TC02103

Appeal number: TC/2011/3164

PROCEDURE – costs – unreasonable behaviour

EXCISE DUTY – hardship – failure to show hardship on balance of probabilities

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRADIUM LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 4 May 2012

Mr K S Sood, for the Appellant

Mr D Bedenham, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant was assessed to £412,214 of excise duty on 7 March 2011 and the appellant appealed on 15 April 2011 and applied to HMRC for relief against payment of the assessed tax pending the appeal on the grounds of hardship. Information was provided by the appellant to HMRC in support of this application on 27 June 2011 but the application was refused on 14 July 2011.

Costs of adjourned hearing

2. The hearing of the appellant's hardship application, postponed from an earlier date, was due to take place on 29 March 2012. Mr Sood on behalf of the appellant brought with him to the hearing a substantial bundle of documents. Mr Bedenham for HMRC had not seen this in advance of the hearing and objected to its admission.

3. Mr Sood also asked for the hearing adjourned because he wished to adduce some bank statements in evidence: these were not part of his bundle and he had not brought them with him.

4. Refusing a hardship application is a serious matter as it means that the appellant cannot pursue its appeal if it cannot afford to pay the tax: I decided to adjourn the hearing to allow Mr Sood to adduce evidence, including the bundle he had brought with him and the bank statements he referred to.

5. HMRC asked for its costs under Rule 10(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 of the adjourned hearing on 29 March 2012 on the basis that the appellant and/or Mr Sood had acted unreasonably in conducting the proceedings.

6. I found that Mr Sood was well aware of the need to provide in advance to HMRC and the Tribunal any documents on which he wished to rely at the hearing. Indeed, he implied as much because he claimed that he had instructed his secretary to send the bundle both to HMRC and to the Tribunal in advance. In any event, I find on 8 December 2011 Mr Sood had sent to HMRC and to the Tribunal a list of documents. The only item listed was "A copy of the letter dated 14 July from the Respondent refusing hardship grounds". In this document Mr Sood stated he was complying with the directions of the Tribunal of 13 October 2011 and those brief directions were that a list of documents would be served by both parties.

7. So for all these reasons I found Mr Sood was well aware of the need to provide a copy of any document on which he wished to rely in advance to HMRC and to the Tribunal.

8. I also found that he had failed to do so. He had failed to produce either the bundle or the bank statements in advance.

9. I went on to consider whether by this failure the appellant by its representative Mr Sood had conducted the proceedings unreasonably. I found that Mr Sood's claim that he had instructed his secretary to send out the bundle was unreliable because the bundle was not listed on the appellant's list of documents provided to the Tribunal by Mr Sood dated 8 December 2011, which it would have been had it merely been a secretarial error in failing to place the bundle in the envelope. I was therefore unable to accept that Mr Sood had arranged for the bundle to be sent to the Tribunal and HMRC nor that the fault lay with his secretary.

10. Mr Sood said that HMRC had had all the papers in the bundle and they could not complain they were taken by surprise by the contents of the bundle. I find, however, that Mr Sood had not come to the hearing expecting HMRC to have produced all the documents on which Mr Sood wished to rely as his conduct was inconsistent with such an expectation. In particular, had he been expecting HMRC to produce such a bundle then he would not have produced his own bundle, nor claimed to have earlier instructed his secretary to post that bundle to HMRC and the Tribunal.

11. Nor was I satisfied that Mr Sood had ever produced the documents in the bundle to HMRC as part of his hardship application as they were not mentioned on the form completed by the appellant on 27 June 2011. I found Mr Sood had not expected HMRC to produce the bundle of documents on which he wished to rely yet was aware of the need to produce such a bundle himself but had failed to do so in advance but instead brought a substantial bundle to the hearing giving HMRC no time to consider its contents. I found this to be unreasonable conduct by Mr Sood on behalf of the appellant.

12. Mr Sood's view was that the adjourned hearing was in any event a wasted hearing because the hardship hearing was meaningless as HMRC had no right to raise the assessment. I did not agree that the adjourned hearing was necessarily a wasted hearing in any event: even if the appellant ultimately were to succeed in its appeal, as a matter of law it must first pay or give security for the tax or show hardship. It cannot pursue its appeal, let alone succeed in it, unless it does so. As HMRC have not accepted that the appellant has shown hardship, it follows that the March hearing would have determined the matter of hardship had it not been adjourned due to Mr Sood's unreasonable behaviour. It was only a wasted hearing because of Mr Sood's behaviour and for no other reason.

13. Mr Sood's view was also that the adjourned hearing of 29 March was in any event a wasted hearing as (due to the company having entered into a creditors' voluntary arrangement ("CVA")) the appellant was bound to succeed in its application for hardship. I do not agree that that is the case, but even if I did, it is no licence to waste everybody's time with an adjourned hearing. Whether a party has an unanswerable case or merely an arguable case, it must not unreasonably waste the time of the other party by failing to produce all the documents on which it wishes to rely in advance for the other party to consider and which it clearly knows it ought to have produced in advance.

14. As the hearing had to be adjourned in order to allow HMRC time to consider the bundle and therefore for the appellant fairly to be allowed to rely on it, and to also to allow Mr Sood to bring further evidence, I decided that I should make an award of costs against the appellant to the extent HMRC had incurred costs in relation to the adjourned hearing.

15. HMRC claimed costs in the amount of £654 which represented 1.3 hours of HMRC's solicitor's time (at £196 per hour plus VAT) and 3.45 hours of counsel's time (at £80 per hour plus VAT). I found that the hours claimed and the rate claimed to be reasonable and awarded costs of £654 against the appellant and payable to HMRC.

The hardship application

16. Section 16(3) Finance Act 1994 provides:

> "An appeal which relates to a relevant decision falling within any of paragraphs (a) to (h) of section 13A(2), or which relates to a decision on a review of any such relevant decision, shall not be entertained if the amount of relevant duty which HMRC have determined to be payable in relation to that decision has not been paid or deposited with them unless –
>
> (a) the Commissioners have, on the application of the appellant, issued a certificate stating either -
>
> (i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or
>
> (ii) that, on the grounds of hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate; or
>
> (b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners."

17. In this case no security has been offered to HMRC and HMRC have refused to issue a certificate under s 16(3)(a)(ii). Therefore, I have to be decide whether the appellant has satisfied me under s 16(3)(b) that HMRC should have issued a certificate under s 16(3)(a)(ii). In other words, I have to decide if the appellant has satisfied me that on the grounds of hardship that would otherwise be suffered by appellant it should not be required to give security for the payment of the amount assessed.

18. If I am not so satisfied, the appellant's appeal cannot be entertained (unless of course the tax is paid or satisfactory security given).

Principles to be applied

19. Although the above provision is not worded identically to that for VAT assessments (s84(3B) Value Added Tax Act 1994), in principle it is the same and I consider that what was said by the High Court in *R (oao ToTel Ltd) v First Tier Tribunal (Tax Chamber) and HMRC* [2011] EWHC 652 is equally applicable here. Mr Justice Simon said in that case:

> "[82] The principles to be applied in hardship cases are clear and emerge from various passages in the previous decisions of the First-tier Tribunal or its predecessors.
>
> (i) the subsection which provides relief in case of hardship should not operate as a fetter on the right of appeal, see *Tricell UK Ltd* [2003] UKVAT 18127 at [27].
>
> (ii) the test is one of capacity to pay without financial hardship, and must be applied in a way which complies with the principle of proportionality in order to comply with Community Law, see *Seymour Limousines Ltd* (above) at [57].
>
> (iii) The hardship enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available. It should not involve a lengthy investigation of assets and liabilities, and an ability to pay in the future, see *Seymour Limousines Ltd* (above) at [58]. This is a reflection of the broader principle that the issue of hardship ought to be capable of prompt resolution on readily available material."

In line with this I will assess whether the appellant does not have sufficient assets to pay the assessment of £412,214 without undue hardship.

20. I note that Mr Justice Simon's decision is under appeal to the Court of Appeal but the basis of this appeal was his decision that there was no right of appeal from the First-tier decision. That is not an issue in the hearing before me.

Burden of proof

21. The burden of proving that it would suffer hardship if forced to pay the tax is on the appellant. In the case of *ToTel Limited* at first instance Judge Bishopp, in the face of a lack of contemporaneous material and in particular a lack of draft accounts, management accounts, list of debtors and creditors, or cash flow forecasts, ruled:

> "[18]The burden is on an appellant making a hardship application to satisfy the Commissioners and, failing that, the tribunal that payment of the disputed tax would cause it hardship. So much is obvious from the replacement subsections of s 83, which reflect what was in fact the earlier practice. I have asked myself whether I can simply take what I have about the appellant's current bank balance at face value, and infer from that that it would suffer hardship if required to pay. I have concluded, however, taking into account the age of most of the material I have, the history of the case, particularly the payment of the dividend and the inexplicable failure to obtain recent accounting

> information, that I can be satisfied of no more than that it might not be able to pay, and that is not enough. The appellant has not discharged the burden and its application must consequently be dismissed."

Date at which hardship should be assessed

22. In the High Court in *Totel* Mr Justice Simon ruled that:

> "[75]….In most cases hardship will be assessed at the date of the hearing. …

while also considering it legitimate for the Tribunal to have considered hardship at the teme of the assessment (see paragraph 78). On the facts in this case, as explained below, I reach the same conclusion on the question of hardship whether the date at which it is assessed is the date of the hearing before me or the date of the assessment.

The facts

23. Therefore, I have to decide the simple question of fact which is whether I am satisfied that the appellant would suffer financial hardship if it had to pay the assessed tax of £412,214.

Procedural irregularity?

24. Firstly, I address the appellant's allegation that the proceedings were conducted irregularly. This allegation was made after the hearing when Mr Sood for the appellant sent to the Tribunal an email objecting to the Tribunal considering in its deliberations answers given by Mr Sood in cross examination. In particular, Mr Sood claimed that I had conducted the proceedings improperly by allowing HMRC's counsel to question him. The hearings, said Mr Sood, were meant to be arguments and not cross examination, and he had objected at the time.

25. I do not accept that there was any irregularity. As I explained to Mr Sood at the time, he was giving evidence on behalf of the appellant and therefore he must answer questions from HMRC. If a person gives evidence, then they must allow the other side to question that evidence. It is a fundamental principle of justice. Indeed, procedural impropriety would have occurred if, after Mr Sood had given evidence about the financial position of the company, which he did, I had not allowed HMRC to question Mr Sood.

26. Mr Sood could (but did not), of course, have elected to give no evidence at all. In such a case, he could not be cross examined. However, he chose to give evidence. Indeed, he was the only person present on behalf of the appellant and it is for the appellant to satisfy me as a matter of fact that it would suffer financial hardship if it had to pay the tax assessed: if Mr Sood had elected to give no evidence the appellant was *bound* to lose its application because that would leave me with no evidence. Without evidence, I could not be satisfied of the appellant's financial status.

27. As an example, Mr Sood proffered bank statements in relation to an account in the name of the appellant. He gave evidence about them, including evidence that it

was the appellant's only bank account. If Mr Sood had proffered the bank statements but given no evidence in respect of them, they would be evidentially useless. For instance, I would not have evidence about whether the bank account was the company's only bank account. So, I reiterate, if Mr Sood had elected to give no evidence, the company's application was bound to fail.

28. There was no procedural impropriety. If a person chooses, as Mr Sood did, to give evidence, then they must be prepared to be questioned by the other side.

29. So I proceed to consider the evidence from Mr Sood, including the evidence given under cross examination. As explained below in paragraph 51, in the event it would have made no difference to the outcome if Mr Sood had elected to give no evidence.

The facts

30. The background to this matter was that HMRC assessed the appellant to tax of £636,264.15 on the basis it was principally liable for excise duty on certain movements of excise goods. After the date of this assessment, the appellant entered into a CVA. HMRC issued legal proceedings to challenge the legality of the CVA on the grounds that it was only approved (HMRC alleged) because HMRC's assessments in the sum of £636,264.15 were admitted with a nominal value of only £1. HMRC withdrew this legal challenge on 22 February 2011 on the grounds that they had withdrawn the assessment.

31. HMRC's explanation for their withdrawal of the assessment is that they decided that properly the assessment should have been issued under the joint & several provisions as the appellant was not principally liable. A new assessment was raised and the review decision upholding this assessment for £412, 214 is the decision against which the appellant wishes to appeal and in particular against which it wishes to enter an appeal without paying the tax.

The CVA

32. From the papers in the bundle produced by Mr Sood, I find that on 30 November 2010 the members and creditors of the appellant voted in favour of a CVA. The appellant's director, Mr Swallow, prepared a proposal for the CVA. That proposal included a statement of the company's assets as at 26 October 2010 and stated that the company was insolvent. The statement of assets showed debtors of about £908,000 and creditors (excluding HMRC) of £927,000. If this statement was correct, the company was insolvent in October 2010.

33. But this tells me nothing. I was given no accounts or other information to judge whether Mr Swallow's Proposal was accurate nor did Mr Swallow attend to give evidence. Virtually all I know about Mr Swallow is that he did not chose to come to the hearing to explain the company's financial position and that he is not a signatory on the only bank account Mr Sood admitted the company to possessing: neither of these factors dispose me to accept his CVA Proposal at face value.

34. It is clear that the Supervisor of the CVA, Mr D A Ruben of David Rubin & Partnership LLP, also considered the company to be insolvent as he agreed to be appointed supervisor and said the company was insolvent in a letter. However, he did not attend to give evidence. Nor do I know on what basis he formed his view that the company was insolvent in 2010. I do not know, for instance, to what extent the appellant traded in cash, nor to what extent Mr Ruben was aware that the company traded in cash.

35. All I have is Mr Ruben's opinion that the company was insolvent in 2010. I have no means of judging whether his opinion was fairly formed on the basis of accurate information. Nor do I know what has happened to the company in the 18 months since he gave that opinion.

36. The creditors who voted in favour of the CVA may also have believed the company to be insolvent but I have no means of judging whether such opinions were fairly formed on the basis of accurate information (and I note one of the main creditors was Fivestream which Mr Sood said was his son's company).

The bank statements

37. I was shown bank statements for a single account with Lloyds TSB from 27 Mary 2011 to 29 February 2012 (some 9 months). The balance at 27 May 2011 was £167.08 and the balance as at 29 February 2012 was £74.71.

38. The first statements were addressed to Mr Sood but the later ones were to Mrs Sood at the same address.

39. The balance varied somewhat. On 23 September 2011 it jumped from £20.77 to £45,812.77 following a receipt of £45,792.00 from Rowan International. Mr Sood said this was in payment of an invoice for the supply of wine. At no point was the balance higher than this figure and mostly it was significantly lower.

40. Mr Sood's explanation of how the company had been able to buy the wine which it then sold to Rowan was that his son's company Fivestream Capital had lent the money to the appellant by paying it direct to the seller and this was why the transaction did not appear in the appellant's bank statements). A payment out on 30 September 11 of £32,475.49 to Fivestream Capital was said by Mr Sood to be repayment of this loan.

41. No other transactions of this magnitude appear in the bank statements. The next largest sum was the unexplained payment in of £12,000 on 24 November 2011. There was also a deposit of nearly £9000 on 20 June 2011 which Mr Sood said was a payment by a client. It appears to be a payment in cash. Otherwise, largely the statements just itemised a great many small expenditures.

42. Mr Sood's evidence was that this was the only bank account held by the appellant. It was also his evidence that the financial position of the company had not improved since the last bank statement in evidence before this Tribunal.

43. Mr Sood also said that Mr Donachie (HMRC officer dealing with the hardship application) had been given the bank statements. I do not accept this as they are not recorded on the document prepared by the appellant for HMRC on 27 June 2011 to support its hardship application.

Cash trading

44. Mr Sood accepted that in the past the appellant had traded in cash but said that the last time that had happened was the transactions which gave rise to the assessments the subject of this hardship hearing.

What I was not shown

45. Mr Sood said that the company has few trade creditors or debtors, and amounts owing were considerably smaller than the amount of the assessment, but had nothing with him to back up his evidence.

46. No accounts, statutory, management or otherwise were produced.

47. No evidence was given by anyone other than Mr Sood and indeed no one other than Mr Sood attended the hearing on behalf of the appellant.

Reliability of Mr Sood's evidence

48. I have already explained why I am unable to accept as reliable Mr Sood's evidence that the failure to provide the bundle at the postponed hearing was due to a clerical error by his secretary. At the hearing in May, Mr Sood again blamed his secretary for failing to include in the new bundle the online statements for the bank account covering the period since February 2012. I did not accept this as reliable either: I think blaming his secretary is a stock excuse used by Mr Sood to cover for his own actions or inactions.

49. I took into account that Mr Sood is not a director of the appellant. He described himself as its manager. Yet it was his evidence that the only signatories to the appellant's bank account in respect of which he produced statements were himself and his wife. His evidence was that the appellant's director, Mr Swallow, was not a signatory. For these reasons, I find myself unable to take at face value Mr Sood's statement that he was only the manager of the appellant.

50. I took into account that it was Mr Sood's evidence that the appellant's main asset was a claim against HMRC for £3million in damages and that he said near the start of the hearing that this claim was "solid". Yet later in the hearing, when asked how the matter was progressing, gave me a long explanation of various reasons why the appellant had been unable to progress its claim and that he expected the CVA to fail because money would not be forthcoming from HMRC and I find from this that the appellant was not actively pursuing this claim. Therefore, I found the evidence from Mr Sood on this inconsistent as, had he really believed the claim to be solid for

£3million (as he said to me at the start of the hearing), he would have ensured that it was being actively pursued.

51. My overall conclusion is that I was unable to consider the evidence given by Mr Sood as reliable.

Conclusions on hardship application

52. I find myself unable to accept Mr Sood's evidence as to the appellant's financial position. In the event, of course, this leaves the appellant in the position in much the same position as if Mr Sood had given no evidence at all.

53. If I took the bank statements at face value, the appellant was clearly unable to pay the assessment without hardship. But I find that the bank statements do not advance the appellant's position because I have no reliable evidence that the appellant has only one bank account. The position is that I do not know how many bank accounts the appellant has nor how much money is in such accounts if they exist. Nor do I know if the appellant has other assets.

54. I do know that the company has in the past traded in cash as Mr Sood admitted this somewhat reluctantly; I have no reliable evidence that it has not continued to do so. On the contrary, there were some cash deposits into the account (albeit for a much smaller sum than the assessment in issue) and I do not know how the company funded the purchase for which Rowan paid it £45,000 (as I do not know whether Mr Sood's explanation that his son's company loaned the money is correct). I simply do not know what the appellant's receipts in cash have been.

55. I do know that the company was placed in a CVA in late 2010. At least two persons other than Mr Sood, its director Mr Swallow and the Supervisor, Mr Ruben, considered the company at that date to be insolvent. But I do not know whether the opinions on the appellant's insolvency were reliably and fairly formed on the basis of accurate information about the appellant's financial affairs.

56. Mr Sood also stated his opinion that the effect of the company entering into the CVA put an end to HMRC's ability to assess the company for excise duty, and that that submission will form part of the basis of his appeal if the appellant is permitted to bring one (see paragraph 60 below). While it might seem unlikely a company would voluntarily enter into a CVA if it was not insolvent as the purpose of a CVA is to allow a company to trade out of insolvency, nevertheless Mr Sood's belief that the CVA defeated HMRC's claim may have given the appellant another motive. I am unable to conclude on the balance of probabilities that merely because the appellant did enter into a CVA, it was insolvent.

57. In any event, I have no reliable information about the appellant's financial affairs in the 18 months since entering into the CVA. While in a CVA the company is run by its directors and it appears in this case that Mr Sood's position within the company (whether as manager or shadow director) was unchanged by the CVA.

58. In conclusion, I know virtually nothing about the appellant's financial position at the time of the CVA or now. All I can conclude, as Judge Bishopp did in *Totel*, that the appellant *may* be put to financial hardship if it were to pay the tax assessed: I simply don't know. As it has not been shown to me that it is more likely than not that it would be put to financial hardship if it were to pay the tax assessed its application for relief on the grounds of hardship fails.

59. I make this decision aware that if the appellant does not or cannot pay the assessment, it puts an end to the appellant's appeal against the assessment: but I note in this regard that my directions after the adjourned hearing on 29 March 2012 and issued on 30 March made it very clear to Mr Sood that the appellant had to satisfy the Tribunal that it would suffer hardship and that it was for the appellant to provide evidence in advance to support its case. I also note in this regard that HMRC had also earlier asked for evidence to support the appellant's financial position and that the appellant clearly knew this as it had responded on 27 June 2011 albeit with very limited information.

Appellant's application for costs

60. Mr Sood asked for the appellant's costs in defending the assessment on the grounds that HMRC had acted unreasonably in defending the proceedings because (in his view) the assessment should never have been raised. Mr Sood's grounds for saying that the assessment should never have been raised were:

- At the time of the assessment HMRC knew that the appellant was in a CVA;
- Although the assessment post-dated the CVA it was a replacement assessment for an assessment which pre-dated the CVA but was withdrawn and that therefore the replacement assessment was (in Mr Sood's opinion) an attempt by HMRC to avoid the CVA;
- That because it replaced an assessment which pre-dated the CVA, it was nevertheless within the CVA and could not be pursued;
- HMRC have no right to ask the appellant to deposit the amount of the assessment;

61. Whether the assessment assesses tax which is lawfully due is something to be determined on appeal. That cannot now be determined unless and until the appellant pays the tax or gives adequate security for it. If it does so, it can ask that Tribunal, which will hear full argument on these points, for its costs.

62. I am determining only the issue of hardship and not whether the assessment was lawfully due. The appellant has not shown that HMRC acted unreasonably in defending the hardship proceedings, particularly as HMRC have succeeded. I dismiss the appellant's application for costs.

63. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 26 June 2012