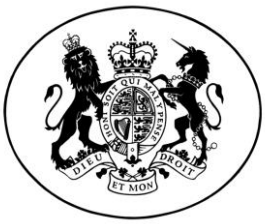
[2019] UKFTT 149 (TC)



TC07015

Appeal numbers: (1) TC/2017/00446
(2) TC/2017/04007
(3) TC/2017/02850

PROCEDURE – Costs applications – Complex Category – Additional issue raised and withdrawn in respect of appellant that has "opted out" of costs regime – Whether 'unreasonable' conduct by respondents – No – Other applications not pursued – Whether costs Order appropriate at this stage – No – Costs in case/no order for costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) GEOFFREY RICHARD HAWORTH
(2) KLEINWORT BENSON TRUSTEES LIMITED
(3) IAN FRANCIS LENAGAN **Appellants**

- and -

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

TRIBUNAL: JUDGE BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 20 February 2019

Giles Goodfellow QC and Ben Elliott, instructed by Mazars, for the Appellant

Christopher Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. These appeals, all of which have been categorised as "complex", concern what is known colloquially to tax practitioners as the 'round the world scheme'. They raise issues relating to the application of the UK-Mauritius Double Taxation Convention and Mauritian law. Although listed as a case management hearing to determine the application made by the appellants on 22 October 2018 for further information in relation to particular allegations and contentions raised by the respondents ("HMRC") in their statement of case and for directions to assist the appellants in their understanding of HMRC's position in relation to a proposition of Mauritian law, this hearing became in essence a costs application by the appellants.

2. This is because by the time of the hearing the information the appellants had requested had been provided by HMRC and they were able to understand, but not agree with, HMRC's position in relation to Mauritian law. However, despite a flurry of correspondence in the days preceding the hearing, given their differences the parties were unable to agree that the hearing be vacated.

3. As indicated in the pre-hearing correspondence, on 18 February 2019 a formal application for costs (to which was attached a costs schedule in accordance with Rule 10(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) was made by the appellants.

4. The costs sought by the appellants are in relation to:

   (1) a new issue raised by HMRC in the appeal of Kleinwort Benson Trustees Limited ("KBTL");

   (2) the appellants requests for further information; and

   (3) the Mauritian law issue.

5. First, however, it is necessary to consider whether, as Mr Stone who appeared for HMRC contends, such a costs application should be determined at the conclusion of the substantive appeal rather than at this stage of proceedings. This, he says would be the usual practice in the Courts and Tribunals and the Tribunal will be able to judge at that stage the relevance of the matters on which costs are sought. Mr Goodfellow QC for the appellants contends that I am in a better position now, after hearing argument on the issue of these specific costs, than the judge hearing the appeal at some date in the future who will be more concerned with the substantive issues in the appeals.

6. However, having considered the costs application, for the reasons below and apart from the application in relation to the new issue raised in KBTL's appeal which I have dismissed, I do not consider it appropriate to make any direction for costs at this stage of proceedings, other than costs in the case in the appeals of Mr Haworth and Mr Lanagan and no order for costs in KBTL's appeal. I should also say that in reaching this conclusion, that although carefully considered, it has not been necessary to mention every argument advanced on behalf of the parties or all of the evidence to which I was referred.

Law

7. I have already observed that all three appeals have been allocated to the "complex" category. With the exception of KBTL which opted out of the costs regime in accordance with Rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the full cost shifting regime applies subject, under s 29 of the Tribunals Courts and Enforcement Act 2007, to the discretion of the Tribunal.

8. In *Versteegh Limited and others v HMRC* [2014] UKFTT 397 (TC) the Tribunal (Judge Berner) said, at [10]:

> "In the context of the First-tier Tribunal as a whole, a full costs-shifting jurisdiction is an unusual feature. There is, as a consequence, no detailed guidance in the Tax Tribunal Rules as to the exercise of the Tribunal's discretion in this respect. This particular costs jurisdiction has more in common with that applicable in the courts, and accordingly it is clear to me, and indeed it was common ground, that the principles applicable under the Civil Procedure Rules ("CPR"), and the relevant authorities in that respect, are equally applicable to the exercise by this Tribunal of its power to award costs. These are a reflection of the same overriding objective, namely to deal with cases fairly and justly."

9. Part 44.2 of the Civil Procedure Rules ("CPR") provides:

> "(1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs–
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any to make about costs, the court will have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; …
>
> (5) The conduct of the parties includes—
>
> (a) conduct before, as well as during, the proceedings …;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

10. In all other cases, ie appeals categorised as basic, standard or where an appellant in a complex category case has, like KBTL, opted out of the costs shifting regime, the Tribunal may only make an order in respect of costs if "it considers that a party or their representative had acted unreasonably in bringing, defending or conducting the proceedings (see Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).

11. In *Tarafdar v HMRC* [2014] UKUT 362 (TCC) the Upper Tribunal observed that:

> "'[18]…The scope of [unreasonable conduct] has been discussed in this Tribunal in *Catana* [2012] UKUT 172 (TCC) where Judge Bishopp, at [14], described it as covering:
>
> > "cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonable resisted an obviously meritorious appeal, 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"
>
> [19] The costs 'of an incidental to the proceedings' cover only those costs incurred in the course of preparing and pursuing the appeal…,and, on an application by the appellant, it is only the reasonableness of HMRC's conduct in defending or conducting the proceedings that falls to be considered. The reasonableness of the original decision against which the appeal has been made is not directly in point, but is relevant to the question whether it was reasonable of HMRC to defend, or to continue to defend, the appeal.
>
> [20] Even if the tribunal is satisfied that a party has acted unreasonably in the terms of rule 10, the tribunal nevertheless has a discretion whether or not to make a costs order, or as regards the extent of a costs order. Such a discretion, like any other discretion conferred on the tribunal, must be exercised judicially.'

The Upper Tribunal went on to say, at [34]:

> "In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) what was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could that party have withdrawn at an earlier stage?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"

12. In *Distinctive Care Limited v HMRC* [2018] 155 (TCC), at [44], the Upper Tribunal referred to its decision in *Market and Opinion Research International Limited v HMRC* [2015] STC in which it endorsed the following approach:

> (1) the threshold implied by the works 'acted unreasonably ' is lower than the threshold of acting 'wholly unreasonably' which had previously applied in relation to proceedings before the Special Commissioners;
>
> (2) it is possible for a single piece of conduct to amount to acting unreasonably;
>
> (3) actions include omissions;
>
> (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
>
> (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
>
> (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;
>
> (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and
>
> (8) the power to award costs under Rule 10 should not become a 'backdoor method of costs shifting'.

It added, at [45]:

> "…one small gloss to the above summary, namely that …questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight"

13. Additionally, the meaning of "unreasonable" was considered in *Ridehalgh v Horsefield* [1994] in the following terms:

> 'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because the more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable.

14. The Lands Chamber of the Upper Tribunal in *Willow Court Management Company v Alexander* [2016] UKUT 290 (LC) observed, at [22] that the "language and approach" (of an identical provision to the Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) to be "clear and sufficiently illuminated by the decision in *Ridehalgh*."

15. With that in mind I turn to the costs sought by the appellants in their application.

KBTL new issue

16. It is sufficient for present purposes, and without going into the details of the various transactions in these appeals, to record that neither the closure notice against which KBTL appealed nor HMRC's statement of case referred to any gain being taxable by KBTL on a deemed disposal on 1 August 2000 for which a holdover relief claim under s 165 of the Taxation of Chargeable Gains Act 1992 had been made in June 2006.

17. However, when attempting to agree a Statement of Agreed Facts with KBTL, on 2 March 2018 HMRC suggested the addition of an additional issue:

> "Issue 4: Whether the liability to capital gains tax stated in the closure notice should be increased to include the gain arising from the appointment by the trustees … on 1 August 2000."

18. KBTL responded to the suggestion on 16 April 2018 stating that it is "unclear how this issue could give rise to additional taxation." On 21 June 2018 KBTL, in an email to HMRC, stated that the issue "cannot be included until HMRC have amended their case and explained how the argument can possibly lead to a higher amount of capital gains tax."

19. HMRC accepted, by email of 20 July 2018, that the issue was not included in the statement of case but state that this will be addressed and the issue "will be argued before the Tribunal in due course." On 27 September 2018 HMRC filed a supplemental statement of case including the additional issue which had been served on KBTL on 25 September 2018.

20. On 4 October 2018 KBTL requested further information regarding the supplemental statement of case from HMRC. This was followed by a further letter, attached to an email of 19 October 2018, to HMRC which advised that:

> "… it appears that a timely claim for holdover relief was made in 2006 in relation to the gain … that HMRC now wish to tax …
>
> It is hoped that the parties will be able to agree that no liability arises and therefore the new issue does not need to be determined by the Tribunal."

21. A copy of the holdover election and letter of 11 December 2006 were sent to HMRC on 22 October 2018. On 5 November 2018 HMRC confirmed that there had

been a valid claim for holdover relief made and the supplemental statement of case withdrawn.

22. As KBTL has opted out of the costs regime it is only able to succeed in its application for costs to the extent that it can establish that HMRC's conduct was "unreasonable". Mr Goodfellow, drawing an analogy with the withdrawal of an appeal in *Tarafdar*, contends that it was pointing to HMRC's failure to identify that there was a valid election for holdover relief. Mr Stone, however, argued that far from being unreasonable, HMRC by withdrawing its reliance on the additional issue as soon as it had been able to confirm that holdover relief had been claimed had acted in an entirely reasonable manner.

23. I agree with Mr Goodfellow that *Tarafdar* can be applied to the circumstances of this case. Clearly the reason for the withdrawal of the additional issue was the existence of the election for holdover relief. Although HMRC should have had a record of this to which they could have referred before raising the additional issue, I do not consider that it was unreasonable for them not to have done so before being alerted to the holdover relief claim. As Mr Stone submitted, on becoming aware of the claim HMRC did act relatively swiftly to withdraw any reliance on the additional issue and did not, in my judgment, act unreasonably.

24. As such KBTL cannot succeed in its application for costs on this issue.

Request for further information

25. HMRC served their statement of case in relation to the appeals of Mr Haworth and Mr Lenagan on 30 June 2017 and KBTL on 6 September 2017. On 4 October 2017 requests were made by all appellants for further information which HMRC refused on 10 October 2017 as they did not "consider that it is necessary or proportionate for HMRC to respond to those queries." A further request for information was sent to HMRC on 4 October 2018 stating that in the absence of a response an application would be made to the Tribunal. On 12 October 2018, HMRC again refused to provide the information sought and indicated that any application would be contested.

26. On 22 October 2018 the appellants made the application to the Tribunal – this was the application for which this hearing was listed. HMRC reiterated their position in an email of 22 October 2018 but on 24 October 2018, in an email, confirmed that they will reply to the queries in the application "to the extent that they require any response … in due course".

27. On 30 January 2019 HMRC provided the appellants with a "Defendants' analysis of key scheme documents" which the covering letter explains is based on the chronology of the judicial review proceedings between Mr Haworth and HMRC (*R (on the application of Geoffrey Richard Haworth) v HMRC* [2018] EWHC 1271 (Admin)) set out by all appellants. As a result of the information provided the appellants were able, in a letter of 8 February 2019, to reduce their request for information from 74 questions to five questions.

28. HMRC responded to the remaining five questions on 11 February 2019 and on 13 February 2019 the appellants were able to confirm that they had all of the information required. As such it was not necessary to pursue the application at the hearing.

29. Mr Goodfellow contends that Mr Haworth and Mr Lenagan, as the appellants in a complex category appeal, were successful in their application. Therefore, HMRC should, in accordance with the general rule, be ordered to pay their costs. In relation to KBTL, which has opted out of the costs regime, he contends that HMRC's conduct was unreasonable.

30. For HMRC, Mr Stone argues that the appellants did not succeed in their applications which were not pursued because the information had been provided by HMRC prior to the hearing. He says that there was nothing of substance before the Tribunal and that the appellants have not achieved anything.

31. While I would not go so far as to completely agree with Mr Stone, given that the application was not pursued and the parties were able to resolve this issue without the Tribunal's involvement, I do not consider it appropriate to make any direction other than costs in the case in relation to this issue in respect of the appeals of Mr Haworth and Mr Lanagan and no order for costs at this stage in regard to KBTL's appeal.

Mauritian law issue

32. This issue has arisen as a result of an argument advanced by HMRC in relation to the status of a trust/trustees for tax purposes under Mauritian law, particularly in relation to what Mr Goodfellow described as the difference between the chargeability to tax and against whom a liability could be enforced.

33. Although there were differences between the parties up to and including the hearing as to what could and should be included in the statement of agreed facts and the extent to which expert evidence should be directed, as is apparent from the protracted correspondence which continued from February 2018 until the day before the hearing, it was eventually resolved by the issue of a direction, endorsed by the Tribunal, that:

> "The parties shall each have permission to rely upon the evidence of an expert in Mauritius law on the following issues:
>
> (a) Under the domestic law of Mauritius, is a trust that is resident in Mauritius a person that is subject to tax? If so, in what circumstances and in what way?
>
> (b) Under the domestic law of Mauritius, and considering the legal status of a trust, can tax be recovered from a trust separately from the person or persons who hold or have held the office of trustee during the period for which Mauritian tax is chargeable?"

34. As with the request for further information, Mr Goodfellow argues that Mr Haworth and Mr Lenagan were successful and should be awarded their costs. Also, that HMRC's conduct, in relation to KBTL, was unreasonable. Similarly, Mr Stone

contends that as the applications were not pursued in relation to this issue the appellants did not succeed. With some prompting the parties were able to agree directions to resolve their differences regarding the questions for the expert witnesses and, as such, there was no need of any formal action by the Tribunal, other than to endorse the agreed directions.

35. In the circumstances I consider it premature to make an order for costs in relation to this issue other than costs in the case in respect of the appeals of Mr Haworth and Mr Lanagan and make no order in respect of the appeal of KBTL.

Decision

36. Therefore, for the reasons above, I dismiss the application for costs in relation to the new issue in the KBTL appeal. In respect of the request for further information and Mauritian law issue I direct that in the appeals of Mr Haworth and Mr Lanagan costs be in the case and make no order for costs in the appeal of KBTL.

Appeal rights

37. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 28 FEBRUARY 2019