



[2021] UKFTT 0205 (TC)

TC08155

PROCEDURE – costs – whether HMRC behaved unreasonably - no – whether wasted costs should be awarded – no – application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01909

BETWEEN

JESSICA PALA

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

On 29 October 2020 the Appellant applied for costs against the Respondents. The Tribunal determined that application on 9 March 2020 without a hearing.

Ms Silvia Lowe of HM Revenue and Customs' Solicitor's Office provided a written submission for the Respondents.

Hirsh Sharma and Co Ltd, the Appellant's agent, provided written submissions on her behalf.

DECISION

Summary

1. During 2016-17 and 2017-18 Ms Pala was a director of a company, but received no salary or dividends; instead she was paid via PAYE as an employee of one or more other employers.
2. On 31 December 2018, HMRC issued Ms Pala with Notices to File Self Assessment (“SA”) returns for 2016-17 and 2017-18. She failed to file those returns by the due dates, and HMRC issued her with two £100 late filing penalties under para 3 of Finance Act 2009, Schedule 55 (“Sch 55”). Ms Pala filed the SA returns on 16 September 2019, and on 17 September 2019, HMRC issued her with two daily penalties under Sch 55, para 4, each of £710.
3. Ms Pala’s agent, Argento Accountancy Ltd (“Argento”) appealed all the penalties to HMRC on the basis that a subsequently completed questionnaire on HMRC’s website showed that Ms Pala was not required to file SA returns, because she had no income above £50,000 and no dividends, and she had also answered “no” to other questions such as whether she had a capital gain.
4. HMRC refused the appeal. Ms Pala’s new agent, Hirsh Sharma and Co Ltd (“Hirsch Sharma”) notified the appeal to the Tribunal, relying on the same grounds of appeal as had been put forward by Argento.
5. The Tribunal directed HMRC to file a Statement of Case. In the course of preparing that document, Ms Lowe considered the daily penalty requirement in Sch 55 para 4(1)(c) that HMRC “give notice” to Ms Pala “specifying the date from which the penalty is payable”. Ms Lowe decided that HMRC could not prove that this requirement had been met, and contacted Hirsch Sharma to say that HMRC would not be pursuing the daily penalties.
6. The parties agreed to settle the appeal on the basis that Ms Pala would pay the two fixed penalties of £100. Hirsch Sharma then withdrew the appeal. However, that firm then applied to the Tribunal for an award of costs on the basis that HMRC had behaved unreasonably, or in the alternative, for an award of wasted costs.
7. As explained in more detail below, I have no hesitation in concluding that HMRC did not behave unreasonably, and there is also no basis for a wasted costs award. Ms Pala’s application for costs is therefore dismissed.

Evidence

8. The Tribunal was provided with a Bundle of papers from HMRC, which included:
 - (1) screenshots of HMRC’s internal self-assessment return summaries for Ms Pala for 2016-17 and 2017-18, and screenshots of the penalties charged;
 - (2) a printout from the gov.uk website headed “Check if you need to send a self-assessment tax return”; and
 - (3) correspondence between the parties, and between the parties and the Tribunal.
9. On the basis of that evidence I make the findings of fact set out in the following part of this decision.

The facts

10. Before 2016-17, Ms Pala was an employee paid via PAYE; she had never been issued with an SA tax return. During 2016, she was appointed as the director of a company, but received no earnings and no dividends from that company. Instead, her only income continued to be paid under PAYE as the result of her employment with one or more other employers.

11. At some date before 31 December 2018, HMRC identified that Ms Pala had been appointed a company director and issued her with Notices to File SA returns for 2016-17 and 2017-18. Ms Pala did not file those returns by the due dates, and on 9 April 2019, HMRC issued her with two £100 fixed penalties under Sch 55, para 3. Ms Pala filed the returns on 16 September 2019, and on 17 September 2019, HMRC issued her with two daily penalties under Sch 55, para 4, each of £710.

12. On 14 May 2019, Argento sought to appeal all the penalties on the basis that Ms Pala was “paid through PAYE only therefore no Self-Assessment returns would have been required”. On 13 August 2019, HMRC refused the appeals on the basis that Ms Pala did not have a reasonable excuse.

The questionnaire

13. On 17 February 2020, Mr Crisp of Argento wrote to HMRC again, saying “I have checked with HMRC’s calculator, albeit for 2018/19, but I assume the same rules applied back in 2016/17, that no tax return was necessary. Please see print out attached”.

14. The print out was from the gov.uk website and was headed “check if you need to send a self-assessment tax return”. It included the following questions (shown in normal type) and answers (shown in italics):

1. Did you work for yourself between 6 April 2018 and 5 April 2019? *Yes*
2. What was your work status when you worked for yourself? *Director of limited company*
3. What was your total income for the year: *Less than £50,000*
4. Did you get more than £10,000 from dividends or savings or investments?
No

15. The website also asked other questions: about land and property, capital gains, other income, and certain occupations with special tax treatment. Ms Pala answered no, or not applicable, to all those questions. The result of the questionnaire was stated to be “you do not need to send a self-assessment tax return”.

16. The next paragraph was headed, in bold “if HMRC has told you to send in a return” and it reads “You can ask to stop sending in returns if HMRC has told you to send one and you do not think you need to”, and gives contact details.

17. On 29 April 2020, HMRC refused to cancel the penalties and told Argento that Ms Pala could notify her appeal to the Tribunal by 29 May 2020.

The appeal to the Tribunal

18. On 28 May 2020, Hirsch Sharma filed Ms Pala’s appeal. Under “grounds for appeal” that firm said that “the HMRC website stated that the tax returns were not due. Please see attachment as proof”, and attached the questionnaire which had already been provided to HMRC. The Notice of Appeal also asked that, in addition to cancelling the penalties, the

Tribunal award Ms Pala £250 for stress, together with “our” fees of £498 plus VAT. I have taken it that these were Hirsch Sharma’s fees for filing the Notice of Appeal, and not Argentó’s fees.

19. HMRC was directed by the Tribunal to prepare a Statement of Case, and that task fell to Ms Lowe. She considered Sch 55, para 4, which reads as follows (where “P” means “person”):

- “(1) P is liable to a penalty under this paragraph if (and only if)
 - (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
 - (b) HMRC decide that such a penalty should be payable, and
 - (c) HMRC give notice to P specifying the date from which the penalty is payable.
- (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
- (3) The date specified in the notice under sub-paragraph (1)(c)
 - (a) may be earlier than the date on which the notice is given, but
 - (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).”

20. Para 4(1)(c) thus requires that HMRC “give notice” to Ms Pala “specifying the date from which the penalty is payable”. Ms Lowe decided that HMRC could not prove that this requirement had not been met, and she contacted Hirsch Sharma to say that HMRC would not be pursuing the daily penalties.

21. On 13 August 2020, Hirsch Sharma replied, saying “since you have taken off all the penalties except £200, we accept your offer to settle the matter now. Please confirm the above acceptance by return email and we will withdraw the tribunal action”. Ms Lowe responded the following day, saying “HMRC is happy to settle the appeal under the terms you suggest – acceptance of the late filing fixed penalty of £100 for 2016-17 and £100 for 2017-18”.

22. Hirsch Sharma notified the Tribunal that the appeal was settled, but also asked that the Tribunal “award at least 98% of the compensation we have requested” and added that “the matter is not settled without it”. The firm reiterated its earlier submission that HMRC had “disregarded” its own website and had fined Ms Pala “a huge amount”, and also caused her to incur unnecessary costs. In subsequent correspondence, Hirsch Sharma said they were applying for an award of costs on the basis that HMRC had behaved unreasonably, or in the alternative, an award of wasted costs.

The complaint

23. On 17 November 2020, Hirsch Sharma wrote separately to HMRC complaining about HMRC’s approach and asking for costs. HMRC agreed to pay £250 for “worry and distress” and requested further details about the other costs, to see whether redress should be paid under their complaints procedure. The Tribunal has not been informed of the outcome of this complaints procedure and has proceeded on the basis that the only sum which has been paid to Ms Pala is the £250 for “worry and distress”.

The Tribunal Rules

24. Rule 10 of the Tribunal Rules is headed “Orders for costs” and so far as relevant to this case reads:

- “(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;...
- (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
- (3) A person making an application for an order under paragraph (1) must—
- (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
 - (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.
- (4) An application for an order under paragraph (1) may be made at any time during the proceedings...”

Unreasonable behaviour?

25. In this part of the decision I first consider the legal principles as to what constitutes “unreasonable” behaviour under Rule 10, and then apply those principles to the facts of this appeal.

The case law

26. In *Distinctive Care v HMRC* [2019] EWCA Civ 1010 Rose LJ gave the only judgment with whom Lewison and Floyd LJ both agreed. She said at [7] that “the First-tier Tribunal is designed in general to be a ‘no costs shifting’ jurisdiction...Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeal”.

27. At [25] she approved the approach taken in *Catanã v HMRC* [2012] UKUT 172 (TCC) (“*Catanã*”) where the Upper Tribunal (“UT”) had said that the phrase “bringing, defending or conducting the proceedings” was:

“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 unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.”

28. She also said in the same paragraph:

“There may be circumstances in which behaviour before the appeal is brought is relevant to the tribunal’s assessment of the reasonableness of conduct post-commencement but an applicant cannot extend the scope of the tribunal’s inquiry by alleging bad faith at an earlier stage on the part of HMRC. The

parties and the tribunal must always bear in mind first that the focus should be on the standard of handling the case rather than the quality of the original decision: see *Maryan (t/a Hazeldene Catering) v HMRC* [2012] UKFTT 215 (TC).”

29. In *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) the UT said that the Tribunal should “consider what a reasonable person in the position of the party concerned would reasonably have done, or not done”, which was a value judgment.

Did HMRC behave unreasonably in issuing the penalties?

30. Hirsch Sharma submitted that HMRC had acted unreasonably in issuing the penalties, because Ms Pala did not have an obligation to file the SA returns. Ms Lowe responded by saying that if there was any unreasonableness in the decision to issue the penalties, this was a matter for HMRC’s complaints procedure.

31. Ms Lowe is clearly correct. The Tribunal only has jurisdiction (broadly, that means the power) to make an award of costs in relation to “the proceedings”, and not in relation to the decision which is under appeal, see the citation from *Catanã* set out at §28 above.

Did HMRC behave unreasonably for the reasons given by Hirsch Sharma?

32. Hirsch Sharma’s case rested on the extract from HMRC’s website. They said HMRC should have cancelled the penalties because Ms Pala was not required to submit a return. Ms Lowe submitted that this argument was wrong, because Ms Pala was required to submit a return as a matter of law.

33. I again agree with Ms Lowe. It is clear from Taxes Management Act 1970 (“TMA”) s 8(1) that once a person has been issued with a Notice to File an SA return, he or she is obliged by law to complete and submit that return within the specified period. If the return is not sent back by that date, penalties can be charged under Sch 55.

34. TMA s 8B provides that an exception to that filing requirement applies where the recipient of the Notice to File contacts HMRC within two years of the end of the year in question (or such longer period as HMRC may allow) and asks HMRC to withdraw the Notice. But that exception does not apply in Ms Pala’s case, because she did not ask for the Notices to be withdrawn. Instead, she ignored them until after she received the penalties, and finally filed the returns on 16 September 2019.

35. Contrary to Hirsch Sharma’s submissions, HMRC’s website does not say that a person who has been sent a Notice to File can ignore it on the basis that, having carried out an online questionnaire, the outcome of that questionnaire states that she does not need to file a return. Instead, it says (my emphasis) “if HMRC has told you to send in a return...you can ask to stop sending in returns if HMRC has told you to send one and you do not think you need to”, and gives contact details. Ms Pala did not contact HMRC to say she did not need to fill in a return and she did not ask for the returns issued to be withdrawn. The TMA s 8B exception therefore did not apply.

36. It was clearly reasonable for HMRC to seek to uphold penalties issued to a person who had been sent Notices to File; has not asked for those Notices to be withdrawn, and who has then delayed filing the returns until long after the statutory deadline.

Did HMRC behave unreasonably in relation to the daily penalties?

37. HMRC's reason for cancelling the daily penalties was nothing to do with Hirsch Sharma's grounds of appeal. Instead, HMRC cancelled the penalties because they decided they could not show that HMRC had met the technical requirements in Sch 55, para 4(1)(c) that HMRC "give notice" to Ms Pala "specifying the date from which the penalty is payable".

38. There has been extensive litigation about Sch 55, para 4(1)(c), notably *Donaldson v HMRC* [2016] EWCA Civ 761 and subsequent case law. In *Donaldson* HMRC provided evidence that Mr Donaldson had received:

- (1) an "SA Reminder" after the deadline for submitting a paper return had expired, which informed him that daily penalties would be charged if his return was not filed by 31 January 2012; and
- (2) an "SA 326D notice" informing him of the first £100 fixed penalty and warning that if the return was more than 3 months late, daily penalties would be charged.

39. The Court of Appeal held that those documents were sufficient to constitute notices to Mr Donaldson that complied with Sch 55, para 4(1)(c). In *Sudall v HMRC* [2017] UKFTT 0404 (TC) Judge Richards said:

"HMRC have the burden of proving the daily penalties are chargeable. Mr Sudall has not, in his Notice of Appeal or other correspondence, taken any point to the effect that the requirement of paragraph 4(1)(c) of Schedule 55 is not met. However, HMRC have the burden of proof on this point. It is clear from *Burgess and Brimheath Limited v HMRC* [2015] UKUT 0578 (TCC) that HMRC must prove their case even if Mr Sudall has not taken the point."

40. Thus, to succeed in an appeal on daily penalties HMRC have to provide evidence that they gave the requisite notice under para 4(1)(c) to the taxpayer. This is often straightforward (a) where a person receives Notices to File every year, because they also receive SA Reminders, or (b) where they are issued with paper SA returns, because the warning is normally on the front page of the return. However, in cases such as Ms Pala's, where the Notices to File were issued some considerable time after the end of the relevant tax year, no SA reminder will have been issued. In those cases HMRC will need to show that the taxpayer was given the relevant notice in another document, possibly in the £100 penalty notice.

41. Ms Lowe identified this evidential issue when she was preparing the Statement of Case. Because she was unable to show that the relevant notice had been given to Ms Pala, she said that HMRC would not be defending the penalties. The Tribunal was not informed why Ms Lowe came to this conclusion; in particular, why the notice was not included on the £100 penalty notices which Ms Pala was sent.

42. The requirements of Sch 55, para 4(1)(c) formed no part of Hirsch Sharma's grounds of appeal. This was therefore not a case where HMRC had "unreasonably resisted an obviously meritorious appeal", as the UT put it in *Catanã*. Instead, Ms Lowe identified a weakness in HMRC's defence in the normal course of the proceedings and withdrew the related penalties. That is clearly a reasonable course of action.

Conclusion

43. I have no hesitation in concluding that HMRC did not act "unreasonably in bringing, defending or conducting the proceedings".

Wasted costs

44. Wasted costs can be awarded under Rule 10(1)(c) if costs have been incurred “as a result of any improper, unreasonable or negligent act or omission” by a representative (emphasis added).

45. In that context, the word “unreasonable” means “conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case”, see *Ridehalgh v Horsefield* [1994] Ch 205, followed in *Bedale* [2014] UKUT 99 (TCC).

46. Hirsch Sharma has not identified any HMRC “representative” against whom an award of wasted costs could be made, and in any event it is clear that no-one at HMRC engaged in the sort of conduct which would justify a wasted costs order.

Worry and distress

47. Hirsch Sharma also asked the Tribunal to make an award to Ms Pala for “worry and distress”. The Tribunal has no power to consider such an application, as this type of award does not fall within the scope of Rule 10. In any event, HMRC have already agreed to pay the £250 requested.

Decision and appeal rights

48. Ms Pala’s application for costs is dismissed. This is not a case where there should be any exception to the general rule that “both sides will bear their own costs, whatever the result of the appeal”.

49. 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.

ANNE REDSTON
TRIBUNAL JUDGE
Release date: 29 MARCH 2021