Neutral Citation: [2023] UKFTT 00696 (TC)

Case Number: TC 08888

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2014/06192
TC/2015/03288 and 00457

COSTS - third-party costs order – individual sole director/shareholder of appellant involved in MTIC fraud - guilty of criminal conduct - impecunious – rule 10(5)(b) FTT Rules - application refused

Heard on: 4 July 2023
Judgment date: 4 August 2023

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

HOBBS CLOSE LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

and

SAMEER DHANJI

Third Party

Representation:

The Third Party (Mr Sameer Dhanji) in person

For the Respondents: Jenny Goldring of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Respondents ("HMRC") apply for a direction pursuant to rule 10(1)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") that Mr Sameer Dhanji ("Mr Dhanji") be jointly and severally liable along with the Appellant ("HCL") to pay HMRC's costs of and incidental to these three appeals, to be assessed if not agreed.

2. HCL appealed against three decisions of HMRC denying it the right to deduct input tax amounting to nearly £17 million and imposing a penalty for a deliberate inaccuracy in a return in an amount just over £16 million. The denial of the right to deduct input tax was on the grounds that the transactions were connected with a fraudulent tax loss and HCL knew or should have known that this was the case.

3. Mr Dhanji (who was the sole director of HCL) was convicted of conspiracy to cheat the public revenue in respect of transactions undertaken by HCL in the period 1 January 2013 to 31 January 2015, the period to which these appeals relate, and sentenced to 3½ years' imprisonment

4. All three appeals were struck out for failure to comply with an "unless" order. They were complex appeals and HCL had not opted out of the costs regime. Accordingly, on 4 August 2022, the First-tier Tax Tribunal ("the Tribunal") decided that HCL should pay the costs of the three appeals, but indicated it was not satisfied that the costs application had come to the attention of Mr Dhanji.

5. By 5 October 2022, the Tribunal was satisfied that Mr Dhanji was aware of the costs application against him. The Tribunal having already determined that costs are payable by HCL, this hearing is solely concerned with the application by HMRC for a third-party costs order against Mr Dhanji.

6. I waived the requirement in rule 10(3)(b) for HMRC to serve a schedule of costs with this application, on the grounds that the costs of this matter are large and complex. HMRC say they exceed £400,000. As Judge Poole observed in *Vardy Properties (Teesside) Limited v HMRC*, [2013] UKFTT 096 (TC) at [18]-[20], it is a sensible approach to defer the preparation of a costs schedule until after an in-principle decision has been reached on costs liability where the amounts of costs involved are large and complex.

DOES THE TRIBUNAL HAVE POWER TO MAKE A THIRD-PARTY COSTS ORDER?

7. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), so far as relevant, provides as follows:

> "(1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

8. Sections 29(1) and (2) mirror the provisions in section 51(1) and (3) of the Senior Courts Act 1981 ("the SCA 1981"). The power under the SCA 1981 is not limited to costs between parties; *Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No.2)* [1986] AC 965.

9. Rule 10 of the FTT Rules (so far as relevant) provides as follows:

> "(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—…
>
> (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 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 statement 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) …
>
> (5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—
>
> (a) giving that person an opportunity to make representations; and
>
> (b) if the paying person is an individual, considering that person's financial means… "

10. There have been two successful applications for non-party costs in the First-tier Tax Tribunal. In *Golden Harvest Wholesale Ltd v HMRC,* [2020] UKFTT 0369 (TC), the Tribunal considered that the power to make a third-party costs order must extend to the FTT subject to any restriction on its application contained within the FTT Rules. At [40] the Tribunal held;

> "Rule 10 FTT Rules restricts the circumstances in which costs orders may be made. The Tribunal may not make an order for costs save in the specific circumstances of envisaged under rule 10 FTT Rules. The ability to order costs for unreasonable conduct is constrained to an order against "a party or its representatives" (rule 10(1)(b)). Similarly, the rule 10(1)(c) limits the award of costs in cases categorised as complex to those cases in which there is no election by the taxpayer to opt out of the costs regime. It therefore appears to the Tribunal that the "full power" granted under s29(3), in particular the power to make an order against a non-party, does not apply to the FTT except in the case of a wasted costs order under rule 10(1)(a) and an order for costs to the successful party in a complex case within the costs regime."

11. At [41] it concluded that "as the present application is one made in a case categorised as complex in respect of which the Appellant did not opt out of the costs regime there is no inhibition under the FTT rules precluding an order against Mr Karsan."

12. In *Eurochoice Limited v HMRC,* [2020] UKFTT 0449 (TC), the Tribunal held that in complex cases it had the power to make a non-party costs order. It relied upon the wide scope of section 29 of the TCEA and noted that there was a distinction in the wording of rule 10(1)(b) which referred to a party or representative, wording which was not present in rule 10(1)(c). In other sections of the FTT Rules dealing with costs (and elsewhere in the FTT Rules) there were references to "persons" as opposed to parties or representatives, suggesting a wider jurisdiction.

13. I agree with the reasoning in *Eurochoice* and *Golden Harvest* and the conclusion in those cases, that in complex cases where the taxpayer has not "opted out" of the costs regime the Tribunal has jurisdiction to make costs orders against both parties to the litigation before it and third parties.

HOW SHOULD THE TRIBUNAL EXERCISE ITS JURISDICTION IN RELATION TO THIRD-PARTY COSTS?

14. In *Symphony Group PLC v Hodgson*, [1994] QB 179, Balcombe LJ set out the approach to be adopted in deciding whether to award costs against a third-party under section 51(1) and (3) SCA 1981 as follows:

> "(1) An order for the payment of costs by a non-party will always be exceptional…
>
> (2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings…
>
> (3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him...
>
> (4) An application for payment of costs by a non-party should normally be determined by the trial judge…
>
> (5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias…
>
> (6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger…
>
> (7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings…
>
> (8) The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action…
>
> (9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. …"

15. The applicable principles concerning the award of non-party costs pursuant to section 51 SCA 1981 were also considered in *Metalloy Supplies Ltd v MA (UK) Ltd*, [1997] 1 WLR 1613, where Millett LJ said (at p1620B):

> "The court has a discretion to make a costs order against a non-party. Such an order is, however, exceptional, since it is rarely appropriate. It may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are bought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified…"

16. In *Dymocks Franchise Systems (NSW) Pty v Todd* [2004] UKPC 39, the Privy Council held that:

> "25…Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense… …
>
> Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation…Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation … provided that he is "a real party in ... very important and critical respects"…"

17. *Europeans Ltd v HMRC,* [2011] EWHC 948 (Ch), concerned missing trader fraud and whether the taxpayer knew or should have known of the fraudulent trades in the supply chain. The taxpayer's appeal was determined against it, in the main, as a consequence of conclusions that the director's evidence was untruthful and that, despite his evidence, he had actual knowledge of the fraud. The taxpayer appealed to the High Court against the decision of the VAT and Duties Tribunal, but on the day before the hearing of HMRC's application to strike out the appeal the appeal was withdrawn. HMRC were granted a costs order against the taxpayer. The taxpayer promptly went into liquidation. HMRC then sought a non-party costs order against an individual who, like Mr Dhanji, was the sole director and shareholder. The director resisted the application on the basis that the appeal had been bought in good faith and that he had not been given adequate notice of the intention to seek such an order. Proudman J decided that the director had a close personal association with the litigation. As sole director and shareholder he had given instructions in connection with the appeal and the heart of the appeal lay in clearing his name. She concluded that there was "in reality, no separate interest of the company in bringing the appeal". As far as warning of the risk of a third-party costs order being made against him, Proudman J said:

> "30 … failure to give an early warning is not a stand-alone requirement which will operate conclusively against the applicant. It is no more than a

> material consideration, albeit a highly material consideration. It is only one of the factors which the court must take into account in the exercise of its discretion in considering the overall justice of the case…"

18. The object of providing a warning is to allow the target of the application to take a different course of action at an earlier stage of the litigation, and the fact that a warning would not have made a difference is a material consideration (see *Dymocks* at paragraph 31).

19. In *Deutsche Bank A.G v Sebastian Holdings Inc., Alexander Vik* [2016] EWCA Civ 23 , Moore-Bick LJ considered (at [30]-[39]) the submissions on behalf of Mr Vik that it was essential the third-party received a warning. Moore-Bick LJ stated at [31] that it was worth remembering that the *Symphony Group PLC* guidelines had been formulated in the context of an attempt to obtain a costs order against a third-party whose connection with the legal proceedings was fairly tenuous, as opposed to a third party who can properly be regarded as the "real party" to the litigation. In addition, at paragraph [32] he stated that the importance of a warning will vary from case to case and may depend on the extent it would have affected the course of the proceedings. In the circumstances of that case, the failure to warn Mr Vik was of very little weight at all.

20. The relevant case law and principles as to non-party costs were also considered recently in the case of *Goknur Gida Maddeleri Enerji Imalet Ithalat Ithracat Ticaret Ve Sanayi As v Cengiz Aytacli* [2021] EWCA Civ 1037. In the context of costs awards against directors, the Court of Appeal (Coulson LJ with whom Lewison and Dingemans LJJ agreed) observed (at [41]):

> "Therefore, without being in any way prescriptive, the reality in practice is that, in order to persuade a court to make a non-party costs order against a controlling/funding director, the applicant will usually need to establish, either that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation, or that he or she was guilty of impropriety or bad faith. Without one or the other in a case involving a director, it will be very difficult to persuade the court that a s 51 order is just. Mr Benson identified no authority in which a s 51 order was made against the director of a company in the absence of either personal benefit or bad faith/impropriety. Conversely, there is no practice or principle that requires both individual benefit and bad faith/impropriety on the part of the director in order to justify a non-party costs order. Depending on the facts, as the authorities show, one or the other will often suffice. …"

21. *Golden Harvest* (supra) concerned a third-party costs order against an individual who was the sole director and shareholder of the taxpayer company. Together with 3 others, Mr Karsan was arrested in connection with a significant investigation carried out by HMRC. He was charged with cheating the public revenue and conspiracy to commit money laundering. Shortly before the conclusion of the prosecution case in his criminal trial, Mr Karsan pleaded guilty to the first count. The prosecution accepted the plea and the second count was not pursued. When applying the principle relating to a third-party costs order against a director/shareholder, the Tribunal commented (at [56]):

> "Therefore when applying the [relevant] principles … above by reference to all of the circumstances and in order to achieve a just and fair outcome, it is to be concluded:
>
> (1) the circumstances of the present application are exceptional in the sense that they are not in the ordinary run of cases;

> (2) Mr Karsan, as the sole director and shareholder of the Appellant business, caused an appeal to be lodged which he knew to be hopeless and which he needed in order corroborate his not guilty plea;
>
> (3) Mr Karsan's personal interest in the appeal is therefore precisely of the nature identified in the case law as relevant in justifying a non-party costs order;
>
> (4) as the appeal was categorised as complex and no option to be excluded from the cost's regime was exercised the Tribunal has the power to make a non-party costs order;
>
> (5) HMRC's costs were all incurred as a consequence only of the appeal having been bought."
>
> As in *Europeans*, HMRC had not notified Mr Karsan of their intention to seek to make the application promptly. As to this, the Tribunal commented (at [58]) that "it would have been inconceivable that even had Mr Karsan been notified that he was at risk as to costs he would have withdrawn the appeal." Accordingly, the Tribunal made the third-party costs order sought by HMRC.

22. In *Eurochoice* (supra) the Tribunal made a joint and several costs order against the taxpayer and Mr Ahmed (its sole director/shareholder) because (at [31]) "having regard to the exceptional circumstances of this case, particularly that the Company, on Mr Ahmed's instigation and with his knowledge pursued an appeal on a false basis, I consider the situation in this case to be completely different from that envisaged by Millett LJ in *Metalloy Supplies* of a director bringing bona fide proceedings. Accordingly I consider that it is appropriate to make an order for costs against Mr Ahmed in the form sought by HMRC."

APPLICATION TO THIS CASE

23. As we have already noted, Mr Dhanji was convicted of cheating the public revenue in relation to the affairs of HCL. In sentencing him, the trial judge observed:

> "[T]he total VAT element, and therefore loss to the revenue, in transactions comprised in the VAT fraud in which HCL featured was £12,366,619.62. You alone gave evidence at the trial and I accept that you were brought into the fraud [by] RK whom you had known for many years. It was in the nature of a part-time job, taking up a few hours a week whenever you could fit it in since you were throughout in work full-time in security at London Heathrow Airport and were the primary carer for your young son. Your motive was financial gain – payment of £2000 per month as a supplement to your legitimate earnings – for which, as Mr Hughes suggested in cross-examination – you had to do very little; you just had to take HCL's paperwork to the accountants on average once per month and act as the front man for some 8-10 HMRC compliance visits over the relevant period.
>
> The scale of transactions in which HCL was involved mean that a prison sentence is wholly unavoidable. Nonetheless your previous good character, and the references indicating that your conduct was out of character provide substantial mitigation. I also have to consider the impact of any sentence on your family life and in particular on your young son who has lived with you all his life. Although you acted for financial gain, the benefit to you was not great in the context of this case. While you knew well what you were doing, RK took full advantage of you."

24. Mr Dhanji has been the sole director and shareholder of the Appellant since 1 January 2013. HMRC say that he can be considered the controlling mind of the company, and "the real party" to the litigation in the terms described by the Privy Council in *Dymocks*.

25. In its grounds of appeal, HCL asserted that (i) there was no objective evidence for denying recovery of input tax; and (ii) there had been no wrong-doing by HCL. HMRC say that, in the light of Mr Dhanji's conviction, these statements were clearly false. They also say that, outside of the specific words used in the grounds, it was fundamentally dishonest for Mr Dhanji to cause HCL to instigate and pursue an appeal seeking to challenge tax assessments in circumstances where he knew that the transactions were part of a large VAT fraud in which he was an active participant. The appeals were therefore commenced by HCL at the instigation of Mr Dhanji in bad faith, and such conduct falls well outside the "ordinary run of cases".

26. HMRC concede that no warning in respect of a liability for costs was provided to Mr Dhanji. The earliest date that this warning could be properly made was the date of Mr Dhanji's conviction. Until that date Mr Dhanji was entitled to be presumed not guilty of the offences with which he was charged. In any event, HMRC say, provision of a warning at an earlier stage of the litigation would not have made any significant difference to Mr Dhanji or to HCL. The vast majority of costs in this appeal were incurred prior to Mr Dhanj's conviction. He had continued to assert his innocence right up until the date of his criminal trial notwithstanding the benefits (in respect of a sentencing discount) to be obtained by an early plea. Given that Mr Dhanji was content to maintain his innocence in the criminal proceedings right up to trial, it is unlikely that he would have caused HCL to withdraw its appeal before that stage simply to avoid a cost consequence.

27. Mr Dhanji represented himself in relation to this application. He drew my attention to the comments of the trial judge that he was not the "mastermind" behind the VAT fraud. He said that his role was to be the "public face" of HCL and he was unaware of the VAT fraud until the criminal case was brought against him. The conduct of the tax appeal had been in the hands of advisers (Vincent Curley) who had said they might need to get a barrister involved. He had left the conduct of the case to them.

28. Although Mr Dhanji said that he was unaware of the detail of the VAT litigation, he clearly knew at time HCL was making its input tax claims that something wrong/dishonest was going on and he was part of it, albeit that his was a relatively minor role and he was not the architect or instigator of the fraud. That was the basis on which he was sentenced; the judge commented that "you knew well what you were doing". Despite being a "bit player" in the larger VAT fraud, he must have known that, in authorising the appeals against the assessments, HCL was seeking to justify the unjustifiable. Any other finding would be inconsistent with the basis on which he was sentenced.

29. Mr Dhanji wrote to the Tribunal (on 20 January 2014) authorising Vincent Curley & Co Ltd to act on his behalf and asked the Tribunal to correspond with them. When we came to enquire into Mr Dhanji's means, I asked him about his financial position before his conviction and also how the litigation in the Tribunal was funded. This is what he wrote:

> "In regards to the payments made to my representatives at that time which were Vincent Curley and Hammad Baig, I managed to pay their costs to deal with my civil case (tax litigation) at that time through my salary from Heathrow Airport and the salary I was gaining from Hobbs Close Ltd."

We should not read too much into this, but it is interesting that Mr Dhanji refers to the litigation in this Tribunal as "my civil case", whereas it was (at least technically) HCL's. More importantly, it is clear that he was funding the litigation, although (given the other calls on his income and his modest salary from HCL, as noted by the trial judge in the criminal case) it seems unlikely that his costs were running at a high level.

30. HMRC have, however, incurred very substantial costs in relation to this appeal. Miss Goldring says their costs exceed £400,000 and they were incurred in part because one aspect of HCL's defence was that HMRC's track and trace exercises are often fundamentally flawed. This required an extensive forensic investigation, into over 3,000 underlying transactions, not just an enquiry into what HCL knew or should have known about the wider, tax loss arrangements.

31. Miss Goldring did not suggest that Mr Dhanji knew that this assertion was part of HCL's appeal or that he was aware of the impact that such a claim would have on the costs to be incurred by HMRC. Despite his evidence that he left the conduct of the case to others (Vincent Curley & Co and Mr Baig), she did not question him on his involvement in the appeal, in particular his input in this area. She suggested at one point that I should approach HMRC's application on the basis that the appeal was instigated and approved by Mr Dhanji. I agree that I should approach this exercise on the basis that Mr Dhanji allowed an appeal to be made which he must have known was made on a dishonest basis but which needed to be made in order to shore up his defence in the criminal action. I am not, however, prepared to proceed on the basis that he understood and approved every step in the litigation, particularly when it comes to the very significant implications of the "flawed track and trace" challenge to the assessments, which is a very significant argument, which goes beyond and is quite separate from an assertion that there was no wrongdoing by HCL.

32. Before turning to the impact of Mr Dhanji's means on any order I might make, I record my conclusions on the points discussed so far:

(1) This appeal is clearly exceptional. It concerned whether HCL knew or should have known that transactions it was involved in were connected with a tax loss arrangement and the sole director/shareholder was convicted of a serious criminal offence arising out of the same set of transactions;

(2) Mr Dhanji, as the sole director and shareholder of HCL, caused an appeal to be lodged which he must have known was hopeless and which he needed in order support his not guilty plea;

(3) Mr Dhanji's personal interest in the appeal is therefore precisely of the nature identified in the case law as relevant in justifying a non-party costs order;

(4) As the appeal was categorised as complex and no option to be excluded from the costs regime was exercised, the Tribunal has the power to make a non-party costs order;

(5) HMRC's costs were all incurred as a consequence of the appeal having been bought and are as substantial as they are because of the way it was argued.

(6) Mr Dhanji was not warned about the risk of a third party costs order being made against him, but this would not have made any difference. He continued to assert his innocence up to the date of his criminal trial. It is unlikely that he would have caused HCL to withdraw its appeal simply to avoid a costs risk, and the vast majority of the costs in this appeal were incurred prior to Mr Dhanj's conviction.

33. If matters had stopped here, I would have made an order that Mr Dhanji should be jointly and severally liable with HCL to meet all HMRC's costs incurred in relation to the appeal excluding the costs incurred in the forensic investigation into the underlying transactions. I would have excluded those costs because I do not consider it to be fair and just to make Mr Dhanji liable for such a large body of exceptional costs in circumstances where he asserted that he gave the conduct of the appeal over to others and HMRC have not probed his knowledge and understanding of the nature and serious costs implications of the "flawed track and trace" line of argument. I should stress that I am not saying that I could not

have been persuaded that Mr Dhanji should be responsible for all those costs, only that I am not so persuaded.

THE IMPACT OF MR DHANJI'S MEANS

34. However, matters did not stop here. Rule 10(5)(b) requires the Tribunal, before making a costs order against an individual, to consider that person's financial means. In the course of the hearing it became apparent that HMRC had not looked into Mr Dhanji's means or raised this issue with him.

35. During the lunch break, HMRC looked to see if they could find any decisions where rule 10(5)(b) had been considered. They found two decisions. The first is *Walsh v HMRC*, [2019] UKFTT 0350 (TC). Here the taxpayer sought permission to appeal late against assessments totalling over £2 million. He was largely unsuccessful; he ended up being liable to pay HMRC just over £1.6m (plus interest). HMRC sought to recover costs estimated at around £14,000 (possibly higher once finally reviewed). His advisers did not make any representations as to his means, despite being prompted to do so. Judge Mosedale commented as follows:

> "24. The Rules require me to consider the appellant's means.
>
> 25. The Decision of the FTT in the appeal recorded that Mr Walsh was a man of some means (investing profits of the sale of his business property into 10 investment properties); nevertheless, I note that in the Decision the Judge appeared to consider at [43] that Mr Walsh might have difficulties meeting the full amount assessed (some £2.1 million plus interest) but it is also clear that she did not have the facts and was unable to draw any conclusion other than that meeting the debt would have 'very serious consequences' for Mr Walsh.
>
> 26. I am also without evidence of Mr Walsh's means. Having no evidence on what they are, despite the opportunity to provide the evidence, I draw the inference that the appellant has sufficient means to pay an amount of costs of about the sum claimed by HMRC. My conclusion is therefore, that having considered Mr Walsh's means, they are not a contra-indication to an award of costs."

36. Judge Mosedale made the costs order against Mr Walsh.

37. The second decision is *Wheeler v HMRC*, [2019] UKFTT 0336 (TC). HMRC sought costs of just under £5,000 on the basis that the taxpayer had been "entirely unreasonable" in bringing and defending an appeal against penalties for not complying with an information notice. Looking at the taxpayer's means, Judge Bailey commented (at [65]-[67]):

> "I am not satisfied that the Appellant currently has the means to pay an order for costs in the sum of £4,695.15. Therefore, I do not consider it would be appropriate, at this stage, for a costs order in that amount to be enforced.
>
> Given those conclusions, I have decided to make an order that the Appellant pays the Respondents costs of £4,695.15 but that this order cannot be enforced without the express permission of this Tribunal, to be sought on application (supported by evidence). The effect of such an order is that, if the Respondents have evidence which they consider sufficient to establish that the Appellant has the means to pay costs of £4,695.15 (for example, by the confirmation of discovery assessments) then they may apply to the Tribunal for permission to enforce the costs order. There is no time limit for the Respondents to make such an application. If any such application is made, the Appellant will have the opportunity to respond. Unless the Tribunal grants permission, the order for costs cannot be enforced.

> I recognise that orders of this type can be unsatisfactory for both parties: for the Respondents because they have the order they sought, but cannot enforce it without permission; and for the Appellant because he has the threat of the costs order being enforced at a later date. It seems to me that that is an unfortunate consequence of the stalemate the parties appear to be in. I do not consider it to be the Respondents' fault that the Appellant has failed to comply with the information Notice served on him. However, as the Respondents have further information powers, it would appear to be time either that these were used, or action taken on the information already available."

38. The penalties the taxpayer had accrued (around £5,000) amounted to over half his annual income and the Tribunal commented, "If the Appellant has no means other than his employment, and no other source of income, it is difficult to see how he will pay the Respondents the penalties which the Tribunal has confirmed. If the Appellant has no other income and no assets then those penalties are sufficient for the Respondents to make the Appellant bankrupt." The particular difficulty in that case was that the taxpayer was not complying with an information notice and so HMRC and the Tribunal had no real means of knowing whether he could pay the penalties or meet the costs order.

39. Rule 10(5)(b) requires the Tribunal to consider an individual's means before making a costs order against them. It must be the case that a costs order can only be made if the individual against whom it is made either has, or can confidently be expected to acquire, the means to meet the order. That seems to have been accepted, if not expressly articulated in those words, in *Wheeler* and *Walsh* and it is hard to see what the purpose of rule 10(5)(b) would otherwise be. The draftsman cannot sensibly be viewed as requiring the Tribunal to think about an individual's means but then ignore them when it comes to setting the costs order.

40. In *Walsh* the Tribunal concluded that the taxpayer had the means to meet the costs order and so made it. In *Wheeler*, the Tribunal was not satisfied that the taxpayer had the means of meeting the order and so made the costs order but suspended enforcement. The Tribunal in that case was confronted by the difficulty of not knowing about the taxpayer's means because of the nature of his default (not responding to information notices). The Tribunal considered such a delayed enforcement order to be unsatisfactory and commented that it was time for HMRC to use their powers to find out about the taxpayer's position or act on what they knew. I do not consider that Judge Bailey was suggesting that, in cases involving individuals, the Tribunal should always make the full costs orders sought by HMRC but suspend HMRC's ability to enforce them except to the extent that it is clear that the relevant individual can afford to pay and only allow enforcement to the extent they can.

41. At this point, it was agreed that Mr Dhanji would prepare a summary of his financial position and send it to HMRC. They would then use their systems to check what he said and comment on his summary. It was agreed that, once this had been done, I would give my decision, only reconvening the hearing if I considered it necessary to do so.

42. Mr Dhanji submitted a detailed note of his financial position before and after his conviction with primary material (such as bank, council tax and universal credit statements) to support this. Before his conviction he was employed as a security officer at Heathrow Airport with an annual salary of £34,200. He owned a house subject to a mortgage and was supporting himself and his son on his own. Following his conviction he said that,

> "I lost all my bank accounts, I incurred personal debts, I had to sell my house, from what little money that resulted from the sale my ex-wife got her share and my personal share went to satisfy the POCA charges (£45,000.00).

> The conviction impacted my career, my credit history and caused me to have many debts of which I am currently paying back to outsourcing credit card management companies.
>
> It was very difficult for me to get a job due to my conviction. It took a long time for me to get some sort of employment. Due to this I had to claim for universal credit and council tax support."

43. In broad terms, he now supports himself from a combination of universal credit and a very much lower paid job.

44. HMRC did not challenge any of Mr Dhanji's evidence as to his means.

WHAT IS THE "FAIR AND JUST OUTCOME"?

45. Rule 2 of the FTT Rules sets out the "overriding objective" of the FTT Rules as follows:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) …
>
> (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."

46. Rule 10 of the FTT Rules gives the Tribunal a power to make an order in respect of costs. It goes without saying that this power must be exercised in a way which is fair and just, and it is to factors relevant to this question that I now turn.

47. The starting point in a costs regime is that it is fair and just that the winner's costs are paid by the loser; as to this, see the comment of the Upper Tribunal in *Bastionspark LLP and others v HMRC*, [2016] UKUT 425 at [16], that "if the FTT is to have a discretion over costs, the starting point will usually be that if any order for costs is made at all, it will be that costs should follow the event, that is that the loser will pay the winner. This is what fairness and justice would seem normally to require.". *Bastionspark* is, however, a useful reminder that the approach to costs in this Tribunal is not the same as the approach in the courts where the Civil Procedure Rules ("CPR") are in point. The FTT's task is to find the fair and just outcome in accordance with the overriding objective. So, in that case (where both parties had a measure of success in the FTT) the Upper Tribunal decided that the FTT should not, as the courts operating under CPR would, look to identify the successful party. At [19] it observed:

> "Under the CPR the court has to identify the successful party in order to apply (or decide not to apply) the general rule under CPR 44.2, and as appears from the authorities (below) there has been a tendency for courts to seek to identify one or other of the parties as "the successful party" (and the other as "the unsuccessful party"). But it is not obvious, at any rate to me, that the exercise that the FTT is engaged in is necessarily quite the same. No doubt in a case where there is a clear winner and loser, one would normally expect the costs to follow the event in the FTT as in a court. But that is not because any of the rules require this approach but simply because that is likely to be the fair and just outcome and hence in accordance with the overriding objective applicable in the FTT. It by no means follows that in a case where both sides have had some measure of success the FTT has to, or ought to, approach the question of what is fair and just by seeking to identify one or other party as the successful party. I would have thought that what the FTT should be doing is seeking to identify a fair and just outcome, and that

> that is likely to be one that reflects, by one means or another, the fact that the parties have each been successful in part."

48. We are not concerned with identifying the successful party or measuring the relative success of both parties where each has achieved a measure of success, but we are still "seeking to identify a fair and just outcome". Given that HMRC were successful here and that we are in a costs regime, they are entitled to expect that their costs will be paid; in a costs regime that is the "fair and just outcome". That, of course, is exactly what this Tribunal has decided.

49. As the losing party (HCL) cannot afford to pay those costs, HMRC is, given all the exceptional circumstances of this case, in principle entitled to a costs order against Mr Dhanji. For the reasons explained above, that would be the "fair and just outcome". My only caveat relates to the costs of responding to the "flawed track and trace" argument. Because of the way HMRC ran this application, I do not consider that it would be a "fair and just outcome" to make Mr Dhanji personally liable for those exceptional costs.

50. Where an individual is the paying party, the FTT Rules require the financial means of the individual to be taken into account in deciding what is the "fair and just outcome". The clear purpose behind rule 10(5)(b) is that the Tribunal should make a costs order that is appropriate (fair and just) in the light of the individual's known financial circumstances. Here, unlike *Wheeler*, we know Mr Dhanji's financial position. It is dire. His earning-capacity and credit history are severely compromised. He has no capital assets. He is still paying off debts. Where an individual has no current financial resources beyond what he needs to live on and no realistic chance of improving his lot, the "fair and just outcome" is not to make a costs order against them. Here HMRC seek to make Mr Dhanji jointly and severally liable for costs in excess of £400,000. It was not suggested that anything useful would be obtained by doing so, and it is unsatisfactory to leave an individual who cannot afford to meet a costs order with the threat of one hanging over them, particularly where the liability is so large. Judge Bailey recognised this in *Wheeler*, where the costs figures were much lower, but exceptionally made a suspended costs order because of the lack of knowledge about the taxpayer's financial position. This is not the case here; we have all the information we need, it is not challenged and it all points in one direction.

DISPOSITION

51. Mr Dhanji is a convicted criminal. He should not for a moment take my decision as suggesting that I regard his behaviour in knowingly facilitating a VAT fraud, and then compounding that by instigating a hopeless appeal in this Tribunal which caused large amounts of public money to be wasted, as anything other than extremely serious wrongdoing indeed. Nevertheless, having considered his financial circumstances as required by rule 10(5)(b) of the FTT Rules, I do not consider that it would be a "fair and just outcome" to make him personally responsible for any part of HMRC's costs in this case.

52. For the reasons set out above, this application is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 4 August 2023