TC01992

Appeal number: TC/2011/06877

VAT – Requirement of security for VAT – Company directors were previously directors of company which went into administration leaving a VAT debt – Whether decision to require security reasonable – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE DISTINCTIVE PUB COMPANY (STRATFORD) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
JOHN CHERRY FCA

Sitting in public at 45 Bedford Square, London WC1B 3DB on 22 March 2012

The Appellant did not appear and was not represented

Leslie Bingham of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by The Distinctive Pub Company (Stratford) Limited (the "Company") against a decision by HM Revenue and Customs ("HMRC") to issue a Notice of Requirement to give Security (the "Notice") under paragraph 4(2)(a) of schedule 11 to the Value Added Tax Act 1994 ("VATA") on 11 May 2011.

2. The amount of security required by the Notice was £13,439.00 if the Company submitted quarterly VAT returns or £9,389.00 if monthly VAT returns were filed. Following a review, by HMRC, this was reduced to £7,650 provided monthly returns were submitted by the Company. HMRC notified the Company of the outcome of the review by a letter dated 1 August 2011 and it is the reduced amount of security with which this appeal is concerned.

Absence of Appellant

3. Although the Company was not represented and the Tribunal clerk was unable to speak to any of its directors by telephone on the morning of the hearing, Notice of the date, time and place of the hearing had been sent to the Company at the address stated on its Notice of Appeal on 27 February 2012. We were therefore satisfied that reasonable steps had been taken to notify the Company of the hearing.

4. We had been provided with documents prepared on behalf of the Company by Richard Harvey, one of its directors. These were headed "Summary Appeal", "Rebuttal of HMRC Statement of Case" and "Recommendation Going Forward" and set out the Company's case. In the circumstances we considered that it was in the interests of justice to proceed with the hearing in the absence of the Company in accordance with Rule 33 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.

Evidence

5. In addition to a bundle of documents, including those provided by the Company, we heard oral evidence from HMRC officers, Mrs Leah Warner and Mrs Janice Uzzell. On the basis of this evidence we make the following findings of fact.

Facts

6. As its name suggests, the Company, which trades as "The Queens Head", operates a public house in Stratford upon Avon.

7. It was registered for VAT on 22 December 2010 and its directors are Martyn Peter Jones and Richard John Harvey. The Company acquired its business and assets from The Distinctive Pub Company Limited which went into administration on 24 January 2011 leaving a VAT debt of £52,067.85.

8. Mr Jones and Mr Harvey were the directors of The Distinctive Pub Company Limited which had been registered for VAT for 15 years and had failed to submit its VAT returns and/or pay its VAT on time on 20 occasions including its last nine VAT returns.

9. Mr Jones and Mr Harvey are also the directors of 007 Stratford Taxis Limited. During its previous 11 prescribed VAT accounting periods its returns and/or payments have not been made on time and at 11 May 2011 there was an outstanding VAT debt of £58,966.25.

10. Although there was a reference to 007 Stratford Taxis Limited in the Company's application to register for VAT (form VAT 1) there was no mention of The Distinctive Pub Company Limited on the form in response to the question asking if any of the directors in the business being registered have been involved in running other businesses either as a sole proprietor, partner or director.

11. In view of these circumstances and the fact that the Company had failed to file its first VAT return (for the period ending 28 February 2011), or pay the VAT for that period, and that it operated from the same premises and had the same accountants as The Distinctive Pub Company Limited, Mrs Warner came to the conclusion that the Notice should be issued. The amount of security required was calculated on the basis of the last four returns submitted by The Distinctive Pub Company Limited adjusted to a 20% rate of VAT to which was added the outstanding VAT liability of the Company as at 11 May 2011.

12. Mrs Warner hand delivered the Notice to Mr Harvey at the Company's premises on 11 May 2011. Mr Harvey signed the following acknowledgment on a copy of the Notice retained by Mrs Warner:

> I have this day received a Notice of requirement to give security of which this is an identical copy. I have read and understood the aforementioned notice.

13. On 26 May 2011 Mr Harvey and Mr Jones wrote to Mrs Warner stating that the Company would like to appeal against the Notice. He referred to the difficult trading conditions of the "old company" (The Distinctive Pub Company Limited) and that the first VAT return was late for administrative reasons and not an inability to pay. It was explained that the Company's accountants would be instructed to complete returns and that they were confident that "we can get up to date."

14. However, as Mrs Warner in her reply of 9 June 2011 confirmed the Notice, on 26 June 2011 the Company requested that a review be undertaken by "an officer not previously involved in the matter." The officer who conducted that review was Mrs Janice Uzzell. In her letter, of 1 August 2011, to the Company Mrs Uzzell made the following observations comparing the Company with The Distinctive Pub Company Limited:

(1) The trading address is the same.

(2) The trading style is the same.

(3) There was no break in style between the two businesses.

(4) The old business and assets were purchased from the administrators as a "Pre-pack sale".

(5) The purchase of the business and assets from the administrators over a period of time is an indication that the business is not adequately funded which is a concern that the VAT may be at risk.

(6) The contracts of the employees were transferred to the purchaser.

(7) Richard Harvey and Martyn Jones were both directors of the old business.

(8) The old business failed in January 2011 owing VAT debts of £62,067 plus direct taxes.

(9) The old business had a history of VAT arrears dating back to February 2004, had several time to pay arrangements with the Debt Management Unit, had several unpaid cheques and had 20 periods of default surcharge from 1997.

(10) Returns were rendered late without payment; the last return rendered was for 03/10.

The letter continued referring to the Company being a "cash trader" which had "received the VAT declared on returns, but chosen not to pass it over [to HMRC] by the due date as legally required" before concluding the decision by Mrs Warner to require security "to be a sound one".

15. It was noted that at the time the decision to require security was made the Company had not submitted its first VAT return. However, by the time of the review that return had been submitted, albeit late, and the subsequent return was filed and the VAT paid on time. It was also noted that the Company would be making monthly VAT returns and in the circumstances the amount of security was re-calculated on the basis of these returns and reduced to £7,650.

16. On 31 August 2011 the Company appealed to the Tribunal on the grounds that:

> A period of regularly monthly returns and payments over 12 months will prove that the business is not going to default again.

Law

17. Under paragraph 4(2) of schedule 11 VATA HMRC may "require a taxable person, as a condition of his supplying or being supplied with goods or services under a taxable supply, to give security, or further security, for the payment of any VAT that is or may become due from" him "if they think it necessary for the protection of the revenue".

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

"It is important to start by stating that it is common ground that the jurisdiction of the tribunal is only supervisory. The appeal before the tribunal is not by way of a rehearing (see, for example *Customs and Excise Comrs v J H Corbitt* (*Numismatists*) *Ltd* [1980] STC 231 at 239, [1981] AC 22 at 60 per Lord Lane). This was accepted in the present case by the chairman himself. He put the matter clearly and, in my view, accurately in his decision in these terms:

> 'The jurisdiction of the tribunal in cases such as this where the Commissioners are exercising discretionary powers has been clearly established in previous cases. It is, for instance, clear that the tribunal cannot substitute its own discretion for that of the Commissioners for the tribunal has no discretion in these matters. If it is alleged that the Commissioners have reached a wrong decision then there can be a question of law but only of a limited character. The question would be whether their decision was unreasonable in the sense that no reasonable panel of Commissioners properly directing themselves could reasonably reach that decision. To enable the tribunal to interfere with the Commissioners' decision it would have to be shown that they took into account some irrelevant matter or had disregarded something to which they should have given weight.'

In my judgment, in exercising its supervisory jurisdiction the tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of the commissioners was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected."

Discussion and Conclusion

19. The documents submitted on behalf of the Company by Mr Harvey refer to the current "gloomy" economic climate and suggests that the request for security is "not only unreasonable but would create unnecessary hardship" for the Company.

20. He points out, and we accept, that being a public house with a "well known name 'the Queens Head' it is extremely unlikely that the business model for this unit would change."

21. In addition, Mr Harvey explains that the turnover of the Company does not consist solely of cash takings but also includes of credit card transactions. Finally in the "Recommendation Going Forward" Mr Harvey suggests that a "common sense approach" would be to allow the Company to trade whilst making monthly VAT returns without being required to provide security as a small business such as that of the Company "in this current economic environment cannot manage HMRC's deposit request.

22. Although we do not consider the delay in receiving payment by credit card, as opposed to cash, would have a materially adverse effect on the Company's cash flow, we do understand and accept that the Company faces genuine difficulties in the current economic climate. However, the effect of the applicable law in an appeal such as this means that the Company's appeal can only succeed if we consider that, at the time it was made, HMRC did not reasonably arrive at the decision to issue the Notice. It is not sufficient that we might ourselves have reached a different conclusion.

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

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

24. Having carefully considered the evidence and in view of the fact that the requirement for security would cause hardship to an appellant has been held not to be a relevant consideration (see eg *Rosebronze v Commissioners of Customs and Excise* (1984) VAT Decision No.1668), we find that HMRC did not take irrelevant matters into account or fail take into account all relevant matters at the time the decision to issue the Notice was made. As such we consider that HMRC did arrive reasonably at the decision to issue the Notice and therefore dismiss the appeal

Right to apply for Permission to Appeal

25. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 4 April 2012