



TC03341

Appeal number: TC/2013/05288

Costs – litigant in person – reasonable excuse case – whether Respondents acted unreasonably – yes – costs awarded

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEIL HAMILTON BOGLE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE DR K KHAN
MS ELIZABETH BRIDGE**

Sitting in Bedford Square, London on 6 December 2013

The Appellant represented himself

Gloria Orimoloye, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the Appellant for costs to cover the time spent preparing an appeal against a penalty on tax paid late. The substantive appeal has fallen out since the Respondents have now agreed that the Appellant does have a reasonable excuse having originally decided that there was no such reasonable excuse.

Background facts

2. The Appellant was required to pay his tax liability for the end 5 April 2012 by 31 January 2013. The tax was not paid in full until 7 March 2013. A penalty was therefore accrued of £3,482.

3. The Appellant indicated the reason for the late payment was because his wife fell ill between the end of January and middle of February with a serious illness and was admitted to hospital at short notice and he provided full time care for her both during and after her discharge from hospital.

4. His wife explained in details with supporting evidence from her surgeon, Professor J Cobb that she was gravely ill at the time and her husband was concerned about her condition as she went through major surgery. There were attendant health issues which also had to be addressed.

5. The Appellant requested a review of HMRC's decision of 19 March 2013 to charge the penalty for failing to pay the tax liability on time. He provided all relevant details and evidence to the Review Officer including a statement from the physician.

6. The review was concluded on 11 July 2013 and the conclusion was that the decision to charge a penalty was correct. The Review Officer, M Harkin stated:

- “I note the delay in payment was due to an oversight, your wife was admitted into hospital at short notice and you were needed to provide full care for her on her discharge from hospital. Whilst I empathise that your personal circumstances were difficult, I cannot accept this as a reasonable excuse for the late payment of the tax due.”

7. On 11 August 2013 the Appellant appealed the decision to the Tribunal.

8. On 20 November 2013 the Respondents accepted that there was a reasonable excuse and the appeal was cancelled.

The Law

- (1) The Litigants In Person (Costs and Expenses) Act 1975 (“LIP Act”).
- (2) Tribunals, Courts and Enforcement Act 2007, (“TCEA 2007”).
- (3) Rule 29 TCEA 2007.

Appellant submissions with regard to reasonable excuse

- (1) Section 60 TMA 1970 imposes an obligation on the collector to make a demand for tax “when it becomes due and payable” and this was not done.
- 5 (2) Even if section 60 TMA 1970 is not applicable, the failure to issue a Self-Assessment Statement and Payslip is in breach of HMRC’s own declared procedure set out in its Self-Assessment Manual: SAM 13001.
- (3) If the submissions regarding section 60 TMA 1970 or SAM 13001 are not accepted then the question is whether there was a reasonable excuse pursuant to paragraph 16, Schedule 56, Finance Act 2009.

10 **Appellant submissions with regard to costs**

9. Since the Appellant’s reasonable excuse was accepted on 21 November 2013 when HMRC wrote to the Appellant stating:

15 “I have reconsidered your appeal at this office prior to the hearing. In the light of the information made available to me, I have decided to withdraw the late payment penalty on the basis that you do have a reasonable excuse for the default.”

The Appellant states that by virtue of the late withdrawing of the appeal, HMRC acted unreasonably and he should recover his costs for the preparation of the appeal. He puts that costs as award of £2,000 which is calculated at 42 hours and 24 minutes at 20 £50 per hour. He states that the Tribunal has a residual discretion toward costs in cases such as this one.

HMRC’s submission

10. HMRC say that the Appellant only provided the relevant information for the withdrawal of the appeal in November 2013 and that the appeal was withdrawn the 25 day following the provision of the information relating to his wife’s illness.

11. They do not believe that they acted unreasonably in the circumstances.

12. They say that the costs application properly falls under rule 10 Tribunal Proceeding (First-tier Tribunal) Tax Chamber Rules 2009 where it is provided at 10(1)(b):

30 “The Tribunal considers that a party or their representative had acted unreasonably in bringing, defending or conducting the proceedings”.

and since they had not acted unreasonably but made their decision only when all information was available that there is not cause for awarding costs in this matter.

Discussion and conclusion

The Tribunal's powers

- 5 (1) After 1 April 2009 the First-tier Tribunal has the power to award costs in certain circumstances. These are as follows:
- (i) When it makes a wasted costs application under section 29(4) TCEA 2007;
 - (ii) When it considers that a party or their representative has acted unreasonably in bringing, defending or conducting proceeding.
- 10 (2) In this respect the Tribunal should consider the arguments put forward by the parties and the merits in those arguments and the factual representations made. If an argument is clearly without merit but is pursued nevertheless then such conduct would be unreasonable.
- 15 13. We are concerned here with the second circumstance which is to say, when a party has acted unreasonably in bringing proceedings.
14. Where there is a Litigant In Person, the LIP Act 1975 s.1(1) provides that costs awarded to a Litigant In Person may include sums in respect of work done and any expenses or losses incurred. This provision applies to civil proceedings before the First-tier Tribunal or the Upper Tribunal with effect from 3 November 2008 by virtue of the TCEA Act 2007, s.48(1) and Schedule 8, para.6(1), and (2).
- 20 15. A Litigant In Person is a person who acts on his own behalf and may include a solicitor who is acting on his own behalf.
16. A Litigant In Person claiming costs may present a claim in one of two ways. The first is an hourly rate to reflect an actual financial loss, which is not our case. The second is where unable or unwilling to establish actual loss, on a fixed hourly charge. The hourly charge is currently £18 per hour increased from £9.25 per hour on 1 October 2011. There is a ceiling for the maximum a Litigant In Person can recover for time which is two-thirds of the amount that would have been allowed if legally represented. The Appellant represented himself.
- 25 17. In our case the litigant has not suffered financial loss since he is a retired person and not in gainful employment. The Appellant is a solicitor who practised for 34 years but is now no longer in practice though he has a practising certificate.
- 30 18. In s.29(1) and (2) TCEA, the costs incidental to all proceedings in both the First-tier and the Upper-tier Tribunals shall be within the discretion of the Tribunal in which the proceedings take place, and the Tribunal has, to determine by whom and to what extent the costs are to be paid. This Tribunal therefore has a discretion to award costs in basic cases such as this one. In order to obtain costs, it must be shown that the party against whom the costs is awarded acted unreasonably in “bringing, defending or conducting proceedings”.
- 35

Did HMRC act unreasonably

19. The Tribunal should consider the merits of the argument made by the parties. HMRC had at the time of their review on 28 March 2013 all relevant information to make a determination as to whether there was a reasonable excuse due to the illness of the Appellant's wife. HMRC have always maintained that in order to claim a reasonable excuse the taxpayer would have to show something exceptional prevented compliance with the rules, such as, an unexpected serious illness. Their own instruction state "a reasonable excuse is normally an exceptional and unforeseeable event that is beyond the person's control". The Tribunal finds that the unexpected grave illness of the Appellant's wife was beyond the control of the Appellant and were exceptional.

20. HMRC established, by requesting from the Appellant bank records, that there was no issue relating to a shortage of funds for the payment of tax. This was established as a fact because shortage of funds does not provide a reasonable excuse in most cases.

21. In spite of having all relevant information, HMRC stated to the Appellant that there was no reasonable excuse for the late payment when there clearly was such an excuse, which was clearly stated in their own guidance information. Anyone dealing with reasonable excuse cases would know that serious unexpected illness does provide a reasonable excuse for the late payment of tax. It is established in the case law.

22. After the Appellant had filed an appeal on 11 August it took HMRC until 20 November to make a decision to allow the reasonable excuse on the facts provided by the Appellant. HMRC claimed that they were waiting on further information before making a decision. This is clearly not true since they had all of the relevant information for making a decision at the time of the review on 28 May 2013.

23. The Tribunal therefore finds that HMRC's conduct was unreasonable since having regard to the merits of the legal argument it was clear that there was no reason why a reasonable excuse could not have been determined at a much earlier time.

24. A party would only be awarded costs which are reasonably incurred and reasonable in amount. In this sense the costs should be proportionate which is to say that the work was necessary and the time taken to undertake the work was reasonable. The level of costs must be proportionate to the circumstances of the case.

25. This case is a basic case. The Appellant is a solicitor of 34 years standing. He claims to be unfamiliar with tax law. For this reason he had to first understand tax law and then the cases and legislation involved. He had to become familiar with the law and then to create an argument, create the paperwork required, take the witness statement form his wife and gather all of the relevant information.

26. The Tribunal does not feel that this should take 42 hours for an experienced lawyer. He would be familiar with the way in which the legal research is conducted and given that this case lacks complexity his main task would have been to read the

legislation and the relevant case law which was outlined to him by HMRC. The Appellant being thorough and possessing intellectual curiosity may have taken the task further than required for the purposes of the preparation of a basic case before the Tax Tribunal.

5 27. For this reason, the Tribunal thinks that no more than 10 hours, which is one-quarter of the time spent, would have been sufficient for the Appellant to become familiar with the relevant parts of the law and to prepare the small amount of documentation required for the hearing. This amount of time is reasonable and proportionate in the circumstances.

10 28. The rate at which the Appellant should be compensated would be the hourly charge of £18 per hour. This is the rate given in the LIP Act 1975. There is no issue of financial loss. The Appellant has kindly provided a schedule of his costs. There are certain items which are clearly excessive. 11 hours undertaking research in Tolleys Tax, a book providing a summary of the law and 4 hours to do a witness statement of
15 3 pages long does seem excessive. A further 7 hours to generate the first draft of submissions to the Tribunal which contains 5 paragraphs on reasonable excuse also appears to be excessive.

20 29. Without going into details of all of the heads claimed, the Tribunal feels that 10 hours work would be adequate to prepare most Litigants In Person (moreso a qualified solicitor) to present an adequate case before the Tribunal.

30. The award of costs therefore would be £180 which would indemnify the Appellant for the work in preparation of the case.

31. Accordingly, the appeal on costs is allowed.

25 32. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

35

**DR K KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 30 January 2014