NCN: [2021] UKFTT 229 (TC)

TC08178

PAYE, NIC & VAT – notices of requirement to pay security – whether or not the appeal is against the whole decision-making process – yes – whether or not the decisions were ones that could not reasonably have been arrived at – no – appeals dismissed

FIRST-TIER TRIBUNAL	**Appeal number:**	**TC/2019/03736**
TAX CHAMBER		**TC/2019/04636**
		TC/2019/04637
		TC/2019/04438
		TC/2019/04641
		TC/2019/04634

BETWEEN

SOUTHEND UNITED FOOTBALL CLUB LTD
RONALD MARTIN
DAVID MARKSCHEFFEL
FRANKLIN VAN WEZEL
GARY LOCKETT
GEOFFREY KING **Appellants**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC

Sitting in public at Taylor House, 88 Rosebery Avenue, London, EC1R 4QU on 4 March 2020 with further written submissions dated 23 March 2020 and 30 April 2020. A summary decision was released on 30 December 2020. An application was made by the Appellant for a full decision to be requested out of time on 15 March 2021 with submissions in respect of the same on 19 March 2021. HMRC agreed to the application on 15 April 2021.

Mr Tim Brown, Counsel, for the Appellants

Mr Alexander Barrett, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Southend United Football Club Ltd ("SUFC") is, as the name suggests, a company carrying on business as a football club. Mr Martin, Mr Markscheffel, Mr Van Wezel, Mr Lockett and Mr King are directors of SUFC ("the Directors").

2. These appeals relate to notices of requirement to provide security for SUFC's PAYE, NIC, and VAT ("the Notices"). The Notices relating to PAYE and NIC, in their varied form, require security for 24 months in the total sum of £711,847, comprising £443,608 in respect of PAYE and £268,239 for NIC. The Notices relating to VAT, in their varied form, were in the sum of £40,950. The Notices provided for joint and several liability as between SUFC and each of the Directors.

3. The parties agree that the appeals all turn upon the same matters and will stand or fall together. The imposition of security and the duration of security are in issue. Subject to those matters, the quantum of the security is not in dispute.

FINDINGS OF FACT

4. I heard evidence from Mr Martin on behalf of SUFC and the Directors and from Mr Butler (the original decision-making officer) on behalf of HMRC. Both witnesses gave clear and credible evidence and were doing their best to assist the Tribunal.

5. I make the following findings of fact based upon the witness evidence and the documents placed before me (much of which was not in dispute in any event).

6. SUFC is a professional football club and is a member of the English Football League.

7. Mr Martin accepted that SUFC's payment history for PAYE, NIC and VAT was, to use his word, erratic. Mr Martin explained in his evidence that this was because of cash flow issues and the delay in finalising plans which would provide long term stability for SUFC. These plans included the relocation of SUFC's ground from its current ground at Roots Hall to a new ground known as Fossets Farm. A residential development of the current ground would raise funds. Further, the development of the new ground would include a new stadium, facilities and a retail park which would generate income for SUFC. He also said that this was compounded by injuries sustained by 14 of the first team playing squad in late 2017, who still had to be paid whilst injured, notwithstanding that further wages had to be incurred in respect of replacement players.

8. The relevant history prior to the issue of the Notices was as follows. SUFC was the subject of previous Tribunal proceedings relating to an appeal against a notice of requirement to give security in respect of VAT issued on 13 July 2012. The appeal was dismissed by the Tribunal (Judge Bishopp and Mrs Newns) on 23 October 2013 (see [2013] UKFTT 715 (TC)).

9. A notice of requirement to give security in respect of PAYE and NIC was issued in 2015 but subsequently withdrawn.

10. A notice of requirement to give security in respect of PAYE and NIC was issued on 24 November 2016 ("the 2016 Notice").

11. The 2016 Notice was withdrawn by a letter dated 23 January 2017. This letter included the following:

> "Security was required as a result of concerns over the compliance of Southend United Football Club Ltd (SUFC). There has been, as you accept, a

> history of late compliance. Such late payment has been accepted by the Vat and Duties Tribunal as a risk, giving cause for 'fear that the trader will eventually find itself unable to pay at all.' I believe it was entirely reasonable to issue the Notice.
>
> The club has been, at times, dependent on financial support from its parent company. You have provided some reason for expectation, evidenced by accounts extracts, that such support will continue to be available.
>
> You have also provided evidence that the significant plans for the sale of Roots Hall ground and development of a new ground are well advanced. You have explained the commercial importance of this to SUFC's finances.
>
> You have provided evidence of recent release of monies expected some time ago in respect of a transfer.
>
> In addition, following discussions over the future compliance, a specific undertaking that returns will be paid in full and on time has been received.
>
> In the light of the foregoing I am prepared to withdraw the Notice of Requirement. However the situation will be monitored to ensure that SUFC does, indeed, remain compliant. Should any payment not be received in full and on time we reserve the right to issue a Notice of Requirement without any further warning. Should this be necessary it is unlikely that assurances of compliance will carry sufficient weight to enable the Notice to be withdrawn."

12. General education letters were issued on 6 March 2018 and 13 September 2018.

13. SUFC regularly paid its PAYE, NIC and VAT liabilities late after the withdrawal of the 2016 Notice. HMRC's position was that these liabilities were "habitually" paid late (as referred to in HMRC's letter dated 21 February 2019). SUFC and the Directors did not take issue with this characterisation.

14. A table dated 13 January 2019 shows that payments of VAT were late for each return for the periods from 07/17 to 09/18 with the exception of 07/18 which was paid a day early. Of the late periods, nine were one day late, four were two days late and the 09/18 period was 40 days late, 10/18 was, as at 13 January 2019, unpaid and 37 days late and 11/18 was, as at 13 January 2019, unpaid and six days late.

15. A table dated 14 January 2019 shows that payments of PAYE were late for 11 periods from 03/17 to 12/18. These varied from 1 to 23 days late. The same table shows that payments of NIC were late for 12 periods from 03/17 to 12/18, also varying from 1 to 23 days late.

16. As at 18 January 2019, SUFC was in arrears of PAYE and NIC in the sum of £208,159.89 and VAT was outstanding in the sum of £16,209.30.

17. On 18 January 2019, Mr Butler issued the Notices requiring security for 24 months in the total sum of £920,006.90, comprising £578,620.31 in respect of PAYE and £341,386.59 in respect of NIC. The basis for this was stated in the Notice as being because, "HMRC believe there is a risk that Southend United Football Club Ltd will not pay the Pay As You Earn (PAYE) and National Insurance Contributions (NIC) that are or may become due."

18. Also on 18 January 2019, Mr Butler issued the Notices requiring security for VAT in the sum of £76,570.30. This was calculated as a four-month period plus any arrears of VAT. The Notices made no mention of the duration of the security but did enclose VAT Notice SS/FS2a which includes the following:

> "We normally hold security for VAT for at least 12 months for a business on monthly returns and 24 months for a business on quarterly returns. During this time we'll monitor the tax affairs of the business. We'll return the security

> when we consider there's no longer a risk that the business will fail to pay the VAT that's due or that may become due."

19. Mr Butler gave evidence as to his reasoning in issuing the various Notices. In summary, he said that he took into consideration the previous Tribunal case, previous warnings, further defaults, and outstanding amounts of PAYE, NIC and VAT. He also referred to the compliance charts and noted that there had been ever decreasing compliance since the 2016 Notice had been withdrawn. Further, he treated payments which were only one day late as on time for compliance purposes. He also noted that late payment was itself a risk.

20. On 1 February 2019, SUFC paid the sum of £209,218 in respect of outstanding PAYE and NIC liabilities up until November 2018. The December 2018 liabilities were also paid in full by 4 February 2019 with the effect that, as at 4 February 2019, PAYE and NIC were up to date.

21. In early February 2019, VAT payments were made in the sum of £33,980.35 to cover all VAT payable by SUFC up to and including the period ending December 2018.

22. By two letters dated 14 February 2019, Taylor Wessing (on behalf of SUFC and the Directors) appealed against the Notices relating to PAYE and NIC and sought a review of the Notices in respect of VAT.

23. By letters dated 21 February 2019, Mr Butler gave his view of the matter in respect of the Notices relating to PAYE and NIC. He reduced the amount of the security to £711,847 but otherwise confirmed the Notices.

24. By a letter dated 13 March 2019, Taylor Wessing sought a review of the Notices relating to PAYE and NIC.

25. By letters dated 29 March 2019, Mr Lennox (HMRC's review officer) reviewed and upheld the Notices relating to VAT but recommended that the quantum be revisited following the fact that the debt included in the original calculations had been repaid. His review letter included the following:

> "When considering this issue I gave considered all the documentation issued in respect of this matter, and HMRC's reasoning for the decision to request security.
>
> In doing so, I wish to confirm I have also taken into consideration all the points made on your behalf by your agent in the letter dated 14 February 2019.
>
> Having done so, I have noted the fact the club has now cleared its outstanding debts for the VAT periods 10/18 & 11/18. Equally, I can also confirm I have considered the comments regarding the future plans and growth of the club, primarily in connection with the proposed new ground.
>
> I wish to confirm I have therefore considered if the fact you have now paid the outstanding debt provides me with justification to cancel the decision to request VAT security. A review of the relevant legislation and guidance however confirms this is not possible. This is on the basis my review must consider the facts known at the time the decision was made and come to a conclusion on whether that decision was fair and reasonable.
>
> Having considered this issue it is clear that at the time the security was raised in this case, the VAT returns for periods 10/18 & 11/18 remained unpaid. I believe such payments were subsequently received on 1 February 2019 and 4 February 2019.
>
> It is apparent therefore that at the time the request for security was made, there was an existing VAT debt on file which coupled with the compliance history

of the company has led to the raising of the NoR. Accept the payments have been made late rather than not at all, this however still poses a risk to the revenue.

In support of this viewpoint I would reference the previous tribunal hearing involving the company whereby it was confirmed that late payment is viewed as depriving HMRC of the tax due to them, just as non-payment does. It is reasonable to conclude therefore that persistent lateness, as in this case, casts doubt on the ability of the company to pay its debts as they fall due.

Additionally, I am aware there has [sic] been previous requests for security and I wish to specifically refer to the latest request which had been made in November 2016 and subsequently withdrawn in January 2017. The letter withdrawing the request concluded with the final paragraph:

"Should any payment not be received in full and on time we reserve the right to issue a Notice of Requirement without any further warning. Should this be necessary it is unlikely that assurances of compliance will carry sufficient weight to enable the Notice to be withdrawn."

In the light of these comments, and having considered all of the relevant facts, I am therefore content that HMRC Officer Gary Butler has been justified in his decision to request securities in this case in line with the legislation held at Paragraph 4(1A) and paragraph 4(2) of Schedule 11 to the Value Added Tax Act 1994.

At this point I would also confirm that having reviewed all of the facts there is nothing which would lead me to believe that HMRC have acted in a way in which no reasonable panel of Commissioners would have acted, nor that they had taken into account some irrelevant matter or had disregarded something to which they should have given weight.

Having considered the legislation referred to earlier in my letter I am also satisfied there is no indication HMRC have erred on a point of law.

I am therefore satisfied that HMRC Officer Gary Butler was correct to issue the Notice of Requrement (NoR) dated 18 January 2019."

26. By letters dated 1 April 2019, Mr Sleight (HMRC's review officer) reviewed and upheld the Notices relating to PAYE and NIC save that the quantum was reduced to £711,847 as provided for in the letter dated 21 February 2019, comprising £443,608 in respect of PAYE and £268,239 in respect of NIC. These reductions reflected the amount paid since the Notices as at 21 February 2019.

27. Mr Sleight's review letter explained what he had considered in his review. This included a summary of the legislation and, under the heading "The evidence I have seen", the following matters:

"i. The Company was incorporated in 1906.

ii. The current directors of the Company are named as [details omitted from this decision as it refers to the appellants' dates of birth and national insurance numbers]

iii. The Company had a Mandation Date for Real Time Information of 6 April 2013 and joined 25 April 2013.

iv. Real Time information does show payments up to date although some payments were received late and for the period 6 October 2018 to 5 January 2019 penalties amounting to £16,019 was incurred in respect of late payments. Earlier years also show late payment penalties.

v. Notices of Requirement were served on those named as being liable jointly and severally.

vi. HMRC systems shows [sic] that the Company was issued a General Education Letter on 06 March 2018 highlighting the importance and impact of late and incorrect Real Time Information submissions although no response was requested (or expected). A further similar letter was issue[d] on 13 September 2018.

vii. Four previous security requests have been made and the latest was in November 2016, which was withdrawn, however this came with a caveat in that the Company was made aware that, "… any payment not be received in full and on time we reserve the right to issue a notice of requirement without further warning."

viii. The Company has had [sic] repeatedly been made aware of the fact that a failure to meet its obligations will result in Notices being issued.

ix. The Notices of Requirement were issued at a time when there was non-compliance in regard to the payment of Pay As You Earn and National Insurance Contributions and when this was subsequently paid a reduction in the quantum was offered.

x. Consideration was given to the matter of the Company's future and it was explained to those named on the notices that the ongoing investment did not provide the reassurances that future liabilities will be paid in full and on time. Whilst the investments are claimed to show the ongoing commitment to the financial stability of the Company this has not been reflected in its recent compliance history. As an employer, it is the Company's responsibility to ensure that the Pay As You Earn and National Insurance Contributions deducted from its employee's [sic] wages and paid to HMRC on time; this has not been done on several occasions and it is reasonable to assume that those deductions have been used to support cash flow of the business.

xi. Consideration was also given by HMRC to the fact that circumstances have changed and that HMRC has offered to lower the amount of the security to reflect the payments that have been made, but it is unclear if the said payments would have been made when they were if it was not for the action taken by HMRC.

xii. Previously security has been asked for and the last time a notice was issued for Pay As You Earn and National Insurance Contributions then upon appeal the notice was withdrawn as it considered that the Company was trying to improve its compliance in this respect, but the Company's behaviour appears not to have changed.

xiii. Where there is evidence that past failings are being addressed and payments are being made on time that may indicate a reduction in risk which it would be proper to take into account, but records show that the Company has persistently made late payments.

xiv. The fact that the Company has stated that it is committed to the future financial security of the Company and pointing to a potential development of the clubs ground is not in itself any guarantee that Pay As You Earn and National Insurance Contributions will not be paid late, or not at all. Furthermore it was explained by your agent that planning permission had yet to be obtained.

xv. The Company has not provided any kind of plan to remedy the persistent compliance failure and no evidence has been provided by the Company to show any financial security, cash flow etc. At the time security

> was requested, the Company owed HMRC considerable amount of money; hence the quantum requested."

28. Further details were given as to what was considered in respect of the quantum calculation, which largely turned upon a further summary of the legislation and HMRC's guidance. He then stated that:

> "Whilst the current position on Real Time Information suggests compliance at face-value, that is not the full picture and given the compliance history, the lack of any reassurance for the future and that the legislation was written for the following purposes –
>
> - To remove unfair commercial advantage gained by rule-breaking
> - To drive up and encourage compliance
> - Influence the behaviour of a taxpayer
> - Prevent losses to the Crown
>
> Then I do not consider it unreasonable that HMRC has asked for security to the value that it has. Therefore the amount of PAYE and NIC required under the Notice is varied down to Pay As You Earn £443,608.00 and NIC £268,239.00 totalling £711,847 as previously offered by HMRC; it should be noted that the new calculation based on most recent four months Real Time Information would amount to £826,003.27."

29. Under the heading "Conclusions", Mr Sleight stated that, "Having considered the information made available to me I have concluded that the HMRC decision is varied as set out above."

30. By letters dated 5 April 2019, Mr Butler confirmed the reduction of the VAT security to £40,950.

31. Appeals to the Tribunal were issued on various dates ranging from 30 April 2019 to 4 July 2019. HMRC has not raised any objection to the timing of the appeals.

32. The following issues arise within this appeal:

(1) The appropriate legal framework.

(2) The significance of the absence of oral evidence from the review officers.

(3) Whether or not the Notices were unreasonable.

THE LEGAL FRAMEWORK - PAYE AND NIC

Common Ground

33. HMRC's power to require security for PAYE and NIC is by virtue of Part 4A of the Income Tax (Pay As You Earn) Regulations 2003 ("the PAYE Regulations 2003") and Part 3B of the Social Security (Contributions) Regulations 2001 ("the NIC Regulations 2001").

34. A right of appeal to the Tribunal is provided by regulation 97V of the PAYE Regulations 2003 and regulation 29V of the NIC Regulations 2001.

35. The parties agreed that the Tribunal's jurisdiction is a mix of supervisory and appellate. The position is summarised as follows in *D-Media Communications v HMRC* [2016] UKFTT (TC) ("*D-Media*") at [18] to [21].

> "[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 Comrs* [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 Comrs v Peachtree Enterprises Ltd* [1994] 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."

36. The parties also agreed that the relevant test for the supervisory element is as to whether or not HMRC acted in a way in which no reasonable panel could have acted or took into account some irrelevant matter or disregarded something to which they should have given weight (see Neill LJ in *John Dee Ltd v HMRC* [1995] STC 941 ("*John Dee*")). Neill LJ stated as follows at 952:

> "It seems to me that the statutory condition (as Mr Richards termed it) which the Tribunal has to examine in an appeal under s 40(1)(n) is whether it appeared to the commissioners requisite to require security. In examining whether that statutory condition is satisfied the tribunal will, to adopt the language of Lord Lane, consider whether the commissioners 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. The tribunal may also have to consider whether the commissioners have erred on a point of law. I am quite satisfied however, that the tribunal cannot exercise a fresh discretion

> on the lines indicated by Lord Diplock in *Hadmor*. The protection of the revenue is not a responsibility of the tribunal or of a court."

37. However, even where a decision is found not to have taken relevant material into account, an appeal may be dismissed if the decision would inevitably have been the same had it been considered. Neill LJ stated as follows in *John Dee* at 953a (see also *GB Housley Ltd v HMRC* [2014] UKUT 320 (TCC) at [11]):

> "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."

38. The material to be considered is that available at the time of the relevant decision (see *Customs and Excise Commissioners v Peachtree Enterprises Limited* [1994] STC 747 ("*Peachtree*") *per* Dyson J at 751).

Submissions

39. There was a dispute as to whether the appeal was against the original decision to issue a notice to require security or against the review decision. There was also a dispute as to the evidence which must be provided by HMRC as to the basis for the decision.

40. Mr Brown submitted that the appeal was against the reasonableness of the whole decision-making process, including the review officer's decision. He particularly relied upon *Bluechipworld Sales & Marketing Ltd v HMRC* [2019] UKFTT 705 (TC) ("*Bluechipworld*") in this regard, albeit noting that, as a First-tier Tribunal decision, it is not binding upon me. The Tribunal (Judge Bedenham and Mr Bayliss) stated as follows at [29] and [30]:

> "[29] We reject HMRC's submission that, even where there has been a review of a decision to require security, the relevant decision for the purpose of an appeal remains the decision as originally made. Such an approach is not consistent with the statutory provisions (certainly in relation to VAT) which provide that on review any further representations provided since the original decision should be considered and that the deadline for an appeal is 30 days after the review has been concluded. Further, such an approach as contended for by HMRC is illogical in that it is the review decision that is HMRC's 'last word' and it may be that HMRC's position/reasoning on review is considerably different to that expressed originally - in those circumstances it would be nonsensical for an appeal to focus solely on the original decision. In our view, the Tribunal needs to consider the decision as it stands following the review. In some cases the review decision will in effect have superseded the original decision, in other cases the original decision and the review decision will need to be considered cumulatively (this was the approach adopted by Lady Mitting in *Sanleo Ltd & Zonin Restaurants Ltd v HMRC* [2010] UKFTT 266 (TC)).
>
> [30] We note that on the facts of this case, if the approach in *Pachangas* is correct, the original decision (considered on its own) would arguably be flawed by reason of it not containing any reasons for the decision (albeit the Tribunal would still have dismissed this appeal on the basis that it is inevitable that the same conclusion would be reached if the decision was taken again). However, we are of the view that any defect caused by the initial failure to give reasons was cured by the giving of reasons in the review letters".

41. Mr Brown also relied upon the following First-tier Tribunal decisions for the same proposition: *Premier Telecom Solutions Ltd v Revenue and Customs* [2012] UKFTT 42 (TC) at [45], *D-Media* at [40], *Derby Access Scaffolding Ltd v Revenue and Customs* [2018] UKFTT

203 (TC) at [6], and *Tower Hire & Sales Ltd v HMRC* [2019] UKFTT 648 (TC) ("*Tower Hire*") at [31].

42. Mr Barrett submitted that the decision in question is the original decision and not any variation made by the review conclusions. He relied upon the following legislation in support of his submissions: sections 31, 49A, 49B, 49G, 49E, 49I and 54 of the Taxes Management Act 1970 ("TMA 1970"), regulation 97V of the Income Tax (Pay as You Earn) Regulations 2003 ("the 2003 Regulations"), and regulation 29V of the Social Security (Contributions) Regulations 2001 ("the 2001 Regulations").

43. Mr Barrett relied upon *Fidex Ltd v HMRC* [2015] STC 702 ("*Fidex*") at [54] to [57] of *Fidex*, in which the Upper Tribunal stated as follows:

> "[54] As we have mentioned, Fidex drew our attention to ss 49A to 49I TMA (see para [37] above). These were inserted with effect from 1 April 2009, and were not in force when *Tower MCashback* was heard.
>
> [55] The sections apply where, following the issue of the closure notice, the taxpayer appeals. The appeal is made initially to HMRC. The new sections permit the taxpayer to require, and HMRC to offer, a review of 'the matter in question'. This phrase is defined by s 49I(4)(a) to mean 'the matter to which an appeal relates'. On offering a review HMRC must notify the taxpayer of its view of the matter in question. Where a review takes place the nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances (s 49E(2)). HMRC are required to notify the taxpayer of the conclusions of the review 'and their reasoning' within a prescribed period.
>
> [56] Once the results of the review have been communicated, the taxpayer may notify the appeal to the tribunal, and s 49G(4) provides that the tribunal 'is to determine the matter in question'.
>
> [57] The language of ss 49A to 49I does not affect the scope of the appeal. The 'matter in question' is defined as the matters to which an appeal relates and, as we have seen, here that refers to an appeal against 'an amendment of a company's return' which is required to give effect to conclusions stated in a closure notice (see sub-paras 34(2) and (3) of Sch 18 to the Finance Act 1998)."

44. Mr Barrett also relied upon the First-tier Tribunal decision of *The Executors of the Estate of David Harrison (Deceased) v HMRC* [2020] UKFTT 68 (TC) at [25] to [30] and the Upper Tribunal decision of *HMRC v NT Ada Ltd* [2018] UKUT 59 (TCC) ("*NT Ada*").

45. Mr Barrett distinguished the cases of *Tower Hire, Bluechipworld* and *D-Media* and noted that they did not take into account *Fidex*.

Discussion

46. I find that the reasonableness of the whole decision-making process, including the review officer's decision, must be taken into account. It remains the case that the decision which is being appealed is the notice of the requirement to give security for PAYE and NIC. However, that decision is as varied or supplemented by the review decisions. This therefore means that the reasonableness of the Notices is to be considered taking into account the information available at the time of the review decision and the decision-making process as a whole including the review decision. This is for the following reasons.

47. First, section 97V(5) of the PAYE Regulations 2003 refers to, "an appeal under paragraph (1) that is notified to the tribunal." The same is true of section 29V(5) of the NIC Regulations 2001. It is therefore the appeal against the notice which is then referred, rather than an appeal against the review decision itself.

48. Secondly, sections 49A, 49E and 49F of TMA 1970 treat the review process as a separate one to the decisions themselves as follows:

> "49A Appeal: HMRC review or determination by tribunal
>
> (1) This section applies if notice of appeal has been given to HMRC.
>
> (2) In such a case—
>
> (a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),
>
> (b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or
>
> (c) the appellant may notify the appeal to the tribunal (see section 49D).
>
> (3) See sections 49G and 49H for provision about notifying appeals to the tribunal after a review has been required by the appellant or offered by HMRC.
>
> (4) This section does not prevent the matter in question from being dealt with in accordance with section 54 (settling appeals by agreement).
>
> …
>
> 49E Nature of review etc
>
> (1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.
>
> (2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.
>
> (3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—
>
> (a) by HMRC in deciding the matter in question, and
>
> (b) by any person in seeking to resolve disagreement about the matter in question.
>
> (4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.
>
> (5) The review may conclude that HMRC's view of the matter in question is to be—
>
> (a) upheld,
>
> (b) varied, or
>
> (c) cancelled.
>
> (6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—
>
> (a) the period of 45 days beginning with the relevant day, or
>
> (b) such other period as may be agreed.
>
> (7) In subsection (6) "relevant day" means—
>
> (a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,
>
> (b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached.

…

49F Effect of conclusions of review

(1) This section applies if HMRC give notice of the conclusions of a review (see section 49E(6) and (9)).

(2) The conclusions are to be treated as if they were an agreement in writing under section 54(1) for the settlement of the matter in question.

(3) The appellant may not give notice under section 54(2) (desire to repudiate or resile from agreement) in a case where subsection (2) applies.

(4) Subsection (2) does not apply to the matter in question if, or to the extent that, the appellant notifies the appeal to the tribunal under section 49G.

…"

49. Thirdly, by virtue of section 49G(4) of TMA 1970, the appeal is against "the matter in question". The matter in question in the present case is that of the Notices. Section 49G provides as follows:

"(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "post-review period" means—

(a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or

(b) in a case falling within subsection (1)(b), the period that—

(i) begins with the day following the last day of the period specified in section 49E(6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9)."

50. Fourthly, the fact that it is the Notices which constitute the decisions appealed against does not mean that those Notices exist in a vacuum or cannot take into account the review. Instead, where the review amends or varies (either in its own right or requiring a further process to amend or vary) the substance or reasoning for the Notices, the Notices take effect as amended

or varied by the review decisions. Indeed, in the present case, the Notices were varied by the review (or at least the variations offered were confirmed by the Notices).

51. Fifthly, whilst *Sanleo* and *Bluechipworld* are not binding on me, I agree with what is said in them at [20] and [29] respectively. *Sanleo* and *Bluechipworld* are not saying that the decision being appealed against is the review decision; instead, they are saying that the decision being appealed against is the notice of requirement as it stands after the review, and so the entire decision-making process must be taken into account when considering the reasonableness of that decision.

52. Sixthly, *Fidex* was dealing with the scope of the arguments in respect of a closure notice rather than the interplay between the review process and an original decision. The Upper Tribunal decision in *Fidex* was affirmed in the Court of Appeal in *Fidex Ltd v HMRC* [2016] STC 1920, setting out the following principles at [45] *per* Kitchin LJ:

> "[45] In my judgment the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court. So far as material to this appeal, they may be summarised in the following propositions:
>
> (i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> (ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> (iii) The closure notice must be read in context in order properly to understand its meaning.
>
> (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

53. Seventhly, I note that if the Notices were to be considered without reference to the review decisions, HMRC would face the difficulty that the Notices themselves did not provide any explanation for the basis upon which they were made.

THE LEGAL FRAMEWORK – VAT

Common Ground

54. HMRC's power to require security for VAT is by virtue of paragraph 4 of schedule 11 to the Value Added Tax Act 1994 ("VATA 1994"), the relevant sub-paragraphs of which are as follows:

> "(1A) If they think necessary for the protection of the revenue, the Commissioners may require, as a condition of making any VAT credit, the giving of such security for the amount of the payment as appears to them to be appropriate.
>
> (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.
>
> …

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

55. A right of appeal to the Tribunal is provided by section 83(1)(l) of VATA 1994.

56. The parties agreed that the jurisdiction of the Tribunal in respect of VAT is supervisory. They also agreed that the principles set out above in *John Dee* and *Peachtree* are equally applicable to VAT.

Submissions

57. Mr Brown submitted for the same reasons as set out above that the appeal in respect of the notice of requirement to provide security for VAT was against the reasonableness of the whole decision-making process including the review decisions. He also made the same submissions as above in respect of the absence of evidence from the review officer.

58. Mr Barrett submitted that the review process provided by sections 83A to 83G of VATA 1994 are similar to the provisions within direct tax but that review conclusions cannot result in a deemed settlement, and section 83F(5) refers to the review conclusions upholding varying or cancelling the "decision". He particularly referred me to *NT Ada* at [26] to [30], in which the Upper Tribunal stated as follows:

> "[26] Section 83 contains a right of appeal against an assessment made under s 76 and, again, there is nothing to indicate that this right is dependent on the assessment having been made or notified in a particular form, or on it having been accompanied by an offer of a review. It simply requires there to have been an assessment made (and we would add notified) under s 76.
>
> [27] Section 83A, the provision which imposes an obligation to offer a review, refers to a 'decision' of HMRC in respect of which 'an appeal lies under section 83'. The term 'decision' does not appear in s 76 but s 83(2) makes it clear that the reference to a decision with respect to which an appeal lies under s 83 includes any matter listed in s 83(1). In other words, it includes the amount of any penalty assessed under s 76, within s 83(1)(q).
>
> [28] Whilst it is clear that Parliament did intend that a person receiving an appealable decision should be offered a review, we can see nothing in the terms of s 83A to support the proposition that failure to do so renders an assessment invalid, invalidly notified, or not capable of appeal. Rather, the language indicates that the opposite is the case.
>
> [29] In our view both s 83A(1) and (2) are written in terms of the offer of a review being separate from, albeit something that should be issued alongside, the notification of an appealable decision. The decision itself is the assessment, or strictly the 'amount' assessed (s 83(1)(q)). Section 83A(1) is written on the basis that there is a decision in respect of which an appeal lies. If there was no valid, notified, assessment under s 76 then it is hard to see how any obligation to offer a review would arise. It is the existence of an appealable decision which gives rise to the obligation to offer a review.
>
> [30] This is also supported by s 83A(2). This requires the offer of a review to be made 'at the same time' as the decision is notified. This carries a clear implication that the decision has an existence that is independent of the review offer, and that such offer is not part of the decision, or its notification, but is to be notified alongside it."

59. Further, Mr Barrett submitted that *Half Penny Accountants v HMRC Ltd* [2016] UKFTT 45 (TC) and *Bluechipworld* were wrong insofar as they held that the appeal was against the review decision and that, in any event, they are not binding upon me.

Discussion

60. I find that (in the same way for VAT as for PAYE and NIC) the reasonableness of the whole decision-making process, including the review officer's decision must be taken into account. I agree with Mr Barrett that *NT Ada* is authority for the proposition that the review process is separate from an assessment decision and that it is an assessment decision which is being appealed. On the face of it, a decision to issue a notice of requirement to provide security is to be treated in the same way for these purposes as an assessment. However, I repeat paragraphs 50 to 53 above. Again, I agree with the Tribunals in *Sanleo* and *Bluechipworld* at [20] and [29] respectively to the effect that whilst the decision appealed against is the original notice, the whole decision making process is to be taken into account and so the appeal is against the original notice as it stands in the light of the review.

THE NECESSARY EVIDENCE

Submissions

61. As regards the necessary evidence, Mr Brown submitted that the absence of any witness evidence from the review officers in the present case (Mr Sleight for PAYE and NIC and Mr Lennox for VAT) was fatal because the reasonableness of the decision of the review officer was in issue, He relied upon *Sanleo Restaurants Ltd v HMRC* [2010] UKFTT 266 (TC) ("*Sanleo*") at [20] as follows:

> "[20] It was accepted by Mr. Mansell that the tribunal was considering not only the original Notices of Requirement raised by Mr. Reeves but the entire decision making process, culminating in the review letter of Mrs. Ogburn. It follows from this that we are looking at the complete process and have to be satisfied also that Mrs Ogburn's decision to uphold the Requirements was a reasonable decision, reasonably taken. The problem which we the tribunal have is that we heard no evidence, either in written form or orally, from Mrs. Ogburn. We raised with Mr. Mansell her absence and he agreed that she was not present, but told us that he had spoken to her. He advised us that she told him that she 'had considered all information put forward' and that she had also spoken to the administrator. This is hardly acceptable evidence. We have no idea what 'all information put forward' consisted of. We know that she considered in some detail the submissions put in by Mr. Della Pesca's accountants because they are referred to in her review letter. However in that letter she did not refer to any other material which she looked at or to any other reasons. Considering the first decision, ie that of Mr. Reeves, we are satisfied that he took into account all relevant information which was available to him, which of course did not include the later submissions made by the companies. He was clearly aware of the ongoing financial difficulties of the company. We were told he considered the compliance record but believed it to have been outweighed by what he saw as two phoenix companies replacing the defunct company. We cannot say his decision was one which no reasonable body of Commissioners could have made. However we cannot say the same of Mrs. Ogburn's decision for the simple reason that we do not know what matters she took into account. Without hearing from her, it is quite impossible for the tribunal to be satisfied that her decision to uphold the Requirements was one which was reasonably taken. Most importantly we have no idea what weight, if any, she attached to the previous good compliance record and how she balanced that against the failures, given her knowledge of the reasons for those failures."

62. Mr Brown also submitted that he would have wanted to ask Mr Sleight questions as to points (x) and (xi) in his review letter and also as to the purpose of the legislation requiring security. He also submitted that without oral evidence on the point it was not possible to establish what bearing or weight the various factors had on the decisions. He did not submit that he would have had any questions for Mr Lennox.

63. Mr Barrett did not accept that the absence of any evidence from the review officers was fatal. He submitted that review officers were simply considering the original decision and would refer back any substantive new information to decision making officers. He also makes the point that SUFC could have applied for a direction that Mr Sleight or Mr Lennox attend pursuant to rule 16 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules").

Discussion

64. I note that neither Mr Brown nor Mr Barrett distinguished between the Notices relating to PAYE, NICs and VAT in their submissions relating to the necessary evidence. I agree that the answer is the same for each.

65. I find that the absence of witness evidence from the review officers is not in itself fatal to HMRC's defence of the present appeal. The task for the Tribunal is to consider the reasonableness of the decision-making process. In the present case, the review letters themselves provide a full explanation of what was taken into account in upholding the Notices other than varying their amount. Whilst Mr Brown submitted that he would have had various questions for the review officers (or at least Mr Sleight), he did not go so far as to suggest that he did not accept that the basis for the review decisions was as set out within the review letters. If SUFC wished to challenge HMRC's position that the reasoning for each of the review decisions was as set out within each of the review letters, they could have asked for information from HMRC in that regard or could have applied for a direction that either of the review officers be required to attend.

66. This is not to say that HMRC does not need to provide evidence as to its reasoning for decisions in such cases. Sometimes the evidence relied upon will be documentary evidence alone, whereas on other occasions that documentary evidence will be supplemented by oral evidence. However, where HMRC relies only on documentary evidence by way of the review decisions themselves to provide evidence of the reasoning without oral evidence, HMRC takes the risk of a finding that that documentary evidence is insufficient to understand the reasoning or that an appellant challenges the proposition that the review decision accurately reflects HMRC's reasoning. Indeed, *Sanleo* is an example of a case where the Tribunal did not know what the review officer took into account because the review letter only dealt with one point raised by the appellant's representatives, whereas it was submitted by HMRC that she had considered all information put forward (see *Sanleo* at [20]). In the present case, however, the review letters are full ones, SUFC have not challenged either of them as accurate representations of what was taken into account, and HMRC have not asserted that other matters not referred to in the review letters were taken into account. I note that Mr Butler's evidence was merely to explain his own decisions.

67. It is correct that the absence of oral evidence means that the weight given to any particular factor cannot be considered further than that set out in the documentary evidence. Again, however, it is wrong to say that there is no evidence on the point. The review letters themselves set out the reasoning for the decisions. Insofar as the review letters do not place any greater weight on one or more of the factors referred to within them, in the circumstances of the present case none is to be given any particular priority and each of the matters referred to in the review letters is to be taken as having had a material effect on the respective decision.

THE REASONABLENESS OF THE NOTICES

Submissions

68. Mr Brown submitted that the Notices were all unreasonable because there was no evidence from the review officers. In particular, he said that he would have asked Officer Sleight questions about what bearing his view of the purpose of the legislation had on his decision in respect of PAYE and NIC.

69. Crucially, the fact that there were no outstanding debts by the time of the review decisions was not taken into account. As regards the PAYE and NIC Notices, point (ix) of the review letter noted that the Notices were issued at a time when sums were outstanding. However, the reconsideration of the Notices in the light of the payment of the arrears seems only to have related to quantum. As regards the VAT Notices, the review officer expressly stated that he was not taking the payments into account as they were made after the Notices were issued and he restricted himself to the facts known at the time the decision was made.

70. Mr Brown also submitted that the duration of two years for the security was excessive because it did not take into account that after a reasonable time of compliance there was only one outstanding payment at the time the Notices were issued.

71. In summary, Mr Barrett submitted that: HMRC took into account the non-compliant history of SUFC; the amounts were reduced in order to take into account the payments made; the relocation plans did not satisfy HMRC of the risk of non-payment; and two years is a standard period of time for the duration of security.

Discussion

72. I find that, taking into account the whole decision-making process, the decisions to require SUFC and the Directors to provide security for PAYE, NIC and VAT were reasonable and I do not accept that they were decisions that could not reasonably have been arrived at. This is for the following reasons.

PAYE and NIC

73. The only matter that Mr Brown submitted was not taken into account was that were no outstanding debts by the time of the review. I do not agree that this was not taken into account. Paragraph (ix) of the review letter notes that the payments were made. Further, paragraph (xi) of the review letter, Mr Sleight stated that, "Consideration was also given by HMRC to the fact that circumstances have changed and that HMRC has offered to lower the amount of security to reflect that payments that have been made, but it is unclear if the said payments would have been made when they were, if it was not for the action taken by HMRC." The fact of the payments clearing the arrears were therefore taken into account but the outcome of doing so was a reduction in quantum rather than withdrawal of the Notices.

74. Mr Sleight's review letter was clear in setting out what had been considered. As such, the absence of his oral evidence does not prevent me from ascertaining what was taken into account in making the review decision. It is clear from Mr Sleight's review letter as set out in paragraph 27 above that HMRC took into account the following matters:

(1) There was a history of late payment.

(2) Previous security requests had been made. Although the latest was withdrawn following explanation of SUFC's plans for the future, it was with the caveat that if any payment was not received in full and on time HMRC reserved the right to issue a notice of requirement without further warning.

(3) SUFC had repeatedly been made aware that a failure to meet its obligations would result in Notices being issued.

(4) SUFC and the Directors' commitment to the future had not been reflected in the recent payment history.

(5) Insufficient evidence had been provided as to plans to remedy the persistent compliance failures.

75. I find that each of these matters was relevant and each when combined together mean that it cannot be said that HMRC acted unreasonably in reaching the conclusion that security in the terms of the Notices was necessary for the protection of the revenue. Further, HMRC did not fail to take into account any relevant matters. Indeed, the combination of the repeated lateness of SUFC's payments, the repeated warnings and the absence of any sufficient evidence that the compliance failures would be resolved provide strong grounds for the need for the protection of the revenue in this case. The payment of the arrears does not affect this as it is plainly incapable of curing the lateness of the payments.

76. In any event, there was no suggestion by Mr Brown that any of the matters set out in Mr Sleight's review letter ought not to have been taken into account. Similarly, he did not submit that incorrect weight was given to any of the matters in the review letter. Whilst I note that Mr Brown was not able to cross-examine Mr Sleight, it was of course still open to SUFC to submit that the weight apparently given to any particular factor on the face of the review letter was too great or too little, but no such submission was made.

77. Mr Brown's argument that the duration of two years was excessive is based upon the suggestion that HMRC did not take into account the amount owing at the time of the Notice. However, paragraph (iv) of the review letter reveals that the compliance record had been taken into account.

78. In any event, I find that this is a reasonable period of time when taking into account (as HMRC did) the number of times SUFC was late in making payments of PAYE and NIC, the period of time which this has been the case for, and the previous warnings and notices given to SUFC.

79. For the avoidance of doubt, I bear in mind the point made in *D-Media* at [21] that the Tribunal is entitled to form its own view as to whether the appellants are persons 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. However, of these matters only the duration of the security is in issue. For the reasons I have set out in paragraph 77 above, find that two years is an appropriate period of time.

80. For the further avoidance of doubt, I also bear in mind that, as set out in *John Dee*, where it is shown that had the additional material contended for been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss an appeal. As such, even if I had held that HMRC did not sufficiently take into account the fact that there were no outstanding debts by the time of the review decisions, I would have found that taking the same into account would still inevitably lead to the same conclusion to issue the Notices in respect of PAYE and NIC. This is because of the matters set out in paragraphs 73 to 78 above.

81. Indeed, even if I had found that it was not possible to reach a conclusion as to what Mr Sleight took into consideration (or as to the weight of the various factors), I find that the decision would inevitably have been the same if he had taken into account the factors contended for by SUFC. Again, this is because of the matters set out in paragraphs 73 to 78 above.

VAT

82. Again, the only matter that Mr Brown submitted was not taken into account was that were no outstanding debts by the time of the review. Again, I do not agree that this was not taken into account. Mr Lennox (the review officer) stated that he considered whether the fact

that the outstanding debt had been paid provided justification to cancel but said that he could not do so because he must consider the facts known at the time the decision was made. Notwithstanding this, however, he did in fact take this into account as he stated that, "It is apparent therefore that at the time the request for security was made, there was an existing VAT debt on file which coupled with the compliance history of the company has led to the raising of the NoR. I accept the payments have been made late rather than not at all, this however still poses a risk to the revenue." It follows that he was treating the risk to the revenue as being the fact that the payment was late when the Notices were issued, not that there was any sum still outstanding at the time of the review.

83. Again, Mr Lennox's review letter was clear as to what he was taking into account; namely, the following matters:

(1) There was a history of late payment.

(2) Late payment casts doubt on the ability of SUFC to pay its debts as they fall due.

(3) Previous requests for security had been made.

(4) The last request for security was withdrawn with the caveat that, "Should any payment not be received in full and on time we reserve the right to issue a Notice of Requirement without further warning. Should this be necessary it is unlikely that assurances of compliance will carry sufficient weight to enable the Notice to be withdrawn."

84. Again, I find that each of these matters was relevant, that no relevant matters were left out of account, and that it cannot be said that HMRC acted unreasonably in reaching the conclusion that security in the terms of the Notices was necessary for the protection of the revenue. I repeat the matters set out in paragraph 75 above.

85. Again, if I had reached the conclusion that HMRC had not taken all relevant matters into account, left relevant matters out of account, or that the absence of oral evidence from Mr Lennox prevented an analysis of what was or was not taken into account, I would have found that the decision would inevitably have been the same if he had taken into account the factors contended for by SUFC. I repeat the matters set out in paragraphs 73 to 78 above in this regard.

86. The Notices in respect of VAT did not set out a duration for the security to be held. As set out above, HMRC Factsheet SS/FS2a was enclosed with the Notices which stated HMRC's standard position that security for VAT would be held for at least 12 months for a business on monthly returns and 24 months for a business on quarterly returns. SUFC and the Directors have not explained why this standard position should not apply. In any event, I find that there are no features in the present case which render this standard approach unreasonable.

DISPOSITION

87. It follows that I dismiss the appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

88. 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.

RICHARD CHAPMAN QC

TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2021