

Neutral Citation: [2022] UKFTT 446 (TC)

Case Number: TC08655

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2020/04378  
TC/2021/00333

*COSTS – rule 10(1)(b) FTT Rules – was schedule of costs compliant with rule 10(3) – no – were there proceedings to which the costs were incurred – no – was there evidence of unreasonable conduct – unnecessary to determine – application refused*

**Judgment date:** 29 November 2021

**Decided by:**

**TRIBUNAL JUDGE AMANDA BROWN KC**

**Between**

**WINCANTON HOLDINGS LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

The Tribunal determined the application for costs without a hearing under rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**) with the consent of the parties and the Tribunal considering that it was able to determine the matter without a hearing. Both parties had made substantive submissions in writing.

## DECISION

1. This is an application for costs made by Wincanton Holdings Limited (“**the Appellant**”) pursuant to rule 10(1)(b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 (“**FTT Rules**”).

### BRIEF CHRONOLOGY

2. From the documents provided by the parties the Tribunal sets out the chronology of events.

3. The Appellant is an approved warehouse keeper for excise goods and acted as guarantor in respect to movements of excise goods under duty suspension. In the period March 2017 – January 2020 certain goods that left the Appellants warehouse were unlawfully diverted to the UK market without excise duty having been paid.

4. Pursuant to regulation 9(1)(b) Excise Goods (Holding, Movement and Duty Provisions) Regulations 2020 (“**the HMDP Regs**”) where an irregularity (including a diversion) occurs in the course of a movement of goods under duty suspension, a guarantor is jointly and severally liable (along with those knowingly causing the irregularity) for the duty (and VAT).

5. In the usual course of events, and pursuant to Articles 25 and 28 Council Directive 2008/118 and regulation 46 of the HMDP Regs where HM Revenue & Customs (“**HMRC**”) issue a report of export a guarantor is released from his excise duty obligations on the basis that the report of export represents evidence that duty suspended movement of goods has come to an end.

6. With regard to the movements in question HMRC were fraudulently induced (by the actions of those other than the Appellant) to issue reports of export.

7. As a result of the fraud and despite the issue of the reports for export, HMRC issued a number of assessments to excise duty and VAT to the Appellant. Assessments were initially issued on 19 May 2020, 10 June 2020, 15 June 2020, 17 June 2020, and 24 June 2020. The Appellant was notified that HMRC intended to issue assessments. The Appellant challenged the proposed assessments the basis that there was no legal provision justifying any assessment as, in respect of each movement, the Appellant held a reports of export which the Appellant contended represented conclusive proof of export even in circumstances in which export irregularities were subsequently discovered.

8. Following the issue of the assessments HMRC granted an extension of time in which the Appellants were required to request a review and on 10 November 2020 the Appellants sought a review of the excise and VAT assessments predicated on the same basis of challenge as set out in paragraph 7 above. HMRC were required (pursuant to s15F Finance Act 1994 (“**FA 04**”)) to complete their review within 45 days of the date of request i.e. 25 December 2020.

9. On 18 November 2020 HMRC notified the Appellant that the excise assessments dated 19 May, 2020, 15 June 2020 and 24 June 2020 contained arithmetical errors such that they were withdrawn and reissued. Similarly for the VAT assessment dated 17 June 2020. New assessments were issued in respect of each of the withdrawn assessments together with further VAT assessments all the assessments were notified to the Appellants on 18 November 2020.

10. From a procedural perspective therefore the requirement for review requested on 10 November 2020 fell away in respect of the three withdrawn excise and the single withdrawn VAT assessment and applied only to the excise assessment dated 10 June 2020.

11. On 1 December 2020 HMRC informed the Appellant, in very brief terms, that the basis on which it was considered that the reports of export did not constitute conclusive proof of export was that it was an established principle that “once proved ... fraud vitiates all

transactions whatsoever” and on the basis that all the proofs of export relied upon by the Appellant had been obtained on the basis of fraudulent representations by the Appellant’s customer, the documents were vitiated.

12. The assessments notified on 18 November 2020 were appealed to the Tribunal on 11 December 2020. The Notice of Appeal stated that the amount claimed by assessment had not been paid to HMRC but that there had been an application for hardship. The grounds of appeal reiterated that there was no lawful basis on which to assess the Appellants given the issue of the reports of export.

13. On 16 December 2020 the Appellants issued a pre action protocol letter in respect of a claimed breach of legitimate expectation by reference to the terms of Excise Notice 197 which, in summary, provides that a guarantor’s liability in respect of a movement of goods extends only to the date of issue by HMRC of the report of export.

14. HMRC’s substantive legal position as briefly set out in their letter of 1 December 2020 was more fully (though not expansively) explained in a letter of 24 December 2020.

15. On 25 December 2020, and absent a review conclusion, the excise assessment dated 10 June 2020 was deemed as upheld.

16. The Appellant lodged an appeal against the excise assessment dated 10 June 2020 and deemed to have been upheld on review, on 28 December 2020. The terms of the appeal were the same as that lodged on 11 December 2020 both in terms of hardship and the grounds of appeal.

17. As the appeals were subject to an hardship application the Tribunal did not categorise them, or formally notify HMRC of the appeal. The time limits that begin to run against HMRC to issue a statement of case did not begin to run.

18. HMRC responded to the pre action protocol letter on 5 February 2021. They asserted that the claim was out of time in respect of the 10 June 2020 assessment and reiterated their position that as the reports of export were procured by fraud they were a nullity and could not be relied upon by the Appellant with the consequence that there could be no basis on which to found a legitimate expectation and/or it was not unfair to depart from the legitimate expectation created on public interest grounds.

19. Judicial review proceedings were commenced on 17 February 2021 in respect of all excise and VAT assessments.

20. On 18 May 2021 HMRC withdraw the VAT and excise assessments.

21. HMRC notified the Tribunal on 20 May 2021 that the assessments were withdrawn and that “as both cases were being considered by the Hardship team at the time of HMRC’s withdrawal, it follows that the case references should fall away in turn, having not become live appeals and as there is now nothing for the Appellants to pay”.

22. On 23 June 2021 the Appellants made a claim for costs pursuant to rule 10(1)(b) FTT Rules i.e. an unreasonable costs order. By the application, they contend that HMRC’s decision to assess and failure to withdraw at the earliest possible moment constituted unreasonable behaviour. The claim was supported by a schedule identifying the fee earners involved in the matter, the hours spent in total by each under the headings: attendances on the Appellant (letters/emails out, telephone), attendances on the opponent (letters/emails out, telephone), attendances on others (letters/emails out, telephone), work done on documents, attendance at hearings. No particularisation of the work undertaken was provided beyond those broad categories nor any dates on which the work was carried out.

23. HMRC raised a number of objections to the claim on 27 July 2021: 1) that it failed to meet the requirements of rule 10(3)(b) because it failed to provide a schedule of costs or expenses sufficient to permit a summary assessment should the Tribunal choose to undertake one; and 2) that their conduct in the proceedings was not unreasonable. Further challenges were made to the reasonableness and proportionality of the claim.

24. The Appellants responded to the objection on 25 August 2021 providing a further schedule of costs particularising the work carried out by the solicitors but not providing dates on which the work was done nor providing fee notes for counsel or a breakdown of the substantial costs incurred by accountants also engaged in connection with the matter.

#### **PROCEDURAL ISSUES**

##### **Was there a complaint claim?**

25. Rule 10(3)(b) FTT Rules provides that a person making an application for an order for costs shall 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”.

26. HMRC contend that the inadequacies in the schedule render the application invalid on the basis that as regards the RPC’s costs the schedule provided no dates or detail of the work undertaken or any explanation for the number of fee earner’s involved, they also note that costs are claimed for a hearing (when no hearing occurred). HMRC flag that as judicial review proceedings (in respect of which costs have been paid) were also in train the failure to particularise ran the risk that costs claimed in these proceedings could be duplicated in the costs paid in respect of the judicial review. HMRC highlight that no fee notes were provided for Counsel and that the claim for £388,235 in respect of the role of Ernst Young, is not particularised in any way.

27. The Appellant’s application must be taken to assert, in accordance with the provisions of section 29 Tribunal Courts and Enforcement Act 2009 (“TECA”), that all the costs claimed are of, or incidental to, “the proceedings”. The terms of the application contend that the schedule is sufficient to permit a summary assessment but invites the Tribunal to agree that the costs be paid on the standard basis subject to detailed assessment if not agreed. In their response to HMRC’s objection the Appellant contends that their application was never intended to be one for summary costs and that the format was appropriate.

28. It is fair to recognise that the standard form claim documentation was used by the Appellant breaking down the time into the various categories specified within the form itself in respect of the time spent by the solicitors. However, the Tribunal considers that the schedule as prepared would not allow for summary assessment, certainly not for a claim exceeding £700,000 in respect of an appeal commenced only 5 months prior to when it ended in circumstances in which only the procedural step of commencement had taken place.

29. The terms of rule 10(3)(b) do not permit the applicant to decide to serve a lesser schedule because, in the view of the applicant, a summary assessment is unlikely or not sought. The schedule should be sufficient to permit the Tribunal to undertake the assessment should it decide to do so. The Tribunal is of the view that the assessment as originally served would not have permitted any form of summary assessment of it. The alternative is to seek an application for the requirement to serve the schedule to be waived on that basis that summary assessment is inappropriate. The Appellant did not make such an application and the statement in the application for costs cannot be interpreted as an application for waiver of the requirement provided for in rule 10(3)(b).

30. The further schedule of costs addresses one of the limitations of the first but still does not, in the Tribunal's view, represent a schedule which would permit the Tribunal to undertake over a summary assessment should it have decided to do so. In particular over half of the claim (that relating to the time spent by Ernst Young) remains entirely unparticularised.

31. Accordingly, there is presently no valid claim for costs and the claim is dismissed.

**Were there any proceedings in which to claim costs?**

32. One of HMRC's other objections is that there were in fact no proceedings in respect of which a valid claim for costs could be made.

33. Section 84(3) Value Added Taxes Act (in respect of the VAT assessments) and section 16(3) FA04 in respect of the excise assessments both provide that no appeal shall be entertained unless the amount which HMRC has determined as payable by way of VAT or excise duty, as applicable, has been paid to them unless the taxpayer has either satisfied HMRC that payment of the amount determined would cause hardship or, upon HMRC not being so satisfied, the tribunal decides that hardship would be caused.

34. Rule 8(2) FTT Rules provides that where the Tribunal has no jurisdiction in relation to the proceedings then those proceedings must be struck out.

35. Thus, when a taxpayer lodges an appeal to the Tribunal in circumstances in which there has been no payment (as required by s84(3) or s16(3)) and before HMRC have determined whether they are satisfied as to hardship there are, and can be, no proceedings before the FTT.

36. In practice the Tribunal receives and allocates a tribunal reference number to the appeal pending being seized of jurisdiction initially, and as required, with regard to a determination of a hardship application and subsequently, if hardship is established, of the substantive appeal. However, that administrative convenience cannot create proceedings which do not, on the terms of the statute, exist.

37. By reference to the Notices of Appeal, the Appellants had applied for hardship but their applications had not been determined by HMRC. As such the Tribunal was not seized of any proceedings. As s29 TECA and rule 10 prescribe the circumstances in which costs of or incidental to "the proceedings" there must be proceedings on foot for the costs rules to be invoked.

38. Therefore, had the Tribunal concluded that the schedule of costs were sufficient, the claim would nevertheless have failed as there were no proceedings pursuant to which the claim could be made.

**BASIS ON WHICH THE TRIBUNAL MAY AWARD UNREASONABLE COSTS**

39. It is unnecessary for the Tribunal to consider whether HMRC had acted unreasonably in light of the conclusions reached on the procedural aspects of the claim. However, briefly and for completeness the Tribunal sets out its view below.

40. As set out above s29 TECA provides that the award of costs of and incidental to all proceedings in the Tribunal shall be at the discretion of the Tribunal and subject to the FTT Rules.

41. Rule 10 FTT Rules provides that the Tribunal may only make an order for costs in certain limited cases including: a) wasted costs; b) unreasonable costs and c) in a case allocated to the complex track and in respect of which the appellant has not opted out of the costs' regime.

42. The leading and binding authority on the question of unreasonable costs is *Distinctive Care Ltd v HMRC* [2019] EWCA Civ 1010. In that case, and by reference to the approval of the Upper Tribunal judgment, it was determined:

(1) The earliest conduct that was relevant in the context of determining whether a party had behaved unreasonably was the point at which the proceedings commenced with the issue of a notice of appeal as the discretion applies only to unreasonable conduct in the proceedings and not to the investigation leading to those proceedings.

(2) The focus of the Tribunal was to be the handling of the litigation and not as to the quality of the original decision. The Tribunal is warned that the award of costs should not represent a wide-ranging analysis of the parties conduct prior to the appeal.

(3) The granting of an unreasonable costs order is not to be seen as a “back-door” means of costs shifting with the consequence that what constitutes unreasonable behaviour is unlikely to extend to improper or negligent behaviour.

(4) Where a party withdraws from an appeal it is necessary to consider whether they had acted promptly once it was identified that the proceedings were to be discontinued.

(5) Where costs are awarded on the grounds of unreasonable behaviour the scope of the costs award may include costs incurred prior to the commencement of proceedings provided that such costs are within the scope of the ultimate appeal.

43. In respect of the approach to be taken to considering whether a decision to withdraw amounts to unreasonable conduct the Tribunal is also bound to follow the approach directed by the Upper Tribunal in *Tarafdur v HMRC* [2014] UKUT 00362 in which the Upper Tribunal considered the approach to be to answer the following questions:

(1) What was the reason for withdrawal of that party from the appeal?

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in proceedings?

(3) Was it unreasonable for that party to not to have withdrawn at an earlier stage?

#### **APPLICATION OF THE RELEVANT TEST**

44. The Tribunal is mindful of the overarching direction given by the Court of Appeal that the award of costs, unless within the complex category, which of course was not the position here, is to be the exception and that the focus of attention is on the conduct of the litigation and not the underlying quality of the taxing decision.

45. HMRC assert that they conceded the judicial review proceedings with the consequence that they withdrew the assessments thus leaving the Tribunal with nothing to determine. They contend that applying the *Tarafdur* tests they could not reasonably have been expected to have acted more promptly than they did given that the judicial review proceedings were not commenced until 17 February 2021.

46. That answer does not, however, address that the Appellants had, implicitly and increasingly explicitly, asserted the position that there was both no statutory basis for looking beyond the reports of export and that HMRC’s public guidance reinforced the simplicity on the face of the legislation. The Appellants had issued a pre action protocol letter on 16 December 2020, only 5 days after they had lodged the first appeal.

47. However, it does not appear to be denied by the Appellant that as a matter of fact the movements which formed the subject of the assessments had not been exported and that a very significant fraud had been perpetrated (albeit not by the Appellant).

48. The Tribunal would have been mindful of the direction given by the Court of Appeal in *Distinctive Care* that conduct prior to the proceedings commencing is not relevant when determining whether to make an unreasonable costs order (though the costs incurred prior to commencement may be recoverable to the extent that they were aimed at early settlement).

49. Had the costs claim not been dismissed for the reasons stated above the Tribunal would have had to determine whether the public interest served in fully evaluating the public law position, assessing the possibility that a common law argument may vitiate a statutory document outweighed the prejudice ultimately suffered by the Appellant in bringing an appeal which was ultimately unnecessary. It is likely, in those circumstances, that the Tribunal would have wanted to hear evidence from HMRC (to the best they were able to give it in light of public interest privilege) as to the processes followed and the reasonableness of them.

50. The Tribunal is therefore unable to determine whether, on the material before it, if HMRC's conduct was or was not unreasonable. It is however unnecessary to do so.

51. If either party is dissatisfied with the outcome of the application for costs, they have a right to apply to the Upper Tribunal for permission to appeal the decision in this appeal. Such an application must be made in writing to the Upper Tribunal at 5th Floor, Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL no later than one month after the date of this notice. Such an application must include the information as explained in the enclosed guidance booklet *Appealing to the Upper Tribunal (Tax and Chancery Chamber)*.

**AMANDA BROWN KC  
TRIBUNAL JUDGE**

**Release date: 29<sup>th</sup> NOVEMBER 2021**