[2019] UKFTT 90 (TC)

TC06974

Appeal number: TC/2016/03661
TC/2016/03671
TC/2016/03676

APPLICATION FOR COSTS – standard case – no wasted costs – no unreasonable behaviour - Rule 10(1), Tribunal Procedure (First Tier Tribunal)(Tax Chamber) Rules 2009 – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VINOD SHAH, SHASHI SHAH, AND MAHENDRA SHAH **Appellants**

- and -

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

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House, London EC1 on 20 November 2018

Chinan Shah, chartered accountant, for the Appellant

Simon Foxwell, an officer of HM Revenue & Customs, for the Respondents

DECISION

1. This is an application by the Appellants for costs pursuant to Rule 10(1)(b) of the Tribunal Procedure (First Tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules").

2. Mr Chinan Shah represented the Appellants and Mr Foxwell represented HMRC. Various bundles of documents were presented in evidence. In addition a witness statement of Mr Matthew Allsopp was submitted and Mr Allsopp gave oral evidence. Mr Allsopp was the HMRC officer responsible for the various enquiries that led to these appeals. Mr Allsopp was not subjected to cross-examination, and his evidence was unchallenged. No witness evidence was given on behalf of the Appellants.

3. I gave my decision orally at the end of the hearing. This decision notice formally records the reasons for my decision.

Background facts

4. On the basis of the evidence before me, I find the background facts to be as follows.

5. The appeal to which this application relates has at its root an enquiry by HMRC into the affairs of Joysleep Limited which was commenced on 4 February 2010. HMRC was concerned about the use by the directors of a directors loan account and the acquisition and construction of "Norwegian Barn", a residential property owned by the Joysleep directors. The directors of Joysleep Limited were six brothers, including the three Appellants.

6. Joysleep went into insolvent administration on 20 April 2010, before any information or documents were supplied by it to HMRC.

7. Some documents were provided by the administrators in July 2010. These showed that the directors' loan account was a single composite facility operated by all six directors and members of their respective families. The company's nominal account was not detailed (it failed to give the dates for transactions or the purpose of a debit or credit entry).

8. At a meeting later in July 2010 with Mr S Shah, the administrators, and the Appellants' accountant, an HMRC Inspector explained HMRC's concern that the funds passing through the directors' loan account appeared to be inconsistent with the declared means of the six directors over the period 2006 to 2008. Accordingly HMRC proposed to undertake a full review of the means of all six directors.

9. In August 2010, Joysleep went into creditors voluntary liquidation, and HMRC were notified of this in October 2010. The liquidators advised HMRC that the Joysleep's business had been sold in the course of the administration, and that the company's records had been transferred to the new owners (although subject to a right of inspection by company).

10. HMRC commended a review of the personal bank, building society and mortgage accounts of the directors in August 2010. In November 2010, the Appellants' accountant disclosed an omission of rental income and interest income from the tax returns of the six directors from 2003/04 to 2009/10.

11. HMRC inspected the company's records in May 2011, and were concerned that the sales audit trail was not robust – in particular there were weaknesses within the cash records, and a lack of audit trails for transactions within the directors' loan account – and that there could have been omissions of income and extractions of profits by directors. HMRC considered that the acquisition and construction costs and mortgage interest incurred in relation to the Norwegian Barn might have been met out of the omitted sales from Joysleep.

12. In May 2013, Mr Allsopp took over responsibility for these enquiries.

13. Because Joysleep was in liquidation, the enquiry had to be pursued individually with each director. Between July 2013 and September 2015, Mr Allsopp sought to reconcile the entries in the directors' loan account with the quantifiable outgoings of the directors, their spouses, and their dependent and non-dependent children. As many as 25 individuals were users of the loan account over 12 years. Many of the line items were composite entries and could not be attributed to any one individual.

14. Protective discovery assessments were raised by HMRC on all the directors in August 2013 for the periods 1997 to 2010, which were appealed. The Appellants applied for a closure notice in October 2015 and directions for closure of the enquiries were given by the Tribunal in February 2016. Mr Allsopp decided to raise income tax assessments on the basis of the information that had been gathered to date, which were issued on 18 February 2016 together with penalty determinations. On 6 July 2016, each of the Appellants filed their appeal to the Tribunal.

15. HMRC were notified by the Tribunal of the appeal in September 2016, when the Tribunal gave directions for the Appellants' appeals to be heard together.

16. The appeal was categorised as a standard case, and proceeded in the normal manner. Directions were given by the Tribunal in relation to the provision of a Statement of Case, listing and exchange of documents, the provision of witness statements etc. There were applications from time to time for extensions of time, which were granted.

17. The Appeal was set down to be heard on 10 July 2017 – about one year after the appeal was notified to the Tribunal.

18. In the period leading up to the hearing HMRC started to prepare the hearing bundles. Their original bundle had 1200 pages of documents (omitting over 400 pages of banks statements). There was in addition an authorities bundle of 100 pages. At a late stage, the Appellants asked for a further 925 pages of documents to be added to the bundles plus another 400+ pages of bank statements. HMRC sought and obtained a two week extension in order to prepare the hearing bundles.

19. The Appellants served a 16 page skeleton argument shortly before the hearing date. According to the Appellants this was served on Monday 26 June 2017, but according to Mr Foxwell, he only received it on 29 June 2017. According to Mr Foxwell, this was the first time that the Appellants had brought together all their submissions and had put them into context. Mr Allsopp's evidence was that the skeleton provided explanations for the first time which allowed him to understand information previously provided. At the request of the parties, the Tribunal adjourned for 2 hours on the hearing date to allow the parties to see if they could reach a settlement. As a result of those discussions, the Tribunal granted a further adjournment to 30 September 2017 to allow the Appellants to reach agreement with HMRC. The parties reached agreement by that deadline and the Appellants then withdrew their Appeals.

The law

20. The Tribunal has only limited powers to award costs. These are set out in Rule 10 as follows:

> 10.—(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
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> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
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> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;
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> (c) if—
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> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
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> (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph; or
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> (d) in a MP expenses case, if—
>
> (i) the case has been allocated as a Complex case under rule 23 (allocation of cases to categories); and
>
> (ii) the appellant has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this subparagraph.
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> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
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> (3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses, including the costs or expenses of the assessment, incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—

(a) in England and Wales, to a county court, the High Court or the Costs Office of the Senior Courts (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998(a) shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

(b) in Scotland, to the Auditor of the Sheriff Court or the Court of Session (as specified in the order) for the taxation of the expenses according to the fees payable in that court; or

(c) in Northern Ireland, to the Taxing Office of the High Court of Northern Ireland for taxation on the standard basis or, if specified in the order, on the indemnity basis.

(7A) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

> (8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings;

21. These appeals were categorised as standard cases under Rule 23. The Tribunal can therefore only make an award of costs under paragraph (a) or (b) of Rule 10(1). In other words the Appellents must either have incurred wasted costs for the purposes of s29(4) of the Tribunals, Courts and Enforcement Act 2007, or HMRC must have acted unreasonably in bringing, defending or conducting the appeal proceedings.

22. S29(4) of the 2007 Act gives the Tribunal power to order a legal or other representative to meet of a party to meet wasted costs in whole or in part. "Wasted costs" are defined in s29(5) of the 2007 Act as

> any costs incurred by a party—
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> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
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> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

23. The case law addressing the principles which the Tribunal should apply in deciding whether or not a party has acted unreasonably were summarized by Judge Brannan in *British-American Tobacco (Holdings) Limited v. HMRC* [2017] UKFTT 99 (TCC) at [5] to [14]. I agree with his summary which is as follows:

> 5. The principles to apply in deciding whether a party acted unreasonably were helpfully summarised by Judge Raghavan in *Market & Opinion Research International Ltd v Revenue & Customs* [2013] UKFTT 475 (TC) at [8]:
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> "(1) It was to be noted that the test in the Tribunal Rules that a party or representative had "acted unreasonably" required a lower threshold than the costs awarding power of the former Special Commissioners in Regulation 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 which was confined to cases where a party had acted "wholly unreasonably". This was discussed in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395 (TC) at [9].
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> (2) It was suggested that acting unreasonably could take the form of a single piece of conduct. I was referred to [9] to [11] of the decision in *Bulkliner* by way of support for this proposition. In particular at [10] the decision highlights the actions that the Tribunal can find to be unreasonable may be related to any part of the proceedings
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> > "…whether they are part of any continuous or prolonged pattern or occur from time to time".

(3) The point is I think mentioned in the context of contrasting the Tribunal's rules in relation to acting unreasonably across the span of proceedings with the former Special Commissioners' costs power which was in relation to behaviour which was "in connection with the hearing in question". Having said that there would not appear to be any reason why the proposition that a single piece of conduct could amount to acting unreasonably. It will of course rather depend on what the conduct is.

(4) Actions for the purpose of "acting unreasonably" also include omissions (*Thomas Holdings Limited v HMRC* [2011] UKFTT 656 (TC) at [39].)

(5) A failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct (*Carvill v Frost (Inspector of Taxes)* [2005] STC (SCD) 208 and *Southwest Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC)) at [45]).

(6) The test of whether a party has acted unreasonably does not preclude the possibility of there being a range of reasonable ways of acting rather than only one way of acting. (*Southwest Communications Group Ltd* at [39]).

(7) The focus should be on the standard of handling of the case rather than the quality of the original decision (*Thomas Maryam v HMRC* [2012] UKFTT 215(TC)).

(8) The fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it. In *Leslie Wallis v HMRC* [2013] UKFTT 81(TC) Judge Hellier stated at [27]:

> "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong…"

(9) As cautioned by Judge Brannan in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] Rule 10(1)(b) should not become a "backdoor" method of costs shifting."

6 This summary was approved by the Upper Tribunal in that case, [2015] UKUT 12 (TC) at [23]. The Upper Tribunal added:

> "We would add only what this Tribunal (Judge Bishopp) said in *Catanã v Revenue and Customs Commissioners* [2012] STC 2138 , at [14] concerning the phrase "bringing, defending or conducting the proceedings" in rule 10(1)(b) :
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> 'It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.'"

7 The Upper Tribunal went on to describe the test as follows at [49]:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT Rules."

8 The Upper Tribunal in *Market & Opinion Research* at [55] and [56] also made it clear that the attributes of the party concerned should be taken into account:

> "55. There is one point we should make in this respect. In his skeleton argument, Mr Bremner submitted that if it were suggested that HMRC should be subjected to some higher standard than other litigants, then HMRC would submit that such a suggestion was wrong. There was, it was argued, no justification for subjecting different litigants to different standards.
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> 56. To the extent this argument is concerned with the application of a test of reasonableness, and not some different or higher standard, we agree. However, the test of reasonableness must be applied to the particular circumstances of a case, which will include the abilities and experience of the party in question. The reasonableness or otherwise of a party's actions fall to be tested by reference to a reasonable person in the circumstances of the party in question. There is a single standard, but its application, and the result of applying the necessary value judgment, will depend on the circumstances."

9 I should note two important limitations on the Tribunal's powers under section 29 TCEA and rule 10(1)(b) , although I consider that neither limitation is relevant in this case. The power to award costs is limited to costs "of and incidental" to the proceedings, rather than costs in respect of other matters, such as a prior investigation by HMRC: *Catanã v HMRC* [2012] STC 2138 at [7]. In this case this issue does not arise since it is clear that the costs claimed relate to the period after the notice of appeal was filed.

10 Secondly, the power to award costs under rule 10(1)(b) relates to unreasonable conduct in bringing, defending or conducting proceedings. As explained in *Catanã* at [8] and [9], whilst conduct or actions prior to commencement of an appeal might inform actions taken during the proceedings, unreasonable behaviour prior to commencement of proceedings cannot be relied upon to claim costs under rule 10(1)(b). In the present case the conduct of which BAT complains took place after proceedings had been commenced so this second limitation does not apply.

11 Finally, I should also refer to two additional decisions of this Tribunal. First, in *Roden and Roden v HMRC* [2013] UKFTT 523 (TC)

Judge Mosedale, having observed that the Tribunal in *Leslie Wallis* was of the opinion that a party would not be acting unreasonably when pursuing a case without merit unless he ought to have known his case was without merit, stated at [15]:

> "…The Tribunal should not be too quick to characterise pursuing what is found to be an unsuccessful case is unreasonable behaviour: the Tribunal rules provide for a no-costs regime in virtually all tax cases (and the exception for complex cases does not apply in this case). So if in this case HMRC's view had no reasonable prospect of success, HMRC would have been acting unreasonably if they ought to have known this but not otherwise. In considering whether HMRC ought to have known whether the case had a reasonable prospects of success, I consider that I should consider HMRC as a whole and not just the individual officer presenting the case."

13 I respectfully agree with Judge Mosedale's comments.

14 Secondly, in *John Scofield v Revenue & Customs* [2012] UKFTT 673 (TC) I noted that:

> "… Rule 10(1)(b) must also be read in the light of the overriding objective (Rule 2(1)) of the Rules which is "to enable the Tribunal to deal with cases fairly and justly." In particular, Rule 2 (4) provides that:
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> > "Parties must
> >
> > (a) help the Tribunal to further the overriding objective; and
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> > (b) co-operate with the Tribunal generally."

Submissions

24. Mr Chinan Shah's submissions were in essence that:

(1) The original HMRC enquiry was conducted unreasonably and as a result took far too long.

(2) There had been a previous tax enquiry into Joysleep, and HMRC should not have raised assessments in respect of periods covered by the prior enquiry.

(3) During the course of the enquiry HMRC were provided with all the information that they needed, and should have been able to see that the Appellants had no liability to pay any tax, and that therefore HMRC should never have raised the assessments and closure notices that were the subject of these appeals.

(4) HMRC acted unreasonably in the conduct of the appeal itself.

(5) The fact that the Appeal hearing was adjourned and that the parties reached a settlement demonstrates that HMRC were unreasonable in raising the assessments in the first place.

25. Many of Mr Chinan Shah's submissions related to the conduct of HMRC's enquiries prior to the filing of the appeals with the Tribunal. As explained in the decision in the *BAT* case, the power to award costs under Rule 10(1) relates to unreasonable conduct in relation to the proceedings themselves. Whilst conduct or

actions prior to commencement of an appeal might inform actions taken during the proceedings, unreasonable behaviour prior to commencement of proceedings cannot be relied upon to claim costs under Rule 10(1).

26. I also agree with Judge Mosedale in *Rosedale* (cited in *BAT*) that the Tribunal should not be too quick to characterise pursuing what is found to be an unsuccessful case is unreasonable behaviour. Mr Allsopp's unchallenged evidence was that he could not (amongst other things) reconcile the directors' loan account, and that he was therefore justified in raising discovery assessments, closure notices and penalty determinations.

27. There was an issue in relation to a prior enquiry by HMRC into Joysleep, and the existence of the tax raised as a result of that enquiry had not been taken into account by Mr Allsopp in his calculations. Mr Allsopp in his evidence accepted that this had been an error. But he was not aware of this enquiry, and because Joysleep went into liquidation it had not come to his attention until shortly before the hearing date. Once it had been brought to his attention, he prepared revised computations in advance of the hearing taking this information into account. Mr Allsopp's unchallenged evidence was that the effect of the prior enquiry was to take various years out of assessment. However it would not have had any impact on the tax arising as a result of the writing-off of the overdrawn directors loan account, which was the largest part of the tax under appeal.

28. Mr Allsopp's unchallenged evidence was that it was not until he received the Appellants' skeleton argument that the Appellants' arguments were brought together and placed into context. Nothing of this kind had been previously submitted to HMRC, and apart from a meeting in July 2010 at the start of the enquiry, the Appellants had made no attempt to meet HMRC. It was only as a result of receiving the skeleton argument a few days before the appeal hearing that Mr Allsopp was able to complete his reconciliation and see that a settlement was possible. This is why HMRC sought an adjournment at the hearing to go through the skeleton with the Appellants, and the settlement was reached shortly afterwards following the submission of further documents to HMRC by the Appellants.

29. Mr Foxwell submitted that the Appellants did not act proactively to expedite the original enquiry. The documentary evidence supports this. I find that information was "drip fed" to HMRC, and provided separately for each of the directors. HMRC could not be expected to read across information provided in respect of one of the Appellants and apply it to another of the Appellants – in circumstances where the information was not stated to be relevant to the other Appellants.

30. The volume of documents in the original hearing bundles supports Mr Foxwell's submissions as to the complexity of HMRC's reconciliation exercise.

31. Mr Foxwell recognised that HMRC made a mistake in relation to assessment of taxes pre-2004 (because of the previous enquiry into Joysleep). Mr Foxwell submitted that the Appellants had never drawn the existence of this enquiry to his attention. It was included in a case history appended to the back of the Appellants' list of documents – but that list was never reviewed in any detail by Mr Foxwell, as it was used for the

preparation of bundles that was undertaken by a junior caseworker. But even if the Appellants had drawn the existence of the prior enquiry to his attention, that would not have avoided this Appeal, as most of the tax in dispute related to the writing off of the balance on the directors' loan account.

32. I also note that the Appellants took more than four months to file their appeals with the Tribunal from the date on which the closure notices were raised.

33. As regards the conduct of the appeal itself, HMRC submit that they complied with the deadlines in the Rules or in the Tribunal's directions. To the extent that extensions of time were required (for example, to address a bereavement), these were sought and granted by the Tribunal. Overall, extensions of time amounting to 40 days were given by the Tribunal. In the context of the circumstances of this Appeal, I do not consider that to be a material delay. Nor do I consider that HMRC acted unreasonably in seeking those extensions (and as the Tribunal granted the extensions that were sought, the extensions were self-evidently reasonable).

Conclusion

34. I find that neither HMRC nor its representatives acted unreasonably in bringing, defending or conducting the proceedings. I also find that no wasted costs were incurred. It was only when HMRC received the Appellants' skeleton argument that they were given all the information and context which enabled them to reach the conclusion that the Appeals could be settled. Once the skeleton had been received and analysed, HMRC acted reasonably and without undue delay in seeking to settle the Appeals with the Appellants.

35. I therefore dismiss this application for costs.

36. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 11 FEBRUARY 2019