



TC06613

**Appeal number: TC/2017/04769
TC/2017/04770
TC/2017/04771**

*PAY AS YOU EARN – HMRC decision to require security for PAYE and
NIC liabilities – whether or not decision reasonable – held yes – appeal
dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**BOSHIP LIONS FARM HOTEL LTD
MANSION LIONS HOTEL LTD
ALBANY LIONS HOTEL LTD**

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE PHILIP GILLETT
JULIAN SIMS**

Sitting in public at Brighton on 24 May 2018

The Appellants were not present and were not represented at the hearing

Siobhan Brown, Officer of HMRC, for the Respondents

DECISION

5 1. Neither the appellants nor a representative of the appellants were present at the hearing. Prior to the hearing the tribunal contacted Mr Gulzar, director of the appellants, who informed us that:

- (1) He had six broken ribs,
- (2) He thought a member of his office was attending, and
- (3) He thought the hearing was the following week.

10 2. Mr Gulzar did not suggest that he had not received notice of the hearing.

3. 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,
15 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.

4. These were three appeals in which all the material facts are identical. We therefore heard them as a single appeal and will treat them as a single consolidated appeal.

20 5. The appeals are against three separate notices of requirement to give security for PAYE and NIC liabilities in accordance with Part 4A of the Income Tax (Pay As You Earn) Regulations 2003 and Part 3B of Schedule 4 to the Social Security (Contributions) Regulations 2001. Three separate notices were given to the three appellants and three notices, relating to the three appellants, were given to the director
25 and 100% shareholder of all three appellants in his personal capacity. It is not clear if the notices issued to the director, Mr Gulzar, in his personal capacity were also subject to appeal but we will treat such an appeal as having been incorporated into the appeals by the three appellants.

The Facts

30 6. Having considered the documents provided to us by HMRC and the evidence of Sue Ogburn, the decision making officer of HMRC, we find the following as matters of fact:

7. All three appellants (“Boship”, “Mansion” and “Albany”) were formed on 1 December 2015. Boship and Mansion registered for PAYE on 1 February 2017 and
35 Albany registered for PAYE on 1 January 2017.

8. Mr Sheikh Abid Gulzar is shown on the Companies House registration documents as the sole director and shareholder of all three companies.

9. Albany took over a business formerly trading as Sheikh Abid Gulzar t/a Albany Lions Hotel. Boship took over a business formerly trading as Sheikh Abid Gulzar t/a Boship Lions Hotel and Mansion took over a business formerly carried on by Lions Hotels Ltd, of which Mr Gulzar was also the sole director and shareholder. In the
5 absence of any contrary evidence within the document bundle, and given the consistency of the business addresses, we find this as a matter of fact.

10. At the time the decision to issue the notices of requirement to give security was taken Sheikh Abid Gulzar t/a Albany Lions Hotel owed £47,626.49 PAYE and NIC as well as having a VAT liability of £16,582.74, Sheikh Abid Gulzar t/a Boship Lions
10 Hotel owed £79,825.08 PAYE and NIC and Lions Hotels Ltd had become insolvent on 13 January 2017 with a PAYE and NIC debt of £260,013.05.

11. The notices were issued on 1 March 2017 and were sent by post to the registered office and the principal places of business of the three companies. Notices were also issued to Mr Gulzar, the director and 100% shareholder of the companies,
15 in his personal capacity, under Reg 97P(1) of the Income Tax (Pay As You Earn) Regulations 2003, as set out below.

12. Other businesses in the ownership or under the control or influence of Mr Gulzar also owed monies to HMRC:

20 (1) Sheikh Abid Gulzar t/a Lions Cub Nursery owed £16,534.68 PAYE and NIC.

(2) Lions Pier Ltd, which is currently subject to separate security action, owed £46,565.81.

(3) Chatsworth Hotels Ltd went into liquidation on 13 January 2017 with a PAYE debt of £39,217.98.

25 (4) Lions Group Shop, in which Mr Gulzar was a partner, owed VAT of £135,773.23, including penalties and interest.

13. A review of the decisions to give a notice of security requirement was requested by Mr Gulzar on 30 March 2017, although no further information was provided by him at that time. HMRC sought further clarification of the reasons for requesting a
30 review on 12 May 2017 and Mr Gulzar replied saying that he had problems in his previous businesses due to issues with his bank and that although there had been problems in the past all the debts had eventually been paid. He did not therefore consider that the new businesses represented a risk to HMRC.

14. The debts had not in fact been paid at that time, although some payments had
35 been made, and Lions Hotels Ltd had become insolvent with a debt due to HMRC of £260,013.05.

15. HMRC issued their review conclusion letter on 18 May 2017 upholding the decision to issue notices of requirement to provide security.

16. The amounts of the security requested have been calculated in each case by taking four months average PAYE and NIC payments for the respective predecessor businesses.

17. Appeals were submitted to the First-tier Tribunal on 16 June 2017.

5 **The Law**

18. Regulation 97N of the Income Tax (Pay As You Earn) Regulations 2003 provides:

10 “In circumstances where an officer of Revenue and Customs considers it necessary for the protection of the revenue, the officer may require a person described in regulation 97P(1) (persons from whom security can be required) to give security or further security for the payment of amounts in respect of which an employer described in regulation 97O (employers) is or may be accountable to HMRC under regulation 67G[, as adjusted by regulation 67H(2) where appropriate]2, 68 or 80 (payments to HMRC and determination of unpaid amounts).”

15

19. Regulation 97P(1) provides that HMRC may require security from the following:

“The persons are—

- (a) the employer,
- 20 (b) any of the following in relation to the employer—
 - (i) a director,
 - (ii) a company secretary,
 - (iii) any other similar officer, or
 - (iv) any person purporting to act in such a capacity, and
- 25 (c) in a case where the employer is a limited liability partnership, a member of the limited liability partnership.”

20. Similar provisions regarding NI contributions are contained in regulations 29N and 29P(1) of the Social Security (Contributions) Regulations 2001.

30 21. 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. This case in fact concerned the similar provisions relating to VAT but the principles are equally applicable to the current appeal.

5 “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
10 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
15 have arrived at the same conclusion we should dismiss the appeal.”

Grounds of Appeal

22. The appellants’ grounds of appeal are set out in the notice of appeal to the tribunal as follows:

- 20 (1) There have been arrears on the director’s sole proprietorship businesses. The total arrears were £292,870.09.
- (2) From the above arrears £215,773.23 has already been paid. The director is in continuous discussions with HMRC and making arrangements to clear the balance.
- 25 (3) The company that has been requested to provide security is not in arrears of the amount as stated by HMRC. Payments have been made which are not yet reflected on HMRC’s records.
- (4) The company is in the process of appointing new directors as well so the current director will not be the only person answerable.
- 30 (5) Hence we [the appellants] feel because of the director’s personal history the company is being unfairly treated. We feel any other new business or company in the same position will not be treated as us and hence we request the tribunal to reconsider the review decision.

Discussion

35 23. 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.

24. 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.

5 25. 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.

10 26. 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.

27. The appellants' grounds of appeal are set out above and we will consider each in turn.

15 28. Firstly Mr Gulzar acknowledges that there have been arrears totalling £292,870.09 on his personal businesses but then states that £215,773.23 has been paid off in the interim. This may well be true but, as stated above, we are unable to take into account subsequent events. We would also note that although some amounts may have been paid off in respect of Mr Gulzar's personal businesses, one of his companies, Lion Hotels Ltd became insolvent in January 2017 owing £260,013 to
20 HMRC. Another company, Chatsworth Hotels Ltd went insolvent, again in January 2017, owing £39,218 to HMRC.

25 29. Mr Gulzar then states that the companies which have been required to provide security are not actually in arrears to HMRC. This may well be true, but HMRC have come to the conclusion that these companies present a risk to HMRC because of the history of those businesses when they were owned by Mr Gulzar personally or by one of his companies. They are entitled to do this, under the provisions of reg 97N set out above, where "an officer considers it necessary for the protection of the revenue." This is a very broad power conferred on HMRC, which is not qualified in any way by reference to whether or not the company in question is actually in arrears.

30 30. Such a broad, unfettered, power being conferred on HMRC may concern many taxpayers, but that is the reason why a person upon whom such a security notice is served may appeal to this tribunal, and it is this tribunal's role to ensure that HMRC have exercised that power reasonably.

35 31. Mr Gulzar then goes on to say that the company is in the process of appointing new directors. Again that may be true but we cannot consider events which may have taken place after the decisions were taken and, in any case, we understand that no new directors had been appointed as at the date of the hearing.

40 32. Finally Mr Gulzar makes the totally correct point that "we feel because of the director's personal history the company is being unfairly treated. We feel any other new business or company in the same position will not be treated as us and hence we request the tribunal to reconsider the review decision."

33. The appellant companies are indeed not being treated like any other new business in the same position precisely because of the director's personal history. It is the very fact that the companies have taken over businesses which were controlled by the director, which built up very large debts owing to HMRC, and which in some cases have become insolvent, leaving those large debts to be written off by HM Government, which has led HMRC to decide to impose security requirements on those companies.

34. Mr Gulzar's grounds for appeal do not therefore offer him or us much assistance. We must simply consider whether or not HMRC's decision to impose security requirements on the companies was reasonable in all the circumstances.

35. In our view, the behaviour of Mr Gulzar as regards the way in which the previous businesses under his control dealt with their PAYE obligations is a relevant fact for HMRC to consider when making their decision under Reg 97N.

36. Given the previous history of the businesses concerned, and the previous history of the director, Mr Gulzar, we are satisfied that the decision which HMRC took that the giving of security was necessary in these cases was not unreasonable. The same view also applies to the review decision. We believe that HMRC took into account all relevant information and did not take into account any irrelevant information and did not reach a conclusion which no reasonable officer of HMRC, if properly directed could have reached.

Decision

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

38. 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: 23 JULY 2018