



Neutral Citation: [2022] UKFTT 162 (TC)

Case Number: TC08489

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2017/02605

COSTS – Complex category case – Application for costs on indemnity basis following withdrawal of case by Respondents – Application refused

Heard on: 1 October 2021
Judgment date: 16 May 2022

Before

TRIBUNAL JUDGE SUKUL

Between

WORLDPAY (UK) LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For Worldpay: Mr Kieron Beal QC, instructed by PricewaterhouseCoopers LLP for Worldpay

For the Respondents: Mr Owain Thomas QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the hearing was conducted on the Tribunal's video hearing platform. The documents to which I was referred were included in a 143-page supplementary bundle of documents on costs, a core hearing bundle, 20 supplementary hearing bundles, authorities bundles and written submissions with attachments.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This is an application by the Appellant ('Worldpay') for the Respondents ('HMRC') to pay its costs of and incidental to the appeal on the indemnity basis. The application invites the First-tier Tribunal ('FTT') to direct that the costs' assessment should be made by a Costs Judge of the High Court, pursuant to rule 10(6)(c) and 10(7)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules') and seeks the following directions from the FTT when dealing with the question of costs:

(1) A direction pursuant to rule 10(7)(a) of the FTT Rules that the detailed assessment of the entirety of the costs should be on the indemnity basis. Alternatively, the costs should be assessed on the standard basis until 14 May 2019 and thereafter on the indemnity basis;

(2) A direction in any event that HMRC should pay to Worldpay within 14 days the sum of £250,000 on account of costs before the assessment takes place, pursuant to rule 10(7A) of the FTT Rules.

4. HMRC do not oppose the application for a direction for payment on the account of costs in the sum of £250,000 (subject to receipt of Worldpay's indicative schedule of costs) and accept that the FTT should direct that the costs' assessment should be made by a Costs Judge of the High Court. HMRC do, however, contest the application for costs to be assessed on the indemnity basis and asks the FTT to award HMRC their costs incurred in resisting this application.

THE APPEALS

5. The substantive FTT appeals, categorised as 'complex', were made against HMRC's VAT liability decision of 19 December 2016 and concerned the VAT classification of supplies made by Worldpay to another company in the Worldpay group. On 13 July 2017, HMRC served their Statement of Case and, on 5 June 2019, the FTT granted HMRC's application for permission to make a very late amendment to their Statement of Case to allege 'Halifax abuse' (a doctrine derived from a Court of Justice of the European Union decision concerning the VAT treatment of 'abusive transactions').

6. The FTT reserved its decision on the costs of that application until conclusion of the FTT proceedings. On 24 September 2020, the Upper Tribunal ('UT') heard Worldpay's appeal against the FTT's decision to reserve costs and dismissed that appeal. *Worldpay UK Limited v HMRC* [2020] UKUT 290 (TCC) ('the UT decision') sets out, in some detail, the background to HMRC's VAT decisions and the procedural background to HMRC's application to amend their Statement of Case (see [3] to [42]). The UT decision states, at [40]:

"40. Overall, the FTT concluded at [19] that HMRC had behaved reasonably. On receiving Worldpay's witness evidence, HMRC acted promptly in asking Worldpay for further information, waiting to see if that answered their questions and, when it did not, making an application for disclosure to the

FTT. The answers that HMRC received to their questions were relevant to the pleaded case but also to the Halifax abuse issue. The core of the FTT's conclusion on this issue is to be found in the following extract from the parties' note of the decision:

20. It then comes down to whether HMRC ought to have pleaded the case on Halifax from the start. And whether the failure to do so means there is no good excuse for doing so now. What I've come down to in making that decision is that, this being a tax case, the Appellant holds all of the evidence. A significant amount of this evidence has recently been disclosed, which impacts upon the case to be heard. It is not unreasonable for HMRC to respond to that disclosure, and as a tax authority they are not going to have that evidence before they start the case.

21. To some extent, the real problem is that both parties allowed the hearing to be set down for listing before the exchange of evidence was complete. If I refuse the amendments requested, I will be depriving HMRC of the product of their reasonably pursued application for the further and better particulars and disclosure. My decision has not been easy and on balance, despite the inevitable expense and delay, I shall allow the amendments. There is a reasonable and good explanation for why the application was made late. It is important to see things in the round. Ultimately both parties should have made the Tribunal aware that the evidence process in this case was not complete. The amendments to the Commissioners' Statement of Case are allowed, and the hearing set for 10 June 2019 is adjourned."

7. The appeals were determined following the withdrawal of HMRC's case on 21 September 2021, two days before the re-listed hearing of the appeals was due to commence. HMRC accepts that it should be ordered to pay the costs of the appeals but on the standard basis. Worldpay contends that the unreasonable conduct of HMRC's defence of the appeal justifies awarding costs on an indemnity basis.

STANDARD OR INDEMNITY BASIS OF ASSESSMENT - PRINCIPLES

8. Rule 10(1)(c) of the FTT Rules provides that the Tribunal may make an order in respect of costs if the proceedings have been allocated as a Complex case under rule 23 and there is no request for the proceedings to be excluded from potential liability for costs. Rule 10(7)(a) makes provision for a detailed assessment of the costs on the indemnity basis, if specified in the order.

9. I consider the relevant principles to be applied in determining whether costs should be assessed on the standard or the indemnity basis are those clearly set out by Judge Cannan in *Ad Hoc Property Management Limited v. HMRC* [2019] UKFTT 0315 (TC) at [13] onwards, which I was referred to by both parties:

"13. Costs may be awarded on an indemnity basis where the litigation has been conducted in a way which is "unreasonable to a high degree" which takes the case "out of the norm". Both parties were content to rely on the description of the conduct which will justify indemnity costs in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden, & Johnson* [2002] EWCA Civ 879 endorsing what was said by Simon Brown LJ in *Kiam v MGN* (No 2) [2002] EWCA Civ 66 at [12]:

"12. ... [The] conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Rule 44

(unlike one made under Rule 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory.”

14. There was some discussion as to what is meant by “the norm”. Mr Singh submitted that it was “everyday unreasonableness”. I am content to adopt the description given by Judge Berner in *Bowcombe Shoot* as follows:

“43. In order to determine if conduct, or a circumstance, is outside the norm it is first necessary to consider what constitutes the norm. That will depend upon the nature of the case and the particular circumstances. There can be no single criterion or set of criteria that defines the norm in a given case. There is likely to be a range of circumstances and conduct and behaviour all of which can be regarded as within the norm in a particular case, some of which may be closer to the unreasonable than others, but none of which is unreasonable to such a high degree as to merit the stigma that attaches to an award of indemnity costs.”

15. Further, in considering whether there has been unreasonable conduct to a high degree I should be wary of placing too much weight on the fact that the respondents effectively capitulated. The reason for this was given by Barling J in *Catalyst Investment Group v Lewinsohn* [2009] EWHC 3501 (Ch):

“34. ... I remind myself that all other things being equal, I should be rather wary of placing much weight on the mere fact of capitulation by the defendants. To rely upon such capitulation as a factor pointing to a less favourable basis of assessment of costs for the party capitulating could be seen as non-conducive to achieving early resolution of litigation, and inconsistent with the overriding objective. One must also bear in mind that there can be many reasons for abandoning proceedings.”

16. Similarly, in *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 a judge had ordered the claimants to pay indemnity costs on the basis that their claims were bound to fail. That order was overturned by the Court of Appeal where the Chancellor stated:

“83. The Judge had a wide discretion as to costs but I consider that, in awarding costs on the indemnity basis rather than the standard basis, the Judge made an error in principle. The weakness of a legal argument is not, without more, justification for an indemnity basis of costs, which is in its nature penal. The position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit.”

17. I was also referred to what was said by Sir Anthony Colman in *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1742 (Comm) at [28]:

“28. Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself. ... in each case in which the costs of the whole litigation are under consideration, the conduct adversely criticised must be looked at in the context of the entire litigation and a view taken as to whether the level of unreasonableness or inappropriateness is in all the circumstances high enough to engage such an order.”

18. The reference to “pre-litigation dealings” would doubtless encompass compliance in civil procedure with any pre-action protocols which have no equivalent in tax tribunal procedure. However, I accept that the respondents conduct prior to an appeal to the tribunal is relevant in the context of the present application (see Judge Berner in *Curran v HM Revenue & Customs* [2012] UKFTT 655 (TC) at [16]. I must consider all the circumstances.”

GROUNDS FOR THE APPLICATION

10. The grounds for the application are stated by Worldpay as follows:

“6.1. First, HMRC unreasonably advanced a case based on Halifax abuse very late in the day, necessitating an adjournment of the substantive hearing in June 2019, only to withdraw their case in its entirety two days before the re-listed substantive hearing in September 2021;

6.2. Secondly, HMRC’s case on Halifax abuse, upon which they shouldered the burden of proof, was unreasonably conducted in the course of the litigation;

6.3. Thirdly, HMRC’s case substantially changed over time, so that the final presentation of the arguments differed from the reasons given for the contested decision, moving the goalposts on the substantive case which Worldpay had to meet;

6.4. Fourthly, HMRC advanced submissions in the appeal which were wholly at odds with the submissions they had advanced in other recent cases before the Court of Justice of the European Union and the Court of Appeal.”

DISCUSSION

11. Worldpay’s first ground for the application is that HMRC unreasonably advanced a case based on Halifax abuse very late in the day. Worldpay argues that it is unreasonable for HMRC to have chosen belatedly to advance a case where they bear the burden of proof, which encompasses significant and serious allegations of inappropriate and unlawful conduct, without sufficient thought or foundation, so that such a case is then withdrawn at the door of the Tribunal.

12. Having considered the Appellant’s submissions and all the circumstances of the case, I agree with HMRC on this point, namely that the FTT has already considered these arguments and rejected them, and that the FTT lawfully took the view that HMRC’s conduct in introducing a Halifax argument at a very late stage was sufficiently reasonable to allow their application to amend their Statement of case. It is clear from the principles I have referred to that I should be wary of placing much weight on the mere fact of HMRC’s capitulation and I am therefore not satisfied that there was unreasonableness to a high degree or that the conduct, in respect of this ground, was outside the norm.

13. The second ground for the application is Worldpay’s contention that HMRC’s case on Halifax abuse was unreasonably advanced in the course of the litigation. Worldpay argues that HMRC’s case challenged as abusive the conclusion of a separate agreement between Worldpay and the merchants for remittance services to be provided in return for a fee of 1p per remittance and that case was never properly pleaded or proved and was never the formal subject of a decision from HMRC or supported by any witness evidence on their part.

14. Worldpay further contends that having repeatedly requested a series of pieces of information and other disclosure, and having secured from Worldpay very extensive replies to those requests and extensive documentation, HMRC resorted to a legal case based on submission alone in support of the very serious allegation of abusive conduct. They argue that HMRC refused to accept at every stage the commercial explanations which Worldpay gave for

its conduct and that Worldpay and its witnesses were all ready to defend themselves from these unmeritorious allegations when HMRC decided to withdraw their case.

15. HMRC submits that Worldpay’s criticism was made before the UT, who observed at [67]:

“Worldpay’s contention that HMRC had everything they needed at the time of their decision on liability, or at the time of service of their Statement of Case, is wide of the mark. To give just one example, one of HMRC’s requests for information arising from Mr Dunn’s witness evidence asked for samples of invoices setting out details of the 1p per transaction fee for providing remittance services. If the response to that request showed that, despite the contracts, Worldpay never charged that fee, or merchants never paid it, HMRC might reasonably consider that material relevant to their consideration of whether to make the serious allegation of Halifax abuse.”

16. HMRC contends that they advanced the abuse argument in the light of all the evidence provided by Worldpay, including but not limited to the last tranche of evidence disclosed in May 2019, and argue that where a taxpayer is invited to articulate the commercial rationale of a particular feature of some structure but declines to do so, they are entitled to draw conclusions on the basis that there is no commercial rationale. HMRC refer to the comments made by Judge Mosedale at [20] of the decision to allow the application to amend their Statement of Case that “...this being a tax case, Worldpay holds all of the evidence... It is not unreasonable for HMRC to respond to that disclosure, and as a tax authority they are not going to have that evidence before they start the case”. HMRC contend this has been borne out by the fact that, subsequent to the amendment being allowed, Worldpay brought witness evidence and disclosed material which was highly relevant to the explanation for the insertion of a notional fee for the purported remittance agency service.

17. I consider HMRC’s contentions here to be supported by the finding in the UT case at [75]:

“We do not accept the premise of Worldpay’s submission. The FTT did not base its conclusion on a finding that the May 2019 disclosure resulted in HMRC “turning a corner” in their perception of the case. The FTT had certainly observed that the May 2019 disclosure was “relevant” (at [18] of the note of the Decision). It also said, at [20], that a “significant amount of evidence has recently been disclosed”, but that was a reference to both the material provided in May 2019 and that provided in March 2019. The FTT’s core conclusion was, at [19], to the effect that it was reasonable for HMRC “to amend pleadings in the light of the evidence and disclosure received, even though that disclosure was only ordered because it was relevant to existing pleadings”. Moreover, as we have said at [39] above, the FTT found that it was reasonable for HMRC to review all the material disclosed before deciding whether to plead the Halifax case. The FTT’s conclusions, therefore, referred to HMRC’s response to the totality of evidence received and were not based on any mistaken finding that HMRC’s amended pleading was justified by a review of the material disclosed in May 2019.”

18. Further, Worldpay’s submissions that HMRC’s case was unmeritorious and based on submission alone concerns the weakness of HMRC’s legal argument, which is not, without more, justification for an indemnity basis of costs (see *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 at [83]). Having considered the relevant principles and the findings of the UT and the FTT, I am not satisfied that HMRC’s case on Halifax abuse was unreasonably advanced in the course of the litigation or that the conduct was outside the norm.

19. The third ground for this application is Worldpay's contention that HMRC's case on the other aspects of the appeal substantially varied over time, with reference to discrepancies between the reasons given in the contested liability decision and HMRC's Statement of Case. Worldpay contends that HMRC's final skeleton argument for the hearing then departed yet further from the pleaded case in the amended Statement of Case, for example in relation to the nature and extent of the implied terms... which was much narrower. Worldpay argues that HMRC's case on implied terms based on sponsorship was always doomed.

20. I accept HMRC's submissions that the amendments to the Statement of Case were permitted by the FTT and the question of whether the case on implied terms was doomed goes to the substantive merits of HMRC's case, rather than any question of conduct so as to justify indemnity costs. Again, I am not satisfied on the basis of this ground that there was unreasonableness to a high degree or that the conduct in this was outside the norm.

21. Worldpay's final ground for this application is that HMRC advanced submissions in the appeal which were wholly at odds with the submissions they had advanced in other relevant cases and they were arguing for a result which was diametrically opposed to the direction of travel which they themselves had been taking in the last five years, with no evident explanation for such inconsistency, beyond a desire to maximise the tax take from any particular taxpayer on different sets of facts.

22. HMRC contends that the facts of the present appeal were different in important respects from the facts in the other cases referred to and that they had set out in their skeleton for the substantive hearing why the judgments in those cases were not dispositive of the outcome in the present appeal. HMRC further submits they were not treating two identical sets of facts differently; but in a complex and difficult area of law, had concluded that the result of the VAT analysis was different, in different factual scenarios. Worldpay never sought, at any time, to strike out HMRC's case as being without reasonable prospect of success (whether due to this case law, or otherwise).

23. I find HMRC's references to the factual differences they consider to be shown between these appeals and the other cases referred to, provides a reasonable explanation for any inconsistency in HMRC's approach. I do not consider there to be any reasonable basis for Worldpay's contention that HMRC had a desire to maximise the tax take from any particular taxpayer on different sets of facts. I am therefore not satisfied that, on the basis of this ground, that there was unreasonableness to a high degree or that HMRC's conduct was outside the norm.

24. Worldpay made reference to the comments of Briggs J in *The Bank of Tokyo-Mitsubishi UFJ Limited and another v Baskam Gida Sanayi VE Pazarlama AS and others* [2009] EWHC 1696 (Ch) where, after reviewing the authorities, he said (at [26]):

“...The bringing of a case alleging serious dishonesty may qualify for indemnity costs if on the material it can properly be categorised as speculative, weak, opportunistic or thin, if it is advanced on the basis of a constantly changing case, and if it is pursued on a very large scale without apology to the bitter end, including by hostile cross-examination, without constant regard to its merits. Some combination of those factors may justify the view that the litigation has been unreasonably pursued.”

25. Worldpay also referred to the judgment of Tomlinson J in *Three Rivers DC v. Bank of England* [2006] EWHC 816 (Comm) [2006] 5 Costs L.R. 714, which states at [25]:

The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

- (a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;
- (b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;
- (c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;
- (d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;
- (e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;
- (f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;
- (g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.”

26. I agree with Worldpay’s submission that HMRC’s capitulation very shortly before trial is an aggravating factor which supports an application for costs on an indemnity basis. However, although HMRC’s case on Halifax abuse amounted to a serious allegation, it was not a fraud case and I do not consider it to have met the level of “a case alleging serious dishonesty” or “serious and wide ranging allegations of dishonesty or impropriety over an extended period of time”. Further, whilst there was some change in HMRC’s position throughout the course of the proceedings, I do not consider their case, based on the amendment permitted by the FTT, was pursued “despite lack of any foundation”. I therefore find the overall circumstances in this case, when taken in combination with the fact that HMRC withdrew only at a very late stage in proceedings, do not take this case out of the norm or demonstrate unreasonableness to a high degree sufficient to justify an order for indemnity costs.

27. Worldpay seeks, in the alternative, an order that costs are awarded on the indemnity basis from 14 May 2019 when HMRC applied for permission substantially to amend their case to plead a case of Halifax abuse. Having considered the submissions made on this point, the case chronology and all the circumstances of the case, I am not satisfied that conduct of the proceedings during this period was outside the norm or that there was unreasonableness to a high degree.

CONCLUSION

28. Having carefully considered the relevant principles, the submissions made by both parties, the context of the litigation and all the circumstances of the case, my finding is that HMRC’s conduct of this case falls within the range of circumstances which can be regarded as within the norm, some of which may be closer to the unreasonable than others, but none of which is unreasonable to such a high degree as to merit an award of indemnity costs. I do not consider the proceedings or steps taken within them to have been motivated by some ulterior purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit. I am not satisfied that there was unreasonableness or inappropriateness in all the circumstances high enough to engage such an order and I do not consider granting such an order would be in

the interests of fairness and justice in these circumstances. Worldpay's application for an award of indemnity costs is therefore refused.

COSTS OF THIS APPLICATION

29. HMRC seeks an order that Worldpay should pay their costs of and occasioned by the application. I have refused Worldpay's application for indemnity costs and, as this is a complex case, the costs of this application would normally follow the event. I therefore agree that Worldpay should pay HMRC's costs of the application, to be subject to a detailed assessment if not agreed.

DIRECTIONS

30. For the reasons given above I direct as follows:

(1) HMRC shall pay Worldpay's reasonable costs of and occasioned by the appeals on the standard basis, to be subject to a detailed assessment by a Costs Judge of the High Court if not agreed.

(2) HMRC shall pay Worldpay the sum of £250,000 on account of those costs within 14 days of the date of release of this Order. If the amount of the payment on account exceeds the costs as assessed or agreed, Worldpay shall, within 14 days of the assessment or agreement, repay to HMRC an amount equal to the difference between the payment on account and the assessed or agreed amount. In such a case, such allowance for interest may be made as the Costs Judge considers to be just.

(3) Worldpay shall pay HMRC's costs of this application on the standard basis to be the subject of a detailed assessment if not agreed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

31. 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.

**KIM SUKUL
TRIBUNAL JUDGE**

Release date: 20 MAY 2022