TC03460

Appeal number: LON/2002/08239

COSTS – case under Rule 29 VAT Tribunal Rules 1986 – HMRC applied for costs after appeal dismissed – parties' reasonable expectations – whether Sheldon statement applied – no – costs awarded on standard basis

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRAPPS CELLARS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square London on 10 February 2014

Mr A Young, Counsel, instructed by Vincent Curley LLP for the Appellant

Mr R Hill, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. On 11 November 2013 the Tribunal dismissed the appellant's appeal against assessements to excise duty in respect of alcoholic goods which had been diverted after they left the appellant's warehouse. On 25 November 2013 HMRC applied for their costs to be assessed on the standard basis by a Costs Judge of the High Court. The appellant objected and the matter came on for hearing.

Facts

2. The facts were not really in dispute so far as the costs application was concerned and I find as follows:

3. A number of appeals were lodged in October 2002 by the appellant against a number of assessments and against the withdrawal of its WOWGR registration.

4. Not long after the assessments, the appellant entered into administration and was then put into liquidator. Sometime in 2003 a Mr Hooper of Haslers was appointed liquidator of the appellant. He wrote to HMRC about the risk of costs in the litigation initiated by the appellant. No copy of this letter was made available: HMRC do not have it or cannot find it and Mr Hooper will not disclose it without a tribunal order.

5. A Mr Fairweather, an HMRC officer who had no direct connection with the litigation, wrote back to Mr Hooper on 19 December 2003. He said:

> "You asked me if I could estimate costs in a contested tribunal case. Can I say that this would very much depend on the case. However, I can say in an alcohol case such as this, the Department could claim costs of up to and possibly exceeding £30,000 should be win at tribunal.
>
> You have also asked me if we would be likely to claim these cost (sic) and the answer in (sic) most definitely yes. The 'Sheldon' issue relates to small cases, which involve a straightforward tribunal decision, in these cases, the Department does not claim costs. Where the matter is akin to a High Court hearing we do, and that is the likely outcome of this case."

6. At this time, the director of the appellant (for whom Mr Curley was acting) was in negotiation with the liquidator for permission to conduct the appeal on behalf of the appellant. On the same day as receiving the above letter, and clearly in reference to it, although there is no indication it was actually copied to Mr Curley, Mr Hooper wrote to Mr Curley. He said:

> "...I attach a copy of a letter that I have sent to the Insolvency Practitioner Control Unit, which is considering my application for sanction.
>
> As you will note, HM Customs & Excise have estimated that the adverse costs which might arise in a tribunal appeal could exceed £30,000.
>
> Bearing this in mind, you may wish to advise your clients to reconsider the provision of a secured indemnity in relation to these costs, as it would appear to me that sanction is likely to be declined on the basis on (sic) an inadequate provision to deal with adverse costs....."

7. The question of the provision for a secured indemnity must have been resolved to the parties' satisfaction as the Liquidator authorised Mr Davis to conduct the appeal on its behalf and this is noted in a Tribunal direction dated 3 February 2004.

8. HMRC's served an extremely brief consolidated statement of case on 8 July 2004. It did not make any mention of costs. Similarly, HMRC's even briefer consolidated statement of case dated 17 March 2008, no doubt issued as yet more appeals had been consolidated with the original one, made no mention of costs.

9. At a contested directions hearing on 13 September 2008 the Tribunal made an order, the last direction of which was that costs of that hearing would be costs in the cause.

10. In an application for directions dated 23 January 2009 the appellant applied for various directions and its last application was for its costs of the application.

11. The Tribunal made a direction on the appellant's application and unopposed by HMRC on 29 September 2009 that Rule 29 of the VAT Tribunal Rules 1986 would apply to this appeal. That same direction stated that the cost of that applications hearing (which dealt with more than just costs regime) would be costs in the cause.

12. A disclosure application dated 5 March 2010 made by the appellants requested, as did its last application, that HMRC be directed to pay its costs of the application.

13. A letter from HMRC in August 2012 referred to an issue which they had been unable to agree with the appellant and indicated that they wished the appellant to engage with their proposals "failing which our clients may consider raising the issue of costs with the Tribunal given that we continue to operate under the old costs rules."

14. Mr Hill's skeleton argument, filed on 7 November 2012 on behalf of HMRC, asked for the appeal to be dismissed with costs. This was repeated in his closing submissions filed on 20 December 2012.

Delay

15. The appeal was lodged in 2002 and it was over ten years from that date before the substantive hearing commenced. Mr Young sought to show that delays in this appeal were caused by HMRC and he referred me to a number of letters written in

2005 which showed that HMRC's discussions with their counsel (not Mr Hill) were somewhat delayed on occasions due to counsel being busy and then ill. HMRC later removed instructions from its own solicitors' office and transferred it to external solicitors, and they also instructed new counsel when their original counsel left for a maternity break.

16. I agree that the letters indicated some of the delay was due to HMRC and its advisers: however, what happened in 2005 offered no explanation of why the appeal took from 2002 to 2012 to come on for hearing. I find a significant part of the ten year delay was caused by a number of very extensive disclosure exercises conducted by HMRC at the appellant's application, which included information from other taxation authorities and intelligence reports, as well as papers from criminal proceedings. While the appellant was entitled to ask for this disclosure, I find Mr Young has not shown that HMRC caused any substantial delays or was at fault for the ten years it took to bring this case on for hearing.

The law

17. Costs awards under the old rules are in the discretion of the Tribunal. This was provided for by Rule 29(1) of the VAT Tribunal Rules 1986. In 2009, the VAT Tribunal Rules 1986 ceased to apply and instead Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009/273 applied to all cases which commenced before 1 April 2009 but which were still ongoing at that date, as this case was. However, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 2009/56 Schedule 3 Paragraph 7(3) enabled the Tribunal to make a direction to apply any of the old rules to transitional appeals, such as this one. As I have said, such a direction was made in respect of old Rule 29(1) on 29 September 2009 at the appellant's request.

18. The Appellant nevertheless objected to HMRC's application for costs. It considered HMRC should not seek costs against it because HMRC should abide by the so-called Sheldon statement. This was a parliamentary answer given by the Right Hon. Mr Sheldon in 1978 and was as follows:

> "the Commissioners [ie HM Customs & Excise] have concluded that, as a general rule, they should continue their policy of not seeking costs against unsuccessful appellants; however, they will ask for costs in certain cases so as to provide protection for public funds and the general body of taxpayers. For instance, they will seek costs at those exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases, unless the appeal involves an important point of law requiring clarification. The Commissioners will also consider seeking costs where the appellant has misused the tribunal procedure – for example, in frivolous or vexatious cases, or where the appellant has failed to appear or to be represented at a mutually arranged hearing without sufficient explanation, or where the appellant has first produced at a hearing relevant evidence which ought properly to have been disclosed

> at an earlier stage and which have saved public funds had it been produced timeously."

19. A re-affirmation of this statement was given by the Right Hon Mr Brooke in 1986 and was as follows:

> "The new penalty provisions and right of appeal to the value added tax tribunals have made no change to this policy. Customs and Excise, with the agreement of the Council on Tribunals, consider that appeals against penalties imposed under FA 1985 s13 [now VATA 1994 s60 – civil dishonesty penalties] on the grounds that a person has evaded VAT and his conduct has involved dishonesty fall to be considered as being comparable with High Court cases. Where such appeals are unsuccessful, Customs and Excise will normally seek an award of costs."

20. A written ministerial statement was made by the Financial Secretary to the Treasury on 10 March 2009 in respect of transitional cases under the new regime:

> "the practice set out by the Right Hon. Robert Sheldon, now Lord Sheldon of Ashton-under-Lyne, on 13 November 1978 – and restated on 24 July 1986 by the Right Hon. Peter Brooke, now Lord Brooke of Sutton Mandeville – will also continue to apply on a transitional basis, and HMRC will not seek costs from appellants in most cases."

21. A Tribunal would normally award costs in line with the reasonable expectations of the parties: the party which wins the appeal would normally expect an order of costs in their favour. However, an Appellant which loses an appeal would not expect an award of costs to be made against them where the Sheldon statement applies. Although the Sheldon statement is extra-statutory, that does not prevent the appellant relying on it as costs are in the discretion of the Tribunal and the Tribunal in exercising its discretion would normally take into account the parties' reasonable expectations, including expectations engendered by concessions.

The parties' expectations

22. Was the appellant on notice that HMRC would seek their costs in the event they won the appeal? I agree with Mr Young the fact that the appellant was put on notice just before the hearing in 2012 that HMRC would be seeking costs is mostly irrelevant as the appellant had already been committed to the proceedings for the previous 10 years and substantial costs had already been incurred. The 2012 warnings were too late to be relied on by HMRC to justify its application for costs.

23. I also accept that the various applications by the appellant over the years at interim hearings for costs to be in the cause are irrelevant as they are as consistent with a belief that the Sheldon statement applied as a belief that both parties would

seek costs in the event of winning. For the same reason, I set no weight on the appellant's application for the old costs regime. This could have been, and I am told it was, motivated by a belief that the Sheldon statement applied.

24. However, while HMRC's statement of case did not refer to costs (or indeed, much else), HMRC had early on expressly informed the appellant's liquidator that the Sheldon statement did not apply to this litigation. I note that Mr Fairweather, the writer of the letter of 19 December 2003, was not connected with the litigation in this appeal, but the letter was clearly written in respect to Trapps' appeal and indeed the heading on the letter referred solely to Trapps Cellars. I reject Mr Young's position that the letter amounted to no more then a general policy statement: while it was a statement of general policy it was also a statement that the application of that general policy would mean Trapps could not benefit from the Sheldon statement.

25. Mr Davis' advisers may or may not have seen this letter but it was, I find, sent to the appellant's liquidator. It was clearly received by Mr Hooper as the contents of his letter of the same date refer to information which must have come from the letter from HMRC. Mr Davis chose to conduct the litigation on behalf of Trapps and it was for him to ensure that the liquidator passed to him all correspondence relevant to the appeal. I consider the appellant, and any person, such as Mr Davis acting on behalf of the appellant, was fixed with notice of the contents of this letter received by the appellant's liquidator.

26. Further Mr Davis' adviser, Mr Curley, received Mr Hooper's letter of the same date. I reject Mr Young's case that this letter was too vague to amount to specific warning that HMRC would apply for costs. The letter did not come from HMRC, but it clearly identified the risk of adverse costs to Mr Curley.

27. From the point of view of the exercise of my discretion, I consider that the appellant (acting via Mr Davis) is fixed with knowledge of Mr Fairweather's letter to its liquidator and that in any event Mr Davis' adviser was actually aware that the issue of adverse costs had been raised. My conclusion is that, in view of the contents of Mr Fairweather's letter, which specifically said that HMRC did not consider this case within the Sheldon statement, the appellant could not reasonably expect to take advantage of the Sheldon statement.

28. Further, the appellant has throughout been advised by experienced advisers who ought to know that under the costs regime which applied up to 2009 and was directed to apply thereafter, an appellant is at risk of liability to pay HMRC's costs if it loses the appeal. Mr Young did not suggest that they did not know this. Their position was that they thought the Sheldon statement applied. However, I consider that if the appellant claims reliance on the Sheldon statement, it must be taken to know the contents of the Sheldon statement. In particular, it must be treated as knowing that 'substantial and complex cases where large sums are involved and which are comparable with High Court cases' were excluded from the benefit of it. If this appeal is such a substantial and complex case, the appellant cannot complain that the Sheldon statement does not apply: it should have known this.

29. Was it such a case? I find it was substantial and complex. It took 10 years to prepare for hearing at least in part due to the very extensive disclosure. That disclosure was reflected in a large number of bundles before the Tribunal. The hearing lasted for 14 days. Both parties were represented by junior counsel. There was a great deal of witness evidence from 13 witnesses. Questions of fact and law were presented to the Tribunal panel and the Tribunal's decision ran to 39 pages.

30. It involved a large sum of money as assessments of some £1.5 million were in dispute. I find it was akin to High Court proceedings. I agree with what I said in *Innocent Ltd* that:

> [24] However, where the case was conducted by the Appellant in much the same way as if it were dispute in front of the High Court, it seemed to me, that it is one of those exceptional cases where HMRC were in the Sheldon statement reserving their right to apply for costs. To decide whether the Appellant was treating the dispute similarly to one in front of the High Court includes looking at how long it took the Tribunal to hear the evidence they brought, who they chose to represent them, and how in general they presented their case.
>
> [25] Mr Brown's view is that the exception for cases comparable to High Court cases is there to protect HMRC from incurring expenses in defending appeals beyond what they would expect to incur in the ordinary Tribunal case. I agree: I think this is saying what I said in the previous paragraph but a different way. If the Appellant treats the case like a High Court case, then HMRC are put to costs in excess of those than they would expect in an ordinary Tribunal hearing.

My view is that this was not a run of the mill tribunal case: it was treated by the parties as akin to High Court proceedings. There was a great deal of disclosure, many witnesses, complex legal arguments, and counsel instructed (even in preliminary hearings).

31. Mr Young pointed out that no expert evidence was given. This is true. But not all High Court cases need expert evidence. While I agree that expert evidence clearly points to a case akin to a High Court one, the lack of it does not necessarily show the reverse, particularly in a case where, as Mr Hill pointed out, it would be very difficult to see on what issue expert evidence could have been given.

32. Mr Young also relied on the fact that no tax avoidance scheme was involved, unlike the position in the *University of Reading [1998] V&DR 27* case, where the Tribunal made an award of costs against an appellant who had litigated an avoidance scheme as the Tribunal did not consider that the appeal fell within the Sheldon statement. While I agree that this was not an avoidance case, I do not see the point as significant. A case may be large and complex, involve a large sum of money and be akin to High Court proceedings, without involving abuse and the case of *Innocent Ltd* is an example of this.

33. Mr Young suggested this case was within the exception to the exception of the Sheldon statement in that (he said) the application of 'fortuitous events' rule and the appellant's allegations that HMRC's SEED database was unreliable were matters of public importance.

34. However, the exception to the exception in the Sheldon statement refers to "an an important point of law requiring clarification". The reliability of the SEED database is a question of fact and the issue raised on the meaning of 'fortuitous events' was in my view relatively clear and certainly not an important point of law requiring clarification. Had the Tribunal thought that it was, no doubt it would have been referred to the CJEU.

35. It may well be that Mr Young applied for the old costs regime in 2009 on the appellant's behalf in the mistaken belief that the appellant would benefit from the Sheldon statement. But if so, HMRC are not at fault for the mistake. The appellant could have referred back to the 2003 correspondence, consulted the terms of the Sheldon statement or asked whether HMRC agreed that the Sheldon statement applied. If it held the belief that the Sheldon statement applied, I find that that belief was not reasonable and should not be given effect.

Partial success

36. The parties' expectations should reasonably have been that an open costs regime applied because such a regime did apply before April 2009 and was directed to apply after that date. This case was not within the Sheldon statement and both parties should have known this (and the appellant could have queried it with HMRC if they were uncertain). In any event the appellant, by its advisers, had been told by an HMRC officer in 2003 that HMRC considered that the Sheldon statement did not apply.

37. An open costs regime normally dictates that costs will follow the event. Mr Young's case is that therefore only a limited costs award should be made against HMRC as the appellant was to some extent successful. He pointed out that in 2005 HMRC withdrew some assessments and later reduced the assessments which were the ultimate subject of the appeal to about £1.5million. The appellant considers that if a costs order is made it should reflect the fact that it was partially successful.

38. My view is that the assessments withdrawn in 2005 should have no impact on the costs award. Most of the work in the appeal would have been done after they were withdrawn; in any event, they were only a small proportion of the amount assessed. The reduction of the overall assessments was not by a sufficiently significant amount: it seems merely to be have been an adjustment when more information came to light and had the assessments been in the right amount form the start I find it would have made no difference to the appellant's and Mr Davis' decision to litigate nor to the amount of costs incurred. HMRC was very substantially successful in this appeal.

HMRC to be criticised?

39. And while an open costs regime would normally result in costs following the event, this would not always be the case and it might well not be the case where the successful party was in some way at fault, particularly where that fault led to the unsuccessful party incurring unnecessary costs.

40. I have mentioned that I do not consider that the appellant has shown that HMRC was at fault for the appeal taking over 10 years from start to end. While there was some minor delays attributable to HMRC, the appellant has not suggested that it was put to any expense as a result of this. Consideration of this factor does not affect my decision on making an award of costs in HMRC's favour. And of course, to the extent HMRC unreasonably incurred costs, the Costs Judge will not allow them.

41. I also note that the appellant originally indicated in submissions, but chose not to pursue at the hearing, a case that even though it was a finding of the Tribunal that HMRC had not allowed the excise duty fraud at the root of the appeal to run, nevertheless the appellant was a victim of another person's fraud and the Italian tax authorities had allowed the fraud to run. I do not need to rule on this as the appellant chose not to pursue it; in any event I note that firstly, the finding was (§167) that neither did the Italian authorities permit the fraud at the root of this appeal to run and secondly, at §32-37 and §88-104 the appellant was negligent in protecting itself and HMRC from excise duty fraud and cannot therefore be seen as a faultless victim. This would therefore not affect my decision to award HMRC costs.

Conclusion

42. For the reasons given above, I consider that as HMRC very substantially succeeded in the appeal (including that element of the appeal (Garcias) conceded by the appellant at the start of the hearing) they ought to be awarded their reasonable costs in the appeal. The Sheldon statement does not apply as this was a substantial and complex case and the appellant should have known that the Sheldon statement did not apply and did know that the appeal was in an open costs regime. I follow the decision in *University of Reading* that it does not matter if HMRC did not give an early indication of intention to seek costs in a Rule 29 case because parties who are represented must be taken to know the terms of the Sheldon statement. In any event in this case the appellant did have an early indication of HMRC's intention to seek costs.

43. I therefore award HMRC their costs in this appeal on the standard basis to be assessed by a costs judge of the High Court.

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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 1 April 2014