TC03549

Appeal number: TC/2012/11143

COSTS –appeal against penalty for failure to comply with information notice – appeal withdrawn two days before hearing – HMRC applied for costs without costs schedule – whether extension of time to be granted for provision of schedule –* Mitchell *considered – yes - whether appeal had reasonable prospect of success – no – whether appellant's conduct in bringing and maintaining appeal unreasonable – yes - costs awarded

FIRST-TIER TRIBUNAL
TAX CHAMBER

R P BAKER (OXFORD) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 2 May 2014

The appellant did not appear and was not represented

Mr P Massey, HMRC Officer, for the Respondents

DECISION

1. The appellant lodged an appeal against a penalty imposed on it for failure to comply with an information notice. It withdrew the appeal late on 14 October 2013, effectively one whole day before the hearing was due to commence on 16 October. On 15 October 2013 HMRC applied for its costs. Its application, however, did not include a schedule of its costs as required by Rule 10(3)(b) of the Tribunal Procedure (First tier Tribunal) (Tax Chamber) Rules 2009.

Appellant's non attendance

2. The appellant did not appear and was not represented at the hearing of HMRC's application. I was satisfied that the appellant's representatives, Baxendale Walker Ltd, was aware of the hearing as they had been in correspondence with the Tribunal over it.

3. Baxendale Walker Ltd requested that the hearing be conducted on the papers. I took the view that I would be assisted by an oral explanation of the parties' position and the history of the appeal, bearing in mind it was an application for costs on the basis of alleged unreasonable behaviour and I refused the application for the hearing to be on the papers. Nevertheless, Baxendale Walker Ltd indicated by letter that they would not attend the hearing but would rely on written submissions.

4. Therefore, I took the view that it was in the interests of justice for the hearing to continue in the appellant's absence. The appellant and/or its representatives had had the opportunity to attend but chose not to. Their written representations were before the Tribunal for consideration.

HMRC's application for its costs schedule to be admitted late

5. The Tribunal wrote to HMRC on 21 October 2013. This letter formally notified HMRC of the appellant's withdrawal of the appeal, although HMRC had been copied in by the Tribunal on the withdrawal on 15 October and this was what presumably had led to the costs application on the same date. The letter of 21 October also pointed out that the costs application had been received without a schedule of the costs claimed. Unfortunately, the letter did not notify HMRC that the costs schedule needed to be received within 28 days of the notification of the withdrawal, which would have been by 19 November 2013 as that was 28 days after 21 October.

6. Mr Massey for HMRC explained the delay was occasioned because he was unaware of the rule which required HMRC to provide the schedule by the same date that the costs application had to be made. He had been consulting with HMRC's solicitors' office about the matter generally and, unaware of the deadline, the schedule was provided on 22 November, 3 days late.

7. The appellant objects to the application for costs and to the application for the schedule (which effectively completed the costs application) being admitted late. The

appellant's objection is that Mr Massey's ignorance of the rules should not be allowed to prejudice it.

8. What is not apparent to me is why Baxendale Walker Ltd consider the late delivery of the schedule prejudiced the appellant. They treat the delay as being of 10 rather than 3 days because they (incorrectly) count it from the date of withdrawal rather than the date of the Tribunal's letter formally notifying the withdrawal. Either way, the delay was a short period of time. The appellant had known from the day after the withdrawal that HMRC intended to pursue a claim for costs based on the appellant's alleged unreasonable behaviour, and a two page letter objecting to it by the appellant's business accountants (Snedkers) was sent on 15 October. So while it is true to say that the appellant did not know how much HMRC were claiming in costs until 22 November, that had not prevented it objecting to the application.

9. I find that there was no prejudice to the appellant in HMRC's short delay in providing the schedule.

10. Prejudice is not the only factor to take into account when considering whether to allow HMRC an extension of time to comply with the Tribunal's rules. I have to consider all relevant factors in the exercise of my discretion. However, some factors may be more significant than others.

11. Recently, the rules governing the High Court (CPR) were amended, in particular to provide that when considering relief from sanctions:

> "[3.9] …the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

12. The Court of Appeal considered CPR 3.9 in the case of *Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and said:

> "We accept that, depending on the facts of the case, it will be appropriate to consider some or all of these factors [referring to the checklist of factors in the old CPR 3.9] as part of 'all the circumstances of the case'. But, as we have already said, the most important factors are the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders."

13. To what extent the new CPR rules would affect the Upper Tribunal (Tax and Chancery) Chamber was considered in *McCarthy & Stone (Developments) Limited and others* on an out of time application for permission to appeal against an FTT decision (PTA/345/2013). The decision was to the effect that:

> "[45] … I can see no reason why time limits in the UT rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach

> to time limits are as applicable to proceedings in the UT as proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the new approach to CPR3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules."

14. While this decision may not be strictly binding on the FTT as it was on a PTA application and was given in relation to the Upper Tribunal, I can see no good reason why the same approach would not apply in the FTT. I think that it does.

15. However, while the two listed factors in the new CPR3.9 are the most significant, they are not the only relevant factors when considering relief from sanctions. So I consider all relevant factors.

Efficient conduct of litigation

16. HMRC's schedule was 3 days late but the appeal has been withdrawn. I do not consider that the late receipt of the schedule has or will cause any litigation to be conducted inefficiently or at disproportionate cost.

Need to enforce compliance with rules

17. Permitting the schedule to be lodged 3 days late will mean a failure to enforce compliance with the rules. While obedience to the rules is very important, nevertheless, that has to be measured against a background of a case in which HMRC have been punctual in all other respects, the appellant was granted at its request and without objection from HMRC a number of extensions of time to provide its dates to avoid, and the 28 day limit for the schedule was not drawn to HMRC's attention in the Tribunal's letter of 21 October.

Explanation for delay

18. The delay was inadvertent and arose because of the HMRC officer's unfamiliarity with the rules and in particular the need for the costs application to be accompanied by a schedule.

Consequences of refusing extension

19. If I refuse the extension of time the complete costs application will be out of time. This will mean a costs award cannot be made. It will mean HMRC will lose the opportunity to make out its case that the appellant behaved unreasonably: if it has a good case on this, the consequence of refusing the time extension will be to deprive it of the award of costs which is likely to follow and the appellant will avoid the costs sanction for its (alleged) unreasonable behaviour.

20. So I need to consider how likely is it that HMRC can make out a case of unreasonable behaviour? I consider, having heard their submissions, that they have a

reasonable prospect of success of doing so (and indeed I do find at §52 that there was unreasonable conduct by the appellant in bringing and maintaining this appeal).

Conclusions

21. Time limits should be respected unless there are good reasons not to. Time limits are there for a reason and parties are entitled to finality.

22. Nevertheless, if the sanction for failure to meet a deadline is always that party is deprived of the opportunity to make (or defend) its case, then justice cannot be served. Each case must be considered individually. I take account of the fact that in this case the delay was minor in that (a) it was only by 3 days, and (b) it was only a part of the application (the schedule) that was late. I take account of the fact that the delay did not prejudice the appellant. I take account of the fact it was only inadvertent. I take account of the fact that a failure to grant relief to HMRC would potentially prevent HMRC making out its case on costs; it may therefore allow the appellant to escape a sanction for unreasonable behaviour (if HMRC can prove this) on the basis only of a minor delay by HMRC. Weighing all factors in the balance, and giving appropriate weight to the factors mentioned in CRP 3.9, I waive the time limit in Rule 10(3) and therefore find that the application and schedule must be treated as if they had been filed in accordance with the rules.

23. I comment in passing that in some cases the Tribunal has waived the requirement to provide a schedule. Those are large cases where the production of a schedule is expensive and may be wasted if the costs order is not made or, if made, is made on the basis of assessment by a Costs Judge. This case is suitable for summary assessment and therefore I would not waive the requirement for a schedule. I have, instead, simply extended time for its production.

The costs application

24. HMRC's costs application is made on the basis of alleged unreasonable conduct by the appellant under Rule 10(1)(b) which permits the Tribunal to make an award against a party:

> "if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending, or conducting the proceedings"

History of appeal

25. The history of the matter is that in the years ending 2009 and 2010 the appellant made payments totalling about £728,000 into a trust ('the Trust') based in Belize and claimed a deduction for these payments in its accounts. HMRC opened an enquiry and sought details of information about various matters connected to these payments and the Trust. The information was not provided and an information notice was issued under Finance Act 2008 Schedule 36.

26. The Information Notice was dated 2 July 2012. It required a very great deal of information, running to several pages. The appellant provided a significant quantity

of the information required, but not all of it. HMRC imposed a penalty of £300 under paragraph 39(2) of Schedule 36 of the Finance Act 2008 on 13 September 2013 on the basis that the Information Notice had only been partially complied with.

27. The documents which HMRC considered that had not been provided as at that date were (in summary):

> The Trust accounts
>
> Details of loans made by the Trust
>
> Engagement letters between Baxendale Walker LPP and the appellant
>
> Baxendale Walker LLP's invoice dated 25-6-9 to the appellant
>
> A description of the business relationship between two named companies
>
> Evidence of the company's attempts to obtain information from the Trust
>
> Names and address of beneficiaries who received payments from the Trust
>
> Names and address of other persons receiving payments from the Trust
>
> Correspondence between the company and potential beneficiaries of the Trust
>
> Details of payments from the Trust and loan agreements

28. The appellant has never disputed that these documents were not provided: its position is that it was not liable to provide them. I find that they were not provided to HMRC by the due date.

29. The penalty of £300 is absolute. There is no scope for a reduced penalty for partial compliance. The penalty of £300 is payable to the extent that there was any non-compliance with the Information Notice, save to the extent that the taxpayer can establish it had a reasonable excuse for that non-compliance (paragraph 45).

30. The appellant appealed against the penalty. HMRC conducted a review and upheld the penalty in its letter of 19 November 2012. The appellant appealed to the Tribunal on 17 December 2012.

31. The appeal was treated as basic, which meant that it was to be set down for hearing without directions. The parties were asked for their dates to avoid and the appellant requested (and was given) two extensions of time on the grounds that they intended to instruct counsel and the 'inherent complexity' of the matter. Dates to avoid were provided by letter of 8 May although it appeared from the appellant's letter that the appellant had still not instructed counsel.

32. The hearing was listed in July for 16 October 2013. On 14 October 2013 at 12:45, the Tribunal conveyed to both parties the hearing judge's request for skeleton arguments by close of play on 15 October.

33. At 13:19 on 14 October, just over half an hour later, Snedkers emailed HMRC stating it intended to engage with HMRC's 'Litigation and Settlement Strategy' to resolve its tax dispute and therefore wanted a stay on the appeal proceedings and a short summary from HMRC of what documents they considered to be outstanding.

34. HMRC responded and refused to consent to a stay. At 16:46 the appellant notified the Tribunal that it was withdrawing its notice of appeal, as it intended to engage with HMRC's 'Litigation and Settlement Strategy' to resolve its tax dispute.

Grounds of appeal

35. With the letter of appeal, the appellant's representatives (Baxendale Walker Ltd) enclosed 4 items of correspondence which it claimed were subject to LPP. The letter of appeal set out a number of grounds of appeal, which were:

- Information was not reasonably required;
- Information subject to legal professional privilege (LPP)
- Documents not in company's power or possession.

36. However, the letter was rather brief in explaining why any of these grounds, in the view of the appellant, applied. So far as 'reasonably required' was concerned, the allegation appeared to be that HMRC had failed to demonstrate it was reasonably required. So far as LPP was concerned, there was a reference to *R v SPC ex p Morgan Grenfell*. So far as possession or power was concerned, there was a comment 'it has been explained why each of the marked items cannot be provided'.

37. HMRC's claim is that there was nothing in any of these grounds of appeal, as evidenced by the fact that no details were ever forthcoming and that the appellant withdrew its appeal and has now provided some at least of the documents requested.

When is it unreasonable to bring proceedings?

38. Withdrawing an appeal cannot be taken as evidence that an appeal should never have been made: there may be many reasons for withdrawing an appeal which it was reasonable to bring. Any other conclusion would discourage parties from withdrawing their appeals.

39. The meaning of rule 10(1)(b) has been considered by the Upper Tribunal in *Catana* [2012] UKUT 172 (TCC) where Upper Tribunal Judge Bishopp said of that provision:

> "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 resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings…"

40. To ascertain whether it was unreasonable of the appellant to bring the proceedings therefore necessitates consideration of its grounds of appeal. As I have already said, the £300 penalty was payable if there was even one document which was not produced without a reasonable excuse. It is not enough to have a valid ground of appeal in respect of the rest of the documents not produced: to succeed in its appeal the appellant had to have (at least) an arguable case in respect of all the documents not produced.

Possession or power

41. While the notice of appeal itself is short on detail, enclosed with it was a letter from Snedkers (the appellant's accountants) to HMRC dated 6 August 2012 which stated that the information sought was confidential to the Trust and that it was irrelevant that the appellant's director (Mr Baker) was Protector of the Trust as he had no power to compel the trustees to hand over the information sought by HMRC. Also enclosed was a request from Mr Baker to the trustees to hand over the information, and a refusal by the trustees to do so.

42. HMRC's reply to this was dated 29 August 2012 and pointed out that the purpose of the Trust was stated to be to facilitate the company's trade by establishing a 'commercial incentive scheme' and it seemed inconsistent with this objective if the company did not know and could not compel the trustees of the Trust to tell them what payments had been made and to whom. HMRC also pointed out that the Protector of the Trust had the power to dismiss and appoint trustees.

43. However, the following year, as I have said, the appeal was withdrawn. In a letter from Snedkers' to HMRC, referred to below, dated 14 November, they explained the reason for the withdrawal as follows:

> "Ultimately, rather that risk the possibility of additional time and costs, and feeling subjected to continued harassment by HMRC, the Company decided to provide the documents…"

44. Mr Massey confirmed that further documents had been provided to HMRC following this although he was unable to identify precisely what was provided or state whether HMRC was satisfied that the information notice had been, albeit late, completely entirely complied with. His point is that the documents must have been in the appellant's possession in order for them to provide them to HMRC.

Legal Professional Privilege

45. The claim made by the appellant was that all communications relating to giving or obtaining tax advice were protected from disclosure. Four documents were provided to the Tribunal on which LPP was claimed; all were from Baxendale Walker LLP which described itself as 'The wealth strategy firm' but there was nothing on the face of the letters to suggest that the firm (or anyone in it) was regulated by the Law Society.

46. In Snedkers' letter dated 15 October 2013 in which they objected to HMRC's application for costs, they pointed to the Supreme Court decision in *R (oao Prudential & another) v SPC* [2013] UKSC 1 and indicated that it was following that decision that the appellant wrote to HMRC on 14 October 2013 to ask for a stay of proceedings in this appeal, and then, a few hours later, conceded the appeal.

Conclusion

47. HMRC's case is that the appellant's lodged an appeal despite having no reasonable prospect of success that its appeal could succeed.

48. In so far as the appeal was based on the argument that the documents were not reasonably required by HMRC, no grounds to support this have ever been put forward. In any event, it seems obvious to me that the information listed at §27 is reasonably required to check the company's tax position and in particular whether it was entitled to the claimed deduction. I find this ground of appeal had no prospect of success.

49. While there may be interesting arguments whether in the particular circumstances of its case, the appellant had 'power' over documents exclusively held by the trustees of the Trust, Mr Massey's point is that the appellant in practice had possession of the documents because it handed them over to HMRC. I agree and find that I am not satisfied that this ground of appeal ever had any prospect of success because as a matter of fact the appellant did have possession of the documents as evidenced by the fact it produced them, and it has done nothing to satisfy me that that was not always the case.

50. I accept that the claim for LPP may have had a reasonable prospect of success in respect of some of the documents HMRC required (eg the engagement letter) but only until the issue by the Supreme Court of its decision in *Prudential.* There is no suggestion in Snedkers' letter or elsewhere that the appellant considers that the claim to LPP could be maintained in the face of that decision. I do not think it could be. Baxendale Walker LLP is not a firm of solicitors. It appears therefore that the appellant (rightly) accepted it could not make out a case for LPP but has failed to explain why it maintained the appeal for over 8 months after the date of the decision in *Prudential.*

51. In any event, only four documents which were not provided were subject to the claim for LPP and, as I have said, a defence which only covered some of the documents would not amount to a case with a reasonable prospect of success for the reasons explained at §28.

52. And in any event, even with respect to those 4 documents, the appeal was bound to fail after the Supreme Court's decision in *Prudential,* and therefore it was unreasonable to pursue the proceedings after January 2013.

53. I find the appellant acted unreasonably in bringing the appeal as it should have known it had no prospect of success.

54. I also find that the appellant conducted the appeal unreasonable in that no reason at all has been proffered of why the appellant allowed the appeal to proceed to almost the last moment before withdrawing it. Nothing had changed; the offer to engage the 'Litigation and Settlement Strategy' had been made by HMRC nearly a year earlier. The appellant should have appreciated that it was putting HMRC to the expense of preparing for the hearing which the appellant had no prospect of winning. It should not have waited until prompted by the request for skeletons, as I find it did, to decide to withdraw the appeal.

Complaint against HMRC

55. On 14 November 2014 Baxendale Walker Ltd, on behalf of the appellant, wrote to HMRC Local Compliance making a complaint about the officer's handing of the appellant's tax enquiry. A large part of that complaint appeared to centre on the officer's various requests for the documents and the issuing of the information notice and then the penalty for non compliance. It alleged that the officer repeatedly asked for the information despite the appeal against the penalty, failed to answer questions put to him and 'systematically applied undue and improper pressure on the company'.

56. A letter to the Tribunal from Baxendale Walker dated 21 January 2014 stated that it was unreasonable for HMRC to seek costs in a case where a complaint had been lodged against them.

57. I do not agree that an award of costs should not be made against the appellant while they have a complaint pending against an HMRC officer. Complaints can be made: that does not mean they are justified. The Tribunal's processes cannot be held up pending complaints procedures: that would lead to abuse. And whether the appellant's position is either or both that (a) its conduct was not unreasonable if viewed in the light of what (it alleges) HMRC did and/or (b) even if its conduct was unreasonable, the Tribunal in its discretion should not award costs because of HMRC's (alleged) misconduct, then this application for costs in this Tribunal is the appropriate forum to put that case. Whatever the outcome of the complaint against the individual officer cannot affect the outcome of HMRC's application for costs in this Tribunal.

58. On the assumption that sending to the Tribunal a copy of the complaints letter was the appellant's method of bringing its allegations to the attention of this Tribunal for it to consider them, I have read the appellant's complaint letter. I have not been satisfied that there is any justification to the various complaints made. Certainly I am not satisfied that there is anything in it that alters the conclusion I have reached that the appellant acted unreasonably in bringing this appeal. Nor am I satisfied that there is anything in the letter of complaint that would cause me not to exercise my discretion in HMRC's favour following such unreasonable behaviour by the appellant.

59. I find the appellant's behaviour in both bringing and then maintaining this appeal until the last moment was unreasonable and exercise my discretion to award costs to HMRC.

Schedule of costs

60. HMRC's schedule of costs was provided on 22 November 2013 to the appellant and to the Tribunal. No representations about the reasonableness or otherwise of the hours worked or hourly rate claimed were made to me by the appellant. I consider that the hours claimed (5.7 hours) at a rate of £146 per hour is reasonable and I make the award of costs in the amount claimed of £832.20.

Order

61. The appellant is hereby ordered under Rule 10(1) of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009 to pay to HMRC the sum of £832.20 within 28 days of the date of this decision in respect of HMRC's costs in defending the appeal against the imposition of the £300 penalty for failure to comply with an Information Notice.

62. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 9 May 2014