NCN: [2020] UKFTT 0279 (TC)

TC07763

PROCEDURE – COSTS – whether Appellant acted unreasonably in opposing HMRC application to stay proceedings then withdrawing the opposition at the hearing of the HMRC application (rule 10 First-tier Tribunal Rules)

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05638

BETWEEN

SAMUEL & HELEN MOORE T/A MOORE FARMS **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Belfast on 25 July 2019

Mark Orr QC, counsel, for the Appellant

Barbara Belgrano, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This is the decision on an application made by HMRC for an order requiring the Appellants, or alternatively the Appellants' representatives, to pay HMRC's costs of preparing for and attending a hearing on 25 July 2019 (the "**25 July 2019 hearing**").

2. The HMRC costs application was made in writing. The Appellants were invited to respond to the HMRC application, but did not do so. This decision is taken on the papers following consideration of the HMRC application.

BACKGROUND

3. On 8 February 2010, the Appellants were granted a Flat Rate Farming Certificate under the Agricultural Flat Rate Scheme ("**AFRS**"). The AFRS is an alternative to the normal VAT system which eligible businesses can opt to use.

4. In a decision dated 6 June 2013, HMRC cancelled the Flat Rate Farming Certificate with effect from 8 June 2013. The decision stated that the AFRS is intended to relieve eligible businesses from the administrative burdens of the normal VAT system, that the AFRS is intended to be fiscally neutral and not to be financially advantageous to users, and that AFRS registration can be cancelled where a trader is making a substantial net gain by using it.

5. In a letter dated 28 June 2013, the Appellants' representative appealed against the 6 June 2013 decision, but the appeal was subsequently discontinued.

6. On 12 October 2017, the Court of Justice of the European Union gave its judgment in Case C-262/16 *Shields & Sons Partnership v Revenue and Customs Commissioners* EU:C:2017:756; [2017] STC 2205 ("***Shields***"). The effect of that judgment is that traders cannot be excluded from the AFRS by reason alone that they are found to be recovering substantially more as a member of the AFRS than they would if they were subject to the normal VAT arrangements.

7. In a letter dated 23 January 2018, the Appellants' representatives, a firm of chartered accountants, PKF-FPM (the "**Appellants' representatives**"), requested that the 6 June 2013 decision be reversed, in the light of the decision in *Shields*.

8. In a letter dated 2 March 2018, HMRC refused that request on the ground that the time limit for appealing against the 6 June 2013 decision had long since expired.

9. Following further correspondence, in August 2018 the Appellants commenced the present Tribunal appeal proceedings. The notice of appeal acknowledged that permission to bring a late appeal was required. The grounds for a late appeal are stated to be that an earlier in-time appeal was discontinued as a result of incorrect information being given by HMRC on 15 July 2013. The substantive grounds of appeal state that the Appellants' appeal was "in all material respects identical in fact and practice" to *Shields*.

10. On 11 October 2018, HMRC filed an objection to the Appellants' application for permission to bring a late appeal.

11. On 8 November 2018, HMRC applied for directions that this appeal be stayed until 21 days after the decision of the First-tier Tribunal on an application for permission to bring a late appeal in a case called *Hewitt v Revenue & Customs*, which was said to be a substantially similar case.

12. In an e-mail to the Tribunal dated 23 November 2018, the Appellants' representatives objected to the HMRC application for a stay. The letter expressed the following view. *Hewitt*

had certain similarities with the present case, as well as with two other appeals of which the Appellants' representative was aware. All four of these cases should be heard together.

13. In a letter to the parties dated 18 December 2018, the Tribunal stated that it was not appropriate for four late appeal applications to be heard together, even if they rely on similar matters.

14. Nevertheless, in January 2019 it appeared to be common ground between the parties that all four late appeal applications should be heard together, with the appellants all represented by the same representative (Mr Maas, a tax consultant) and with HMRC represented by the same counsel in all cases.

15. Despite this, the appeal in *Hewitt* was heard alone by the Tribunal on 4 February 2019.

16. On 22 February 2019, the Tribunal directed a stay in the other three appeals (including the present appeal) until 60 days after the issue of the First-tier Tribunal's decision in *Hewitt*. At the same time, the Tribunal directed that the applications for permission to bring a late appeal in these three appeals be case managed together.

17. The First-tier Tribunal gave its decision in *Hewitt* on 28 February 2019, refusing permission to bring a late appeal: *Hewitt v Revenue & Customs* [2019] UKFTT 152 (TC).

18. The Appellant in *Hewitt* applied for permission to appeal to the Upper Tribunal. On 2 May 2019, HMRC applied for a direction that the applications for permission to appeal out of time in the other three appeals (including the present appeal) be stayed until 60 days after the final determination of *Hewitt*.

19. In a letter to the Appellants' representatives dated 16 May 2019, the Tribunal asked for the Appellants' comments on the HMRC application for a further stay of proceedings to be provided within 14 days.

20. In an e-mail to the Tribunal dated 7 June 2019, the Appellants' representatives opposed the stay requested by HMRC, on the ground that "their [the Appellants'] factual position is very different to Mr Hewitt's, albeit that the arguments in reference to European Law are obviously similar". The letter went on to state that "My clients are anxious for their appeal to be resolved quickly as it continues to be very damaging commercially to be excluded from using the scheme when major competitors have been allowed to continue to benefit from the scheme.

21. On 26 June 2019, the Tribunal informed the parties that the HMRC application for a stay of proceedings in the three appeals had been listed for a 3 hour hearing on 25 July 2019.

22. HMRC further contend as follows. On 12 and 16 July 2019, there was an exchange of correspondence between HMRC and Mr Maas, in which both sides confirmed their understanding that the 25 July 2019 hearing was solely in relation to the issue of the other three appeals being stood behind *Hewitt*. On 18 July 2019, HMRC served their skeleton argument for the 25 July 2019 hearing which dealt solely with that issue. The representatives in the other two appeals indicated that they did not oppose the HMRC stay and would not attend the hearing. On 19 July 2019, the Appellants' representatives sent HMRC an "outline skeleton argument" for the 25 July 2019 hearing, and stated that Mr Mark Orr QC would represent the Appellants at that hearing. However, the "outline skeleton argument" dealt with the issue of whether permission for a late appeal should be granted, not the issue of whether the application should be stood behind *Hewitt*. In an exchange of correspondence on 22 July 2019, the Appellants' representatives confirmed to HMRC their common understanding that the only issue at the hearing would be the HMRC stay application, and not the question whether a late appeal should be granted or whether the case should be expedited. On 24 July 2019, HMRC

received from the Appellants further submissions on why the late appeal should be allowed. At the hearing on 25 July 2019, when the Tribunal clarified at the outset that the purpose of the hearing was to determine the HMRC stay application, Mr Orr QC explained that he had been instructed to attend the hearing in order to seek permission for a late appeal. After the hearing was adjourned briefly for him to take instructions, Mr Orr QC confirmed to the Tribunal that the Appellants no longer maintained their objection to HMRC's application for a stay. The Tribunal thereupon directed the stay.

APPLICABLE LAW

Legislation

23. Section 29(1)-(3) of the Tribunals, Courts and Enforcement Act 2007 (the "**2007 Act**") provides that, subject to Tribunal Procedure Rules, the costs of and incidental to all proceedings in the First-tier Tribunal shall be in the discretion of the Tribunal in which the proceedings take place, and that the relevant Tribunal has full power to determine by whom and to what extent the costs are to be paid.

24. Section 29(4)-(6) of that Act empowers the Tribunal to make orders in respect of wasted costs. Section 29(4)-(5) provides:

> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) *"wasted costs"* means any costs incurred by a party–
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

25. Rule 10(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**") relevantly 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) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …

Principles relevant to rule 10(1)(a)

26. For purposes of s 29(5)(a) of the 2007 Act, conduct will be:

(1) "improper" if it is a significant breach of a substantial duty imposed by a relevant code of professional conduct, or is conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion whether or not it violates the letter of a professional code;

(2) "unreasonable" if it is vexatious, designed to harass the other side rather than advance the resolution of the case, regardless of whether it is the product of excessive zeal and not improper motive; and

(3) "negligent" if it is a failure to act with the competence reasonably to be expected of ordinary members of the profession, or an act or omission in the course of professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do, or an error such as no reasonably well-informed and competent member of that profession could have made.

(*Bedale Golf Club Limited v Revenue and Customs Commissioners* [2014] UKUT 99 (TCC) ("***Bedale***") at [27]).

27. The jurisdiction to order wasted costs is a compensatory jurisdiction, not a punitive or regulatory jurisdiction. The applicant for wasted costs can recover only such costs as are established by the applicant on a balance of probability to have been incurred as a result of the improper, unreasonable or negligent conduct in question.

Principles relevant to rule 10(1)(b)

28. The power under rule 10(1)(b) of the Rules is discretionary. Even if the Tribunal finds that a party or their representative has acted unreasonably, the Tribunal may in its discretion decline to make an order for costs. See s 29(1)-(3) of the 2007 Act, *Tarafdar v Revenue & Customs* [2014] UKUT 362 (TCC) at [20]; *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC) at [27]. The 2007 Act and the Rules do not prescribe the matters that the Tribunal may, or may not, consider in the exercise of that discretion.

29. There is no compendious or precise test of "unreasonableness" for purposes of rule 10(1)(b), and Tribunal case law provides no judicial gloss on the plain words of the provision. The requirement that a party has acted "unreasonably" is an objective test. 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. (*Distinctive Care Ltd v The Commissioners for HM Revenue and Customs* [2018] UKUT 155 (TCC) ("***Distinctive Care***") at [46].)

30. The words the words "acted unreasonably" is lower than the threshold of acting "wholly unreasonably" (*Distinctive Care* at [44(1)]).

31. Given that rule 10 of the Rules is made pursuant to s 29(1)-(3) of the 2007 Act, the word "unreasonably" in rule 10 is presumably intended to have a similar meaning as the word "unreasonable" used in s 29(5) of the 2007 Act. In any event, even if the word "unreasonably" in rule 10(1)(b) has a slightly broader meaning than this, that expression does not have a meaning as broad as the expression "improper, unreasonable or negligent" in s 29(5). Thus, for instance, the fact that a party or representative acts *negligently* does not, without more, mean that he or she has acted "unreasonably" for purposes of rule 10(1)(b).

32. The power to award costs under rule 10 should not become a "backdoor method of costs shifting" (*Distinctive Care* at [44(8)]).

THE HMRC ARGUMENTS

33. It was abundantly clear from the notice of hearing dated 26 June 2019 and from correspondence between the parties that the hearing listed for 25 July 2019 was solely to

consider HMRC's application for a stay dated 2 May 2019, and those representing the Appellant confirmed that this was their understanding. The Appellants and/or their representatives acted unreasonably in objecting to HMRC's application for a stay until the day of the hearing of that application. This caused HMRC to incur costs in preparing for and attending the hearing unnecessarily, given that the Appellants consented to the stay applied for by HMRC once the hearing had commenced. HMRC went to significant lengths to ensure, through correspondence, that the Appellants understood the purpose and scope of the hearing on 25 July 2019. No explanation was provided to the Tribunal, or to HMRC, at the hearing as to why the Appellants had objected to HMRC's application for a stay right up to the start of the hearing. HMRC's substantial preparation for the 25 July 2019 hearing was compounded by confusion caused by the Appellants' "outline of argument" document which required HMRC to engage in unnecessary further correspondence to ensure the both parties were fully aware of the scope of the hearing.

34. Alternatively, the behaviour of PKF-FPM, the Appellant's representatives, was unreasonable or negligent in the period from 19 July 2019 to 25 July 2019 during which HMRC understand Mr Orr QC was instructed by PKF-FPM. Mr Orr QC stated at the hearing that he had been instructed to appear in order to argue the substantive matter as to whether the Appellants should be granted permission to appeal out of time. PKF-FPM's behaviour led to Mr Orr QC receiving incorrect instructions, which may have been part of the reason HMRC were needlessly put to the cost of preparing for and attending the 25 July 2019 hearing. On that basis, HMRC seek an order for wasted costs against PKF-FPM. Reliance is placed on *Bedale* at [27]. Instructing Mr Orr QC to appear on 25 July 2019 in relation to the Appellants' application to bring a late appeal, rather than instructing him to consider the listed application for a stay, was negligent and/or objectively vexatious.

THE TRIBUNAL'S FINDINGS

The application for an order under rule 10(1)(a)

35. The HMRC application states that "HMRC make no criticism of Mr Orr QC". Rather, HMRC contend that there was an improper, unreasonable or negligent act (within the meaning of s 29(5) of the 2007 Act) on the part of the Appellant's representatives PKF-FPM. This is said to be the act of PKF-FPM giving incorrect instructions to Mr Orr QC for the hearing, namely instructions to seek permission for a late appeal rather than instructions to oppose the HMRC stay.

36. Paragraph 44 of the HMRC application states that HMRC seek wasted costs only from 19 July 2019, which is the earliest date on which HMRC know that Mr Orr QC had been instructed.

37. However, a wasted costs order can only be made in respect of costs incurred as an actual consequence of the improper, unreasonable or negligent act in question.

38. The unstated premise of the HMRC application appears to be that the Appellants withdrew their opposition to the HMRC application because of advice given by Mr Orr QC that was different to the advice that had previously been given to them by PKF-FPM. The suggestion appears to be made by HMRC that if Mr Orr QC had been given correct instructions at the outset, he would have given the Appellants this new advice earlier, such that the Appellants could have withdrawn their objection in time for the listed 25 July 2019 hearing to be vacated.

39. HMRC do not suggest that they are entitled to wasted costs on the basis that Mr Orr QC was instructed at a late stage for the 25 July 2019 hearing, or on the basis that Mr Orr QC gave

different advice to that previously given by PKF-FPM. The only basis on which HMRC is seeking wasted costs is that Mr Orr QC was not given correct instructions at the outset.

40. However, even if it were to be assumed that the Appellants withdrew their opposition to the HMRC application as a result of advice given by Mr Orr QC, the difficulty for HMRC is the following. Even if Mr Orr QC was instructed by 19 July 2019, on the material before the Tribunal it cannot be known when he actually received the papers, and when he began working on the case. Even if the instructions had been clear at the outset, on the material before the Tribunal it cannot be known that he would have given the advice he did within such a timeframe that it would have been unreasonable for the Appellants not to have reached a decision prior to 25 July 2019 to drop their opposition to the HMRC application. The burden is on HMRC as the applicant for wasted costs to prove on a balance of probability the point in time by when Mr Orr QC would otherwise have given this advice, and the point in time by when the Appellants should in consequence have made the decision to withdraw their opposition to the HMRC application. HMRC have not discharged that burden.

41. Indeed, the HMRC application for wasted costs is expressed rather faintly. HMRC state that "it appears that PKF-FPM's own behaviour in instructing Mr Orr QC led to Mr Orr QC receiving incorrect instructions, which *may have been part of the reason* HMRC were needlessly put to the cost of preparing for and attending the 25 July 2019 hearing" (emphasis added).

42. HMRC have therefore not established on a balance of probability that any of its costs were incurred as a result of conduct of PKF-FPM of which it complains. For this reason, the application for wasted costs is refused.

43. In the circumstances, the Tribunal does not need to make any finding as to whether there has been any conduct on the part of PKF-FPM that was "improper, unreasonable or negligent" within the meaning of s 29(5) of the 2007 Act, and nothing in this decision should be construed as making any such finding. It is not clear from the material before the Tribunal exactly what instructions Mr Orr QC received from who or when to do exactly what. Had HMRC raised the matter at the 25 July 2019 hearing, Mr Orr QC might have been invited at the time to give further details of the circumstances. The Tribunal is not willing to draw any inferences from the failure of the Appellant to respond to the costs application.

The application for an order under rule 10(1)(b)

44. The Tribunal is satisfied that the Appellants and their representatives acted in good faith in relation to the 25 July 2019 hearing. They instructed a QC to represent them at that hearing, no doubt at some expense to the Appellants. HMRC have not alleged that the Appellants obtained or were seeking to obtain any improper tactical advantage by having an unnecessary hearing. The Tribunal cannot see that the Appellants *did* obtain any advantage by having this hearing, or by not withdrawing their opposition to the HMRC application earlier.

45. The Tribunal is satisfied that prior to the 25 July 2019 hearing, the Appellants had articulated reasons for opposing the HMRC application for a stay.

46. First, the Appellants had contended that in their case, an in-time appeal against the HMRC decision had been made, and then discontinued as a result of HMRC giving incorrect information to the Appellants' representative on 15 July 2013 (see paragraphs 5 and 9 above). According to the Appellants, in a conversation with the Appellants' representatives on 15 July 2013, an HMRC official had stated that "there was little point in appealing (but we could if we wished) since the [AFRS] scheme was ending" and that HMRC were "in the process of excluding all farmers from AFRS". The Appellants contended that but for this incorrect

information given by HMRC, the in-time appeal would not have been discontinued. It was said that this circumstance, which was unique to this appeal, distinguished it from *Hewitt*, such that a stay of the appeal behind *Hewitt* was not warranted.

47. Secondly, the Appellants argued that the refusal of registration under the AFRS was having adverse financial consequences for the Appellants, that it was a matter of importance for the Appellants that the appeal be decided quickly, and it appears that for this reason also the Appellants opposed a stay behind *Hewitt*.

48. It may be that these reasons for opposing a stay were not very well articulated or developed by the Appellants prior to the 25 July 2019 hearing. They may not have been fully particularised, and the Appellants may not have submitted all necessary evidence in support of them. They also may not have succeeded if the Appellants had maintained their opposition to the stay at the 25 July 2019 hearing (and it is noted that HMRC disputed the Appellants' account of the 15 July 2013 conversation). However, the Tribunal considers that the Appellants' reasons for opposing the stay were nonetheless stated by the Appellants prior to the hearing, and the Tribunal is satisfied that they were advanced in good faith.

49. These reasons are articulated for instance in the Appellants' representatives' e-mail of 7 June 2019 read together with the notice of appeal, and the "outline of argument" which HMRC say they were sent by the Appellants' representatives on 19 July 2019. Contrary to what HMRC contend, this last document (which in fact purports to be a memo from the Appellants' representatives to the Appellants themselves) states expressly at paragraph 8 that "The suggestion of a stay behind HH [*Hewitt*] is not fair on Moore Farms, since the reason for not entering his appeal in 2013 is quite different from HH [*Hewitt*] and was on foot of Mr Amos (HMRC) misleading telephone conversation".

50. The Tribunal is therefore satisfied that up until the date of the 25 July 2019 hearing, the Appellants had in good faith articulated reasons for opposing the HMRC stay.

51. It is unclear exactly why, at the hearing, the Appellants changed their position, and withdrew their opposition to the HMRC application for a stay. As noted above, the premise of the HMRC argument seems to be that this was the result of advice given by Mr Orr QC who was instructed only very shortly before the hearing. If that were so, the Tribunal does not find that it was unreasonable to instruct counsel for a hearing such as this at the stage at which Mr Orr QC was instructed, or for the Appellants to change their position in the light of new advice given by newly appointed counsel. For the reasons above, the Tribunal also finds that it has not been established that the Appellants' change of position would have been made known to HMRC and the Tribunal earlier than 25 July 2019 even if there had been no initial error or misunderstanding in relation to the instructions given to Mr Orr QC.

52. Although the Tribunal cannot know exactly why the Appellants changed position (and the Tribunal makes no finding in this respect), no explanation has been suggested other than that set out in the previous paragraph. The burden is on HMRC as applicant to establish on a balance of probability that the Appellants or their representatives acted unreasonably within the meaning of rule 10(1)(b). The Tribunal finds that HMRC have not established that it was unreasonable of the Appellants or their representatives not to have communicated the change in position earlier than they did.

CONCLUSION

53. The HMRC application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 30 JUNE 2020