TC03219

Appeal number: TC/2012/07655

Costs – HMRC withdrawing from appeal after receipt of new information – application by Appellant for award of costs of £10,800 plus VAT – whether HMRC had acted unreasonably in defending or conducting the appeal – only for very short period between provision of new information and HMRC's delayed decision to withdraw from the appeal – award of costs made in respect of that period, summarily assessed at £150 – warning that in appropriate circumstances, withholding by an appellant of crucial information or evidence which later persuades HMRC to withdraw from the appeal might entitle HMRC to costs for the relevant period during which they are unnecessarily being put to the expense and effort of conducting the appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

PING KONG LAM **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Determined on the basis of written submissions from the parties.

This decision comprises full findings of fact and reasons for a summary decision previously released on 12 December 2013

DECISION

Introduction

1. This decision concerns the application of Rule 10 of the Tribunal's Procedure Rules in a situation where the Appellant claims that HMRC have acted unreasonably in defending or conducting an appeal. The application arises out of HMRC's withdrawal from the appeal at a comparatively late stage as a result of new information provided to them by the Appellant.

2. The application was made after the time limit for doing so in accordance with the Tribunal's Procedure Rules, and the decision also addresses the question of whether that time limit should be extended so as to admit the application late.

The facts

3. The Tribunal's correspondence file was destroyed in line with its usual document retention policies after HMRC's withdrawal from the appeal (which was notified on 15 February 2013) and before the Appellant made his application to the Tribunal for costs (on 21 June 2013). The history of the appeal, so far as relevant, has had to be reconstructed from the documents provided by the parties and the few items which the Tribunal has been able to retrieve from its own records.

4. It appears that the Appellant's notice of appeal was lodged with the Tribunal on 8 May 2012. The appeal was categorised as standard and HMRC delivered their statement of case on or around 16 November 2012.

5. HMRC have asserted (and the Appellant has not disputed) that the Appellant's statement of case (which was sent to them on 11 December 2012) contained new material, particularly the names of the trading companies that occupied the premises and ran the business known as "Hong Kong Island" in 2008-09 and 2009-10, which persuaded HMRC that the income tax assessments for those two years could no longer be sustained. In the absence of any argument to the contrary from the Appellant, I accept HMRC's assertion.

6. There was also another matter under appeal, concerning a capital gains tax assessment in relation to another property. Clearly HMRC decided, in the light of its intended withdrawal of the income tax appeal, that the defence against the CGT appeal was not strong enough to justify persisting with the CGT appeal on its own. There does not appear to have been any new information supplied to HMRC in relation to the CGT appeal after 16 July 2012, when they were sent a copy of a document terminating the relevant lease without any payment from the landlord.

7. The Tribunal sent a copy of HMRC's notice of withdrawal to the Appellant's representative on 22 February 2013, and the deadline for delivery of a costs application to the Tribunal by it was therefore 28 days later (see Rule 10(4)(b) of the Procedure Rules). No such application was received until 21 June 2013.

8. It would have been clear to HMRC from 1 March 2013 that the Appellant was seeking to have his costs paid, and a detailed breakdown of the costs claimed (£10,800 plus VAT) was provided to them at that time. The Appellant's representative (one of a series of freshly incorporated companies operating from the same premises at Ethel Street, Birmingham) states that "originally we wanted to avoid involving the Tribunals service in awarding costs to the Appellant because we had reasonable expectations that compensation would be provided as HMRC had previously provided compensation…"

Discussion and conclusion

Application to extend time for submission of the costs application

9. I note that HMRC have not objected to the application being made out of time.

10. I apply the principles set out in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *O'Flaherty v HMRC* [2013] UKUT 161 (TCC) in considering whether to exercise my discretion to extend the relevant time limit in this case.

11. The matter is finely balanced, and during the period of delay the Tribunal's correspondence file was destroyed in line with its usual procedures (thus reducing the evidence available for consideration in respect of the costs application) because no application had been received in time.

12. Nonetheless, in all the circumstances I consider it appropriate to consider the application on its merits and I therefore grant an extension of time for its submission such that it is deemed to have been received within the appropriate time limit.

13. This decision should not be taken as a precedent and the Appellant's representative (and companies, present and future, operating from the same premises under the control of the same individuals) is warned that time limits in the Tribunal's rules must be obeyed unless good reason can be shown for failure to do so.

The substantive costs application

14. It is clear from the decision in the Upper Tribunal in *Catana v HMRC* [2012] UKUT 172 (TCC) that costs incurred before proceedings are actually brought before the Tribunal (e.g. in respect of a previous investigation which gives rise to the appeal in question) cannot be recovered under the Tribunal's Procedure Rules. We are concerned therefore only with costs incurred after that time (possibly also including costs incurred in connection with the actual commencement of the appeal, e.g. costs of preparation of the notice of appeal itself – though that is not a matter which I consider in detail because of the view which I take on the application more generally).

15. It is inherent in the finding I have made at [5] above that I do not consider HMRC to have acted unreasonably in defending or conducting the appeal up to the time they became fully aware of the new information furnished by the Appellant's representative on or shortly after 11 December 2012.

16. It would have taken some time to consider the new information and reach a decision to withdraw in the light of it. Given that HMRC actually gave notice of withdrawal on 15 February 2013, it took them approximately two months from receiving the new information before they communicated their intention to withdraw. It could be said that a quicker decision could have been made, but given the time of year and the stage which the appeal had reached by that time, I would not consider the delay to have become unreasonable before 1 February 2013.

17. It might be said (though the Appellant has not done so in this case) that there was no new information provided in relation to the capital gains tax appeal in December 2012, therefore HMRC should perhaps have withdrawn their defence to that part of the appeal at an earlier stage.

18. However, in a situation where HMRC reasonably considered until early in 2013 that they had good grounds for defending the income tax appeal, based in part upon the inadequacy of the information and records provided, I consider it would not have been unreasonable on their part to continue to defend the CGT assessment on similar grounds, or to decide to drop that defence at the same time as they dropped the defence of the income tax assessment. I therefore see no reason to undertake the potentially complicated task of seeking to separate out the costs associated with the CGT appeal from those associated with the income tax appeal for the period from 16 July 2012 up to either 1 or 15 February 2013.

19. In summary, I therefore find that HMRC did not act unreasonably in defending or conducting the appeal up to 1 February 2013, but that they did so act for the period after that date until 15 February 2013, when they withdrew. I note the appellant claims for 2 hours of work during this period at a rate of £175 per hour, totalling £350. However, from the very brief description given of the work involved, and an overall assessment of what would have been reasonably necessary at that time, I summarily assess the costs to be paid by HMRC in respect of that work in the sum of £150.

20. I therefore order that HMRC pay £150 in respect of costs to the Appellant, within 56 days of the date of release of this decision.

21. Whilst this decision relates to an application for costs made by the Appellant and not by HMRC, I should sound a note of warning to appellants and their advisers. If it could be shown that an appellant was in possession of information or evidence that would have persuaded HMRC to withdraw its defence of an appeal, but for whatever reason that appellant withheld that information or evidence and as a result put HMRC to the unnecessary effort and expense of continuing with the appeal until a much later date, HMRC may well have a claim for their own costs in respect of the appellant's unreasonable conduct in doing so, even though the appeal itself is successful as a result of their withdrawal upon the eventual production of that information or evidence. In such circumstances, a wasted costs order might also be made against an adviser personally under section 29(4) of the Tribunals, Courts and Enforcement Act 2007, if the Tribunal found that adviser guilty of an improper, unreasonable or negligent act or omission.

22. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 13 January 2014