Neutral Citation: [2022] UKFTT 00428 (TC)

Case Number: TC08646

FIRST-TIER TRIBUNAL
TAX CHAMBER

Determined on the papers

Appeal reference: TC/2020/03506
TC/2020/03507

COSTS – appellant's application for unreasonable costs – application dismissed

Judgment date: 24 November 2022

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

DAVID OAKES

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

DECISION

INTRODUCTION

1. This decision deals with an application for costs of £1,698.60 (inclusive of VAT) made by the appellant pursuant to section 29 Tribunal Courts and Enforcement Act 2007 ("**TCEA**") and Rule 10 (1) (b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**").

BACKGROUND

2. In September 2020 the appellant appealed against a number of matters relating to income tax assessments and penalties, and to VAT assessments and penalties. These appeals were brought out of time, and so the appellant applied to this tribunal for permission to bring those appeals out of time.

3. The application for permission to appeal ("**permission application**") was scheduled as a one day face-to-face hearing to take place by video link, and that hearing took place on 15 March 2022. However, due to the length of the witness evidence, the hearing was adjourned, and the tribunal sought dates to avoid for a second day's face-to-face hearing, which was also to take place by video link. At the end of the first day, I indicated that the witness evidence was complete.

4. By an application dated 22 March 2022, before the second day's hearing had been listed, HMRC applied for permission to introduce into the proceedings, new evidence (the "**late evidence**") which comprised an email exchange between HMRC's witness, Officer Langan and the appellant (the "**late evidence application**"). The ground of that application was that both of the appellant's oral witnesses, namely the appellant, and Mr Bailey (of Howard's accountants who had been the appellant's previous agent) had stated in oral testimony that Officer Langan had refused to accept evidence offered by the appellant in support of the bulk of items included in the list of input tax which had been disallowed.

5. The appellant opposed the late evidence application on a variety of grounds, and in his submissions setting out that opposition dated 27 March 2022, the appellant also sought an order for costs (the "**costs application**").

6. I considered the late evidence application, and in a decision released on 4 May 2022, dismissed it. I also indicated that we would consider the costs application on the second day of the hearing.

7. In submissions dated 3 October 2022, HMRC set out their objections to the costs application.

8. The second day the hearing took place on 11 October 2022. Once again we were unable to deal with all outstanding matters, including the costs application. Having discussed the matter with the parties, it was agreed that we would deal with the costs application on the papers. Following further written submissions, we released our decision on the permission application on 10 November 2022 ("**our decision**"). We allowed the permission application but only to a limited extent.

9. This decision should be read in conjunction with our decision which sets out, in detail, the issues which we had to decide, our findings of fact, and the relevant law. We have, therefore, only dealt in a superficial way with those issues, in this decision.

THE LAW

10. There was no dispute between the parties regarding the relevant legislation and case law which relates to the costs application. I set it out below.

The legislation.

11. Section 29(1) TCEA provides:

> **"29 Costs or expenses**
>
> (1) The costs of and incidental to-
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules".

12. Rule 10 provides, inter alia;

> **"10. Orders for costs**
>
> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …….
>
> (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…….

(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—

i. in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (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 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;……".

Case law

13. In the case of *Haworth and others v HMRC* [2019] UKFTT 0149, Judge Brooks has provided the following neat summary of the relevant case law relating to this issue. I am not bound by this summary but I have considered it and agree with it. I set it out, suitably edited, below.

"10. In all other cases, ie appeals categorised as basic, standard or where an appellant in a complex category case has, like KBTL, opted out of the costs shifting regime, the Tribunal may only make an order in respect of costs if "it considers that a party or their representative had acted unreasonably in bringing, defending or conducting the proceedings (see Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).

11. In *Tarafdar v HMRC [2014] UKUT 362 (TCC)* the Upper Tribunal observed that:

"[18]…The scope of [unreasonable conduct] has been discussed in this Tribunal in *Catana [2012] UKUT 172 (TCC)* where Judge Bishopp, at [14], described it as covering:

"cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonable resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side".

> [19] The costs 'of and incidental to the proceedings' cover only those costs incurred in the course of preparing and pursuing the appeal…,and, on an application by the appellant, it is only the reasonableness of HMRC's conduct in defending or conducting the proceedings that falls to be considered. The reasonableness of the original decision against which the appeal has been made is not directly in point, but is relevant to the question whether it was reasonable of HMRC to defend, or to continue to defend, the appeal.
>
> [20] Even if the tribunal is satisfied that a party has acted unreasonably in the terms of rule 10 , the tribunal nevertheless has a discretion whether or not to make a costs order, or as regards the extent of a costs order. Such a discretion, like any other discretion conferred on the tribunal, must be exercised judicially…..".

12. In *Distinctive Care Limited v HMRC [2018] 155 (TCC)*, at [44], the Upper Tribunal referred to its decision in *Market and Opinion Research International Limited v HMRC [2015] STC* in which it endorsed the following approach:

> (1) the threshold implied by the words 'acted unreasonably' is lower than the threshold of acting 'wholly unreasonably' which had previously applied in relation to proceedings before the Special Commissioners;
>
> (2) it is possible for a single piece of conduct to amount to acting unreasonably;
>
> (3) actions include omissions;
>
> (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
>
> (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
>
> (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;
>
> (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and
>
> (8) the power to award costs under Rule 10 should not become a 'backdoor method of costs shifting'.

It added, at [45]:

> "…one small gloss to the above summary, namely that …questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight".

13. Additionally, the meaning of "unreasonable" was considered in *Ridehalgh v Horsefield* [1994] in the following terms:

> ‘Unreasonable’ also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because the more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

14. The Lands Chamber of the Upper Tribunal in *Willow Court Management Company v Alexander [2016] UKUT 290 (LC)* observed, at [22] that the "language and approach" (of an identical provision to the Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) to be "clear and sufficiently illuminated by the decision in *Ridehalgh*".

THE PERMISSION APPLICATION

14. The legislation and case law which is relevant to the permission application is set out in our decision, but in essence it revolves around the application of the threefold test set out in the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178 (TCC) (“***Martland***”). I set this out below:

> “44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal……".

15. As can be seen from paragraph 46 of that decision, whilst we can consider obvious strengths and weaknesses of the underlying appeal, we should not undertake a detailed analysis of the underlying merits.

16. As mentioned above, the permission application dealt with appealable decisions ("**appealable matters**") which we categorised, in our decision, as "**income tax matters**" and "**VAT matters**".

17. As far as the VAT matters were concerned, it was the appellant's case that HMRC had not established that the appealable notices had been properly served on the appellant. But if they had, then the appellant had not received them. Furthermore, even though the appellant might have been on notice of the VAT matters since the date of the bankruptcy petition in July 2018, it was not possible to tell from the bankruptcy petition the precise nature of the VAT matters. Notwithstanding repeated requests of HMRC to obtain those details, the information was not forthcoming. It was not, therefore, until September 2020 that an appeal could be made.

18. As far as the income tax matters were concerned, the appellant accepted that his agent had been served with the relevant notices, but that rogue employees had been responsible for failing to properly act following receipt of that information. And so the failings of the appellant's agent should not be attributed to the appellant. And even if they could, then the same lack of detail regarding the VAT matters in the bankruptcy petition applied to the income tax matters.

19. HMRC's case was that the appealable matters had been properly notified to the appellant or the appellant's agent, and that the evidence that they had not been received by the appellant was thin. The failings of the agent and its employees should be attributable to the appellant as the behaviour of those employees was simply failing to comply with office procedure. There was sufficient information in the bankruptcy petition to enable the appellant to make an appeal in respect of the matters set out in it which could have been done in the summer of 2018. There was no new information available to the new agent who made the appeal in September 2020. There was little evidence of repeated requests by the appellant or the appellant's agent, of HMRC, between July 2018 and September 2020, for additional information to enable him to make an appeal.

20. Both parties submitted that the strength of the others case regarding the underlying appeal was weak. But the permission application did not consider, in any detail, the strengths and weaknesses of the parties respective positions in that underlying appeal.

21. In a nutshell, it was our decision that to the extent that the VAT matters were not apparent from the bankruptcy petition, the appellant should have permission to bring a late appeal. However, to the extent that they were so apparent, he should not have permission. Furthermore, he should not have permission to bring a late appeal in respect of the income matters whether they were apparent in the bankruptcy petition or not.

THE LATE EVIDENCE APPLICATION

22. I dismissed the late evidence application. It was my view that when exercising my judicial discretion to permit, or otherwise, the introduction of late evidence, I was exercising judicial discretion. The test was, to all intents and purposes, the same as the *Martland* test. There is no presumption that all relevant evidence should be admitted unless there was a compelling reason to the contrary. It was my view that the late evidence should have been put before the tribunal in preparation for the hearing of the permission application. The delay in doing so was serious and significant. The reasons for this delay were not good. The evidence had been available at the time that HMRC compiled a list of documents and would therefore have been available for inclusion even if it was only peripherally relevant to the issues to be addressed in the permission application. And at the final evaluation stage, I agreed with the appellant that the late evidence, comprising an email exchange between the appellant and Officer Langan was largely irrelevant for the permission application (albeit relevant to the underlying issues in the substantive appeal). The late evidence provided no further insight into any obvious strengths or weaknesses in the parties' respective positions in that substantive appeal.

THE COSTS APPLICATION

23. The appellant submits that HMRC have acted unreasonably in making the late evidence application. He makes the following specific submissions:

(1) The tribunal had issued directions on 25 November 2021, and HMRC were in breach of these by failing to include the late evidence in their list of documents.

(2) HMRC had failed to seek permission to admit the late evidence prior to the first day of the oral hearing.

(3) HMRC had failed to seek permission to admit the documents during cross examination.

(4) HMRC have failed to provide any explanation for their foregoing omissions.

(5) HMRC had not put the appellant on notice that it was making the late evidence application.

(6) The late evidence application had not been supported by a witness statement.

(7) The late evidence application is without merit as the late evidence does not counter the evidence of the appellant that he needed an extension of time as obtaining copies of the invoices was proving difficult, and there was no evidence that the late evidence was ever seen by Mr Bailey or by Howard's, so cannot go to the evidence of Mr Bailey.

(8) HMRC, having been told that the evidence had closed at the end of day one of the hearing was seeking to admit new evidence after the date of closure of the evidence.

24. HMRC submit as follows:

(1) In his Witness statement the appellant asserted that "HMRC had incorrectly disallowed VAT because copy invoices were not immediately produced but which I could have obtained had I been given the chance".

(2) At the first day of the hearing on 15 March, both the appellant and Mr Bailey stated that the appellant had obtained duplicate invoices in respect of over 90% of the disallowed input tax and that the invoices had been offered to Officer Langan who had refused to accept them (the "**assertion**").

(3) Following that hearing, Ms Davies reviewed the file to see whether the assertion was correct. She found the late evidence which, contrary to the assertion, shows that the appellant had not obtained duplicate invoices as evidence of the disallowed input tax.

(4) The appellant's case before 15 March had been that that the disallowed input tax related to invoices he could not obtain. The late evidence supports this and rebuts the assertion.

(5) When considering an application to admit a late appeal, the tribunal can look at the obvious strengths and weaknesses of the applicant's case. The assertion goes to that point. In Ms Davies' view, if the assertion was accepted, it might strengthen his case. She was not to know the weight which I might attach to the assertion at the final evaluation stage. It was therefore reasonable to apply to admit the late evidence.

(6) As HMRC understood the appellant's case to be that he could not obtain the invoices, they only included in the bundle those documents which supported their position that without those invoice as evidence that he had incurred input tax, the appellant was unlikely to succeed in the substantive appeal and would thus suffer no prejudice if the permission application was refused.

(7) Had HMRC been made aware of the assertion before the hearing, they would have applied to have the late evidence included in the hearing bundle as it is relevant at the final evaluation stage of the *Martland* test. HMRC could not do so as they were ambushed by the assertion.

(8) HMRC were not seeking to admit new evidence but to respond to the assertion which was made on the first day of the hearing and of which they had no prior warning.

(9) The appellant has not complied with time limits. He also withdrew over 40 applications to admit late appeals less than 2 weeks before the hearing on 15 March 2022 notwithstanding that he had been in possession of all the relevant evidence since September 2021. No reasons were given for the lateness of these withdrawals.

DISCUSSION

25. In *Ridehalgh v Horsefield* mentioned above ("***Ridehalgh***") the court set out a three-stage test which should be adopted when exercising the discretion to award wasted costs. Given that an application for wasted costs asks whether a representative has acted unreasonably, it seems to me that the same approach can be adopted towards an application for unreasonable costs against a party. This three-stage test asks firstly, whether the legal representative of whom complaint is made has acted improperly, unreasonably or negligently. Secondly, if they did, did such conduct cause the applicant to incur unnecessary costs? And finally, is it in all the circumstances of the case just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

26. The acid test for unreasonable behaviour is whether that behaviour permits of a reasonable explanation. It is my view that HMRC's behaviour does permit of a reasonable explanation.

27. Ms Davies submits that the assertion was made on the first day of the hearing. I have checked my notes, and I can find no reference to the 90% figure which she says made up part of the assertion, But my notes show that both the appellant and Mr Bailey gave evidence that they had provided the invoices to Officer Langan (in the case of Mr Bailey he said "eventually" and went on to say that Officer Langan had said that the submission of the invoices should be "all or nothing"). Mr Avient, in his submissions, has not sought to refute the submission that the assertion was made, and I find as a fact that it was.

28. In these circumstances I can understand why Ms Davies made the late evidence application. I accept that it might well have been possible for the late evidence to have been included in the bundle originally, but her explanation as to why it wasn't, namely that it was not necessary given that prior to the first day of the hearing, HMRC's understanding of the appellant's case was that he had not supplied the invoices as he had been given insufficient time to do so, meant that there was no necessity to do so. And it is my judgment, too, that having heard the assertion, it was reasonable to make the late evidence application.

29. I dismissed the late evidence application largely on the basis that it was my view that the late evidence was not relevant to the permission application, albeit that it might be relevant to the substantive appeal. But as Ms Davies submitted, when considering the permission application, at the final evaluation stage of the *Martland* test, the obvious strengths or weaknesses of the appellant's case can be considered. And she was not to know what I might consider obvious strengths or weaknesses. As things turned out, I did not think this affected the merits of the appellant's case. But her concern that it might and was therefore something of which we could take into account at the final evaluation stage, was a reasonable one.

30. Mr Avient submits that the late evidence was always available to HMRC and thus should have been included in the bundle pursuant to directions, and if not, an application could readily have been made for the inclusion prior to the first day of the hearing. But Ms Davies' explanation as to why this was not done (namely that HMRC were proceeding on the basis of the appellant's case that he had been given insufficient time to provide the invoices, and were ambushed by the assertion that they had in fact obtained the duplicate invoices but these had been rejected by Officer Langan) is a reasonable one. Mr Avient also submits that the late evidence application should be supported by a witness statement. But I can see no justification for this. The documents speak for themselves. They go some way to rebutting the assertion.

31. It is true that the late evidence application was made after I had told the parties that the evidence had closed. But that does not automatically shut out the possibility of making an application to submit late evidence. It is something which goes to the exercise of my discretion when considering unreasonable costs.

32. So, as stated above, I do not find HMRC's conduct to be unreasonable. Although I dismissed their late evidence application, there is a reasonable explanation for why it was brought in the first place.

33. In these circumstances, there is no need for me to go on to consider the second limb of the test, namely whether the conduct caused the appellant unnecessary cost.

34. Turning to the third limb of the test, namely whether it is just in all the circumstances to order costs, I am conscious that in *Ridehalgh*, the tribunal stated that the cost shifting rule was to be used in only the clearest of cases and should not be invoked without good reason (see paragraph [27]). It is also contrary to the general rule that in non-complex cases, each side bears their own costs. And my power to award costs should not be a back door method of cost

shifting. I have found that HMRC's conduct admits of a reasonable explanation. In these circumstances I do not consider that it would be just to allow the costs application. I therefore dismiss it.

DECISION

35. The costs application is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 24th NOVEMBER 2022