[2022] UKFTT 00138 (TC)

TC 08469

COSTS – whether HMRC behaved unreasonably – whether any related costs - whether claim made in accordance with the Tribunal Rules – whether disproportionate – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2016/00435
TC/2016/04787; TC/2017/00681

BETWEEN

MARK FOX **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

On 16 November 2021, Reynolds Porter Chamberlain LLP ("RPC") applied for HMRC to pay costs relating to the Appellant's three appeals under references TC/2016/00435 TC/2016/04787 and TC/2017/00681 ("the Costs Application").

On 8 December 2021, HMRC applied for disclosure of certain information in the context of the Costs Application ("the Disclosure Application").

Both parties agreed that the Costs Application and the Disclosure Application (together "the Applications") should be decided on the papers.

DECISION

1. The Costs Application relates to the hearing of these and other appeals. The related decision was issued on 1 March 2022 under reference [2022] UKFTT 00103 ("the Substantive Decision").

2. In the Costs Application, RPC submitted that HMRC had acted unreasonably by withdrawing the surcharges against which Mr Fox had appealed under references TC/2016/00435 TC/2016/04787 and TC/2017/00681 ("the Surcharge Appeals") on 6 October 2021, the second day of the hearing. The costs claimed were £87,768.30.

3. For the reasons set out below, I decided that:

(1) HMRC did not behave unreasonably;

(2) on the basis of RPC's own evidence, the costs would have been the same whether or not HMRC had withdrawn the surcharges, so no costs were incurred as the result of HMRC's behaviour;

(3) the Costs Application did not meet the requirements of Rule 10(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"); and

(4) it was made on an indemnity basis without any explanation or justification; furthermore, it was also disproportionate.

4. HMRC made a Disclosure Application relating to the issues raised by the Costs Application. Given that the Costs Application has been refused, the Disclosure Application falls away.

The documents considered

5. In deciding the Applications, I considered:

(1) the Substantive Decision;

(2) the Costs Application and the Disclosure Application;

(3) HMRC's letter of 26 November 2021;

(4) RPC's letter of 30 November 2021; and

(5) RPC's letter dated 10 December 2021, received by the Tribunal on 13 December 2021.

The Tribunal Rules

6. Rule 10 of the of the Tribunal Rules deals with costs. So far as relevant to this decision, it provides:

> "(1) The Tribunal may only make an order in respect of costs…
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;…
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
>
> (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; or

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings

(5) …

(6) The amount of costs…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."

WHETHER HMRC ACTED UNREASONABLY

7. I first set out the case law guidance, followed by a summary of the facts, the submissions of the parties and my decision.

The case law guidance

8. In *Distinctive Care v HMRC* [2019] EWCA Civ 1010, Rose LJ gave the only judgment with which Lewison and Floyd LJJ agreed. At [7] she explained the intention behind Rule 10 as follows:

> "the First-tier Tribunal is designed in general to be a 'no costs shifting' jurisdiction…Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeals."

9. The Upper Tribunal ("UT") in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) ("*MORI*") observed at [15] that:

> "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."

10. The UT went on to say, at [49]:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose…It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an

> imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates."

The facts

11. The facts in this part of the decision are taken from those in the substantive appeal. I have not thought it necessary to reproduce all the background, but have instead focused on points which are particularly relevant to the Costs Application.

Mr Fox and the joined appeals

12. Mr Fox was one of many taxpayers who:

(1) entered into tax planning arrangements;

(2) received Accelerated Payment Notices ("APNs") issued by HMRC under Finance Act 2014 ("FA 2014"), Part 4, Chapter 3, and/or under Sch 2 to the National Insurance Contributions Act 2015;

(3) was subsequently issued with penalties and/or surcharges for failing to pay their APNs; and

(4) appealed those penalties and surcharges to the Tribunal.

13. Mr Fox and around 500 other recipients of APNs were represented by RPC. HMRC and RPC liaised with the Tribunal to identify informal lead cases, and initially agreed that these would be Exclusive Promotions Ltd ("Exclusive") and a Mr Underwood. On 20 March 2020, RPC notified the Tribunal that HMRC were withdrawing three of the penalties issued to Mr Underwood, and suggested Mr Fox replace Mr Underwood as an informal lead case. On 3 September 2020, the Tribunal agreed.

14. Mr Fox had been issued with three surcharges in relation to two APNs issued on 11 June 2015 and 19 June 2015; the appeals against those surcharges were given the Tribunal reference numbers TC/2016/00435, TC/2016/04787 and TC/2017/00681, the three appeals with which the Costs Application is concerned.

15. Mr Fox was sent a third APN on 27 July 2015, and was issued with penalties for non-payment; his appeals against those penalties were given the references TC/2016/01942 and TC/2016/04789. The penalties and surcharges issued to him totalled £9,512.62.

The legal argument.

16. The normal payment date for an APN is 90 days after it has been received by the taxpayer. However, FA 2014, s 222 provides that where a taxpayer makes "representations" to HMRC within those 90 days, HMRC have a duty to consider the representations and issue a determination. The APN payment date is then the later of (a) the 90 days and (b) 30 days after notification of the determination. If the taxpayer does not pay the APN by the payment date, he is liable to a penalty/surcharge.

17. Mr Fox had sent HMRC letters in relation to the first two APNs, but HMRC decided they were not "representations" within the meaning of s 222, and so refused to consider them. One of Mr Fox's grounds of appeal was that as a result, the payment date for the APNs had not begun to run, and so no penalties were due. In the substantive judgment, I have called this "the time limit issue".

18. Until the first day of the hearing, the only authority cited in the Appellants' skeleton argument to support the time limit issue was an FTT judgment of Judge Thomas, *Dr Rai v HMRC* [2017] UKFTT 467 (TC). In the course of opening submissions on behalf of the Appellants, Mr McDonnell referred to the time limit argument and said that there was a relevant Court of Appeal authority". At my request he identified that case as "*Archer"* and said that it was authority for the proposition that "representations should be able to consider all of the points that the taxpayer would want to argue in the judicial review claim".

19. As later became clear, the case to which he was referring was *R (oao Mrs Archer) v HMRC* [2019] EWCA Civ 1021 ("*Mrs Archer*"). The key principles of *Mrs Archer* are summarised at §178 of the Substantive Decision, and include the following:

> (1) although representations must "fall within the scope" of s 222, that section must "be given a broad and non-technical construction, with the aim of enabling all objections to the application of the three conditions, or to the amount of the accelerated payment, to be covered if at all possible by the representations";
>
> (2) in particular, "non-computational matters" which bear upon the "amount" of tax to be paid, fall within the scope of s 222; and
>
> (3) given that broad approach, it "should be rare that any representation made by a tax payer about the APN could fall outside of the ambit of [s 222]".

20. Although *Mrs Archer* was referred to in the Appellants' skeleton, this was only as an example of a case where an appellant's judicial review claim had a successful outcome. *Mrs Archer* was not cited in the context of the time limit issue.

21. In addition, no copy of *Mrs Archer* was provided to HMRC before the hearing. RPC filed and served the authorities bundle on 28 September 2021, but instead of *Mrs Archer*, the bundle included *Archer v HMRC* [2020] UKFTT 288 (TC), a judgment about surcharges issued to Mrs Archer's husband, William Archer. The inclusion of the wrong case in the bundle was a mistake. RPC emailed the correct judgment to HMRC and the Tribunal on the evening of the first day of the hearing, 6 October 2021, after Mr McDonnell had highlighted its significance.

22. When proceedings resumed the following day, HMRC's representative Mr Hall said that having considered *Mrs Archer*, HMRC accepted that (a) they should not have rejected Mr Fox's letters, and (b) in consequence no surcharges were due. Mr Fox then withdrew his appeals against the surcharges.

23. The hearing of the substantive case overran and it was listed for a further day on 22 November 2021. By the time it resumed, HMRC's position had changed. Although Mr Fox's surcharges had been withdrawn and would not be reissued, Mr Hall said that HMRC now considered they had earlier been wrong to conclude that *Mrs Archer* applied to Mr Fox, because his letters were not "representations" within the meaning of s 222. The reasons for this are explained at [314]-[315] of the Substantive Decision.

24. Mr Fox did not withdraw his separate appeals against penalties issued for failure to pay the APN dated 27 July 2015. These therefore remained in issue and were determined as part of the substantive decision.

Submissions on unreasonable behaviour

25. The Costs Application was filed before the final day of the hearing, but RPC's later letters of 30 November 2021 and 10 December 2021 were issued after the hearing had concluded, and thus after HMRC's further change of position.

26. RPC submitted that:

(1) HMRC "must be taken to know the law in the relevant area" and should thus have been aware of the judgement in *Mrs Archer,* noting that HMRC were a party to the case.

(2) The relevant principles were also set out in *Walapu v HMRC* [2016] EWHC 658 (Admin) ("*Walapu*") and in *Beadle v HMRC* [2020] EWCA Civ 562 ("*Beadle*"), both of which had been cited in HMRC's own skeleton argument.

(3) Mr Fox's case had been selected as a lead case because the letters he wrote to HMRC were similar to those of other appellants, and the withdrawal of the surcharges in the course of the hearing affected the position of those other appellants.

(4) Had HMRC properly considered the case law before the hearing, the approach taken to selecting lead case appeals was likely to have been different.

The Tribunal's view

27. The starting point is that an award of costs for unreasonable behaviour is an exception to the general rule that each party bears its own costs, see *Distinctive Care* above. In deciding whether HMRC acted unreasonably I considered "what a reasonable person in the position of the party concerned would reasonably have done, or not done", see *MORI*.

28. I find as follows:

(1) It is true that the time limit argument had been raised by the Appellants and included in their skeleton, but there is a big difference between an argument which relies on a FTT decision, and one which relies on a binding Court of Appeal judgment.

(2) HMRC were unaware of *Mrs Archer* before the hearing because it was not been cited in the context of this ground of appeal, and it was not included in the authorities bundle.

(3) It is not unreasonable for HMRC not to know every case to which it is a party; instead they are required to consider the authorities cited by an appellant in the context of the submissions being made.

(4) The principles established by *Mrs Archer* and summarised at §19 above do not appear in clear terms in either *Beadle* or *Walapu.*

(5) It is true that the course of the appeals would have been different if HMRC had considered *Mrs Archer* before the hearing. But their failure to do so was not unreasonable, given that the Appellants did not cite the case in their skeleton, or include it in the authorities bundle.

29. I therefore find that HMRC did not act unreasonably.

30. That is enough to dispose of the Costs Application, but I also set out the other reasons why that Application has been refused.

The quantum claimed

31. The Costs Application was accompanied by a schedule of RPC's costs from 2 October 2020 to 25 October 2021 ("the Schedule"). I have assumed that 2 October 2020 is when Mr Fox replaced Mr Underwood as an informal lead case, although this was not explained by RPC. The end date of 25 October 2021 is after the conclusion of the first part of the hearing but before the final day.

32. The Schedule sets out RPC's costs of £98,391.60. Counsel's costs are an additional £77,145. By the Costs Application, RPC ask that HMRC pay 50% of these costs, so £87,768.30.

33. HMRC questioned this validity of this approach to quantum and RPC responded, saying on 10 December 2021 (my emphasis):

> "Any suggestion by HMRC that costs incurred should be segregated out as between each specific appeal number is both unnecessary and unreasonable. The application for costs related to the three appeals conceded by HMRC on the second day of the hearing (TC/2016/00435, TC/2016/04787 and TC/2017/00681). To the extent that costs claimed relate to the appeals which HMRC chose not to concede, we submit that none of the costs claimed need be attributed to those appeals. That is because all of the work undertaken in relation to the three appeals for which costs are claimed would have been undertaken in any event. In other words, **no specific or additional work was undertaken in respect of the two appeals which HMRC did not concede. For example, a letter written by us to the Tribunal in relation to all five appeals would have been necessary/written in the same terms if Mr Fox had simply been proceeding with the three appeals which HMRC conceded**."

34. Just as "no specific or additional work was undertaken in respect of the two appeals which HMRC did not concede", it must also be the case that "no specific or additional work was undertaken in respect of the three appeals which HMRC did concede". In other words RPC would have incurred the same costs irrespective of whether the dispute concerned (a) only the surcharges; (b) only the penalties or (c) both the penalties and the surcharges.

35. Even if I were to be wrong, and HMRC had acted unreasonably by withdrawing Mr Fox's surcharges, it must follow from the above that there are no related costs. RPC and the barristers would have had to write the same letters and carry out the same work even if the surcharges had not been in issue. This is the second reason for refusing the Costs Application.

The requirements of Rule 10(3)(b)

36. Rule 10(3)(b) requires an applicant to "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".

HMRC's challenge and RPC's responses

37. HMRC wrote to RPC on 26 November 2021, saying that the Schedule "does not comply with Rule 10(3)" because it did not set out the costs which related only to the withdrawn appeals. HMRC also asked whether any of the costs related to the general case management of the other 500 cases being managed by RPC.

38. On 30 November 2021, RPC replied. They said that none of the costs related to the other stayed appeals, and that if HMRC "considers that certain specific items fall to be disregarded,

it should set those out when making submissions to the Tribunal" (RPC's emphasis). In their subsequent letter of 10 December 2021, RPC:

(1) said that HMRC's suggestion that "costs should be segregated out as between each specific appeal number is both unnecessary and unreasonable";

(2) repeated the statement that none of the costs related to the stayed appeals; and

(3) suggested that if the Tribunal does not agree that all the costs were properly due, a *de minimis* discount should be applied.

The Tribunal's view

39. The Schedule simply lists the costs charged by RPC in the most general terms: for example numerous items are simply identified as "correspondence with Counsel" "correspondence with HMRC"; "case management" or "work on evidence". Others relate to Exclusive Promotions, but no attempt has been made to remove those costs.

40. There is no attempt, either, to allocate costs as between Mr Fox's two penalty appeals, which remained live and were determined by the Substantive Decision, and his three withdrawn surcharge appeals. This is significant because Mr Fox had three grounds of appeal, of which two were based on reasonable excuse. Those two grounds remained in issue to exactly the same extent when Mr Fox's surcharges were cancelled and the related appeals withdrawn.

41. Despite RPC's assertions, I agree with HMRC that the Schedule also incudes items which appear on their face to relate to the other stayed cases, including "updating records following receiving the latest documents including a 'nudge' letter sent to 56 members"; "drafting and sending email to the Tribunal requesting stay of a member's appeal"; "sending email to FTT requesting a stay for a member" and "drafting letter to send to tribunal in response to multiple directions issued threatening to strike out members appeals".

42. RPC are incorrect to say that it is for HMRC to identify costs which are not properly due. It is instead the applicant who must set out, in sufficient detail, the costs which properly relate to the matter in question. No such exercise has been carried out in this case. The Costs Application is therefore refused for the further reason that it does not comply with Rule 10(3)(b).

Indemnity costs and proportionality

43. The amounts sought in the Costs Application are 50% of the total costs incurred by RPC and the barristers; in other words, the claim is made on an "indemnity" basis. It is however clear from the case law that indemnity costs are only to be awarded where a party's behaviour is unreasonable "to a high degree", and that there must be "something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs", see the judgment of Coulson J in *Noorani v Calver* [2009] EWHC 592 (QB) and the cases there cited. In no part of the Costs Application does RPC explain why those thresholds are met.

44. The costs claimed are the full charge out rates of the staff involved, plus the actual costs of both Mr McDonnell and Mr Brodsky, his junior. There is no acknowledgement that when assessing standard costs claimed on a summary basis, the Tribunal normally takes the rates set out in the Guideline Hourly Rates for solicitors as a starting position for solicitors, and that for barristers the starting point is normally the fees paid by the Attorney General's Panel. It is for the party claiming costs to explain and justify any claimed increases above those rates.

45. The Costs Application also does not seek to explain:

(1) why it was proportionate for the Schedule to include the costs of both an RPC partner and a staff member attending the hearing of the appeal each day, noting that the daily costs were £7,000 (of which 50% was claimed);

(2) why the third day of the hearing was included in the claim when the three appeals in question were withdrawn in the second day; or

(3) why it was necessary and proportionate to include 50% of junior counsel's costs of £19,000 in addition to 50% of the £45,157 charged by Mr McDonnell.

46. Finally, the Costs Application does not itemise any of the work carried out by either Counsel by date, or in relation to the work carried out.

47. In the absence of that analysis and any related justifications or explanation, the Costs Application is additionally refused because the amounts claimed are disproportionately high.

Wasted costs?

48. Rule 10(1)(a) allows the Tribunal to make an order for "wasted costs" as defined in s 29(4) of the Tribunal Courts and Enforcement Act 2007. Section 29(5) provides that such an order can be made:

> (a) a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay.

49. In other words, a wasted costs order is an order against a representative to pay the other party's costs because of his behaviour. The threshold for making such an order is high, see *Ridehalgh v Horsefield* [1994] Ch 205.

50. At paragraph 19.2 of the Costs Application, RPC say that Mr Fox's costs of the hearing were "wasted costs" as defined. They do not identify the relevant legal representative, so the Tribunal is left to infer that they mean Mr Hall. RPC also do not explain why in their submission costs had been wasted because of Mr Hall's conduct (rather than on the instructions of his client, namely HMRC), and how any such behaviour satisfied the high threshold set by the case law.

51. To the extent that the Costs Application is also for wasted costs, it is based on a mere assertion, and is dismissed. .

The Disclosure Application

52. By the Disclosure Application, HMRC asked for copies of engagement letters with Mr Fox and with Exclusive Promotions; they also asked for details of the Individual Voluntary Arrangement ("IVA") into which Mr Fox entered in April 2019 (see §281 of the Substantive Decision).

53. HMRC explain in their letter of 26 November 2021 that these documents will enable the Tribunal to see what Mr Fox's "true liability" was for the proceedings. In their response letters, RPC insist that Mr Fox "is liable" for 50% of the costs claimed in the Schedule.

54. Like HMRC, I find that surprising. My understanding was that the costs of these lead appeals had been funded by insurance and/or by contributions from the wider pool of appellants. It would be particularly extraordinary for Mr Fox to have volunteered to be an informal lead case if as a consequence he became personally liable for costs of £87,768.30, as RPC say is the position, given that:

(1) he entered into an IVA in 2019; and

(2) the total amount he was due to pay HMRC was only £9,512.62, around 11% of the costs which RPC now say he is liable to pay.

55. As the Costs Application has been refused it is not necessary to explore these points. Had HMRC acted unreasonably, and had RPC complied with the Tribunal Rules in making the Costs Application, it might have been necessary to consider the funding position, see for example the issues raised by *Cook on Costs* in Part 2 and Chapter 37.

Conclusion

56. The Costs Application is refused for the reasons set out above. The Disclosure Application is refused because there is no need for it.

57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 14 APRIL 2022