TC03248

Appeal numbers: TC/2012/07515, TC/2012/07866 & TC/2012/07867

COSTS – On 12 November 2013 HMRC conceded all disputed matters in a standard category appeal listed for hearing on 22 November 2013 – Appeal settled by agreement on 19 November 2013 – Failure of HMRC to comply with Directions – Whether HMRC acted unreasonably in defending or conducting proceedings – Rule 10(1)(b) Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

MESSRS J H & I M WARD (PARTNERSHIP) **Appellant**

- and -

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

J H WARD (PARTNER) **Appellant**

-and-

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

I M WARD (PARTNER) **Appellant**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS

With the consent of the parties this application was determined on the papers on the basis of the written submissions of the Appellants dated 2 December 2013 and 14 January 2014 and those of the Respondents submitted on 7 January 2014

Chris Madge of Chris Madge & Co Chartered Accountants for the Appellant

Simon Bates of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the appellants, the farming partnership of Messrs J H and I M Ward and the individual partners (which I shall subsequently refer to as the "Partnership" to include all of the appellants), for an order that HM Revenue and Customs ("HMRC") pay the costs of an appeal listed for a hearing on 22 November 2013 that was settled by agreement on 19 November 2013 following a concession by HMRC, on 12 November 2013, in respect of the issues in dispute.

2. The grounds on which costs are sought are that HMRC acted unreasonably in defending or conducting the proceedings by failing to settle the case sooner than it did and by failing to comply with the directions of the Tribunal.

Law

3. The ability of the First-tier Tribunal to make an order in respect of costs is derived from s 29 of the Tribunals Courts and Enforcement Act 2007 ("TCEA"). This provides:

> (1) The costs of and incidental to—
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> (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.

4. As Judge Bishopp noted in *Catanã v HMRC* [2012] UKUT 172 (TCC) at [7]:

> "… the tribunal may only make an order in respect of costs "of and incidental to" the proceedings. There is no power to make an order in respect of anything else, and particularly, in the context of this case, in respect of the investigation into Mr Catanã's tax affairs which preceded the proceedings."

He agreed, at [8], with the following observation of Judge Berner at [11] in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395 (TC) that:

> "…one thing that has not changed is that the Tribunal's jurisdiction continues to be limited to considering actions of a party in the course of "the proceedings", that is to say proceedings before the Tribunal whilst it has jurisdiction over the appeal. It is not possible under the 2009 Rules, any more than it was under the Special Commissioners' regulations, for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the

> Tribunal does have jurisdiction, can costs incurred before that period be ordered. In these respects the principles in *Gamble v Rowe*, and *Carvill v Frost* [2005] STC (SCD) 208 remain good law. That is not to say that behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform actions taken during proceedings, as it did in *Scott and another (trading as Farthings Steak House) v McDonald* [1996] STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal."

5. Therefore, the Tribunal has no power to make an order for costs in respect of the matters which preceded the proceedings. Also, as is clear from s 29(3) TCEA, the power of the Tribunal to award costs is also subject to Tribunal Procedure Rules.

6. Insofar as it applies to standard category cases, such as the present, rule 10 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") provides:

> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;…
>
> (c) …
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
>
> (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 the order be made; and
>
> (b) send or deliver with the application a schedule of 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.

7. In *Market & Opinion Research International Limited v HMRC* [2013] UKFTT 475 (TC), Judge Raghaven, at [8] considered the following propositions, drawn from various First-tier Tribunal decisions:

> (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. He 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 that 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 081(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.

Facts

8. On 16 January 2008 HMRC commenced an enquiry into the Partnership's 2005-06 tax return. Following a review of the Partnership's records, a meeting with the partners on 7 August 2008 and, what is described by Chris Madge & Co, the Partnership's representatives, as, "a substantial amount of correspondence", the

parties were unable to reach agreement, the substantive issue between them being the application of accounting principles in the valuation of livestock, crops in the ground, produce and stores.

9. On 3 August 2010 Chris Madge & Co wrote to HMRC to arrange a further meeting. The letter also referred to the issues in dispute stating:

> By any accountancy definition, the majority of the proposed adjustments [made by HMRC] are immaterial and it would be my argument you withdraw these irrelevant and immaterial clams [relating to the substantive issues in dispute] immediately.

10. However, despite the reference to accountancy matters in the letter, HMRC's caseworker, in breach of HMRC's guidance did not seek the advice of an accountant before issuing penalties in respect of 1989-90 to 2007-08 on 11 January 2012 and, on 19 January 2012, an amendment to the Partnership's 2005-06 tax return and assessments for 1989-90 to 2004-05, 2006-07 and 2007-08. The Partnership's notice of appeal stated that the total amounts concerned were £8,680 in respect of tax, of which only a small proportion was disputed, and penalties of £1,791.

11. The Partnership appealed to HMRC against assessments and penalties on 7 February 2012 and on 16 February 2012 requested a review. A three month extension of time for this review was agreed and, on 22 June 2012, Chris Madge & Co was notified by a letter that the assessments and penalties on the Partnership had been upheld. Again, contrary to its own guidance an internal accountant was not consulted by HMRC's reviewing officer.

12. On 24 June 2012 the Partnership appealed to the Tribunal.

13. The parties were notified on 9 October 2012 that the case had been allocated to the standard category under rule 23 of the Tribunal Procedure Rules and, in accordance with directions issued on the same day the appeals of the Partnership and the partners were joined and to be heard together at the same time by the same Tribunal. The directions also required HMRC to provide their 'Statement of Case' "addressing each of the appeals separately to the Tribunal and the appellants no later than 60 days after the date of these directions" ie by 8 December 2012.

14. According to HMRC the statement of case was delivered to the Partnership and the Tribunal on 11 December 2012, three days late, but, as stated in HMRC's submissions the "vagaries of the Department's posting procedures probably added to the delay in their receipt" by the Partnership's representatives who received it on 17 December 2012 by 'Special Next Day Delivery'.

15. On 18 January 2013 further directions were issued by Tribunal extending the time for the parties to provide information for listing the appeal for a hearing and a list of the documents that they intended to rely on to be sent to the Tribunal to 1 March 2013. HMRC was also directed to prepare and provide the Partnership with a copy of the bundle of documents by 5 April 2013 and a 'Statement of Authorities' no later than 14 days before the hearing.

16. The Partnership complied with the directions and provided the information required by 1 March 2013. However, HMRC provided the information on 4 March 2013, three days late, after first receiving the Partnership's list of documents. HMRC, in breach of the directions, has not provided the Partnership with a copy of the bundle of documents or a Statement of Authorities.

17. On 14 June 2013 the parties were notified by the Tribunal that the appeal was to be heard on 12 July 2013. However, HMRC requested, and was granted, a postponement to allow time for preparation of bundles and to accommodate annual leave. This was confirmed by the Tribunal on 1 July 2013.

18. On 2 July 2013 Chris Madge & Co made an application to the Tribunal for the case to be "struck out" under rule 8 of the Tribunal Procedure Rules. On 2 September 2013 the Tribunal notified the parties that the hearing of the Partnership's strike out application was listed for a hearing on 22 November 2013.

19. By way of explanation, although the application did refer to the appeal being struck out, rule 8(7) of the Tribunal Procedure Rules provides that:

> This rule applies to a respondent [ie HMRC] as it applies to an appellant except that–
>
> (a) a reference to the striking out of proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; ...

Therefore, the application would have been read as an application for a direction barring HMRC from taking any further part in the proceedings. In such circumstances the Tribunal need not, in accordance with rule 8(8) consider any submissions made by HMRC and may summarily determine any or all issues against them.

20. On 25 September 2013 HMRC's caseworker responsible for the conduct of the appeal failed to attend the office and was signed off on long term sick leave. A new caseworker, Mr Simon Bates, was appointed on 8 November 2013. On reviewing the files Mr Bates realised that there had been breaches of HMRC's guidance and contacted HMRC's Solicitors Office regarding the accountancy issues keeping Chris Madge & Co informed of developments.

21. On 11 November 2013 the HMRC's Advisory Accountant recommended that it would be imprudent to pursue the valuation issues at a hearing given the breaches of procedure, the amount of tax involved and the difficulty of obtaining an expert witness at short notice. Chris Madge & Co were told on 12 November 2013 and on 19 November 2013 the appeal was settled by agreement broadly as suggested by Chris Madge & Co in their letter to HMRC of 3 August 2010 (see paragraph 9, above).

22. On 20 November 2013 Chris Madge & Co wrote to the Tribunal regarding the hearing listed for 22 November 2013 in the following terms:

> Further to your letter by email yesterday and our subsequent telephone conversation. I confirm that we have reached agreement with HMRC

> and the adjustments to profit are confined to the 31 March 2006 accounts.
>
> All other years are vacated.
>
> The only matter outstanding is the issue of Costs and we enclose our application for consideration under Rule 10.
>
> We respectfully request the Tribunal to consider either:–
>
> (i) leaving this matter in the list on Friday 22 November to consider the Costs Application on the understanding the Strike Out is no longer in point; or
>
> (ii) to consider the matter of costs without a hearing therefore saving Court time and further costs on both sides.
>
> We await the Tribunal's decision.

No schedule of costs, as required by rule 10(3)(b) of the Tribunal Procedure Rules, was provided with the letter which was copied to HMRC.

23. Unfortunately this letter was not forwarded to me until 16:51 on 22 November 2013 by which time it was too late to cancel the hearing listed for the next day and attended by Mr Bates for HMRC and Mr Madge and Ms Zena Summerell for the Partnership.

24. However, in the absence of a schedule of costs it was not possible to deal with the issue of costs that day but I directed, with the agreement of the parties that the Partnership was to provide the Tribunal and HMRC with a schedule of their costs and any written submissions in support of their application by 6 December 2013 and that HMRC could, by 10 January 2014, make written submissions in response to those of the Partnership.

25. The parties complied with the directions and Chris Madge & Co provided a schedule of costs. However, while this schedule did provide a chronology, a summary of work done and a breakdown of the time costs of Chris Madge & Co, which in total amounted to £25,850, there is no evidence that the Partnership has or will be invoiced for work undertaken on their behalf by Chris Madge & Co other than the following paragraphs of the submissions on behalf of the Partnership which state:

> 51. When considering time costs to be billed to our Clients realistically we would seek 60% of actual costs of time recorded.
>
> 52. However, we would ask that it be borne in mind that the remaining time spent/costs could have been employed in other remunerative work.

Discussion and Conclusion

26. For the Partnership Mr Madge, who accepted that costs could only be awarded from the commencement of the appeal on 24 June 2012, contended that the letter of 3 August 2010 shows that the appeal could have been settled earlier and that the failure to do so has involved the Partnership in unwarranted expenditure.

27. He referred to the following approach taken in such circumstances by Judge Raghaven at [45] of *Market & Opinion Research International Limited v HMRC*:

> "Taking account of the concerns outlined above as to the need to be aware of the effect of hindsight, I will consider whether at the various stages of the proceedings (which the appellant has highlighted as being points in time the case could have settled) it was unreasonable on the part of HMRC to continue to defend the proceedings considering what was reasonably available to them at the time. In doing this I will also take into account what if any new information or arguments which advanced the appellant's case became available to HMRC. This is on the basis that given HMRC's view at settlement must be taken to be that its case was weak, if it then turns out they had the same information available to them at the outset then this would tend to support a finding that HMRC ought to have appreciated the weakness of their case sooner and settled earlier."

28. Mr Madge also referred to the persistent failure by HMRC to comply with directions as being unreasonable citing an example given by Judge Bishopp at [14] of *Catanã v HMRC* where he said in relation to the phrase "bringing, defending or conducting the proceedings":

> "It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he knew could not succeed, a respondent has unreasonably 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 or directions to the prejudice of the other side."

29. He submitted, relying on the fifth of Judge Raghaven's propositions, namely that a failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct, that I should find in this case, as Judge Mosedale had in *N D Roden & R C Roden v HMRC* [2013] UKFTT 523 (TC), where she said at [19], after taking into account their resources:

> "… that HMRC acted unreasonably in defending this case … which they ought to have known had no reasonable prospect of success."

30. In *Roden* Judge Mosedale, at [13] referred to the decision of the Tribunal (Judge Hellier and Kamal Hossain) in *Leslie Wallis v HMRC* [2013] UKFTT 81 (TC) where it said at [27]:

> "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable. After all the result of any appeal is that one party is found to be wrong. The rules clearly do not intend that just because a party is wrong that party should be ordered to pay the other's costs (otherwise the specific provision for Complex cases would make no sense). In our judgment 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. Thus for example a party who persists in a legal argument which is precisely the same as one recently dismissed by the Supreme

> Court and which has been drawn to his attention, or who proceeds on the basis of facts which that party accepts, or can only reasonably accept, are wrong, could be acting unreasonably in defending or conducting the appeal. …"

31. I agree with Judge Mosedale who said, of *Leslie Wallis* in *Roden*:

> "14. In that decision, it appears that the Tribunal was of the opinion that the party would not be acting unreasonably when pursuing a case without merit unless he ought to have known his case was without merit.
>
> 15. I agree. The Tribunal should not be too quick to characterise pursuing what is found to be an unsuccessful case as 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 prospect of success, I consider that I should consider HMRC as a whole and not just the individual officer presenting the case."

32. However, as Mr Bates submitted, it does not necessarily follow that the concession by HMRC in relation to the accountancy matters in the present case is an acknowledgement that it had no reasonable prospect of success. Rather HMRC took a pragmatic decision not to defend the appeal in a similar manner to an appellant who, after receiving advice from counsel, may decide to withdraw an appeal for commercial considerations. In such circumstances I am unable to find that HMRC acted unreasonably in conducting or defending the proceedings

33. With regard to the breaches of its own guidance which occurred before the commencement of proceedings I note that HMRC do recognise that the Partnership is probably entitled to financial redress and that Mr Bates, having spoken with a Complaints Officer, is confident that should Chris Madge & Co make a formal complaint and submit such a claim on behalf of their clients they will meet with success. I hope and trust that this will be the case.

34. Turning to the failure of HMRC to comply with the directions of the Tribunal, I agree with Judge Bishopp in *Catanã v HMRC* that a party that persistently fails to comply with directions of the Tribunal to the prejudice of the other side has acted unreasonably in the course of proceedings.

35. Clearly HMRC has failed to comply with the directions in this case; its statement of case which was due on 7 December 2012 was received by Chris Madge & Co on 17 December 2012 by 'Special Next Day Delivery'. The possible reason given for this delay by Mr Bates, namely the "vagaries of the Department's posting procedures" is in my view simply unacceptable as is, given the size and resources of HMRC, the reliance on the illness of one officer which as Mr Bates contends "very likely contributed" to the failure to comply with the various directions.

36. Notwithstanding HMRC's failure to comply with the directions Mr Bates contended that the Partnership have not been prejudiced as these failings cannot be shown to have unduly extended the proceedings. However, the costs schedule provided by Chris Madge & Co indicates that they have undertaken work as a direct result of the failure of HMRC to comply with the directions, eg letters and telephone calls to the Tribunal in respect of the failure to provide the statement of case. Insofar as the Partnership is required to pay for this work it has, in my judgment, clearly been prejudiced by HMRC's failures.

37. I therefore order HMRC to pay the Partnership's costs that have arisen as a result of the failure by HMRC to comply with the directions of the Tribunal appeal with such costs being limited to those for which the Partnership is liable to pay Chris Madge and Co. Such costs are to be assessed on the standard basis if not agreed.

38. In making this order it should be made absolutely clear that the costs claimed in an application under rule 10 of the Tribunal Procedure Rules are those of a party to proceedings and not those of its advisors or representatives and should therefore not exceed the amount charged or to be charged by the advisors or representatives to their client.

Right to apply for Permission to Appeal

39. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 20 January 2014