[2019] UKFTT 621 (TC)

TC07405

Appeal number: TC/2019/03144

VALUE ADDED TAX – notice of requirement to provide security – whether decision was flawed – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BPF TANKS LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE JANE BAILEY
MR TERRY BAYLISS

Sitting in public at Centre City Tower, Birmingham on 1 October 2019

Mr Andrew Lockley, director, for the Appellant

Ms Siobhán Brown, HMRC litigator, for the Respondents

DECISION

Introduction

1. The Appellant's appeal, received by the Tribunal on 8 May 2019, is made against the requirement, imposed upon it by a Notice to provide security to the Respondents in the sum of £110,930.47 (or £102,580.47 if the Appellant filed monthly VAT returns). The Notice, served on 31 October 2018 and affirmed in a review decision dated 8 April 2019, was served by the Respondents under paragraph 4(2)(a) of Schedule 11 to the Value Added Tax Act 1994 ("VATA 1994").

This Tribunal's jurisdiction on appeal

2. In an appeal against the imposition of a Notice of Requirement to provide security in respect of VAT, the Tribunal's jurisdiction is to assess whether it was reasonable for the Respondents to consider it was requisite for the Appellant to provide security. That jurisdiction was clearly set out in *John Dee Limited v Customs & Excise Commissioners* [1995] STC 941 where Neill LJ held (at page 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.

3. In considering the reasonableness of the Respondents, we do not take into account events which have happened subsequent to the date of the decision to require security. We consider that this is clear from the decision of Dyson J set out in *Customs and Excise Commissioners v Peachtree Enterprises Limited* [1994] STC 747. Dyson J stated (at page 751):

> 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 it was effected.

4. We are aware of a recent decision of this Tribunal – *Pachangas Mexican Restaurant Limited* [2019] UKFTT 436 – in which the Tribunal drew attention to the

jurisdiction described in *Gora v HMRC* [2003] EWCA Civ 255 and seemed to suggest that the Tribunal had a *Gora* jurisdiction when considering a security notice. *Gora* concerned HMRC's refusal to restore goods it had seized, and the Tribunal's jurisdiction in such appeals is derived from the Finance Act 1994. In *Gora* the Court of Appeal determined that the Tribunal, as a fact-finding Tribunal, was able to consider whether a decision taken by HMRC was reasonable in light of the facts which the Tribunal found at the date of the hearing (even though those facts might differ fundamentally from the facts known to the decision-maker when the decision was taken). That unusual jurisdiction was recently confirmed by the Court of Appeal in *HMRC v Behzad Fuels (UK) Ltd* [2019] EWCA Civ 319.

5. The Tribunal's jurisdiction in security notice appeals is derived from VATA 1994, not the Finance Act 1994. We do not agree that the Tribunal's jurisdiction in security notice appeals is necessarily analogous to appeals where the Tribunal's jurisdiction is derived from the Finance Act 1994. We have concluded that the Tribunal's musings in *Pachangas* are obiter, and that we are, in any event, bound by *Peachtree*. Therefore, we consider the position at the time the decision was taken.

6. There remains the issue of which decision is under review: the original decision (of 31 October 2018) or the review decision (of 8 April 2019). Subsections 83F(2), (4) and (5) VATA 1994 set out how the Respondents should conduct a review:

> (2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.
>
> (4) The review must take account of any representations made by P, or the other person, at a stage which gives HMRC a reasonable opportunity to consider them.
>
> (5) The review may conclude that the decision is to be-
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> (a) upheld,
>
> (b) varied, or
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> (c) cancelled.

7. It seems to us that subsection (5) gives the reviewing officer the power to exercise a fresh discretion, based on the information in front of him/her. In particular, the power to vary the original decision means that the reviewing officer has greater power than the Tribunal (which, if it concluded a decision was unreasonable, could only remit the matter back to the Respondents for a fresh decision to be taken). It is possible for a reviewing officer to increase the amount of security sought (a point noted by the reviewing officer in this case).

8. Given the extent of the power of the reviewing officer to uphold, vary or cancel the original decision, we have concluded that the review decision is as relevant as the original decision and should be subject to the same scrutiny. Should a reviewing officer decide to double the security sought without any justification for that increase, it would be of no consolation to the taxpayer for the Tribunal to conclude that the original amount sought was not unreasonable.

9. Our conclusion fits with the comments of Dyson J in *Peachtree* about the remedy open to a taxpayer if further information came to light. Dyson J said at p 752:

> If after a requirement has been made under para 5(2) fresh material comes to light or into existence which the taxpayer considers justifies a modification of the requirement, the taxpayer may ask the commissioners to reconsider the matter. The commissioners have a duty to reconsider in the light of the fresh material in those circumstances.

10. We consider that the Respondents' review is, in essence, the kind of "reconsideration" contemplated by Dyson J. and, therefore, it is as susceptible to review by the Tribunal as the original decision taken by the Respondents.

11. In this case, the original decision to require security was taken on 31 October 2018. This decision was affirmed by a review decision, taken on 8 April 2019. In limiting ourselves to the facts and matters which existed at the time, we focus upon the events at the time of the original decision (31 October 2018), but updated with the events known at the time of the review decision (8 April 2019) when considering the reasonableness of that later review decision.

The issues to be determined

12. The issues for us to determine are whether, on 31 October 2018 and again on 8 April 2019, it was reasonable of the Respondents to consider it necessary for the protection of the Revenue to require the Appellant to provide £110,930.47 (or £102,580.47 if the Appellant filed monthly returns) by way of security in respect of the amount of VAT which was or may be due.

Facts found

13. We heard evidence from Mrs Caroline Barfield, the original decision maker, for the Respondents. Mr Lockley gave evidence to us as part of his submissions and was cross-examined by Ms Brown. We consider both Mrs Barfield and Mr Lockley to have been honest witnesses who gave truthful answers to the best of their ability.

14. On the basis of the witness evidence and the documents in the bundle before us, we find the following facts:

<u>The first company</u>

a. Mr Lockley was the director of a company named Brimar Plastics Limited. This company had registered for VAT on 21 September 2000. Brimar Plastics Limited traded in the design and manufacture of water tanks and other water storage systems.

b. Mr Lockley told us that Brimar Plastics Limited had been put out of business by a factoring agent which it had engaged, initially by payments being disputed by the factoring agent and then by the percentage which Brimar Plastics Limited received being reduced. Mr Lockley told us that this was a deliberate strategy by the

factoring agent, that this had affected other companies and that this was well documented (although no documents relating to this were provided to us). Mr Lockley told us that he had been advised to put Brimar Plastics Limited into administration.

c. On 16 December 2014, Brimar Plastics Limited went into administration, owing the Respondents £116,618.61 in unpaid PAYE and £117,335.26 in unpaid VAT.

d. On 18 December 2014, Brimar Plastics Limited changed its name to BP Realisations Limited. On 23 March 2016, the company was dissolved.

e. Mr Lockley bought the assets of this first company out of the administration.

The second company

f. On 28 November 2014, a company called BP Water Tanks Limited was incorporated and Mr Lockley was appointed as the sole director. On 1 December 2014, this company registered for VAT.

g. On 18 December 2014, BP Water Tanks Limited changed its name to Brimar Plastics Limited. This company had the same business as the first company. Mr Lockley told us that Brimar Plastics Limited had taken on a £200,000 contract with a particular company and 50% of the fees had been paid up front. However, this company had refused to pay the remainder of the fees due, and had defended legal proceedings brought by Brimar Plastics Limited to recover amounts due. Mr Lockley told us that Brimar Plastics Limited had been owed £120,000 and, in face of the defended legal proceedings, he had been advised to put this second company into liquidation. Mr Lockley told us that he had no choice in this decision as Brimar Plastics Limited owed its creditors about £100,000 and, if it had continued trading, then it would have caused untold damage to the company's reputation. Mr Lockley told us that he wanted to keep employees in jobs.

h. On 1 December 2016, Mr Lockley wound up Brimar Plastics Limited. The liquidators report showed assets of approximately £25,000 and debts of approximately £200,000. Those debts included £62,797.88 of unpaid PAYE and £78,547.70 of unpaid VAT.

i. Mr Lockley told us that these two previous companies had been forced into insolvency by outside factors, not by mismanagement, so he considered it unreasonable for HMRC to take the history of these companies into account.

The Appellant

j. The Appellant was incorporated on 23 September 2016, and Mr Lockley is its sole director and shareholder. The Appellant's business is the same as the first and second companies run by Mr Lockley. The Appellant's business assets were purchased out of the liquidation of (the second) Brimar Plastics Limited and the Appellant trades from the same address as (the second) Brimar Plastics Limited.

k. Mr Lockley's role in running the Appellant is to negotiate and price the Appellant's contracts with customers. Mr Lockley's wife is responsible for issuing the Appellant's invoices. Mr and Mrs Lockley are the signatories to the Appellant's bank account. Mr Lockley accepted that he has full control of the Appellant.

l. The Appellant registered for VAT from 1 November 2016. Mr Lockley told us that the first 12-18 months of trading were very difficult and that the turnover was a fifth of the turnover of the previous company.

m. The Appellant's first VAT return (for the period to 02/17) was due to be filed no later than 7 April 2017. The return was filed on time showing VAT due of £11,720.49. This amount was not paid in full by the due date, and was not cleared until 5 January 2018.

n. The Appellant's second VAT return (for the quarter to 05/17) was due to be filed no later than 7 July 2017. The return was filed on time, showing VAT due of £12,377.88. This amount was not paid in full by the due date, and the VAT due was not cleared until 30 November 2018.

o. The Appellant's third VAT return (for the quarter to 08/17) was due to be filed no later than 7 October 2017. The return was not filed until 14 June 2018. Under the return VAT of £13,275.40 was due. This amount remains unpaid.

p. The Appellant's fourth VAT return (for the quarter to 11/17) was due to be filed no later than 7 January 2018. This return was not filed until 14 June 2018. Under the return VAT of £12,554.29 was due. This amount remains unpaid.

q. The Appellant's fifth VAT return (for the quarter to 02/18) was due to be filed no later than 7 April 2018. This return was not filed until 14 June 2018. Under the return VAT of £11,255.05 was due. This amount remains unpaid.

r. The Appellant's sixth VAT return (for the quarter to 05/18) was due to be filed no later than 7 July 2018. This return was filed on time. Under the return VAT of £18,025.85 was due. This amount remains unpaid.

s. In about September 2018, the Appellant agreed a Time to Pay arrangement with the Respondents in respect of outstanding PAYE arrears, which stood at about £35,000 at that time. The Appellant substantially met the payments due under this arrangement.

t. The Appellant's seventh VAT return (for the quarter to 08/18) was due to be filed no later than 7 October 2018. This return was not filed until 22 February 2019 so, in the meantime, an estimated assessment for 08/18 was raised by the Respondents. VAT of £17,267.89 was due under the return filed on 22 February 2019, but this amount remains unpaid.

u. In October 2018, Mrs Barfield of the Respondents began to consider whether security was required from the Appellant. On 12 October 2018, the Respondents sent the Appellant a letter to inform it that they might issue a Notice of Requirement

to provide security. The amount of VAT owed by the Appellant at that date was £67,488.47. In that letter the Respondents informed the Appellant that the VAT return for the period to 08/18 was outstanding. The Appellant was warned that if the return was not submitted, and the arrears paid within ten days, then Notice of Requirement to provide security could be issued.

v. The arrears were not paid, and the outstanding VAT return was not filed. Mrs Barfield took the decision that security was required from the Appellant for the protection of the revenue. In making this decision, Mrs Barfield took into account:

   i. The amount of VAT which was in arrears (then £85,930.47), and the amount of default surcharge payments in arrears (then £7,223.38);

   ii. The number of VAT returns which had been filed late (or, at that date, not at all);

   iii. The Appellant's failure to meet current VAT liabilities as they became due (with the outstanding liabilities arising from the VAT returns for 05/17, 08/17, 11/17, 02/18 and 05/18, and an estimated assessment for 08/18);

   iv. The date of the last payment of VAT by the Appellant (at that date, 5 January 2018);

   v. The Appellant's use of a factoring agent (which meant that the Appellant had received some payment from its customers);

   vi. The accounts filed by the Appellant at that date (which showed losses of £150,000);

   vii. The history of the previous companies, and the amounts which those companies owed the Respondents;

   viii. The Time to Pay arrangement which the Appellant had agreed in respect of the outstanding PAYE (which had largely been met).

w. Mrs Barfield concluded that the Appellant constituted a risk to the revenue. On 31 October 2018, the Respondents issued a Notice to Provide Security to the Appellant. That required security of £110,930.47 (or £102,580.47 if monthly returns were filed) from the Appellant.

x. Also, on 31 October 2018, the Respondents issued a warning to the Appellant that security might be required in respect of PAYE and NICs.

y. On 30 November 2018, Mr Lockley emailed the Respondents. In that email Mr Lockley gave some background to the insolvency of (the second) Brimar Plastics Limited and the position of the Appellant. Mr Lockley continued:

For the first 18 months we struggled to gain the confidence of our customers back to regain our orders. This has resulted in our current situation and the arrears that have built up.

We are now seeing a large number of our former customers returning and placing substantial orders with ourselves and over the past few months, we have been able to pay off a large portion of our arrears. We made an arrangement with yourselves and managed to stick to the arranged payments despite there being a couple of misunderstandings. When I spoke to the lady in September I had assumed that she had included our VAT arrears within this agreement, but it appears that these were not included. There were also a few issues with allocation of payments which resulted in us having to clear the balance of the time to pay early.

As you will be able to see from our record we have been able to make some substantial payments over the past few months and these will continue over the coming months. We have orders in place for December and January and we are just in the process of securing a large regular contract with a customer that has a five year contract with Bovis/Lend Lease. The first of these orders is due in to us in January. This order alone is worth around £10,000 a week and after the first two or three months this is likely to double. We also have a number of large orders from our regular customers which are due to be despatched in January, February and March.

Unfortunately we are not in a position to deposit the amount of money that you have asked us for. If we had that amount we would already have cleared off the outstanding arrears. However we are now in a good position, having regained the confidence of our customers and out sales are increasing so I have reviewed our cashflow and believe the following proposal would be manageable. If possible I would like to come to an arrangement that incorporates all of the arrears into once agreement so that we know exactly where we stand.

I would propose that we pay the following:

December £12,000

January £15,000

February £15,000

In March we could review and discuss whether we can increase the payments to £20,000 or if we need to keep them at £15,000 and then review this amount on a monthly basis.

If we are able to, and as cashflow allows we will clear off more of the balance earlier and this if of course would be on top of paying the PAYE and VAT as they fall due.

z. The Appellant did not pay £12,000 in December 2018, as indicated, and Mr Lockley told us that none of the payments set out in his email were made as no Time to Pay arrangement was agreed. However, it seems that a payment was made by the Appellant to the Respondents on 30 November 2018, and allocated to the Appellant's VAT debt (as this enabled the arrears due under the VAT return to 05/17 to be cleared).

aa. The Appellant's eighth VAT return (for the quarter to 11/18) was due to be filed no later than 7 January 2019. This return was not filed until 22 February 2019. Under this return VAT of £15,461.79 was due. This amount remains unpaid.

bb. On 17 January 2019, the Respondents wrote to the Appellant to reject the offer which Mr Lockley had made. The rejection was on the basis of the Appellant's history of non-compliance. In that letter the Respondents noted that the VAT returns for 08/18 and 11/18 were both outstanding.

cc. On 25 January 2019, Mrs Barfield wrote to the Appellant to explain why she considered it requisite to seek security. Mrs Barfield set out reasons i – iv above, and noted that the £12,000 promised for December had not been paid, that the arrears had increased (to £104,209.47) and that an estimated assessment for 11/18 had been issued. Mrs Barfield also noted that the Appellant had (at that date) only cleared the VAT due under its first return, with the unpaid VAT covering seven periods or 21 months. Mrs Barfield further noted the Appellant's use of a factoring agent, and suggested that the Appellant had insufficient operating capital and was potentially trading insolvently. Mrs Barfield explained how the amount of security had been calculated, and informed the Appellant it had 30 days to seek a review or to appeal.

dd. At an unknown date, bailiffs visited the Appellant to secure funds due to the Respondents. The Appellant was able to raise £28,000, at two weeks' notice, to secure the release of goods seized and to pay the bailiff fee .

ee. On 20 February 2019, Mr Lockley sought a review of the requirement to provide security. In his request Mr Lockley referred to the bailiff visit, and to a call he had made to the Respondents in December 2018 when they had been unable to tell him the exact amount outstanding at that time. Mr Lockley concluded:

> We are just now moving into our busy period and have several contracts that will mean we can make a substantial reduction in the outstanding debt over the next few months. I am happy to provide a list of orders that we have in hand and the potential orders that are due to be placed and from this you should eb able to see that we would be able to clear our arrears.
>
> We will be making payments over the next few days which should be a minimum of £16,000 and I understand all our returns are in the process of being submitted.

> I would still propose that we pay £15,000 a month off our arrears and would hope that you can see that we are trying extremely hard to work with you to ensure all our outstanding arrears are cleared.

ff. On 22 February 2019, the two outstanding VAT returns were filed. On 6 March 2019, the Appellant paid £10,000 to the Respondents.

gg. The Appellant's ninth VAT return (for the quarter to 02/19) was due to be filed no later than 7 April 2019. This return was filed on time. Under the return VAT of £14,785.69 was due. This amount remains unpaid.

hh. On 8 April 2019, the Respondents issued their review decision. Mrs Barfield's decision was upheld. The reviewing officer, Mr Grimshaw, noted that it was not necessary to look at the history of previous companies as the Appellant's lack of compliance alone presented a risk to the revenue. Mr Grimshaw looked at matters as they stood at 31 October 2018.

ii. On 23 April 2019, the Appellant paid £3,005.59 to the Respondents. On 1 July 2019, a further £10,000 was paid to the Respondents by the Appellant. No payments of VAT have been made since that date.

jj. We were told that the Appellant's VAT return for the quarter to 05/19 (due no later than 7 July 2019) had not (at the date of the hearing) been filed. Mr Lockley told us he was unaware that was the case, and that he was unable to say what reason there was for any of the Appellant's VAT returns being filed late.

kk. At the hearing Mr Lockley was unable to tell us the current outstanding VAT liability of the Appellant. Mr Lockley told us he had been unable to obtain a definitive figure when he had telephoned HMRC. However, this telephone contact took place in December 2018, and Mr Lockley appeared unable to give us even a rounded estimate of the amount due as at the date of the hearing. Mrs Brown told us, and we accept, that the amount of VAT due from the Appellant stood at £108,715.46 and that a further £14,000 was due in respect of default surcharges. Mr Lockley did not accept, with a VAT debt of that size, that the Appellant was in financial difficulties. Mr Lockley asserted that the Appellant could clear that debt but no timetable was suggested.

ll. Mr Lockley accepted that the last payment of VAT made to HMRC (which he had identified as taking place in September 2019) was made on 1 July 2019, and that no amounts had been paid since then.

mm. When asked to tell us about the business, Mr Lockley told us that the Appellant had made a loss of £50,000 in the year up to September 2017, and a £25,000 loss in the period up to October 2018. Mr Lockley thought that the Appellant had broken even in the year to October 2019, and suggested that this was, in part, due to losing two members of staff and reducing overheads.

nn. Mr Lockley told us that the Appellant was deliberately only taking small orders and so was not able to pay the VAT as it fell due because it had insufficient funds. Mr

Lockley accepted that the Appellant could not subsist on such orders. When asked by Mrs Brown why the Appellant was not currently attempting to pay the VAT which fell due, Mr Lockley told us that he didn't know if the business was going to continue. Mr Lockley told us that the Appellant would be wound up if it was required to provide security.

oo. Mr Lockley told us that the Appellant could accept much larger orders, and that there were potentially £100,000 worth of orders which could be placed this week. There was also an order worth £700,000 which could be placed in the next few weeks. These larger orders would be more profitable, and the customers were willing to pay up front but the Appellant would not accept these larger orders while the requirement to provide security was in place. Mr Lockley agreed that he had told some of his customers about this requirement being imposed.

pp. Mr Lockley told us that he wanted to secure a Time to Pay arrangement to pay off the arrears but he could not do that and also provide the security which had been required. Mr Lockley agreed that the conditions set by HMRC for a Time to Pay arrangement included an obligation to keep liabilities up to date and that the Appellant did not meet this condition.

Discussion and decision

15. The burden of proof in this appeal is upon the Appellant. We consider whether the Appellant has established that either the original decision or the review decision was a decision which no reasonable decision-maker could have reached, or that either decision was flawed in the sense that irrelevant matters were taken into account or relevant matters were not taken into account.

Appellant's main argument

16. Mr Lockley's main argument was that it was unreasonable for HMRC to have required security for VAT when there was a Time to Pay arrangement in place. Mr Lockley told us that he had thought that the agreement with HMRC would continue month on month until all debt (including the VAT arrears) was paid but accepted that, although that was his original understanding, in fact the arrangement covered only the PAYE which was outstanding.

17. Mrs Barfield told us that when making her decision about whether there was a risk to the revenue, she had taken into account that there was a Time to Pay arrangement which covered the PAYE arrears but she knew that that that Time to Pay arrangement did not cover the arrears of VAT. Mrs Barfield also told us that she understood that the payments made by the Appellant under that PAYE Time to Pay arrangement were slightly short but that, as at 31 October 2018 when she made her decision, the Appellant was due to pay imminently the shortfall (of about £1,000).

18. We accept that Mr Lockley made a mistake in misunderstanding the terms of the Time to Pay arrangement which had been reached, but we do not consider that a misunderstanding on his part means that Mrs Barfield (who had correctly understood that the arrangement only applied to the arrears of PAYE) was unreasonable in reaching

the conclusion that, despite the largely successful arrangement with the PAYE, the VAT position was such that there was a risk to the revenue. As at 31 October 2018, the Appellant's VAT arrears were £85,930.47, and it had only paid in full the VAT due under one return. No payment of VAT had been made since 5 January 2018, almost ten months earlier. Three out of seven VAT returns had been filed late or not filed at all. Two predecessors to the Appellant had become insolvent, each owing considerable amounts of VAT. We consider Mrs Barfield was not unreasonable in concluding there was a risk to the revenue.

Appellant's subsidiary argument

19. Mr Lockley also argued that it was unreasonable to take into account the two previous companies. We do not agree that it was unreasonable for Mrs Barfield to take into account the two predecessor companies which were also run by Mr Lockley and which were in the same trade and (in one case) run from the same address. There were sufficient links for those two companies to be taken into account. The three companies traded in the same industry and in the same financial climate; Mr Lockley's own case was that the companies had the same customers. We consider the history of the two predecessor companies to be a relevant consideration when considering the risk presented by the Appellant to the revenue.

20. It is unclear to what extent the two previous companies were taken into account by Mr Grimshaw, the reviewing officer. However, he does make it clear that he would have reached the conclusion that security was requisite based on the Appellant's non-compliance alone.

21. Where a decision taken is based upon a factor which should not have been taken into account, but it is inevitable that the same decision would have been reached in any event, the Tribunal will not strike down a decision. As Judge Bishopp stated in *Southend United Football Club Limited v HMRC* [2013] UKFTT 715 at paragraph 10:

> If we are persuaded the decision was flawed but that, had HMRC approached the matter correctly they would inevitably have arrived at the same conclusion, we should dismiss the appeal.

22. Therefore, even if it had been unreasonable to take into account the history of the two previous companies, as Mr Grimshaw would still have reached the same decision about the requirement to seek security, we would still dismiss this appeal.

The information available at the date of the review decision

23. Although it was not raised by Mr Lockley, we have considered whether the reviewing officer, Mr Grimshaw, should have taken his decision on the basis of the information available to him on 8 April 2019, or whether he was correct to base his decision on the information available to the Respondents on 31 October 2018.

24. Given the extent of Section 83F VATA 1994, we have concluded that Mr Grimshaw should have made his decision on the basis of the information available to the Respondents on 8 April 2019. That is in accordance with the comments of Dyson

J in *Peachtree* and would have allowed Mr Grimshaw to take account of VAT payments which the Appellant had made in November 2018 and March 2019. Therefore, we consider there was an error of law in the review decision. However, we note that the Appellant's VAT arrears had increased between 31 October 2018 and 8 April 2019, further VAT returns had been filed late, and the Appellant continued not to pay VAT as it fell due. Given the deterioration in the Appellant's position by 8 April 2019, we also consider it is inevitable that Mr Grimshaw would still have reached the conclusion that it was requisite to require security.

Other points made by the Appellant

25. In his submissions before the Tribunal (orally to us and in a statement filed on 9 July 2019) Mr Lockley made a number of points that did not engage with the question of whether the decision of the Respondents (on either 31 October 2018 or 8 April 2019) was unreasonable.

26. Mr Lockley argued that while the notice to provide security was in place, the Appellant was unable to take on larger contracts. Mr Lockley told us that the Appellant was only able to accept smaller contracts which made insufficient profit for the Appellant to meet all of its obligations. Mr Lockley argued that if the requirement to provide security was removed then the Appellant would be able to take on larger contracts, make greater profits and so begin paying off the arrears of VAT.

27. This argument engages with Mr Lockley's perceived consequences of a Notice to provide security, not the reasonableness or otherwise of the Respondents' decisions to require security. The decisions about which orders the Appellant should accept are made by Mr Lockley alone.

28. Mr Lockley also asked that the Tribunal allow a Time to Pay arrangement so that the Appellant could continue to trade. This is despite Mr Lockley's acceptance that the Appellant does not meet the conditions for such an arrangement in respect of its arrears as it does not meet its liabilities as they fall due. Our role is to review the decisions taken by the Respondents. It is not within the Tribunal's powers to direct the Respondents to agree to conclude a Time to Pay and (given our conclusions that the Respondents' decisions were not unreasonable) it would be an inappropriate direction in any event.

Conclusion

29. The Appellant has failed to satisfy us either that the Respondents' original decision to require security from the Appellant, or that the review decision confirming the original decision, either contained an error of law or was so unreasonable that no commissioners, properly directed, could have reached those decisions. Therefore, the Appellant's appeal is dismissed.

30. Our decision was communicated verbally to the parties at the conclusion of the hearing on 1 October 2019. We informed the parties that our written decision would be issued shortly thereafter.

31. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 11 OCTOBER 2019