TC01906

Appeal number: TC/2009/11147

Procedure - Costs – Rule 10 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – whether Respondent had acted unreasonably in defending or conducting the proceedings

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOHAMMED AFZAL t/a KINGSTON FURNITURE **Appellant**

- and -

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

TRIBUNAL: **JUDGE MICHAEL S CONNELL**

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 12 December 2011

For the Appellant : Mr P Rayner of Portcullis VAT Consultancy

For the Respondents : Mr Richard Mansell of Counsel for HMRC

DECISION

The application

1. This is an application by the Appellant, Mohammed Afzal t/a Kingston Furniture, for costs of the appeal

The background

2. An examination of the Appellant's bank statements indicated a discrepancy between bank receipts and sales declared on his VAT returns. For the period 1 January 2007 to 3 December 2008 receipts totalled £519,904 whereas declared sales were £353,105, a difference of £166,799 representing a possible under-declaration of output tax of £24,842. For the period 4 January 2008 to 22 December 2008 total receipts were £399,923 whereas declared sales were £294,935 representing a possible under-declaration of output tax of £15,636. For the latter period, when extracting the VAT figures from gross VAT inclusive sales, the Appellant had incorrectly calculated VAT which resulted in a potential over-declaration of output tax. The Appellant's records and calculations for the first period were not available. On 17 March 2009, after an exchange of correspondence with the Appellant's accountants, HMRC assessed the Appellant for output tax of £40,478 plus interest of £2,945.

3. On 16 June 2009 the Appellant lodged an appeal against the assessment. The appeal was outside the time limit set out in the decision letter received from HMRC and accordingly the Appellant requested the Tribunal to extend the time limit for making the appeal. The Appellant said that the amount assessed was "*without merit*" on the basis firstly that the Appellant's bank receipts "*rarely represent accurate sales figures*" because he "*regularly injected capital and just as regularly paid it from the business*". Secondly the Appellant argued that because HMRC had not used financial year ends when arriving at the assessment, an accurate figure could only be calculated until "*all visit reports containing the details have been disclosed*". No calculations were submitted. The Appellant acknowledged that there had been an under-declaration of VAT, but said that the assessment should be reduced from £40,475 to "*approximately £4,765*". The Tribunal categorised the appeal to proceed under the Basic Category.

4. An application to the Tribunal not to pay a disputed amount pending the outcome of an appeal on grounds of hardship must, in the first instance, be made to HMRC. The Appellant's notice of appeal stated that he had not applied to HMRC for their agreement to postponement of the tax, but that payment of the disputed amount "*would cause the business to suffer*". Therefore the indication was that the Appellant would be applying to HMRC for postponement on the grounds of hardship. On 29 June 2009 the Appellant's accountant formally applied to HMRC for their agreement that the appeal could proceed without payment of the disputed tax. No supporting grounds or representations were submitted with the application.

5. On 9 July 2009 HMRC acknowledged receipt of the appeal advising that they did not consent to the Appellant's request to appeal out of time. HMRC did not address the postponement issue, possibly because at that stage no representations had been submitted. In the meantime the Tribunal stayed the appeal under Rule 22(4) pending the outcome of the postponement application. Thereafter nothing further was heard from either party. It may have been that each thought they were awaiting the other in respect of the postponement application.

6. On 11 January 2010 the Tribunal asked HMRC to clarify whether a formal postponement application had been made. HMRC responded by saying that it had received no representations from the Appellant but that it would "oppose" any application (to the Tribunal) in that regard. At this stage the situation had become somewhat confused because there had been no formal decision by HMRC and no postponement application to the Tribunal by the Appellant. On 13 July 2010 the Tribunal reminded the Appellant that no representations had been submitted to HMRC in support of its application and that any such representations should be lodged with supporting documentation without further delay. The matter was re-categorised to proceed under the Standard Category once the postponement application had been determined by HMRC. Representations were eventually submitted to HMRC by the Appellant on 11 October 2010 and on 7 December 2010 HMRC accepted the application, notifying the Tribunal on 17 January 2011. At this stage therefore the appeal was ready for listing and HMRC's statement of case was due to be filed in accordance with Rule 25(1)(c), by 22 March 2011.

7. On 16 February 2011 HMRC, having further reviewed the VAT assessment and having additionally taken into account the reduced (15%) rate of VAT applicable from 1 December 2008, reduced the assessment to £23,587. The Appellant was notified accordingly.

8. On 25 February 2011 the Appellant's accountant notified the Tribunal that the Appellant still wished to proceed with his appeal. He also said that HMRC had failed to comply with Rule 25(1)(b) in that a statement of case had not been delivered within the requisite time period. This was not correct. Under Rule 25(1)(c) HMRC had 60 days following the sending by the Tribunal of the notice of appeal and therefore had until 22 March 2011 to serve their statement of case.

9. Of its own motion the Tribunal listed the appeal for a pre-trial review on 1 April 2011 for the purposes of case management directions. The Appellant did not attend at the pre-trial review, possibly (as became evident from subsequent correspondence) because he had by then decided to accept HMRC's reduced assessment of £25,837.

10. On 3 April 2011 the Appellant formally notified the Tribunal of his acceptance of HMRC's revised assessment, withdrew his appeal and applied for a wasted costs order.

11. Under Rule 10(1) the Tribunal may only make an order in respect of costs:

(a) under s 29(4) of the Tribunals, Courts and Enforcement Act 2007 (Wasted Costs), or

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.

Wasted costs are costs incurred by a party as a result of any improper, unreasonable or negligent act or omission of any representative which the Tribunal considers it unreasonable to expect a party to pay. Accordingly Rule 10(1)(a) does not apply in this case. Under Rule 10(1)(b) the Tribunal's jurisdiction is limited to considering actions of a party in the course of "the proceedings", that is to say proceedings before the Tribunal, whilst it has jurisdiction over the appeal.

12. The Appellant applies for a costs order, firstly because he says that HMRC eventually agreed an assessment based on information which had been available from the outset, and secondly because HMRC initially refused, and then subsequently agreed, a postponement to the hardship application.

Conclusion

13. HMRC's enquiry into the Appellant's VAT returns had indicated a substantial discrepancy between bank receipts and declared sales on his VAT returns. The under-declaration was initially assessed by HMRC at £40,478. Although the Appellant in his notice of appeal, said that the assessment of £40,478 was "without merit", by proposing that the assessment be reduced to £4,765, he acknowledged that there had been underpaid output tax. Furthermore, he subsequently agreed HMRC's revised assessment of £23,587 without further enquiry. Therefore the original assessment could not have been described as "without merit", particularly given the lack of information and records for a substantial part of the assessment period. Accordingly, there cannot be any suggestion that HMRC acted unreasonably in pursuing the assessment. Although the reduced assessment was based on a review of the information and was proposed by HMRC in mid February 2011, it was not until the end of June 2011 that the Appellant accepted the assessment and withdrew his appeal. In the meantime he allowed proceedings to continue without giving any indication that he intended to accept the Respondent's revised assessment, suggested erroneously that HMRC had not filed their statement of case within the requisite time period and failed to attend a pre-trial review without explanation. In order to deal with matters fairly and proportionately, these issues must be taken into account to the extent that proceedings continued, perhaps unnecessarily and without fault on the part of HMRC, longer than they might have done.

14. For the Tribunal to make an order for costs against HMRC on the first ground (referred to in paragraph 12 above), it would be necessary for the Appellant to show that the decision had been made after wholly inadequate enquiries or that on the information available when the decision appealed against was made, it should have been obvious that the decision was erroneous. Quite clearly HMRC were entitled to make the original assessment based on the information which they held. Indeed, it is difficult to see how the decision could have been "clearly erroneous" when the Appellant had not produced any records, information or calculations to refute HMRC's assessment for the period 01.01.07 to 03.12.07. Although the assessment

was subsequently reduced to £23,587, this was not as a result of additional information provided by the Appellant and was based on a review of the information and assessment by HMRC following the discovery that the Appellant had made additional errors of calculation in assessing his output VAT.

15. With regard to the Appellant's second ground (as referred in paragraph 12 above) for applying for costs, his notice of appeal indicated that a hardship application would be made, but that notice of the application had not at that stage been submitted to HMRC. Although the application was confirmed by the Appellant's accountant in a letter dated 29 June 2009 to HMRC, representations were not submitted until October 2010. The application was accepted by HMRC in December 2010. It is difficult therefore to understand on what grounds the Appellant considers that HMRC acted unreasonably with regard to his hardship application. There was no significant delay by HMRC in dealing with the application following receipt of the Appellant's representations.

16. For the above reasons the Tribunal does not consider that HMRC have acted unreasonably either in defending or conducting the proceedings or with regard to the Appellant's postponement and hardship application. Accordingly the Appellant's application for costs under Rule 10 is refused.

17. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 21 March 2012