[2019] UKFTT 648 (TC)

TC07423

SECURITY FOR PAYMENT of VAT and PAYE/NICs - HMRC acted unreasonably in deciding to issue the notices as they took into account irrelevant matters – not inevitable that they would have come to the same decision if those matters had been disregarded – decision flawed – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2019/00916
TC/2019/00918

BETWEEN

TOWER HIRE & SALES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
SIMON BIRD

Sitting in public at Cardiff on 19 September 2019

Mr Khandaker Rahman of KRC Chartered Accountants for the Appellant

Miss Siobhan Brown, Officer of HM Revenue & Customs, for the Respondents

DECISION

INTRODUCTION

1. This is the appeal of Tower Hire & Sales Limited (the "**Company**") against the decisions of the respondents (or "**HMRC**") to issue to it:

> (1) A Notice of Requirement, dated 24 September 2018, to require security to be given for PAYE and National Insurance Contributions (**NICs**) in accordance with Part 4A of the Income Tax (Pay as You Earn) Regulations 2003 ("**PAYE Regulations**") and Part 3B of Schedule4 to the Social Security (Contributions) Regulations2001 ("**NICs Regulations**"); and
>
> (2) A Notice of Requirement, also dated 24 September 2018, to provide security under paragraph 4(2)(a) of Schedule11 of the Value Added Tax Act1994 ("**VATA**") for the protection of the Revenue.

2. In this decision we shall refer to the foregoing Notices of Requirement as the "**Notices**".

3. The amount of VAT security required is based on six months liability for quarterly returns and is in the amount of £21,900. The amount of PAYE & NIC security was originally required in an amount of £14,586, but this was subsequently adjusted on review and reduced to £4,800.

4. Security for the PAYE and NICs was not only required from the Company. It was also required, on a joint and several basis, from its director, namely Mr Anthony Mark Davies ("**Mr Davies**"). The Tribunal has only received an appeal from the Company, and it is with that appeal that this decision is concerned.

THE LAW

5. There was no dispute between the parties as to the relevant law.

VAT

6. For VAT, the legislation is to be found at paragraph 4(2) (a) and 4(4) of Schedule 11 of the Value Added Tax Act 1994. Those paragraphs read 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 20 payment of any VAT that is or may become due from – (a) the taxable person…
>
> 4(4) Security under sub-paragraph (2) above shall be of such amount, and shall be in such manner, as the Commissioners may determine."

PAYE and NICs

7. For PAYE and NICs the legislation is found in the PAYE Regulations and the NICs Regulations. There is no material difference between the provisions giving HMRC power to require security in the case of PAYE on the one hand and NICs, in the form of Class 1 contributions, on the other. The provisions in the PAYE Regulations and the NICs Regulations

effectively mirror one another, with only necessary changes to reflect the different regimes covered by the provisions. We shall therefore refer primarily to the PAYE Regulations.

8. Regulation 97N of the PAYE Regulations provides that in circumstances where an officer of HMRC "considers it necessary for the protection of the revenue" the officer may require certain persons to give security or further security for the payment of amounts of PAYE tax in respect of which an employer is or may be accountable to HMRC under various of the PAYE Regulations.

9. The persons from whom security may be required are the employer (with certain exceptions not relevant in this case) (see Reg 97O) and, in the case of a company a director, a company secretary, any similar officer and any person purporting to act in such a capacity (Reg 97P).

10. Regulation 97V(1) makes provision for appeals against the Notice or against any requirement in it. So far as material to this appeal, Reg 97V(4) provides:

> "On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may –
>
> (a) confirm the requirements in the notice,
>
> (b) vary the requirements in the notice, or
>
> (c) set aside the notice."

OUR JURISDICTION

11. There is a distinction between our jurisdiction in relation to VAT security on the one hand and PAYE/NIC security on the other. This distinction is neatly set out in the case of *D-Media Communications Limited v HMRC* [2016] UKFTT 430 (TC) in which Judge Berner said the following:

> "18. It is clear that, in relation to security for VAT, the jurisdiction of the Tribunal is supervisory only (*John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941). Thus, on such an appeal, the task of the Tribunal is to consider whether HMRC had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. In doing so, the Tribunal is confined to considering facts and matters which existed at the time HMRC made their decision (*Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] 15 STC 747). The Tribunal might also have to consider whether the Commissioners had erred on a point of law. The Tribunal cannot, however, exercise a fresh discretion; the protection of the revenue is not the responsibility of the Tribunal or the court. If the decision is found to have been flawed, the appeal will be allowed, and HMRC may make a further determination if they so choose.
>
> 19. As Ms Brown fairly acknowledged, whilst the need for protection of the revenue is common to VAT security cases and those with which this appeal is concerned, there is a significant difference in the way the legislation has been drafted in each case. There is nothing in the VAT security provisions corresponding to the powers expressly given to the Tribunal, in Reg 97V(5) of the PAYE Regulations, to vary the requirements in the notice.

20. Accordingly, although I accept that the Tribunal's jurisdiction in relation to security for PAYE and NICs is to some extent supervisory in nature, it is an appellate jurisdiction. The supervisory approach, that is having regard to the reasonableness of HMRC's decision is, in my view, limited to the matters referred to in Reg 97N, namely whether the giving of security is necessary for the protection of the revenue. It is not for the Tribunal itself to second guess that exercise of judgment, so long as it has been exercised reasonably within the terms expressed in *John Dee*.

21. All other aspects, on the other hand, are matters on which the Tribunal is entitled to form its own view, and on doing so to confirm, set aside or vary the Notice of Requirement. That includes whether the appellant is a person from whom security may be required, the value of the security to be given, the manner in which it is to be given, the date on which it is to be provided and the period of time for which the security is required. The value of the security and the manner in which it is to be provided are included amongst these matters; in contrast to the VAT security provisions which provide, at para 4(4), that the security is to be of such amount and given in such manner as HMRC shall determine, the PAYE Regulations merely require those matters to be specified in the Notice, and the power of the Tribunal to vary the requirements in the Notice, in my view, renders these matters susceptible to substitution of the Tribunal's own view."

12. There is one further point on this. we can allow the taxpayer's appeal if we find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before them (as per Lord Justice Neill in *John Dee*).

"I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.

It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:

> "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."

I cannot equate a finding "that it is most likely" with a finding of inevitability.

On this narrow ground I would dismiss the appeal."

BACKGROUND TO THE APPEALS

13. The Company was incorporated on 8 October 2013 and changed its name to its current name with effect from 22 March 2017.

14. Its registered office is Room 1, 7 Meadows Bridge, Parc Menter, Cross Hands, Llanelli SA 14 6RA.

15. Its principal place of business is at 61 Black Lion Road, Gorslas, Llanelli, SA14 6RT.

16. Mr Davies was appointed a director of the Company on 23 March 2017. He owns 50%

of the shares in the Company, the other 50% being owned by Jodie Louise Davies.

17. The Company leases out security equipment.

18. It has been registered for VAT since 1 July 2018 and that registration remains extant.

19. It has been registered as an employer since 31 August 2018.

20. For the reasons set out below, HMRC considered the Company to be a risk to the revenue and, accordingly, issued the Notices to the Company on 24 September 2018:

(1) On 17 October 2018 the Company's representative, KRC chartered accountants, requested a review of the decision to issue the Notices and sought reasons for their issue.

(2) In letters dated 24 October 2018, the reviewing officer, Officer Ogburn ("**Officer Ogburn**") who was also the officer who had issued the Notices, replied to the Company's representative. Her decision, following her review, was that the Company was still required to provide security for both the VAT and PAYE/NICs in the amounts originally set out in the Notices.

(3) The Company's representative then sought an independent review on 20 November 2018 and submitted further representations for the purposes of this review on 9 January 2019.

(4) The reviews were carried out by two separate review offices. As regards VAT, the reviewing officer concluded that the decision to require security was correct and confirmed the amount of security at the amount in the original notice.

(5) As regards PAYE/NIC, a separate review officer concluded that the decision to require security was correct, but reduced the amount of security required to £4,800.

(6) On 12 February 2019 the Company appealed to the Tribunal.

THE NOTICES, OFFICER OGBURN AND OFFICER WILD

21. As we have said above, our jurisdiction in these appeals is supervisory. In simple terms we need to put ourselves in the position of the officer who authorised the issue of the Notices, and consider whether she came to a reasonable decision. On reading through the papers prior to the hearing, we were somewhat concerned to see that Officer Ogburn had not submitted a witness statement setting out the basis on which she had come to her decision to issue the Notices, nor did any of the review letters clearly indicate the basis of her decision. The only document which clearly explained the reasons why HMRC considered the Company to be a risk to the revenue was HMRC's statement of case.

22. However the hearing was attended by Officer Julie Wild ("**Officer Wild**"). Officer Wild has worked for HMRC and before that the Inland Revenue for more than thirty years and is currently a decision maker in the security unit, a role which she has been performing for over six years. Towards the end of 2019 she was asked to take over this case from Officer Ogburn who has now retired from HMRC. She was able to speak briefly to Officer Ogburn about her decision, and the basis of Officer Ogburn's decision is set out in detail in HMRC's electronic case notes. Officer Wild confirmed that the basis of Officer Ogburn's decision was as set out in HMRC's statement of case. This is set out below.

> "Resec Ltd-traded from the same principal place of business and the trading activity is shown as private security activities. The sole director and 50% shareholder is Anthony

Mark Davies. Jodie Louise Davies resigned as director on 30 April 2018 and holds a 50% share in the company. The company has a VAT debt of £115,308.73; default surcharge debt of £22,145.52 with an outstanding return for the period to 07/18. The debt relates to unpaid returns for 01/17, 07/17, 10/17, 01/18, 04/18 and the 07/18 assessment. There are also 18 periods of default surcharges at 15% since 04/15. In addition to the VAT there is a PAYE/NIC debt of £27,859.86. The company was subject to two separate security interventions due to non-compliance. These were cancelled as time to pay arrangements were set up though these subsequently failed. The company entered into a creditors voluntary liquidation on 18 October 2018.

Specialist Monitoring Services Ltd-traded from the same principal place of business and the trading activity is shown as security monitoring services. The sole director and 50% shareholder is Anthony Mark Davies. Jodie Louise Davies resigned as director on 29 January 2018 and holds a 50% share in the company. The company has a VAT debt of £22,846.84 and PAYE debt of £27,558.58. The company has ceased to trade.

Clear Recycling Solutions Ltd-company traded in the collection of non-hazardous waste. Anthony Mark Davies was appointed director on 10 February 2014. The company was wound up on 12 December 2016 with a VAT debt of £7,981 and a PAYE debt of £71,625.18.

Clear Energy UK Ltd-Anthony Mark Davies was appointed director on 10 February 2014. The company was wound up on 30 January 2015 with a VAT debt of £114,401.68 and a PAYE debt of £77,701.18.

Clear Security Ltd-company traded in security systems service activities. Anthony Mark Davies was appointed director on 10 February 2014. The company was wound up on 28 July 2015 and had a VAT debt of £82,320.32 and a PAYE debt of £36,458.25.

Anthony Mark Davies was made bankrupt on 7 February 2013"

23. Officer Wild also gave the following evidence about the decision making process:

(1) The securities team in which Officer Ogburn worked had compiled a chain chart. This was included in the bundle of documents which was given to us by HMRC for the purposes of the hearing. It listed details of the companies with which Mr Davies was connected as well as other details about those (including financial information and details of the owners/directors/shareholders). This chain chart was 99% completed when Officer Wild took over the case. Officer Wild confirmed that Officer Ogburn took into account the information set out in the chain chart.

(2) Resec Ltd ("**Resec**") traded in a similar way to the Company and went into members voluntary liquidation owing a considerable amount of VAT and PAYE/NICs to HMRC. Mr Davies was the sole director of Resec, which was an habitual late payer of VAT and PAYE/NICs. At the time that the Notices were given to the Company, it had been in the default surcharge regime for 18 periods at the highest rate and five VAT returns and one assessment were unpaid. Furthermore, there were seven unpaid months of PAYE/NICs.

(3) Resec had been subject to 2 previous security interventions, in March 2015 and March 2016. The latter involved the serving of a notice of requirement for security. Time to pay arrangements were agreed with HMRC for both interventions and so no further

action was taken at that time. However, even though Resec had been given extensions to those time to pay arrangements, it had failed to keep up its payments under them.

(4) HMRC had been asked to participate in a creditors voluntary arrangement for Resec in August 2018 but it had decided not to do so. But this meant that no notice of requirement for security was given at that time.

(5) HMRC had taken securities action against Specialist Monitoring Services Limited by issuing it with a notice of requirement for security, but that company ceased to trade within the 30 day payment period so HMRC took no further action.

(6) HMRC officers had attended the principal place of business of Clear Recycling Solutions Ltd but had not found any evidence of that company being present at that address.

(7) Officer Ogburn had read in a newspaper that in March 2015 Mr Davies had been charged with being a director of a company whilst bankrupt, without the court's permission. Officer Wild explained, however, that little weight is given by HMRC to such press stories. But it was a factor. It had also come to Officer Ogburn's attention that Mr Davies had been prosecuted by Swansea Trading Standards and had been found guilty of a number of offences. These arose from the trading activities of the Clean Energy group of companies.

(8) Officer Wild took us to a number of compliance charts which had been compiled for the hearing. These set out details of the VAT, PAYE/NICs and other payments owed by the relevant companies at the time the Notices were given to the Company. The information on which these compliance charts were based was used by Officer Ogburn in reaching her decision.

24. The basis of all of the foregoing evidence given by Officer Wild where the electronic case notes. Officer Wild had a copy of these with her at the hearing but was not able to hand a copy up since it needed to be redacted if a copy was to be given to the appellant. And it was too late to do so.

25. However, given that her evidence was given on oath and was repeated, in many cases verbatim, from those notes, we find as a fact that the foregoing matters set out at paragraphs [22] and[23] above formed the basis of Officer Ogburn's decision to issue the Notices to the Company.

THE APPELLANT'S CASE

26. Before turning to the appellant's evidence, we pause to consider the appellant's case. In its pleaded form (in correspondence) it can be summarised as follows:

(1) HMRC have given no reasons for their decision to issue the Notices. If they were issued because of adverse behaviour by its officers, details of that behaviour should be provided.

(2) The amount requested is excessive.

(3) Resec and Specialist Monitoring Services Limited were both forced to cease trading due to difficult trading conditions. Resec, furthermore, was forced to go into liquidation because HMRC had rejected two company voluntary arrangement proposals.

(4) Mr Davies had personally raised funds to attempt to sustain cash flow. Neither he nor the Company constitutes a serious risk for revenue loss and the amount requested

under the Notices were not reasonable and proportionate in comparison to the Company's ongoing monthly liability for VAT.

27. At the hearing, and as set out in Mr Davies witness statement, it was also the Company's case that HMRC should have found out a great deal more about the activities of the various companies, before issuing the Notices. And had they done so, they would have realised that there was justification for each of the issues which had been taken into account by HMRC when coming to its decision to issue the Notices; and that justification would have allowed HMRC to have come to a different decision, namely that there was no need to require security. HMRC would not have issued the Notices if they had undertaken further research.

28. We deal later in this decision with the submissions made by the Company as outlined above. But at this stage, we say that we do not agree with the appellant that the reasonableness of HMRC's decision includes any failure to carry out what the appellant considers to be a more detailed review of the circumstances surrounding the various companies. And by failing to undertake this review and considering the reasons why the various companies failed, or why he was involved in court proceedings, that renders HMRC's decision unreasonable.

29. HMRC must, of course, have sufficient information before them before they can reach a rational decision. And so issue a Notice. But it is clear from the evidence of Officer Wild that HMRC had sufficient information on which to base their decision to issue the Notices. Our role is to decide whether Officer Ogburn's decision to issue the Notices based on that information was a reasonable one. It is in fact for the appellant to show that that decision is, more likely than not, to have been an unreasonable one. And when doing so, it is only the information which was available to Officer Ogburn at the time of her decision, which is relevant. We say this before we go on to review the evidence given by Mr Davies since much of that evidence, although providing helpful background to his various business activities, and those of the companies with which he has been associated over the past six or so years, was not known to Officer Ogburn at the time of making her decision. And so she could not have been expected to have considered it. And so in reviewing Mr Davies evidence, we have only set out below that evidence which we believe to be relevant to the "reasonableness" issue.

THE APELLANT'S EVIDENCE

30. The appellant provided its own bundle of documents, many of which duplicated those which were included with HMRC's bundle. In addition, Mr Davies gave oral evidence. We found him to be an articulate and truthful witness and accepted much of his evidence. His evidence was as follows:

(1) The Company trades in a different way from Resec. The Company rents out security equipment. Resec provided personnel as well as security equipment.

(2) He considered that he kept in constant touch with HMRC regarding Resec's tax debts. HMRC's attitude towards these changed when that company's affairs were taken over by HMRC at Bristol. His view, too, was that some £31,000 of the amount of £111,000 purportedly owed by Resec in May 2018 had been paid to HMRC.

(3) Specialist Monitoring Services Limited failed because it was a creditor of Resec.

(4) The companies in the Clear Group (namely Clear Recycling Solutions Ltd, Clear Energy Ltd and Clear Security Ltd) were set up as special-purpose vehicles for former friends and business associates of his. He had no shareholdings in them. He was not a director of them until, according to him, June 2014. [We note that this appears to be a different date that set out in the chain chart which indicates that Mr Davies was appointed

a director of the Clear Group companies on 10 February 2014]. On 30 July 2013 these former associates resigned, as directors, of the companies in the Clear Group taking with them all of the cash in the various companies' bank accounts. He endeavoured to sort this out and in order to do so became a director at a time when he was bankrupt. He had to deal with the fallout from these resignations which resulted in the failure by those companies to fulfil contractual commitments to their customers. It also resulted in the prosecution by Swansea trading standards. He was not convicted at the trial, he pleaded guilty to 6 offences in order to get things "sorted" as the judge had requested.

(5) He was not "made" bankrupt, but petitioned for his own bankruptcy. At the time that he became bankrupt, he owed no tax to HMRC.

(6) Since he did not become a director of the Clear Group companies, until June 2014, and had no knowledge of the way in which those companies were run (since they were run exclusively by his former associates) he should not be criticised for any tax debts incurred by those companies before the date on which he became a director.

(7) As a director of the various companies with which he was associated, he admitted that he did not fully understand his obligations towards HMRC [we found this to be a strange admission given that it was clear from the written evidence that he had made numerous attempts to discuss Resec's tax issues with HMRC].

(8) The main reason for late or non-payment of tax was because the relevant company had not been paid by its customers.

(9) HMRC should have participated in Resecs' creditors voluntary arrangement and if it had done so, Resec would not have gone down.

(10) The Company has no current tax debts.

(11) No contact was made with the Company by Officer Ogburn before she issued the Notices.

DISCUSSION

31. Before delving into a detailed discussion of the relevant issues, we pause to make two points:

(1) The first concerns the relevant decision or decisions that we need to review. It is clear that the original decision, made by Officer Ogburn to issue the Notices is one which we must review. But Mr Rahman submitted that it extended beyond this, and we are required to consider the reasonableness of the whole decision making process. This includes the reviews by firstly Officer Ogburn of her original decision, and subsequently the "independent" reviews, carried out by Officer Champion (VAT) and Officer Telfer (PAYE/NICs). We accept his submission. A review of other tribunal cases show that this is the approach which they have adopted. It is clear that the review decisions affect the Notices. In this case the PAYE/NIC review resulted in a reduction of the amount of security required. The reviews are part and parcel of the same decision making process. And in reviewing the reviews, we can take into account information which was before the reviewing officers even if it had not been before the original decision maker.

(2) Secondly HMRC's methodology in these cases, namely to establish links between entities which have failed in the past, is a primer facies rational one. In this case the high level justification for the Notices is that Mr Davies has been involved in a number of businesses which have previously failed owing HMRC considerable sums of money. But it is our view

that simple linkage is not enough. HMRC also need to show that the individual linking that entities (in this case Mr Davies) exerted an influence over the relevant companies to the extent that their delinquent tax behaviour can, in effect, be attributed to him. This is likely to be the case if the entities are one-man band companies through which the sole shareholder and director conducts what is in essence a sole trade. But less likely if the linked companies have a number of employees, some of whom might be responsible for tax compliance, and those employees are not common to the linked entities. The important point is that the individual at the centre of the web of linked companies must be able to exert influence over the tax behaviours of those companies.

32. Resec was the first company cited by HMRC as being non-compliant and linked to the Company. It is our view that the non-compliance of this company is a wholly justifiable and relevant matter for the decision makers to have taken into account when coming to the decisions in the Notices and on review. Mr Davies was linked to this company as shareholder and director and had been since 2014. He effectively ran the company. It failed owing considerable sums to HMRC. Mr Davies protestations that this was largely due to a more hostile attitude taken by the Bristol HMRC office, and HMRC subsequently failing to participate in the creditors voluntary arrangement do not, we are afraid, cut much ice with us. The reasons given by HMRC to justify Resec's failings are reasonable ones. The evidence shows that Resec owed massive sums to HMRC when it failed and this is entirely consistent with HMRC's view that this reflects failings by Mr Davies which could be repeated with further businesses in which he might become involved (in particular, the Company). HMRC need to decide whether the revenue needs to be protected. For all the reasons given by HMRC we agree that the financial position of the sick is an entirely relevant matter for them to have taken into account.

33. The same is true of Specialist Monitoring Services. We accept Mr Davies' evidence that this company failed because of the failure of Resec which was the sole customer of Specialist Monitoring Services. But the bare fact is that this company failed owing HMRC considerable sums. HMRC had taken securities action only to find that this company had ceased to trade before the payment period expired.

34. We note, and accept, Mr Davies evidence of the reason for the failure of these two companies was that his customers (and by this we mean the customers of Resec) failed to make timely payments of its invoices. But HMRC's concern is only with the protection of the revenue. When considering this, they can consider the tax position of a company. There may be reasons why a company fails to pay tax. But unless it is shown the position of that company has a very different pattern of trading and a greater likelihood of customers paying on time, than the failed company, HMRC's decision is unlikely to be unreasonable. It is true that in making representations for the review, Mr Rahman explained that the risk to the revenue of non-payment of tax by the Company was lower than the risk posed by Resec due to the fact that the Company had fewer staff and a more balanced distribution of customers. But equally, it is telling that, as recorded by officer Champion in her review letter, the Company had failed to submit its first VAT return on time. To HMRC, it must have appeared at the Company was setting out along the same route as Resec.

35. But the situation in relation to the Clear Group is very different. It is clear (no pun intended) that HMRC have taken into account the tax owed by these companies since the date of their registration for VAT, PAYE/NICs. They have also taken into account compliance failings by those companies. But the chain chart shows that the trading addresses of these companies was different from the trading address of the Company and of Resec and of Specialist Monitoring Services Ltd. Whilst the address for Clear Energy Ltd and Clear Security

Ltd is the same, it is the address of Mr Rahman's firm. There is nothing sinister about this. The fact that the registered office of two of these companies is the same and is the same as the Company simply demonstrates that Mr Rahman acted on a professional basis for these companies. The chain chart shows Mr Davies was not a shareholder of any of the Clear Group companies, and only became a director on 10 February 2014 (we prefer HMRC's evidence on this point given that it is culled from documentary records rather than the evidence of Mr Davies who suggested that he became a director in June 2014). So we can see no link between the Clear Group and the Company before Mr Davies became a director in February 2014. And this would have been apparent not only to Officer Ogburn when she decided to issue the Notices, but also to the reviewing officers. The failings of the Clear Group were failings both to submit returns and to pay tax. And some of this tax, arising in periods before February 2014, was substantial. For example, of the £114,401.68 of VAT owed by Clear Energy UK Ltd, £67,815.86 was due in December 2012.

36. Our view is that HMRC's reliance of the tax failings of the Clear Group for periods before February 2014 which they clearly took into consideration in issuing the Notices and on review, is an irrelevant consideration and renders the decision to issue the Notices, and the review decisions, unreasonable ones. HMRC can point to the newspaper report of the Swansea trading standards prosecution of Mr Davies as evidence that he must have been involved with the Clear Group. But Mr Davies does not deny that he had become involved from February 2014, and we cannot see from the evidence that the newspaper report justifies any finding by HMRC that he was involved in those companies before February 2014.

37. We now turn to the relevance of Mr Davies' bankruptcy in 2013. Mr Rahman submits that this is irrelevant. We agree with him. For it to be relevant, HMRC need to show that it supports their view that the Company is linked to other entities which have failed owing HMRC tax, and thus the Company represents a risk to the revenue. If HMRC had evidence that Mr Davies' bankruptcy was caused, for example, by creditors (for example HMRC) calling on personal guarantees because of a failure by a company to pay debts including tax debts, we can see that that bankruptcy might be a relevant factor. But there is nothing to suggest that they had any such evidence. The bankruptcy took place in 2013, some five years before the Notices were issued. Nor can we see the relevance of Mr Davies becoming a director when he was an undischarged bankrupt. It might show that he was prepared to play fast and loose with regulatory requirements relating to company law. But we cannot see how it affects the likelihood of the Company failing to meet its tax obligations.

38. So we also find that Mr Davies' bankruptcy is an irrelevant factor which should not have been taken into account in the decision firstly to issue the Notices and then not to overturn that decision on review.

39. Thus, since HMRC have taken into account irrelevant factors (namely the tax debts and non-compliance of the Clear Group before February 2014, and Mr Davies' bankruptcy in 2013), their decisions to issue the Notices and to leave that decision unaffected on review (save as regards the amount of PAYE/NICs security) are unreasonable ones.

40. But that is not the end of it. If we find that HMRC would inevitably have come to the same decisions if they had left out of account the irrelevant matters, we can dismiss the appeal. Unfortunately for HMRC there is nothing on which we can base a finding of inevitability. The difficulty for HMRC in not having Officer Ogburn present in person to give evidence is that it is very difficult for HMRC to explain the weight that she had given to the various factors on which she based her decision. The only comments about weight of evidence have been made

in respect of the newspaper reports which Officer Wild explained were given little weight by Officer Ogburn. So we do not know the weight that Officer Ogburn gave to the bankruptcy or the pre February 2014 tax failings by the Clear Group.

41. HMRC might protest that the tax failings by Resec alone are sufficient to justify their decisions. But if they did so protest, they face some difficulty given the comments made by Officer Telfer in his PAYE/NICs review letter. In that letter, having reviewed the tax position of Resec and Specialist Monitoring Services on which Mr Rahman had made representations, Officer Telfer said this

42. "Had this been the only instance in which a company connected to Mr Davies had encountered difficult trading conditions and then gone out of business owing HMRC PAYE and NIC arrears then I could accept that there would be a case to be made that HMRC was being unreasonable in requiring security in respect of Tower Hire and Sales Ltd. As it is, though, the company's failure and the arrears to HMRC owing when it entered liquidation is a situation that is on all fours with the failures of several previous companies with which Mr Davies was involved"

43. It is not apparent precisely which "several previous companies" Officer Telfer is referring to. But it seems to us likely, given that the only companies which were taken into account by Officer Ogburn other than the two mentioned above, were those in the Clear Group, that they were the Clear Group companies.

44. So the tax position of these companies is something which was a factor, and perhaps a significant one, which was considered as part of the decision making process.

45. Whilst we think that if HMRC had left out of account the irrelevant matters that we have identified they might well have come to the same conclusion, we cannot say that they would inevitably have come to the same conclusion.

DECISION

46. For the reasons given above it is our view that HMRC have taken into account irrelevant matters and thus their decision to issue the Notices, and to uphold that decision on review (save as regards the amount of security for PAYE/NICs) is flawed. Accordingly we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 28 OCTOBER 2019