Neutral Citation: [2023] UKFTT 693 (TC)

Case Number: TC 08884

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video

Appeal reference: TC/2021/01323
TC/2021/01327
TC/2021/01328

*Costs, standard or indemnity basis*

**Heard on:**
**Judgment date:** 15 August 2023

**Before**

**HIS HONOUR JUDGE MALEK**
**DUNCAN MCBRIDE**

**Between**

**GIGABIZ LTD**
**XIAO WANG**
**XUHUA JI**

**Appellants**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr. Colin Smith, The Independent Tax & Forensic Services LLP

For the Respondents: Mr. Charles Asuelimen, litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

1. Following the hearing of these appeals on 6-10 February 2023 the Appellants, by application dated 10 March 2023 (the "Application"), sought an order that the Respondents pay their costs pursuant to Rule 10 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules"). The Respondents provided a written response dated 29 March 2023 and the Appellants, thereafter, provided a "written response to the Respondents' Objections" dated 9 May 2023. In accordance with this Tribunal's usual practice I considered the application without convening a panel or an oral hearing. This document sets out my decision on the Application and provides brief written reasons as to why I have come to that decision.

**THE LAW**

2. The relevant parts of Rule 10 provide:

> "(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) if—
>
> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
>
> (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph
>
> .....
>
> (3) A person making an application for an order under paragraph (1) must—
>
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
>
> (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.
>
> (4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made 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 amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—
>
> (a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses [, including the costs or expenses of the assessment,]incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—

(a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

....

**DISCUSSION**

3. It is not entirely clear whether the application is made under Rule 10(1)(b), 10(1)(c) or both. The Application begins by saying that an order is sought under Rule 10(1)(b), but then goes on to cite Rule 10(1)(c). Further the submission made by the Appellants are formulated in such a way so as to suggest that the author had Rule 10(1)(c) in mind and, indeed, the Respondents appear to work under the assumption that the application is made under Rule 10(1)(c). For my part I shall take treat the application as one primarily made under subsection (c), but will also deal, briefly, with subsection (b) as an alternate.

**Rule 10(1)(c)**

4. In the present case it is common ground that (i) the case was allocated to the complex category, (ii) the taxpayer Appellants has not opted to exclude liability for costs, and (iii) the taxpayer Appellants had made the application under Rule 10 within the requisite 28 day time period. Accordingly, the wide discretion as to costs pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 is engaged.

5. In my view in exercising such discretion I can gain much assistance from the Civil Procedure Rules ("CPR") (see for eg *Versteegh Ltd and others v HMRC* [2014] UKFTT 397 (TC)). CPR 44.2(2) makes clear that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. It has further been opined that the court should be slow to depart from this straightforward approach (see for e.g. *Biffa (Jersey) Ltd and another v HMRC* [2015] UKFTT 10 (TC)). This simple approach has much to commend it (not least because it brings with it an element of certainty and avoids costly satellite litigation) and I gratefully adopt it.

6. I could detect little or no argument against the incidence of costs (i.e. whether the Respondents ought to be ordered to pay the Appellant's costs) in the Respondents written response, with most of their fire being reserved for whether or not costs ought to be ordered to be paid upon an indemnity basis (more on this below). Indeed, there was probably little that the Respondents could have said given the manner in which they had lost. Accordingly, I have no hesitation in making an order that the Respondents do pay the Appellants costs of and occasioned by the appeals.

***Standard or indemnity costs***

7. CPR 44.3 provides that costs may be assessed on a standard (i.e. the usual) basis or upon on an indemnity basis. It is fair to say that the award of costs under the indemnity basis is normally reserved for cases where the court wishes to indicate its disapproval of the conduct of litigation of the party against whom the costs are awarded ( see *Reid Minty v Gordon Taylor* [2001] EWCA Civ 1723).

8. In *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1696 (Ch) Briggs J provided a helpful summary of the principles engaged in applications for indemnity costs. He said at paragraph 26:

> "In my judgment those cases, together with the others summarised in the notes to CPR 44.4(3) on pages 1194 and following of Volume 1 of the 2009 White Book establish the following principles:
>
> i) the court's discretion to grant indemnity costs is not limited by any hard rules of exclusion.
>
> ii) Nonetheless the primary considerations relevant to the award of indemnity costs are first, whether the conduct of the party against whom the order is sought is such as to take the case out of the norm, and secondly, whether that party's conduct can properly be categorised as either deliberate misconduct, or conduct which is unreasonable to a serious degree.
>
> iii) 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.

9. He went on to say at paragraphs 27 and 28:

> "It follows in my judgment that it is not enough for a party to assert simply that it has successfully fought allegations of the utmost gravity, regardless of the circumstances in which those allegations came to be made. Although a case in which such allegations are made may for that reason alone be out of the norm, especially a case of the present size and complexity, that is unlikely in itself to constitute a good reason for the award of indemnity costs.
>
> To those conclusions on the issues of principle separating the parties I would add this. Whenever the court is asked to make some out-of-the-ordinary costs order in consequence of the alleged misconduct of the party against whom the application is made, the court must bear constantly in mind the conduct of the party making the application. I consider this to be so for two main reasons. The first is that the conduct of the party making the application may have been, in some respect, a contributory cause of the conduct complained about. It may even lead to the conclusion that the conduct complained about, although unsuccessful, was nonetheless not unreasonable in the circumstances."

10. The Appellants contend that indemnity costs ought to be awarded on the basis that the Respondents have acted unreasonably to the extent that this conduct should be seen as exceptional. Eight grounds (or considerations) are given by the Appellants by way of support or justification. In summary these are:

(1) The Respondents changed several of their arguments in between the drafting of the statement of case and skeleton argument,

(2) The Respondents lacked understanding of documents,

(3) The Respondents misinterpreted their own internal systems,

(4) The Respondents raised an argument about the identity of a supplier which was irrelevant,

(5) The Respondents failed to consider any form of real-world credibility checks,

(6) The Respondents relied upon unclear and unsubstantiated documents,

(7) The Respondents raised an issue with R&D, and

(8) The "accusations of fraud" should never have been made.

11. None of these matters (whether viewed alone or together), to my mind, represent conduct which merits the stigma of an indemnity costs award. All of the matters complained of are criticisms of either the merits of the Respondents case or the way it was conducted. To my mind, mere weakness of the Respondents case, absent more, cannot justify an indemnity award given the latter's penal nature. This is particularly so because the Respondents will already be paying the Appellants costs of meeting those weak arguments under the standard basis. It follows, then, that the Appellants cannot hope to persuade a Judge that an indemnity costs order is appropriate by simply criticising the Respondents for a lack of understanding of documents and internal systems or for relying upon weak evidence or raising a weak argument in relation to suppliers or R&D.

12. In much the same way, criticising the way in which the Respondents conducted the case is equally hopeless. If the Respondents argument or position changed to such a degree that it was prejudicial to a fair hearing then the proper course of action for the Appellants would have been to seek an adjournment and the costs thrown away as a result. It is not to seek indemnity costs later. Likewise, had the Respondents conducted "real world" checks at an earlier stage of the proceedings then these might (but only might) have saved time and cost. However, the fact that the Respondents will pay the added costs (via a standard costs order) occasioned by this failure is punishment enough.

13. The argument set out in the Application that the Respondents made an "accusation of fraud" which was both serious and baseless stands out for its failure to provide specific, or any, detail. If what is meant is that the Respondents raised penalties for deliberate behaviour in the context of their investigation then it seems to me, in this case, to be properly open to them to have both raised such penalties and then to seek to prove their case and test the evidence (including by cross-examination). The Respondents case could not, in any fair sense, be described as opportunistic, thin, speculative or unduly weak.

14. The only unusual feature of this case which might engage the indemnity cost jurisdiction was the decision of the Respondents to, effectively, concede the appeal on the very last day of the hearing. Whilst this was both unusual and unfortunate it was, in my judgment, preferable to making mealy-mouthed submissions and then insisting that the Tribunal provide a full written decision. To hold otherwise and punish the Respondents (in indemnity costs) would have a chilling effect on the ability of the Respondents to take a pragmatic and sensible view of litigation – no matter how late in the day. In short, whilst this sort of step is outside of the norm in litigation and ought accordingly to be generally deprecated (because it seems to suggest a failure to review the case and evidence at an earlier stage) it is, nonetheless, not, in the present case, conduct that was unreasonable to the necessary serious degree given the context of the Respondents investigation and the evidence as a whole. That is, of course, not to

suggest that no case abandoned on the last day of the hearing will ever (or is unlikely to ever) attract sanctions in the form of indemnity costs. Each case will turn on its specific facts and there will, no doubt, be cases where (once the entirety of the litigation and conduct of the parties is taken into account) a judge will be entitled to come to the view that the only appropriate course of action is an order for indemnity costs.

**Rule 10(1)(b)**

15. Given that, in my judgment, an application which is premised on unreasonable conduct on the part of the Respondents under Rule 10(1)(b) involves the application of a similar test as to that for making an indemnity costs order I do not consider the matter any further. In short, given what I have already said, I cannot agree that the Respondents acted unreasonably in defending or conducting these proceedings. I appreciate that there might be an argument that a test premised simply on "unreasonable conduct" may represent a lower hurdle than the one postulated for the award of indemnity costs. However, this point was not argued before me and, in the absence of proper argument, I should not like to express any further view. Neither, in fairness, can it be said that the Appellants fully and squarely raised Rule 10(1)(b).

**Summary assessment**

16. The Appellants have sought, by their application, a summary assessment of their costs. The total sum sought is either £134,835 plus VAT (according to the Application) or £153,672.50 without any VAT being claimed (according to the second schedule of costs).

17. The Respondents make criticisms of the schedule itself, the reasonableness of the sums sought and the addition of VAT which the Appellants are not entitled to claim.

18. The summary assessment of the Appellants costs is neither appropriate and nor possible. Firstly, it is clear that any substantial claim for costs (say exceeding £20,000) is unlikely to be suitable for summary assessment. The fact that there has had to be an updated schedule adding in additional work / sums and taking out a claim for VAT is evidence of this point. Secondly, a summary assessment, other than of the most basic kind, can only take place where there is a proper schedule of costs drafted in line with CPR PD 44. A failure to provide one renders the schedule subject to the, fair, criticism that it lacks both the required detail and the relevant information.

19. Further, it is not at all clear that any thought has been given to the costs incurred as between the various Appellants.

20. This is a classic case where the receiving party can and should seek a detailed assessment.

**Costs of the assessment**

21. Given what I have said above about the need for a detailed assessment the costs of the assessment are now, of course, properly a matter for the costs judge. However, I should like to express a preliminary view which I hope will assist the costs judge. If the decision were mine I would not be minded to award any costs as a result of and occasioned by the preparation of the Application, the updated "Application for costs" or the "Applicants' response to Objections". The schedule was not in proper form and, in any event, unnecessary given that it was highly unlikely that costs in the sums sought would be awarded without a detailed assessment. The Application (running to 25 pages) and "Applicants' response to Objections" (running to 13 pages) were given to prolixity, unfocussed, took every point (no matter the merits) and, as a result, unnecessarily lengthened what should have been a relatively straightforward process. In short, not only did these documents put both the Respondents and

this Tribunal to unnecessary additional work, but were not, on the whole, of assistance to me identifying and resolving the core issue(s) in dispute.

## Orders

22. By reason of the matters aforesaid I make the following order:

(1) The Respondents shall pay, on the standard basis, the Appellants costs of occasioned by the following appeals: TC/2021/01323, TC/2021/01327, TC/2021/01328, to be assessed if not agreed.

### 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.

**HIS HONOUR JUDGE MALEK**
**SITTNG AS A TRIBUNAL JUDGE**

**Release date: 15 August 2023**