



TC03063

Appeal numbers: LON/2007/01238

COSTS – whether consideration of Respondents’ application for costs should be deferred pending determination of Appellant’s application for permission to appeal - held no - Respondents’ application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STARMILL UK LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public at 45 Bedford Square, London on 25 October 2013

Joseph England, counsel, instructed by Waller Pollins for the Appellant

Clare Huntley, counsel, instructed by the General Counsel and Solicitor for HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns an application by the Respondents ("HMRC") for an order that the Appellant ("Starmill") should pay HMRC's costs in relation to this appeal. The application was made under Rule 29 of the Value Added Tax Tribunals Rules 1986 ("Rule 29").

Brief history of proceedings

2. In July 2007, Starmill appealed to the VAT and Duties Tribunal against an assessment for VAT of £221,485 issued by the Respondents ("HMRC"). Starmill had treated two supplies as zero rated for VAT on the ground that they had been exported. HMRC took the view that Starmill did not have any evidence to show that the supplies had in fact been exported. Progress towards a hearing of the appeal was slow.

3. With effect from 1 April 2009, the jurisdiction of the VAT and Duties Tribunal transferred to the Tax Chamber of the First-tier Tribunal ("FTT"). With effect from that date, the rules governing the award of costs in appeals changed but the FTT could direct, under Paragraph 7(3) of the Transfer of Tribunal Function and Revenue and Customs Appeals Order 2009, that the costs regime under Rule 29 should continue to apply.

4. On 19 April 2010, the FTT, exercising the power under Paragraph 7(3) of the 2009 Order, directed that the costs regime under Rule 29 should apply to the appeal.

5. On 27 June 2011, the FTT informed Starmill that its appeal had been struck out because Starmill had failed to serve a witness statement within the specified time limit.

6. On 21 December 2011, Starmill made an application for its appeal to be reinstated. On the same day, HMRC made their application for costs under Rule 29. HMRC provided a schedule of costs with the application which showed that the costs were £15,067.34.

7. Starmill's application for the appeal to be reinstated was heard by Judge Bishopp, the President of the FTT, on 2 March 2012. In an oral decision given on the day of the hearing, Judge Bishopp refused the application.

8. After the hearing on 2 March 2012, there was some confusion about the correct way for Starmill to challenge Judge Bishopp's decision. I do not need to set out the details of what occurred but the eventual outcome was that Judge Bishopp gave full written reasons for his direction in March 2012 and refused Starmill permission to appeal to the Upper Tribunal ("UT") in a decision notice released on 29 July 2013.

9. Having been refused in the FTT, Starmill applied to the UT for permission to appeal on 29 August 2013. I dealt with that application on the papers and, on 30

5 September, I refused permission to appeal on the ground that the application did not identify any error of law in Judge Bishopp's approach to the question of whether or not Starmill's appeal should be reinstated. As it was entitled to do under Rule 22(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008, Starmill applied for my decision to be reconsidered at a hearing. I understand that Starmill has been asked to provide dates when it would be available for a hearing but has not done so and, as yet, the oral hearing of the application for permission to appeal has not been listed.

Submission

10 10. HMRC's application for costs was the subject of a short hearing before me on 25 October 2013. At the hearing of the application, Mr Joseph England, who represented Starmill, made three submissions, namely:

- (1) consideration of the matter of costs should be deferred until after the oral hearing of the application by the UT;
- 15 (2) the appellant should not be required to pay HMRC's costs pending determination of its appeal to the UT because that would cause hardship; and
- (3) if awarded, HMRC's costs should be the subject of a detailed assessment by a costs judge.

Discussion

20 11. I consider that deferring consideration of an application for costs by the successful party in an appeal in the FTT until after consideration of an application for permission to appeal or until after final determination of an appeal is only appropriate in exceptional cases. Such exceptional cases might include where an appellant could show that it would suffer hardship that would prevent it pursuing its appeal or that
25 there was a real risk that it would not be able to recover the costs if it were successful in the appeal. The latter situation cannot apply in this case where the person that would be obliged to repay the costs, if Starmill were to succeed in its appeal, is HMRC.

30 12. Hardship is not, and cannot be, a reason for not ordering a party to pay costs. It may be a reason for deferring the payment of costs if payment would mean that the paying party could not pursue an appeal. I do not accept that Starmill has shown that it would suffer such hardship if it were required to pay HMRC's costs at this stage. Mr England directed me to the witness statement of Mr Luay Alkasab, the director of Starmill, dated 1 March 2012. Paragraph 6 of the witness statement is as follows:

35 "There are further difficulties in relation to the funding of the litigation that our company is now involved in. We have been deprived of the repayment of what we consider to be our lawfully due VAT for some six years. I have therefore had to make redundant all staff and have
40 been left to deal with matters by myself. This is not ideal especially when I have had personal issues to contend with."

13. Although it appears that Starmill has had to pay VAT of £221,485 which may have led to the staff being laid off, the witness statement does not say anything about Starmill's current assets and resources. I note that the company continues in existence with Mr Alkasab still dealing with unspecified matters. Starmill also continues to
5 fund the ongoing proceedings, including instructing solicitors and counsel. Accordingly, I am not satisfied on the evidence that I have seen that Starmill would suffer hardship and I refuse to stay consideration of HMRC's application for costs on the ground of hardship.

14. Mr England did not seek to argue that HMRC were not entitled to their costs. He did submit that the costs claimed should be the subject of a detailed assessment. I
10 was provided with various documents showing time spent, fees charged and items of expenses claimed but I was not taken through the figures in detail. In the circumstances, I accept that, if they cannot be agreed by the parties, HMRC's costs should be assessed on the standard basis by a costs judge.

15 **Decision**

15. For the reasons set out above, my decision is that the Appellant shall pay the Respondents' costs in relation to the appeal, including the costs of the application hearing on 25 October 2013, such costs to be assessed on the standard basis by a costs judge if not agreed

20 **Rights of appeal**

16. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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
25 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.

30 **GREG SINFIELD**
TRIBUNAL JUDGE

RELEASE DATE: 13 November 2013