



Taxing Matters

Episode 8 – Let's talk VAT security notices with Joshua Carey

Alice Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax, brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes; Taxing Matters brings you a roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information, or just want some bedtime reading, there is a full transcript of this and, indeed, every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.

Alice One of the things that becomes clear over the course of one's career is that enforcement trends are important for business to be aware of. Both macro trends like sanctions compliance - and a rise in enforcement powers available to tackle the UK's vast fraud problem - but also smaller trends: campaigns against particular tax risks and the relegation of certain information gathering powers, such as those under the "Taxes Management Act", to relative obscurity.

Today we are talking about a rise in one of the smaller trends, the resurgence of the "VAT security provisions". These provisions aren't new but they are experiencing an upswing. So, here to talk us through these powers we have Josh Carey. Josh is a barrister at recognised repository of tax excellence, Devereux Chambers, where he specialises in tax, public and judicial review, commercial litigation, civil and criminal fraud and business crime - and did I mention tax?

Josh was recently named a "legal 500 rising star" and, having worked with him a number of times - including on some pretty thorny cases, I can only say that the legal 500 were absolutely on the money with their accolade! So Josh welcome to Taxing Matters!

Josh Thanks Alice!

Alice So, let's dive right in. What is a security deposit letter of notice and when might it be issued?

Josh A notice of security, or a notice of requirement to give security, is a notice - effectively notifying a taxpayer - that security is required from them by a particular date. Typically given to a business which has a history of non-compliance, whether that be accidental non-compliance - simply didn't have the money to pay the bill - or, sometimes, more nefarious reasons. Historically it's been used to require a security where a business is a "phoenix business" but, it's being increasingly used where tax payments are simply missed by the particular taxpayer. It might, typically, be issued when someone hasn't paid their VAT and there is a particular notice in respect of VAT that is given, or there's a second type of notice in respect of PAYE and national insurance debts. Those are two distinct notices that can sometimes be given to a business. There are different consequences which flow from each of those notices but, broadly, that's really what they are.

Alice So, how do you avoid getting one? You mentioned a bit of non-compliance and accidental non-compliance there - how do you stop it from happening?

Josh The short answer, unfortunately, is for a business to avoid receiving one has to make sure it's paying its tax obligations and that they are up to date. The legal basis for issuing a notice of requirement to give security is that the Revenue considers it 'necessary for the protection of the Revenue'. That's quite a broad discretion which is given to individual officers and they have to take account of all of the circumstances when assessing whether to give one and work out whether it's appropriate to do so - and if they do decide it's appropriate what value it should have.

Modern legislation which deals with the requirement to give security was originally introduced to deal with missing trader fraud. Notice of security has been around for a little while, but the modern version of them was introduced to deal with missing trader fraud - and that saw a vast amount of litigation, including references to the CJEU, for example. Following the Revenue's view that it had now a relatively successful tool in its armoury, the PAYE and NICs legislation was introduced in the "Finance Number 3 Bill 2011". What was said about the particular provision was that HMRC currently require some businesses owing, or likely to owe taxes and duties to provide security, before being approved or to ensure payments are met. A facility to require security exist for most of the indirect taxes, but it's most commonly used for that where a taxpayer has poor payment record. It's also used for "Phoenix traders" where a business accrues a VAT debit, goes into liquidation or administration and then sets up again - usually with the same directors - and runs up further VAT debts.

So, that was the background to it. Despite the statement that these are typically issued for "Phoenix"-type companies, what one now sees is they are being rolled out more broadly, including for things like non-payment post-covid. How do I avoid getting one? Unfortunately, it is just to pay those tax debts because otherwise you may be faced with receiving one or both of these types of notices.

Alice And what does one do if one receives one, or both, of these types of notices?

Josh If you receive one, I think, the first thing to remember is not to panic.

There might be a temptation immediately to panic because it will be probably a large sum of money to the business that predicated on the calculations that the Revenue has done and that anticipates the likely liability over the course of several months – they're usually 3 to 6 months, somewhere in that region. So, it's likely to be a sum of money that you open the letter and think, "oh, no! Look at how much I've got to pay!"

The second thing to do is - once you've not panicked - read the actual letter and see what is being said because, as with all Revenue decisions, there is a process that goes along with it. Typically, what one will see is a warning letter being issued before a notice of requirement to give security. The warning letter will set out the dates by which they would expect certain tax debts to be brought up to date, the value of tax debts that are owing and the likely continued tax debts that will be owed. That, of itself, doesn't trigger any appeal decisions, or appeal rights, or anything like that. It's a warning to you to get your tax affairs in order. As I've said, sometimes these are large sums of money and there can be a case where taxpayers, through no fault of their own, simply don't have the money there to pay. So, if they can't, at that stage enter into discussions with the Revenue - which they really should be doing at this point - the next part of the process will be the notice of requirement to give security being issued. So, the third thing that I would say that taxpayers need to do is - once they have the notice in their hand - take urgent and immediate advice from someone like you Alice, or RPC. The reason that advice has to be urgently sought is because failure to comply with the notice once it's been issued may result in both the business - but also the directors of the business, or other senior individuals, key individuals within the business - being convicted of a crime.

There are, really, two stages to these types of notices. One is the, kind of, more civil stage where you can challenge it in the tribunal, or seek to deal with it before it goes anywhere, but the second - and much nastier side of this - is where it all goes wrong, you can't afford to pay the requirement or security that's been imposed and you may then find yourself before a magistrates court with the possibility of a criminal conviction being recorded. It's important, that that third stage, to take immediate advice.

The fourth thing you'd need to do is look at what your options are. Typically you will have three options. The first is to pay the notice of security - which might be difficult if the business is struggling. Secondly, challenge the notice, that's quite an important step because there are time limits that go along with challenging the notice. Initially that challenge will be to HMRC. Ultimately if that is unsuccessful you will need to challenge it before the First Tier Tribunal Tax Chamber. The final likely outcome will be that you need to try and organise a time to pay arrangement with HMRC to try and work out how you can make meaningful payments over a period of time to spread out the notice of security value that has been imposed.

All of those are, obviously, active steps that you've taken with a view to resolving the fact that you've received a notice of requirement to give security, but if you do none of those things you are very likely to then find yourself on the inside of a criminal court further down the line.

Alice So, let's deep dive into some of those things. What do you do if you can't get the money together? You talked about entering time to pay and talking conversations, can you negotiate to say that either security isn't required, or that it should be at a lesser sum?

Josh Yes, certainly you can go back to the Revenue as part of the discussion and say, "look, I am challenging the fact that you have issued me with the notice of requirement to give security, we don't think it should be issued to us for all of these reasons...". Provide quite detailed reasons to the Revenue, try if you can, to provide some analysis that accompanies the arguments that you're making. Often the Revenue will be assisted by having more information - if they have imposed a notice of security - in order to try and avoid you being lumped with the notice of security moving forwards.

If you can't pay it at that point in time you do really start needing to engage then with the "time to pay team" at the Revenue and having those discussions about what meaningful payments might look like in order to make sure that you're trying to pay off the security within a reasonable amount of time – but, again, that will be subject to all the guidance that sits around time to pay arrangement with the Revenue.

The key takeaway at this point is if you don't think the notice has been properly imposed - bearing in mind the legal test that there has been risk to the Revenue and you think, "my business isn't a risk to the Revenue, we've just gone through a bit of a tough patch but, actually, we've got some new trade that's come in. The business is starting to pick up again, we're very happy with how the business is going", there might be some scope there to go back and have that discussion with the Revenue. It's important to remember that you need to put forward all arguments at that point that you want the Revenue to take account of because if this all goes wrong and you end up in the tax tribunal, what you will be challenging is the 'reasonableness' of the decision to impose the notice of security. The tribunal will be very unlikely, at that stage, to be able to take into account new evidence. So, really you want to make your arguments as full as possible at that stage.

Alice And what about the challenge process? You mentioned some time frames earlier, so, how does that challenge process work?

Josh Initially you will approach the Revenue by way of an appeal to the Revenue and they will give you a view over the matter. If they decide their view of the matter hasn't changed - they still think it's an appropriate decision to have made - you can then seek an independent review within HMRC, typically within 30 days and then after that, if again the decision isn't overturned on the independent review, you can bring an appeal to the First Tier Tribunal. Obviously an independent judicial body they will then review the reasonableness of the Revenue's decision to impose those notices of requirement to give security.

Alice What about the more pointy end? What happens if you don't comply, if you do just ignore this? You mentioned that you can end up in the magistrates court, how does that work and what does that look like?

Josh It does start to get a bit difficult for the business and for the taxpayer.

The Revenue will, traditionally, send some reminders about the 'notice of requirement to give security'. They will say, "we told you about this and you still haven't paid security please pay now by this date". If you ignore those reminder letters, however, the next stage is the file will be sent off to the Crown Prosecution Service for a charging decision about whether the full-code test is met to prosecute. At that point in time the CPS take over the case - other than having provided the information - the Revenue, at that point, don't have any further specific involvement. They will obviously have to give evidence in the criminal case but it's the CPS at that point which take the case over and will issue the charging decision and the summons. The summons will be issued to the business and to the individual, director, or directors as the case may be and they will be required to appear in a magistrate's court where they will be invited to enter a plea of guilty, or not guilty. These are summary only offences, so it won't be a big jury trial, or anything like that. The maximum penalty that can be imposed by the magistrates court is a fine. No risk of jail time, or anything like that, for this offence which is the failure to pay but there may be a hefty fine both for the business and also the individual directors if found guilty.

There is also one important distinction between a VAT notice of requirement to give security and a PAYE notice of requirement to give security and that is for VAT the offence isn't committed unless you keep trading. So, every time you do a deal you will commit the offence. Whereas, for the PAYE and NICs notice of requirement to give security it is the act of non-paying which gives rise to the offence. So, there is a little more latitude in respect of avoiding criminal conviction in respect of VAT because if you receive the notice and just stop trading altogether the offence will, likely, not be committed whereas the PAYE and NICs notices whether you stop trading or not the offence is predicated along the fact that you didn't pay the amount that was required from you. Which is why it's quite important at a very early stage to really be engaging with these types of decisions because they can have quite important and lasting consequences.

Alice And they can have some really significant and full on consequences for both the business and the individual can't it? So, things like, for the business, it can have consequences on what you can tender for, what your banking arrangements are, your engagement with third parties - particularly when they have good-faith in negotiation provisions and particularly where they have requirements that you comply on an ongoing basis with UK law – and, of course, for the individual. So, things like your ability to travel might be affected, your personal financial situation, your banking relationships and of course your fit and proper person test...?

Josh Yeah, those are all very important things to be thinking about. That's why the decisions that need to be made around notices of requirement to give security have to be made, really, at an early stage. Because you do want to guard against the - quite serious - potential ramifications that you've just mentioned.

At the end of the day this will be a criminal conviction, it will be something that you do need to think about when you see that box on a form, for example, "do you have any criminal convictions?" at that point you will be ticking yes. So, it can have some lasting impacts and that's why it's so important to deal with it at an early stage.

Alice So why are we talking about all of this now?

Josh Well, we're talking about this now for a couple of reasons. There has certainly been a 'shift', an increased number of notices of security appearing on the horizon. Also, the Upper Tribunal -Tax and Chancery Chamber - had cause to look at a related case on this. In that case the taxpayer had, effectively, been summoned to the magistrates' court and appealed out of time to the Upper Tribunal. It was assessing whether permission to appeal was rightly, or wrongly, refused before the First Tier Tribunal - but as part of that analysis the Upper Tribunal was looking at the notice of security provision and some of the issues that sit around that.

Ultimately, it has left the issue for determination on a different day, but there is also a certain increase in the number of cases that are starting to appear before the criminal courts where individuals and businesses haven't taken those early steps that we've talked about. Because they haven't taken those early steps they are now in the more pointy-end of the process.

We're really talking about this now because there's, certainly, an increase in the number of "notice of requirement to give security" that I've seen. Historically I've appeared in cases before the magistrates court - for taxpayers - and have occasionally appeared for the Revenue in the tax tribunal for these types of decisions. But there is now - anecdotally anyway, from within the profession - a sense that there are more notices of requirement to give security being issued and that really should be some cause for concern to individuals because, if they're not dealing with these notices in a timely way and appropriately and engaging with the Revenue to the extent that is appropriate, then they really find themselves in the more difficult end of the process - namely a case before the magistrates court where you're either pleading guilty or not guilty to a criminal offence and then you'll either have to be sentenced or attend a trial where you run the very real risk of being convicted. So, it's important to be thinking about these issues both from a personal point of view, but also, the business' point of view as well for all the reasons that you mentioned before.

Alice And if you had one key takeaway what would it be?

Josh The key takeaway probably doesn't come as a surprise based on what I've been saying. Get advice urgently and immediately upon receipt of one of these notices because if you leave it too late ten the horse very-much will have bolted. The difference between success, or not, really does depend on having sought that advice - at a very early stage - and making sure that the full picture is given to the Revenue and so the taxpayer has a particularly good opportunity then to try and avoid the notice of security effectively becoming final and the only way then to challenge it being before the Frist Tier Tribunal Tax Chamber.

Alice Thank you so much. Unfortunately that's all we've got time for in this week's episode. Thank you again to Josh for joining us. You can contact him on Carey@devchambers.co.uk. As ever a big thank you goes to Inciter Productions and Andrew Waterson for the production, music and sound editing of this episode.

Alice If you like Taxing Matters, why not try RPC's other podcast offering "Insurance Covered" which looks at the inner workings of the insurance industry. Hosted by the brilliant Peter Mansfield and available on Apple podcasts, Spotify and our website.

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