TC03765

Appeal number: TC/2013/07790

Appeal against Taxpayer Information Notice – Claim of Legal Professional Privilege – Appeal withdrawn by Appellant prior to hearing – HMRC application for costs under rule 10 (1) (b) – was Appellant's bringing and conduct of proceedings unreasonable - yes – making of order for costs deferred so as to consider Appellant's means under rule 10 (5) (b)

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAJID ALIMADADIAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in Chambers on 26 June 2014

DECISION

1. This matter concerns HMRC's application for costs under rule 10 (1) (b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. I have considered written submissions from both parties before making this decision.

Background

2. The Appellant lodged a Notice of Appeal to the Tribunal on 8 November 2013. The Notice of Appeal form states that the Appellant's "legal representative" was Baxendale Walker Limited, although for the purposes of the present application the Appellant is represented by CKR Accountants.

3. The Appellant's dispute with HMRC concerned the service of an information notice pursuant to schedule 36 of the Finance Act 2008. The Appellant appealed against the notice in respect of three documents which he claimed he was not required to supply to HMRC as they were subject to legal professional privilege ("LPP").

4. In accordance with the LPP Dispute Regulations, the disputed documents were lodged with the Tribunal and on 29 November 2013, Judge Berner directed that HMRC was to serve and file the submissions and evidence on which it relied in resisting the claim to LPP and the Appellant was directed to file a Reply within 14 days thereafter. In the event, neither party was able to meet this timetable and HMRC's submission was, with the consent of the Tribunal, eventually made on 2 January 2014.

5. The Appellant applied for, and was granted by the Tribunal, two extensions of time in which to file its Reply, but the third application for an extension of time, made on 18 February 2014, was refused by Judge Berner. In so doing, he described the Appellant's application as "open ended". On 24 February Judge Berner made an "unless" order, warning the Appellant that the appeal would be struck out unless it made its Reply within 14 days.

6. On 6 March 2014 the Appellant filed its Reply to the submission made by HMRC on 2 January.

7. The directions of 29 November 2013 had also provided that after the exchange of submissions, the parties should indicate whether this matter should be decided on the papers or at an oral hearing. HMRC complied by informing the Tribunal that it required an oral hearing, but the Appellant did not reply within the time set by the Tribunal. As the Tribunal can only proceed to determine an appeal on the papers if both sides agree (rule 29), on 24 March Judge Berner directed an oral hearing of the appeal.

8. On 1 April 2014 the Appellant notified the Tribunal that he was withdrawing his appeal under rule 17. HMRC made its application for costs on 13 May and the Appellant responded on 6 June 2014.

The Application for Costs

9. The Tribunal may award costs under rule 10 (1) (b) of the Rules if it considers that a party or their representative has acted unreasonably in bringing, defending or conducting proceedings. HMRC's application relies upon the Appellant's conduct of the proceedings on two grounds: (i) the "*succession of delays and a missed deadline*" and (ii) the Reply of 6 March which is said to be "*lacking in detail*". It also relies upon the bringing of the proceedings, on the basis that "*nothing of substance has been provided to HMRC or the Tribunal to support [the] claim and in HMRC's view his representatives ought to have known from the outset that the claim was not backed by evidence and was therefore without merit"*.

10. HMRC's application also relies upon the fact that the advice in respect of which LPP is claimed was given by a solicitor employed by Baxendale Walker LLP and a related firm, Minerva, both of which sell wealth management strategies. Neither was, at the relevant time, a law firm regulated by an authorised body. The Appellant's communications with the Tribunal made clear that it was seeking on-going advice from a third party (now known to be the SRA) in respect of that issue and whether LPP attached to advice given by a solicitor employed in a non-law firm. HMRC submits that, as a party making an assertion bears the burden of proving it, the Appellant should have been in possession of all the facts and familiar with the relevant legal principles before making its appeal to the Tribunal and that, in this case, the succession of delays and the acknowledged need for third party advice suggests that the assertion of LPP in relation to the documents was made without an analysis of the facts and law and was unfounded.

11. HMRC's letter communicating the decision which was appealed (dated 14 October 2013) made clear that it viewed the decision of the Supreme Court in *Prudential Plc and another v Special Commissioners of Income Tax and Another* [2013] UKSC 1, as being fatal to the Appellant's claim to LPP. This was reiterated in the submission of 2 January but the Appellant's Reply of 6 March did not, in HMRC's submission, properly address the point. HMRC submits that the Appellant's case never had any prospect of success and that bringing the appeal at all was arguably unreasonable; alternatively that after 2 January, when the Appellant was formally put on notice of the nature of HMRC's case in the Tribunal proceedings, it should have been obvious that there was no reasonable prospect of success for the appeal, so the Appellant's decision to continue with the appeal until 1 April was unreasonable.

12. Finally, HMRC asks the Tribunal to note that the appeal was withdrawn by the Appellant "without explanation". I do not understand the decision to withdraw the appeal to be relied upon by HMRC as a ground for making a costs order in itself. I simply note here that there is no requirement in the Rules for an explanation of a decision to withdraw an appeal to be provided to the Tribunal or to the opposing party.

13. The Appellant's submissions in response to the conduct of proceedings may be summarised as follows. Firstly, the Tribunal is asked to note that HMRC also asked for an extension of time in respect of the Tribunal's directions of 29 November 2013; secondly, it is disputed that the Appellant made an "open-ended" application for an extension of time in February 2014; thirdly, that there was a good reason for requesting extensions of time as the advice of the SRA was thought to be crucial to the Appellant's case.

14. The Appellant's case in relation to the bringing of the proceedings is that, having considered the decision of the Supreme Court in the *Prudential* case, it was considered that "*the strength of the dissenting judgement suggested that the entrenched position of HMRC in relation to LPP could be mistaken*". It is also submitted that confusion had arisen from the treatment of the LPP issue in the First-tier Tribunal's decision in *Edward C Behague v HMRC* [2013] UKFTT 596 (TC) because Baxendale Walker Limited's view was that the First-tier Tribunal's finding that LPP applied to a document in that case might be applied to similar reports prepared by Baxendale Walker LLP where the advice contained in those reports was given by or under the supervision of a solicitor. In summary, this was a complex area and an on-going review by the Appellant and his advisers had been necessary throughout. Further that, as the Tribunal had been made aware, extended compassionate leave by a member of staff at Baxendale Walker Limited had hampered its efforts to obtain advice from the SRA.

15. The Appellant reports that, in the event, the SRA had confirmed that a duty of confidentiality arose in these circumstances but that the applicability of LPP was not something it could advise upon and that Baxendale Walker Limited might like to take legal advice on the issue. The Appellant submits that this response implies that the boundary between the principle of client confidentiality and the application of LPP is unclear and that, had the Appellant's advisers been given more time to file the Reply, further advice would have been taken and the Reply would have been fuller. In summary, the Appellant asserts that the appeal was not one with no reasonable prospect of success and that it was not unreasonable to have pursued it up until the point where it was withdrawn.

The Law

16. Rule 10 of the Rules does not contain a definition of "unreasonable". HMRC has referred me to a number of decisions of the First-tier Tribunal on the exercise of its costs jurisdiction and, in particular, the sort of conduct which has been found to constitute unreasonable conduct for the purposes of rule 10. These decisions each turn on their own facts and do not establish precedent. HMRC has also referred me to the decision of Judge Bishopp CP in the Upper Tribunal (Tax and Chancery Chamber) in the case of *Gheorge Calin Cantana v HMRC* [2012] UKUT 172 (TCC) in which it was confirmed at paragraphs [15] and [16] that the decision on costs is an exercise of judicial discretion.

17. I have also considered a recent decision of Judge Edward Jacobs sitting in the Upper Tribunal (Administrative Appeals Chamber). In *Buckingham County Council*

v ST [2013] UKUT 468 (AAC), Judge Jacobs helpfully reviewed a number of decisions from the higher courts regarding "unreasonable conduct" in relation to rule 10 (1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (an analogous provision to the Tax Chamber Rules).

18. Of particular relevance to this case was Judge Jacobs' consideration of the decision of the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 232-233:

> '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 other 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 judgment, but it is not unreasonable.'

19. The Court of Appeal also dealt in that case with the proper approach to what it called 'a hopeless case' (pages 233-234):

> 'A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. … As is well known, barristers in independent practice are not permitted to pick and choose their clients. … As is also well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it'.

20. Judge Jacobs' conclusion in *Buckingham County Council v ST* was that it will not always be "unreasonable" to present and pursue an argument that the Tribunal decides it would be perverse to accept and that the First-tier Judge was not entitled, in the circumstances of that case, to have characterised the conduct of the local authority as unreasonable so the power to award costs was not engaged.

Conclusion

21. In respect of the first "conduct" aspect of HMRC's application (delays and a missed deadline) I am not satisfied that the Appellant's conduct was unreasonable. I note that both parties applied for extensions of time in which to make their

submissions and that the applications were granted by the Tribunal, apart from the last application made by the Appellant. Judge Berner described that application as "open-ended" in the reasons given for his refusal of that application and it is not open to me to go behind that finding now. I note that the Appellant did subsequently comply with the new time limit for filing a Reply then imposed by the Tribunal. There was a missed deadline in respect of the requirement to confirm whether an oral hearing was required, but as HMRC had already indicated that it did not agree to a disposal on the papers, the Appellant's overdue response on that point had already become of marginal significance to the progress of the case.

22. In respect of the second "conduct" aspect of HMRC's application, (that the Reply of 6 March was lacking in detail) I am satisfied that the Appellant's conduct was unreasonable in this regard. The letter of 6 March "refutes" HMRC's case, firstly in reliance upon the First-tier Tribunal's decision in *Behague*; and secondly, in reliance upon an "inference" drawn from SRA's response that the advice of an in-house solicitor is subject to LPP but accepts that no legal advice has been taken due to time constraints and personal circumstances. It does not seem to me that this was a reasonable response to HMRC's application or that it met the duty imposed upon a party by Rule 2 to co-operate with the Tribunal and help it to further the overriding objective. The Reply did not, in my judgment, properly clarify the Appellant's case or the issues for determination by the Tribunal. It did not describe the evidenctial basis of the appeal at all, and in relation to the legal basis I note that a decision of the First-tier Tribunal establishes no legal precedent so it is difficult to see how it could reasonably have been relied upon by a representative as displacing the Supreme Court authority upon which HMRC relied. It is also difficult to see how it was reasonable to rely upon the view of the dissenting minority in the Supreme Court when this Tribunal is clearly bond by the majority decision. I also note that HMRC had, some months previously, set out a detailed case for disputing that LPP applied and that it had been open to the Appellant to take legal advice for some time before it received a reply from the SRA. I also find it difficult to conceive of how the Appellant's representative could reasonably have thought that the SRA would have been able to resolve this technical issue, and I do not consider that it was reasonable to have delayed taking legal advice until a response was received from the SRA which, predictably in my view, did not provide an answer to the point in any event.

23. The Appellant's explicit acceptance that no taken legal advice had been taken on the technical legal issue raised in the Appellant's appeal is also relevant to the final aspect of HMRC's application. I have considered whether it was unreasonable for the Appellant to have raised the claim to LPP in the Tribunal at all in all the circumstances. I have taken into account (1) the absence of a detailed case in the grounds of appeal section of the Notice of Application form; (2) the lack of detail contained in the Reply of 6 March and in particular, the lack of any evidential basis for the appeal and the reliance upon a First-tier Tribunal decision which sets no precedent and the minority judgment of the Supreme Court; (3) the Appellant's failure substantively to respond to HMRC's suggestion that the appeal had no prospect of success in view of the Supreme Court's decision in *Prudential;* (4) the decision to seek advice from the SRA and to delay obtaining legal advice until after it was received – and I have concluded that the bringing of this appeal was unreasonable in

all the circumstances. The Appellant has not satisfied me that there had been a proper analysis of the evidence and law before the appeal was lodged, or that the on-going review of the case referred to was sufficiently robust for the Appellant to have made an informed decision whether to withdraw the appeal at an earlier stage.

24. I have concluded that this case falls into the category of cases considered by the Court of Appeal in *Ridehalgh v Horsefield* as meeting the "acid test" that "the conduct permits of no reasonable explanation". This was, in my view, a case which was litigated on the advice of the representative, rather than one where the Appellant has rejected sound advice and insisted on litigating. I reach that conclusion because, as I have found, the course of conduct embarked upon by the Appellant's representative was itself unreasonable. As a result of that course of conduct, Baxendale Walker Limited did not in my view put itself in a position where it could have given sound advice to the Appellant before lodging and pursuing the appeal. I conclude that this constitutes unreasonable conduct on the part of the Appellant's representative so as to fall within rule 10 (1) (b) and that it gives rise, in principle, to a liability for the entirety of HMRC's costs in defending the appeal.

25. I would also comment here that Baxendale Walker Limited is a separate legal entity from Baxendale Walker LLP and is also not a law firm. I am concerned that Baxendale Walker Limited described itself as a "legal representative" on the Appellant's Notice of Appeal form, when it may not have met the requirements of rule 11 (7) of the Rules. However, I make no specific finding in relation to that issue, not having received submissions on the point.

26. Rule 10 (5) of the Rules provides that the Tribunal may not make a costs order without (a) giving the "paying person" an opportunity to make representations and (b) if the paying person is an individual, without considering that person's means. I am accordingly deferring the making of a costs order in this matter until I have heard from the Appellant as to his means, and I direct that he write to me setting out details of his financial circumstances and, in particular, his ability to pay the sum of £4398.94 claimed by HMRC in its schedule of costs within 28 days of the date appearing below. I should make clear that I have not yet decided whether to direct that the amount of the costs order should be determined by summary assessment by the Tribunal (rule 10 (6) (a)) or assessed by the court (rule 10 (6) (c) and (7) (a)). I would be grateful if the Appellant could also indicate whether the amount of costs is agreed (rule 10 (6) (b)) within 28 days, as this information is lacking from his response to HMRC's application.

27. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 27 June 2014