TC04320

Appeal number: TC/2013/0106, TC/2013/0107 & TC/2013/0108

PROCEDURE – costs – substantive appeal allowed – unreasonable behaviour of Respondents in defending or conducting the proceedings

FIRST-TIER TRIBUNAL
TAX CHAMBER

RYAN GARDINER **Appellants**
ANNE GARDINER
MICHAEL GARDINER

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 2 December 2014

Mr Keith Gordon of counsel instructed by EDF Tax Limited appeared for the Appellant

Mr Peter Massey of HM Revenue & Customs appeared for the Respondents

DECISION

Background

1. This is an application for costs by the appellants following a decision of the tribunal (myself sitting with Mr John Wilson) allowing the appeal ("the Decision"). The appeals were allowed for the reasons set out in the Decision at [2014] UKFTT 421 (TC). By way of summary:

(1) The respondents had failed to fully particularise their allegations of negligence in support of the penalties under appeal.

(2) The ground of negligence which was particularised was that the appellants, having examined relevant documents, ought to have realised that the tax avoidance scheme they had participated in had not been properly implemented. There was no allegation that the appellants had negligently failed to ask for documents that would have demonstrated the flawed implementation of the scheme.

(3) The respondents had failed to adduce evidence in support of that allegation of negligence and had failed to establish a prima facie case of negligence. In particular there was no evidence that the documents said to give rise to a suspicion that the scheme had not properly been implemented were available to the appellants at the time of submitting their tax returns in January 2007.

2. The Decision also records the circumstances in which the appellants raised the absence of evidence in support of the respondents' case prior to the hearing as follows:

> "*8. The appellants each lodged notices of appeal with the Tribunal on 27 December 2012. One ground of appeal pursued by each appellant was that the respondents had not demonstrated negligence.*
>
> *9. On 26 April 2013 the Tribunal gave directions for the conduct of the appeals. These were standard directions, which did not include any direction for witness statements. However both parties were required to give listing information including whether or not witnesses were to be called. On 10 June 2013 the respondents provided listing information and stated "the respondents do not intend to call any witnesses".*
>
> *10. The appeals were listed for hearing by way of a notice dated 4 February 2014 informing the parties that the appeals would be heard on 29 April 2014. In early March 2014 the respondents confirmed to the appellants' representative (EDF Tax) that they were not intending to call witnesses.*
>
> *11. On 27 March 2014 EDF Tax wrote to the Tribunal, copied to the respondents, in the following terms:*

"We note in particular the fact that HM Revenue & Customs (HMRC) do not propose to adduce any witness evidence … Given the fact that the burden of proof falls squarely on them … we have been advised that the appeal should be summarily allowed as there is no evidence or statement of agreed facts on which HMRC's case can rest. "

12. The writer went on to say that the appellants would argue at the hearing that the appeals should be allowed on the basis of lack of evidence from the respondents. This approach was repeated in a letter dated 4 April 2014 from EDF Tax to the Tribunal."

The Application for Costs

3. The application for costs raises two separate issues:

(1) Whether there should be a costs direction against the respondents, and

(2) How the costs should be assessed, taking into account the funding arrangements in place.

4. I shall deal with the question of whether there should be a direction for costs in this section of my decision. In the following section I shall deal with questions relevant to the assessment of costs.

5. The appellants applied for their costs in a written application dated 12 May 2014. They relied on Rule 10(1)(b) of the Tribunal Rules pursuant to which the tribunal can make a direction for costs:

"*if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings …*"

6. In *Market & Opinion Research International Limited v Commissioners for HM Revenue & Customs [2015]UKUT 0012 (TCC)* the Upper Tribunal has recently held that Rule 10(1)(b) is a threshold to the exercise of a discretion as to costs. It stated as follows:

" *15. The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise.*

16. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment."

7. The appellants had put the respondents to strict proof of negligence in their notice of appeal, as they were entitled to do. They clearly identified their position in correspondence leading up to the appeal, and indeed in their skeleton argument. Mr Gordon on behalf of the appellants submitted that even without that correspondence

he could have made the same submissions at the final hearing without warning. I do not wholly accept that submission. He would at least have had to identify the submissions in his skeleton argument which was served on 15 April 2014, which he did.

8. Mr Gordon submitted that the respondents' decision to proceed without evidence amounted to unreasonable conduct of the proceedings, more so in light of the clear warnings given in correspondence. He also relied on the respondents' failure to properly particularise the allegations of negligence as a further example of unreasonable conduct.

9. The failures relied on by Mr Gordon were, he submitted, evident from the outset of the appeal, Alternatively, he submitted that the respondents can have been in no doubt about their failures after 27 March 2014 following the correspondence from EDF Tax.

10. Mr Massey submitted that the conduct of the respondents was not unreasonable. He distinguished something being done inadequately from unreasonable conduct. Not every failure amounts to unreasonable conduct.

11. I accept the submission of Mr Massey that not every error amounts to unreasonable conduct. I have also had regard to the guidance in *Market & Opinion Research* as to what amounts to unreasonable conduct.

12. Mr Massey submitted that it was only when the appellants resiled from what their advisers had previously told the respondents about the implementation of the scheme that there was any need for evidence. He described this as a "volte face" which only became apparent to the respondents at the hearing when Mr Gordon submitted that there was no evidence the "unilateral documents" were available to the appellants when completing their tax returns (see [22] of the Decision).

13. I do not accept Mr Massey's submission. It was clear from the notice of appeal and from a response by the appellants to the respondents Statement of Case in June 2013 that HMRC were being put to strict proof of negligence. Proof of negligence requires evidence of negligence. It ought to have been clear that the respondents would need evidence to substantiate the allegations of negligence, such as they were. I am not satisfied from the material relied on by Mr Massey that there was any volte face by the appellants.

14. In the absence of evidence raising a prima facie case of negligence the appeal was bound to fail for the reasons set out in the Decision. In my view it was unreasonable conduct on the part of the respondents to defend the appeal without intending to adduce any evidence to establish a prima facie case of negligence. That failure was compounded by a lack of action on the part of the respondents following the correspondence in March 2014 which highlighted the arguments the appellants intended to make.

15. I consider that it was unfair to expect the appellants to answer in the Tribunal a case in negligence which had not been fully particularised and where the respondents had not adduced evidence to make out a prima facie case of negligence.

16. In the light of all the circumstances I consider that in this case the respondents ought to pay the appellants' costs of and incidental to the appeal.

Assessment of Costs

17. The appellants sought a summary assessment of the costs. By the time of the costs hearing before me the appellants only sought to recover the costs of instructing Mr Gordon. His fees in connection with the appeal were incurred in the period after 1 March 2014 when he was first instructed.

18. No costs were sought in relation to EDF Tax. There was an unusual arrangement in respect of the instructions to EDF Tax and the basis upon which they would instruct counsel. For reasons which will become apparent I will not make findings of fact in relation to those arrangements but in broad terms the intention was that EDF Tax would bear their own costs and the fees of counsel.

19. In the light of the fee arrangements the respondents submitted that the indemnity principle prevents any recovery of costs. In particular they submitted that as between the appellants, EDF Tax and counsel the appellants have no liability for costs.

20. Mr Gordon accepted that the arrangements between the appellants and EDF Tax did fall foul of the indemnity principle and as a result the appellants could not recover any costs in relation to work done by EDF Tax. However issues remain in relation to whether his fees are recoverable.

21. The remaining issue concerns counsel's fees.

22. It seems to me, and I indicated as such to the parties at the costs hearing, that issues relating to liability for costs and the indemnity principle are best resolved as part of a detailed assessment of costs. A costs judge will be in a better position than this Tribunal to resolve such issues.

23. At the costs hearing I heard evidence from Mr Iain McLeod of EDF Tax Defence Ltd which provides services to EDF Tax. He was acting for the appellants on behalf of EDF Tax. He produced a short witness statement setting out the basis upon which EDF Tax were acting for the appellants and the basis upon which Mr Gordon was instructed. He was briefly cross examined.

24. The parties invited me to make findings of fact as to the nature of the arrangements pursuant to which EDF Tax and Mr Gordon were instructed. At the costs hearing I indicated that I would do so, but without fettering the jurisdiction of a costs judge on a detailed assessment from making further findings of fact. On reflection I do not consider that is a satisfactory approach. The evidence I heard concerns a relatively straightforward and discrete issue. The written arguments before

me as to the application of the indemnity principle relied on various authorities which will be put before the costs judge. In those circumstances it seems to me that the costs judge should hear evidence as to the arrangements and make relevant findings of fact unfettered by any findings I might make.

Conclusion

25. I will make a direction that the respondents pay the appellants costs of the appeal on the standard basis to be the subject of a detailed assessment if not agreed. Given the issues which arise in relation to the indemnity principle it is not appropriate for me to direct any amount to be paid on account of those costs.

26. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 11 March 2015