TC02195

Appeal number: TC/2009/10414

PROCEDURE – Costs - taxpayer disputed assessments on ground of misdirection - strike out proceedings commenced - Commissioners conducted review of merits of assessments and withdrew assessments - taxpayer applying for costs order on grounds Commissioners had acted unreasonably in defending or conducting the proceedings - Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, r 10(1)(b) - Commissioners had not acted unreasonably - application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ZANACO INVESTMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER

Sitting in public at Bedford Square on 23 July 2012

Kevin Andrews of VAT Consultants Ltd for the Appellant

David Yates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This case concerns an application by Zanaco Investments Limited ("the Appellant") to recover its costs. The Appellant was assessed to VAT by The Commissioners for Her Majesty's Customs and Excise ("the Commissioners"). The Appellant appealed to this Tribunal against that assessment. In the course of the preparatory proceedings for the hearing of the appeal the Commissioners reviewed the case and concluded (on grounds different from those on which the Appellant was relying in its appeal) that the assessment should be withdrawn. The Appellant argues that it is entitled to its costs in the proceedings on the ground that the Commissioners acted unreasonably in defending the proceedings. The Appellant estimates that its costs amount to £4,803.75 plus the VAT it paid on those costs.

2. For the reasons I give below it is my decision that the Commissioners did not act unreasonably in their defence or conduct of the proceedings relating to the appeal made by the Appellant. Accordingly the Appellant's application fails.

Facts

3. The relevant facts are straightforward and are not in dispute between the parties: they are as follows.

4. The Appellant was assessed to VAT in the sum of £46,576 on 9 April 2008. The assessments covered the Appellant's VAT quarterly periods 07/05 to 07/07 inclusive. The Appellant carries on the business of developing property, and the relevant question concerned whether (and if so, the extent to which), in relation to two properties, the Appellant could recover input tax, which depended upon whether its supplies were exempt or taxable supplies. The matter was one of some complexity, in circumstances where the Appellant eventually sold one developed property (a zero-rated supply) but pending such sale had made short-term lettings (which were exempt supplies), and in relation to the other developed property had made short-term lettings.

5. On 18 May 2009 the Appellant appealed against the assessments (the appeal notice was out of time, but allowed by the Tribunal without objection by the Commissioners). The Appellant's ground of appeal was in these terms:

> "Input tax disallowed - due to exempt supplies. HMRC mislead trader in past in relation to what can be claimed - see also visits to assoc. companies eg Fat Sams Holdings & Fullcompany Ltd."

(That associated company was pursuing its own appeal to the Tribunal, also on misdirection grounds. That appeal was struck out by the Tribunal in its decision released on 24 May 2012 on the grounds that there was no reasonable prospect of the company's case succeeding.)

6. On 2 August 2010 the Commissioners applied to the Tribunal for the Appellant's appeal to be struck out on the grounds that either the Tribunal had no jurisdiction to hear an appeal based on misdirection or there was no reasonable prospect of the Appellant's case succeeding.

7. On 9 December 2010, and before that application could be heard by the Tribunal, the Commissioners withdrew the assessments under appeal.

8. On 16 February 2011 the Commissioners wrote in detail to the Appellant to explain why they had taken such action. The Commissioners explained that they had reviewed the case and had concluded that although they remained of the view that they were correct to assess for input tax wrongly claimed, they could not be satisfied that their calculation of the wrongly-claimed input tax was correct, nor could they be satisfied that the assessments were allocated to the correct VAT periods in circumstances where the matter turned on the date (and hence the VAT quarterly period) when firm intentions were established as to the sale or lettings of the properties. The Commissioners had also concluded that they were out of time to make certain corrective assessments.

9. On 12 July 2011 the Appellant applied to the Tribunal for an order awarding the Appellant its costs. The application included a schedule of the chargeable hours of VAT Consultants Ltd, the Appellant's representative, in dealing with the appeal from the date of the Appellant's appeal notice, and the hourly billing rate applied by VAT Consultants Ltd.

10. Since the notice of appeal is dated 18 May 2009 the appeal is subject to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Procedure Rules"). Under the Tribunal Procedure Rules the appeal was categorised as a Standard case, and therefore the Tribunal has only a limited jurisdiction to make a costs order. In the circumstances of this case the Tribunal's powers are set out in Rule 10(1)(b), which is in these terms:

> *10(1) The Tribunal may only make an order in respect of costs...*
>
> *(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;*

Submissions

11. Mr Andrews of VAT Consultants Ltd appeared for the Appellant. His principal submission was that the Commissioners had made a grave technical error at the outset in making an incorrect assessment in April 2008, and it had taken them until December 2010 to realise that this was the case, at which point they withdrew the assessment (it had then taken them another two months - after pressure from the Appellant - to provide an explanation for their action). During that period they had fought hard to defend the appeal, in particular by making the strike out application. They had not produced a statement of their case, and had they done so they would then have realised that the assessment was wrong - although in the Appellant's

submission the errors underlying the assessment should have been apparent to the original assessing officer.

12. Mr Andrews referred to the First-tier Tribunal case of *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395 (TC). In that case, which concerned the application of Rule 10(1)(b) of the Tribunal Procedure Rules, the taxpayer was not awarded costs since it was held that the Commissioners had not acted unreasonably, as they had shown no undue delay in carrying out a review which led to their decision to withdraw the assessment. In that case the taxpayer had made its appeal on 11 November 2009 and the assessment was withdrawn by the Commissioners on 1 April 2010. The facts of the *Bulkliner* case are to be contrasted with those of the Appellant's case, where there was over eighteen months between the date of the appeal notice and the decision of the Commissioners to withdraw the assessment.

13. In all the circumstances the Commissioners had acted unreasonably, both by making erroneous assessments and then by vigorously defending them until December 2010. That unreasonable conduct had caused the Appellant to incur costs it would otherwise not have incurred, and such costs should be met by the Commissioners.

14. Mr Yates appeared for the Commissioners. He submitted that the Commissioners had not acted unreasonably in their contesting of the Appellant's appeal or in their conduct of the proceedings. He pointed out that the grounds of the Appellant's appeal were wholly unrelated to the technical basis of the assessments, and instead comprised a contention that there was misdirection by the Commissioners. The Commissioners had conducted the proceedings by reference to that stated ground of appeal, which led them to apply for a strike out direction. The technical merits of the assessments were not the issue joined in dispute by the parties (and for that reason no statement of case had been prepared by the Commissioners). The Commissioners themselves had taken the initiative to review the assessments (and had done so whilst strike out proceedings were under way), and that led to their decision to withdraw the assessments. This was not a case where the Commissioners had persisted in disputing an appeal in the face of a taxpayer consistently putting forward his arguments which the Commissioners finally conceded were correct.

15. Mr Yates stressed the complexity of the VAT issues in the circumstances of the different property transactions of the Appellant, arguing that the Appellant had made incorrect returns and had never put forward a clear statement of the basis of its claim for recovery of input tax. The Commissioners remained of the view that VAT was due, but because of insufficient information as to apportionment of costs, and because they were out of time to make further assessments, they had decided not to proceed, and as a result the Appellant had enjoyed a windfall.

16. He also referred to the *Bulkliner* case, submitting that the conduct of the Commissioners in the present case was as reasonable as their conduct was held to be in that case.

Discussion and decision

17. An order for costs for unreasonable behaviour can be made by the Tribunal under Rule 10(1)(b) of the Tribunal Procedure Rules only where the unreasonable actions are related to the proceedings before the Tribunal - that is, the proceedings which begin when an appellant's notice of appeal is lodged with the Tribunal and end when that appeal is determined whilst within the Tribunal's jurisdiction (normally, by the Tribunal's decision or the withdrawal of the appeal, before it is so decided, as a result of the actions of either or both parties). What is quite clear, and is confirmed by the *Bulkliner* case, is that the actions of a party before proceedings are begun cannot be taken into account for these purposes, except to the extent that they result in, or influence, the actions of that party in the course of the proceedings. In particular, even if the Commissioners in any case have acted unreasonably in making an assessment which gives rise to an appeal, that in itself will not entitle the taxpayer appellant to an unreasonable behaviour costs award.

18. As I understand the case made by Mr Andrews, the Appellant argues that the Commissioners acted unreasonably in making the assessments, and then continued to act unreasonably in not withdrawing those assessments until December 2010, some eighteen months after the notice appealing against those assessments was served.

19. For the reasons mentioned, even if the Commissioners acted unreasonably in making the assessments, that does not form a ground on which the Tribunal can make a costs order in favour of the Appellant - it is action which pre-dates the proceedings before the Tribunal. I would add that I am not persuaded in any event that it was unreasonable on the part of the Commissioners to make the assessments in question - the fact that they were subsequently withdrawn does not of itself establish that they were unreasonable, and the letter of explanation from the Commissioners, and the further explanation given by Mr Yates at this hearing, show, first, that the facts and issues underlying the assessments were of some complexity and uncertainty, and secondly, that the Commissioners hold to the view that credit for input tax should rightly be denied because of the exempt use made of the properties so that the assessments were correct in principle but may not have been correct in the amounts assessed or in the way amounts were allocated to particular VAT return periods. Had the appeal come to a hearing it might have been proved that the assessments were, in some or all particulars, wrong, but even if that were so it would not necessarily be the case that the Commissioners had acted unreasonably in making the assessments.

20. As to the second limb of the Appellant's case, that the Commissioners had acted unreasonably in defending the assessments for such a long period during the proceedings, the first point is that if it was not unreasonable for the Commissioners to make the assessments, their defence of the appeal against the assessments was unlikely to be unreasonable unless it had become apparent that for some reason the assessments should be withdrawn, and despite that the Commissioners had persisted in maintaining their position. That is far from the case here.

21. The most telling point against the Appellant is that its notice of appeal sets out no ground which contests the technical correctness of the assessments - the only ground stated is that the Appellant's conduct resulted from it being misled by the

Commissioners. The assessments are not challenged because they are wrong on the facts and issues of the case or by reference to the proper application of the relevant statutory provisions, but on the ground that they are unfair because representations made by the Commissioners to the Appellant had induced the Appellant to take a course of action which resulted in its becoming liable to VAT.

22. The first point which arises from this is that it reinforces the conclusion that the assessments themselves were not the result of unreasonable action by the Commissioners: if the Appellant, the person with the best knowledge of the circumstances of the case, is unable, or is not prepared, to assert that the assessments are wrong, it cannot credibly argue that it was unreasonable on the part of the Commissioners, with their more limited knowledge, to make those assessments.

23. The second point is this: in setting out its grounds of appeal in its notice of appeal to the Tribunal an appellant marks out the initial battleground, so to speak, over which the dispute will be fought. This is particularly so where, as in the present case, the appellant is professionally advised (and, I might add, exceptionally the Appellant was allowed over a year in which to decide upon its grounds of appeal). I say the "initial battleground", because the Tribunal Procedure Rules require the Commissioners to send a statement of their case to the Tribunal and the appellant normally within 60 days after the Tribunal has sent the Commissioners the notice of appeal served by the appellant (see Rule 25). That statement of case must, in effect, explain on what grounds, and under which legislative provisions, the disputed assessment has been made. By that process the battleground may be re-defined.

24. In the Appellant's proceedings matters never reached the point at which the Commissioners were required to produce their statement of case. This was because the Appellant had decided to dispute the assessments on the ground that they were unfair by reason of misdirection by the Commissioners. The Commissioners, perfectly reasonably, responded to that approach by challenging it with a strike out application. One consequence was that they were not required to prepare their statement of case justifying the assessments on their technical merits until it was established, in the strike out proceedings, that the Tribunal had jurisdiction to hear a case based on misdirection, and if it did, that the Tribunal considered that the Appellant's case (as it appeared from its notice of appeal) had a reasonable prospect of succeeding (see Rule 8(2) and (3)).

25. No explanation was given to me as to why it took eighteen months for the strike out application to be made and for those proceedings to reach the point where they were about to be heard by the Tribunal, but there was no complaint before me by the Appellant that there had been prevarication or undue delay on the part of the Commissioners. What is clear, however, is that the Commissioners at that stage carried out a technical review of the assessments, and reached the conclusions which led them to decide to withdraw the assessments.

26. Normally such a review takes place, I surmise, as part of the process of producing a statement of case, and although the strike out proceedings had not been determined, that might nevertheless have been the case here. What internal procedure

on the part of the Commissioners prompted the review which was undertaken is not material. What is material is that it was initiated by the Commissioners themselves, and not in response to any promptings by the Appellant, or at least any promptings based on arguments that the assessments were technically deficient. The Appellant was still running its case that the assessments were wrong in law because they were unfair.

27. In these circumstances I cannot conclude that the Commissioners behaved unreasonably. They had made assessments which cannot be said to be unreasonable. They took note of the ground on which the Appellant challenged those assessments. They took action, by way of the strike out application, which was a reasonable and proper response to the Appellant's ground of appeal. Before they were required to produce their statement of case they, on their own initiative, reviewed the technical basis of the assessments and concluded that they could not be sustained. That was responsible and proper conduct in the course of the proceedings as they were unfolding and having regard to the nature of the proceedings.

28. I therefore conclude that the Appellant has shown no grounds for the Tribunal to make an order in its favour for costs under Rule 10(1)(b) of the Tribunal Procedure Rules.

29. I should add that Mr Yates made representations that the schedule of costs produced on behalf of the Appellant was, in some matters, disputed by the Commissioners. Having decided that this is not a case where an order for costs should be made I have not considered the merits of those representations.

30. The Appellant's application is dismissed.

Right to apply for permission to appeal

31. 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 Rules. 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.

EDWARD SADLER
TRIBUNAL JUDGE

RELEASE DATE: 14 August 2012