TC02955

Appeal number: TC/2010/08319

VAT –input tax – successful appeal - costs application made out of time – should application for costs be allowed to proceed – yes- was conduct of proceedings by HMRC unreasonable within meaning of rule 10 of Tribunal Rules – no – application dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

WOOD GREEN ANIMAL SHELTERS **Appellant**

- and -

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

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in public at Bedford Square on 2 October 2013

Thomas Mobee of Saffery Champness Chartered Accountants for the Appellant

Gloria Orimoloye of HMRC for the Respondents

DECISION

1. The Appellant ("the charity") was successful in its appeal before the First-tier Tribunal, (Judge David Demack and Mrs Caroline de Albuquerque) which issued a decision dated 1 June 2012. The Tribunal's decision included the following statement at [25]:

> "It was quite plain from the evidence of Mrs Shackleton that she considered that she had no alternative but to reject WGAS's input tax repayment claim since the Business Brief issued by HMRC following release of the *Gables Farm* decision contained no reference to input tax claims such as that of WGAS, nor did the internal advice with which she was provided deal with such claims. We have no hesitation in saying that she wholly failed to consider the claim against the background of the tribunal decision in *Gables Farm.* Had she done so, in our judgment, she would have had no alternative but to allow the claim".

2. The charity has applied for its costs in the appeal, on the basis that HMRC's conduct in defending the proceedings constituted unreasonable conduct so as to bring it within rule 10 (1) (b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the rules") and that the Tribunal should therefore award costs to the charity.

3. Rule 10 (4) of the rules provides that an application for costs may not be made later than 28 days after the date on which the Tribunal sends a decision notice recording the decision which finally disposes of all the issues in the proceedings. The decision notice of 1 June 2012 is in the format of a final decision, including the standard final paragraph about rights of appeal. This application was made by the charity's accountants on 4 December 2012, which means that it is some five months out of time.

4. I must consider first of all whether the application should be permitted to proceed out of time. In so doing, I have had regard to Mr Justice Morgan's decision in *Data Select v HMRC* [2012] UKUT 187 (TCC), in which he held that the correct approach to an application to proceed out of time was for the Tribunal to consider the overriding objective of dealing with cases fairly and justly, and all the circumstances of the case, including the matters referred to at CPR rule 3.9, before balancing the various factors and reaching its conclusion.

5. Mr Mobee explained that the reason for the delay in making the costs application was that there had been some confusion between the parties as to whether the decision of 1 June 2012 constituted a decision which finally disposed of the proceedings for the purposes of rule 10 (4). He helpfully referred me to copy correspondence between the parties which illustrated the problem. It appears that, following receipt of the decision, the charity's accountants first asked HMRC to confirm whether it would be appealing to the Upper Tribunal. When it appeared not, the accountants then asked HMRC when the charity might expect settlement of its

input tax claim. HMRC replied that the Tribunal had not determined the matter of quantum, and that as the charity's own computation was not agreed, it may be necessary for the matter to return to the Tribunal for a decision on quantum.

6. As I did not hear the substantive appeal in this matter I am at something of a disadvantage in knowing whether the parties' expectation that the Tribunal would deal with quantum was well-founded. Mr Mobee and Ms Orimoloye both tell me that they were expecting a decision on the point. I note that the charity's Notice of Appeal does not explicitly ask for a decision on quantum but refers obliquely to it in stating that HMRC is obliged to "meet its claim". HMRC's Statement of Case, however, clearly states that quantum was an issue between the parties and further that it was an issue for the Tribunal to decide. I do not know whether there were any further discussions with the Tribunal on the point but, in the event, the Tribunal's decision was silent on the issue of quantum.

7. As I explained at the hearing of this application, the Tribunal did not in its decision leave open the opportunity for the parties to return to it for a further decision on quantum if this could not be agreed. I am therefore rather mystified as to why the parties thought that the Tribunal, which was *functus officio,* could have re-convened to decide that issue. I note that the suggestion that this might happen was first made by HMRC in writing in a letter dated 1 October 2012, after the time limit for making a costs application had already expired. Ms Orimoloye told me that she had thought that if HMRC refused to meet the charity's claim in full then that would be a further decision which was itself appealable and so she had not thought that the original Tribunal would re-convene. Whilst that may be her view now, it does not seem to me to be the view she communicated in correspondence with the charity's accountant (referred to below). I am pleased to note however that the parties have now reached an agreement on the issue of quantum so that further litigation will not be necessary.

8. Mr Orimoloye urged me to refuse to allow this application for costs to proceed out of time. She pointed out that she had drawn the time limit to the charity's representative's attention in October 2012 but that the charity had not made the costs application until December of that year. I note, however, that the 5 October letter from Ms Orimoloye herself states that:

> "HMRC's preference would be for both sides to agree quantum without further recourse to the Tribunal, failing which, we will have no alternative than to go back to the Tribunal for a further hearing to resolve the matter…."

9. It seems to me that Ms Orimoloye's letter, whilst it did point out the time limits for a costs application, only served to compound the charity's accountant's confusion with its reference to "a further hearing…". It is perhaps disappointing that the charity's accountant did not contact the Tribunal administration and ask for advice about its situation. It seems to me that all efforts were focussed on securing payment of the claim rather than on paying attention to the time limits for making a costs application. The charity's accountant seems first to have raised the issue of costs with HMRC in writing on 4 September, by which time the 28 day limit had already expired, and not to have made the application to the Tribunal for a further three

months. In the normal course of events, a failure on the part of a party's representative to acquaint themselves with the Tribunal's rules would not constitute a good reason for extending the time for permitting an application for costs to be made. However, in this unusual case I can see from the correspondence that both parties were confused by the silence of the Tribunal's decision as to quantum and that they continued to correspond about the implications of that silence for some months when they should have been progressing other matters.

10. Having considered this case carefully, I have decided that the charity's application for costs should be allowed to proceed out of time. Whilst I do not know why the Tribunal's decision is silent on quantum and there may very well be a good explanation for it, it seems to me that if the Tribunal is itself in any way to blame for the confusion that arose following its decision, then it is fair and just that the time limit should be extended to permit this application to be made.

11. Turning to the merits of the application, I have noted the strongly-worded paragraph [25] of the decision referred to above and I can see why the charity takes the view that it provides a basis for the making of a costs application based on unreasonable conduct by HMRC. If the failure to consider properly the applicability of a relevant legal authority had led HMRC to defend proceedings which could never have been defended successfully, then there is indeed a strong argument that the defence of the proceedings was unreasonable.

12. It follows that, if the applicability of the *Gables Farm* decision was the only issue on which the charity's appeal had turned, then it is likely that I would decide this application in favour of the charity. However, it is clear from the Tribunal's decision that there was another issue which needed to be resolved at the substantive hearing. That was a conflict of evidence at the heart of the charity's case as to whether dogs had been re-homed by the charity in exchange for consideration or without consideration but with the new owner making a donation to the charity. In the past, a different firm of accountants acting for the charity had written to HMRC stating that the charity received a donation only, whereas witness evidence was presented to the Tribunal from the charity's staff and former staff to the effect that there had been a price list for the dogs and that a sale of the animal had taken place so that this exchange was a business activity for VAT purposes. The Tribunal heard evidence from the former Finance Director of the charity, who said that he had been completely unaware of the representations made to HMRC about the receipt of donations only, even though they were made by professional advisers acting on the charity's behalf. Mr Mobee very fairly accepted in the hearing before me that this crucial point had not been contained in the witness statement which had been served but had emerged during questioning of the witness.

13. The Tribunal made a finding of fact at paragraph [12] of its decision that the charity had received consideration for the re-homed dogs, explicitly accepting the evidence of the charity's witnesses that the representations made by the accountants were not only incorrect but also that they had been made without the charity's authority. It seems to me that it was only once this key evidential point was resolved

by the Tribunal that the similarity of this charity's activities to those in the *Gables Farm* case was fully apparent.

14. Mr Mobee submitted that there was other evidence previously available to HMRC in support of a finding that consideration had been received, including the comments of HMRC's own officers following visits to the charity. I accept that, but it nevertheless seems to me that there was a serious evidential flaw in the charity's case on this crucial point as a result of the previous representations made to HMRC on its behalf. It also seems to me that HMRC was entitled to put the charity's witnesses to the test in an oral hearing and to have the Tribunal rule upon the issue in dispute. I do not consider that HMRC's decision to do so constituted unreasonable conduct of the proceedings but rather that it reflects usual litigation practice. I do not consider that HMRC could have settled the charity's case as it appeared on the papers in view of the conflict of evidence it contained, as only the Tribunal could make the relevant finding of fact having heard from the witnesses.

15. Mr Mobee referred me to a number of decisions of the First-tier Tribunal on the exercise of its costs jurisdiction and, in particular, what sort of conduct constitutes unreasonable conduct for the purposes of rule 10. The authorities he referred me to each turn on their own facts and do not establish precedent. I have, however, been assisted by a decision of Judge Bishopp CP in the Upper Tribunal (Tax and Chancery Chamber) in the case of *Gheorge Calin Cantana v HMRC* [2012] UKUT 172 (TCC) in which it is confirmed at paragraphs [15] and [16] that the decision on costs is an exercise of judicial discretion. Having considered all the circumstances and for the reasons given above, I now exercise that discretion in refusing this application.

16. 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.

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 16 October 2013