[2022] UKFTT 00009 (TC)

TC 08362

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03798

BETWEEN

COSTS APPLICATION – by Appellant – whether Border Force acted unreasonably – no – application refused

ALWAYS PURE ORGANICS LIMITED **Appellant**

-and-

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the application on 7 July 2021 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

DECISION

Introduction

1. The Appellant had appealed requesting the restoration of goods seized by Border Force. On 11 January 2021 the appeal by the Appellant was allowed on the basis that the goods had been restored by the Director of Border Revenue ("DBR"). The Appellant has made an application for costs pursuant to rule 10(1)(b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 ("FTT Rules").

2. Rule 10 of the FTT Rules relevantly provides that the Tribunal may only make an award in respect of costs if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting of proceedings.

Background

3. On 20 June 2020, Border Force officers tested various CBD products being imported by the Appellant. The products were found to have tested positive for cannabis/THC using a the DBR field test kit. The goods were therefore seized.

4. The Appellant challenged the legality of the seizure in the Magistrates Court and, whilst awaiting a hearing, requested restoration of the goods and provided laboratory test results. the DBR replied to the request on 21 September 2020, before the Magistrates Court hearing, refusing restoration on the basis that the field test had been positive and it was difficult to determine if the laboratory tests provided were linked exactly to the products imported. Although the Appellant stated that they were also licensed to import CBD products, the DBR stated that the licence would have needed to be produced prior to importation to comply with the requirements for importing products. the DBR was therefore unable to restore the goods.

5. The letter stated that the decision had been made on the assumption that the Magistrates court would find that the seizure was lawful but that, if the Appellant succeeded in their claim to the Magistrates, the goods would be returned.

6. The Appellant appealed the refusal to this Tribunal on 15 October 2020. They subsequently asked the Tribunal to make a direction that they be given access to the DBR field test results, as the DBR refused to provide these, and also be allowed access for their own expert to analyse the products seized. The Tribunal refused to make the direction at that time on the basis that the condemnation proceedings in the Magistrates court were ongoing. It was also considered that such requests should properly be directed to the Magistrates Court.

7. Pending the condemnation proceedings in the Magistrates, the DBR requested further forensic tests on the products. As a result of these tests, the seized goods were returned to the Appellant and the appeal was allowed as noted above.

Application

8. On 15 January 2021, the Appellant made an application for costs to this Tribunal on the following grounds:

(1) The seizure had been challenged immediately. The DBR had relied on field test results that were wrong and so the seizure was unlawful.

(2) The DBR had refused, more than once, to allow the Appellant to see the results.

(3) The Appellant was not allowed to carry out their own tests.

(4) The request to restore was dismissed and none of the Appellant's points were considered. The starting point for the refusal was a false premise.

(5) The Appellant had to lodge an appeal to this Tribunal.

(6) The DBR had had months to undertake further tests, allow the Appellant to arrange for tests and to consider the restoration properly.

(7) It was only after the Appellant applied for a direction for an inspection and tests that the goods were eventually restored.

(8) The DBR had acted in bad faith as they had concealed the fact that additional tests had been applied for on 28 August 2020. The test results had not been disclosed on release.

(9) The seizure caused loss to the Appellant, and they had incurred costs.

9. It was submitted, in summary, that the DBR's behaviour had been unreasonable and so the Appellant had incurred costs as they were forced to issue the appeal.

The DBR Response

10. The DBR contended as follows:

(1) Disclosure of the test results was a matter for the condemnation proceedings, and the results would have been disclosed when necessary in the course of those proceedings. This had been agreed by Judge Bailey of the First-tier Tribunal ("FTT") in refusing to make the direction for disclosure when requested by the Appellant.

(2) Judge Bailey of the FTT had, similarly, noted that the Appellant's request to be allowed to carry out their own tests should also have been directed to the Magistrates as part of the condemnation proceedings. It was not appropriate for the FTT to make such a direction in respect of condemnation proceedings.

(3) These matters related to the reasonableness of the seizure, restoration decision and review, and decision not to disclose the field test result (other than to say that this had been positive). These are not matters which can support an application for costs under Rule 10 of the FTT Rules.

(4) The Appellant had specifically stated in an email of 5 January 2021 that they were not criticising the solicitor acting for the DBR with conduct of the appeal proceedings in the FTT.

(5) The Appellant's appeal was not obviously meritorious, relying on grounds relating to the legality of the seizure. This is a matter for the Magistrates Court rather than the FTT, as confirmed in *HMRC v Jones* [2012] Ch 414.

(6) The FTT had refused to direct disclosure of the test results and had refused to direct that the Appellant should be allowed to test the products. the DBR contended that they could not be said to have acted unreasonably for not doing something which the FTT refused to require it to do.

(7) The decision to return the goods was taken within a reasonable time of the DBR being notified of the negative forensic test results in respect of the goods. The relevant the DBR officer was entitled to spend some time considering the impact of the results on the condemnation proceedings as there may be other reasons for goods being liable to forfeiture.

(8) The DBR denied that they had deliberately concealed that they were conducting further tests on the goods.

11. The DBR contended that they could not have withdrawn from the appeal before the negative forensic test results had been received. Prior to that date, it was appropriate for the DBR to proceed on the basis of the positive field test result. The appeal to the FTT had

effectively duplicated the condemnation proceedings and appeared to have no merit on the basis of the field test results.

Case law

12. The approach to be taken in relation to applications for costs on the basis of unreasonable behaviour when an appeal before the Tribunal is withdrawn was helpfully summarised by the Upper Tribunal in *Marshall & Co v HMRC* [2016] UKUT 116 (TCC)('Marshall') at §§10-13:

> "10. The scope of Rule 10(1)(b) has been discussed in this Tribunal in *Catanã v Revenue and Customs Commissioners* [2012] UKUT 172 (TCC), where Judge Bishopp, at [14], stated:
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>> 'Mr Catanã has made a number of points about 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 should know 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 and directions to the prejudice of the other side.'
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> 11. The reference to 'the proceedings' in Rule 10(1)(b) is to proceedings before the Tribunal which has jurisdiction of the appeal, whilst it has such jurisdiction. In *Catanã* this Tribunal approved (at [9]) the following statements from *Bulkliner Intermodal Limited v HMRC*[2010] UK FTT 395 (TC):
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>> '….. It is not possible under the 2009 Rules … 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*… 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 anor (trading as Farthings Steak House) v McDonald (Inspector of Taxes)*[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.'
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> 12. Where HMRC eventually withdraw from a case against a taxpayer, in relation to the pre-2009 costs regime the Special Commissioners held in Carvill v Frost [2005] STC (SCD) 2008 that failure by HMRC properly to have reviewed its decision to pursue a claim would be relevant. The Commissioners stated (at [73]):
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>> 'It seems to us, however, at least in the circumstances of this case, that where we are required to determine the reasonableness or otherwise of the Revenue's conduct in pursuing a case from which it eventually decided to withdraw, internal action, such as the adequacy or otherwise of a review of the issues on which the Revenue's case is founded and which is carried out whilst the appeal is within the jurisdiction of this Tribunal, is directly relevant to the findings we are required to make as to the Revenue's conduct.'
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> 13. Again in the context of the withdrawal by HMRC of a case before the FTT, the decision of this Tribunal in *Tarafdar (t/a Shah Indian Cuisine) v Revenue and Customs Comrs* [2014] UKUT 362 (TCC) is relevant. In *Market &*

> *Opinion Research International Ltd v Revenue & Customs Comrs* [2015] UKUT 12 (TCC), this Tribunal endorsed (at [18]) the test set out in *Tarafdar* at [34]:
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> > 'In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
> >
> > (1) What was the reason for the withdrawal of that party from the appeal?
> >
> > (2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
> >
> > (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"'

13. In the case of *Distinctive Care Limited* [2018] UKUT 155 (TCC) the Upper Tribunal noted (§45) that "… questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight"

Discussion

14. I note that the burden of showing that the DBR have acted unreasonably lies with the Appellant who must establish that they have done so on the balance of probabilities.

15. The Appellant primary argument is, in summary, that the DBR acted unreasonably because they should not have seized the goods; should have told the Appellant at an earlier date that they were re-testing the products; and refused to restore the goods on request. The first point, that the DBR should not have seized the goods, is a matter for the Magistrates. This Tribunal has no jurisdiction in that aspect. Similarly, this Tribunal does not have jurisdiction with regard to any losses arising from the seizure itself.

16. The Appellant takes the view that, if HMRC had advised them that further tests were being undertaken, they could have delayed making an appeal until the results of that later test were known. The Appellant also argues, in similar vein, that the DBR should have allowed the Appellant to conduct their own tests.

17. I note that the FTT had refused to order disclosure of test results and had refused to order that the Appellants should be allowed to conduct their own test results; I agree that the DBR cannot be regarded as having acted unreasonably where the FTT has specifically refused to order them to undertake the relevant actions.

18. To the extent that the Appellant argues that they were forced to appeal to this Tribunal and would have delayed the appeal to the Tribunal if they had known that further tests were being taken, I note that there was no evidence provided for the allegation that the DBR deliberately concealed the fact that they were undertaking further forensic tests. I do not consider that there is any evidence that the DBR acted in bad faith whether before or after the appeal was lodged and find that the DBR did not act in bad faith at any time with regard to these proceedings.

19. The DBR's argument, in summary, is that they could not withdraw from the proceedings until they had received the results of the forensic tests as there had been a positive field test result and that they had withdrawn and returned the goods within a reasonable time after receiving the forensic test results.

20. Considering the overall circumstances and the test in *Tarafdar* in particular, I do not agree that the DBR acted unreasonably in defending or conducting these proceedings. I do not agree that they could have withdrawn, or agreed to restore the goods, before they had received

the forensic test results and I consider that they withdrew within a reasonable time after receiving such results.

21. I conclude therefore that the DBR have not acted unreasonably in defending or conducting the proceedings. The Appellant agreed that the DBR's representative had not acted unreasonably.

Decision

22. For the reasons set out above, the application by the Appellant for an order under Rule 10(1)(b) of the FTT Rules that HMRC pay its costs in relation to this appeal is refused.

Right to apply for permission to appeal

23. 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 FAIRPO
TRIBUNAL JUDGE

Release date: 07 DECEMBER 2021