[2019] UKFTT 701 (TC)

TC07473

Appeal number: TC/2019/01498

COSTS APPLICATION – whether Appellant behaved unreasonably in bringing and conducting his appeal – whether Appellant behaved unreasonably in failing to withdraw from his appeal and failing to to appear at the hearing - Yes
HMRC's application for costs allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MUKHTER AHMED **Appellant**

- and -

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

TRIBUNAL: G NOEL BARRETT
PRESIDING MEMBER

Decided on the papers with representations from Mr Connor Fallen of HMRC, as contained in HMRC's Notice of Appeal. HMRC's application and representations having been served on the Appellant, no reply or other communication has been received from him)

DECISION

BACKGROUND

1. On 11 March 2019 the appellant lodged a notice of appeal with the Tribunal against HMRC's refusal to review its decisions to impose penalties against the appellant for late payment of Self-Assessment Tax for the tax year 2010/11 and late filing of his return for the tax year 2011/12.

2. The grounds of appeal appeared to be that a) the appellant had sold his business in 2011 and was under the impression that his accountant had finalised everything; b) he did not know he had to continue filing self-assessment returns as he was no longer self-employed; c) he was subsequently advised otherwise and filed his self-assessment; d) he has liaised with HMRC on numerous occasions and that whilst his 2012/13 return was accepted by HMRC, the charges (sic penalties) for the 2010-11 and 2011-12 tax years remain outstanding; he did not realise, until shortly before appealing to HMRC that the penalties were outstanding against him.

3. Numerous letters and notices of assessment were sent by HMRC to the appellant to his registered addresses, firstly to Oak Street and latterly, since July 2012 to The Mount. (The Mount being the appellants address as stated on his Notice of Appeal)

4. The appellant made his appeal to HMRC on 20 December 2018. He should have appealed against the penalty decision for the 2010-11 tax year at the latest by 10th May 2012 and against the penalty for the 2011-12 tax year at the latest by 16th May 2013.

5. HMRC refused the appellant's appeal as it was late and the appellant had not provided any reasonable excuse for the lateness of his appeal and declined to accept the appellant's appeal on being requested to review the matter, for the same reasons

6. The matter was assigned to proceed under the basic category and was listed to be heard as a permission to appeal late followed by a hearing of the substantive matter, if the late appeal was allowed

7. On 20 March 2019 standard directions were issued to the parties and the appeal was listed to be heard on the 1st August 2019.

8. On 30 May 2019 HMRC served noticed, along with its bundle of documents requesting that the appellants appeal be rejected.

9. The appellant wrote to the tribunal by email on 21st June 2019 repeating some of his grounds of appeal; offering to agree a payment plan; stating that he was anxious about the appeals process; stating he was unsure as to whether or not he needed to attend and asking the Tribunal to explain the appeals process.

10. The appellant was informed by the Tribunal of the nature of the appeals process; that the Tribunal could not assist with a payment plan; that he needed to contact HMRC;

that he was expected to attend the hearing to put forward his case; and that if he did not do so that the Tribunal may decide the matter in his absence.

11. No further communication was received from the appellant.

12. The Hearing proceeded on 1 August before me and Mrs Bridge. As the appellant was not in attendance I asked the Tribunal Clerk to telephone the appellant to establish that he was aware of the hearing and as to why he was not in attendance.

13. My own notes of that telephone conversation accord with the details provided by HMRC in their Notice of Application.

14. Namely that the appellant admitted that; he was fully aware of the hearing, had no intention of attending the hearing; he had not notified the Tribunal that he would not be attending; he was seeking a payment plan; he knew that he owed the money (sic penalties); he had been "chancing his arm as he had not wanted HMRC to collect the money quickly or to have bailiffs turning up"; he knew that he was liable to pay the penalties

15. When asked whether he wished for the appeal to continue in his absence; to ask for it to be adjourned; or to withdraw his appeal, the appellant confirmed he wanted to withdraw his appeal.

16. On 17 August 2019 the respondent applied for its costs incidental to and consequent upon the appeal, to be paid by the appellant and provided a schedule of costs with its application to enable the Tribunal to make a summary assessment of those costs.

THE LAW ON UNREASONABLE BEHAVIOUR COSTS ORDERS

17. The Rules of this Tribunal provide that the Tribunal may only make an order for costs in certain circumstances. The only circumstance which is suggested to be relevant in this case is in Rule 10(1)(b) which provides for the power to make an order for costs: if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

18. When addressing the question of what conduct is unreasonable, the guidance given by the Upper Tribunal in *Catana* [2012] UKUT 172 TCC was that acting 'unreasonably in bringing, defending or conducting the proceedings' captured behaviours where: an appellant has unreasonably brought an appeal which he should know could not succeed; a respondent has unreasonably resisted an obviously meritorious appeal; or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.

19. In *Distinctive Care Ltd* [2018] UKUT 155 (TCC), the Upper Tribunal endorsed what it had said in *Market & Opinion Research International Limited v HMRC* [2015]

UKUT 0012 (TCC) ("MORI") at [22] and [23] on the meaning of unreasonable behaviour, which it summarised as: [44]…. (1) the threshold implied by the words "acted unreasonably" is lower than the threshold of acting "wholly unreasonably" which had previously applied in relation to proceedings before the Special Commissioners; (2) it is possible for a single piece of conduct to amount to acting unreasonably; (3) actions include omissions; 2 (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct; (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct; (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision; (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and (8) the power to award costs under Rule 10 should not become a "backdoor method of costs shifting". [45.] …. questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight.

20. In MORI the Upper Tribunal had also said of acting 'unreasonably': [49] 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. ….

THE BURDEN AND STANDARD OF PROOF

21. The burden of proving that the appellant has acted unreasonably rests with the respondents who must prove to the normal required civil standard "on the balance of probabilities" .

EXAMINATION OF UNREASONABLENESS IN THE BRINGING AND SUBSEQUENT CONDUCT OF THE PROCEEDINGS AND THE WITHDRAWAL FROM THE PROCEEDINGS ON THE DAY OF THE HEARING

Were the proceedings brought unreasonably?

22. The appellant's grounds of appeal are based in part in his mistaken beliefs as to the relevant law and his obligations thereunder and in part on the basis that he alleges that he was unware of the penalties until shortly before he appealed to HMRC.

23. As Judge Hellier in *Garnmoss (Trading as Parnham Builders) v HMRC)* [2012] UKFTT 315 (TC) said at [12] that,

> "What was clear is that there was a muddle and bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act

> does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse"

24. The proposition, whilst made in a case involving VAT is one with which I concur and which is just as relevant to direct tax cases as it is to indirect tax cases, namely that a mistake which has not been reasonably made cannot be a reasonable excuse.

25. Subsequently it was noted in another VAT case, *County Inns Ltd v HMRC* [2015] UKFTT 204 (TC), at [34] that "the Tribunal [in Garmoss] was not ruling out the possibility that an act or omission can be a mistake and a reasonable excuse. Instead, the Tribunal was in our view making the straightforward point that a mistake is not enough on its own to excuse a default; the mistake has to have been reasonably made in order to constitute a reasonable excuse."

26. It follows in my view whether in direct or indirect tax cases that a mistaken belief must be held reasonably for that mistaken belief to be capable of amounting to a reasonable excuse.

27. Judge Medd in *The Clean Car Company Limited v C&E Commissioners* [1991] VATTR 234 is widely applied in the field of tax and has been approved subsequently many times. Judge Medd stated;

> "…the test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do… the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer … such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously.

28. I do not accept that the appellant's mistaken belief was entirely unreasonably held in the context of these cited case extracts. Whilst the areas of law in question – as to whether the appellant needed to pay self –assessment tax and as to whether or not he needed to file a self-assessment return, are not complex areas of law.

29. Never-the-less I would not have expected an unrepresented appellant to be aware of the case law in this area, nor to understand the nuances of whether a mistaken belief was of itself a reasonable one to hold and so amounted to a reasonable excuse.

30. I do not however accept that the appellant was unaware of the penalties until shortly before making his appeal. HMRC's bundle prepared for the previous hearing, shows that numerous letters and notices were issued to the appellant to the correct address and further he admits that he liaised with HMRC on multiple occasions.

31. No explanation was ever proffered by the appellant as to why so many letters to him were allegedly going astray?

32. Just as the appellant was almost bound not to succeed in his substantive appeal, nor was he likely as a preliminary matter, to have even overcome the hurdle of having his appeal admitted late, given the excessive lateness of his request for a review which was some five and half years late, the weaknesses in his substantive appeal, the balance of prejudice to the parties of the delay and on review, the evaluation of the circumstances of this case.

33. Never-the-less I do not accept that it is reasonable for an unrepresented appellant to be taken to understand the detailed tests propounded in *Denton v T H White Ltd (and related appeals)* [2014] EWCA Civ 906 and *William Martland* [2018] UKUT 178 (TCC) before those cases have been put (and indeed explained) to the appellant as they were in HMRCs hearing bundle and Statement of Case.

Were the proceedings conducted by the appellant unreasonably after having been brought?

34. The appellant contributed little if anything to the proceedings once they were underway.

35. To my mind it would be difficult to imagine an appellant who was less engaged with his own appeal. The appellant seemingly engaged just two or three times throughout the whole process. Firstly by his letter of 20 December 2018, secondly by his application to appeal to this Tribunal and thirdly through his email to the Tribunal dated 21 June 2019.

36. However, in my experience, unrepresented litigants, frequently do little to promote their cases until they are absolutely forced to do so. Few litigants in person understand, let alone research, their obligations. Nor do they understand such notions as "the burden" let alone "the standard" of proof.

37. It seems to me that where a number of litigants in person act in particular way that they could be properly be attributed to being a large enough class to be labelled as "the reasonable tax payer".

38. I am inclined to this view and to find that Mr Ahmed acted as a reasonable tax payer would have done, had they been in Mr Ahmed's position and thus to construe that Mr Ahmed acted reasonably in doing (or indeed not doing) what he did and did not do, up to a point in time.

39. On the other hand, unless or until the appellant withdrew his appeal, HMRC had no course open to it other than to pursue the matter and prepare the necessary papers, including the hearing bundle and their Statement of Case.

40. I cannot however ignore the fact, that despite HMRC serving early notice in June 2019 detailing their grounds for rejecting both the appellant's application to appeal late and his substantive appeal, still the appellant took no action.

41. Whilst it remains in my view debateable as to whether a reasonable tax payer in Mr Ahmed's position would have appealed in the first place; whether having done so they would have pursued their appeal more vigorously; and, as to whether or not a reasonable tax payer would have withdrawn their appeal at an earlier juncture. It seems to me that a reasonable tax payer would and indeed should have withdrawn their appeal at the very latest within a few days of being served with the respondents bundle and notice of application in June 2019, by which time it should have been clear to the appellant, that both his application to appeal late and his substantive appeal were hopeless.

Was it unreasonable for the appellant to withdraw his appeal on the day of the hearing?

42. Mr Ahmed made no attempt to contact either the Tribunal or HMRC on the approach of the hearing date, to confirm that he did not intend to attend. Indeed it seems plain to me, had I not asked the Tribunal Clerk to telephone the appellant on the day of the hearing that he would not have engaged further.

43. The appellant clearly had no intention of attending the Tribunal hearing.

44. Had Mr Ahmed attended the hearing and provided oral evidence and explanation in support of his appeal and/or understanding or indeed misunderstanding of his position, then it is conceivably just possible that he would not have found himself in the position in which he now finds himself and that the respondents would not have made his application.

45. I have no doubt that Mr Ahmed acted unreasonably on the day of the hearing and that a reasonable tax payer in Mr Ahmed's position would have given notice to the Tribunal prior to the hearing date of their intention to withdraw their appeal in their absence.

46. In my experience, where the appellant appears at a hearing and argues his case, even when the appellant has a weak case and is unlikely to succeed, HMRC rarely make applications for costs against appellants in such cases.

47. It appears to me that what has driven the respondent's into making this application is not the original appeal itself, nor indeed the conduct of the appeal by the appellant, but primarily his failure (without having given any prior notice thereof) to attend the hearing itself.

48. This case was listed as a basic case and generally such cases, involving as the often do, litigants in person, are conducted less formally than more complex cases.

49. I remain conscious of Judge Berners decision in *Versteegh Limited and Others v HMRC* [2014] UKFTT 397 (TC) in which he states:

> "In the context of the First-tier Tribunal as a whole, a full costs-shifting jurisdiction is an unusual feature. There is, as a consequence, no detailed guidance in the Tax Tribunal Rules as to the exercise of the Tribunal's

discretion in this respect. This particular costs jurisdiction has more in common with that applicable in the courts, and accordingly it is clear to me, and indeed it was common ground that the principles applicable under the Civil Procedure Rules ("CPR"), and the relevant authorities in that respect, are equally applicable to the exercise by this Tribunal of its power to award costs. These are a reflection of the same overriding objective, namely to deal with cases fairly and justly."

50. Nevertheless I conclude on balance that a reasonable tax payer in the appellant's position would have withdrawn from the proceedings on having read HMRC's bundle of documents and Statement of case and that the appellant acted unreasonably in not so doing and withdrawing from these proceedings within a few days of receiving the respondent's bundle of documents and Notice of Application. That in my view is the point in time after which the appellant acted unreasonably. It follows therefore that the appellant should be responsible for paying the respondents costs from that point onwards

51. I do not however on balance accept that the appellant acted unreasonably in first lodging his appeal, nor that he acted unreasonably in the conduct of his appeal up until a few days after the date upon which he had received the respondent's bundle of documents and Notice of Application.

ORDER

52. The Tribunal ORDERS after summary assessment that the appellant should pay to HMRC a contribution in the sum of £500 towards the respondent's costs for its preparation for and attendance at the hearing on 1st August 2019, such contribution towards the respondent's costs to be paid no later than 28 days after the date of this decision

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. 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 35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

G NOEL BARRETT
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 19 NOVEMBER 2019