[2015] UKFTT 0347 (TC)

TC04531

Appeal number: TC/2010/2061

COSTS –whether unreasonable behaviour in lodging and pursuing appeal – yes – whether costs should not be awarded because other party acquiesced in multiple stay applications – costs awarded

FIRST-TIER TRIBUNAL
TAX CHAMBER

BARRELL BOOZE LTD t/a CELLARVINO **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

The application for costs was determined on the papers at the request and with the consent of the parties.

Mr V Curley, of Vincent Curley Ltd, for the Appellant

Ms H Barnard, solicitor, of HMRC Solicitors office.

DECISION

1. On 11 February 2010 the appellant (via its representative) lodged an appeal against a refusal by HMRC dated 8 December 2009 to restore to the appellant certain goods seized by HMRC on 27 August 2009. The appellant had requested but not received a review of that decision so that decision was deemed upheld after 45 days and the appeal is technically against that deemed review decision.

2. There was a large quantity of goods seized – about 1,480 cases of beer/lager. There was no challenge to the legality of the seizure.

3. The grounds of appeal were stated to be:

> "The appellant purchased the goods from established and reputable suppliers and at market price, which included UK excise duty. If, which is not admitted, there were any irregularities in the supply chains then the appellant was an innocent third party to such irregularities. In the circumstances the decision to refuse to restore the seized goods was unreasonable and/or not proportionate.

4. HMRC's statement of case dated 17 June 2010 stated that the decision to refuse to restore was reasonable and proportionate even if the appellant was innocent as it had not undertaken any due diligence and due to the low price should reasonably have suspected that excise duty had not been accounted for.

5. The appeal made very little progress for four years until withdrawn by the appellant. Indeed, it failed to progress at all apart from the service of lists of documents by the appellant in late 2011. Other than that I find that it stagnated; some 14 or so applications for a stay on various grounds were made by the appellant and allowed unopposed by HMRC.

6. The grounds of the application for the stay were originally for such reasons as the appellant said it needed time to consider the documents disclosed by HMRC, its counsel was unavailable for consultation, and the appellant was undertaking its own investigation into whether the excise duty on the goods was unpaid.

7. In 2012 the stays applied for were on the grounds that *Eastenders* [2012] EWCA 15 might have an (unspecified) bearing on this appeal.

8. By the end of 2012 the stay applications were being made on the grounds that the appellant was pursuing a complaint against HMRC. On 16 November 2012 the appellant's representative requested a further stay to 15 January 2013 on the grounds that it was in this case and other cases for other clients pursuing a complaint against HMRC. The email made 3 serious but generalised allegations against HMRC including:

- HMRC officers not applying HMRC's policies when considering restoration requests;

- HMRC officers not acting impartially or fairly;

- HMRC officers 'routinely' misleading taxpayers and the courts, including making false accusations and suppressing relevant evidence.

The email stated that all these alleged behaviours by HMRC officers were a feature of this appeal. It went on to say that "the appellant requires evidence arising from investigation of the complaints for the fair hearing of the appeal."

9. No objection was received and the application, like all those before, were allowed by default. The stay applications were renewed on much the same grounds at around the time the former one expired, again without any effective query from the tribunal, and without objection from HMRC.

10. On the instructions of a judge the Tribunal wrote to both parties on 31 July 2013 giving 14 days for a reply and asking:

> "(a) when [do you] expect the complaints process to be completed;
>
> (b) why do [you] consider that the outcome of the complaints process will impact this appeal"

11. The appellant's response was dated 14 August and stated that they did not know when the complaint process would be finalised. It explained the relevance to the appeal by saying that "the appellant is seeking to obtain evidence from the investigation of the complaints which can be used for cross examination of the review officer in this appeal". It went on to suggest that appeals were considered individually but the complaint process looked at a number of complainants with similar complaints and that this would expose the shortcomings in HMRC's officers' decisions on restoration.

12. HMRC did not reply until 12 September and then only when reminded by the Tribunal. The solicitor explained he had contacted the HMRC officer dealing with the complaint lodged by Mr Curley on behalf of various clients. The complaint was 73 pages long, had considerable documents enclosed with it, and was lodged on 2 February 2013. It had been rejected by HMRC on 27 June 2013 and so far as the writer knew no steps had been taken to lodge the complaint with the adjudicator's office.

13. In mid 2013 in a letter from HMRC stating the complaint to HMRC had been unsuccessful, the writer stated he thought the complaint had no relevance to the appeal (which begs the question why HMRC had never objected to the many stays pending the outcome of it). This was taken as an objection to the stay application; the appellant was told if he wished to maintain it, he needed to notify the Tribunal and it would be listed for hearing. Nevertheless about a month after HMRC's letter, the appellant applied for a further stay on the basis it wished to have a further 21 days to consider HMRC's comments and take legal advice.

14. Yet again the Tribunal automatically consented to the application subject to HMRC objecting. A new solicitor became involved for HMRC who notified the

Tribunal that she did not object but did not see the point in a further stay. Nothing further happened and HMRC chased progress on 7 November.

15. On 14 November 2013 Mr Curley wrote to the Tribunal requesting a 6 month stay on the grounds that on behalf of 10 clients Mr Curley had now lodged a complaint with the Parliamentary Ombudsman. This was allowed without objection. On 4 December 2013 Mr Curley notified the Tribunal that he had received a reply from the Parliamentary Ombudsman and would now be pursuing a complaint to the Adjudicator. At the expiry of the six months stay, there was a further short stay due to the appellant's adviser's absence on holiday. The appellant then asked for a further 6 months (or 6 weeks from the decision if earlier) on the grounds he was still awaiting release of the adjudicator's decision.

16. A judge refused this and set it down for a case management hearing. Due to the cancellation of the original hearing, this case management hearing was set down for 9 October 2014. On 6 October the appellant withdrew the appeal.

17. HMRC applied for their costs. The schedule of costs was for £14,289.37.

18. On 21 April 2015 the appellant filed their defence to the claim and counterclaimed for £7,848.60 for the appellant's costs in defending the claim on the grounds that the application for costs was 'wholly unreasonable'.

Complex or standard regime?

19. The appeal was at the outset allocated to the complex category. No opt out from the costs regime was received at the time from the appellant.

20. After the receipt of HMRC's application for costs at the end of 2014, which was made on the basis that the appellant's behaviour had been unreasonable, the Tribunal pointed out to the parties that the appeal was in the complex regime and the Tribunal had an open costs discretion.

21. The appellant's representative gave evidence, in the form of a witness statement which HMRC did not challenge, that the Tribunal's letter allocating the appeal to the complex category had not been received. It opted out of the costs regime within 21 days of receiving a further notification that the appeal was within the complex regime.

22. HMRC accepted that the appeal in these circumstances ought to be treated as if the appellant had opted out of the complex regime; indeed HMRC, in making its application for costs had been under the mistaken impression that the appeal was a standard appeal, despite receiving the original notification that it was in the complex regime.

23. The Tribunal considers that the appellant opted out of the costs regime in time in view of the unchallenged evidence that it did not receive the original notification of category; in any event, in these circumstances, it would not be right to exercise the Tribunal's discretion to make an award of costs on the basis the Tribunal had an open discretion; and as both parties acted under the misapprehension the appeal was in the

standard category the Tribunal in its discretion ought only make an order for costs if it would have made such an order had the appeal been categorised standard.

Unreasonable behaviour?

24. The Tribunal has a discretion in a standard case to make an award of costs against a party if that party has behaved unreasonably in bringing, conducting or defending proceedings in front of the Tribunal. HMRC allege that the appellant behaved unreasonable in bringing and in its conduct of this appeal. It is HMRC's application for costs on the basis of alleged unreasonable behaviour and it is therefore for HMRC to show that the appellant has behaved unreasonably.

25. What amounts to unreasonable behaviour? Is it unreasonable behaviour in all cases to pursue an appeal on the basis of a legal and/or factual position which did not have a reasonable prospect of success? Or would it only be unreasonable behaviour if the losing party ought to have known that it had no reasonable prospect of success?

26. Although I was not referred to it, in the case of *Leslie Wallis* TC2499 the Tribunal said:

> "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…The rules clearly do not intend that just because a party is wrong that that party should be ordered to pay the other's costs….In our judgment before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of unbeatable argument that he is wrong. Thus for example a party who persists in a legal argument which is precisely the same as one recently dismissed by the Supreme Court and which has been drawn to his attention…..could be acting unreasonably…."

27. In that decision, it appears that the Tribunal was of the opinion that the party would not be acting unreasonably when pursuing a case without merit unless he ought to have known his case was without merit. I came to the same conclusion in the case of *Rodan* [2013] UKFTT 523 (TC) at [15].

28. I still consider that that is right. It is unreasonable behaviour where a person files an appeal without reasonably held belief that the appeal has a real prospect of success. I accept that an appellant does not need to have obtained all the evidence before it lodges an appeal: this would be impossible when appeals must be lodged within short time constraints. I think an appellant is behaving reasonably when it files an appeal where it has objectively at least reasonable grounds for believing it will be able to gather sufficient evidence to make out the necessary factual case with a reasonable prospect of success.

The stated grounds of appeal

29. In this case the ground of appeal expressed in its grounds of appeal by the appellant in this case was that it was an innocent purchaser buying at full price from

reputable sellers. I will refer to this as the "no knowledge and no means of knowing" defence. Such a defence may have been sufficient to succeed, if it was proved, in a case that HMRC's decision to refuse to restore was unreasonable.

30. Did the appellant reasonably believe it could make out a case with a reasonable prospect of success on this "no knowledge and no means of knowing" ground of appeal?

31. I take into account that no particulars accompanied this ground of appeal to give flesh to its bones; I take into account that in the four years of the appeal the appellant never served any evidence to support it; and I take into account for a large part of that time the appellant said it was seeking evidence to support a different case (that of alleged unreasonable/unlawful behaviour by HMRC officers). I also take into account that during that time up to and including this application for costs the appellant has said nothing to give any substance to this 'no knowledge and no means of knowing' ground of appeal and then ultimately withdrew its appeal.

32. The appellant referred me to an email exchange between the appellant's representative and HMRC in 2011 which it was said indicated the appellant's grounds of appeal. I find it does nothing of the sort; all that could be discerned from the exchange was that appellant did not contest the legality of the seizure. It revealed nothing of what the appellant's grounds of appeal were.

33. I am satisfied that the appellant could not reasonably have believed that its appeal on this ground had a real prospect of success. It was unreasonable in these circumstances to lodge an appeal.

34. As mentioned, the appellant later appeared to pursue a different ground of appeal, that of alleged unfairness or unlawfulness in how HMRC exercised their discretion in restoration cases. However, I find that this ground of appeal, if it can be described as such, was completely unparticularised; no attempt was made at any time to explain in what context the alleged behaviour (eg misleading taxpayers) arose in this case nor what relevance it had to the appeal. The appellant admitted that it was using the complaints process to find evidence; and it then dropped the appeal.

35. In these circumstances, I am satisfied that the appellant could not reasonably have believed this ground of appeal had a real prospect of success. It was fishing for evidence without showing that it had any good grounds for believing it existed. It was unreasonable in these circumstances to continue with the appeal.

Appellant's defences

Following HMRC guidance?

36. The appellant's case is that it was quite proper for it to seek to have the appeal stayed while it was undertaking a complaint against HMRC. Indeed, it was Mr Curly's case that HMRC's own guidance required it to pursue a complaint to HMRC and then to the adjudicator before pursuing its appeal.

37. I was referred to HMRC 02/15 *Complaints* and to a print out from HMRC's website *Complain to HM Revenue and Customs.* These two documents contain virtually identical information on the complaints process. No where in either is it stated that an appellant should hold off appealing, or put an appeal on hold while pursuing a complaint. Indeed, HMRC 02/15 states:

> "If you don't agree with an HMRC decision, such as the amount of tax or charges we've asked you to pay, then you may need to follow the review and appeals process instead. If you would like to appeal, please refer to the factsheet HMRC 1….."

I do not, therefore, accept that in seeking to have its appeal stayed the appellant was following HMRC guidance. On the contrary, it ought to have been obvious to the appellant's representative that appealing a decision relating to tax or a penalty is a quite different matter to complaining about the conduct of HMRC officer.

38. In any event the question is not so much whether it was right to ask to stay the appeal but whether it should have lodged, and then continued with, the appeal if it did not have a reasonable belief in an arguable case.

Like ADR?

39. The appellant also likened the complaints process to ADR. It appeared to consider the complaints process as a form of ADR, and implied that HMRC ought to have treated as such and therefore there was nothing wrong in staying the appeal pending resolution of the complaints procedure.

40. This is of course quite wrong. ADR ('alternative dispute resolution') is intended to be an alternative method to this tribunal for resolving disputes on tax liability. It has nothing to do with resolving complaints about how HMRC, or an HMRC officer, has behaved.

41. In any event HMRC did acquiesce in the appeal being stayed pending the complaints process being finalised.

42. And in any event the question is not so much whether it was right to ask to stay the appeal pending the complaints process but whether it should have lodged, and then continued with, the appeal if it did not have a reasonable belief in an arguable case.

Lack of evidence

43. The appellant also said in its defence that "the complaints were not matters that were properly within the jurisdiction of the tribunal but the appellant was seeking evidence for the appeal from the complaints investigations". While it is very true that this Tribunal has no jurisdiction over complaints, it is not obvious why that amounts to a defence to the charge of unreasonable behaviour.

44. It may be the case that an appellant may lack evidence when it lodges its appeal: there are short time limits in which to lodge an appeal and so an appellant may necessarily still be seeking evidence after it has done so. Nevertheless, the appellant when it lodges an appeal, should have grounds on which to do so, even if it lacks all the evidence it hopes to obtain to prove those grounds. So to make out its case that it had good grounds but just lacked evidence, the appellant should explain what evidence it realistically expected to obtain from the complaints process and why that evidence was expected to be relevant to the appeal. But it does not. And the matter is not obvious.

45. This seems to be a case where there was a lack of grounds at the time the appeal was lodged.

46. The lack of particularity expressed anywhere by the appellant over its grounds of appeal suggests to me that there is great force in HMRC's view that the appellant lodged the appeal without knowing of any ground of appeal with a reasonable prospect of success, but just delaying the progress of the case while it searched around hoping to find something on which it could justify the appeal.

Deemed review only?

47. The appellant also relied on the fact that it only had a 'deemed' review decision and claimed it could not formulate grounds of appeal as it did not have HMRC's full reasons for the refusal to restore. I do not accept this.

48. Firstly, it had HMRC's original letter refusing restoration which ran to some 2.5 pages and contained HMRC's reasons. Shortly after the appeal was lodged, it also had HMRC's statement of case dated 17 June 2010 (see §4) which contained a statement of HMRC's position, necessarily brief in view of the paucity of the grounds of appeal. Secondly, in any event the appellant ought to have known why it considered the refusal to restore unreasonable and it should have stated the reasons in its notice of appeal.

Did HMRC behave unreasonably and is it relevant?

49. I consider that for the reasons given above (§§34-40) it was unreasonable to the appellant both to lodge the appeal and to continue pursuing the appeal for 4 years without having any real grounds of appeal. Nothing in the above paragraphs §§37-49 amounts to any kind of excuse for this.

50. That finding gives me jurisdiction to award costs against the appellant but I do not have to do so. I have concerns about awarding costs where I consider that HMRC's conduct of the appeal and even the Tribunal's handling of the appeal, to be less than exemplary. This is a point also raised by the appellant. In particular, the Tribunal constantly granted the appellant the requested stays subject to HMRC not objecting and without challenging whether there were good grounds for a stay or even good grounds for the appeal. HMRC failed on many occasions to respond at all, which resulted in the stays being imposed without objection. And HMRC failed to

challenge appeals when it clearly had concerns whether the stays had a purpose (see §§13-14).

51. However, lodging and then pursuing an appeal without good grounds for doing so is unreasonable conduct and HMRC's and the Tribunal's failure to effectively challenge this for four years was exploited by the appellant who was able to keep the appeal alive for that time. While HMRC could have challenged the appeal more actively by opposing the stay applications, nevertheless the appellant cannot complain that its applications for stays were successful. The appellant's case on this amounts to admitting that its stay applications were unjustified and saying that therefore it was unreasonable for HMRC not to have challenged them: but the appellant should not have made the applications in the first place unless they were justified. And actively challenging the applications would have involved HMRC in expense. I consider it is proved that the appellant behaved unreasonably in bringing and then pursuing this appeal and for this reason they should bear HMRC's costs, and that conclusion is not altered by HMRC's failure to be more proactive in challenging the stay applications.

52. I award HMRC their costs on the standard basis. It is clear that there is a dispute between the parties as to the calculation of such costs. In default of the parties agreeing the amount of this award, I direct that the costs be determined by a Costs Judge.

The appellant's application for its costs of defending this application

53. The appellant's application for its costs in defending this application is dismissed. The application has been successful so it was clearly not unreasonably made.

54. 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: 13 July 2015