# TC01739

**Appeal number: TC/2011/03718**

***VAT – security – poor compliance record and directors' involvement in previous failed companies – reasonableness of Commissioners' decision – appeal dismissed.***

**FIRST-TIER TRIBUNAL**

**TAX**

**BURGESS RECYCLING LTD** **Appellant**

**- and -**

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

**TRIBUNAL: LADY MITTING (TRIBUNAL JUDGE)**
**RAYNA DEAN, FCA (MEMBER)**

**Sitting in public in Birmingham on 15 December 2011**

**Nigel Harper, Accountant for the Appellant**

**Sylvia Knibbs, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. The Appellant was appealing against the Decision of the Commissioners to serve a Notice of Requirement to provide security under section 11 paragraph 4(2)(a) Value Added Tax Act 1994. The original Notice was served on 18 November 2010, the amount required being varied by Notice dated 11 February 2011. The amended amounts of security were in the sum of £10,200 for quarterly returns or £6,800 for monthly returns.

2. We heard oral evidence on behalf of the Commissioners from the officer who raised the assessment Mr Ian Pumfrey. No oral evidence was given on behalf of the Appellant but submissions on its behalf were made by its accountant, Mr Nigel Harper.

**The Evidence**

3. It was Mr Pumfrey's decision to raise the requirement for security and he did so on the basis of a combination of multiple business failures involving the Appellant's Directors and its own ongoing poor compliance. The Appellant was incorporated on 18 March 2010 and was registered for VAT with effect from the same date. Its two Directors were and are Mr Steven Hamnett and Mr Stephen Leigh. The main business activity is the processing and recycling of scrap metal on site which is then sold on as regrind or compound.

4. Mr Pumfrey was aware that the Appellant's registration was the fourth VAT registered business operated by Mr Hamnett and Mr Leigh from the same premises in similar trades. Both had been involved as Directors in SS Recycling Ltd ("SS"), BPS Stoke Ltd ("BPS") and were still involved as Directors in Burgess Colour and Compounds Ltd ("Colour and Compounds"). All had had or were continuing to have a history of poor compliance.

5. SS was registered for VAT on 1 June 1991. We were told of no problems with its compliance until period 03/08 when the Return and payment were submitted some three months late. The Return and payment for 06/08 were submitted on time but thereafter Returns were late or not submitted and no payments were received. The company continued to trade until April 2010, its debt to the Commissioners on cessation being £43,028.50.

6. BPS registered for VAT on 1 October 2002. We were told of no significant problems in compliance prior to 04/07, although we do note that four of the previous five returns and payments were all submitted a matter of days late. The Returns for periods 04/07 to 01/08 inclusive were all submitted together in May 2008, i.e. the first of these being over a year late. The combined liability for these periods was shown to be £63, 656.48. No further Returns were received and the Company de-registered at the end of October 2008 with a VAT debt of £78,620.42, this sum including two centrally issued assessments for the latter two periods of trading.

7. Colour and Compounds was incorporated on 3 July 2002 and was still trading at the time of Notice of Requirement. Again we were told that there was reasonable compliance initially but from period 07/08 onwards direct debits from HMRC failed, all Returns were submitted exceedingly late with payments even later. The 07/08 Return, for example, was one year late with the payment two years late. The pattern of very late Returns continued and no payments were received after 10/08 although there was one repayment Return in 01/10. At the time of the Notice, the company had not submitted its return for 07/10 and its indebtedness to the Commissioners stood at £23,952.03.

8. The Appellant's first Return was due on 31 October 2010, being for the long period 18 March to 30 September. It had not been lodged at the time of issuing the Notice of Requirement. A centrally issued assessment had been raised in the sum of £5,436 but this had not been paid.

9. The directors owned the premises on which all of the companies had been trading together with the adjacent premises where Colour and Compounds operated. Mr Pumfrey considered that this had the benefit of protecting any assets in the event of a liquidation thus allowing the directors to restart their business with another company.

10. It was against this background of current poor compliance and previous failed companies that Mr Pumfrey decided security was required. In the absence of any Return from the Appellant, Mr Pumfrey calculated the amount required by reference to the last four returns submitted by the associated company SS. On receipt of the Notice, Mr Leigh wrote in to the Commissioners by letter dated 17 December 2010. He contended that the requirement would put the company at an unfair disadvantage in an already competitive market and explained that SS had gone into liquidation through no fault of its own but as a direct result of one of its customers, Hasan (Manchester) Ltd., failing to pay a sum in excess of £65,000 for goods purchased. The company had also been hit by a general global downturn resulting in a decreasing demand for plastics by over 50%. Mr Leigh believed that the company would have been able to trade through this had it not been for the default of Hasan. Mr Pumfrey replied on the same date declining to carry out any reconsideration until the outstanding VAT Returns had been submitted and paid. Following this letter, the first Return was submitted on 7 January, payment clearing on 11 January and the second Return due on 31 January 2011 was submitted on-line, being received on 6 February. Payment was cleared on 9 February. Mr Pumfrey considered the late payment by Hasan but noted that the Returns submitted by SS for periods 09/08 to 09/09 declared outputs of £506,000. Against this, Mr Pumfrey took the view that the £65,000 debt should not have been that critical. Bearing in mind the failed companies and the current poor compliance, Mr Pumfrey still considered that security was required but he reduced the amount to reflect the liabilities declared on the first two Returns.

11. A further application for an independent review was received on 14 March. This was strictly outside the 30 day period allowed but, exceptionally, the review was undertaken. By letter dated 16 March 2011 this review upheld Mr Pumfrey's amended decision. Specifically, Mrs Ogburn, the reviewing officer, referred to the late payment on the second Return. Mr Leigh had told her that he had misunderstood

the time periods for making electronic payments. The payment had left the company's bank account several days earlier but had not cleared the Commissioners' account until the 9 February, thus being two days late. Mrs Ogburn was influenced by the directorial links to the failed companies; the first Return for the Appellant having been lodged over two months late; even when operating the cash accounting scheme monies had not been paid over on time despite specific advice from a visiting HMRC officer; the compliance of Colour and Compounds had not improved since the start of the security action against the Appellant and finally the late payment of the second Return for the Appellant.

12. In cross examination of Mr Pumfrey, Mr Harper set at length details of what he called an "investigation into BPS" by the Commissioners. This was something of which Mr Pumfrey had been quite unaware until cross examination but which was in Mr Harper's contention, a relevant factor as it explained the failure of BPS. We were told that BPS had originally traded as sandblasters but in period 04/07 decided to change direction and trade in metals. Immediately the Commissioners were notified of the change, BPS was visited by an officer of the Commissioners who advised of the prevalence of carousel fraud in the scrap metal industry and advised the company of the need to be vigilant. In March 2008, BPS was informed that one of its suppliers had had its VAT registration withdrawn, although Mr Harper accepted that BPS were not told of the reason for the withdrawal. BPS had struggled to trade in metals from the outset, the reason for this being, in Mr Harper's contention, the involvement of the Commissioners in the supply chain which had had the affect of "slowing down" the trade and deterring customers from paying. The company continued to trade until period 04/08 but eventually ceased trading, we were told by Mr Harper because of the fear of the proximity of carousel fraud, and the Commissioners de-registered the company in October 2008. Having been set this scenario, Mr Pumfrey accepted that had he been made aware of it it would have been something which he would have considered but off the cuff it was impossible to say how much weight he would have attached to it, especially as he did not at this stage know what he would have been told.

13. Also in cross examination, Mr Pumfrey was asked how much weight he had attached to the significance of the ownership of the adjoining business premises. Mr Pumfrey's response was that this was a relevant factor as it was a means by which the directors could at any stage generate cash to pay the VAT liability. It was not however nearly so significant in his thinking as the non-compliance.

**The Appellant's Submissions**

14. Mr Harper contended that had the Commissioners not withdrawn the VAT registration for BPS, that company would have been able to continue trading, would have collected in outstanding debts and would have been able to repay the Commissioners. It was the involvement of the Commissioners in the supply chain that had, in effect, brought down the company. We, the Tribunal, pressed Mr Harper as to the merit of this contention and he did accept that in reality there would have been very little chance of collecting in sufficient monies to repay the Commissioners. The non-compliance, submitted Mr Harper, of the three other companies had no

bearing on the ability of the Appellant to trade. Each of the companies had experienced difficulties due to unfortunate circumstances and bad debts and their difficulties were not down to any attempt to defraud. The Appellant was a brand new company trading well and a demand for security now would hinder its continuance. A further contention was that it was wrong of Mr Pumfrey to take into account the directors' ownership of the two adjoining sets of buildings. This should not make any difference and was merely akin to the directors owning their own homes.

**Consideration**

15. The jurisdiction of the Tribunal is limited to considering the reasonableness of the Commissioners' decision to require security. It is only if that decision was one which no reasonable body of Commissioners could have made that the appeal can succeed. In considering this question, the tribunal gives thought to the factors which were taken into account, ensuring that they were all relevant and were given due weight; to any factors which were not considered but which should have been and finally to whether or not there was any error of law in the approach by the officers.

16. Although the initial decision was made by Mr Pumfrey, the decision to require security is a composite process involving not only the original decision but any review decisions by both Mr Pumfrey and any other officers. We therefore have to consider both Mr Pumfrey's and Mrs Ogburn's decisions. It is quite clear that both officers were predominantly motivated by the involvement of the directors in other failed and non-compliant companies. The first Return for the Appellant company was not lodged and paid until Mr Pumfrey refused a reconsideration for as long as the Return remained outstanding and unpaid. These factors are of crucial significance and were quite correctly given a significant weight by both officers. We reject Mr Harper's contention that Mr Pumfrey should not have taken into account the ownership of the adjacent premises. He pointed out in his witness statement that this had the benefit of protecting the assets in any liquidation and allowing the directors to re-start the business on site in another guise. We also believe, as Mr Pumfrey pointed out in his oral evidence, that these assets which are associated with the business could have been used as security for a loan which the directors could have used to pay the VAT liability. This is in no way akin to the directors merely owning their own homes. We also believe that Mr Pumfrey was correct in not giving it quite so much weight as the non-compliance. We are satisfied that both Mr Pumfrey and Mrs Ogburn took into account matters to which their attention was drawn in correspondence – namely the Hasan debt and the late payment of the second Return for the Appellant. We are satisfied that the factors taken into account by Mr Pumfrey and Mrs Ogburn were all relevant and were given proper weight.

17. We come to look now at any factors which were not taken into account but which should have been. The only factor here to which our attention was drawn was the Commissioners' involvement in BPS. The first point to be made is that neither Mr Pumfrey nor Mrs Ogburn had any knowledge of this. The point was never made in correspondence or in the requests for a reconsideration and neither officer could therefore take into account something of which they were unaware. However, that is not the end of the matter because it was a factor which was within the knowledge of

the Commissioners as a body and if it was to be a relevant and significant factor, that knowledge would have been imputed to Mr Pumfrey and Mrs Ogburn. We do not in fact believe it is of any great importance in respect of the matter before this Tribunal. It is quite clearly an unreasonable assertion for Mr Harper to make that BPS only failed because of the involvement of the Commissioners in its supply chains. It appears to us that the Commissioners acted entirely reasonably in alerting BPS to the prevalence of carousel fraud in their trade and in advising the company as soon as one of its suppliers had had its VAT registration number removed. It was perfectly fair of Mr Pumfrey to reply in cross examination that had he been made aware of this factor he would have taken it into account but on the very scanty information before the Tribunal, not backed up by any sworn or documentary evidence, this could not conceivably have had any real impact upon Mr Pumfrey's thinking. It is our considered view that if Mr Pumfrey had known at the time he made his decision what he was told in cross examination, it would have made no difference whatsoever to his consideration and his decision to require security would undoubtedly have been the same.

18. We would conclude by stressing one point put forward by Mrs Knibbs and that is that notwithstanding the various reasons why BPS, SS and Colour and Compounds got into trading difficulties and fell into arrears, there can never be any excuse for their failure to at least submit their Returns. There was a double non-compliance – there was the failure to put in any Returns and a failure to make payment.

19. To summarise therefore we find that the decision of the Commissioners to require security of the Appellant was entirely reasonable. The factors which were taken into account were correctly considered and were given proper weight and the BPS issue which was not taken into account was of such insignificance in the consideration of security for the Appellant that it could have made no difference to the outcome. The arithmetical calculation of quantum was not challenged and the appeal is therefore dismissed.

20. 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.

**TRIBUNAL JUDGE**
**RELEASE DATE: 12 January 2012**