Neutral Citation: [2024] UKFTT 00236 (TC)

Case Number: TC09110

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2022/11156

Procedure – Application for costs by successful appellant – Whether Respondents acted unreasonably in defending proceedings – Yes – Application allowed

Judgment date: 20 March 2024

Before

TRIBUNAL JUDGE BROOKS

Between

AFTAB AHMED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The application was determined on 15 March 2024 without a hearing on the basis of the written submissions of the Appellants dated 8 December 2023; the response of the Respondents, dated 12 February 2024; and the Appellant's reply, dated 1 March 2024

DECISION

INTRODUCTION

1. On 8 December 2023, having succeeded in his appeal, the Appellant, Mr Aftab Ahmed, made an application for costs (the "Application"). The Application is opposed by HMRC who provided their written submissions in response to the Application on 12 February 2024. On 1 March 2024 the Tribunal received written submissions, on behalf of Mr Ahmed, in reply

BACKGROUND

2. Mr Ahmed, a director of five companies, filed his 2013-14 personal self-assessment tax return on 31 December 2014. On 2 March 2016 he "signed off", as director, each of companies accounts for accounting periods ended 31 December 2014. These showed that the loans from the companies to Mr Ahmed had been written off with the effect, of which Mr Ahmed accepted he knew, of increasing his 2013-14 liability to income tax. However, the exact amounts written off (and therefore the increased tax due) remained uncertain and was not finalised or agreed with HM Revenue and Customs ("HMRC") for some years with the result that it was too late for Mr Ahmed to amend his 2013-14 tax return (see s 9ZA Taxes Management Act 1970).

3. On 19 March 2020 Mr Ahmed was issued with a 'discovery assessment' made by HMRC under s 29 TMA of the Taxes Management Act 1970 ("TMA"). Having first appealed to HMRC, Mr Ahmed notified his appeal to the First-tier Tribunal on 26 May 2022. At the conclusion of the hearing, on 7 November 2023, the Tribunal (Judge Brooks and Mrs Neill) in an extempore decision allowed Mr Ahmed's appeal. On 13 November 2023 the Tribunal issued a "short" decision pursuant to Rule 35(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 as both parties agreed that it was unnecessary for the decision to include full or summary reasons of fact and reasons for the decision.

4. At the hearing HMRC argued that the assessment was to recover a loss of tax that had arisen as a result of Mr Ahmed's careless behaviour in relation to income he had received in 2013-14 as a result of the written off loans. Accordingly, because of Mr Ahmed's carelessness, HMRC contended that the extended time limit under s 36 TMA applied, and the assessment was therefore in time, valid and should be upheld.

5. Mr Ahmed, who was represented at the hearing (and in relation to the written submissions made for this application) by Mr Liban Ahmed of CTM Tax Litigation Limited, did not dispute that if his actions were found to be careless the extended time limit under s 36 TMA did apply and the assessment was valid. However, he contended that he was not careless and, as such, the assessments were out of time, invalid and his appeal should succeed.

6. It was only when the skeleton argument on behalf of Mr Ahmed had been filed and served, 14 days before the hearing, that it had become apparent that the sole issue before the Tribunal was whether Mr Ahmed was careless, ie whether Mr Ahmed failed to take reasonable care to avoid bringing about a loss of tax (see s 118(5) TMA). This was confirmed by the parties at the commencement of the hearing. Until then it had been understood that in addition to the carelessness issue there was a separate issue regarding the date on which the assessment was raised and sent to Mr Ahmed and whether that assessment was in time even if extended time limit contained in s 36 TMA was applied. Indeed in his Notice of Appeal Mr Ahmed had argued that as he had not received the assessment until 9 April 2020 it was out of time.

7. HMRC's case was that Mr Ahmed, who was aware that the loans had been written off on 2 March 2016 and the consequent tax effect of this, was careless because he failed to notify HMRC of the position as he was required to do so by s 118(6) TMA. In his evidence, Officer Smethurst, the HMRC officer who had made the discovery assessment, said that Mr Ahmed would not have been careless if he had notified the "income tax department" of HMRC.

8. Although Mr Ahmed did not notify HMRC's "Income Tax Department", HW Fisher and Company, the auditors of the five companies of which he was a director did write to HMRC on 8 April 2016 referring to the written off loans. This was shortly after the companies corporation tax returns had been filed on 30 March 2016. That correspondence resulted in a telephone conversation between HMRC Officer Keith Alexander and Mr Gary Window of HW Fisher and Company on 5 July 2016.

9. A contemporaneous note taken by Officer Alexander of that conversation included the following paragraph:

> "… I then also needed to explain that my team was part of a new way of working larger cases that tried to make the process considerably less disjointed when other heads of duty were involved. **I explained that the review would be looking at Corporation Tax, Income Tax (including reviews of the directors' private and personal spending**), VAT and Employer Compliance duties." (emphasis added).

Officer Alexander's Note also records:

> "The other areas of the review I needed to outline for him related to the directors' private and personal affairs."

10. In the light of this evidence the Tribunal concluded that Mr Ahmed had, through his accountants/auditors, taken reasonable steps to notify HMRC of the written off loans and consequent increase in his liability to tax.

11. In reaching that conclusion the Tribunal noted that s 118(6) TMA referred to "Her [now His] Majesty's Revenue and Customs" and not any particular department of HMRC. Although subsequent correspondence may not have referred specifically to Mr Ahmed's personal tax affairs and an enquiry was not opened until some time later, given Officer Alexander's comments that the review would be looking at Corporation Tax, Income Tax (including reviews of the directors' private and personal spending), the Tribunal found that Mr Ahmed did take reasonable care and that his actions could not be described as careless.

Law

12. The ability of the Tribunal to make an order for costs is derived from s 29 of the Tribunals Courts and Enforcement Act 2007 ("TCEA") which provides:

> (1) The costs of and incidental to—
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> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
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> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

13. As is clear from s 29(3) TCEA, the power of the Tribunal to award costs is also subject to Tribunal Procedure Rules. Insofar as it applies to standard category cases, such as the present, rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") provides:

> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) —
>
> (a) …

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …

(c) …

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

…

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) …

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

14. The Upper Tribunal ("UT") in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) ("*MORI*") observed at [15] that:

> "The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise."

The UT continued, at [49]:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose… 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."

15. *MORI* has been endorsed by the UT in *Distinctive Care Ltd v HMRC* [2018] UKUT 155 (TCC) ("*Distinctive Care*"). At [38] – [39] of its decision the UT referred to the earlier decision of the UT in *Catanã v HMRC* [2012] UKUT 172 (TCC) saying;

> "38. As was said by the Upper Tribunal in *Catanã* at [14] in relation to the meaning of the phrase "bringing, defending or conducting the proceedings" in Rule 10(1)(b):
>
> > "It is, quite plainly, an inclusive phrase designed to capture cases in which 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."
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> 39. In agreeing with this formulation, we consider that in a costs application made against an appellant, the actions of that appellant (and its representative) in bringing the proceedings are to be considered; for an application made against a respondent, the actions of that respondent (and its representative) in defending the proceedings are to be considered; and in both cases their respective actions (and those of their representatives) in conducting the proceedings are to be considered. These are the relevant actions to be considered for the purposes of Rule 10. It may be that some earlier actions of one party or the other might inform the FTT's assessment (for example by demonstrating bad faith), but the focus of the assessment remains on these relevant actions, not on any earlier actions.,

16. At [44], the UT summarised the approach set out in relation to whether a party had acted unreasonably as follows:

> "(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;
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> (2) it is possible for a single piece of conduct to amount to acting unreasonably;
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> (3) actions include omissions;
>
> (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
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> (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."

17. At [45] the UT added the following, which it described as a "small gloss", to the summary:

> "... that (as suggested by the FTT in *Invicta Foods Limited v HMRC* [2014] UKFTT 456 (TC) at [13]), 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."

18. The decision of the UT in *Distinctive Care* was upheld by the Court of Appeal in *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010.

DISCUSSION AND CONCLUSION

19. Mr Ahmed contends that HMRC, by persisting with an argument that on the evidence they knew could not succeed, have acted unreasonably in defending these proceedings. In essence HMRC's case is that just because their argument that Mr Ahmed was careless was unsuccessful it does not follow that they acted unreasonably by pursuing it.

20. HMRC also contend that if they had acted unreasonably in defending or conducting the appeal the Tribunal would have referred to it either in the extempore decision given at the conclusion of the hearing or in the subsequent short decision. The fact that this was not mentioned by the Tribunal confirms that HMRC were not unreasonable in conducting or defending the appeal.

21. However, I consider this argument to be misconceived. In giving its decision in this case the Tribunal was concerned with the issue before it, ie whether Mr Ahmed was careless. The question of costs or whether HMRC had been unreasonable was not before the Tribunal as this was a "standard" as opposed to a "complex" (cost shifting) category of appeal. As such, the absence of any comment or observation by the Tribunal does not assist HMRC.

22. Although it was only shortly before the hearing that it became apparent that the sole issue before the Tribunal was whether Mr Ahmed had been careless, the argument abandoned by Mr

Ahmed, regarding whether the assessment had been raised and sent to him in time, could only have arisen if it had first been established that Mr Ahmed had been careless.

23. HMRC's case (as summarised at paragraph 7, above), that was maintained at the hearing, was that Mr Ahmed had been careless because he failed to notify HMRC that the loans had been written off on 2 March 2016.

24. However, given that under the case management directions issued by the Tribunal on 19 December 2022 HMRC were required to, and did, prepare the Hearing Bundle which included the auditors letters of 8 April 2016 and the contemporaneous note of the 5 July 2016 telephone converstion, it must follow that HMRC were aware, or certainly should have been aware had a rigorous review been undertaken, that Mr Ahmed through his auditors had notified HMRC shortly after the loans had been written off.

25. In such circumstances I consider that HMRC's reliance on the argument, up to and throughout the hearing, that Mr Ahmed was careless by not notifying HMRC of his position when he clearly did so to be unreasonable and as a result his application for costs must succeed.

26. Mr Ahmed sought a summary assessment of his costs and included a schedule of these costs (totalling £26,208 with an additional £1,800 incurred in respect of the Reply to HMRC response to the Application). HMRC, in their response to the Application requested further time to provide a detailed response on the issue of quantum, Mr Ahmed objects to further time being allowed as this matter should have been dealt with together with the response to the Application.

27. Other than note that the sums sought by Mr Ahmed are clearly within the range of a summary assessment by the Tribunal I shall leave it to the parties to reach an agreement on costs with the option of applying to the Tribunal within 28 days for a summary assessment in the absence of agreement.

28. I therefore allow the application and direct that HMRC pays Mr Ahmed his costs of and incidental to the appeal with such costs to be agreed. In the absence of agreement either party may apply to the Tribunal within 28 days for a summary assessment of costs.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 20th MARCH 2024