



TC06817

Appeal number: TC/2017/07784

COSTS – Rule 10 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – HMRC acting unreasonably – amount of costs – litigant in person – summary assessment

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW GREEN

Appellant

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in in Chambers on 13 November 2018 having received written submissions

DECISION

Introduction

5 1. On 21 February 2017 HMRC visited the appellant, Mr Green, for a VAT compliance check. This eventually resulted in an assessment for VAT totalling £2,987. After an unsuccessful review, Mr Green appealed against HMRC's decision and on the evening before the appeal was due to be heard, HMRC decided not to contest the appeal and to withdraw its disputed decision.

10 2. Mr Green, who intended to represent himself at the hearing, has applied for his costs. The case was categorised as a "standard" case. HMRC accept that their late decision not to contest the appeal and withdraw the decision against which the appeal was taken, was unreasonable within the meaning of Rule 10 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules").

15 Background

3. Mr Green works as a composer, musician and music copyist working in the preparation of music for films, the theatre and television.

4. The point at issue in the appeal related to Mr Green's reclaim of VAT on the supply and installation of a garden office and furniture at his home. HMRC took the
20 view that the construction of the garden office constituted a supply of services because it was the direction of a "bespoke" building and that the installation of the furniture was also a supply of services and did not constitute "capital expenditure goods". In short, HMRC decided that Mr Green was not entitled to reclaim VAT on the supply and installation of the items in question.

25 5. I do not think it is necessary to go into the minutiae of the dispute, but in the course of 2017 there was correspondence between Mr Green (and his new agent, "X-VAT"). Eventually on 19 July 2017, HMRC issued a decision letter with appeal rights. They had come to the view that Mr Green could not reclaim VAT in respect of the supply made to him and consequently a Notice of Assessment was issued to Mr
30 Green for a total of £2,987.

6. X-VAT asked for a statutory review of the decision and on 25 September 2017 HMRC issued a review letter which upheld the original decision.

7. Mr Green appealed to this Tribunal on 23 October 2017.

8. The preparation for the appeal, which was listed to be heard on 6 June 2018
35 before me, proceeded in the normal course. The tribunal issued directions and bundles of documents were produced etc. I shall deal later with some of Mr Green's complaints about the conduct of HMRC in the course of the appeal.

9. There were numerous emails between the HMRC team dealing with the appeal in the period 29 May 2018 to 4 June 2018. On the afternoon of 4 June 2018, Mr Ridley (the HMRC litigator dealing with the appeal) went home on sick leave. The case was passed to Mr Ridley's colleague, Ms Hancox. At that stage, the advice of HMRC's Policy specialists was that the appeal should not be withdrawn.

10. On 4 June 2018, Mrs Hancox made an application on behalf of HMRC to postpone the hearing on the grounds that her colleague had been taken ill. On the same day, Mr Green objected to the postponement application. On 5 June Ms Hancox telephoned the Tribunal Service to enquire about a response to her postponement application.

11. In the course of 5 June, Ms Hancox reviewed the documents and held several telephone conversations with specialists within HMRC to discuss the merits of HMRC's case and the available evidence. She had concerns about the lack of evidence relating to the split of costs between goods and services and also concerning the duration of the construction of the Home Office. Email exchanges between Ms Hancox and Mr Heyward (HMRC Policy) revealed HMRC's doubts about the strength of their case, including the lack of evidence to support it.

12. At around the same time on 5 June 2018, the Tribunal service confirmed that HMRC's application to postpone would be heard by me at the outset of the hearing on the morning of 6 June 2018.

13. Shortly thereafter on 5 June, Mr Heyward suggested to Ms Hancox by email that if she thought that the evidence was insufficient to support HMRC's case, the appeal decision should be withdrawn. Whereupon, Ms Hancox telephoned Mr Green to advise him that the appealed decision had been withdrawn and that she would notify the Tribunal Service (which she immediately did). I was only notified that the hearing had been cancelled on the morning of 6 June 2018 as I was travelling to the hearing.

Mr Green's costs application

14. On 14 June 2018 Mr Green applied for his costs.

15. Essentially, Mr Green applied for costs on three grounds.

16. First, he applied for wasted costs, under Rule 10 (1)(a) because HMRC pursued their view that he was not entitled to input tax under the Flat Rate Scheme from February 2017, or at least 12 May 2017, until the evening of the day before the hearing proposed for 6 June 2018.

17. Secondly, Mr Green applied for costs under Rule 10(1)(b) on the basis that HMRC had acted unreasonably in defending their decision.

18. Thirdly, Mr Green applied for costs under Rule 10(1)(b) on the basis of HMRC's conduct of the proceedings. Mr Green allege that HMRC had failed to comply with deadlines contained in the First-tier Tribunal ("FTT")'s directions, had

submitted documents late and had chaotically applied to postpone the hearing on 4 June 2018 and had followed this with a withdrawal of the decision in the evening of 5 June 2018.

5 19. Mr Green argued that it was unreasonable for HMRC to request a postponement of the hearing and then to withdraw from the appeal at such a late stage and the manner in which HMRC had communicated these matters to him was, he considered, inconsiderate, discourteous and unfair.

10 20. Mr Green argued that it was incredible that his case could have got to the point where a hearing before the FTT was about to occur, having gone through a formal review, without proper consideration before the decision was withdrawn on the evening before the tribunal hearing. The cost to him was considerable:

15 “The personal investment in exchanges of communication, supplying evidence, negotiation and argument with the Respondents has been very substantial. I have also employed the professional services of Martin Kaney of X VAT Ltd and Ellie Bernard of EMTACS to provide professional advice.

20 I have prepared thoroughly at each stage of the process, with particular intensity leading up to the Tribunal. This has involved missing family events and curtailing valuable social time. Most significantly, as a self-employed, unrepresented taxpayer, clearing my diary to accommodate preparations and putting time aside to administrate the case has resulted in loss of earnings. And this besides the distraction of attention and diversion energy to adequately attend the demands of the case. Many hours were spent reviewing, indexing and cross-referencing the Bundle with my evidence and preparing statements for way Tribunal hearing which never happened.

25 I continued my preparations throughout Monday 4 and Tuesday 5 June, when it was not even clear that the Tribunal would proceed. The respondents had applied for a postponement to the hearing on 4 June, which HMCTS rejected¹ on the afternoon of 5 June before HMRC withdrew their decision that same evening. My nerves were severely tested by having to prepare under such highly unsatisfactory conditions.

30 Throughout the process, it has been made very clear to me what my responsibilities are and what the financial penalties, sanctions and consequences will be in not complying with the request of both HMRC and HMCTS. I would like to understand what penalties and consequences will follow for the Respondents considering their conduct throughout this case.”

35 40 21. Mr Green gave the following details of the costs he had incurred and which he was claiming:

“COSTS

¹ In fact, a tribunal judge decided that the postponement application should be heard at the beginning of the hearing.

Consultant Advice

X-VAT Ltd – Martin Kaney – 9 June 2017 Invoice 20170126-1
£250 + £50 VAT £300.00

5 EMTACS Ltd – Ellie Bernard – 19 October 2017 £175 + £35 VAT
£210.00

Materials

These divider tabs were necessary for preparation of documents and evidence, and for indexing the Bundle.

10 Amazon.co.uk - Avery double sided Printable Adhesive Divider Tabs
£ 17.66

Printing

15 In my business, I charge 15p per A4 page to cover paper, printing and
printer maintenance costs. I have wasted many reams of paper
throughout the course of the case, but in specific preparation for the
Tribunal hearing it would be reasonable to base a printing cost on the
number of pages in the Bundle. While the final Bundle was prepared
by the Respondents, I had also printed all documentation myself for
my own reference and to corroborate the exchange of documents
20 during the process.

335 pages @ 15p per page £ 50.25

Loss of earnings and inconvenience

25 I am [a] self-employed sole trader. My business is as a composer,
musician and music copyist working in the preparation of music for
film, theatre and television. My hourly rate ranges from £38 to £42 per
hour. This is evidenced in my business invoices (which HMRC have
examined during the Compliance Check) and in the rates guidance
published by the Musicians’ Union.

30 My normal working week would be 5 days, at 10 hours per day. I have
worked well in excess of one full working week on this matter since
the pursuance of the case following the Compliance Check of 21
February 2017, and far more in preparation for the Tribunal. However,
I am content to apply for one working week’s pay in settlement for loss
of earnings and the inconvenience caused by the Respondents’
35 persistent and unreasonable defence of their decision.

50 hours @ £38 per hour £1,900.00

TOTAL £2,477.91”

22. Mr Green also supplied (with his Reply) third-party invoices which evidenced his hourly rate.

40 23. In relation to HMRC’s alleged non-compliance with the FTT’s directions, Mr Green drew attention to three matters.

24. First, Mr Green argued that HMRC had submitted a List of Documents just before the deadline but had failed fully to comply with the exchange of documents as required by the deadline of 5 March 2008 in accordance with Direction 1 of the Directions issued by the FTT on 1 February 2018. HMRC had received Mr Green's List of Documents on 26 January 2018.

25. Mr Green had contacted HMRC by email on the deadline of 5 March 2018, concerned that he would not have adequate time to check the List of Documents against his own records. He had already applied to the FTT on 2 March for an extension of time. Mr Ridley, on behalf of HMRC, requested Mr Green's "forbearance due to a personal situation" and agreed that it was in the interests of both parties to request an extension of time. HMRC applied for an extension of seven days to 12 March 2018. Whilst HMRC issued a List of Documents on 5 March 2018, the FTT granted an extension of seven days for any issues regarding the List of Documents and exchanges of documents to be resolved.

26. Discussions and exchanges of documents only began following the grant the extension by the FTT and these were ongoing until 15 March when, according to Mr Green, Mr Ridley assured him that "all was now in order". In fact, Mr Green stated that an exchange of documents was still taking place on 23 March when Mr Ridley requested a copy of an EU Regulation document. Mr Green argued that this was well in excess of the time-frame for the review and exchange of documents set by the FTT and the agreed extension.

27. Secondly, Mr Green argued that HMRC had failed to comply with the FTT's directions (Direction 4 issued on 21 May 2018) in relation to a Statement of Authorities. Mr Green commented that he had raised concerns that HMRC had not included VAT Notice 700, on which HMRC relied in their decision-making process. The Statement of Authorities was due to be lodged no later than 5 pm on Wednesday, 23 May 2018.

28. The day after the deadline, on 24 May 2018, Mr Ridley agreed that VAT Notice 700 should be included and that a paginated copy of the relevant paragraph would be forwarded to insert into the bundle. He also asked whether there were any other relevant paragraphs that Mr Green would like to be included.

29. Thirdly, on 1 June, late in the afternoon, Mr Ridley sent Mr Green a witness statement from Victoria Andrews, an HMRC witness. Attached to the witness statement was VAT Notice 741a paragraph 7.8, which Mr Green regarded as a further authority. Mr Green submitted that it was unreasonable for HMRC to continue to submit documentation in breach of the FTT's directions at such a late stage.

HMRC's submissions

30. HMRC submitted that a claim for wasted costs under section 29 (4) Tribunal Courts and Enforcement Act 2007 ("TCEA") was inapplicable, but gave no reasons.

31. HMRC accepted that the decision to withdraw the appealed decision was taken very late in the day – the day before the hearing – and that in this regard their actions were unreasonable.

5 32. In relation to Mr Green’s specific points concerning missed tribunal deadlines etc, HMRC made the following submissions:

(1) Direction 1 of the directions dated 1 February 2018 stated that each party should supply a List of Documents (by 5 March) that it intended to rely on in connection with the appeal and “provide to the other party copies of any documents on that list which have not already been provided to the other party.”
10 HMRC noted that an extension of seven days for this deadline was granted by the FTT. Although documents were exchanged after the extended deadline, HMRC argued that these were duplicate documents of correspondence between HMRC and Mr Green and therefore had already been provided to the other party. HMRC noted that in correspondence between Mr Green and HMRC, Mr
15 Green had referred to the exchange of a document on 26 March 2018. This followed a request by HMRC for a copy of an authority which Mr Green had indicated he was relying upon and one that HMRC were having difficulties locating for inclusion in the bundles before the deadline of 10 April 2018 specified in the tribunal’s directions.

(2) Direction 4 was to supply a statement of authorities no later than 14 days prior to the hearing date i.e. 25 May 2018. HMRC had quoted two paragraphs from Notice 700 in correspondence with Mr Green from the decision-maker and the review officer. This was originally omitted as an authority and later provided to Mr Green on 29 May 2018 at his request. There were no
25 submissions in HMRC’s Statement of Case regarding these paragraphs.

(3) Mr Green also referred to the paragraphs from Notice 700 and failed to include these in the authorities that he submitted.

33. HMRC argued that they had not acted unreasonably in requesting a postponement of the hearing. Mr Ridley, who had prepared for the hearing, was taken
30 ill shortly before the 6 June hearing date and there was no one else with sufficient knowledge of the matter confidently to put HMRC’s case at the hearing.

34. As regards the quantum of the costs claimed by Mr Green, HMRC had the following objections:

(1) Mr Green was a litigant in person. HMRC referred to the Civil Procedure
35 Rules (“CPR”) Part 46.5 which state:

“(4) The amount of costs to be allowed to the litigant in person for any item of work claimed will be –

(a) Where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for the time recently spent on doing
40 the work; or

(b) Where the litigant cannot prove financial loss, an amount for the time recently spent on doing the work at a rate set out in Practice Direction 46.”

(2) Practice Direction 46 at paragraph 3.4 stated:

5 “The amount which may be allowed to a self represented litigant under rule 45.39(5)(b) is £19 per hour.”

(3) HMRC argued that Mr Green had not proved financial loss under Part 46.5 (4).

10 (4) Therefore, although HMRC accepted Mr Green may have spent 50 hours preparing for litigation, the hourly rate should be limited to £19.

(5) The disputed decision was subject to a statutory review and the conclusion letter was dated 25 September 2017. The X-VAT invoice predated the review conclusion letter and therefore was irrecoverable as legal costs (*Stomgrove Ltd v HMRC* [2014] UKFTT 169 (TC) (Judge Sinfield)) at [31].

15 (6) Although HMRC provided Mr Green with a bundle for the hearing, they accepted that Mr Green may have had cause to print off documents in preparation for the hearing. No proof had been supplied at 335 pages were necessary at a rate of 15p per page. HMRC considered 15p per page to be excessive and suggested 5p per page.

20 (7) Mr Green had included VAT in the claim but because he was VAT registered and withdrew from the Flat Rate Scheme on 31 March 2007, VAT should not be included. CPR Practice direction 44 2.3:

25 “VAT should not be included in a claim for costs if the receiving party is able to recover the VAT as input tax. Where the receiving party is able to obtain credit from HMRC for a proportion of the VAT as input tax only that proportion which is not eligible for credit should be included in the claim for costs.”

(8) Finally, HMRC asked me summarily to assess costs on the papers.

Mr Green’s Reply

30 35. On 13 July 2018, Mr Green replied to HMRC’s submissions:

(1) Mr Green did not agree that a claim for wasted costs was not applicable.

(2) The application to extend the deadline regarding Direction 1 was made at his prompting because HMRC had not submitted their List of Documents in a timely manner.

35 (3) He did not accept that he had failed to include paragraphs from Notice 700 in his statement of authorities because it was HMRC who were relying on this authority in support of their decision.

40 (4) HMRC’s request for a postponement of the hearing was unreasonable and their explanation for doing so was weak. HMRC should have had the resources to provide an alternative litigator.

5 (5) As regards loss of earnings, inconvenience and compensation, Mr Green noted that HMRC accepted the reimbursement of costs equivalent to 50 hours of work. In fact he had spent well in excess of 50 hours in the course of the appeal. He considered the sum of £1,900 was proportionate and reasonable for the loss of earnings, wasted time, personal inconvenience and stress when, by HMRC's own admission their actions were unreasonable and their original decision was incorrect and should not have been defended. He attached invoices which evidenced his hourly rate along with the printing page rate (also contested by HMRC).

10 (6) Mr Green had made it clear to his colleagues that he would not be able to work beyond 31 May 2018 because he was representing himself before the Tribunal and needed the final five days (including the weekend of 2 and 3 June 2018) to prepare. Between 29 March 2018 and 31 May 2018, Mr Green worked 323.25 hours across 40 days. Some days were much longer and some were shorter, but the project concerned averaged 8.08 hours per day at £42 per hour. Therefore, for the four working days beyond 31 May 2018 (1, 4, 5 and 6 June 2018) it was reasonable to suppose that he had lost potential earnings of £1357.44 on that project alone. Mr Green attached invoices for recent projects which evidenced his hourly rate.

20 (7) The costs of X-VAT were "incidental" to the appeal. *Stormgrove* at [12] and [22] supported Mr Green's view. X-VAT's advice in relation to the appeal was "incidental", the cost was "reasonable" and there was an indisputable "causal connection between the proceedings and the incurring of the costs."

25 (8) In relation to printing costs, HMRC's suggestion of 5p per page was arbitrary and without evidence. Mr Green noted that a well-known high street chain would charge 10p per page for printing 335 pages and another would charge 8.4p, and he attached quotations in support of this. Mr Green argued that the rate of 15p was in line with professional costs that he would charge a client as evidenced in the invoices that he submitted. The rate was set to cover the materials of paper and toner as well as the maintenance of printing equipment.

30 (9) Mr Green accepted HMRC's submission that VAT should not be included in the professional consultancy costs.

35 (10) Finally, Mr Green understood that HMRC accepted the application for the reimbursement of costs of £175 for the professional consultancy services of EMTACS Ltd and of £17.66 in respect of materials of Avery double sided Printable Adhesive Divider Tabs.

The relevant statutory provisions

36. Rule 10 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009 provided, so far as relevant,:

- 40 (1) The Tribunal may only make an order in respect of costs...
- (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 bringing, defending or conducting the proceedings;
- (3) A person making an application for an order under paragraph (1) must –
 - 5 (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...claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs... if it decides to do so.
- 10 (4) an application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends –
 - ...
 - 15 (b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.”

37. Section 29(5) TCEA 2007 defines “wasted costs” as any costs incurred by a party:

- 20 “(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative of 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.”

38. The phrase “legal or other representative” is defined as “any person exercising a right of audience or right to conduct the proceedings on his behalf” (section 29(6) TCEA).

Discussion

39. HMRC accepts that it acted unreasonably in notifying Mr Green, at a very late stage, that they were not intending to defend the decision at the hearing scheduled for 30 6 June 2018. I have no doubt that HMRC were correct to make this admission. In my judgment, HMRC should have reviewed the evidence and the strength of their position at a very much earlier stage and not to have done so until the eve of the hearing was plainly unreasonable.

40. As regards the other matters of which Mr Green complained in relation to the 35 conduct by HMRC of the appeal referred to at [22]-[28] above, I am not persuaded that HMRC acted in an unreasonable manner. These matters seem to me to be part of the rough-and-tumble of litigation and it would be harsh to characterise them as “unreasonable” for the purposes of Rule 10. Certainly, without a full review of the correspondence (with which I was not provided) I would not feel confident in 40 reaching a more definite conclusion. HMRC’s admission of unreasonable conduct does not require me to consider this issue further.

41. Furthermore, although it happened at almost the same time as HMRC were coming to the conclusion that their decision should be withdrawn, the application for a postponement of the hearing on the grounds of ill-health of Mr Ridley does not seem to me to be unreasonable. It is very difficult for another advocate to pick up the threads of a relatively complex appeal at very short notice.

42. The real dispute in relation to this application relates to the quantum of costs claimed by Mr Green.

43. In this regard, I am satisfied that this is an appropriate case for summary assessment and that I have the necessary information to make that assessment. To order a detailed assessment would, in the circumstances and given the amounts claimed, be disproportionate.

44. First, I should note that the CPR do not, strictly speaking, apply to this Tribunal. Nonetheless, they provide useful guidance which I should follow unless required to do otherwise. I am satisfied on the evidence put forward by Mr Green that his claim for £1,900, representing loss of earnings, accurately represented his financial loss. His rate per hour seemed consistent with what he would charge to third parties. On that basis, Part 46.5(4)(b) CPR has no application.

45. Secondly, there appeared to be no dispute as regards the £175 fees for advice from EMTACS and for £17.66 in relation to materials.

46. Thirdly, I see no reason to doubt Mr Green's assertion that he had to print 335 pages in order the course of this appeal, even allowing for the fact that HMRC prepared the bundles. However, in the light of his evidence of comparable costs charged by high Street suppliers, I would limit the cost to 10p per page resulting in a total of £33.50.

47. Next, I have concluded that I should disallow the costs of X-VAT. These costs, incurred under an invoice dated 9 June 2017, pre-dated the submission of the notice of appeal on 23 October 2017. That may, of itself, not matter if those costs had been incurred in the preparation of the notice of appeal or in obtaining advice as a prelude to submitting such a notice. The costs, however, were incurred in relation to a letter to HMRC of 11 June 2017 requesting a review. Costs incurred at the review stage are not recoverable under Rule 10. The Upper Tribunal (Judges Sinfield and Poole) in *Distinctive Care Ltd v HMRC* [2018] UKUT 155 (TCC) said at [42]:

“We consider that the word “proceedings” in this context clearly means “proceedings before the FTT” and does not have a wider meaning which encompasses any earlier stage of the appeals or review process before the relevant notice of appeal is delivered to the FTT. The Upper Tribunal has already said as much in *Catanã* and *Marshall*.”

48. I therefore disallow the costs of X-VAT.

49. Finally, I should add that it is, of course, unnecessary for me to consider the matter of “wasted costs”, an issue which relates the conduct of “any person exercising

5 a right of audience or right to conduct the proceedings on his behalf” (section 29(6) TCEA). Had it been necessary to do so, I would have been minded to dismiss the application under this heading, because I was not satisfied that the persons identified by section 29(6) TCEA were those responsible for any “improper, unreasonable or negligent act or omission.”

Conclusion

50. For the reasons given above, I summarily assess Mr Green’s costs, to be paid by HMRC within 30 days of the date of release of this decision, as £2,126.16.

Rights of appeal

10 51. 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 15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

20 **GUY BRANNAN**
TRIBUNAL JUDGE

RELEASE DATE: 14 November 2018