Neutral Citation: [2023] UKFTT 536 (TC)

Case Number: TC08839

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

Appeal reference: TC/2020/04235

COSTS – FTT decision that the Appellant liable to excise duty and penalty for deliberate behaviour –- HMRC costs application on basis that the Appellant had acted unreasonably – in relation to the duty, the Appellant had relied on an invoice which was not genuine – whether unreasonable of the Appellant to contest the appeal on that basis – held, yes – whether unreasonable of Appellant to dispute penalty – held, no – application allowed in part

Judgment date: 14 June 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

HARE WINES LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: No submissions were received from or on behalf of the Appellant

For the Respondents: Nadia Akhtar of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. The Appellant, Hare Wines Limited ("HWL") operates an alcohol warehouse. On 7 December 2019. HMRC conducted a stock check, during which a quantity of OJ Beer was found ("the Beer"). By a judgment issued on 3 January 2023 ("the Decision"), the Tribunal upheld the following HMRC decisions:

(1) an excise duty assessment of £1,126 ("the Assessment"), on the basis that HWL had not shown that duty had been paid on the Beer; and

(2) a wrongdoing penalty of £957 ("the Penalty"), on the basis that HWL's behaviour had been deliberate and concealed.

2. HWL's appeal had been categorised as a "standard". On 30 January 2023, HMRC made an in-time application for costs ("the Application"). The Application was made under Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") on the basis that HWL had acted unreasonably in "bringing" and/or "conducting" the proceedings in question.

3. In *Catanã v HMRC* [2012] UKUT 172 (TCC) ("*Catanã*") the UT (Judge Bishopp) said that Rule 10(1)(b) was "an inclusive phrase" which *inter alia* was "designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed".

4. In *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 0012 (TC) ("*MORI*"), the UT (Judges Berner and Powell) said at [55] that "the reasonableness or otherwise of a party's actions fall to be tested by reference to a reasonable person in the circumstances of the party in question".

5. HWL's case on the Assessment relied on an invoice ("the Disputed Invoice"). As early as 5 May 2020, HMRC had provided HWL with detailed reasons, soundly based on the evidence, as to why the Disputed Invoice was not genuine. I agree with HMRC that on receipt of that information, the reasonable person in the position of HWL would have accepted that the Disputed Invoice was not genuine and the appeal could not succeed. It follows that HWL acted unreasonably in bringing and conducting its appeal against the Assessment.

6. In relation to the Penalty, HMRC submitted that HWL had acted unreasonably, because Mr Hare, HWL's director and the company's controlling mind, knew the Disputed Invoice was not genuine. For the reasons explained at §20, I decided this was insufficient to amount to unreasonable behaviour. In addition, Mr Hare's knowledge was not the only issue in dispute: the parties also disagreed on what was required for HMRC to meet their burden of proof that HWL had acted deliberately. The reasonable person in the position of HWL would not have known that that its further arguments could not succeed.

7. HMRC provided detailed costs schedules totalling £31,147.28. On the basis of the information they contained, together with the other points considered at §25ff below, including in particular proportionality, I assess the costs payable by HWL in relation to the Assessment as £20,764.85. The Application is therefore allowed in part.

THE LACK OF A RESPONSE FROM HWL

8. In accordance with Rule 10(5) of the Tribunal Rules, on 23 February 2023, the Tribunal Service wrote to HWL's representative, Rainer Hughes LLP, inviting a response to the Application within 14 days, but no response was received. The Tribunal Service wrote again on 25 April 2023, giving a new deadline of 7 days from the date of that letter, but again no

reply was received. On 5 May 2023, HMRC asked that the Application be determined, and it was referred to me on 19 May 2023.

THE CASE LAW

9. In *MORI* the UT approved a number of points made by Judge Raghavan at first instance relating to costs applications for unreasonable behaviour; these included the following:

(1) The fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it. In *Leslie Wallis v HMRC* [2013] UKFTT 081(TC) ("*Wallis*") Judge Hellier stated at [27]: "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong…"

(2) As cautioned by Judge Brannan in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] Rule 10(1)(b) should not become a "backdoor" method of costs shifting".

10. The UT also added the following passage from *Catanã* at [14] concerning the phrase "bringing, defending or conducting the proceedings" in rule 10(1)(b):

> 'It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side."

11. The UT then said at [49]:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done."

THE DISPUTED INVOICE AND THE ASSESSMENT

12. It was HWL's case that:

(1) the Beer had been purchased from another UK supplier, LGVA Solutions Ltd, trading as Shakthi Cash & Carry ("Shakthi"); it was common ground that Shakthi had originally traded from two sites, known as Unit 1 and Unit 8;

(2) Shakthi had provided HWL with the Disputed Invoice for the Beer; and

(3) as a result, the Beer had been "purchased from a reputable source on a UK duty paid basis".

13. The Disputed Invoice had the number 6203 and an issue date of 5 October 2019, it was from Shakthi's Unit 8 address and contained an "anniversary badge" reading "10th anniversary". In its defence to the Assessment, HWL relied only on the Disputed Invoice.

14. Following detailed research including a visit to Shakthi's liquidator, on 5 May 2020m Officer Idziak issued HWL with a pre-assessment letter. This included the following reasons why the Disputed Invoice was not genuine.

(1) On 7 August 2019, almost two months before the date on the Disputed Invoices, Shakthi had stopped trading from Unit 8; the computer used to issue invoices at that site had broken, and it was still out of action on 4 October 2019.

(2) The date of the Disputed Invoice fell within Shakthi's eleventh year, not its tenth year (but the anniversary date on the Disputed Invoice was for year 10).

(3) The documents held by the liquidator did not include a copy of the Disputed Invoice, but copies of all other invoices issued to HWL by Shakthi were present.

(4) There were multiple differences in typeface and formatting between genuine Shakthi invoices and the Disputed Invoice.

15. In October 2021, Officer Idziak made a further visit to Shakthi's liquidator. He included the following additional findings in his witness statement; this was dated 8 November 2021 and was served on the same date.

(1) Shakthi had issued an invoice numbered 6203 from Unit 8 to an entirely different company, Queens Park Food and Wine, on 13 December 2018.

(2) All but one of Shakthi's invoices had been issued on a sequential basis, and

(a) its records showed that the last invoice issued from Unit 8 was on 27 July 2019, over two months before the date on the Disputed Invoice;

(b) that last invoice was numbered 10117, much higher than the 6203 on the Disputed Invoice; and

(c) the last Shakthi invoice issued before it stopped trading was numbered 6052, considerably lower than that on the Disputed Invoice.

16. At no point in its correspondence with HMRC or in its submissions to the Tribunal did HWL rebut or challenge the points at §14 or §15 above. In oral submissions, Mr Bedenham said only that some of the differences on the face of the Disputed Invoice (see §14(4)) might be explained by the "poor quality pdf" HWL had provided to HMRC, but as the original was never put into evidence by HWL this submission lacked any evidential basis.

17. I considered whether the reasonable person who had been provided with the information in the pre-assessment letter would have accepted that the Disputed Invoice was not genuine or whether that person would only have come to that conclusion when he read Officer Idziak's witness statement. However, in my judgment, the information in the pre-assessment letter was such that the reasonable person in the position of HWL would have realised the Disputed Invoice was not genuine, and would therefore not have appealed the Assessment.

18. There was thus overwhelming and unchallenged evidence that the Disputed Invoice was not genuine. To apply the wording used by Judge Hellier in *Wallis,* this constituted an "unbeatable" reason why HWL's case on the Assessment could not succeed, yet it nevertheless persisted. This was unreasonable.

THE PENALTY

19. HWL's primary case on the Penalty was that it believed the Disputed Invoice to be authentic for the reasons set out at [79] of the Decision. HMRC submitted that HWL knew the Disputed Invoice was not genuine, and had given it to HMRC with the intention that HMRC should rely upon it as a genuine document. For the reasons set out in the Decision (see [114] and the previous paragraphs), the Tribunal agreed with HMRC.

20. Although the reasonable person would not have believed the Disputed Invoice to be genuine, it does not follow that it was unreasonable of HWL to contest the Penalty on the basis

of Mr Hare's belief. That is because the burden of proving what Mr Hare believed rested on HMRC, and it was a matter for the Tribunal in the light of all the evidence to decide whether to accept or reject what Mr Hare said.

21. The position is the same in MTIC cases where the appellant denies knowledge of the fraud, but the Tribunal finds actual knowledge. It does not automatically follow from that Tribunal finding, that the appellant had acted unreasonably by challenging HMRC's MTIC decision. Instead, costs are only awarded if a party acted unreasonably for some other reason, or the case was complex and the appellant did not opt out.

22. Even I were to be wrong in my conclusions about Mr Hare's belief, Mr Bedenham also submitted that if HWL knew the Disputed Invoice was not genuine and had given it to HMRC with the intention that HMRC should rely upon it as a genuine document, that was insufficient to show that HWL had acted deliberately. For that to be the case, HMRC's Counsel, Mr Millington, had put to Mr Hare in cross-examination that:

(1) HWL had themselves falsified the Disputed Invoice, and/or

(2) had arranged for a third party to falsify the Invoice.

23. Mr Millington disagreed, by reference to *HMRC v Tooth* [2021] UKSC 17, which concerned the meaning of the word "deliberate" used in Taxes Management Act 1970, s 118(7). In order to decide which party was correct, I had to consider and apply the *ratio* of *Tooth* to the Penalty, which had been charged under the different legal provisions contained in Schedule 41 Finance Act 2008. I decided these points against HWL, but as the UT confirmed in *MORI,* "the fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it". In other words, these were not points which the reasonable person in HWL's position "should have known could not succeed", see *Catanã*.

24. I refuse the Application to the extent that it relates to the Penalty.

SUMMARY ASSESSMENT

25. I respectfully agree with Judge Amanda Brown KC's description of a summary assessment in *Harris v HMRC* [2022] UKFTT 447 (TC) at [36]:

> "[Summary assessment] is not intended to involve a lengthy consideration of each item of costs claimed but, rather, represents a proportionate means of justly, fairly and swiftly resolving the question of costs without the need for further costly proceedings regarding the costs themselves. In colloquial terms it is a somewhat rough and ready means of dealing with costs; its roughness is justified on the grounds of proportionality."

26. HMRC attached to the Application detailed schedules of the time spent, the individuals who carried out the work and the nature of the work. HMRC's time was included at the Guideline Hourly Rates. In *Samsung v LG Display* [2022] EWCA Civ 466, the Court of Appeal held that these Rates were appropriate to costs awards on the standard basis under the CPR, and there is no reason for this Tribunal to diverge from that approach. Mr Millington's time was claimed at the rate paid by the Attorney General's regional B panel, and that is an appropriate basis on which to claim counsel's costs on the standard basis.

27. The total costs were £31,147.28. In considering whether these were proportionate, I took into account that the Assessment was for £1,126 and the Penalty for £957; the costs were thus many times greater than that amount. However, in considering proportionality, the quantum of the assessment is not the only relevant factor. HWL operates an alcohol warehouse, and that activity requires that the operator be "fit and proper", see the Alcohol Liquor Duties Act 1979, s 88C; HMRC's approval process is known as the Alcohol Wholesaler Registration Scheme ("AWRS").

28. HWL's appeal concerned (a) whether it had provided HMRC with an invoice for the Beer which was not genuine, and if so, (b) whether that failure had been both deliberate and concealed . Given the statutory approval requirements reflected in the AWRS, these were very important issues, particularly in relation to the Penalty. However, it was a precondition for the Penalty that HWL was liable for the duty charged by the Assessment. As HWL did not accept that it was so liable, evidence and submissions were also required on the Disputed Invoice.

29. The parties recognised the significance of HWL's appeal: both sides instructed counsel and provided formal witness statements. Mr Hare, from the witness box, said that HWL's own costs were significantly in excess of the amounts at stake. Taking into account the importance of the issues in dispute, I find that the costs were proportionate.

30. HMRC's costs schedules did not separate the work relating to the Assessment and that on the Penalty. This was unsurprising, given that liability to the Assessment was a precondition for the Penalty.

31. In deciding the costs properly assessable in relation to the appeal against the Assessment, I took into account the following:

(1) The facts about the Disputed Invoice had to be established by witness evidence, including cross-examination, as well as from detailed documentation. This took HMRC considerable time, both in terms of prior preparation (their own witness statements and preparation for cross-examination of HWL's witness) and during the hearing.

(2) Had HWL accepted that the Disputed Invoice was not genuine, that time could have been saved; a statement of facts could have been agreed instead.

(3) The hearing would instead have been focused on the whether HWL knew the Disputed Invoice was not genuine, and on the relevant test for deliberate and concealed behaviour. Much less time would have been required.

32. I decided, given those points, and taking a broad view of the matter, that one-third of the costs were allocable to the Penalty and the other two-thirds to the Assessment. The part of the costs relating to the Assessment was thus £20,764.85. HMRC would not have incurred those costs had HWL acted as a reasonable person would have done, and accepted that the Disputed Invoice was not genuine. It is fair and just that they be recovered from HWL.

CONCLUSION AND APPEAL RIGHTS

33. I direct that HWL are to pay HMRC its costs of £20,764.85 within 28 days of the date of issue of this decision.

34. 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 Rules. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 14 JUNE 2023