# TC02071

**Appeal number: TC/2011/5954**

***Costs – s 29 Tribunals, Courts and Enforcement Act 2007 – Tribunal Procedure Rule 10 - Costs incurred before start of proceedings – Relevant behaviour of party***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**G WILSON (GLAZIERS) LIMITED** **Applicant**

**- and -**

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

**TRIBUNAL: JUDGE PETER KEMPSTER**

**DETERMINATION OF COSTS APPLICATION**

DECISION

**Background**

1. Following a hearing in Norwich on 13 October 2011 the Tribunal issued a decision notice on 11 November 2011 allowing the Applicant's appeal in part. By a letter dated 8 December 2011 the Applicant informed the Tribunal that it wished to apply for costs. By a letter dated 4 January 2012 the Tribunal reminded the Applicant of the requirements of Tribunal Procedure Rule 10 (Orders for Costs) and requested further information, including the grounds for the application.

2. By a letter dated 5 January 2012 the Applicant stated:

> "The grounds for claiming costs are that HMRC acted unreasonably in applying three default surcharges incorrectly and failed to ascertain the facts of the case despite being made aware of the circumstances by the [Applicant] and its advisors in two letters dated 27 January 2011 and 29 March 2011 respectfully [sic]."

3. The Tribunal required the Applicant to present a schedule of costs – which was done – and invited representations from the Respondents. The representations were sent on 17 February 2012 and made three main points.

(1) First, that the schedule of costs included work done outside the period when proceedings were before the Tribunal and, therefore, not covered by Rule 10:

> "The costs claimed … include costs from 27 June 2011 to 22 November 2011 (total £2,775.97). However, as the original appeal documents were not lodged with HMRC until 15 August 2011 and as the hearing of the appeals took place on 13 October 2011 then any costs incurred outside of this period should be disregarded for the purposes of Rule 10(1)(b) …"

(2) Second, that the relevant actions of the Respondents in relation to Rule 10 were those *after* proceedings have been commenced:

> ".. the only costs that can be awarded by the Tribunal are those relating to any unreasonable behaviour once proceedings have started."

(3) Third, that the Respondents had not behaved unreasonably:

> "HMRC have a duty to pursue duties which it considers to have been correctly charged ... Pending a decision by the tribunal HMRC believed that the VAT default surcharges had been correctly charged … The comments made by the Judge in the decision notice ... suggest that HMRC did not act unreasonably during the course of the hearing."

**Legislation**

4. Unless otherwise stated, references in this decision notice to the Tribunal Procedure Rules are to The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (SI 2009/273).

5. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") provides:

> "**29 Costs or expenses**
>
> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> 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."

6. The Applicant's appeal was a Basic Category case, under Tribunal Procedure Rule 23. In relation to appeals to this Tribunal (other than those that are allocated to the Complex Category of cases) there is – unlike in court proceedings – no general costs shifting regime, or practice that "loser pays". Instead, Tribunal Procedure Rule 10, so far as relevant, provides:

> **"10.**—(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
>
> (a) under section 29(4) of the 2007 Act (wasted costs);
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …"

**Can costs incurred before proceedings are started be the subject of a Rule 10 Order?**

7. The Respondents' first contention is that costs incurred before proceedings are commenced should be disregarded for the purposes of Rule 10.

8. Section 29 of TCEA 2007 (quoted at ¶ 5 above) refers to "The costs of and incidental to … all proceedings in the First-tier Tribunal …". The words "the costs of and incidental to the proceedings" were considered (in the context of a decision of a taxing master under what was then RSC Ord 62) by Sir Robert Megarry VC in *In re Gibson's Settlement Trusts, Mellors & Another v Gibson & Others* [1981] Ch. 179. The Vice Chancellor stated (at 184 onwards):

> "On an order for taxation of costs, costs that otherwise would be recoverable are not to be disallowed by reason only that they were

> incurred before action brought. … If the order for costs is not for costs simpliciter, but for the costs "of and incidental to" the proceedings (and this is the language of the order in the present case), the words "incidental to" extend rather than reduce the ambit of the order."

9. The Vice Chancellor accepted that, "It is not very easy to extract from the authorities the principles which are to be applied in the case of costs incurred before action brought." However, he analysed two decisions of the Court of Appeal, *Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.* [1928] 1 KB 750 and *Frankenburg v. Famous Lasky Film Service Ltd.* [1931] 1 Ch 428 and concluded,

> "Neither the fact that at the time when the costs were incurred no writ or originating summons had been issued, nor the fact that the immediate object in incurring the costs was to ascertain the prospective litigant's chances of success, will per se suffice to exclude the costs from being regarded as part of the costs of the litigation that ensues. Of course, if there is no litigation there are no costs of litigation. But if the dispute ripens into litigation, the question then arises how far the ambit of the costs is affected by the shape that the litigation takes."

10. In relation to the Vice Chancellor's statement that "if there is no litigation there are no costs of litigation" I should note that more recent cases have held that certain costs incurred in fulfilling designated pre-action protocols are recoverable even if the dispute settles before proceedings are commenced – eg *Crosbie v Munroe & another* [2003] EWCA Civ 350, *Ian McGlinn v Waltham Contractors Limited & others* [2005] EWHC 1419 TCC and *Lobster Group Limited v Heidelberg Graphics Equipment Limited & another* [2008] EWHC 413 TCC.

11. The Vice Chancellor examined how one might identify whether certain costs were truly incidental to the proceedings, including the facts of the *Pêcheries* and *Frankenburg* cases, and observed:

> "It is obvious that the matters disputed before a writ or originating summons is issued, and the matters raised by the writ or originating summons, and by any pleadings and affidavits, may differ considerably from each other."

12. On the authority of *Gibson's Settlement Trusts* costs incurred before commencement of proceedings can be "incidental to" those proceedings, and thus come within the ambit of s 29 TCEA 2007 and Tribunal Procedure Rule 10. The matters in dispute in the Applicant's appeal (several VAT default surcharges) were sufficiently well defined so that all the costs incurred before commencement of the appeal proceedings do constitute costs incidental to the appeal proceedings. Therefore, I do not accept the Respondents' first contention.

**What actions of the Respondents are relevant?**

13. The Respondents' second contention is that the relevant actions of the Respondents in relation to Rule 10 were those *after* proceedings have started.

14. The condition in Rule 10 is "if the Tribunal considers that a party … has acted unreasonably in bringing, defending or conducting the proceedings". The Tribunal Procedure Rules do not explicitly define "proceedings" but Rule 1(3) refers to "the person who starts proceedings (whether by bringing or notifying an appeal, by making an originating application, by a reference, or otherwise)" and Rule 20(1) provides that "A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal." Therefore I conclude that the Applicant's notice of appeal to the Tribunal, which was received by the Tribunal on 1 August 2011, started the proceedings, and those proceedings were the subject matter of that notice – namely an appeal against certain VAT default surcharges stipulated in the notice.

15. I consider that the words "bringing the proceedings" in Rule 10 cannot apply to the Respondents. I take "bringing" as here being synonymous with "starting", and it is the person making the appeal who brings (ie starts) the proceedings – see Rule 20 quoted at ¶ 14 above – and that was the Applicant. So the words in Rule 10 that are relevant to the Respondents are "defending or conducting the proceedings".

16. The Respondents in their representations cited the judgment of Park J in *Gamble v Rowe* [1998] STC 1247. The legislative provisions considered by the learned judge in that case were different from those which apply to the current Application. There the relevant costs rule was Rule 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 (SI 1994/1811), which provided:

> "[the Special Commissioners] may make an order awarding the costs of, or incidental to, the hearing of any proceedings by it against any party to those proceedings (including a party who has withdrawn his appeal or application) if it is of the opinion that the party has acted wholly unreasonably in connection with the hearing in question."

17. Park J observed (at 1257):

> "… the party must act wholly unreasonably 'in connection with the hearing in question'. The commissioners may or may not take the view that the party concerned acted unreasonably or wholly unreasonably at some earlier stage in the history of the tax affairs of the person in question. But if that earlier stage was before the matter was either before the commissioners and being heard or was being prepared for a hearing before the commissioners, they have no power to award costs."

18. The rules considered by Park J in *Gamble* passed into history on 1 April 2009, and the current position is governed by Tribunal Procedure Rule 10. Thus the words in the 1994 Rules considered by Park J in *Gamble* ("the party has acted wholly unreasonably in connection with the hearing in question") have been replaced by "a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings" in Rule 10. However, I consider the restriction in Rule 10 to "in defending or conducting the proceedings" leads to the same conclusion as reached by Park J in relation to "in connection with the hearing" - that only the actions of the Respondents after the proceedings started are relevant for the purposes of Rule 10.

19. As stated at ¶ 15 above, I consider that the words "bringing the proceedings" in Rule 10 refer to the starting of proceedings as described in Rules 1 and 20 (quoted at ¶ 14 above); and the words in Rule 10 that are relevant to the Respondents are "defending or conducting the proceedings". I conclude that the actions of the Respondents at a time before there were any proceedings are not relevant for the purposes of Rule 10. Thus I accept the Respondents' second contention, and consider only how the Respondents acted after the proceedings had started.

**Did the Respondents act unreasonably in defending or conducting the proceedings?**

20. I have studied the decision notice determining the appeal for any evidence that the Respondents acted unreasonably after the proceedings started. I note the following points:

(1) The Respondents made no objection to parts of the appeal being admitted out of time (¶ 16 of the decision notice refers).

(2) One of the surcharges was upheld, albeit in a reduced figure because a lower percentage penalty applied (¶ 111(4) of the decision notice refers).

(3) The Tribunal particularly commented favourably on the behaviour of the Respondents' presenting officer (at ¶ 112 of the decision notice):

> "We particularly commend Mrs Walker for her helpful and professional approach to the evidential and procedural issues raised in the course of this hearing."

(4) The Tribunal considered in depth several issues relating to its findings of fact in relation to the matters in dispute (¶¶ 70 - 105 of the decision notice refer). Indeed, the Tribunal debated whether to adjourn the hearing for further evidence to be adduced but decided not to do so (¶¶ 107 - 110 of the decision notice refer). The Applicant had urged the Tribunal not to adjourn (¶ 60 of the decision notice refers).

21. From the points listed above it is clear to me that there is no evidence of unreasonable behaviour by the Respondents. In particular, the assertion by the Applicant that the Respondents "failed to ascertain the facts of the case despite being made aware of the circumstances by the [Applicant] and its advisors in two letters" is not a fair representation of a dispute where the Tribunal found it necessary to consider several factual matters in depth.

**Conclusion**

22. The Respondents did not act unreasonably in defending or conducting the proceedings and accordingly I REFUSE the Application for costs.

23. 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 Tribunal Procedure Rule 39. 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.

**PETER KEMPSTER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 20 March 2012**