



TC04844

Appeal number: TC/2013/05005

*PROCEDURE – Costs – Failure to agree directions without hearing –
Whether unreasonable conduct – No – Application dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARRELL HEALEY

Appellant

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice on 22 January 2016

Conrad McDonnell, Counsel, instructed by KPMG LLP, for the Appellant

**Christopher Stone, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. This is the application of HM Revenue and Customs (“HMRC”) for its costs in relation to a hearing which its counsel, Mr Christopher Stone, submits was unnecessary and only took place because the appellant unreasonably insisted on a hearing without attempting to agree directions. Mr Conrad McDonnell, counsel for the appellant, Mr Healey, contends that Mr Healey and his representatives, KPMG, were not unreasonable and, although not seeking costs, says that it was HMRC that acted unreasonably.

2. The reference by both counsel to unreasonable conduct by the other party is because in a standard category case, such as this, 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) ...

3. As is clear from the decision of the Upper Tribunal in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) at [16] the determination of the question whether a party has, or has not, acted unreasonably is, not the exercise of discretion, but a matter of a value judgment based on primary facts. Also, as Judge Brannan cautioned in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] rule 10(1)(b) of the Tribunal Procedure Rules should not become a “backdoor” method of costs shifting.

4. The present case is concerned with whether or not Mr Healey was resident in the United Kingdom during 2007-08.

5. On 14 July 2014 HMRC wrote to KPMG requesting information including a schedule of Mr Healey’s whereabouts for 2007-08 showing where he was, what he was doing and who with on each day together with travel documents. This information was not provided. On 18 October 2013 the Tribunal (the “FTT”) issued directions requiring the parties to file and serve their list of documents no later than 29 November 2013 and witness statements no later than 10 January 2014. Mr Healey did not comply with these directions but made an application for the Tribunal to determine, as a preliminary issue:

Whether the appellant’s complete absence from the United Kingdom in the tax year 2006-07 is in itself sufficient to show he effected a “distinct break” from the United Kingdom, for the purposes of determining whether or not he was resident in the United Kingdom in that an the following tax year.

5 6. HMRC opposed the application which came on for hearing before Judge Nowlan on 28 August 2014. In a reserved decision, released on 11 September 2014, Judge Nowlan dismissed the application and, on 15 December 2012, refused Mr Healey's application for permission to appeal to the Tax and Chancery Chamber of the Upper Tribunal.

10 7. Also on 15 December 2014, the FTT wrote to the parties requesting listing information for the substantive hearing (eg dates to avoid, time estimate of hearing length etc). HMRC replied on 5 January 2015 stating that it appeared detailed directions would be required for effective case management but suggested that it would be sensible to wait until the outcome of Mr Healey's further application for permission to appeal, made directly to the Upper Tribunal, was known. As a result of the FTT, by a letter dated 9 January 2015, extended the time for the parties to provide listing information and to agree case management directions until 6 February 2015.

15 8. Mr Healey made his application for permission to appeal to the Upper Tribunal on 9 January 2015. On 14 January 2015 KPMG were sent draft directions by HMRC in the hope that these could be agreed in substance. These directions were in a standard form and in almost identical terms to those frequently issued by the FTT in similar cases. KPMG replied on 16 January 2015 suggesting that any discussions on directions should be deferred pending the outcome of the application for permission to appeal and, on 26 January 2015, made an application for a general stay in the FTT proceedings to which HMRC objected.

20 9. On 28 January 2015, Mr Healey's application for permission to appeal was dismissed on the papers by Judge Sinfield. It was renewed for an oral hearing listed on 22 April 2015. However, on 20 April 2015, KPMG sent an email to the Upper Tribunal confirming that Mr Healey wished to withdraw his application. The email continued stating that KPMG would:

... liaise with HMRC directly with a view to agreeing directions for the litigation before the FTT in relation to the substantive (residence) issue.

30 10. In an email of 12 May 2015 to KPMG, HMRC noted the withdrawal of the application for permission to appeal. Draft directions, in essentially the same form as previously sent but with new dates inserted, were attached to the email. KPMG responded on 19 May 2015 stating that they were seeking instructions from Mr Healey.

35 11. In the absence of any detailed response by or on behalf of Mr Healey, on 7 August 2015 HMRC made an application to the FTT issue the directions that had been sent to KPMG. The FTT, on 18 August 2015, wrote to the parties informing them that HMRC's application had been allowed "unless the other party objects within 14 days."

40 12. On 1 September 2015, in an email to the FTT, KPMG objected to HMRC's application and sought a directions hearing on the basis that:

... this case is all about the appellant's residence, schedules of whereabouts should be completed and exchanged by the parties so as to reduce any areas of disagreement to a minimum.

13. On 17 September 2015 HMRC wrote to the FTT objecting to a directions hearing asking the FTT to endorse the directions on the papers without further recourse to the parties. In relation to the provision of a "whereabouts schedule" the letter stated:

10 If the Appellant wishes to produce whereabouts schedules (in respect of the tax years 2006-07 and 2007-08) and disclose full evidence in support (which we anticipate will include: original copies of personal/work diaries; boarding passes and other original travel documents; all bank and credit card statements; itemised telephone bills), these can all be included in the Appellant's list of documents. We do not consider that there is a need for specific directions dealing with these matters.

14. Given the position of the parties it was decided to list a case management hearing. Unfortunately, due to their limited availability, it was not possible to list this before 10:30 am on 22 January 2016.

15. On 15 January 2016 to in an email to KPMG, to which were attached the same draft directions as had previously been sent, HMRC wrote:

25 You were copied into HMRC's letter to the Tribunal of 17 September 2015, which enclosed the attached proposed directions. At no time have HMRC received detailed comments on their proposed directions (which have been in substantially the same form for many months). We should be grateful for these comments now to enable the parties to agree matters as far as possible in advance of Friday's hearing.

16. KPMG replied, as follows, at 20:10 on 21 January 2016, the evening before the hearing:

30 I am writing with sincere apologies for the delay in responding to your earlier correspondence.

I have to today received instructions from my client to attend the hearing and have instructed Mr Conrad McDonnell of counsel to represent my client tomorrow.

35 Having discussed the matter with my client earlier this week, we would like to suggest that the parties attempt to settle this dispute by mediation. I appreciate that there has been a delay in this case. However, in the light of the relatively small sums at stake, my client has been reluctant to incur the costs associated with a fact heavy case going to trial.

40 My client has asked that KPMG contact ... HMRC's alternative dispute resolution team and ask whether HMRC will be prepared to explore the possibility of a mediation. ...With this in mind, my instructions are to seek an order for a short stay for mediation to be explored.

17. By the time of the hearing on 22 January 2016 there was agreement between the parties as to the form of the directions.

18. These were to be as suggested by HMRC on 15 January 2015, but with the addition of a direction for the provision of a “whereabouts schedule” by Mr Healey computing the number of days spent in each location and specifying the methodology by which that computation was made (“the Day Count Schedule”); and a direction that HMRC respond within 28 days stating whether or not the schedule was accepted, explaining the reason for any disagreement and in the absence of any disagreement the Day Count Schedule “shall be taken as agreed”.

19. I issued the directions, as agreed between the parties but, as it is possible to explore the possibility of mediation and comply with directions simultaneously, dismissed the application, made on Mr Healey’s behalf, for a stay in proceedings.

20. Mr Stone contends that HMRC should be entitled to the costs of this hearing in the basis of the unreasonable conduct of Mr Healey or his representatives and points to the obligations of parties to help the FTT to further the overriding objective contained in rule 2 of the Tribunal Procedure Rules in to “deal with cases fairly and justly”, in particular by “avoiding delay” (see rule 2(2)(e) of the Tribunal Procedure Rules). He says that agreement to the directions in essentially the same form as suggested by HMRC over a year previously clearly illustrate why this hearing was not necessary.

21. Although Mr McDonnell accepts that the directions, as issued, were mostly in a standard form it was not until the hearing that HMRC agreed that directions were required for the provision of a “whereabouts schedule”. This was despite stating in response to KPMG, who raised this issue on 1 September 2015, that they did not consider that there was a need for specific directions dealing with these matters. For this reason he submits that it was not Mr Healey or his representatives but HMRC that has acted unreasonably and as such should not be entitled to costs.

22. Clearly there has been delay by or on behalf of Mr Healey. I accept that to some degree this can be explained by the understandable reluctance of KPMG to incur costs when there was an outstanding application for permission to appeal. However, I would have expected further engagement with the appeals process following the withdrawal of the oral application in April 2015 and before the application for this hearing on 1 September 2015. That said, given HMRC’s view that specific directions for the provision of a “whereabouts schedule” were not needed I am unable to agree with Mr Stone that this hearing was unnecessary. Accordingly I do not consider it was unreasonable for those acting for Mr Healey to request the hearing take place.

23. Therefore, for the above reasons, HMRC’s application for the costs of this hearing must, on balance, be dismissed

24. 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.

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JOHN BROOKS

TRIBUNAL JUDGE

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RELEASE DATE: 26 JANUARY 2016