[2016] UKFTT 786 (TC)

TC05513

Appeal number: TC/2010/04944

COSTS – complex categorisation – whether normal order costs follow event should not be made when, after appellant has filed its evidence, HMRC raise unjust enrichment defence leading to withdrawal of appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRITISH SECURITY INDUSTRY ASSOCIATION LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Decided on the papers following representations from both parties.

DECISION

1. On 2 June 2010, the appellant appealed a decision of HMRC refusing to refund input tax of £2,136,203 for the periods from 1973 to 03/08. The basis of the claim is not relevant to this costs application but it was in brief that its supplies were exempt.

2. The Tribunal notified both parties on 28 June 2010 that the appeal was allocated to the complex category. The effect of complex categorisation under Rule 10(1)(c) of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules is that the Tribunal has a discretion to award costs.

3. On 6 September 2010, HMRC filed their statement of case. HMRC defended the primary case of the appellant that it made exempt supplies: they did not raise the defence of unjust enrichment (in other words, HMRC did not claim that any repayment of output tax to the appellant would lead to the appellant's unjust enrichment). Such a defence is potentially applicable to repayments of output tax because of s 80(3) Value Added Tax Act 1994.

4. The appellant points out that when it had initially put in its refund application to HMRC in March 2009, it had set out why it considered the defence of unjust enrichment was not open to HMRC. It appears, therefore, that HMRC agreed with the appellant at this time as their statement of case did not claim the unjust enrichment defence applied.

5. The appeal then progressed slowly. However, on 8 November 2011 the appeal was stayed behind *European Tour Operators Association* Ltd and the case of *British Association of Leisure Parks Piers and Attractions Ltd ('BALPPA')* and ceased to progress at all.

6. On 10 October 2012, the appellant also appealed on the same basis a later decision of HMRC dated 20 September 2012 refusing to refund £136,893.27 for the period 6/08 to 3/09. The second appeal was allocated to the complex category on 21 February 2013 and on the same date the two appeals were consolidated.

7. During the stay of the consolidated appeal, the Upper Tribunal decision in *BALPPA* [2013] UKUT 130 (TC) was released, indicating that associations would be unable to show that they could refund overpaid VAT to their members, as they could not make distributions to their members and in any event membership varied over the years. The implication of the decision was that a defence of unjust enrichment might well defeat a claim for repayment of overpaid VAT by associations.

8. The parties took no further steps in the appeal until in late 2015, in response to a request from the Tribunal, the appellant stated it intended to pursue its appeal. HMRC asked for time to consider the substantive issues in the appeal and the appellant asked for time to gather evidence, so the appeal was further stayed to 31 March 2016.

9. Directions to progress the case to hearing were issued in April 2016 and in the next two months, the appellant filed its list of documents and witness evidence.

10. On 28 July 2016, the appellant wrote to the Tribunal withdrawing its appeal on the basis, it said, that HMRC had just notified it that they would be applying to amend their statement of case to include the defence of unjust enrichment.

11. On 26 August 2016, HMRC applied for its costs of £4,625.60, which were itemised on an attached schedule. HMRC applied for their costs on the basis that the appeal was in the open costs regime as a complex case and HMRC had been successful in defending the appeal.

12. The appellant objected to the application. HMRC responded to those objections. On 10 October 2016 the parties were notified that, unless the parties objected, it would resolve the application on the papers. No objections were received and I have proceeded to resolve the application on the papers. The appellant did make a further reply to HMRC's response.

Complex categorisation

13. In the appellant's reply to HMRC's response to their objections, it appears to be raising a case that the Tribunal should not award costs as the appellant had not wished the appeal to be categorised as complex and indeed would have made a belated application for the appeal to be removed from complex categorisation had it not decided to withdraw the appeal.

14. As this appears to be a new ground to me, if I had considered it arguable, I would have asked HMRC for a response to it. However, I don't need to consider HMRC's response as I am not persuaded of the appellant's case on this.

15. The appellant accepts it knew of the complex categorisation. I find that the letter from the Tribunal back in 2010 (and 2012 for the later appeal) notifying it of the appeal's categorisation explained that that categorisation led to the open costs regime. It also explained the appellant's right of opt out and the 28 day time limit on so doing.

16. The appellant's case is that they had not understood they had a right of opt out: they thought they had to make an application and it would be successfully defended because of the amount of money at stake.

17. I do not know why they misunderstood the law. There is no suggestion that HMRC either caused nor knew of the misunderstanding. There was nothing to prevent the appellant reading the Rules of the Tribunal from which, had it done so, its right to opt out within 28 days of notification would have been apparent. The appellant's misunderstanding is not a fair reason in my view for refusing to give the normal 'costs follow the event' direction.

18. Nor do I consider its avowed intent to make a late opt out application relevant. The application had not been made at the time it decided to withdraw. As the purpose of the time limit on the opt out is to prevent an appellant applying a 'wait and see'

approach to the costs regime, it is extremely unlikely any application for an extension of time for opt out would be allowed where the appellant had already withdrawn the appeal.

19. The appeal was in the complex category and I consider I have discretion to award costs unfettered by the appellant's clear dismay at being in the open costs regime.

Late defence by HMRC?

20. The appellant's main case, and the one on which it originally defended the costs claim, is that it considered HMRC had not raised the defence of unjust enrichment in a timely manner. Had it been raised earlier, the appellant would (I accept) have avoided the expense (in particular, it seems the work in mid-2016 in preparing for the hearing) because it would have withdrawn the appeal earlier. Therefore, while the appellant does not apply for its costs, it thinks that it was put to extra costs unnecessarily by HMRC and that therefore the fair outcome is that each party should pay its own costs.

21. HMRC's case is that HMRC itself only became aware that the defence of unjust enrichment was available to it because of case law developments (unspecified) in 2013 and 2016. It also considers its costs modest. Unlike the appellant it had not submitted witness evidence and its costs were for work undertaken by its in-house solicitors.

Principles

22. I think that where there is an open costs regime, the normal order that costs follow the event should apply, as that is in line with the reasonable expectations the parties should have, unless there are exceptional reasons to order otherwise.

23. Unreasonable behaviour by the party seeking costs would certainly be an exceptional reason justifying a departure from the normal 'costs follow event' rule. I accept that a failure to raise a timely defence might well be unreasonable behaviour and grounds for deviation from the normal order, but it will depend on circumstances and contributory behaviour by the other party.

Not unreasonable at outset

24. I do not consider that there was any unreasonable behaviour by HMRC in failing to raise the unjust enrichment defence at the outset of either appeal. As I have said, at the outset of the proceedings the appellant put forward a positive case that HMRC would not be able to rely on the unjust enrichment defence and it seems that HMRC agreed (§2). The appellant cannot blame HMRC for their acceptance of its case on unjust enrichment.

25. Nothing had changed when the second appeal was lodged so again I do not consider there was any unreasonable behaviour by HMRC at this point.

2012-2015

26. It does seem that in 2016 both parties changed their view on the applicability of the unjust enrichment defence, and while HMRC do not specify the cases which caused them to do so, it must have been, as the appellant says, comments in the *BALPPA* case in 2013. (This was referred to in my decision in *UKinbound* [2016] UKFTT 414 (TC) which is probably the 2016 case to which HMRC also refer.)

27. So my understanding is that the appellant thinks that HMRC ought to have raised the issue of unjust enrichment in 2013 following release of *BALPPA*. That would have saved the appellant the work undertaken in 2016.

28. However, although *BALPPA* was released in 2013, this appeal was stayed until late 2015. I find HMRC had no reason to consider this appeal until late 2015 at the earliest. I do not consider HMRC behaved unreasonably in not raising this defence while the appeal was stayed to end 2015.

Unreasonable behaviour in 2016?

29. I consider both parties should have fully considered their position on the appeal at the time the stay was lifted, and HMRC should certainly have done so during the period of a further stay to 31 March 2016 which they requested specifically to enable them to have time to consider their position.

30. HMRC, however, it appears did not consider unjust enrichment immediately: their notification to the appellant of their intention to apply to amend their statement of case was not until July 2016.

31. However, both parties were equally aware of the potential applicability of the defence; both parties should have been aware of case law developments since the appeals were lodged. This was not a case where the facts relevant to the defence were in HMRC's possession: on the contrary, the nature of the unjust enrichment defence is that the facts are within the knowledge of the appellant.

32. My view is that both parties were equally to blame in not realising the potential applicability of the defence earlier. While the appellant might say it is for HMRC to raise defences, the appellant had chosen to take a point on it right from the outset so it was clearly aware of the defence as a potential issue in its appeal.

Conclusion

33. To the extent that it was unreasonable for HMRC to first raise the defence after, rather than before, 31 March 2016, I consider that the appellant was no less unreasonable in overlooking it at the same time. For this reason, I do not consider that HMRC's behaviour justifies a departure from the normal rule that costs should follow the event.

34. I might well not have taken that view, and indeed did not take that view in *UKinbound* (above) where HMRC's late raising of the defence actually caused

procedural prejudice in that it was raised so late that it did not give the appellant time to deal with it in defence. That was not the case here where the defence was raised long before the appeal was set down for hearing.

35. I also make the point that if there was any suggestion that HMRC had deliberately delayed raising a defence then my decision would have been very different.

36. In conclusion, I am not persuaded that there are any factors present which would justify deviating from giving effect to what are parties' normal expectation that costs will follow the event.

Quantum

37. HMRC's presented the appellant with the schedule of costs and the appellant has not addressed any criticisms of it to me. Indeed, I understand that their position is that their costs are much higher than HMRC's because the appellant did have the work of preparing the evidence. The schedule appears reasonable to me.

Order

38. I order the appellant to pay HMRC the amount of costs of £4,625.60.

39. 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: 28 November 2016