TC04332

Appeal number: TC/2012/06324

PROCEDURE – application to extend time for making costs application granted – application for Rule 10(1)(b) costs dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CONCEPT MULTI CAR LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at 45 Bedford Square, London on 26 September 2014

Mrs Hilary Shortland, managing director of the appellant for the Appellant

Mrs Pat Roberts, HMRC Officer, Appeals and Reviews, for the Respondents

Both parties attended by telephone

DECISION

Introduction

1. The appellant which is a small motor business which specialises in making conversions to VW motor vans was successful in its appeal against two VAT assessments raised by HMRC which the appellant appealed against on 25 May 2012 and 10 December 2012. The full reasons for the decision are set out at *Concept Multi-car Limited v HMRC* [2013] UKFTT 110 (TC). The decision was sent to the parties on 21 January 2014 following the substantive hearing which took place on 18 September 2013.

2. The current decision concerns the appellant's application that HMRC pay its costs in a letter of 13 May 2014. The letter did not specify the basis on which the costs application was made but given the appeal was not categorised as a complex appeal and given the types of issues the appellant raised the Tribunal has treated this as an application for costs under Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") which allows the Tribunal to award costs if it considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

3. HMRC object to the application being made after the 28 day deadline set out in Rule 10(4) and disagree that they have acted unreasonably in their defence or conduct of the proceedings.

4. I had before me letters dated 13 May 2014 (the reference to 2012 was clearly an error) and 2 June 2014 from the appellant and letters dated 27 May 2014 and 4 July 2014 from HMRC in relation to the applications.

Application to extend time

5. Rule 10(4) of the Tribunal Procedure Rules requires that an application for costs under Rule 10(1) must be made:

> "not 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;…"

6. The decision having been sent on 21 January 2014, the costs application ought to have been sent in no later than 19 February 2014. The appellant did not write in until 13 May 2014; a little under three months after the deadline expired.

7. Under the Tribunal's case management powers in Rule 5(3) of the Tribunal Procedure Rules the Tribunal may, by direction, extend the time for complying with the above rule.

8. As identified by HMRC the Upper Tribunal case of *Data Select v HMRC* [2012] UKUT 187 (TCC) suggests the following issues are relevant in considering whether to extend a time limit. These were (1) the purpose of the time limit, (2) the length of

delay, (3) the explanation for the delay and (4) the impact of granting or not granting the extension sought.

9. Mrs Shortland explained that following receipt of the decision she had been told by her advisors that it would be difficult to claim her expenses. She had not pursued the matter with her adviser. She was very busy at work but then had become increasingly filled with a sense of injustice at the expense and trouble the appellant had been put to in dealing with HMRC's assessments and the appeal given that, in her view, no new evidence or matters had been raised. She telephoned the Tribunal and was told she could write in regarding costs. She was not aware of there being a time limit to make such applications. Her expertise lay in making van conversions; she was at a loss as to how to deal with Tribunal proceedings and was a "total lay-person" in that regard.

10. HMRC argue Mrs Shortland's representative ought to have made the appellant aware of the time limit and in any case the appellant would have received a tribunal booklet setting out the time limit. Time limits were there to ensure finality and certainty in litigation. The length of delay at just under three months was not insignificant. The effect of allowing the application would be that HMRC was put the trouble of defending a costs application which it might reasonably have thought was not being pursued once the deadline had passed. The fact HMRC had lost did not mean it had acted unreasonably. HMRC's view of the case was not an unreasonable one.

11. I accept that Mrs Shortland was not aware of the time limit. That does not provide an answer in and of itself as even if litigants are unrepresented they ought to be aware of the Tribunal's Procedure rules. But her actual lack of awareness is something I am able to take into account. Having decided to "go it alone" I can see how it transpired that Mrs Shortland would not have been made aware of the costs application deadline by her representative, or having been represented previously that she would not necessarily have had the Tribunal booklet presented to her. Once she came to the view that she should pursue the costs by herself she did act without undue delay. Any delay was not intentional on her part. While I agree with HMRC the length of delay at just under three months is not insignificant; taking into account Mrs Shortland's particular circumstances, her level of awareness, and that while the resulting impact on HMRC in having to defend a costs application with this level of delay is one of inconvenience rather than substantial prejudice, I consider that it is fair and just to allow the deadline to be extended.

12. HMRC make the point that the letter was not accompanied by the required schedule of costs (or one which was in sufficient detail). I explained that in the event the deadline was extended that I would not be minded to deal with the application as a summary assessment and that the decision would deal simply with liability to costs and that an order for the costs to be agreed or if not agreed subject to a detailed assessment would be made. I do not deal with any arguments on quantum in this decision.

Rule 10(1)(b) costs application

13. In order to put the parties' arguments in context it is necessary to say a little about the substance of the appeal. The appeal concerned eight vehicles that the appellant supplied to disabled customers and whether each of those supplies were correctly treated by the appellant as zero-rated for VAT purposes on the basis that the adaptations made to each of the vehicles satisfied the particular criteria for zero rating treatment in Item 2A of Schedule 8 group 12 of the Value Added Tax Act 1994 which are that the vehicle is "substantially and permanently adapted to enable a handicapped person…who usually uses a wheelchair…to enter, and drive or otherwise be carried, in the motor vehicle."

14. The appellant argued that various features of the vehicles such as front seats that swivel, an ambulance ramp kit, and grab handles amount to adaptations which satisfy the legislative requirements for zero rating.

15. HMRC argued that features such as the swivel seat did not meet the relevant criteria because they are an option put in by the manufacturer which is available to able bodied persons as well, and that the other features such as the ambulance ramp kit and grab handles were not put in with the specific needs of the particular disabled person. Further they say that the adaptations are not permanent or substantial for the purposes of the legislation and that even if the adaptations enable a disabled person to enter the vehicle they are not adaptations which enable the disabled person "to drive, or otherwise be carried" in the vehicle. The legislative requirements were not therefore met.

Appellant's arguments

16. Mrs Shortland feels that HMRC were wrong to pursue the appellant for VAT in the first place. No new evidence came up at the Tribunal which had not already been explained in correspondence with HMRC and she could not understand why she had to go through the process. She had negotiated for one and half years to no avail. It had been three years since the inspection and she had suffered a huge amount of stress and expense. She feels the appellant had been unfairly singled out by HMRC. Rather than going after the larger dealerships where maybe HMRC thought there was profiteering they went after the appellant which was a small company. She referred to her letter of 28 April 2012 addressed to Mrs Newman (pg 119 of hearing bundle). Both she and her adviser had been surprised the case had been taken to tribunal. She wondered whether HMRC had wanted to take the matter as a test case to get a ruling from the Tribunal for its own purposes and felt that the appellant had been a victim in this. Nothing had been picked up in previous inspections and HMRC's guidelines had not changed.

HMRC's arguments

17. HMRC say they do not just litigate against large companies. The appellant's case was fully considered by HMRC's policy team before it was pursued. HMRC's witness, Mrs Newman was considered by the Tribunal to be a credible witness.

Discussion

18. In a case such as this was one which categorised as standard there is no expectation that a costs order is awarded to the winning party.

19. Rule 10(1)(b) of the Tribunal Rules provides that the Tribunal can make a costs order:

> "if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings …"

20. The applicant for the costs order has to show the Respondents, in this case HMRC, acted unreasonably in defending or conducting the proceedings. The case-law indicates that the relevant point in time at which to begin this analysis focus is from the time from which proceedings started. The question is not therefore whether HMRC were unreasonable in raising the assessments in the first place. While the Tribunal is able to take into account conduct of the parties prior to the commencement of there was no evidence before me which suggested that the appellant had been singled out or that the assessment had been made in bad faith.

21. Having considered the Tribunal's decision it appears that even before the evidence of the parties fell to be evaluated there were certain legal issues which arose as to how the legislation had to be interpreted. The parties had their view and the Tribunal had its. There was some agreement on the law but crucially there was disagreement in particular on the approach to determining whether an adaptation was "substantial" and whether the adaptations had to be designed with the particular disabled user in mind. (See [66] to [72] of decision). However the fact HMRC held these views and they turned out to be wrong in the Tribunal's view does not automatically mean HMRC was wrong to argue the case on the basis of its views. The test is whether the conduct was unreasonable. An example of behaving unreasonably would be if for instance HMRC had persisted in running an argument that was wrong in the face of Supreme Court authority (*Lesley Wallis v HMRC* [2013] UKFTT 081(TC) at [27]). HMRC's views were views with which the Tribunal disagreed for the reasons set out but I cannot say that they were untenable or that they were unreasonable views to have held in the light of the legislation and relevant case law. (There was little authority in the area and nothing beyond other First-tier Tribunal level decisions which would only have been of persuasive authority). There is nothing I can see in the way HMRC exposed their view which suggests it was reached in an unreasonable way. Having reviewed HMRC's Statement of Case, skeleton argument and the arguments made before the hearing it appears to me that their legal views (although they were ones which were subsequently found to be wrong), were set out in an adequate level of detail and were explained with sufficient consistency.

22. Having taken a different view on the legal tests the Tribunal applied these to the facts. On HMRC's incorrect view of the law (albeit a view of the law which it was not unreasonable for HMRC to have held), HMRC had come to the view the adaptations fell short of the legislation because they had not been made with the specific disabled user in mind. Having considered the matter I cannot see that HMRC's different view was then unreasonably applied to the relevant facts.

Conclusion on costs application

23. The fact the case turned on HMRC's wrong view of the law rather than on new evidence may explain why it may appear that no new points were presented by HMRC that Mrs Shortland did not feel had already been made before.

24. Nevertheless, it has not been demonstrated to me that HMRC acted unreasonably in defending or conducting the proceedings and the appellant's application for costs therefore falls to be dismissed. While I appreciate that Mrs Shortland may well feel aggrieved with this outcome it is reflective of the costs regime that is in place for cases which are categorised as standard under the Tribunal Procedure Rules and under which the normal rule in such cases is that each party bears its own costs. In requiring it to be shown that the other party has acted unreasonably in order to obtain a costs order the regime presents a hurdle to be surmounted, the flipside of course being the benefit of not being at risk of paying the winning party's costs if other party loses the appeal but has not acted unreasonably in conducting or defending the case.

25. The application for costs is dismissed.

26. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 19 March 2015