TC03830

Appeal number: TC/2013/03919

Costs — s 29 Tribunals, Courts and Enforcement Act 2007 — Tribunal Procedure Rule 10 — Refusal by HMRC of Appellant's request to call two named HMRC officials as witnesses — Whether HMRC thereby "acted unreasonably in … defending … the proceedings" — In the circumstances of the case, no — Application for costs dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER LETTS **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MISS SUSAN STOTT FCA, CTA

Sitting in public in Leeds on 15 July 2014

Mr G Brothers and Mr N Hankinson of Independent Tax, accountants, for the Appellant

Ms J Bartup, Presenting Officer, for the Respondents

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DECISION

Introduction

1. In this appeal, the Appellant appealed against a further assessment to tax dated 20 July 2012, upheld in a review decision dated 1 May 2013, in which HMRC found that the Appellant was liable to an additional £2,000 tax for the year 2007-08. This was the tax on a capital gain of £10,000 found to have been made by the Appellant in that year.

2. The substantive issues in this appeal have now been superseded by events. This is because HMRC, by a letter to the Tribunal dated 18 February 2014, stated that HMRC had withdrawn the assessment.

3. The Appellant has now made an application for an order that HMRC pay part of the Appellant's costs of the proceedings. The application is pursuant to rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules"). It is common ground that in the circumstances of the present case, the Tribunal cannot make the requested order for costs unless, pursuant to rule 10(1)(b), the Tribunal "considers that [HMRC] … or their representative has acted unreasonably in … defending or conducting the proceedings".

4. The Appellant emphasises that he does not seek all of his costs of bringing this appeal, but only his costs in relation to his representatives' work in seeking to have two named HMRC officials called as witnesses. The Appellant's case is that HMRC acted unreasonably in refusing his representatives' request that these officials be called as witnesses, and in forcing the Appellant to apply to the Tribunal for a witness summons. For this work, the Appellant is seeking costs of £5,568.75 plus VAT.

5. This application for costs was heard by the Tribunal in Leeds on 15 July 2014. At the end of the hearing, the Tribunal gave its oral decision refusing the application for costs. The Appellant's representatives requested full written reasons for the decision, which are now provided.

Background

6. A disclosure report dated 8 January 2010 submitted by the Appellant's then representatives to HMRC disclosed at paragraph 4.17 the following. In 2007-08, the Appellant withdrew from the company Brassington & Letts Ltd, and was repaid his director's loan account plus £10,000 as a return for equity. That paragraph of the report further stated that "The transaction did not take place until the tax year 2007/08 and will be returned on the appropriate return as a capital gain".

7. The notice of further assessment which the Appellant sought to challenge in the present appeal was dated 20 July 2012. A covering letter from HMRC to the Appellant's then representatives stated that the £10,000 was not included in the Appellant's 2007-08 return as foreshadowed in paragraph 4.17 of the disclosure report, and that the further assessment was therefore being made.

8. The Appellant requested a review of the assessment, which was upheld by HMRC in a review decision dated 1 May 2013. Issues that were addressed in the review decision included whether HMRC was entitled to make a discovery assessment in the circumstances.

9. The Appellant had submitted a self-assessment tax return for 2007-08, and the time limit for opening an enquiry into that return had passed by the time that the further assessment was made. It was common ground that in the circumstances of this case, by virtue of s 29 of the Taxes Management Act 1979 (the "TMA"), HMRC was only entitled to make the further assessment if the loss of tax "was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf" (s 29(4) TMA), or if at the time of expiry of the enquiry period the HMRC officer "could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of [the loss of tax]" (s 29(5) TMA).

10. The review decision concluded that both of these alternative conditions were satisfied. The decision concluded that the Appellant had been careless in excluding completely the capital gain from his tax return. It also concluded that the HMRC officer could not have been reasonably expected to have been aware of the capital gain because the 8 January 2010 disclosure report was a 23 page document received only 20 days before the 2007-08 enquiry deadline which largely focused on a different tax year.

11. As to the substance of the additional assessment, the review decision stated that it was not in dispute that the £10,000 was chargeable to capital gains tax.

12. The Appellant then brought this Tribunal appeal. In the Appellant's notice of appeal dated 30 May 2013, the grounds of appeal did not dispute that the £10,000 was chargeable to capital gains tax. Rather, the grounds of appeal were that the Appellant had not been careless (such that s 29(4) TMA did not apply), and that HMRC had been careless in not noticing the gain in the 8 January 2010 disclosure report (such that s 29(5) TMA did not apply). The grounds of appeal therefore contended that HMRC were out of time to make the assessment.

13. The HMRC statement of case dated 23 August 2013 relied only on s 29(4) TMA, and contended that this was satisfied. The statement of case took the position that "The appeal is not against the quantum of the assessment".

14. On 6 September 2013, the Tribunal issued directions for the case, including a direction that by 18 October 2013, both parties should provide a statement detailing whether witnesses were to be called and if so their names.

15. On 8 October 2013, the Appellant's representative sent an e-mail to HMRC, stating that the Appellant would intend to call as witnesses two HMRC officials, Mrs Rhodes and Mr Garrahy. The e-mail requested HMRC to confirm that HMRC would agree to these witnesses attending "as indicated in AH0685".

16. On 9 October 2013, the Appellant's representative submitted to the Tribunal a notice stating that "We intend calling the following witnesses", and naming Mrs Rhodes and Mr Garrahy.

17. In a letter to the Appellant dated 10 October 2013, HMRC responded that AH0685 was from the Appeals Handbook, which had now been superseded by Appeals, Reviews and Tribunals Guidance Manual (ARTG). The letter stated that HMRC did not intend to call any witnesses and considered that the arguments in respect of the discovery position were purely technical and could be decided on the documentary evidence. The letter asked "Please advise what evidence you consider that each of these officers will be able to give beyond documentary evidence", and went on to say "HMRC will then consider whether we will make the officers available to you, or whether you will need to make an application to the Tribunal to issue the officers with a summons".

18. In an e-mail to HMRC dated 13 October 2013, the Appellant's representatives confirmed that they were in fact relying on part ARTG8630 of the ARTG Manual. The e-mail went on to indicate as follows. While it was for HMRC to decide what witnesses they wanted to call, the Appellant was also entitled to decide which witnesses the Appellant wanted to call. "As part of our case we will wish to have the opportunity to question Mrs Rhodes and Mr Garrahy about their actions, their decision making and their activities at the salient points of this matter. You will gauge from the above that we have very definite views that the Officers have something to bring to these deliberations".

19. In a letter to the Tribunal dated 17 October 2013, HMRC advised that the Appellant wanted to call Mrs Rhodes and Mr Garrahy, that HMRC had not agreed to call them as it was felt that their evidence was not relevant to the appeal, and that the Appellant's representatives had been advised that they would need to apply to the Tribunal for a witness summons for them to attend.

20. In a letter to the Appellant's representatives dated 18 October 2013, HMRC stated that they would not be calling Mrs Rhodes and Mr Garrahy as witnesses and that the Appellant would need to apply to the Tribunal for a witness summons for them to attend. The letter added that "In this application you will need to state what evidence you consider the witness will be able to give that will assist the Tribunal in reaching a decision in the appeal".

21. In an e-mail to HMRC dated 18 October 2013, the Appellant's representatives responded that they were disappointed with the HMRC response which had the effect of "preventing the Tribunal having all of the facts before it", and of requiring the Appellant "to take up very valuable Tribunal time on this simple and uncontentious matter". The e-mail added that the HMRC response was contrary to HMRC's "publicly available commitment" (which is understood to be a reference to the ARTG Manual).

22. In a letter to the Tribunal dated 28 October 2013, the Appellant's representatives requested a hearing of an application for a witness summons.

23. In an e-mail to HMRC dated 6 November 2013, the Appellant's representatives requested a short meeting with the HMRC representative to discuss the issue, as they did not want to take up valuable Tribunal time with the matter without first seeking to resolve the matter between the parties.

24. In a letter to the Appellant's representatives dated 13 November 2013, HMRC stated that ARTG8630 did not state that HMRC would always produce witnesses, and that a meeting to discuss the issue would not be beneficial.

25. In an e-mail to HMRC dated 20 November 2013, the Appellant's representatives expressed regret at HMRC's unwillingness even to meet, and stated that "Given the absence of evidence that HMRC even considered, actively, the degree to which Mr Letts was 'careless', their testimony becomes paramount". The e-mail stated that Mrs Rhodes and Mr Garrahy had been involved in the process, and that their evidence was relevant to "the degree to which their actions or inactions were appropriate". The e-mail stated that it was these officers "who have decided that Mr Letts was careless in raising the assessments, we assume".

26. In a letter to the Tribunal dated 20 November 2013, the Appellant's representatives requested a stay of proceedings until at least 15 January 2014, in part to enable the parties further to discuss this issue.

27. In a letter to the Appellant's representatives dated 21 November 2013, HMRC stated that the issue was whether the Appellant was careless, not whether officers of HMRC were careless, and that the opinions of the two HMRC officers were not relevant. It was also noted that these were not the officers who raised the assessment under appeal.

28. In an e-mail to HMRC dated 25 November 2013, the Appellant's representatives expressed their regret at the HMRC response and said that the matter would now be raised with the Tribunal.

29. A hearing was held before Judge Cannan on 4 December 2013, which resulted in three directions being issued. The directions indicate that the hearing was "Upon the application of the Appellant dated 28 October 2013". The first direction was that unless the Appellant provided certain information and documentation by 17 January 2014, the amount of chargeable gain under appeal shall be taken to be £10,000. The second direction provided for HMRC to provide an amended statement of case taking account of the information provided pursuant to the first direction. The third direction required HMRC by 21 February 2014 to file and serve witness statements relied upon to support their case, including their case on the Appellant's carelessness.

30. In January 2014, the Appellant provided certain information and documents to HMRC pursuant to the first of the directions, which led HMRC to conclude that the additional assessment should be reduced from £2,000 to some £400. It appears that the Appellant refused to settle on that basis, as the Appellant maintained the view that the additional assessment was made out of time. HMRC then decided to withdraw the

assessment altogether on the basis that continuing with the appeal to finality would not be proportionate to the small sum now in dispute.

The arguments of the parties

31. In essence, the arguments of the Appellant were as follows. In the circumstances of this case, ARTG8630 required HMRC to make the two officials available as witnesses at the hearing. Their evidence was relevant and important. In *Gardiner & Ors v Revenue & Customs* [2014] UKFTT 421 (TC) ("*Gardiner*"), the Tribunal found that the burden was on HMRC to establish negligence, and that "it would not be appropriate to admit documents in evidence without a witness adducing those documents and explaining the reliance placed on them". HMRC therefore had to call witnesses if it was to establish that the Appellant had been careless. At the hearing on 4 December 2013, Judge Cannan was very critical of the position taken by HMRC, and indicated that HMRC would be expected to call at least one witness to establish carelessness. The third of the directions that he issued essentially required HMRC to rethink their case. The Appellant's representatives had since 8 October 2013 made clear that witnesses needed to be called, and had repeatedly sought to resolve this in discussions with the HMRC, in order to avoid the need to make an application to the Tribunal. Reference was made to *G Wilson (Glaziers) Ltd v Revenue & Customs* [2012] UKFTT 387 (TC). The persistent refusal of HMRC was unreasonable for purposes of rule 10 of the Rules.

32. In essence, the arguments of HMRC were as follows. Mrs Rhodes and Mr Garrahy had not been involved in issuing the discovery assessment under appeal, and their evidence was therefore not relevant. Judge Cannan held a hearing on the Appellant's application for a witness summons, but ultimately did not grant the requested witness summons. Instead, he simply asked HMRC to consider which officer or officers made the discovery assessment and to consider calling them as witnesses. HMRC also disputed the amount of costs claimed.

The Tribunal's finding

33. Both parties accept that the Tribunal can only make the requested order for costs if the Tribunal "considers that [HMRC] … or their representative has acted unreasonably in … defending or conducting the proceedings".

34. The Tribunal finds that for purposes of rule 10 of the Rules, even where a party takes a position in proceedings that is simply wrong in fact or law, that party does not thereby for that reason alone act unreasonably for purposes of rule 10 of the Rules. In almost every appeal, there is a party who loses because the Tribunal rules against that party on an issue of fact or a point of law. The fact that that party has advanced a case that is ultimately found to be wrong does not mean that that party has acted unreasonably in advancing that case. If the position were otherwise, the losing party in virtually every appeal would be liable to costs. That is clearly not the intention of rule 10. Indeed, that is the very opposite of the intention of rule 10.

35. The Tribunal finds that the same reasoning applies to positions taken by parties on procedural questions. Two parties may disagree on an issue of procedure, in which case the Tribunal may have to determine the matter. The fact that the Tribunal grants a contested application by one party on a procedural matter does not of itself mean that the other party acted unreasonably in opposing that application. Similarly, the fact that the Tribunal refuses an application by one party on a procedural matter does not mean that that party acted unreasonably in bringing that application.

36. The Tribunal therefore does not need to decide whether any of the positions taken by HMRC in the course of this appeal were incorrect in law. The Tribunal only needs to decide whether the conduct of HMRC was unreasonable.

37. The Appellant argues that the position taken by HMRC was contrary to the decision in *Gardiner*. However, *Gardiner* was decided only on 6 May 2014, which was after HMRC had withdrawn the assessment in the present case. The Appellant has not established that at times material to the present case, it was such a settled principle that HMRC cannot prove facts by relying on documents alone without calling any witnesses, that it was unreasonable for HMRC to proceed on the basis that it could do so. Indeed, the Tribunal is not persuaded that this can be considered a settled principle even now, since *Gardiner* is not a binding precedent and the Appellant has cited no binding authority to that effect.

38. Furthermore, even if it were the case that HMRC was unable to prove carelessness on the part of the Appellant by relying on documents alone, it is not clear how it can be said that this caused any prejudice to the Appellant. In *Gardiner*, the Tribunal simply concluded at [33] that as HMRC had called no witnesses, HMRC had failed to satisfy the burden of establishing a prima facie case of negligence. In the present case, it would have been open to the Appellant to make a similar submission that in the absence of any HMRC witnesses, HMRC had not established carelessness on the part of the Appellant.

39. The Tribunal is also not persuaded that it was unreasonable for HMRC to take the position that the Appellant had not established the relevance of any evidence that Mrs Rhodes and Mr Garrahy could give. Although the 1 May 2013 review decision relied on both s 29(4) and s 29(5) TMA, the HMRC statement of case indicated that in the Tribunal appeal, HMRC now relied only on s 29(4) TMA. The issue in the appeal was thus whether there had been carelessness by the Appellant. HMRC's letter dated 10 October 2013 asked the Appellant to advise what evidence the proposed witnesses would be able to give. The position taken by HMRC was that the issue was whether the Appellant was careless, not whether officers of HMRC were careless, and that the opinions of the two HMRC officers were therefore not relevant, and that the two officials that the Appellant wanted to call had not raised the assessment under appeal. HMRC therefore did not agree to make the two officers available as witnesses, but accepted that it was open to the Appellant to apply to the Tribunal for a witness summons. The Tribunal does not consider that to have been an unreasonable position for HMRC to take.

40. The Appellant says that at the hearing on 4 December 2013, Judge Cannan was critical of HMRC, and indicated that in order to establish that the Appellant was careless, Judge Cannan would expect HMRC to call at least one witness. However, even if this is so, Judge Cannan did not indicate that the witness to be called by HMRC should be one of the two officers that the Appellant wanted to be witnesses. Ultimately, Judge Cannan did not issue the witness summons that the Appellant had applied for. In any event, for the reasons above, the fact that Judge Cannan made a particular direction on 4 December 2013 would not of itself mean that any inconsistent position previously taken by HMRC was unreasonable.

41. The Appellant says that the position taken by HMRC was contrary to ARTG8630. HMRC thought otherwise, and the Tribunal is not persuaded that HMRC's position was unreasonable. ARTG8630 says that "In practice we usually agree to produce officers as witnesses without the need for a summons". The words "In practice … usually" suggest that HMRC will not always do so. In this case, HMRC gave reasons for not doing so.

42. The Tribunal is therefore not persuaded that HMRC acted unreasonably. In view of this finding, we do not need to express any view as to whether or not the amount of the costs that the Appellant seeks to recover is reasonable.

Conclusion

43. For the reasons above, this application for costs is dismissed.

44. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 22 July 2014