TC02509

Appeal number: TC/2012/04067

VAT – decision to require security – paragraph 4(2)(a) Schedule 11 Value Added Tax Act 1994 – whether decision to require security reasonable – held yes – whether amount of security fair and reasonable – held yes – comments in Goldhaven v HMCE and John Dee Ltd v HMCE applied – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHAND SECURITY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public at 45 Bedford Square, London on 28 August 2012

William Maxwell Shand, Director, for the Appellant

Lynne Ratnett, Higher Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision by HMRC to require security for payment of VAT from the Appellant.

2. A summary decision was issued following the hearing of the appeal and this decision, comprising full findings of fact and reasons for the decision, is issued in response to a request made by the Appellant.

The history and background of the Appellant and Mr Shand

3. Mr William Maxwell Shand ("Mr Shand") was, from 4 June 2005, a director of Uniserve (GB) Limited, a company which provided security services. On 14 October 2005, Mr Shand made an application on behalf of that company for VAT registration. Almost from the start of its VAT registration, the company's compliance record was very poor. Numerous returns were not made and by the time the company went into liquidation in June 2009, through a combination of Officer's Assessments, default surcharges and civil penalties, it had an unpaid VAT debt of £272,389.36.

4. On 15 January 2009, a new company called Uniserve Security Limited was incorporated. The VAT registration application form for that company was submitted to HMRC by Mr Shand's then wife, Mrs Katie Shand (who had been appointed as the company's director on its incorporation). The VAT registration application form showed the company's business as being "security services". It gave the same contact telephone number for the company as had previously been given for Uniserve (GB) Limited. The home address given by Mrs Shand was the same as the home address given by Mr Shand on the previous VAT registration form, and Mrs Shand gave the same telephone number for her home address as she gave for the business. Mr Shand was appointed as a director of this company on 1 July 2009. From October 2009 the company's VAT compliance record deteriorated, and through a combination of unpaid amounts shown as due on VAT returns and default surcharges, the company accrued a total unpaid VAT liability of £69,510.78 by the time it was put into liquidation on 10 October 2011

5. Mr Shand was made bankrupt on 31 March 2011.

6. The Appellant company was incorporated on 6 May 2011. Its only director at all times has been Mr Michael Ayrton Richard Shand ("Mr Shand junior"), Mr Shand's son. An application for VAT registration of this company was made on its behalf in the name of Mr Shand junior on 22 June 2011. The business address given for the Appellant was the same as the home address given by Mr Shand and Mrs Shand on the previous two VAT registration applications. The business activity of the Appellant was described as "security".

7. There were lengthy delays before the Appellant was registered for VAT, and those delays have been the subject of separate correspondence between the Appellant and HMRC. It was only issued with a VAT number on 17 November 2011, and this

was after extensive chasing from the Appellant's accountants. It is clear that the delay in registering the Appellant for VAT caused it severe financial difficulties, and it is equally clear that at least one individual officer within HMRC was embarrassed at the way the matter was being dealt with by his colleagues. We have no reason to doubt the Appellant's accountants' statement that the Appellant very nearly became insolvent largely as a result of the problems caused by HMRC's delay in issuing its VAT registration.

The requirement for security

8. After the VAT registration was finally issued, HMRC then considered the question of security. Officer Andrews dealt with this and we heard oral evidence and received a short written statement from her. Her consideration culminated in the issue of a notification dated 13 December 2011, which required the Appellant to provide security in the sum of £12,000. This notification was delivered personally to Mr Shand junior on 13 December 2011.

9. Further copies of the notification were sent to the Appellant on 9 January 2012, addressed to its officers at, respectively, Mr Shand junior's home address, the Appellant's business address and its registered office. In reply, the Appellant's accountants responded by letter dated 11 January 2012, in which they sought to distance the Appellant from Mr Shand, whilst observing that "without any information as to why the security deposit has been requested, it is very difficult to construct a full and satisfying appeal against the decision". They pointed out that:

> (1) Mr Shand junior, the director of the Appellant, had not been involved with any other VAT registered business and had therefore not failed to comply with VAT obligations;
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> (2) Mr Shand junior was running the business and he was neither an undischarged bankrupt nor a disqualified director;
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> (3) Mr Shand junior had never been prosecuted or penalised for a VAT offence; and
>
> (4) there were no other persons concerned in the current registration of the business with past failures to pay VAT due.

10. They went on in their letter to speculate that the possible cause was Mr Shand's involvement in the business. They stated that he was an employee with no control or responsibilities regarding its finances, which remained Mr Shand junior's sole responsibility. Mr Shand, they said, had no access to the business bank account. They requested a formal independent review of Officer Andrews' decision to require security.

Review of the decision on security

11. Officer Ian Pumfrey carried out that independent review, and he provided a short written statement and gave oral evidence before me.

12. As the Appellant's appeal is against Officer Pumfrey's confirmation of Officer Andrews' decision to require security, it appears to me that it is Officer Pumfrey's decision (rather than Officer Andrews') that I must examine most closely.

13. The information available to Officer Pumfrey was the same as the information available to Officer Andrews when she took her decision, plus the content of the Appellant's accountants' letter dated 11 January 2012 and the content of the Appellant's first VAT return for the period up to 30 November 2011.

14. Officer Andrews' evidence was not wholly satisfactory. In her witness statement, she said that "the amount of security required is based on the taxable turnover declared on the VAT 1 application for registration declaration submitted by the business with a *[sic]* allowance given for input tax based upon the tax performance of other businesses". This was clearly incorrect. In her oral evidence, she said that she had worked from an estimated VAT-exclusive annual turnover figure of £269,000 which had been supplied to her by colleagues who had actually registered the business for VAT, whereas the original VAT1 form had given an estimated annual turnover of £85,000. I am satisfied that her oral evidence was true, but the incorrect statement included in her witness statement was highly unfortunate and demonstrated a degree of lack of care in preparation of the witness statement that could have been fatal to HMRC's case in other circumstances.

15. By her calculations, she said, four months of turnover at £269,000 per year would equate to £89,666.67, which at a VAT rate of 20% would generate output VAT of £17,933.33. For the Appellant's type of business, national statistics suggested that output VAT would outweigh input VAT by a ratio of approximately 3.04 to 1 (she actually said 2.04 to 1, but her calculations show she must have been working off the higher figure) and expected input VAT would therefore be £5,899.12. Net output VAT would therefore be just over £12,000, which she rounded down to £12,000.

16. Officer Pumfrey, when he reviewed the decision, approached it differently. By that time, a VAT return had been submitted by the Appellant and in his oral evidence, Officer Pumfrey said he had worked from that VAT return. He calculated the average daily net VAT liability from that return as £73.22, resulting in an expected net VAT liability for a four month period of some £8,860.15. He also noted that the actual VAT liability shown on the VAT return (£13,400.07) was unpaid and overdue (the due date was 31 December 2011 – 7 January 2012 for electronic payment – and he was considering the matter in late January 2012) and therefore he considered HMRC's total exposure to be some £22,250.07. On that basis, he felt that the £12,000 figure fixed by Officer Andrews should not be reduced. It is worth mentioning however that in his written witness statement he had stated that "I reviewed the amount of security required, which had been calculated on the basis of the estimated taxable turnover shown on the company's VAT 1 application for registration…" – which was clearly incorrect.

17. The reason why HMRC had required the security in the first place was because of the links that they considered existed between the Appellant and the two previous failed companies. These were as follows:

(1) Mr Shand, who had been a director of both the previous companies when they had been significantly non-compliant for VAT purposes, resulting in a final unpaid debt to HMRC of some £340,000, was the operations manager of the Appellant and the father of its sole director;

(2) The Appellant appeared to be continuing in the same line of business in succession to the two previous companies;

(3) The telephone number given on the Appellant's invoices was the same as that given to HMRC in respect of both of the earlier two companies, implying continuity;

(4) The business address given on the VAT registration application form for the Appellant was the same as the home address given for Mr Shand on the VAT registration application form for Uniserve (GB) Limited and for Mr Shand's former wife on the VAT registration application form for Uniserve Security Limited.

18. Mr Shand (rather than his son) appeared before the Tribunal on behalf of the Appellant. He gave evidence about a number of matters relating to his ex-wife, their various changes of address and the financial affairs of the Appellant and the earlier companies. Whilst some of this evidence cast a clearer light on matters, none of it was information that was available to HMRC at the time when Officers Andrews and Pumfrey made their respective decisions.

The law

19. Paragraphs 4(2) to 4(4) of the Value Added Tax Act 1994 ("VATA94") provided, at all material times, as follows:

> "(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 –
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> (a) the taxable person, or
>
> (b) any person by or to whom relevant goods or services are supplied.
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> (3) In sub-paragraph (2) above "relevant goods or services" means goods or services supplied by or to the taxable person.
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> (4) Security under sub-paragraph (2) above shall be of such amount, and shall be given in such manner, as the Commissioners may determine."

20. The appeal is made pursuant to section 83(1)(l) VATA94, which lays down no particular requirements for such an appeal.

21. Ms Ratnett referred us to *Goldhaven Limited v HMCE* [1996] VATD 14675, which considered the question of the Tribunal's powers under paragraph 4(2):

> "14. In considering the submissions of the parties we have first identified the principles which we should apply in considering this appeal. These were described by Farquharson J in *Mr Wishmore Limited v Commissioners of Customs and Excise* [1988] STC 723 at page 728g in the following way:
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> > "The tribunal…. should restrict itself, on the hearing of an appeal, to deciding whether the taxpayer company has established that the decision arrived at by the commissioners was unreasonable, or… whether the decision had been arrived at by taking into account matters which are not relevant or by ignoring matters which are relevant."
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> 15. The principles were further developed in *Customs and Excise Commissioners v Peachtree Enterprises Ltd* [1994] STC 747 where it was held that the tribunal had to limit itself to considering facts and matters which were known when the disputed decision was made by Customs and Excise. The principles were yet further developed in *John Dee Limited v Customs and Excise Commissioners* [1995] STC 941 where the Court of Appeal held that the tribunal had to consider whether Customs and Excise had acted in a way in which no reasonable panel of Commissioners of Customs and Excise could have acted, or whether they had taken into account some relevant matter, or had disregarded something to which they should have given weight. The tribunal could not exercise a fresh discretion; the protection of the revenue was not a responsibility of the tribunal or the court. However, if it was shown that the decision of Customs and Excise was erroneous, because they had failed to take some relevant material into account, the tribunal could, nevertheless, dismiss the appeal if the decision would *inevitably* have been the same had account been taken of the additional material."

22. I respectfully agree and adopt the above analysis.

Discussion and decision

23. It is clear from the cases mentioned above that the jurisdiction of this Tribunal in cases such as this is a supervisory rather than a full appellate jurisdiction – that is to say, I have no power to substitute my own decision for that made by HMRC, I only have power to decide whether HMRC's decision should be confirmed or set aside. It is also quite clear that in exercising that power, I can only set HMRC's decision aside if I am satisfied that in reaching it HMRC have acted in a way in which no reasonable panel of Commissioners could have acted, or have taken into account some irrelevant matter or have disregarded something to which they should have given weight.

24. So the question I must ask myself is this: based on the information available to him at the time, am I satisfied that Officer Pumfrey, in reaching his decision to confirm Officer Andrew's earlier decision, acted in a way in which no reasonable

officer of HMRC could have acted, or took account of some irrelevant matter, or disregarded something to which he should have given weight? It is important to remember that in asking this question, I must not take account of information that came to light after Officer Pumfrey's decision was taken.

25. The decision in question was a decision to require security in the amount of £12,000, a sum considered to be equal to approximately four months' net VAT liability. In considering the question set out in the previous paragraph, I must bear that fact in mind.

26. The hurdle that the Appellant must clear in order to win its appeal is a high one: it must demonstrate on the balance of probabilities that no reasonable body of Commissioners could have reached the decision that was reached in this case, or that they took into account some irrelevant matter or failed to take into account some relevant matter.

27. HMRC cannot be expected to have taken into account matters that they were unaware of, and I am satisfied that they did take into account all the information that was provided to them. I do not consider that they took into account, to any material extent, any matters that were irrelevant. On the basis of that information, I am satisfied that Officer Pumfrey's decision to confirm the requirement for security in the amount of £12,000 cannot be criticised.

28. It follows that the appeal must be dismissed.

29. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 1 February 2013