TC03583

Appeal number: TC/2011/06914

PROCEDURE – costs – rule 10, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – whether Respondents had acted unreasonably in defending or conducting the proceedings - no - relevance of (and basis for) the grant of permission to appeal in considering an application for costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

INVICTA FOODS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Bedford Square, London WC1 on 24 April 2014

Nicola Shaw QC, instructed by Ince & Co for the Appellant

Jonathan Bremner, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an application for costs made by the appellant consequent upon the decision of this tribunal released on 10 January 2014. The application is made under rule 10(1)(b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). In short, the appellant argues that the respondents ("HMRC") acted unreasonably in defending and/or conducting the proceedings.

2. The appeal, which was heard in November 2013, proceeded under the Standard Category. Therefore, the successful party would not normally be entitled to its costs under the Rules unless it can show unreasonableness within the meaning of rule 10(1)(b).

3. I have used the same terms in this decision as defined in the original decision of 10 January 2014.

The Decision

4. The appellant imported treated chicken meat ("the Product") from Brazil. The Product had been classified under Chapter 16 of the Combined Nomenclature ("CN") pursuant to a Binding Tariff Information ("BTI") issued to the appellant on 20 October 2010.

5. Pursuant to a decision of HMRC on 12 May 2011 the BTI was revoked and, instead, the Product was reclassified under Chapter 2 of the CN.

6. There were three issues in dispute. They were preliminary issues because it had been agreed between the parties that we should give a decision in principle on these issues and that the parties would thereafter agree upon the correct amount of duty payable in accordance with the decision.

7. The three issues were as follows:

(1) were HMRC entitled to revoke the BTI issued on 20 October 2010 ("the revocation issue");

(2) what was the correct classification of the Product for customs duty purposes ("the classification issue"); and

(3) was the appellant, in principle, entitled to the repayments of duty which it had claimed ("the repayment issue")?

8. The tribunal decided all three issues in favour of the appellant. We decided that:

(1) the revocation of the BTI was a decision which HMRC could not reasonably have reached (in the *Wednesbury* sense) and accordingly we directed that the decision should cease to have effect from 12 May 2011.

(2) The Product was correctly classified under Chapter 16 (subheading 16023211) and was not classifiable under Chapter 2 of the CN. This effectively determined both the classification and (most of)the repayment issues.

(3) Permission to appeal out of time in respect of the decision to deny 11 disputed refund claims was granted (this was part of the repayment issue).

9. It was common ground at the hearing of this application that the repayment issue would follow the determination of the classification issue.

The statutory provisions and the relevant principles

10. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") provides that subject to a tribunal's rules, the "costs of and incidental to...proceedings in the First Tier tribunal" shall be in the discretion of the tribunal. Rule 10 of the Rules provides:

> "(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 proceedings; or
>
> (c) if [the case is a Complex case and the taxpayer has not sought exclusion of potential liability of costs]."

11. Only rule 10 (1)(b) is relevant to this application.

12. This tribunal's discretion to award costs under rule 10(1)(b) has been considered in a number of decisions of this tribunal. These were helpfully summarised by Judge Raghavan in *Market & Opinion Research International Ltd v Revenue & Customs* [2013] UKFTT 475 (TC) at [8], whose summary I gratefully adopt:

> " (1) It was to be noted that the test in the Tribunal Rules that a party or representative had "acted unreasonably" required a lower threshold than the costs awarding power of the former Special Commissioners in Regulation 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 which was confined to cases where a party had acted "wholly unreasonably". This was discussed in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395(TC) at [9].
>
> (2) It was suggested that acting unreasonably could take the form of a single piece of conduct. I was referred to [9] to [11] of the decision in *Bulkliner* by way of support for this proposition. In particular at [10] the decision highlights the actions that the Tribunal can find to be unreasonable may be related to any part of the proceedings
>
> "…whether they are part of any continuous or prolonged pattern or occur from time to time".

(3) The point is I think mentioned in the context of contrasting the Tribunal's rules in relation to acting unreasonably across the span of proceedings with the former Special Commissioners' costs power which was in relation to behaviour which was "in connection with the hearing in question". Having said that there would not appear to be any reason why the proposition that a single piece of conduct could amount to acting unreasonably. It will of course rather depend on what the conduct is.

(4) Actions for the purpose of "acting unreasonably" also include omissions (*Thomas Holdings Limited v HMRC* [2011] UKFTT 656 (TC) at [39].)

(5) A failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct (*Carvill v Frost (Inspector of Taxes)* [2005] STC (SCD) 208 and *Southwest Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC)) at [45]).

(6) The test of whether a party has acted unreasonably does not preclude the possibility of there being a range of reasonable ways of acting rather than only one way of acting. (*Southwest Communications Group Ltd* at [39]).

(7) The focus should be on the standard of handling of the case rather than the quality of the original decision (*Thomas Maryam v HMRC* [2012] UKFTT 215(TC)).

(8) The fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it. In *Leslie Wallis v HMRC* [2013] UKFTT 081(TC) Judge Hellier stated at [27]:

"It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong…"

(9) As cautioned by Judge Brannan in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] Rule 10(1)(b) should not become a "backdoor" method of costs shifting."

13. In addition to the above, I would refer to the passages in my decision in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) in which I counsel against being too ready to resort to the benefit of hindsight when considering the question whether a party's defence or conduct was unreasonable.

Discussion

14. Ms Shaw's application was based on HMRC's approach to the two main issues involved in the appeal: first, the revocation issue and secondly the classification issue. In addition, Ms Shaw drew attention to certain ADR and settlement proposals made by the appellant shortly before the hearing of the appeal.

15. I shall deal with these points in that order. In addition, I shall deal with the relevance of the grant of permission to appeal to this costs application.

The revocation issue

16. Ms Shaw's submission was that it was obvious on the face of HMRC's own evidence that HMRC's revocation decision was unreasonable. It was obvious that Mr Accleton had taken into account irrelevant considerations and had failed to take account of relevant factors.

17. I do not agree. In her skeleton argument for the hearing Ms Shaw argued that, at its highest, the evidence indicated no more than that HMRC's interpretation that the Product fell within Chapter 16 "may" be wrong, not that it was wrong. Ms Gearey's comments (Ms Gearey worked for the food testing laboratory Campden BRI) were that the Leatherhead Report (commissioned by the appellant with the agreement of HMRC) was inconclusive. As Mr Bremner pointed out, we accepted his argument based on *Timmermans* that HMRC were entitled to revoke a BTI if they concluded reasonably that the BTI may be wrong. The question whether Mr Accleton (the HMRC officer at whose behest the revocation decision was made) took account of irrelevant considerations or failed to take account of relevant considerations came subsequently and there was no indication in Ms Shaw's skeleton argument that an argument on this basis was being put forward. Ms Shaw's argument was that HMRC had to have concluded that the BTI was wrong, not that it may be wrong – an argument that the tribunal rejected.

18. It seems to me, therefore, that HMRC's position (applying the lower threshold of whether HMRC's interpretation "may" be wrong") was at least arguable. I recognise that HMRC's position on the revocation issue was not a strong one but it did not seem to me to be so weak as to be unreasonable to put it forward.

19. Accordingly, I do not consider HMRC's defence or conduct in relation to the revocation issue to be unreasonable.

The classification issue

20. There were a number of areas of debate relating to the classification which are discussed in the tribunal's decision. These included:

(1) whether the Product was "slightly sprinkled with sugar or an aqueous solution of sugar";

(2) whether the Product was "brined";

(3) whether the Product was "prepared";

(4) whether the Product was "seasoned meat" on the basis that salt could not be considered to be a seasoning;

(5) whether the fact that the Product still tasted like cooked chicken prevented falling within Chapter 16; and

(6) whether seasoning was "clearly distinguishable by taste".

21. Plainly, some these arguments were stronger than others. For example, the argument in (1) above seemed to us a forlorn one. Nonetheless, it was part of a bundle of submissions and it is perfectly common and acceptable for counsel in a tax appeal to put forward a variety of arguments of different strengths. Some arguments, such as (4) and (6) were stronger arguments and raised questions interpretation of the relevant legislative provisions. I do not think that those arguments could fairly be described as so weak that it was unreasonable for HMRC to put forward its case on those points. On the contrary, those arguments raised points which were not straightforward and it seems to me that HMRC were perfectly entitled to put forward the arguments that they did.

22. Ms Shaw complained that a number of arguments were raised at a late stage either by HMRC in its skeleton argument or orally at the hearing, particularly the argument in (6) above. It did not seem to me that there was any unfairness as a result. The argument in (6) above, for example, was an obvious one for HMRC to raise and Ms Shaw dealt with it without difficulty.

23. I have, therefore, reached the conclusion that HMRC's defence and conduct in relation to the classification issue was not unreasonable.

Pre-hearing ADR and settlement offers

24. The appellant put forward various letters written by the appellant's solicitors, Ince & Co, to HMRC in October 2013 suggesting, first, mediation (letter of 2 October 2013) and, secondly, settlement proposals (letter of 11 October 2013). The settlement offer proposed discounting the appellant's claim by £26,523.45 if HMRC agreed that the Product was correctly classified in Chapter 16 and the appellant's refund claims succeeded (worth £377,646.93 to the appellant).

25. HMRC replied to these letters on 30 October 2013 stating that the Commissioners remained of the view that the evidence the appellant had provided to date was insufficient to demonstrate that the Product should be classified in Chapter 16. HMRC therefore rejected the settlement proposal. However, HMRC suggested that they would be prepared to consider the results of a further analysis of the Product by Campden BRI (the food testing laboratory used by HMRC).

26. I have come to the conclusion that rejecting these offers did not amount to unreasonable conduct on the part of HMRC. It will often be the case settlement offers are made before a hearing in litigation. Sometimes, those offers will be acceptable and sometimes they will be unacceptable. That will often be the result of the parties taking different views of what the likely outcome of the litigation will be. It does not, in my view, form the basis for concluding that HMRC's conduct was unreasonable. Rejecting a settlement offer may turn out to be a mis-judgment but it is not necessarily unreasonable. Moreover, HMRC did put forward the suggestion that Campden BRI should carry out a new test of the Product. It did not seem to me that HMRC had an entirely closed mind.

Relevance of granting permission to appeal

27. After the release of the tribunal's decision on 10 January 2014, the appellant made an application for costs under rule 10 (1)(b) on 23 January 2014. HMRC filed a Notice of Objection to that application on 11 February 2014. On 6 March 2014 the appellant applied for permission to appeal the tribunal's decision of 10 January 2014. On 27 March 2014 I granted the appellant permission to appeal as follows:

> "I grant permission to appeal on both grounds put forward in HMRC's application dated 6 March 2014."

28. As is customary, the grant of permission to appeal did not give reasons because the decision cannot be appealed. Reasons for a decision in respect of an application for permission to appeal need only be given where (or to the extent that) permission to appeal is refused (rule 40 (4) (a) of the Rules).

29. Section 11 (2) provides, so far as material:

> "11. *Right to appeal to Upper Tribunal*
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision [not relevant in this appeal].
>
> (2) Any party to a case has a right of appeal, subject to subsection (8) [not relevant in this appeal].
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by—
>
> (a) the First-tier Tribunal, or
>
> (b) the Upper Tribunal,
>
> on an application by the party. "

30. Ms Shaw argued that the grant of permission to appeal could not be taken as any indication that HMRC had behaved reasonably in the proceedings. Ms Shaw argued that pursuant to section 11 (2) TCEA a party has a right to appeal "on any point of law arising from a decision made by the FTT." The grant of permission to appeal said nothing about the strength of the arguments underlying the appeal. The tribunal's Rules contained no equivalent to CPR r 52.3 (6) that: "(a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard". In HMRC's application for permission to appeal, Mr Bremner had put forward a similar argument in support of his application.

31. In other words, as long as an applicant identified a point of law, Ms Shaw argued that the right of appeal conferred by section 11 (2) was absolute. The tribunal's role in granting permission was simply to sift through applications for permission to appeal to ensure that they did identify a point of law. There was to be no consideration of the merits of the point of law so raised.

32. I do not accept Ms Shaw's submission that the right to appeal is absolute and does not involve a consideration of the merits of the point of law.

33. Subsection 3 makes the right of appeal conferred by subsection 2 one which may only be exercised with the permission of either this tribunal or the Upper Tribunal. It is not an absolute right of appeal. It is true that the TCEA and the Rules do not contain specific criteria guiding this tribunal in the exercise of its discretion to grant permission. In my view, this indicates that the tribunal's discretion is "at-large" and that the tribunal, acting judicially, should consider all relevant factors.

34. Amongst factors which can and, in my view, should be considered are those contained in CPR r 52.3 (6). CPR r 52.3 (6) does not apply to this tribunal but that does not mean that the "real prospect of success" and "other compelling reason" tests should be ignored or that it is wrong to take them into account. Indeed, if it were otherwise and this tribunal was forced to give permission to appeal on any point of law, no matter how hopeless or misconceived, the Upper Tribunal would be in danger of being swamped.

35. In practice, my experience is that this tribunal already applies a test equivalent to that contained in CPR r 52.3 (6) when considering whether to grant permission to appeal.

36. In this context it should be noted that "real prospect of success" amounts to considering whether there is a realistic, rather than a fanciful, prospect of success (see *Tanfern Ltd v Cameron McDonald* (Practice note) [2000] 1 WLR 1311 at paragraph 21). It does not require the tribunal to agree with the arguments put forward in favour of the application for permission to appeal or to believe that they will, in fact, prevail but simply to accept that those points of law are arguable.

37. When granting HMRC permission to appeal I applied the "real prospect of success" test even though the decision notice notifying the parties of my decision did not contain any reasons, as envisaged by rule 40.

38. However, I have borne in mind the fact that an application for permission to appeal is a process in which the other party (i.e. the party that was successful in the initial appeal) plays no part. It is not entitled make submissions on the unsuccessful party's application for permission to appeal. An application for costs under rule 10(1)(b) is, however, an application in which both parties are engaged and in which both parties are entitled to put forward arguments to the tribunal, as has happened in this case. It seems to me, therefore, that I could not deal fairly and justly with the application for costs under rule 10(1)(b) if I allowed myself to be influenced by my decision in relation to the grant of permission to appeal which was part of a process in which the applicant in the issue relating to costs was unable to make representations.

39. In considering this application for costs, I have therefore confined myself to the merits of the submissions made by the parties in respect of this application for costs. I have not been influenced by the views I reached in relation to the application for permission to appeal. I recognise that this could, in an extreme case, lead to somewhat

different conclusions being reached in relation to an application for permission to appeal and an application for costs under rule 10(1)(b). That is not the case in this instance, but if such incongruity has to be the price of fairness then so be it.

Decision

40. For the reasons given above, I dismiss this application.

41. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 13 May 2014