



TC06535

**Appeal number: TC/2017/01639 and
TC/2017/01642**

*Expenses – whether the appellant acted unreasonably in bringing or
conducting the proceedings – Tribunal Procedure (First-tier Tribunal) Tax
Chamber Rules 2009, Rule 10(1)(b) – Yes – expenses awarded*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SIMPLY CONSTRUCT (UK) LLP

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

**The Tribunal determined the appeal on 5 June 2017 without a hearing under the
provision of Rules 2 and 29 of the Tribunal Procedure (First-tier Tribunal) Tax
Chamber Rules 2009**

DECISION

The issue

1. On 14 February 2018 the respondents (“HMRC”) lodged with the Tribunal a formal application for expenses which was stated to be in the sum of £1,871. In point of fact the total was £2,027. That total included elements for preparing for and attendance at taxation. Following the issue of Directions by me on 16 April 2018, on 1 May 2018 an amended application for expenses which deleted those elements and amounted to £1,871 was lodged with the Tribunal.

10 Preliminary matter

2. The said Directions were to the effect that the appellant’s Note of Objections dated 6 March 2018 did not appear to anticipate an oral hearing in the matter and the reply from HMRC dated 21 March 2018 was silent on the subject of a hearing. I therefore directed that within 14 days the appellant should confirm to the Tribunal and to HMRC whether or not it required a hearing but that in the event that the appellant did not comply with the preceding Direction then the appellant would be deemed to have consented to the matter being decided without a hearing. The appellant did not comply with the preceding Direction. I therefore decided that the appellant has consented to the matter being decided without a hearing, as has HMRC. I therefore decided that the matter should be determined in the absence of the parties and that in accordance with the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”).

Background

3. There are two appeals.

4. On 15 February 2017, the appellant’s representative lodged a Notice of Appeal with the Tribunal. The Notice of Appeal was deficient in a number of respects. It stated that the type of tax was VAT and the amount of tax or penalty or surcharge (if applicable) was £32,453.90. The Grounds of Appeal stated “The VAT Demanded £21,870.94 has been paid. The penalties £10,582.96 are not due as the tax has been paid”.

5. Attached to the Notice of Appeal was an email which read “Please find attached copy of HMRC letter re the VAT and PAYE & CIS Appeal”. The letter was in fact a Statement of Liability covering PAYE underpayments, NIC, CIS underpayments, CIS penalties, VAT default surcharges and interest. That Statement of Liability was issued by HMRC’s Debt Management Unit.

6. On the same day a Notice of Appeal was lodged with the Tribunal which is stated to be in respect of PAYE and CIS in a total of £222,167.78. The Grounds of Appeal were that all PAYE had been paid and that the CIS returns showed that a repayment was due. The penalties were not due as there was no outstanding tax. The same Statement of Liabilities was attached to that Notice of Appeal. The total was £254,621.68 which is the total of the sums noted in the two Notices of Appeal.

7. On 18 March 2018 the Tribunal issued Directions specifying that the two appeals should proceed and be heard together.

8. On 24 March 2017, HMRC notified the appellant as to the identity of the officers who would be dealing with the appeals.

5 9. On 12 May 2017, HMRC submitted an application to the Tribunal requesting that the appellant provide full details of the matters in dispute and the Grounds of Appeal therefor. A copy of that application was also sent to the appellant and its representatives on the same date. That application intimated that:

10 (a) The Notices of Appeal had not been compliant with Rule 20 of the Tribunal Rules, a copy of which is annexed at Appendix 1, in that they did not include details of the decisions appealed against or the grounds for making the appeals.

(b) The letter that was attached to the Notices of Appeal did not carry a right of appeal but did indicate decisions which carried rights of appeal.

15 (c) The appellant had not appealed the default surcharges and therefore any appeal would be late in terms of Section 83G Value Added Tax Act 1994 (VATA”). HMRC would oppose late appeals.

(d) The penalty issued under Schedule 24 Finance Act 2007 on 4 November 2014 has had no Grounds of Appeal provided or reasons for a late appeal and that too would be opposed.

20 (e) The interest charged and the PAYE/NIC and CIS underpayments are not appealable decisions and therefore did not fall within the jurisdiction of the Tribunal.

25 (f) The entry for 2013/14 PAYE Regulation 80 (Tax and NIC) had previously been appealed to the Tribunal under reference TC/2015/05245 but the appellant had withdrawn that part of the appeal relating to the 2013/14 assessments by letter dated 6 July 2016. HMRC would oppose any attempt to reinstate that appeal.

30 (g) HMRC had rejected various appeals in relation to CIS penalties charged under Schedule 55 Finance Act 2009 on the basis that there was no reasonable excuse. The appellant had not availed itself of the statutory review offered or appealed those penalties to the Tribunal within the time prescribed by legislation and HMRC considered those appeals deemed settled under Section 54 Taxes Management Act 1970 (“TMA”). HMRC would oppose any application for late Notices of Appeal.

35 (h) In respect of a number of the CIS penalties, no appeal had been made to HMRC in the first instance in accordance with Section 31 TMA and that HMRC sought strike out of those purported appeals under Rule 8(2)(a) of the Rules on the basis that section 49D(1) TMA does not apply and therefore the Tribunal has no jurisdiction.

(i) HMRC sought a direction that the appellant be directed to provide a full and detailed response to those matters within a short timescale and that such a Direction be made under Rule 8(3)(a) of the Rules.

5 (j) Lastly HMRC requested that the requirement to submit a Statement of Case which was due on 17 May 2018 be suspended.

10. On 14 June 2017, the appellant's representative submitted an email to the Tribunal stating that they were in the process of moving office and requested an extension of 21 days to enable them to submit a reply.

10 11. On 6 July 2017, the Tribunal wrote to the appellant's representative and HMRC requesting dates to avoid for a hearing between 18 August 2017 and 18 November 2017. Directions were also included which specified that the appellant must provide any documents on which they intended to rely at a hearing to HMRC and the Tribunal at least 21 days before the hearing. HMRC were directed to provide two copies of the bundle to the Tribunal and one copy to the appellant.

15 12. On 11 July 2017, HMRC advised the Tribunal, copied to the appellant and its representative, of the dates when HMRC were unable to attend a hearing.

13. They also explained the reason for the longer period when they were not available.

20 14. On the same date, the appellant's representative intimated that they would not be available between 18 August 2017 and 31 October 2017. No explanation was offered. They stated that the hearing would require three days. No explanation was offered and that was not copied to HMRC.

25 15. On 2 September 2017, the Tribunal requested dates to avoid in the period 1 December 2017 to 31 January 2018. HMRC promptly responded on 4 September 2017. The appellant did not respond. On 26 October 2017 the Tribunal listed the hearing for 10 January 2018 and directed that both parties should provide to the Tribunal and each other no later than seven days before the hearing, an outline of the arguments to be put at the hearing. The parties should also agree a Bundle for the hearing or in default of agreement provide separate Bundles which would include all
30 relevant documents and directions.

16. On 21 December 2017, HMRC sent copies of the Bundle to the Tribunal, the appellant and the representative.

17. On 22 December 2017, HMRC sent the skeleton argument to the Tribunal, the appellant and its representative.

35 18. On 22 December 2017, the appellant's representative made an application for the hearing to be postponed on the basis that:-

"1 Mr T Mackie, who was dealing with this case, has now retired and his replacement is not in a position to deal with it for the next three months.

2 The case has significantly changed with the VAT aspects of the case being resolved and
the VAT balance is now zero.

3 HMRC are holding on deposit the sum of £116,806.40 belonging to our client which they
are not refunding until the case has been resolved.

5 4 We are trying to resolve the situation with HMRC without the need for Tribunal
intervention for the remaining part of the appeal. In a similar manner to that of the VAT
which has now been resolved. We require the extension to continue our communication
with HMRC and we would prefer to exhaust this method prior to the Tribunal hearing ...
10 We therefore request that the hearing be postponed for a further 12 weeks from this date
by which time we envisage being in a position to resolve matters with HMRC and may
not require a Tribunal hearing as mentioned above.”

19. On 29 December 2017, the Tribunal notified HMRC of the application for
postponement.

15 20. On 8 January 2018, HMRC replied to the Tribunal setting out their objection to
the postponement request on the basis that:-

(a) Retirement is not an unexpected life event.

(b) It is not unreasonable for a prudent and responsible accountancy firm to
ensure a successor is appointed to deal with a client's affairs in a timeous
manner.

20 (c) It was reiterated that the reasoning for the application for HMRC was to
clarify the exact matters to be put before the Tribunal as the Notices of Appeal
referred only to outstanding liabilities and were therefore not appealable
matters.

25 21. On 8 January 2018, the appellant's representative submitted an email in
response stating that Mr Mackie had retired due to ill-health with less than one week's
notice. A person had been appointed to take over the appellant's affairs, however,
there was no time for them to deal with the case within the current timescale and
again requested a postponement. They stated that a representative could attend but
30 "... will not be able to proceed with the case but solely to argue that there is a good reason for
postponement”.

22. On 9 January 2018, the Tribunal notified the parties that the hearing would
proceed on 10 January 2018.

23. On 10 January 2018, Mr O'Brien appeared and reiterated the postponement
application.

35 24. The first issue for the Tribunal was that HMRC had pointed out that the
correspondence from the appellant's representative, and in particular the letter of
14 July 2017, indicated a company number of 389076. HMRC had checked and TOC
Accountants Limited had been dissolved on 16 January 2015. Mr O'Brien confirmed
that the representative was T O'Brien trading as TOC Accountants. The appellant
40 was Mr Mark O'Brien and a Mr Gary Sharp.

25. I had due regard to Rule 11 of the Rules and allowed Mr O'Brien to act for the appellant notwithstanding the fact that there had been non-compliance with Rule 11(2) of the Tribunal Rules.
26. On exploration it transpired that Mr Mackie had had a heart attack but it had been some considerable time previously and he had had bypass surgery in September 2017. He retired on 13 December 2017 having only worked a few days in the intervening period. Mr O'Brien was wholly unable to explain why TOC Accountants had not progressed matters or identified even the matters that might be appealed or the grounds for appeal.
27. HMRC pointed out that action had only been taken after the Debt Management Unit had pursued recovery. A number of the matters included in the Statement of Liability had been included in the 2015 appeal and the appellant had withdrawn the elements relating to PAYE and on 21 October 2016, the Tribunal had struck out the appeal in regard to CIS in terms of Rule 8(1) of the Rules on the basis that the appellant had failed to comply with Directions.
28. After some debate, Mr O'Brien indicated that he had not read the Bundle which HMRC established had not only been served but had been signed for.
29. The application for postponement of the hearing was refused.
30. Mr O'Brien was unable to advance any arguments in regard to the potentially appealable decisions or the Grounds of Appeal.
31. Having heard from Mr Mason and Mrs McIntyre, as well as Mr O'Brien, I indicated that it was my intention to strike out the appeals.
32. Mr O'Brien then indicated that he wished to withdraw the appeals but he had to concede that he had no instructions to do so. He then indicated that he would withdraw from acting.
33. He requested that the decision to strike out the appeals should be in very short form. The parties agreed pursuant to Rule 35(3) that it was unnecessary for the decision to include full or summary findings of fact and reasons for the decision.
34. HMRC made an oral application for expenses in terms of Rule 10 of the Rules and I reserved judgement on that intimating that HMRC should lodge a formal application and that within 28 days of the date of release of the decision.
35. The short form decision was duly issued on 19 January 2018.
36. No application has ever been received for full written findings and reasons, nor for leave to appeal.
37. As indicated above, HMRC duly lodged the formal application for costs on 14 February 2018.

38. On 6 March 2018, the Tribunal received a Notice of Objection from TOC Accountants and that carried a company reference of 571817. It was stated to be by “A Bhandrai (in the absence of T Mackie)”. It read:-

“1. This was not a complex case,
5 2 HMRC had every opportunity to raise an action for dismissal if they felt that the case should not be heard under appeal. No such motion was lodged and HMRC who continued with preparation for the case,
3 The arguments raised in HMRC application are not relevant here,
4 The full VAT element prior to the Tribunal has been reduced to zero and was amended
10 by HMRC,
5 The PAYE element is currently being discussed with HMRC and has unallocated payments and will be reduced.
6 On the day of the Tribunal, the judge refused to hear any application for expenses which HMRC asked for.”

15 39. HMRC responded on the basis that:

- (a) They agreed that it was not complex.
- (b) HMRC have complied with all Directions timeously. The appellant and its representative have been dilatory in compliance with Directions.
- (c) Only the appellant can withdraw an appeal once it has been lodged.
- 20 (d) HMRC argue that the arguments in relation to VAT and PAYE are not relevant to the expenses application and it is not clear what point 3 is meant to be addressing.
- (e) Judge Scott had reserved the decision as the matter had not been raised
25 with the appellant or its representative prior to the hearing. It was for that reason that it was addressed in the decision.

40. In the interim as can be seen from the above there has been no further contact from either the appellant or its representative.

41. There has been no attempt at any stage by the appellant or its representative to engage with the appeal process. It is fundamental that any appeal must specify the
30 appealable decisions and the Grounds of Appeal. There has been no attempt to do so.

42. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides that all costs of and incidental to proceedings in the First-tier Tribunal shall be in the Tribunal’s discretion, subject to the Rules. So far as relevant, Rule 10 of the Rules reads as follows:-

35 “10.— Orders for costs

(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]¹

5 (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; [...]²

(c) if—

(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

10 (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph [; or]³

[(d) in a MP expenses case, if—

15 (i) the case has been allocated as a Complex case under rule 23 (allocation of cases to categories); and

20 (ii) the appellant has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph.

] ⁴

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.”

25 43. It is common ground that since the appeal has not been categorised as complex and there has been no application for “wasted costs” as defined in the 2007 Act, the only basis on which an application for costs could be made in this case was under the “Unreasonable Conduct” head in Rule 10(10)(b).

44. The scope of Rule 10(1)(b) has been discussed in this Tribunal in *Catanã v HMRC*⁵ where Judge Bishopp stated at paragraph 14:

¹ Words inserted by Tribunal Procedure (Amendment) Rules 2013/477 rule 35 (April 1, 2013)

² Word repealed by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(a) (November 29, 2010)

³ Word inserted by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(b) (November 29, 2010)

⁴ Added by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(c) (November 29, 2010)

⁵ 2012 UKUT 172 (TCC)

5 “Mr Catanã has made a number of points about the phrase ‘bringing, defending or conducting the proceedings’. 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, ... or either party has acted unreasonably in the course of proceedings, for example, by persistently failing to comply with the rules and directions to the prejudice of the other side”.

45. I am bound by and agree with Judges Bishopp and Herrington in *HMRC v Jackson Grundy Limited*⁶ at paragraph 47 where they state:-

“... when considering the application of Rule 10(1)(b). The following principles are to be derived from the authorities:

10 (1) The Rule is a threshold condition. It is only if the Tribunal concludes that a party has acted unreasonably in the relevant respect that the question of the exercise of a discretion to award costs can arise. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgement: see *Marshall & Co v HMRC* 2016 UKUT 0116 (TCC) at [30] citing with approval *Market & Opinion Research International Limited v HMRC* 2015 UKUT 12 (TCC)”.

15 46. In *Distinctive Care Limited v HMRC*⁷ the Upper Tribunal stated at paragraph 44 that:-

“(4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct”.

20 This is what happened here.

47. From the outset the appellant and its representative have been aware that no appealable decisions have been identified and no grounds of appeal have been notified. The appeal cannot possibly succeed in the absence of either or both of those aspects. I therefore have no difficulty in finding that the appellant and its representative have acted unreasonably in this matter.

48. The application for expenses is sufficiently detailed to enable me to undertake a summary assessment. I am satisfied as to quantum.

49. Accordingly the application for expenses in the amended sum is granted.

30 50. 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

⁶ 2017 UKUT 180 (TCC)

⁷ 2018 UKUT 155 (TCC)

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.

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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 12 JUNE 2018

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20.—Starting appeal proceedings

5 [(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.]⁸

(2) The notice of appeal must include—

- 10 (a) the name and address of the appellant;
- (b) the name and address of the appellant’s representative (if any);
- (c) an address where documents for the appellant may be sent or delivered;
- (d) details of the decision appealed against;
- (e) the result the appellant is seeking; and
- 15 (f) the grounds for making the appeal.

(3) The appellant must provide with the notice of appeal a copy of any written record of any decision appealed against, and any statement of reasons for that decision, that the appellant has or can reasonably obtain.

20 [(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal must be made or notified after that period with the permission of the Tribunal—

- 25 (a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and
- (b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.]⁹

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⁸ Substituted by Tribunal Procedure (Amendment No.3) Rules 2010/253 rule 6(5)(a) (November 29, 2010)

⁹ Substituted by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(5)(b) (November 29, 1010)