Neutral Citation: [2022] UKFTT 00311 (TC)

Case Number: TC08580

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2020/01131

PROCEDURE – costs application based on unreasonable conduct – defence of FTT proceedings – Rule 10(1)(b) FTT Rules - application refused

Heard on: 29 August 2022
Judgment date: 30 August 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

RUHAL ISLAM

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Sitting in Chambers at Edinburgh on 29 August 2022 considering the written application for costs by the Appellant dated 1 July 2022 and the Respondents' response in respect thereof dated 1 August 2022

DECISION

INTRODUCTION

1. This decision concerns an application by the appellant for an order that the respondents ("HMRC") pay the appellant's costs of £15,000 plus VAT incurred in relation to the appeal.

2. The application was made on 4 July 2022 under section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") and Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the FTT Rules").

3. Under rule 10(1)(b), the First-tier Tribunal ("FTT") may make an award in respect of costs if it considers that a party or their representative has acted unreasonably in bringing, defending or conducting proceedings.

4. In summary, the appellant claims that HMRC acted unreasonably in defending the proceedings because:-

(a) In relation to the issue of rental income, there was no loss of tax, as was conceded by HMRC, so the appeal was obviously meritorious.

(b) As far as the undeclared sales issue was concerned, HMRC had failed to consider the appellant's arguments both during the enquiry and in preparation for the hearing.

5. It is argued that the appellant is of modest means and cannot afford the cost of this litigation.

6. HMRC lodged a Response to the application on 1 August 2022. They argued that the Tribunal's power to award costs is discretionary. Further the appellant's conduct and alleged failures should be taken into account.

7. For the reasons given below, I do not consider that HMRC acted unreasonably in defending these proceedings and, accordingly, the appellant's application for costs must be refused.

Legislation

8. There is no general power to award costs in the FTT. Such power as the FTT has is found in section 29 of the TCEA and Rule 10 of the FTT Rules. Section 29 of the TCEA provides that the FTT has power to determine by whom and to what extent costs of and incidental to proceedings shall be paid but this power is subject to the FTT Rules.

9. Rule 10 of the FTT Rules relevantly provides:

"(1) The Tribunal may only make an award in respect of costs … –

(a) …;

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting of proceedings; or

(c) …".

10. Rule 10(1)(a) relates to wasted costs as defined by section 29(5) of the TCEA Rule. Under that rule, the FTT may order a legal or other representative whose improper, unreasonable or negligent act or omission has caused a party to incur costs to meet those costs. Legal or other representative for this purpose is defined as any person exercising a right of audience or right to conduct the proceedings on behalf of a party. That is not the situation in this case and Rule 10(1)(a) is not relevant to these proceedings. Rule 10(1)(c) relates to proceedings that have been allocated as a Complex case and is also not relevant to this appeal.

The case law

11. I noted the cases referred to by the parties, but I am aware that the case law addressing the principles which the Tribunal should apply in deciding whether or not a party has acted unreasonably were summarised comprehensively 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 I have set out at Appendix 1. Some of the cases referred to below by the parties are rehearsed in that summary.

Summary of the appellant's arguments

12. The appellant relies on the decision in *Catanã v HMRC* [2012] UKUT 172 (TCC) ("Catanã") where at paragraph 14 the Tribunal held that Rule 10(1)(b) is inclusively phrased so as to include amongst other things "where a respondent has unreasonably resisted an obviously meritorious appeal".

13. The appellant went on to rely on *Market & Opinion Research International Limited v HMRC* [2015] UKUT 12 (TCC) ("MORI") at paragraph 49 which stated:-

> "The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgement which will depend on 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".

14. The appellant also relied on *HMRC v Jackson Grundy Limited* [2017] UKUT 180 (TCC) at paragraph 47(4) where the argument was that unreasonableness by HMRC included opposing the appeal when HMRC ought to have known that their opposition had no reasonable prospect of success. In that case at paragraph 74 it was also held that HMRC had acted unreasonably in failing to consider properly new information that was relevant to the appeal that had been put forward by the appellant.

15. Lastly, the appellant relied on *Gardiner v HMRC* [2015] UKFTT 115 (TC) arguing that it was unreasonable to argue a case where HMRC had the burden of proof but where they adduced no evidence.

Overview of HMRC's arguments

16. HMRC argue that orders for costs in the FTT are the exception rather than the rule and in that regard, HMRC rely on *MG v Cambridgeshire County Council (SCN)* [2017] AACR 35 where UT Judge Rowley, in HMRC's words "stated in passing" that the FTT should apply considerable restraint when considering an application for costs under Rule 10. They relied on his statement that it was:-

> "… crucially important … to begin by emphasising that nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order for costs. The Tribunal proceedings should be as brief, straightforward and informal as possible and it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs."

17. HMRC also relied on *MORI* but at paragraph 22 which approves Judge Raghaven's summary of the approach to be applied to costs which is at paragraph 8 of the FTT decision in that appeal (see Appendix 1).

18. Unsurprisingly, HMRC relied on *Tarafdar v HMRC* [2014] UKUT 0362 for the proposition that even if a party is found to have acted unreasonably the Tribunal still has a discretion as to whether to award costs.

19. At paragraph 10 of HMRC's response, it states that "… whilst the Respondents feel that both parties fell short in relation to the proceedings and neither party discharged their burden of proof, the Respondents will not make any objection in relation to the liability issue".

20. HMRC simply queries the quantum and argued that the appellant's own conduct should be taken into account.

21. HMRC did reference two other FTT cases which, of course, do not bind me and which I found did not assist me so I do not refer to them.

Background to the Application and Discussion

22. A full decision on the substantive issue in this matter was issued by the Tribunal on 17 June 2022, a summary decision having been issued on 7 June 2022.

23. This was a successful appeal against discovery assessments issued for the years 2007/08 to 2014/15 inclusive and closure notices for the years 2015/16 and 2016/17. The total tax involved was £293,403.90.

24. In summary, HMRC argued that Mr Islam had overstated his sales by in excess of £1.3 million over a ten year period with in excess of £584,000 being spent on unrecorded purchases leaving him with additional profits of more than £782,000. They argued that that was achieved by using two tills and recording the sales from only one.

25. HMRC relied on till receipts covering the period 29 November 2015 to 30 January 2016 which were compared with declared sales for that period. By Mr Islam's own admission those till receipts were falsified.

26. The Tribunals' conclusion at paragraph 67 of the Decision read:-

> "At the outset [of the Tribunal's discussion] we indicated that this was not a satisfactory case. It was not. Neither party "proved" their case. It came down to the burden of proof and HMRC have not established a loss of tax because of deliberate or careless behaviour in the years for the discovery assessments. For the Closure Notices, we do not find that there is a loss of tax in regard to the rental income. Because we do not accept that the till receipts in the disputed period were 'sales' the appeal must succeed in that regard."

27. The Tribunal had also recorded at paragraph 33, that the appellant had argued that there was a small issue in relation to a failure to disclose rental income. There had been no profit yet Officer Bagley had conceded in his witness statement that there was no tax loss. That underpinned the Tribunal's conclusion in that regard in paragraph 67.

28. I do not propose to amend the Decision because it is not material, but paragraph 33 should have referenced Officer Matthews and not Officer Bagley. It is her witness statement at paragraph 20 which makes that concession.

Rental income

29. In the application Mr Sykes argues that HMRC had defended the appeal in relation to rental income in a situation where, at a meeting with Officer Bagley on 25 July 2018, the appellant had told HMRC that he made no profit and he also said that in a letter that he had sent to the review officer.

30. The note of the meeting does say that Mr Islam had said that he did not make any profit but it also said that he would check with his accountant where that income had been shown in his tax return. Nothing was produced in that regard. In any event, the notes of that meeting were hotly disputed.

31. What is of note is that in the Statement of Case at paragraph 74, HMRC stated "HMRC also submit that the appellant has failed to declare property income of £6,000 per year. These figures are not in dispute." That was in response to the Grounds of Appeal which stated:-

> "The appeal also covers the income from property assessments that do not take account of the rent paid by me for the flat above the business that matched the rent received. This point was covered in the penultimate paragraph of my letter of 6 February 2020."

32. That letter of 6 February 2020 was the letter to the review officer. The relevant paragraph in that letter read:-

> "One point I need to correct and that is the rental income. When I wrote to Mr Bagley on 28 February 2019, I omitted to include the rent payable to the landlord of £6,000, the total expenses were £22,970 and not £16,970. The rent received matched the rent payable so there was no profit."

33. As Officer Bagley explained in his witness statement at paragraph 56, the letter of 28 February 2019 had been received but "no evidence for the additional expenses claimed was provided".

34. The problem with the letter of 6 February 2020 is that the review conclusion letter was issued on 12 February 2020 and stated that no further information had been received from Mr Islam following a telephone conversation on 27 January 2020 when he was given a further week to submit information. Mr Islam's letter was received by HMRC and date stamped as such on 13 February 2020. By that time it was too late to be considered by HMRC as the next stage was the appeal to the Tribunal.

35. Although Mr Islam enclosed a copy of the letter of 6 February 2020 with the Notice of Appeal, it was only when he produced his witness statement, dated 28 June 2021, where he reiterated the information about the expenses, that he produced any evidence being the rental agreement which was exhibited with the witness statement.

36. Officer Matthews' witness statement, where she accepted that it had been established that there was no tax loss, was dated 30 April 2021.

37. As we made clear at paragraph 58 of the Decision, Mr Islam had failed to cooperate with HMRC for a significant period. His letter of 6 February 2020 apologises for the delay in providing the information which had been provided after the one week extension which had been granted on 27 January 2020.

38. Officer Matthews' concession was fair, given that it was produced in the absence of evidence to underpin Mr Islam's assertions about expenses.

The alleged suppression of takings

39. It is argued at paragraph 19 of the application that HMRC should have considered the letter of 6 February 2020 and it had explained the same arguments which were presented at the appeal. Mr Sykes conceded that that letter did not provide "the same volume of supporting evidence" as at the hearing but that a reasonable person would not have opposed the appeal unless they could present arguments explaining why Mr Islam's case was incorrect. HMRC had not presented any such arguments.

40. I have difficulty with that argument. Firstly, that letter was two pages long and produced only a copy of a till reading in 2020. The appellant's Bundle for the hearing was 760 pages long.

41. Secondly, and more importantly, it was in that letter for the first time that Mr Islam offered the explanation that the till in question had "been used to create bogus records" for the purposes of selling the business.

42. An order for costs relates only to unreasonable behaviour in defending an appeal. Therefore the argument about whether the review officer should have considered the letter is not relevant. However, for the reasons given above, that letter was not timeously provided to HMRC.

43. Should HMRC have defended the appeal given that that letter was annexed to the Notice of Appeal? I do not agree with the argument that HMRC's approach to the appeal had no reasonable prospect of success. We previewed this case in some detail before the hearing and in our view HMRC had an arguable case, as did the appellant. There were obvious potential issues in relation to credibility. The threshold for a reasonable prospect of success is not high but our view was that either party might have succeeded in this matter. The issues were far from clear cut. In the words of Judge Bishopp in *Catanã* this was patently not an "obviously meritorious appeal".

44. It is argued for the appellant at paragraph 20 of the Application that HMRC should have presented "arguments that explained by (sic) Mr Islam's case was incorrect" and that that case had been visible since Officer Bagley's meetings with Mr Islam in 2018.

45. As I have pointed out Mr Islam's arguments about the till records only surfaced, notwithstanding numerous previous opportunities and a Schedule 36 Finance Act 2008 Information Notice, in the letter of 6 February 2020 and evidence in that regard was only offered in the witness statement in 2021.

46. As the decision makes clear, HMRC did not cross-examine the witnesses to any material extent but it would have been the obvious route for HMRC in order to establish that HMRC's *prima facie* case on the till records was credible. At paragraph 13 of Judge Brannan's summary, he agrees with Judge Mosedale and the final comment in the quotation from her was that the Tribunal should look at "HMRC as a whole and not just the individual officer presenting the case". We had anticipated that there would have been such cross-examination but the absence of such cross-examination was the litigator's choice. In itself that is not unreasonable conduct.

47. For the reasons given, I do not accept that HMRC did not have an arguable case. They had a case which they lost.

48. I have noted HMRC's argument that "both parties fell short in relation to the proceedings" and their concession that they do not offer any objection in relation to the liability issue. They leave the question of any award and the quantum thereof to the discretion of the Tribunal. I have also noted Mr Sykes' argument that the appellant is a man of modest means and cannot be expected to bear the costs of litigation. His means are not relevant. HMRC are correct to state the general rule in this jurisdiction is that there should be no order for costs.

49. In the decision I refer to some difficulties with both Officer Bagley's and Mr Islam's evidence. The decision does not refer to the transcript in any detail beyond pointing out that it was incomplete, but had there been a need to do so, we would have pointed out that it had been lodged in process by the appellant and presented as being complete. It was only in Closing Submissions, after the recording from which it was derived had been produced to the Tribunal, that it came to light that it was incomplete. I have looked at all of the circumstances in this case. I can see why HMRC argue that both parties fell short in the proceedings. They did.

50. I see no reason to depart from the approach in standard cases that, in general, there should be no award of costs. HMRC's approach to defending and conducting these proceedings was

not unreasonable in the circumstances described here and in the decision. Insofar as there were shortcomings, on the part of both parties, that is simply a feature of litigation.

Decision

50. For the reasons set out above, the application by the appellant for an order under Rule 10(1)(b) of the FTT Rules, that HMRC pay its costs in relation to this appeal, is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

51. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 30 AUGUST 2022

Appendix 1

The Summary by Judge Brannan in *British-American Tobacco (Holdings) Limited v HMRC* [2017] UKFTT 99 (TCC) at [5] to [14] (There is no paragraph 12).

> "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]:
>
> > "(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].
> >
> > (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
> >
> > > "…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):
>
> > '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.
>
> 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:

"Parties must

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."