TC02820

Appeal number: TC/2012/07972 & TC/2012/07973

VALUE ADDED TAX – Security – no evidence of unreasonable behaviour by decision-making officer – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) NORTH ESSEX FLOORING LTD **Appellants**
(2) COLNE FLOORING SOLUTIONS

- and -

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

TRIBUNAL: JUDGE JILL GORT
MR GEORGE BARDWELL CBE

Sitting in public at Bedford Square in London on 2 July 2013

Mr Imran Sharzad, Accountant of BBK Accountants Limited, appeared on behalf of both Appellants

Mr David Ridley, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appeal is against a decision of HMRC to serve a Notice of Requirement ("NOR") to give security under paragraph 4(2)(a) of Schedule 11 to the VATA 1990 on each of the above Appellants. The NOR was dated 12 April 2012, and was upheld on review by a letter dated 24 July 2012.

2. The appeals were heard together and, whilst we will set out the facts relating to the Appellants together, our conclusions in respect of each of them will be set out separately below.

3. In respect of the first Appellant, North Essex Flooring Limited ("North Essex"), the amount of security required was £32,550 or £21,700 if monthly returns were submitted. In respect of the Second Appellant, Colne Flooring Solutions Limited ("Colne"), the amount of security required was also £32,550 or £21,700 if monthly returns were submitted.

4. The grounds of appeal in respect of both Appellants were more or less identical and were to the effect that it was unreasonable to request a security in such a large amount; in each case the company was completing monthly VAT returns and so there were no large arrears building up; HMRC had not attempted to understand why a previous business had failed; the reason for the failure of the previous business was that a number of large customers had gone into liquidation and was due to factors outside the individual Appellant's control. In the case of Colne, it was also submitted that the failure of the previous companies was not due to financial mismanagement.

The facts

5. Both Appellants at the time of the NOR carried on the business of flooring installation from a business address at 7 Spring Chase, Wivenhoe, Colchester, CO7 9QP. Both were registered for VAT with effect form 1 March 2012 and both used BBK Accountants Limited as their accountants. By a letter dated 3 May 2012 BBK Accountants had requested that both companies be placed on monthly returns.

6. In respect of North Essex Flooring, Companies House records show that Susan Ann Bickley (Mrs Bickley) was appointed sole director on 7 February 2012. The records in respect of Colne show that Mark John Bickley (Mr Bickley) was appointed sole director also on 7 February 2012.

7. Mr and Mrs Bickley are husband and wife. Both were previously directors of a company called Wivenhoe Flooring Services Limited ("WFSL"), having been appointed on 1 October 2008. WFSL was a flooring installation business which had also operated from 7 Spring Chase. It had a poor compliance record, with an NOR

being served on 30 September 2010. It was de-registered for VAT from 13 June 2012 after having been wound up by petition. It had an outstanding debt to HMRC in the sum of £177,729.42.

8. Both Mr and Mrs Bickley had also been directors of Millennium Flooring Services Limited ("MFSL"), having been appointed on 5 October 2005. That company also traded in the installation of flooring from 7 Spring Chase. It was de-registered for VAT with effect from 3 March 2009, having been liquidated. It had an outstanding VAT debt in the sum of £124,229.96.

9. Mr Bickley was also registered for VAT as a sole proprietor as from 1 October 2008 again trading from 7 Spring Chase. The main business activity of this registration was that of a flooring contractor. During the trading life of this registration Mr Bickley was granted several Time To Pay arrangements. An NOR was served on this registration on 30 September 2010 and a subsequent VAT 7 deregistration form was received by HMRC on 20 October 2010 with a cessation date of 20 July 2010. Following the receipt of the deregistration form, security action ceased. Mr Bickley cleared all outstanding VAT debts on this deregistration.

The legislation

10. Schedule 11 to the VAT Act 1994 provides where relevant as follows:

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

The evidence

11. We heard no live evidence. HMRC provided one bundle of documents which contained *inter alia* the relevant documents, including Company House printouts in respect of both companies and records of compliance in respect of WFSL and MFSL. There were two witness statements, one from Mr Max Houghton, the decision-making officer of HMRC in respect of both Appellants, and also from Ms Corolita Christian, the Review Officer who reviewed both decisions.

12. Whilst not formally to be considered evidence in the appeal, nor indeed relevant to the decision to be made, at the end of the parties' submissions the Tribunal asked Mr Ridley what the most recent position was with regard to each of the Appellant Companies' VAT liability. We were informed by Mr Houghton that on 7 June 2012 North Essex owed HMRC £594.04, the debt consisting of £504.59 VAT and £89.44 in respect of a default surcharge. With regard to Colne, on 14 June 2013 the total owing to HMRC was £60,728.44, being made up of £52,743.08 VAT and £7,985.36 in respect of a default surcharge.

The Appellants' case

13. As put forward in the grounds of appeal, it was submitted that each company would suffer financial hardship and could not continue to trade if it were required to pay the security. The previous companies with which the directors had been associated had been unable to meet their VAT liability because of a large number of customers who had gone into liquidation.

14. The only further matter put forward in respect of both companies by Mr Sharzad was that the companies both had to give a 3-month credit period on their own invoices, otherwise they would get no work.

15. In respect of Colne we were informed that Mr Bickley was expecting a tax refund of £15,000, but Mr Sharzad, as the company accountant, had not been able to finalise the figures because Mr Bickley had not provided him with the information which would enable the figures to be finalised and a P35 filed.

The Respondents' case

16. The Respondents' case in respect of both companies was that they represented a significant risk to the revenue. HMRC relied on the failure of both WFSL and MFSL and the connection of the directors of both the Appellant companies with those two companies.

17. Each Appellant company was perceived to be a continuation in part of the business previously carried on by WFSL, being engaged in similar trading activities and carrying on from the same address.

18. The Respondents accepted that the Appellants subsequent change to monthly returns reduced the risk to future revenue, but the quantum of the security was reduced accordingly.

19. Whilst the issue of bad debts was raised by both Appellants in their notices of appeal, it was not a matter which had been mentioned by either Appellant company in correspondence with HMRC, nor during the period when security action was being taken against WFSL. WFSL had been wound up by petition and report of the insolvency was available.

20. HMRC had not been provided with the details of any factors outside the control of the directors of either Appellant company. It was submitted that the companies were to be viewed together, not separately.

Reasons for decision

21. The Tribunal's role in this case is a supervisory one. It may only overturn the Respondents' decisions in respect of each company if it finds that at the time the relevant notices were issued the Respondents had acted unreasonably. Consideration must be given to each Appellant separately, and we do so.

22. The burden of proof is on each of the Appellants separately to show that the Respondents in requiring it to provide security in the sums set out above acted unreasonably. By "unreasonably" is meant that the officer concerned took account of something which he should not have done, or failed to take into account something which he ought to have done. Neither Appellant has provided any evidence to show unreasonable conduct by Mr Houghton, the relevant officer, and such argument as has been put forward does not persuade us that at the time the relevant decisions were made in respect of each of them, that that decision was made unreasonably. The fact that each Appellant allowed a three-month period on its invoices is not a relevant factor and no evidence was provided of the bad debts which may or may not have occurred as a consequence of it.

23. There was no appearance by any live witnesses on behalf of either Appellant company, and there was a complete absence of documentary evidence in support of the arguments raised in the notice of appeal and at the appeal. We do not find that the Respondents acted unreasonably in respect of either company and we dismiss both the appeals.

24. We would add, that whilst the Respondents in the respective statements of case made no reference to the other Appellant, in his submission to us Mr Ridley did link the two Appellants, and invited us to consider that the position of the one reflected o the other. This was no part of HMRC's original reasoning, and we have not taken it into account in arriving at our decision. However, the fact that now North Essex indebtedness to HMRC is, as we were informed by Mr Houghton, below the threshold at which HMRC normally require a security, it is a matter which in our view should be taken into consideration by HMRC when they are deciding whether or not to impose the security on North Essex, and if it is decided to impose a security, at what level it should be. We do not consider it would be appropriate for HMRC to impose a security at the rate previously sought given the company's subsequent low level of trading.

25. 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.

MISS J C GORT
TRIBUNAL JUDGE

RELEASE DATE: 7 August 2013