[2011] UKFTT 607 (TC)

TC01450

Appeal number: LON/2007/0945

COSTS – transitional case – old costs regime directed- whether Sheldon statement applicable – not on facts – costs awarded

FIRST-TIER TRIBUNAL

TAX

INNOCENT LIMITED **Appellant**

- and -

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

TRIBUNAL: Mrs B Mosedale (Tribunal Judge)

Sitting in public at 45 Bedford Square, London WC1 on 9 June 2011

Mr E Brown, Counsel, instructed by PwC for the Appellant

Ms E Mitrophanous, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant lodged an appeal on 23 May 2007 against HMRC's refusal to repay output tax accounted for by it on the sale of its fruit smoothies. Prior to the hearing of that appeal at a pre-hearing review in 2009 I directed (with the consent of both parties) that the costs regime under Rule 29 of the Value Added Tax Tribunal Rules 1986 would apply to the appeal.

2. The jurisdiction of the Tribunal to direct the costs regime of the old Tribunal rules arises under Paragraph 7(3) of the Transfer of Tribunal Function and Revenue and Customs Appeals Order 2009 which provides that in "current proceedings":

> "The tribunal may give any direction to ensure that proceedings are dealt with fairly and justly and, in particular, may –
>
> (a) apply any provision in procedural rules which applied to the proceedings before the commencement date; or
>
> (b) disapply any provision of the Tribunal Procedure Rules."

This appeal was "current proceedings" because it was commenced before the new Tribunal came into existence on 1 April 2009 (see paragraph 6 of the same Order).

3. A Tribunal panel of which I was the Judge heard the appeal in June and July 2010 and we issued our decision on 27 October 2010 that HMRC was correct to refuse the Appellant's voluntary disclosure. HMRC applied for their costs by Notice of Application dated 29 October 2010. I awarded HMRC costs at the hearing of that application on 9 June 2011, and at the Appellant's later request now give more fully and in writing the reasons for that decision which were given briefly and orally at the hearing.

The Tribunal's discretion on costs and the Sheldon statement

4. The Appellant objected to HMRC's application for costs. It considered HMRC should not seek costs against it because HMRC should abide by the so-called Sheldon statement. This was a parliamentary answer given by the Right Hon. Mr Sheldon in 1978 and was as follows:

> "the Commissioners [ie HM Customs & Excise] have concluded that, as a general rule, they should continue their policy of not seeking costs against unsuccessful appellants; however, they will ask for costs in certain cases so as to provide protection for public funds and the general body of taxpayers. For instance, they will seek costs at those exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases, unless the appeal involves an important point of law requiring clarification. The Commissioners will also consider seeking costs where the appellant has misused the tribunal procedure – for example, in frivolous or vexatious cases, or where the appellant has failed to appear or to be represented at a mutually arranged hearing without

> sufficient explanation, or where the appellant has first produced at a hearing relevant evidence which ought properly to have been disclosed at an earlier stage and which have saved public funds had it been produced timeously."

5. A re-affirmimation of this statement was given by the Right Hon Mr Brooke in 1986 and was as follows:

> "The new penalty provisions and right of appeal to the value added tax tribunals have made no change to this policy. Customs and Excise, with the agreement of the Council on Tribunals, consider that appeals against penalties imposed under FA 1985 s13 [now VATA 1994 s60 – civil dishonesty penalties] on the grounds that a person has evaded VAT and his conduct has involved dishonesty fall to be considered as being comparable with High Court cases. Where such appeals are unsuccessful, Customs and Excise will normally seek an award of costs."

6. A written ministerial statement was made by the Financial Secretary to the Treasury on 10 March 2009 in respect of transitional cases under the new regime:

> "the practice set out by the Right Hon. Robert Sheldon, now Lord Sheldon of Ashton-under-Lyne, on 13 November 1978 – and restated on 24 July 1986 by the Right Hon. Peter Brooke, now Lord Brooke of Sutton Mandeville – will also continue to apply on a transitional basis, and HMRC will not seek costs from appellants in most cases."

7. The Appellant's case was that this meant, other than in the exceptional cases as mentioned by Mr Sheldon, or dishonesty cases as mentioned by Mr Brooke, the old rule for costs (which applies to this case) was assymetrical: under the pre-1 April 2009 rules an Appellant could expect an award of costs in its favour if it won its appeal but would not expect HMRC to seek costs against it if it lost.

8. HMRC did not disagree: their application for costs was made on the basis that this was one of those exceptional cases recognised by Mr Sheldon which was (in their view) substantial and complex, involving a large sum of money and which was comparable to a High Court case.

9. Costs awards under the old rules are in the discretion of the Tribunal. A Tribunal would normally award costs in line with the expectations of the parties: the party which wins the appeal would normally expect an order of costs in their favour. However, an Appellant which loses an appeal would not expect an award of costs to be made against them where the Sheldon statement applies. Although the Sheldon statement is of course, extra-statutory, I consider that in the exercise of my discretion I would the normally give effect to the Sheldon statement and will do so in this case.

10. I agreed with the Appellant that it is irrelevant that they had sought an order for costs in their favour if they won. The policy set out in the Sheldon statement was intended to be assymetrical. HMRC did not dispute this.

To what cases does Sheldon apply?

11. Rightly the Appellant did not suggest that the appeal involved an important point of law requiring clarification so the exception to the exception to the Sheldon rule of no costs against an unsuccessful appellant did not apply. Similarly it was not suggested by HMRC that the appeal was frivolous or vexatious or that that the Appellant did not attend or that late-produced evidence had put HMRC to extra cost. Nor was it a civil dishonesty case. The Appellant said their appeal was clearly arguable and brought in good faith: this was not disputed.

12. Therefore, the issue for the Tribunal is whether this appeal was a substantial and complex one, involving a large sum of money and which was comparable to a High Court case. The Appellant's view was that the HMRC must show that all the conditions for the exception were met before they were entitled to a costs order: the appeal must be substantial and complex *and* involve a large sum of money *and* be comparable to High Court litigation.

13. A parliamentary statement is by its very nature *not* statutory and should not be read and dissected as if it were. In any event, Mr Brookes' restatement of the policy in 1986, in which it was stated that there was no change to it, used the words "comparable with High Court cases" as encompassing the entirety of that example of the exemption from the no costs rule and did not repeat the reference to 'substantial and complex cases involving a large sum of money'.

14. Nevertheless this may be a distinction without a difference: unless it is a substantial and complex case involving a large sum of money it is unlikely to be seen as comparable to a High Court case by this Tribunal. And nothing turned on this point in this application as my finding, set out below, was that the appeal was both substantial and complex and it was comparable to a High Court case.

15. I also note that that paragraph of the Sheldon statement is prefaced by the word "for instance". A large and complex case involving a substantial sum and comparable to High Court litigation is only an *example* of a case where HMRC will seek costs. Nevertheless I do not think this point is relevant to this costs application: HMRC have not put forward any other grounds on why it would be appropriate to treat this as an exceptional case.

Meaning of substantial and complex?

16. There is no guidance on what is meant by "substantial and complex" and indeed as I have said the Sheldon statement should not be read as if it were a piece of legislation.

17. I was referred to the decision of the Upper Tribunal in *Capital Air Services Limited* [2010] UKUT 373 (TCC) in which the Upper Tribunal ruled on what would be a "complex" case for the purposes of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009. At paragraph 8 the Upper Tribunal considers the meaning of "complex" and (in paraphrase) considers at least in the context of

categorisation of appeals under the new Rules that it refers to cases which are complicated.

18. Words have shades of meaning and the particular shade of meaning is taken from its context. *Capital Air Services Ltd* considered the meaning of "complex" in the context of Rule 23(4)(b) test of whether the case involves a "complex or important principle or issue". This Tribunal is called on to decide the meaning of "complex" in the context of the Sheldon statement which refers to "substantial and complex" in the context of being comparable to a High Court case.

19. I did not need to decide for the purpose of this costs application whether the appeal (had it been made after 31 March 2009) would have been allocated to the complex category. It is most likely it would have been simply by virtue of the sum involved or because the evidence and hearing were lengthy. I consider whether the issue was complex below.

20. Mr Brown also pointed out that the case did not reach the length or substance of an MTIC appeal. However, I agree with Ms Mitrophanous that this was not relevant: MTIC appeals may be now the epitome of a substantial and complex Tribunal case but they were not in the contemplation of Mr Sheldon or Mr Brookes. Hearings of over three weeks with upwards of 10 witnesses and evidence frequently running to over 50 bundles were virtually unheard of in the VAT tribunal before this century. To be "substantial and complex" under the Sheldon statement a case does not need to be comparable to an MTIC appeal.

Meaning of comparable with High Court cases?

21. There is no guidance on what is meant by "comparable with High Court cases" other than the indication from the Sheldon statement itself that it means substantial and complex cases involving a large sum of money. The High Court is like the Tribunal: it hears cases of all sorts: some are very long and others very short. Some involve huge sums of money and others do not.

22. However, the impression clearly given by the Sheldon statement and the context in which "comparable with High Court cases" should be interpreted is that HMRC did not intend to apply for costs in run-of-the-mill Tribunal cases.

23. A purpose of the Tribunal of the Tribunal is to give taxpayers a low-cost and unintimidating forum where they can have their tax disputes resolved by an expert in the law independent of HMRC. Seen in that light the purpose of the Sheldon statement is to reassure taxpayers that they are not at risk of a costs order against them if they lose as long as they have not treated the appeal as they would a dispute in the High Court.

24. However, where the case was conducted by the Appellant in much the same way as if it were dispute in front of the High Court, it seemed to me, that it is one of those exceptional cases where HMRC were in the Sheldon statement reserving their right to apply for costs. To decide whether the Appellant was treating the dispute similarly to

one in front of the High Court includes looking at how long it took the Tribunal to hear the evidence they brought, who they chose to represent them, and how in general they presented their case.

25. Mr Brown's view is that the exception for cases comparable to High Court cases is there to protect HMRC from incurring expenses in defending appeals beyond what they would expect to incur in the ordinary Tribunal case. I agree: I think this is saying what I said in the previous paragraph but a different way. If the Appellant treats the case like a High Court case, then HMRC are put to costs in excess of those that they would expect in an ordinary Tribunal hearing.

26. He also said that Innocent's case was not comparable to a complex case in the High Court and I agreed but that is not the point. The point is whether it is comparable to an ordinary case in the High Court and even in the High Court an ordinary case does not normally last more than a day or two.

27. I now turn to the facts.

Did the appeal involve a large sum of money?

28. As the Appellant's voluntary disclosure was for £27 million it was mutual ground between the parties (and I agreed) that the appeal did involve a large sum of money.

Was the appeal a substantial and complex case?

29. The Appellant pointed out that the Tribunal had to resolve a single point. Were fruit smoothies beverages? They pointed to the headnote of the decision as reported at [2011] SFTD 111 which reads as follows:

> "The fruit smoothies were drinks; they were not merely drinkable liquids. Fruit smoothies were unusual in that they were quite thick and required digestion but that was not sufficient to mean that they were not beverages. The fact that they were also food because of their snack-like properties did not take them out of the category of beverages. They were drunk as a beverage. They were intended, and sold, as a drink, and were pleasant and easy to drink. It was socially acceptable to consume a smoothie in place of beverages such as tea, coffee or fruit juice. The fruit smoothes were beverages for the purposes of Group 1 of Sch 8 to the 1994 Act."

The brevity of this headnote, submitted the Appellant, indicated that the issue before the Tribunal was very straightforward. I did not agree. The ratio of a High Court case could normally be dealt with more shortly than it is: it is the reporter's choice to give greater prominence to decisions of a Court of Record rather than the First-tier Tribunal. And I note that the decision of Warren J in *Kalron* at [2007] EWHC 695 (Ch) dealing with substantially the same issue is given a much longer headnote.

30. Mr Brown also pointed out in support of his case that the appeal was not substantial and complex that the Court of Appeal in *Proctor & Gamble UK* [2009] STC 1990 stated that issues of food classification were "not capable of elaboration or

complex analysis". The context of that quote was in respect to the question of the meaning of whether something was similar to a potato crisp and made out of potato. In the same case Toulson LJ said in respect of issues of food classification:

> "I agree ….it was for the tribunal to decide what was the reasonable view on the basis of all the facts known to the tribunal; and it conveys that this is not a scientific question."

31. This application involves the irony that at the substantive hearing it was the Appellant's case that the matter was complex (and considerably more complex than presented to the Tribunal in *Kalron* VTD 19738*)* while HMRC's position was that there was a simple question in front of the Tribunal: at the costs hearing their positions were reversed.

32. While I agreed that in the substantial hearing fundamentally the Tribunal had to answer the apparently simple question of whether a fruit smoothie was a beverage, this necessitated consideration of both EU and UK statutory and case law (including the social policy underlying the UK's food zero rating) which was argued in front of the Tribunal at some length, and then move on to consider the very many facts, including expert evidence and voluminous marketing evidence presented to the Tribunal.

33. The hearing took place over 6 days, and although two days went short others involved longer than normal hours. Both parties provided skeleton arguments and the Appellant submitted written closing submissions of some 40 pages in length. The Decision Notice of the Tribunal was also nearly 40 pages long.

34. That the simplicity of the question "are fruit smoothies beverages?" is deceptive is also apparent from the decision of Warren J on appeal in the *Kalron* case where his decision occupies some 20 pages of Simons Tax Cases.

35. My conclusion is that the case as presented to the Tribunal was substantial and complex although I accept that the same issue (whether a fruit smoothie was a beverage) could have been presented to the Tribunal (and was perhaps was presented to the Tribunal in *Kalron)* in a manner that was not substantial and complex.

Comparable to High Court case?

36. The Appellant said the case was not comparable to High Court proceedings because it only involved a single pre-hearing review which was necessitated only by a delay in progressing the appeal. Counsel did not attend. The directions were largely agreed by the parties and there was no dispute on timetabling, disclosure, or scope of the evidence.

37. I agreed that there was only one pre-hearing review which resulted in an Unless order against the Appellant to ensure compliance with the timetable. The review went on to deal with largely uncontroversial case management issues. While I agreed counsel did not attend, I considered they should have done as then the parties might have realised their time estimate of 2 days was (as it proved to be) wholly unrealistic.

38. In my view, that there was little dispute between the parties on pre-hearing matters (although it certainly saves the parties's costs and the Tribunal's time) is far from being the single or even an important indicator of whether a hearing is being conducted like a High Court case, as even in the High Court pre-hearing matters can be uncontroversial between the parties. As I have already said the amount of evidence brought and the manner of putting the Appellant's case will be most significant.

39. Mr Brown pointed out that the evidence occupied only 2 lever arch files. However, the quantity of bundles vary and I have certainly had as few as two bundles in cases categorised as complex under the new regime. In any event, in most tax tribunal hearings only a small part of the documents disclosed are actually referred to at the hearing. In *Innocent* the Tribunal was referred to a very great many of the pages in the two bundles and in some detail.

40. I found a great deal of evidence was called and hearing it occupied the greater part of the six days over which the Tribunal sat. The Appellant said the witness evidence was uncontroversial but again I did not agree. The Tribunal did in its decision substantially accept the evidence (but not their interpretation of it) presented by the Appellent's witnesses but at the hearing HMRC (as they were entitled to do) cross-examined both witnesses for the Appellant at length and challenged the statements they made.

41. Mr Brown said that Ms Mitrophanous need not have cross-examined Mr Reed at the lengths that she did: but I did not agree. Where the Appellant chooses to put forward detailed documentary evidence the witness can expect to be cross-examined in detail and challenged on it.

42. The Appellant chose to call an expert witness but says that Professor Strain addressed a single issue of the thirst quenching nature of the smoothies and the science was straightforward and the dispute between the experts a matter of degree rather than principle. My opinion was that calling on expert evidence is an indicator that the case does involve complex issues and further involves HMRC in extra costs (as it did) in instructing their own expert witness in rebuttal. I also note that Professor Strain's evidence went beyond the thirst quenching nature of the drinks and dealt with the effect of soluble fruit fibre on the human digestive system.

43. The Appellant pointed out that HMRC did not consider that the complexity of the appeal warranted the instruction of leading counsel or even A panel junior counsel, and they said it is not relevant that Innocent instructing leading counsel and a junior as (unlike HMRC) they are not subject to policy restrictions.

44. I did not agree: by instructing leading counsel and a junior and calling an expert witness the Appellant was putting into the case the kind of resources I would expect them to put into a case in the High Court. I find they were treating the case as comparable to one in the High Court. If HMRC did not chose to instruct leading counsel themselves, they nevertheless had to pay counsel for a very long hearing.

45. The Appellant also points out that the Tribunal made no award of costs against the Appellant in the *Kalron* decision which was on a virtually identical issue of whether fruit and vegetable smoothies were beverages.

46. On the contrary I thought comparison with the Tribunal decision in *Kalron* shows why this case is in a different category. It was the Appellant's case in *Innocent* that the Appellant in *Kalron* had failed to bring the sort of evidence that could be brought and take the legal arguments open to it to show that a fruit smoothie was not a beverage. The hearing in that cases lasted one day, the Appellant was represented by only a VAT consultant and no expert evidence called or detailed evidence on marketing given. On the contrary in *Innocent* the Tribunal was presented with substantial evidence including expert evidence and complex arguments on the law put to it by leading and junior counsel over a six day hearing.

Was the appellant on notice?

47. The Appellant said that HMRC first indicated that they would seek costs in their skeleton argument depriving the Appellant of the possibility that they might have decided to withdraw from the appeal had they known this earlier. HMRC point out that they asked for the old costs regime to be applied to the appeal, to which the Appellant consented.

48. I consider that the Appellant knew at the time that the Direction in 2009 referred to above that the appeal was under a discretionary costs regime subject only to the Sheldon statement. It was their choice then to put the resources into making the best case that they could and by doing so taking the case away from being a run-of-the-mill tribunal hearing as in *Kalron* to being a case comparable with High Court proceedings.

Decision

49. I had a discretion whether to make an award of costs. I considered that the Appellant was well aware that they were in the old costs regime and must be taken to be familiar with the terms of the Sheldon statement (if they were not, they must have assumed a 'costs followed event' rule applied in any event). It was their choice (for good reason no doubt) to put a great deal of resources into their appeal. They instructed leading counsel and a junior, called expert evidence, and took all possible legal and factual arguments that could be made in favour of their case. By so doing, the deceptively simple question of whether a smoothie was a beverage was dealt with in its full complexity at a substantial and lengthy hearing that was comparable to one in the High Court. A large sum of money was at stake.

50. I found that the Appellant's appeal was within the exception to the Sheldon statement and that, having an unfettered discretion, decided it was appropriate to direct that the costs of the appeal follow the event. I therefore directed that HMRC were awarded their costs of the appeal in an amount to be agreed between the parties or in default of agreement assessed by a costs Judge on the standard basis.

51. HMRC then asked for the costs of the disputed costs application. Mr Brown pointed out that there was a real dispute between the parties on the applicability of the Sheldon statement and it was proper for Innocent to object to HMRC's application. I agreed with this. Nevertheless, having decided that a normal 'costs follow the event' rule should guide the exercise of my discretion, I awarded HMRC the costs of the costs application hearing because their application was successful. The costs were to be in the sum agreed or assessed as set out in the paragraph above.

52. 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.

TRIBUNAL JUDGE
RELEASE DATE: 16 September 2011