[2016] UKUT 236 (TCC)

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**Case number: UT/2014/0081**

**SHOSHANA PINE** **Appellant**

**-and-**

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

**Tribunal Judge: Colin Bishopp**

**Sitting in London on 17 February 2016**

**It is directed as follows:**

1. The appellant's application for a direction that the tribunal shall make no direction in respect of costs, whatever the outcome of the appeal, save in the case of unreasonable conduct, is dismissed;

2 The parties have liberty to apply for further directions.

**Colin Bishopp**
**Upper Tribunal Judge**

**Release date: 17 February 2016**

## REASONS FOR DIRECTION

1. On 16 April 2014 the First-tier Tribunal ("the F-tT") released full reasons for its decision rejecting the appellant's appeal against the imposition on her a penalty of £100 for the late submission of her self-assessment return for the year 2011-12. They rejected the appeal on two grounds: first, that (contrary to her submission) HMRC had validly given notice of the requirement to file a return by service of the notice on her accountant, who was her appointed agent; and, second, that there was no reasonable excuse for the lateness of the return. The F-tT later gave permission to appeal to this Tribunal on the first of those grounds but refused it on the second. I also refused permission to appeal on the second ground on the appellant's written application, but gave it when the application was renewed orally.

2. The appellant then made an application for a protective costs direction, that is to say a direction that whatever the outcome of her appeal there should be no award of costs in either direction. That application came before me on 21 January 2016. The appellant's account, Mr Michael Weissbraun, appeared for her and Miss Barbara Belgrano appeared for HMRC.

3. The essence of Mr Weissbraun's argument was that it is unfair that the appellant should be exposed to a costs direction when her purpose in pursuing the appeal has throughout been the resolution of what Mr Weissbraun considers to be a matter of principle, namely whether it is open to HMRC to serve notice to file a return upon a taxpayer's appointed agent. In this case the notice was sent to him rather than to the appellant because, it seems, the appellant lives in Israel. But, Mr Weissbraun says, the fact that HMRC succeeded on this point before the F-tT may lead them to serve notices on agents regardless of the residence of the taxpayer. He regards it as an important matter, from the perspective of tax agents, to establish that service on agents in that manner is not permissible. His fear was that, were the F-tT's decision to stand, HMRC would consider it open to them to send large numbers of notices to file returns to agents rather than taxpayers themselves, overburdening the agents who might in some circumstances not have instructions from that particular taxpayer in relation to the relevant year of assessment. The appeal is important also to the body of taxpayers who have appointed agents in earlier years but who have since withdrawn their instructions. Such taxpayers might find themselves in default when, unknown to them, a notice to file a return has been served on a former agent who has not passed it on. Mr Weissbraun added that, despite his having devoted some effort to securing permission to appeal against the finding that the appellant had no reasonable excuse, he did not intend to pursue that argument further but would instead concentrate on the argument relating to the giving of notice.

4. Miss Belgrano's response was, in very brief summary, that the point identified by Mr Weissbraun was not of general importance but in any event this was not a case in which the burden of costs, whatever the outcome of the case, should fall upon the general body of taxpayers. The position might possibly be otherwise if it were HMRC wishing to test an important point before the Upper Tribunal, but that is not this case.

5. I did not immediately announce my conclusion, and before I could write and release a decision notice Mr Weissbraun wrote to the tribunal indicating that the appellant wished to withdraw the appeal because the risk that the burden of costs would

fall upon her was too great. He did so on the evident assumption that withdrawal at that stage would represent the end of the matter—that is, HMRC would not take the matter of costs any further while the appellant would accept the imposition on her of the penalty (which she has paid). HMRC were asked, on my instructions, what would be their position should the appellant withdraw, and their response was that they would seek their costs of the application for a protective costs direction, which they put at £2616. They have confined their claim to that aspect of the appeal, and are not, at least at this stage, seeking any costs in respect of the appeal itself.

6. Mr Weissbraun's position has also changed in the light of that response. He says that, if the appellant is expected to pay costs of that magnitude simply in order to seek a protective costs direction (which would of course be the case only if the application was unsuccessful) she might as well carry on, and he seeks to revoke the notice of withdrawal. I am not entirely sure that is a fully informed choice; if she does carry on the appellant will be at risk of an adverse costs direction in respect of the entire costs of the appeal, that is to say those relating to the protective costs application as well as those of the appeal itself. Mr Weissbraun also asks that I should in any event make no direction in respect of costs upon the basis that his aim throughout has been to minimise the costs of the appeal.

7. It is necessary, by virtue of rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"), for the tribunal to consent to withdrawal of an appeal before that withdrawal can take effect. For the present I do not consent, in order that Mr Weissbraun and the appellant have the opportunity of reconsidering her position.

8. This is not a case in which, in my judgment, it is appropriate to make a protective costs direction. Section 29 of the Tribunals, Courts and Enforcement Act 2007 sets out the overriding rule that the costs of and incidental to proceedings in this tribunal are in the discretion of the tribunal, subject to any contrary provision in tribunal rules. Rule 10 of the UT Rules provides that, in the case of an appeal from the Tax Chamber of the F-tT, the tribunal has a full costs-shifting power. In an ordinary case, in which there are no special circumstances, it is usual to make a direction that the losing party pays the winning party's costs. That is consistent with the approach of the courts in similar circumstances.

9. I agree with Miss Belgrano that if HMRC were the appellant, compelling a taxpayer successful in the F-tT to resist an appeal in this tribunal, there might perhaps be some force in the argument that a protective costs direction should be made. Even so, the then President of this Chamber, Mr Justice Warren, decided in a case in which HMRC were successful in overturning a decision of the F-tT in favour of Mr David Finnamore that Mr Finnamore should pay HMRC's costs. (The substantive appeal is [2014] UKUT 0336 (TCC), reported at [2014] STC 2754; the costs direction is unpublished and unreported.) He had argued that he had done no more than resist the appeal by inviting this tribunal to uphold the F-tT's decision, in a case in which the F-tT had no power to award costs; there are restrictions on the F-tT's powers which do not apply in this tribunal. It was, he said, unfair that, having won his appeal in a tribunal in which there was no power to award costs he should, without being able to exercise any choice of his own, be exposed to the risk of costs in this Chamber. Warren J did not, however, consider that Mr Finnamore was in a special position which justified a departure from the ordinary rule. He recognised, as do I, that it is an unfortunate consequence of the manner in which the rules relating to the incidence of costs are

drawn, in the Tax Chamber and in this Chamber, that a taxpayer insulated from a costs risk in the Tax Chamber may, without any opportunity to avoid it, be exposed to a costs risk in this Chamber. But it is apparent from his decision in that case that he was of the firm view, nevertheless, that costs must follow the event in the absence of special circumstances. The judge cannot simply disregard the rule out of sympathy for the taxpayer.

10. Like Warren J, I am conscious that many taxpayers, particularly those with cases of low value, or who are of limited means, find the prospect of an appeal before this Chamber daunting when they realise that they may find themselves liable to pay a significant sum by way of costs. That position will inevitably worsen when fees are introduced in the Tax Chamber and in this Chamber. However, I have to agree with Miss Belgrano that it is difficult to justify the imposition of the cost of tax litigation on the public purse, regardless of the merits of the appeal, in a case in which it is the taxpayer who wishes to challenge a decision of the F-tT.

11. The appellant's position here is, therefore, substantially weaker than that of Mr Finnamore. It is she who wishes to challenge the F-tT's decision. She therefore has a choice whether or not to expose herself to the risk of an adverse costs direction. It does not seem to me that Mr Weissbraun's belief that the point in issue is one of general importance, assuming he is right in that belief, can amount to special circumstances sufficient to insulate the appellant from that risk. I do not think it appropriate to be prescriptive about what might amount to special circumstances in a case in which the taxpayer is the appellant, nor to provide any examples; what is, to my mind, clear is that there are no special circumstances in this case. I decline therefore to make a protective costs direction.

12. The position in which the appellant now finds herself is that she may, if she wishes, continue with the appeal and, if it is unsuccessful, will probably find that she is ordered to pay the entirety of HMRC's costs of the appeal, though if she succeeds she can of course reasonably expect a direction in her favour. I have not yet heard full argument about the direction I should make in respect of the costs of the protective costs application, but it would be unfair to Mr Weissbraun not to inform him that my present inclination is that there is no adequate reason why I should not make a direction in HMRC's favour.

13. As I am not confident that Mr Weissbraun has fully understood what may happen if he withdraws, or does not withdraw, the appeal on behalf of his client I propose at this stage merely to make a direction dismissing his application for a protective costs direction, while leaving him and his client to reflect on her position before she decides what course of action she should take. I have given liberty to apply to both parties, but I hope the respondents will allow Mr Weissbraun and the appellant a month for reflection before making any application of their own.

**Colin Bishopp**
**Upper Tribunal Judge**