

Final demands

Beware! Failure to demand rates may preclude subsequent recovers, warns **Robert Fookes**

Can non-domestic 'business' rates only be demanded retrospectively if the request is made as soon as practicable?

Liability to pay rates arises under section 43 of the Local Government Finance Act 1988. A ratepayer is subject to a non-domestic rate in respect of a chargeable financial year if, on the chargeable day:

- the ratepayer is in occupation of all or part of the hereditament; and
- the hereditament is shown for that day in a local non-domestic rating list in force for the year.

An obligation for a ratepayer to pay up only arises after service of a demand notice. Regulation 4 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 requires that a demand notice be served for each chargeable year. Regulation 5 requires the demand notice to be served "on or as soon as practicable after" 1 April in the relevant chargeable financial year.

Late demands

Questions of late demands arising from late identification of a ratepayer first arose in *Encon Insulation Limited v Nottingham City Council* [1999] RA 392. Deputy Judge David Pannick QC decided that liability depended on:

- (i) not whether the billing authority was unaware of the facts (location of premises) before the date of discovering the true facts and therefore that was not feasible physically to serve a demand notice before that discovery (not as soon as practicable after discovery of the correct information);
- (ii) but whether it was practicable for the billing authority to have taken steps to obtain that information and made that discovery at an earlier date and therefore been able physically to have served the demand at an earlier date (as soon as practicable after the discovery should have been made).

In that case occupation had commenced in 1988 but the discovery of that rateable occupation was not made until 7 November

1997. A demand was issued on 14 November. The billing authority had sent, on one (undated) occasion, an outside inspector who had been unable to locate the premises (wrongly described) on the valuation list. There was no finding as to the length of delay between this visit and the subsequent discovery of the premises and their true address, nor as to how that discovery had been made. The court found that the question was not when the discovery was made but what could earlier have been discovered by taking practicable steps. Confusion had arisen because the name of the hereditament had changed.

This approach has not been altered by the more recent decisions in *North Somerset District Council v Honda, Chevrolet and Graham* [2010] EWHC 1505 (QB).

The *North Somerset* cases considered the correct test to be applied to delay in serving a demand notice in great detail. Burnett J:

- i) rejected the interpretation of regulation 5 of the 1989 regulations that the obligation to serve a demand notice as soon as is practicable is mandatory or that automatic invalidity would arise in cases of delay (implicit but not argued in *Encon*);
- ii) rejected the argument that the recipient must demonstrate that it would be unconscionable for the billing authority to recover rates; and
- iii) found that the recipient must show that he has suffered prejudice.

The judge did not specifically find that it was a requirement of establishing prejudice that the ratepayer did not know of his potential liability. It merely observed that none of the individual ratepayers did know, although they each had rating advisers.

Nevertheless, it was a factor in the balance of prejudice between individual ratepayers and the body of ratepayers as a whole during the relevant period of delay. The fairness to other ratepayers must be weighed against any unfairness to the ratepayer in question.

It was important in the *North Somerset* cases that none of the ratepayers knew that they were liable to pay rates on the relevant dates. The greater the period of delay and the

greater the impact of that delay on the ratepayer, the more likely it becomes that parliament intended invalidity to arise in such circumstances.

Rectification

The error of a late initial demand cannot be overcome by subsequent service of a fresh but retrospective further demand.

The billing authority:

- must decide whether responsibility is their own or that of any outsourced contractor;
- should have a system for inspecting property;
- should have a system which records those inspections;
- should have a system which issues demand notices as soon as practicable; and
- should not attempt to retrieve a delay in issuing a demand notice by serving a fresh one in respect of the period of the delay.

The business ratepayer:

- is under no duty to report occupation to the billing authority; and
- need not pay a retrospective demand if:
 - i) unaware of liability and had not just been keeping quiet;
 - ii) able to show that steps could have been taken to minimise or avoid liability if it had been known that liability might arise; or
 - iii) able to show that the prejudice suffered outweighs that of the loss.

The time limit:

- there is no finite time limit within which a demand notice must be served;
- the period is imprecise;
- the question is whether the demand notice has been served as soon as practicable;
- that is a matter of judgment; and
- the shorter the delay the less likely the sufficiency of the prejudice to invalidate the notice.

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