[2015] UKFTT 0292 (TC)

TC04485

Appeal numbers: LON/2008/1342 and LON/2008/1691

VAT – MTIC - appeal withdrawn – costs - old rules – discretion - costs awarded

FIRST-TIER TRIBUNAL
TAX CHAMBER

SOLUTIONS CENTER LIMITED and 05028035 LIMITED (formerly Teknocom Limited) **Appellants**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: GILL HUNTER

Sitting in public at The Royal Courts of Justice, London on Wednesday 20 May 2015

Nicholas Chapman of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appellants Solutions Center Limited ("Solutions Center") and 05028035 Limited (formerly known as Teknocom Limited) ("Teknocom") are separate corporate entities.

2. It was not in dispute that both appellants were at the material time, and in respect of all relevant matters, under the control of Mr Rajbinder Singh Hunjan ("Mr Hunjan"). Mr Hunjan was the sole director of Solutions Center and a co-director of Teknocom.

3. The appeals were listed to be heard together over three weeks starting on 15 July 2013.

4. Solutions Center's appeal was against a decision of the respondents ("HMRC" which expression is used for convenience to include HMRC's predecessor, HM Customs & Excise), dated 17 July 2008 denying Solutions Center the right to deduct input tax claimed on the VAT returns for the periods 06/06 and 12/06. The total sum refused is £2,179,747.50.

5. Teknocom's appeal was against a decision of HMRC dated 13 February 2008 denying Teknocom the right to deduct input tax claimed on the VAT returns for the periods 04/06, 07/06 and 10/06. The total sum refused is £1,147,510.

6. In respect of both appellants, HMRC decided to deny the right to deduct input tax on the basis that the transactions giving rise to the claims for credit for input tax were connected with the fraudulent evasion of VAT and that both appellants knew or should have known of that fact.

7. This appeal relates to 14 wholesale transactions entered into by the appellants between April and December 2006 inclusive. HMRC argued that eight deals could be traced directly, through a series of interceding (or "buffer") traders, to one of a pool of four fraudulent defaulting traders and thus to fraudulent tax loss and the remaining six deals could be traced to one of two "contra-traders" and thus to fraudulent tax loss.

8. Mr Hunjan contended that he was an honest trader in mobile phones and did not accept that the relevant transactions were connected with fraudulent evasion of VAT. Further, even if they were, he did not know and could not have known of this fact.

9. In summary this was an MTIC appeal.

10. By application notice dated 26 June 2013, filed by Imran Khan & Partners ("IKP"), the appellants applied for an adjournment of the three week hearing listed for 15 July 2013 on the basis that the appellants' previous representatives, who were on a conditional fee arrangement, had withdrawn. Following a hearing on 12 July 2013, Judge Berner allowed the application and the appellants were ordered to pay HMRC their wasted costs.

11. The appeals were listed for hearing over eight days commencing on Monday 18 May 2015.

12. Both parties lodged Skeleton Arguments.

13. By email timed 12.13 pm on Thursday 14 May 2015, IKP forwarded to HMRC a letter sent to the Tribunal one minute previously which read as follows:

"*We write to inform you that the Appellant in the above matter is no longer pursuing the appeal listed for hearing on Monday 18th May 2015"*(sic).

14. No explanation was offered.

15. On 15 May 2015, HMRC requested that the listing session remain, as they would be making an application for costs. In response, on the same day, IKP wrote stating:

"*We write further to our letter of yesterday's date to confirm, in the event that the tribunal sits on Monday morning, we regret that we will not be attending. We make it clear that no discourtesy or disrespect is intended but we have no instructions to attend and nor are we in funds to do so."*

16. Very late on 15 May 2015, HMRC made a formal application for orders for costs including wasted costs from IKP.

17. The costs hearing was listed for 20 May 2015.

18. On 18 May 2015, IKP wrote a detailed and lengthy letter to HMRC, the salient details in regard to this hearing being as follows:

"*We make it clear that the appellant played an active part…both in terms of providing instructions and receiving advice throughout, most notably and recently in the preparation of the Appellant's* (sic) *Opening Submissions* (on 5 May 2015).

As for your query as to the 'circumstances surrounding this', namely why the Appellant (sic) *chose to withdraw the appeal and the timing of it, these are matters which should be directed to and explored with the Appellant and, no doubt will be in the application for costs against it that you have made. Whilst we have sought authority from the Appellant to release such information as might assist in connection with your application for wasted costs against us, we have not been given it. Had such authority been given we would have been in a better position to deal with your queries and indeed, the application."*

19. On 19 May 2015, HMRC responded confirming that they withdrew their application for wasted costs against IKP but that they maintained the Application for Costs against the appellants, being the costs payable pursuant to Rule 29 of the old Tribunal Rules. They stated that, for the avoidance of doubt, they intended indicating to the Tribunal that the appellants should be directed to pay the costs on the ordinary basis being that costs follow the event.

20. On 18 May, HMCTS had written to the appellants formally intimating the Hearing listing and enclosing a copy of the Application for Costs.

21. The following day, IKP wrote to the Tribunal enclosing a witness statement, stating that Mr Hunjan had asked that it be forwarded for "*consideration in relation to the hearing relating to costs tomorrow."*

No appearance by or for the appellant

22. The first issue for the Tribunal was that only HMRC attended the hearing. We had due regard to Rules 2 and 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

23. Rule 2 reads:

"***2.—Overriding objective and parties' obligations to co-operate with the Tribunal***

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—

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

24. Rule 33 reads:

*"**33.— Hearings in a party's absence***

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

> *(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and*
> *(b) considers that it is in the interests of justice to proceed with the hearing."*

25. It was undoubtedly the case that the appellants had been notified of the hearing. Mr Hunjan's witness statement made that explicit. He stated that he was making the statement because *"I cannot attend the hearing because I am not well and will be attending a medical appointment at the hospital."* He went on to narrate that he believed that there was a direct link between the proceedings and the impact on his health.

26. The only contemporary medical evidence produced other than the witness statement was an appointment card for Cardiac Stress Perfusion (imaging) on 18 May 2015 at London Independent Hospital. We did consider whether or not we should adjourn to obtain further and more detailed medical evidence and/or to allow Mr Hunjan to attend.

27. Mr Hunjan had clearly taken legal advice in regard to the costs hearing but had decided that although he would not attend, he would neither seek an adjournment nor engage representation. That was notwithstanding the fact that IKP, as stated in their letter of 18 May 2015, had a detailed knowledge of the substantive appeal and further, as his witness statement indicated, he had discussed his health and whether or not to withdraw the appeal with IKP on 13 and 14 May 2015 and, of course they had prepared the witness statement on 19 May 2015.

28. In all those circumstances, we considered that given that Mr Hunjan had stated that: *"I simply wanted to put the whole case behind me and concentrate on my health*" there would be little point in adjourning the hearing and indeed that in terms of the Rules it would be in the interests of justice to proceed. We therefore did so.

The Application for Costs

29. In addition to the Application for Costs, we had before us a copy of a Joint Application for Directions by the solicitors for all of the parties dated 14 May 2012, the grant of which Application by Judge Sinfield was released on 23 May 2012 and the relevant Direction reads:

"…5. That Rule 29 of the Value Added Tax Tribunal Rules 1986, is the applicable costs rule in this appeal."

30. The relevant sections of Rule 29 read:

"*Award and direction as to costs*

29(1) A Tribunal may direct that a party or applicant shall pay to the other party to the appeal or application —

(a) within such period as it may specify such sum as it may determine on account of the costs of such other party of and incidental to and consequent upon the appeal or application; or

(b) the costs of such other party of and incidental to and consequent upon the appeal or application to be taxed by a Taxing Master of the Supreme Court or a district judge of the High Court of Justice in England and Wales or by the Auditor of the Court of Session in Scotland or by the Taxing Master of the Supreme Court of Northern Ireland or by the Taxing Master of the High Court of Justice of the Isle of Man on such basis as it shall specify.

(2) Where a Tribunal gives a direction under paragraph 1(b) of this rule in proceedings in England and Wales the provisions of Order 62 of the Rules of the Supreme Court 1965 shall apply, with the necessary modifications, to the taxation of the costs as if the proceedings in the Tribunal were a cause or matter in the Supreme Court of Judicature in England…

(5) Any costs awarded under this rule shall be recoverable as a civil debt."

31. We had no explicit objection to the Application for Costs but we assumed that had he attended Mr Hunjan would have objected. We proceeded on that basis.

32. Costs awards in terms of Rule 29 are in the discretion of the Tribunal. We therefore went on to consider all relevant factors.

Expectations of the parties

33. The party that wins an appeal would normally expect an award of costs in their favour. However, an appellant would not necessarily expect an award of costs if they lost as a result of HMRC's practice not to seek costs in certain cases in light of the Sheldon Statement. The appellants have been professionally advised throughout. The appellants must have known, or be deemed to have known, that in requesting a Direction that Rule 29 should apply that costs would follow the event subject only to the exercise of discretion of the Tribunal when considering the factors identified in the Sheldon Statement. They chose to proceed on that basis and indeed incurred costs in that context in 2013.

34. What are the factors that are relevant?

Complexity

35. In *Innocent Limited v HMRC*[1], Judge Mosedale described MTIC appeals as *"the epitome of a substantial and complex Tribunal case"*. In these appeals, HMRC's Skeleton Argument with appendices covering analysis of matters of fact and law ran to some 168 pages. The appellants' Skeleton Argument, which primarily focussed on legal argument, extended to 20 pages. There were 83 bundles. We have no hesitation in finding that these appeals are both substantial and complex.

Sums involved

36. As can be seen from paragraphs four and five above, the sums of money at stake are significant; a total of £3,327,257.50.

Are these appeals comparable with High Court cases?

37. HMRC argued that because of the complexity, the sums of money involved and the very detailed and lengthy preparation over many years, these appeals were certainly comparable to High Court cases. As recently as the appellants' Skeleton Argument, it was argued at paragraphs 12 to14 that, quite apart from matters directly related to the appellants, HMRC were required to prove that there were tax losses, that they resulted from fraudulent evasion and that the deals in question were connected to fraudulent loss. Unlike many MTIC appeals these appeals were not restricted to whether or not the appellant knew or ought to have known that the transactions were connected with fraudulent evasion of VAT. Even by MTIC standards, at 83 bundles the evidence was extensive. The burden of proof on HMRC was considerable.

38. We have no difficulty in finding that these appeals are not what have sometimes been described as "run of the mill" Tribunal cases for which the costs regimes have been tailored and that they are akin to High Court cases as argued by HMRC.

Mr Hunjan's witness statement

39. Of course, this does not fall into the category of factors referred to above but in exercising our discretion we must, and do, consider it.

40. Although drafted with legal assistance, it simply asks that it be taken into account for the costs application but no specific argument is advanced.

41. He provided a copy of a discharge document (illegible) from 2009 and states that he had heart scares in 2011 and 2013 and is on medication. As we indicate at paragraph 26 above there is no other contemporary medical evidence and nothing in regard to medication or the previous "scares".

42. Neither HMRC nor we have had any opportunity to explore or test the information with which we have been provided and as we indicate at paragraph 27 above Mr Hunjan has declined either to attend or arrange representation.

43. Further as can be seen from paragraph 18 above, Mr Hunjan has refused to authorise IKP to release any information in regard to the reasons for the withdrawal of the appeal or the timing thereof. In his witness statement he confirms that: *"As a*

[1] [2011] UKFTT 607

result of my discussions with my legal representatives, which I am not prepared to disclose, I decided that I could no longer pursue the appeal." He goes on to say that he decided to prioritise his well-being.

44. These are, what are effectively, his companies' appeals. It is entirely his choice as to whether or not to progress them. It is by no means unknown for MTIC appeals to progress in the absence of the appellant since the onus of proof lies with HMRC. He has not chosen to adopt that course of action. The fact is that he decided to withdraw the appeals. Accordingly, the appeals have not succeeded.

Decision

45. In summary, with the benefit of legal advice, the appellants chose to seek a Direction from the Tribunal placing these appeals firmly within the parameters of Rule 29. They therefore knew that, given that these were complex MTIC appeals involving large sums of money, the probability was that costs would follow the event.

46. We have discretion. At all times we have had in mind the provisions of Rule 2 of the Rules. Dealing with a case fairly and justly means fairly and justly to both parties.

47. As detailed above, we have considered all of the relevant factors, including the witness statement, and weighed them in the balance. We find that costs should follow the event.

48. Accordingly, we direct that the appellants pay to HMRC the costs of, incidental to and consequent upon these appeals, to be the subject of detailed assessment if not agreed.

49. 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: 15 JUNE 2015