TC04121

Appeal number: TC/2013/08185

VAT – Requirement for Security – Appeal withdrawn by appellant – Whether appeal should be reinstated – Yes – Whether decision to require security reasonable – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LILO GRILL & JUICE BAR LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MR SIMON BIRD

Sitting in public at Eastgate House, Newport Road Cardiff on 31 October 2014

The Appellant was not represented

Siobhan Brown, of HM Revenue and Customs, for the Respondents

DECISION

Background

1. Lilo Grill and Juice Bar Limited ("Lilo") was incorporated on 11 December 2012. It acquired its business as a transfer as a going concern from Lilo Grill Limited on 11 May 2013 and applied to register for VAT on 17 September 2013. Its director is Sabz Ali Khan who is a 70% shareholder. The remaining shares are held by Jamel Hassen and Saleh Mohammed with each holding 15%.

2. In addition to his interest in Lilo, Mr Khan was a director and 60% shareholder of Castle Inns Limited, a director of Gwent Hotels Limited and a director and 100% shareholder of Lilo Grill Limited. Castle Inns Limited had been registered for VAT from 1 January 1991 to 17 October 1995 and during its period of trading had 18 defaults and left a VAT debt of £17,627.78. Gwent Hotels Limited, which had been registered for VAT between 1 January 1994 and 2 March 1997 had one default and a VAT debt of £196. Lilo Grill Limited, which had been VAT registered between 1 June 2012 and 1 May 2013, had a VAT debt of £38,039.15.

3. The other shareholders of Lilo, Mr Hassen and Mr Mohamed, were also directors of Lilos Grill House Limited, for which Mr Hassen held 100% of the shares. This company which is now insolvent with a VAT debt of £108,658.32 traded from the premises from which Lilo now trades. Mr Hassen was also the director and 100% shareholder of NEJM Catering Limited which was registered for VAT between 1 May 2011 and 12 September 2012 and has an outstanding VAT debt of £25,958.

4. On 30 October 2013 HM Revenue and Customs ("HMRC") served Lilo with a Notice of Requirement to give security for the protection of the revenue (the "Notice") under paragraph 4(2)(a) of schedule 11 to the Value Added Tax Act 1994 ("VATA"). The security required under the terms of the Notice was £18,750 if quarterly VAT returns were submitted or £12,500 if VAT returns were filed each month. Lilo's director, Mr Sabz Khan, confirmed receipt of the Notice on 2 November 2013.

5. Lilo appealed against the Notice to the Tribunal on 24 November 2013. On 20 December 2013 HMRC filed and served its Statement of Case and provided its list of documents on 30 January 2014 in accordance with the Tribunal's direction of 17 January 2014.

6. On 19 February 2014 Lilo wrote to the Tribunal stating that a settlement had been reached with HMRC on the basis that £12,500 was to be paid at the rate of £1,000 per week. The letter also stated that "we intend to withdraw our appeal". Lilo also wrote to HMRC on 19 February 2014 enclosing a copy of the letter sent to the Tribunal "confirming the basis on which the appeal is withdrawn". The Tribunal acknowledged the withdrawal of the appeal on 21 February 2014 advising Lilo that it had, under rule 17 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules"), 28 days to apply for appeal to be reinstated.

7. On 19 March 2014 Lilo wrote to the Tribunal requesting that the appeal be reinstated. In the absence of any grounds for reinstatement of the appeal being given in the letter, on 13 May 2014 the Tribunal wrote to Lilo requesting it to provide reasons why the appeal should be reinstated.

8. In a letter dated 1 June 2014 Lilo wrote to the Tribunal in the following terms:

> We agreed to pay £12,500 in instalments of £1,000 per week on the conditions that a VAT return would be submitted on a quarterly basis.
>
> [The Officer] of HMRC broke this Agreement by requesting a monthly return which is not acceptable: –
>
> 1. We do not charge VAT from customers due to the competitive nature of the businesses on City Road. We also dispute with HMRC's computation of VAT which is an issue placed before the Tribunal.
>
> 2. We are a small business and it is difficult for us to make monthly returns.
>
> 3. Deposit money for security is not required as HMRC are taking into account unnecessary and irrelevant facts. It will cause detrimental hardship to the business and staff as the business is operating from hand to mouth.

9. HMRC was invited by the Tribunal, in a letter dated 30 June 2014, HMRC to make representations in respect of Lilo's request to reinstate its appeal.

10. In its reply to the Tribunal, dated 14 July 2014, HMRC referred to the agreement with the appellant for payment of £12,500 in monthly instalments of £1,000 by being in respect of the submission on monthly and not quarterly returns. This is confirmed by letters sent by HMRC to the appellant on 4 February and 14 March 2014.

11. In the circumstances a hearing was listed to determine:

(1) Whether the appeal should be reinstated; and

(2) If so to hear the substantive appeal

12. Although Lilo was not represented at the hearing and the Tribunal clerk was unable to speak to its director by telephone, notice of the date, time and place of the hearing had been sent to Lilo at the address stated on its Notice of Appeal. We were therefore satisfied that reasonable steps had been taken to notify Lilo of the hearing and, as we considered it was in the interests of justice to do so, proceeded with the hearing in its absence under rule 33 of the Tribunal Procedure Rules

Reinstatement of appeal

13. Having considered the correspondence between the parties it would appear that Mr Khan, Lilo's director, misunderstood the nature of the agreement he had reached with HMRC when the appeal was withdrawn. It would seem that he believed that Lilo

would be permitted to make quarterly VAT returns if security of £12,500 was provided whereas HMRC required monthly returns for this level of security.

14. Given the agreement on which the withdrawal of the appeal was made appears to have been based on a misunderstanding and having regard, as we must, to the overriding objective of the Tribunal Procedure Rules, to dealing with the case "fairly and justly" we consider that Lilo's application to reinstate its appeal must be allowed.

Substantive Appeal

15. Under paragraph 4(2) of schedule 11 VATA HMRC 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 "if they think it necessary for the protection of the revenue".

16. The jurisdiction of the Tribunal in an appeal against a requirement to provide security was described by Dyson J (as he then was) in *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747 where he said, at 751:

> "It is important to start by stating that it is common ground that the jurisdiction of the tribunal is only supervisory. The appeal before the tribunal is not by way of a rehearing (see, for example *Customs and Excise Comrs v J H Corbitt* (*Numismatists*) *Ltd* [1980] STC 231 at 239, [1981] AC 22 at 60 per Lord Lane). This was accepted in the present case by the chairman himself. He put the matter clearly and, in my view, accurately in his decision in these terms:
>
> > 'The jurisdiction of the tribunal in cases such as this where the Commissioners are exercising discretionary powers has been clearly established in previous cases. It is, for instance, clear that the tribunal cannot substitute its own discretion for that of the Commissioners for the tribunal has no discretion in these matters. If it is alleged that the Commissioners have reached a wrong decision then there can be a question of law but only of a limited character. The question would be whether their decision was unreasonable in the sense that no reasonable panel of Commissioners properly directing themselves could reasonably reach that decision. To enable the tribunal to interfere with the Commissioners' decision it would have to be shown that they took into account some irrelevant matter or had disregarded something to which they should have given weight.'
>
> In my judgment, in exercising its supervisory jurisdiction the tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of the commissioners was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected."

17. In the present case in concluding that security was required HMRC took into account the matters to which we have referred at paragraphs 1 to 3, above. The amount of security was determined using the Lilo's own estimated annual turnover figure of £300,000 contained in its application for registration, form VAT1 and based on six months liability for quarterly returns or four months liability for monthly returns.

18. Although the Notice of Appeal and Mr Khan's letter of 1 June 2014, which we have quoted at paragraph 6 above, refers to "irrelevant facts" being taken into account Mr Khan has not responded to requests from HMRC to identify these and, as Lilo was not represented before us are we none the wiser as to what these might be. However, in both the Notice of appeal and the letter Mr Khan does refer to the difficulties faced by the business as a result of the economic climate, local competition and its small size.

19. Although we recognise these difficulties do exist we note that hardship to an appellant has been held not to be a relevant consideration (see eg *Rosebronze v Commissioners of Customs and Excise* (1984) VAT Decision No.1668) and that the effect of the applicable law means that Lilo's Company's appeal can only succeed if we consider that, at the time it was made, HMRC did not reasonably arrive at the decision to issue the Notice. It is not sufficient that we might ourselves have reached a different conclusion.

20. In *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 Lord Phillips of Worth Maltravers MR (as he then was) said, at [40]:

> "... the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters"

21. Having carefully considered the evidence before us we find that HMRC did not take irrelevant matters into account or fail take into account all relevant matters at the time the decision to issue the Notice was made. As such we consider that HMRC did arrive reasonably at the decision to issue the Notice and therefore dismiss the appeal

Right to apply for Permission to Appeal

22. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 11 November 2014