TC04712

Appeal number: TC/2009/14274

PROCEDURE – costs – whether appellant acted unreasonably in bringing defending or conducting proceedings – yes -whether costs should be awarded against the appellant – yes – summary assessment performed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TOR VIEW SELF STORAGE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Having considered an application for costs dated 4 June 2015 submitted on behalf of the Respondents and a response to that application dated 13 July 2015 submitted by Albert Goodman Lewis Limited on behalf of the Appellant

DECISION

1. This is my decision on an application by HMRC that costs totalling £1,834.80 be awarded against Tor View Self Storage Limited (the "Company"). That application was made on 4 June 2015 and on 13 July 2015, objections to that application were submitted on behalf of the Company. The delay in making a decision on this application is attributable to the fact that it was only recently put in front of me, a fault of the Tribunal's administration for which I apologise to the parties.

Background and findings of fact

2. I have made the findings of fact set out at [3] to [19] below following a review of the Tribunal's file for this appeal.

3. The Company's appeal related to the question of whether supplies of self-storage facilities that it made should be exempt from VAT on the grounds that they amounted to the grant of a licence to occupy land falling within Group 1 of Schedule 9 of the Value Added Tax Act 1994. The appeal was made in 2009 and, at same point, was stayed behind an appeal in *Finnamore (trading as Hanbidge Storage Services)* ("*Hanbidge*") which was considered to give rise to similar issues.

4. On 17 July 2014, the Upper Tribunal released its decision in *Hanbidge* which was reported at [2014] UKUT 0336 (TCC) and decided that the supply at issue in that appeal was not exempt for VAT purposes.

5. On 17 October 2014, in the light of the decision in *Hanbidge*, HMRC applied to the Tribunal to restore the Company's appeal to the Tribunal list and for the Company to provide further and fuller grounds of appeal.

6. On 18 November 2014, the Tribunal asked the Company's representative who was then authorised to act on the Company's behalf under Rule 11 of the Tribunal Rules, a Mr Brian Corbould, whether he had any objection to HMRC's application. No response was received.

7. On 8 January 2015, the Tribunal made a direction to the effect that the appeal was no longer stayed and requiring the Company, within 14 days, to confirm whether it wished to pursue its appeal and, if it did, to file amended grounds of appeal that took into account the decision in *Hanbidge*. This direction was not an "unless" order: it did not stipulate that failure to comply with the direction would, or could, result in the appeal being struck out.

8. The Tribunal sent its directions of 8 January 2015 to Mr Corbould. On 22 January 2015, Mr Corbould replied to the Tribunal stating:

> The Agent has received no response from the persons instructing him and is unable to comment on the said direction. The Agent has previously attempted to contact the Accountants acting for the

> Appellant seeking instructions but has not received any reply. It has been drawn to the notice of the undersigned that the Person instructing no longer acts for the appellant. The Agent is therefore unable to respond to the direction issued by the tribunal on 8 January 2015.

9. Having received that letter, on 16 February 2015 the Tribunal sent a letter to HMRC and to the Company notifying the parties that it was listing a hearing, to take place on 10 April 2015, to consider striking out the appeal. Therefore, the hearing was listed on the initiative of the Tribunal rather than following a request from HMRC.

10. On 10 March 2015, the Tribunal received a letter (dated 9 March 2015) from "T P Lewis & Partners". This letter noted that the Company was "surprised to see a Notice of Hearing of an appeal listed for hearing in London on 10 April 2015". The letter also contained the following paragraph:

> It is our understanding that the company consulted a VAT consultant in early 2010 but to the best of the company's knowledge they have received no dialogue either from the consultant or from HMRC in respect of any appeal since that time. Is it possible, as a matter of urgency to let us have copies of all papers relating to the appeal so that we may advise our clients that they may be properly prepared should the hearing proceed on 10 April.

11. The letter of 10 March 2015 did not state that it had been copied to HMRC. Moreover, T P Lewis & Partners had not, at that stage, been validly appointed as the Company's representative under Rule 11 of the Tribunal Rules. Therefore, on 10 March 2015, the Tribunal sent HMRC a copy of T P Lewis & Partners' letter and wrote to the Company to advise that, if the Company wished the Tribunal to correspond with T P Lewis & Partners, they would need to be appointed as a representative. The Tribunal supplied the Company with a form to be filled in when appointing a representative.

12. By the end of March 2015, the Tribunal was due to move its administrative functions to a central location in Birmingham. Prior to then, administrative arrangements relating to appeals in London were handled by a team in London. Therefore, Tribunal users were being asked to send correspondence to a new Birmingham address and arrangements were made for correspondence sent to London to be forwarded on to Birmingham.

13. The Tribunal's file shows that a duly completed notice appointing T P Lewis & Partners as representative was stamped as received by the Tribunal's Administrative Support Centre in Birmingham on 20 March 2015.

14. The Tribunal's file also shows a letter dated 1 April 2015 from T P Lewis & Partners stating that, given the decision in *Hanbidge*, the Company had decided to withdraw its appeal. However, that letter was stamped as received by the Birmingham Tribunal centre only on 13 April 2015 (after the hearing on 10 April 2015).

15. Nobody attended the hearing on 10 April 2015 on behalf of the Company. As at 10 April 2015, the Tribunal's administrative team were not aware that T P Lewis &

Partners had been validly appointed as a representative. I have concluded that this was because, although the form referred to at [11] had been received on 20 March 2015, the Tribunal's administrative team (which was in a state of upheaval given the impending move of functions to Birmingham) had not processed that notification. Nevertheless, the Tribunal made contact with T P Lewis & Partners by telephone on the morning of the hearing and were told that the Company had withdrawn its appeal.

16. That placed the Tribunal in something of a quandary. There was clearly no point in considering whether to strike out an appeal that had been withdrawn. However, T P Lewis & Partners' letter of 1 April 2015 had not been received. Moreover, the Tribunal's administrative team were not recording T P Lewis as an authorised representative. Ultimately the Tribunal was not content to cancel the hearing in reliance on T P Lewis & Partners' assurance over the telephone that the appeal had been withdrawn and the hearing accordingly proceeded in the Company's absence under Rule 33 of the Tribunal Rules.

17. During the hearing, Counsel on behalf of HMRC made submissions to the effect that the appeal should be struck out under Rule 8(3)(a) of the Tribunal Rules given the failure of the Company to advance grounds of appeal that took into account the decision in *Hanbidge*. It was also submitted that the decision in *Hanbidge* was on issues so similar to those arising in this appeal as to result in a conclusion that the Company's appeal had no reasonable prospect of success and so should be struck out under Rule 8(3)(c) of the Tribunal Rules.

18. The Tribunal decided not to strike out the appeal because:

(1) Strike out under Rule 8(3)(a) was not appropriate since the Tribunal's direction of 8 January 2015 was not phrased as an "unless" order.

(2) Before the Tribunal could strike out under Rule 8(3)(c), it would need to be satisfied that the facts of the Company's appeal were sufficiently similar to those considered in *Hanbidge*. There appeared to the Tribunal to be a relevant difference between the facts of the Company's appeal and those considered in *Hanbidge* namely that the Company's storage units were said in the Company's Notice of Appeal and surrounding documents to be affixed to the ground, whereas those considered in *Hanbidge* were not. Without hearing full argument as to whether this was indeed a factual difference, what the effect of any such difference would be and whether there were other relevant differences, the Tribunal was not prepared to conclude that the Company's appeal had no reasonable prospect of success.

19. However, the Tribunal did issue the Company with an "unless" order requiring that, if the Company did not withdraw its appeal, it should set out its position on *Hanbidge* and, if it failed to do so, striking out the appeal would be a possible sanction. The Tribunal also stipulated the period of time in which HMRC should apply for costs if they wished to do so.

The grounds for the application for costs

20. HMRC made their application for costs on 4 June 2015. That was within the timescale permitted by the Tribunal's directions referred to at [19]. Therefore, the fact that the application was made more than 28 days after the Tribunal notified HMRC that the appellant had withdrawn from proceedings (and so later than the time specified in Rule 10(4)(b) of the Tribunal Rules) does not matter since the Tribunal has power, by virtue of Rule 5(3)(a) of the Tribunal Rules, to extend a time limit for compliance with a rule.

21. HMRC submit that the Company's non-compliance with directions and failure to conduct proceedings in a reasonable and effective manner resulted in HMRC incurring significant costs in attending a hearing that was otherwise not required.

22. Albert Goodman Lewis Limited ("Albert Goodman Lewis") submit, in essence, that the Company's former representative (who I take to be Mr Corbould) had not kept the Company properly updated on the status of the appeal. Specifically, Albert Goodman Lewis say that they[1] only became aware of the existence of the appeal following a letter from HM Revenue & Customs and that, on 9 March 2015, they had written to the Tribunal precisely because they were unaware of the hearing scheduled for 10 April 2015. On 1 April 2015, they wrote to the Tribunal to withdraw the appeal and, in the circumstances, they submit that the Company did everything it could to withdraw its appeal in good time.

The law

23. This appeal is not a "complex" case. Therefore, in order to be able to make an order of costs, the Tribunal needs, under Rule 10(1)(a) of the Tribunal Rules, to be satisfied that:

> a party or their representative has behaved unreasonably in bringing, defending or conducting proceedings.

24. Even if that threshold is satisfied, the Tribunal has a discretion as to whether to award costs.

25. Part of HMRC's complaint appears to be that the appellant should have withdrawn its appeal earlier than it did. In *Tarafdar (t/a Shah Indian Cuisine) v Revenue and Customs Commissioners* [2014] UKUT 0362 (TCC), the Upper Tribunal said, at [34] :

> In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) What was the reason for the withdrawal of that party from the appeal?

[1] It seems clear that Albert Goodman Lewis are, in some sense, a successor firm to T P Lewis & Partners not least since they have the same office address as T P Lewis & Partners.

(2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?

(3) Was it unreasonable for that party not to have withdrawn at an earlier stage?

Has there been unreasonable conduct?

26. The test is whether the Company or its representative has behaved unreasonably in the sense set out in Rule 10(1)(a). Therefore, even if Albert Goodman Lewis's criticisms of Mr Corbould are valid, they do not dispose of the question of whether the Company behaved unreasonably. In addition, if Albert Goodman Lewis are correct that Mr Corbould did not keep his clients informed of the progress of the appeal, that could amount to unreasonable conduct (of a representative) that could lead to a costs award against the Company.

27. It seems that there are three potential respects in which the Company (or its representative) behaved unreasonably:

(1) By failing to comply with correspondence, and directions, from the Tribunal requiring it to set out its position on *Hanbidge*.

(2) By failing to withdraw its appeal earlier than it did.

(3) By failing to notify HMRC and the Tribunal of withdrawal in sufficient time to save HMRC the costs of attending, and preparing for, the hearing on 10 April 2015.

I will consider those aspects in turn.

Failure to set out its position on Hanbidge *in appropriate detail*

28. The Tribunal asked the appellant twice in writing (once by means of a formal direction) to articulate its position on *Hanbidge*. That was an issue central to this appeal. At no point did the Company set out its position in any detail and Mr Corbould's email set out at [8] was an inadequate response. The failure to articulate any position on *Hanbidge* was an unreasonable manner of conducting proceedings. It does not matter whether it was the Company or Mr Corbould who behaved unreasonably since the unreasonable behaviour of either can justify a costs award against the Company.

29. This unreasonable behaviour has a clear link with HMRC's costs associated with the hearing of 10 April 2015 as it was the appellant's failure to reply to the Tribunal's correspondence that caused the Tribunal to list that hearing.

Failure to withdraw from proceedings earlier

30. Applying the questions set out in *Tarafdar*, it seems clear that the reason for the withdrawal was that the Company accepted that the decision in *Hanbidge* was determinative of its appeal.

31. The decision in *Hanbidge* was released on 17 July 2014. There has been no suggestion that the decision in *Hanbidge* was difficult to digest or difficult to apply to the Company's facts. Indeed, T P Lewis & Partners started acting for the Company in March 2015, but by 1 April 2015 were able to send in a notice of withdrawal on the Company's behalf suggesting that it took them around a month to make a full study of the implications of *Hanbidge*.

32. It therefore certainly would have been practicable for the Company to withdraw its appeal earlier than 1 April 2015.

33. That leaves the question, of whether it was unreasonable of the Company not to withdraw at an earlier stage. I consider it was unreasonable for the reasons set out below:

(1) At some point shortly after 17 July 2014, it is reasonable to expect Mr Corbould to have become aware of the Upper Tribunal's decision in *Hanbidge.* Mr Corbould certainly would have been aware of it in January 2015, since the Tribunal had issued a direction to him requiring his client to provide amended grounds of appeal that took into account that decision.

(2) Since the Company's appeal was stayed behind *Hanbidge*, both the Company and Mr Corbould could reasonably be expected to realise that the decision in Hanbidge was directly relevant to this appeal. Therefore, within at most a few weeks of that decision being released it is reasonable to expect that there would have been a discussion between Mr Corbould and the Company as to the effect of the decision in *Hanbidge* and whether the Company's facts were such that this decision could be distinguished. Given what we say at [31], the decision to withdraw could have been made a month or so after that initial discussion.

(3) The essence of the Company's submissions appears to be that, because Mr Corbould did not adequately keep the Company informed, there was no discussion of the implications of *Hanbidge* until T P Lewis & Partners became involved. I make no finding as to whether or not that is correct, not least since I have no evidence from Mr Corbould. However, I do not need to make a finding on that issue since it is not relevant. Either Mr Corbould failed to initiate a suitable discussion on the effect of *Hanbidge* or he did not. If he did, no good reason has been given as to why it took until 1 April 2015 for the Company to withdraw its appeal. If he did not initiate a discussion of *Hanbidge* before he was replaced by T P Lewis & Partners, that would be unreasonable conduct on his part, that is capable of sustaining a costs award against the Company for reasons set out at [26] above.

34. If the Company or Mr Corbould had behaved reasonably, they would have withdrawn, at the latest, two months or so after the Tribunal sent its direction of 8 January 2015 (as it would not have taken more than two months to consider the implications of the decision in *Hanbidge*). HMRC did not start incurring material costs in connection with the hearing until 10 April 2015. Therefore, if the Company had withdrawn its appeal at this point, the costs of the 10 April hearing would have been saved.

Failure to notify withdrawal sufficiently in advance of the hearing on 10 April 2015

35. It appears that the main reason why neither HMRC nor the Tribunal were aware that the Company wished to withdraw its appeal before 10 April 2015 was that T P Lewis & Partners communicated the appellant's intention to withdraw its appeal in a letter of 1 April 2015 that was sent by post and not received by the Tribunal until 13 April 2015. This letter did not state that it was copied to HMRC. Albert Goodman Lewis have not suggested that any attempt was made to contact HMRC in advance of the hearing (by telephone or otherwise) to let them know that the Company was no longer proceeding with its appeal.

36. In the circumstances, I consider that T P Lewis & Partners adopted an unreasonably slow method of communicating withdrawal of the appeal for the following reasons:

(1) On 1 April 2015, the hearing was just 9 days away. Moreover, 3 April and 6 April were bank holidays (Good Friday and Easter Monday respectively) so the letter was sent (by post) just 4 working days before the hearing.

(2) T P Lewis & Partners should have been aware that HMRC would be incurring costs in preparing for the hearing and that, if they notified HMRC quickly, there was a chance that costs could be saved.

(3) In those circumstances, T P Lewis & Partners showed insufficient urgency in sending a letter to the Tribunal. That course of action meant that HMRC would not find out that the hearing was unnecessary until the Tribunal had received their letter, processed it and notified HMRC of the withdrawal. They should instead have sought to contact HMRC by telephone or email.

Should the Tribunal exercise its discretion to award costs?

37. I am, therefore, satisfied that there has been the requisite unreasonable conduct, on the part of the Company or its representatives, for a costs order to be made under Rule 10. That leaves the question of whether I should exercise my discretion to make such an order.

38. I have taken into account the fact that the Tribunal decided not to strike out the appeal at the hearing of 10 April 2015. Ordinarily, a party would not expect to obtain the costs of an unsuccessful application. However, HMRC had not requested the hearing on 10 April 2015. The Tribunal had listed it of its own motion and therefore HMRC were obliged to attend it. Given that the Tribunal had itself indicated that it was considering whether the appeal should be struck out, it was reasonable for HMRC to make submissions to the effect that it should be struck out. Therefore, HMRC were not in the position of being an unsuccessful applicant and I am satisfied that I should exercise my discretion to award costs in this case.

Amount of costs

39. Given that the appellant is not an individual, I am not obliged to consider financial means (under Rule 10(5)(b) of the Tribunal Rules) before making a costs order.

40. I am entitled summarily to assess the costs under Rule 10(6)(a). I consider that to be an appropriate course of action given the relatively small sum being claimed. If I directed a further hearing before a costs judge, that would involve the parties incurring still further costs which I consider would be disproportionate to the amount at issue.

41. HMRC have requested costs of £1,834.80 in relation to their preparation, and attendance, at the hearing of 10 April 2015. Included within that sum are Counsel's fees of £600 plus VAT and the costs of HMRC's in-house solicitors relating to "work done on documents" of £781.20. I consider Counsel's fees to be entirely fair and reasonable. I am, however, going to reduce the amounts claimed in respect of HMRC's in-house solicitors' time. An amount of £226.80 is claimed for the costs of instructing counsel and £189 for the costs of preparing for the hearing (that sum not including the costs of producing hearing bundles which are itemised separately). Those sums seems excessive given that Counsel was able to prepare a comprehensive skeleton argument, attend the hearing and conduct the advocacy at the hearing for £600 plus VAT and that HMRC's in-house solicitors were not required to do anything at the hearing beyond attending it and making a note of it (both of which tasks have been claimed for separately). I therefore will reduce the figures of £189 and £226.80 by half.

42. My resulting conclusion is that the appellant must pay HMRC costs of £1,626.90.

43. 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.

JONATHAN RICHARDS

TRIBUNAL JUDGE
RELEASE DATE: 18 NOVEMBER 2015