Neutral Citation: [2025] UKFTT 21 (TC)

Case Number: TC09393

FIRST-TIER TRIBUNAL
TAX CHAMBER

Paper

Appeal reference: TC/2019/09340

COSTS – wasted costs claim – withdrawal of decision by HMRC – promoted by misunderstanding between the parties – no unreasonable conduct in the proceedings

Determined on: 19 December 2024
Judgment date: 8 January 2025

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

RAMACHANDREN NARAYANASAMY

Appellant

and

HIS MAJESTY'S REVENUE & CUSTOMS

Respondents

The Tribunal determined an application for costs on 19 December 2024 without a hearing under the provisions of rule 29 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 the parties having consented to the application being determined without a hearing.

DECISION

INTRODUCTION

1. This is an application by Ramachandren Narayanasamy (**Appellant**) for and award of costs under the provisions of rule 10(1)(a) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 (**FTT Rules**). The claim is made in the sum of £16,713 and the Appellant invites the amount to be summarily assessed. HM Revenue & Customs (**HMRC**) object to the application.

RELEVANT RULES ON WASTED/UNREASONABLE COSTS

2. Section 29 Tribunal Courts and Enforcement Act 2007 provides that the award of costs of and incidental to all proceedings in the Tribunal shall be at the discretion of the Tribunal and subject to the FTT Rules.

3. Rule 10 FTT Rules provides that the Tribunal may only make an order for costs in certain limited cases including: a) wasted costs; b) unreasonable costs and c) in a case allocated to the complex track and in respect of which the appellant has not opted out of the costs' regime. This is not an appeal allocated to the complex category.

4. The approach to be adopted in determining whether a wasted or unreasonable costs order should be awarded is essentially the same, the difference between the two orders is who is to pay the costs. In the case of a wasted costs order it is the representative and in the case of unreasonable costs it is the litigating party. Where the representative and the party are the same organisation there is thus no difference.

5. Considering the case law regarding awards of unreasonable costs it is established:

(1) Costs may be awarded under rule 10(1)(a) or (b) in respect of improper conduct, unreasonable conduct, and negligence (see *Cancino v Secretary of State for the Home Dept* [2015] UKFTT 59 (IAC) applying the provisions of the CPR and case law arising)

(2) The meaning of each of those types of conduct has been articulated by the High Court in *Ridehalgh v Horsefield* [1994] Ch 205 and may be summarised as:

(a) Improper conduct – that which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. Significant breach of a substantial duty imposed by a relevant code of professional conduct. Improper according to the consensus of professional (including judicial) opinion

(b) Unreasonable conduct – that which is vexatious, designed to harass the other side rather than advance the resolution of the dispute. Does not include conduct leading to unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation.

(c) Negligence - failure to act with the competence reasonably to be expected of ordinary members of the profession.

(3) When considering entitlement to costs the conduct need not be wholly unreasonable and a single act or omission may be sufficient but there is a range of reasonable conduct (see *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC)

(4) It is the handling of the proceedings which is relevant (see *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010 (***Distinctive Care***)).

6. In respect of the approach to be taken to considering whether a decision to withdraw amounts to unreasonable conduct the Tribunal is also bound to follow the approach directed by the Upper Tribunal in *Tarafdur v HMRC* [2014] UKUT 00362 in which the Upper Tribunal considered the approach to be to answer the following questions:

(1) What was the reason for withdrawal of that party from the appeal?

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in proceedings?

(3) Was it unreasonable for that party to not to have withdrawn at an earlier stage?

7. The test for whether indemnity costs are payable requires that the underlying conduct must be unreasonable to a high degree and "out of the norm" (see *Excelsior Commercial & Industrial Holdings Ltd v Sailsbury Hammer Aspden & Johnson* [2002] EWCA 879 as applied in a Tribunal context in *Ad Hoc Property Management Ltd v HMRC* [2019] UKFTT 315).

BACKGROUND LEADING TO THE CLAIM FOR COSTS

8. The appeal in this matter concerned a closure notice issued by HMRC and associated penalty in respect of tax year ended 5 April 2013 issued on 28 February 2019.

9. In that year, the Appellant had disposed of his practice as a solicitor to a limited company. In his personal tax return he accounted for a capital gain on the disposal. His return was prepared on the basis that the valuation of goodwill in the business was £300,000.

10. HMRC opened an enquiry into the return and referred the question of valuation to the Shares and Asset Valuation (**SAV**) team as the valuation by the Appellant had not been determined on the basis of a professional valuation. SAV initially valued the goodwill at £35,000. Correspondence ensued and SAV revised the valuation to £165,000. The Appellant was invited to agree such valuation and apparently did so in correspondence dated 26 January 2018.

11. Following that agreement the focus of correspondence moved to determining whether an additional £100,000 might be attributed to the value of leases held personally by the Appellant but used for the benefit of the business after disposal to the limited company. HMRC considered there had been no disposal of the leases. HMRC issued the closure notice on the basis that the capital gain on disposal of the company was £165,000, and that the £100,000 credited to the director's loan account over and above the transfer of goodwill required to be taxed as a distribution to the Appellant by the company.

12. The closure notice was appealed. On review the decision was upheld. When the appeal was notified to the Tribunal and so far as relevant the Appellant contended:

> "1. The share valuation office and HMRC have resisted and declined to consider the inherent goodwill value of the business when my business was transferred to the limited company on March 2013, on the basis that the leases were in my personal name. I maintain that the leases were held on trust as nominee fand the transfer of ownership to the limited company is in hand at present. The limited company is benefitting from the lease terms to date and the harsh penalties imposed for this should not apply in my case.
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> …
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> 4. On the matter of goodwill the share valuation office appointed by HMRC did not deal with my matter efficiently as an officer assigned to the case came up with a tiny figure of £24,000 which was later increased to £165,000.00 following the transfer of my case to a more experienced officer. …"

13. HMRC's first statement of case recorded at paragraphs 3, 59, 99 and 102 that they understood the £165,000 had been agreed for the valuation of the goodwill on disposal. The statement of case narrated the correspondence between the parties regarding the ownership and valuation of the leases. At paragraph 77, the points in issue are identified. Point (i) is a general point regarding quantum of the amendment, point (ii) as "whether the £300,000 credited to the Company's Director's Loan Account ("DLA") on incorporation of the Appellant's sole trade business included any amount in respect of the leases on the business premises."; (iii) concerned the penalties. Paragraphs 107 – 114 concern issue (ii) and are introduced: "the Appellant states that £135,000 of the dividend income should be reduced by £100,000 to account for the two leases on the business premises …". HMRC then contend in the statement of case that no such reduction is appropriate because the Appellant continued to own the lease interests.

14. The statement of case was amended following an ADR in respect of related but not directly relevant matters. The relevant parts of the statement of case summarised and referred to above were not amended.

15. Directions were issued, and on 15 October 2022 the Appellant served his witness statement in the appeal. The statement set out how the Appellant had established and grown his solicitor's practice from, May 2004 to the date of disposal in March 2013. Various (impermissible) legal submissions were made in the statement concerning the legal and tax definitions of goodwill. However, based on those submissions the Appellant calculated the value he estimated the goodwill of the business to be as £311, 612 stating "In light of the above, I honestly believe that the goodwill claimed was reasonable and respectfully request the Tribunal to allow the same."

16. The Appellant also set out his assessment of the basis on which lease goodwill could or should have been attributed to the leases and thereby the location of the business. As he had only attributed total goodwill to the value of the disposal the higher value he explained in the statement for business goodwill would have been in the alternative to the lease valuations.

17. HMRC did not serve any witness statements.

18. Following receipt of the Appellant's witness statement, on 19 January 2023, HMRC made an application that the Appellant be directed to serve amended grounds of appeal and for there to be an amended statement of case served following receipt and consideration of the amended grounds of appeal. The basis of the application was expressly that the original and first amended statement of case had been prepared on the premise that the parties had agreed the valuation of goodwill for the business but that the witness statement indicated that the valuation was "under contention". The application notes that if the valuation were challenged, they would need to amend their statement of case and may require to serve witness evidence by the Respondents, presumably supporting the valuation they had previously considered had been agreed.

19. The Appellant objected to the application but on 21 December 2023 it was granted as "in the interest of fairness and justice and the efficient conduct of [the] appeal" that amended grounds be served.

20. In the amended grounds served on 28 February 2024 the Appellant expressly pleaded that his appeal concerned the valuation of goodwill of the business and valuation of the goodwill of the lease properties. The legal submissions previously made in the witness statement were repeated and applied, following the structure used by SAV, to the facts of the business disposed of by the Appellant. The Appellant contended that various of the assumptions underpinning the £165,000 were wrong and proposed an alternative calculation justifying the returned £300,000 valuation.

21. Also reflecting the witness statement the Appellant made submissions justifying attribution of value to the leases which were again contended to have been disposed of for the benefit of the limited company.

22. On 29 April 2024 HMRC notified that they no longer intended to defend the appealed decision.

SUBMISSIONS

23. The Appellant contends that in withdrawing from the appeal approximately 5 years after issuing the closure notice and 9 years after the enquiry began HMRC acted improperly, unreasonably, or negligently in their conduct of the appeal. He particularises the history of the enquiry and appeal and accuses HMRC of mal fides during the review process. Following HMRC's objection the Appellant highlighted various aggravating factors of which he contends that HMRC were aware, and which justify the claim that HMRC's conduct was unreasonable. He also, latterly, contends that the award should be made on an indemnity basis.

24. HMRC oppose the application on the basis that they reasonably considered that the question of valuation was agreed until they received the Appellant's witness statement which caused them to question whether the valuation was or was not agreed. They contend they acted promptly and reasonably in applying for directions requiring the Appellant to amend its grounds of appeal. Upon confirmation as to the issues in dispute they reappraised the question of valuation and accepted the Appellant's original valuation was not unreasonable. They then promptly notified that they were no longer defending the appeal. HMRC further contend that if there is any liability to pay costs on their part the assessment should be on a standard basis and should also take account of the Appellant's conduct in the appeal.

DISCUSSION

25. A claim for costs under either rule 10(1)(a) (or (b)) arises where there has been unreasonable conduct in respect of the proceedings but not in respect of the enquiry preceding the appeal. Accordingly, I am required to consider HMRC's conduct only from 13 December 2019 vis a vis the conduct of the appeal.

26. It is plain to me that there has either been a significant misunderstanding between the parties, or the Appellant changed his position in this appeal.

27. It is unquestionable that HMRC believed that the issue of valuation of the business previously carried on by the Appellant and disposed of to a limited company had been agreed as £165,000 and that the issue to be determined was whether the leases had been contributed by the Appellant to the limited company. That belief is apparent from the terms on which the statement of case was drafted by reference to the narration of the history of the dispute, the terms on which the conclusions in the closure notice were described, the articulation of the issue and their analysis of their own case.

28. On the basis of the documents available to me, in particular the facts and correspondence narrated in the statement of case, with which the Appellant did not apparently take issue at the time, I also consider that HMRC's belief was reasonably based.

29. However, it is easy for me, with the benefit of hindsight and independent objectivity to impartially read the pleadings and conclude that HMRC's position as to the agreement on valuation was obvious. The Appellant was in the thick of the dispute. He had been engaged with HMRC and had persistently sought to defend his self-assessment at least to the tune of a valuation of the assets of the business (which he considered included the leases albeit that he was strictly the tenant) which had been transferred. I am therefore prepared to conclude that it was, at worst less obvious, and very probably not obvious to the Appellant that HMRC did not

understand the basis on which he challenged the conclusions and adjustment in the closure notice.

30. I therefore find that until the Appellant served his witness statement on 15 October 2022 HMRC reasonably failed to appreciate the basis of the Appellant's appeal. Shortly after receipt of the statement HMRC realised that there may be a misunderstanding and sought to determine whether that was or was not the case through their application to require the Appellant to amend or particularise his grounds of appeal.

31. It is unfortunate that resourcing issues at the Tribunal precluded a decision on that application for 10 months and therefore delayed the clarity needed until February 2024.

32. As I have concluded that HMRC reasonably believed that the valuation had been agreed at £165,000 those with conduct of the appeal were defending the closure notice on the basis articulated in the statement of case and by refence to a refusal to conclude that the leases had been contributed and/or that they had value. They defended the appeal on that basis until they were given reason to question the full scope of the Appellant's challenge. Once the Appellant's pleaded case had been amended the appeal was conceded within 2 months.

33. As set out at paragraph 6 above whether withdrawal from an appeal is unreasonable conduct is assessed by asking three questions. When I consider those questions, I take the view that:

(1) The reason that HMRC withdraw in April 2024 was because they had become aware that the Appellant did not accept the valuation of business goodwill as £165,000 and they therefore reconsidered the proper basis of valuation;

(2) Because they had reasonably concluded that the £165,000 was agreed and did not then question valuation of the business and focused only on the leases, they could not, until they became aware, have withdrawn earlier;

(3) It was not therefore unreasonable for them to have withdrawn earlier.

34. In this Tribunal, cost shifting is very much the exception (unless a case is categorised as complex). The Tribunal should therefore be cautious in awarding costs either under rule 10(1)(a) or (b). In this case I do not consider I am acting with any particular caution as I consider that HMRC's conduct in the proceedings was entirely reasonable in the circumstances; however, from within the midst of it I can also understand that the Appellant will be angry and frustrated that an incorrect valuation was reached and that his own valuation was subsequently accepted with no real change in the underlying evidence to substantiate it. But the fact that a mistake happens does not render conduct unreasonable, certainly in the context of a costs award.

35. Nevertheless I am concerned that it was only following confirmation that the Appellant did not accept the valuation of £165,000 that HMRC reviewed the true value to be attributed to the business goodwill. If a valuation of £300,000 or more, as per the Appellant's calculations submitted with his witness statement and amended grounds, represented an appropriate valuation when articulated in February 2024 it should have been one acceptable to HMRC in 2019 when they concluded the value was properly £165,000. I do not understand that an explanation or apology has been given by HMRC for the mistake that was made by SAV at that time. However, as determined in *Distinctive Care* conduct of HMRC during the course of an enquiry or investigation is not relevant when determining whether costs should be paid on the basis of unreasonable conduct.

36. For these reasons I reject the application for costs, and it is not therefore necessary for me to consider the basis on which costs should be awarded or any question of quantum.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 08th JANUARY 2025