".

12 This time, reasons were given: (i) previous associations of the persons responsible for Portsmouth and their previous non-compliance, (ii) Portsmouth's own non-compliance, namely a failure to submit VAT returns for the periods to 30 November 2009 and 28 February 2010, necessitating the issue of assessments; (iii) the new business traded from the same premises with a similar trade class and name; (iii) the current directors were linked with previous directors.

13 A further review, by an independent officer, was requested (notwithstanding that first review had been conducted by an officer other than the one who had issued the notice) and took place on 26 August 2010; again, the notice was upheld. Four reasons were given: (i) Portsmouth was an effective continuation of the previous business, and the same individuals were involved; (ii) there were close family connections between the directors of WML and Portsmouth; (iii) Portsmouth had failed to submit any of its first three VAT returns; (iv) "the director" of Portsmouth was also involved with another VAT registered business which had itself failed to demonstrate compliance in relation to the submission of VAT returns and payment of tax.

14 Mrs Janice Uzzell, who issued the security notice, gave evidence that she had considered the following: (i) that Mr John Waites had signed Portsmouth's application for VAT registration as "executive chairman", and had also been a director and the company secretary of Enfield Polymers Limited, which had become insolvent owing £79,377 of tax; (ii) that Mr Chin Seong Lam who had been a director of WML was living at the same address as Mrs Yit Gan Lam, now a director of Portsmouth; (iii) that Mrs Sing Joan Tan who had been a director of WML was living at the same address as Mr Wei Leng Tan, now a director of Portsmouth, (iv) that there were links in common between Portsmouth and Enfield Polymers Limited apart from Mr Waites, namely trade as a restaurant - the same was true of Portsmouth and WML, and those two businesses had a similar trading name; (v) Portsmouth had still not made its first VAT return, due on 31 December 2009 and an assessment had had to be made (though it had been paid).

15 In cross-examination, Mrs Uzzell claimed that she had known that Enfield Polymers Limited was not in fact a restaurant but a plastics producer; she said the error about the nature of Enfield's trade had been made by an official who had prepared material for her, but she had not thought it appropriate to correct it in the 'Chain Chart' of information she had used to make her decision. Mrs Uzzell's witness statement at paragraph 6, however, clearly indicated that she had seen Enfield's trade as that of a restaurant, consistently with the

documentary evidence of the 'Chain Chart' she had relied on. We conclude that Mrs Uzzell became confused, in what was a challenging cross-examination, and that in issuing the security notice she did think that the fact Mr Waite having also been an officer of the defaulting Enfield Polymers, as well as chairman of Portsmouth, was underlined by a similarity of trades in addition.

16 The concern about Mr Waites was in fact misplaced. The evidence showed that he was a chartered accountant who had for the past 23 years specialised in company turnarounds and, in that capacity, he often had to assume one office or another in the companies he was assisting. To do that, he indeed needed to have a substantial measure of control of a company, but the tendency for his name to come up in connection with defaulting companies had led to problems and he tried to avoid it by taking positions, such as that of 'executive chairman' (but not technically a director) of Portsmouth, which would not register so readily in searches.

Conclusions - Portsmouth

17 It should have been obvious from Mr Waites's first letter of 7 May 2010 requesting a review of the security notice that a chartered account with a degree in economics was an unlikely person to be running a Chinese restaurant as an ordinary manager, prompting further enquiries about him. Moreover, he had volunteered in his further letter of 14 May to be a conduit for communication with the four directors, but no contact with him was made before the review decision was issued on 19 May; the reviewing officer was nonetheless clearly aware that he was an "agent" for Portsmouth and not a director. Nor was any contact with Mr Waites made before the second review of 26 August. It has been seen that that second review also indicated, without naming him, that Mr Waites's former business connection was regarded as relevant, and there is nothing to suggest that Mrs Uzzell's double misconception about Mr Waites did not continue to play its part.

18 Given the severe consequences for a taxpayer of the issue of a security notice, more care should have been taken over the position and significance of Mr Waites, and further checks about him made. It remains the case, however, that without this error the commissioners' decisions to issue the notice, and on review to uphold its issue, would inevitably have been the same: they correctly took into account the fact of connected company directors - of which a concealment appeared to have been attempted by the substitution of spouses as directors.

19 The unpaid tax left by WML at over half a million pounds was very high - too high to contemplate the conduct of the same business by effectively the same people with equanimity. And, lastly, there was already the fact of Portsmouth's non-compliance in regard to its VAT returns to suggest that matters were going off the rails again once more. The security required was calculated by reference to the only figure at that time available, namely Portsmouth's own projection of its turnover in its application for registration, and no other figure could have been used.

The facts – O2

20 The security notice to O2 was issued on 13 July 2010 by Mr Paul Johnstone. It requited cash security of £117,500, or £82,150 if there were to be monthly returns, or an equivalent guarantee. No reasons were given. The taxpayer's right to a review or appeal was stated. On 12 August, Mr Waite wrote to Mr Johnstone:

> "I confirm that we wish your decision to be reviewed by an HMRC officer not previously involved in the matter.
>
> Yours sincerely
>
> John Waites, Executive Chairman"

21 The reviewing officer replied on 25 August: "If you have any further information which you think may be relevant to this matter, please contact me as soon as possible at the above address".

22 On 26 August, the review decision was issued, upholding the notice in terms almost identical to those used in the second review of Portsmouth: (i) O2 was an effective continuation of the previous business, and the same individuals were involved; (ii) there were close family connections between the directors of WML and O2; (iii) O2 had failed to submit either of its first two VAT returns; (iv) "the director" of Portsmouth was also involved with another VAT registered business which had itself failed to demonstrate compliance in relation to the submission of VAT returns and payment of tax. There was no further correspondence and an appeal to the tribunal was lodged.

23 Mr Johnstone gave evidence that his decision to issue the security notice was based on: (i) the first two returns due had not been made, and the second assessment consequently issued had not been paid; (ii) Mr Waites was involved in O2, in WML as executive chairman and in Enfield Polymers Limited as a director, the latter having become insolvent owing £79,377.67 in VAT; (iii) the administrators of WML in their report of 3 September 2009 had stated that Mr S Tan, who had been a director of WML, was involved in O2 and official records showed that he lived at the same address as Mrs Wei Len Tan, a current director of O2; (iv) the assets of WML were purchased by O2. In cross-examination, Mr Johnstone said in regard to Mr Waites that he had not made any enquiries about him, noting simply that he had been involved in two previous defaulting businesses in positions of influence or control.

Conclusions – O2

24 The same erroneous conclusion about the danger from Mr Waites was made in this instance, but there is less reason to criticise it: Mr Waites's profession had not been disclosed in his letter of12 August, and no one supposed Enfield Polymer's business to have been that of a restaurant. The reviewing officer had invited further information on 25 August; and, albeit that he evidently did not wait to see if any was forthcoming, there is equally no evidence that any was ever proffered.

25 In the circumstances, there was nothing to prompt the commissioners to make further enquiries about Mr Waites, and the other factors which led to the decisions to issue and uphold the notice - the connections with previous defaulting businesses, the very large sum involved in WML's default and the concealed link between a former and a current director - were plainly relevant and properly taken into account, and led to the same conclusions as in the case of Portsmouth. The amount of the security required was likewise calculated on the only figures available, namely those projected by O2 themselves.

Decision

26 The two appeals must therefore be dismissed.

27 It is regrettable in both cases that the parties did not communicate with each other more satisfactorily, and that 18 or more months should have elapsed before the full facts became known to each of them at the hearing itself. In this case, that would have been more than usually desirable in that liability appeals concerning the taxpayers' supplies have been stood over pending resolution of this appeal.

28 It is not apparent to us why no reasons at all were given when the notices were issued - putting the taxpayer to the trouble of seeking a review, if only to find out what the commissioners' concerns were, and at the same time delaying the enforcement of the security notice with a potential loss to the revenue. Even on review, the full facts as seen by the commissioners were not disclosed and only emerged at the hearing itself: indeed, we have to record the apology made on behalf of the commissioners that their statement of case did not fully particularise the evidence that they relied upon, and complete details were given only when their skeleton argument was served.

Appeal rights

29 This document contains the 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 no 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.

Malachy Cornwell-Kelly
Tribunal Judge

RELEASE DATE: 12 January 2012