



TC04910

Appeal numbers: TC/2011/07661

***COSTS – application by Appellant for costs on ground of unreasonable behaviour
by Respondents and interest - application refused***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ENVIROENGINEERING LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

**Application determined on the papers under rule 29 of the Tribunal Procedure
(First-tier Tribunal) (Tax Chamber) Rules 2009, each party having consented to
the matter being decided without a hearing.**

DECISION

Introduction

1. This decision concerns an application, dated 16 September 2015, by Mr William Lewis of Lewis Associates on behalf of the Appellant ('Enviroengineering') for the award of:

“1. All of his (*sic*) costs incurred since early 2011, to payment actually being received, in pursuing this action.

2. Interest since that time on the sum found to be due but unpaid.”

2. The costs relate to Enviroengineering's appeal to the First-tier Tribunal ('FTT') in 2011 which arose from the refusal by the Respondents ('HMRC') to pay an amount of input tax due to Enviroengineering in relation to accounting period 01/11. The disputed input tax and a refund of interest paid by Enviroengineering were paid by HMRC on 27 June 2015. Enviroengineering also claims interest on the total amount from the end of February 2011 to the date of payment.

Application for costs

3. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ('the TCEA') provides that the FTT has power to determine by whom and to what extent costs of and incidental to proceedings shall be paid but this power is subject to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules').

4. Rule 10 of the FTT Rules provides for orders for costs. Rule 10(1)(a) provides that the FTT may make an order for wasted costs under section 29(4) TCEA. Wasted costs are those incurred by a party as a result of a representative acting improperly, unreasonably or negligently. Representative in this context means a person exercising a right of audience or right to conduct the proceedings. The rule is aimed at ensuring that a party does not bear the cost of a representative acting improperly etc in the course of acting on behalf of a party in proceedings. That rule is not relevant in this case. Rule 10(1)(c) relates to proceedings that have been allocated as a Complex case, which this appeal was not, and is not relevant to this appeal. The only part of rule 10 that is potentially relevant to Enviroengineering's appeal is rule 10(1)(b) which provides that the FTT may only make an award in respect of costs if the FTT considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings. In summary, the FTT does not have any general power to award costs and can only award costs in relation to this appeal if Enviroengineering can establish that HMRC have "acted unreasonably in ... defending or conducting the proceedings".

5. In his Statement No 6, filed in support of the application, Mr Lewis does not say in what way he alleges that HMRC have acted unreasonably in defending or conducting the appeal proceedings. The statement states that Enviroengineering was set up by Mr Lewis and his wife in 1997 and refers in general terms to dealings between Mr Lewis and HMRC and the fact that there have been 21 other appeals before setting out the history of this appeal. As is clear from the language of rule 10, the only matters that are relevant to an application for costs of and incidental to

proceedings are matters of conduct in relation to those proceedings. This was made clear by the FTT in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395 (TC) at [11]:

5 “... one thing that has not changed is that the Tribunal’s jurisdiction continues to be limited to considering actions of a party in the course of the ‘proceedings’, that is to say proceedings before the Tribunal whilst it has jurisdiction over the appeal. It is not possible under the [FTT] Rules, any more than it was under the Special Commissioners’ regulations, for a party to rely upon the unreasonable behaviour of the
10 other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the Tribunal does have jurisdiction, can costs incurred before that period be ordered. In these respects the principles in *Gamble v Rowe*, and *Carvill v Frost* [2005] STC (SCD) 208 remain good law. That is not to say that the behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform actions taken during proceedings, as it did in *Scott and another (trading as Farthings Steak House v McDonald* [1996]
15 STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal.”
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I adopt the same approach as the FTT in *Bulkliner* in considering whether the HMRC have acted unreasonably in defending or conducting these proceedings.

25 6. I have read the FTT’s file for this appeal and the correspondence contained in it together with the submissions of the parties. It appears to me that the relevant history of these proceedings is as follows.

7. Enviroengineering was registered for VAT from 1 October 1997 to 1 November 2011. In its VAT return for accounting period ended 31 January 2011 (period 01/11),
30 Enviroengineering claimed a net repayment of £6,743.35, of which £5,330.85 was said to be input tax that had not been claimed in earlier periods. HMRC withheld the repayment.

8. On 23 September 2011, the FTT received a notice of appeal submitted by Lewis Associates on behalf of Enviroengineering Limited. No details were given of any
35 decision of HMRC that Enviroengineering sought to appeal against but the grounds of appeal set out details of correspondence to which HMRC had allegedly failed to respond. The grounds of appeal noted that a letter of complaint had been sent to HMRC regarding their failure to deal with this matter in a timely manner. The notice of appeal asked that “allowance of Box 5 repayment should be credited to
40 Enviroengineering Ltd”.

9. On 7 November 2011, the FTT wrote to Mr Lewis, as the representative of Enviroengineering, saying that the papers submitted did not appear to contain an appealable decision. Mr Lewis replied, by letter dated 4 December that he had been

trying to obtain a clear decision from HMRC. The letter included further correspondence but no appealable decision.

10. On 24 February 2012, following correspondence between Mr Lewis and HMRC, HMRC decided that £6,079.54 was properly due to Enviroengineering in respect of period 01/11. HMRC refused to pay £663.81 of that input tax repayment claim.

11. Having heard nothing further, the FTT wrote to Mr Lewis on 29 February 2012 requesting an update. No response was received so the FTT wrote again on 15 May. No response appears in the file but, on 11 July, the FTT listed the appeal for a preliminary hearing in Cardiff on 8 October.

12. HMRC served a notice, dated 17 July 2012, on the FTT that the amounts owing to Enviroengineering had already been repaid and there was, accordingly, no appealable matter. The FTT treated the notice as an application for the appeal to be struck out and notified the parties that it would be dealt with at the hearing on 8 October 2012.

13. On 3 October 2012, Mr Lewis applied to the FTT for the hearing to be adjourned for three months because he was ill and needed to go into hospital. HMRC did not object and the hearing was cancelled. The FTT relisted the application to strike out the appeal to be heard on 26 March 2013.

14. On 16 October 2012, Enviroengineering was removed from the register of companies at Companies House.

15. On 27 February 2013, Mr Lewis applied to postpone the hearing listed for 26 March until June due to his continuing illness and a change of address. HMRC agreed to the postponement and the FTT cancelled the hearing. The application was relisted for hearing on 11 June 2013.

16. On 23 May 2013, HMRC applied to postpone the hearing in June because they required time to consider further information that had been provided by Enviroengineering. Mr Lewis did not object and the hearing was cancelled.

17. Having reviewed the information provided by Enviroengineering in May 2013, HMRC reached the conclusion that Enviroengineering was entitled to be paid a further £569.75 input tax in respect of period 01/11 and should be repaid £1,015.06 interest paid by Enviroengineering during the period when it had been registered for VAT.

18. On 16 December 2013, HMRC contacted the FTT say that it had been agreed that Enviroengineering was entitled to a payment of approximately £1,500 and that, when received, Enviroengineering would withdraw the appeal. HMRC stated that the amount had not been paid at that time, however, as Enviroengineering had been dissolved.

19. Mr Lewis wrote to the FTT to summarise the position in a letter dated 12 December 2013, which was received by the FTT on 8 January 2014. The FTT decided not to list the appeal before May 2014 to enable the parties to resolve the outstanding issue relating to the payment due to a dissolved company, namely
5 Enviroengineering. Correspondence between Mr Lewis and HMRC, which was copied to the FTT, continued.

20. On 24 January 2014, Mr Lewis wrote to the FTT on behalf the Centriline Limited ('Centriline'), which claimed to be the successor to Enviroengineering and to have purchased its debts including the right to repayment from HMRC. Mr Lewis
10 asked whether Centriline had to make a separate application to the FTT for payment of the amount due.

21. In a letter dated 14 February 2014 to the FTT, HMRC set out the background facts of the appeal and applied for it to be struck out under rule 8(3)(c) of the FTT Rules. The basis of the application was that Enviroengineering had been removed
15 from the Companies House register on 16 October 2012. As the company had ceased to exist at the time the payment was agreed, the payment could not be made to Enviroengineering but was bona vacantia. HMRC contended that such payments could only be made to the Treasury Solicitor. HMRC submitted that the fact that they were unable to pay the amount to Enviroengineering was not an appealable matter
20 under section 83 of the VAT Act 1994 ('VATA94') and that if Mr Lewis believed that HMRC had acted incorrectly then the matter should be pursued through the complaints process rather than in an appeal before the FTT.

22. By direction dated 27 February 2014, the FTT stayed the appeal pending an application by Enviroengineering to be restored to the register of companies or by
25 Centriline to be substituted for Enviroengineering in the appeal. The FTT directed that, in the event that neither happened within three months, the appeal would be struck out.

23. In an application dated 3 April 2014, Mr Lewis, on behalf of Enviroengineering, applied for Centriline to be substituted for as the appellant in these proceedings. In a
30 letter dated 23 April, HMRC said that the substitution of Centriline did not change the fact that the payment fell to be made to the Treasury Solicitor because Enviroengineering had been removed the register of companies.

24. On 5 May 2014, Mr Lewis applied for the time limit in the directions of 27 February to be extended. In a direction dated 16 May, the FTT directed that there
35 should be an oral hearing of the application to substitute Centriline for Enviroengineering. The application was subsequently listed for hearing on 22 July. On 28 May, HMRC applied, with Mr Lewis's agreement, for the hearing to be vacated and relisted some three weeks later. The FTT agreed and relisted the application to be heard on 29 August.

40 25. On 2 July 2014, HMRC applied for an extension of time in which to serve the document bundle for the hearing. The application was granted by the FTT on 7 July.

Mr Lewis registered his views by email on the same day but did not object to the extension of time being granted.

26. The parties exchanged correspondence, which was copied to the FTT, in preparation for the hearing on 29 August 2014. HMRC served a Summary of Case, dated 21 August, which set out their view of the history of the case and asked for the appeal to be struck out. Mr Lewis provided his Statement No 4, dated 21 August, which contained a mixture of evidence and submissions on the documents. The hearing of the application took place on 29 August before Judge Short. In a decision released on 11 September, Judge Short agreed with HMRC that Enviroengineering was not in a position to bring the appeal since it was no longer in existence. She also refused Enviroengineering's application to substitute Centriline as a party under rule 9 of the FTT Rules. Finally, Judge Short stayed HMRC's application to strike out the appeal for three months to allow HMRC to agree to make the payment to Centriline or, absent such agreement, Mr Lewis to apply to restore Enviroengineering to the register of companies at Companies House.

27. In a letter to Mr Lewis dated 30 September 2014, HMRC said that they would not pay the amount to Centriline. Mr Lewis responded to HMRC in an email of 4 October and said that he would apply to restore Enviroengineering but could only do so after he had completed his treatment for a serious medical condition. On 25 November, Mr Lewis applied for an extension of time until 31 March 2015, which was granted by the FTT on 18 December.

28. In emails of 17 and 24 March 2015, Mr Lewis applied for a further extension of time. HMRC did not object. The FTT granted an extension of time on 20 April but only until 30 April.

29. On 28 April, Mr Lewis made a further application for an extension of time to 31 May and, again, HMRC did not object. The FTT granted the extension of time although only on 2 June. In fact, Newport County Court made an order restoring Enviroengineering to the register of companies on 13 May. Companies House notified Mr Lewis that Enviroengineering had been restored on 27 May.

30. On 28 June, Mr Lewis emailed HMRC, with a copy to the FTT, to say that a payable order for £1584.81 had been safely received. On 30 June, the FTT received an application for costs and interest from Mr Lewis. This was Application No 3 supported by Statement No 5 from Mr Lewis in support.

31. By letter dated 21 July, HMRC objected to the application for costs on the grounds that Enviroengineering had not provided a schedule of costs as required by rule 10(3)(b) of the FTT Rules and the FTT does not have any power to award interest. In a letter dated 9 September, HMRC also said that they did not consider that they had acted unreasonably within rule 10(1)(b) and had still not received any breakdown of the costs claimed.

32. On 20 September, Mr Lewis submitted Application No 4, the current application, supported by his Statement No 6. On 4 November, HMRC served

submissions opposing Enviroengineering's application for costs. By letter dated 30 November, Mr Lewis provided his Statement No 7 and a document setting out a reply to HMRC's submissions. On 16 December 2015, HMRC confirmed their opposition to the application on grounds already provided and that they had no further representations to make respect of Enviroengineering's application.

33. Enviroengineering's submissions are spread out over the seven statements provided by Mr Lewis. The statements refer in great detail to Mr Lewis's own background and his joint venture company, Amalgamated Pipelining Services Limited, and their dealings with HM Customs and Excise, the forerunners of HMRC, going back to the 1970s. Mr Lewis also refers to the fact that he on behalf of his joint venture company and the Appellant had been obliged to appeal to the FTT (or its predecessors) on no fewer than 22 occasions. None of these matters is relevant to Enviroengineering's application for costs in this appeal. As is clear from the terms of rule 10(1)(b) of the FTT Rules, the only relevant matter to be considered in relation to an application for costs under that rule is the conduct of the party in relation to the proceedings.

34. Mr Lewis set out his version of events relating to this appeal in his Statement No 3. In paragraphs 7 to 16 of that statement, Mr Lewis sets out the Enviroengineering's dealings with HMRC between May and December 2013. It appears that Enviroengineering claims that it incurred costs in relation to these proceedings as a result of the unreasonable behaviour of HMRC. At no point does Mr Lewis make clear in what respect HMRC has acted unreasonably in defending or conducting the proceedings. The real complaint appears to be that HMRC should have made the payment of the amount earlier. It seems to me, however, that HMRC acted reasonably in dealing with the claim and appeal between September 2011, when it was lodged (before there was an appealable decision which was only made in February 2012), and May 2013 when HMRC agreed that Enviroengineering was entitled to the disputed amount as a result of further information provided by Mr Lewis in May 2013. Although the FTT did not strike out the appeal but granted successive stays to enable the Mr Lewis and HMRC to resolve matters between themselves, it is quite clear that, from May 2013, there was no appeal over which the FTT had jurisdiction. Once HMRC had agreed that Enviroengineering was entitled to the disputed amount, the only issue was whom HMRC should pay. That issue is not an appealable matter within section 83 VATA94 and so there could be no appeal to the FTT in relation to it and the FTT had no jurisdiction in the matter. Further, once Enviroengineering had been removed from the register of companies at Companies House on 16 October 2012, it ceased to have any standing as an appellant and the appeal should have been struck out.

35. I also agree with HMRC (and it seems Judge Short did too) that HMRC could not make the payment to Enviroengineering until it had been restored to the register of companies. Once that happened in May 2013, HMRC made the payment within a reasonable time. It appears to me that the reason for the delay in obtaining the repayment was that Enviroengineering was not restored to the register of companies sooner. In saying that, I do not make any criticism of Mr Lewis. It is clear that throughout the period he was dealing with long spells of serious illness. I also note

that he is not a lawyer and was understandably concerned that applying to restore Enviroengineering to the register of companies would involve incurring professional and other fees simply to recover an amount that everyone agreed was due. I can readily understand Mr Lewis's frustration but the fact that Enviroengineering had to be restored to the register (a point first identified in December 2013) before it could obtain the payment from HMRC does not indicate that HMRC acted unreasonably in defending or conducting the proceedings.

36. For the reasons given above, I do not consider that HMRC have acted unreasonably in defending or conducting these proceedings and, accordingly, Enviroengineering's application for costs is refused.

37. I deal briefly with one other point although, in view of my decision that HMRC have not acted unreasonably it does not arise. HMRC state that the application should also be refused because Enviroengineering had not provided a schedule of costs as required by rule 10(3)(b) of the FTT Rules. I do not accept this submission in this case. Attached to the application dated 16 September 2015 was a schedule of correspondence (mostly between Mr Lewis and HMRC) with time spent by Mr Lewis in relation to each item and invoices raised by Lewis Associates at certain intervals. The schedule states that the total costs incurred by Enviroengineering amounted to £7,713.74 excluding VAT, which had been recovered and was not claimed. The costs included charges for 59 hours of Mr Lewis's time at £120 per hour. In my view, this document is a schedule of costs within rule 10(3)(b) even though it is, understandably as Mr Lewis is not a lawyer, not in the usual form. However, I would not make a summary assessment in this case. I consider that the number of items, the period of time and the amount of the fees described in the schedule make this case unsuitable for summary assessment by the FTT. If I had granted the application for costs, I would have directed that the costs payable should be the subject of a detailed assessment on the standard basis by a Costs Judge of the Senior Courts Costs Office.

Application for interest

38. Neither the application dated 16 September 2015 nor the Statement No 6 of Mr Lewis filed in support of the application set out the amount of interest claimed or how it should be calculated. The FTT Rules do not confer any general power on the FTT to award interest in VAT appeals. The provisions relating to interest in VAT matters are found in the VATA94. Section 78 VATA94 provides that HMRC must pay interest in certain cases of official error and a refusal to do so may be appealed to the FTT under section 83(s). A failure to pay a VAT credit within the relevant time limit may entitle the claimant to a repayment supplement under section 79 provided certain conditions are satisfied. Section 85A provides that where, on an appeal, it is found that an amount due to a person was not paid then it shall be paid with interest at the rate applicable under section 197 of the Finance act 1996. There is, however, no right to interest under section 85A where repayment supplement under section 79 is payable on the amount. Enviroengineering's application does not refer to any refusal by HMRC to pay interest under section 78 or 85A and it is not clear to me from the papers that there has been any decision on this point. The application simply asks for interest. In the absence of an appeal against such a refusal, the FTT has no power to

make any direction or decision in relation to interest payable under section 78 or section 85A VATA94.

39. In conclusion, the FTT does not have any general power to award interest and does not have any discretion as to the award of interest or the rate applicable under the sections of the VATA94 just mentioned. As the FTT cannot make an award of interest, it follows that Enviroengineering's application for interest on the amount that was due in 2011 but not paid until 2015 must be refused.

Decision

40. For the reasons set out above, the application by Enviroengineering for costs and interest is refused.

Right to apply for permission to appeal

41. 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 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.

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**GREG SINFIELD
TRIBUNAL JUDGE**

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RELEASE DATE: 19 FEBRUARY 2016