[2020] UKFTT 0488 (TC)

TC07960

PROCEDURE – application for costs – whether HMRC acted unreasonably – Appellant issued with personal liability notices on the basis of dishonesty – HMRC withdrew on receipt of new evidence – whether unreasonable of HMRC not to have withdrawn when received Appellant's witness statement – whether unreasonable not to have accepted that statement given that it was accompanied by a statement of truth – held, HMRC did not act unreasonably and application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04838

BETWEEN

DAVEY PAREKH **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the Appellant's costs application on 27 November 2020 without a hearing. Both parties consented to the application being determined in this way and the Tribunal considered that it was in the interests of justice to do so.

DECISION

Summary

1. The Appellant was a director of a company called Mumbai Junction Ltd ("the Company") which operated a restaurant of the same name ("the Restaurant"). On 8 February 2018 and 14 March 2018, HM Revenue & Customs ("HMRC") issued the Appellant with personal liability notices ("PLNs") in the amounts of £238,023 and £288,927.58.

2. The PLNs were issued under Finance Act 2007, Sch 24, para 13 on the basis that there were inaccuracies in the Company's VAT returns and corporation tax returns; that these inaccuracies were deliberate and concealed, and that they were attributable to the Appellant.

3. The Appellant appealed against the PLNs, and on 6 July 2018 notified an appeal to the Tribunal. Attached to that Notice was the review letter relating to the PLN for £238,023, but HMRC has not sought to argue that the Appellant did not notify the other PLN to the Tribunal. The case has proceeded on the basis that both PLNs are under appeal.

4. On 11 March 2020, HMRC informed the Tribunal that they were no longer defending the PLNs and withdrew from the proceedings. On 20 March 2020 the Appellant's representative, Charles Douglas Solicitors LLP ("CDSL"), applied for the costs of the proceedings for the period from July 2019 to the date of HMRC's withdrawal in the amount of £12,638.20 ("the Application").

5. For the reasons set out below, the Application is **refused.**

The facts

6. The Appellant had previously been a director of two companies which had gone into liquidation owing money to HMRC.

7. In September 2016, HMRC officers carried out covert meal tests at the Restaurant, paying in cash. The meal "dockets" for those sales were not in the Company's records, and the amount recorded on the Z report was around 50% of the total actually paid.

8. On 12 April 2017, two HMRC officers, Ms Harter and Mr Webb, met with the Appellant. The meeting notes record that the Appellant said:

(1) one or two people have access to the till;

(2) there is always a member of the family working in the Restaurant;

(3) the Appellant does a Z reading at the end of each day; and

(4) takes the money home to be counted.

9. Mr Webb extracted data from the Company's till, which showed systematic "voiding"; it was common ground that this was consistent with the till readings being manipulated and sales being supressed.

10. At a subsequent meeting on 25 October 2017, HMRC recorded the Appellant as saying he was responsible for the Company's record-keeping.

11. The Appellant was provided with copies of both sets of minutes but did not write back to HMRC disputing their accuracy.

12. HMRC decided that the Company was deliberately under-declaring its takings on a systematic basis, and issued various assessments and penalties, which were followed by the PLNs. On 27 March 2018, a firm of accountants, KD Associates appealed the PLNs on the Appellant's behalf. That appeal letter said that "it was not until [HMRC's] examination of the sales dockets and till system that the director also to his surprise realised the cash was not being declared", and "it appears that large scale pilfering or theft during this period was taking place" but "it would be difficult to point the fault at any one employee without proof" and that the Appellant "has a purely administrative role in the business and is not present, except for a few hours, when the restaurant is operating". After statutory reviews, the Notice of Appeal was filed with the Tribunal.

13. On 10 April 2019, the Tribunal issued directions for the conduct of the appeal. These included the following direction routinely issued in cases such as this where the parties have also been directed to file witness statements:

> "At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

14. On 12 April 2019, the Appellant informed the Tribunal that he had appointed CDSL as his representative.

15. On 31 July 2019, the Appellant provided his first witness statement, in which he said that "all floor staff have access to the tills" and that it was not possible for him to have manipulated the tills as he was not physically present at the restaurant. He provided two receipts dated 22 March 2017 which he said showed he was elsewhere on that day.

16. On 7 August 2019, a Mr Vockrodt provided a witness statement. He said that the Appellant was at another restaurant at lunchtime and in the evenings, and that he had observed this from his regular visits during the period from September 2018 and July 2019.

17. On 28 August 2019, CDSL wrote to HMRC, reminding them that they had the burden of proof, and asserting that they had provided "no evidence", but were instead relying on "assumptions".

18. A hearing was listed for 9 and 10 January 2020. On 19 December 2019, the parties jointly applied for a postponement on the basis that one of HMRC's witnesses was unwell and because the Appellant had recently instructed a firm of accountants to review HMRC's figures.

19. On 27 February 2020, the Appellant provided a second witness statement, and also filed and served witness statements from Mr Karuvathil, a supervisor at the Restaurant, and from Mr Pevungadan, the manager at the Restaurant. Both new witnesses confirmed the evidence in the Appellant's witness statement that he was rarely present at the restaurant, and that other people had access to the till at the relevant time. Given this new witness evidence, HMRC decided they were on balance unlikely to succeed, and on 11 March 2020 they withdrew from the proceedings.

The Application for costs

20. The Application was made on 20 March 2020 and responded to by HMRC on 20 May 2020; CDSL provided a reply to that response on 9 June 2020.

21. CDSL submit that HMRC acted unreasonably in continuing with the appeal after receipt of the Appellant's witness statement in July 2019 and that costs of £12,638.20 + VAT had been incurred since that date, which HMRC should be directed by the Tribunal to repay. Their submission was made on the following grounds:

(1) The Appellant's first witness statement "must already have highlighted significant weaknesses in HMRC's case" by showing that the meeting minutes were inaccurate;

(2) That witness statement had been signed with a statement of truth and it was "unreasonable conduct" on HMRC's part not to have accepted that it was true;

(3) HMRC had the burden of proof, but it was unlikely they could prove that the Appellant had spent significant time at the till.

(4) HMRC had not put forward "any persuasive argument" that the Appellant's evidence on that point could be disproved in cross-examination;

(5) Mr Karuvathil and Mr Pevungadan's witness statements "do not provide new information" but rather only represent "a marginal shift in the weight of the evidence"; and

(6) CDSL had indicated in December 2019 that they were likely to be filing further evidence which would support the Appellant.

22. HMRC submitted that Mr Karuvathil's and Mr Pevungadan's witness statements changed the position. Until those statements were filed and served, HMRC had only the Appellant's witness statement, which contradicted the information he had provided at the meeting, and Mr Vockrodt's witness statement, which related to a different time period. Moreover, as it was HMRC's case that the Appellant had deliberately and dishonestly suppressed the Restaurant's sales, it was entirely reasonable for HMRC to want to test his witness evidence in cross-examination.

The Tribunal Rules

23. Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 is headed "Orders for costs". So far as relevant to the Application, it reads:

> (1) The Tribunal may only make an order in respect of costs.—
>
> (a) …;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; . . .
>
> (c) …
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
>
> (3) A person making an application for an order under paragraph (1) must—
>
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

> (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so."

The case law

24. In *Distinctive Care v HMRC* [2019] EWCA Civ 1010 at [7] per Rose LJ (with whom Lewison and Floyd LJJ both agreed), the Court of Appeal held that:

> "the [Tribunal] Rules, by Rule 10, reflects the intention that the First-tier Tribunal is designed in general to be a 'no costs shifting' jurisdiction…Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeal."

25. In *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) the Upper Tribunal said that the Tribunal should "consider what a reasonable person in the position of the party concerned would reasonably have done, or not done", and that this was a value judgment.

26. In *Shahjahan Tarafdar v HMRC* [2014] UKUT 0362 (TCC), the UT said at [33] that the proper enquiry is "whether HMRC had unreasonably prolonged matters once they were in the tribunal, or whether they should have withdrawn the assessment at an earlier stage", and continued at [34]:

> "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?
>
> (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?"

Discussion and decision

27. Having considered and applied that guidance to the facts found for the purposes of the Application, it is clear to me that:

(1) HMRC withdrew because they received the witness statements of Mr Karuvathil and Mr Pevungadan;

(2) that evidence changed the position; and

(3) it was not unreasonable for HMRC not to have withdrawn at an earlier stage, either when it received the Appellant's first witness statement or subsequently.

28. I come to that conclusion for the reasons set out below.

29. Until HMRC received the witness statements of Mr Karuvathil and Mr Pevungadan, the evidence provided consisted of:

(1) the statements made to HMRC by the Appellant at the meetings on 12 April 2017, which included explicit admissions as to his role in the business and his presence at the Restaurant;

(2) the Appellant's acceptance that cash takings had been suppressed but his reluctance to identify any member of staff;

(3) the Appellant's first witness statement, contradicting his earlier recorded statements to the HMRC officers; and

(4) Mr Vockrodt's witness statement, which as HMRC say, relates to a different time period.

30. HMRC had taken the view, having considered the evidence provided at the meetings, together with the Z readings and the Company's failure to record the sales made to the officers, that the suppression was systematic and organised, and had been carried out by the Appellant or at his direction. In my judgment, this was an entirely reasonable position to take on the evidence.

31. CDSL submitted that it was "unreasonable" for HMRC not to have accepted the Appellant's first witness statement, because it was accompanied by a statement of truth. It does not follow from the fact that a person has signed a statement of truth that it is unreasonable for the other party to continue with the proceedings. All formal witnesses statements attach a statement of truth, but they are also open to challenge under cross-examination. This is clear from the routine direction given in this appeal, and the similar approach of the civil and criminal courts.

32. In particular, where the person submitting the witness statement is defending a charge of dishonesty, as was the case here, it is self-evidently entirely reasonable for the other party to refuse to accept without challenge evidence in that statement which is inconsistent with other evidence, particularly where that inconsistent evidence had previously been provided by the same person.

33. CDSL also submitted that it was unreasonable of HMRC not to have accepted that the witness statement showed the minutes to be incorrect. However, HMRC were in possession of substantial evidence which demonstrated that sales had been suppressed; the appeal letter sent to HMRC by KD Associates showed that the Appellant himself accepted that this had occurred, and it was HMRC's reasonable view that that the Appellant was responsible for that suppression.

34. In my judgment, HMRC had plenty of points they could have put to the Appellant in cross-examination: the statements made in the meeting as to his active daily involvement and as to the presence of a family member in the Restaurant at all times; his failure to ask for any amendments to the meeting minutes, and the improbability that suppression on this scale could have continued in a systematic way, involving manipulation of the till, without his involvement. It was not unreasonable for HMRC to decide to challenge the evidence in the first witness statement.

35. Once Mr Karuvathil and Mr Pevungadan's evidence had been received, HMRC were on notice that two other witnesses, albeit employees of the Company, would be supporting the Appellant. Having received that evidence, HMRC decided to withdraw. As a result, the appeal is no longer before the Tribunal.

36. However, had HMRC not withdrawn, the outcome would not have been a foregone conclusion. It would have been open to HMRC to challenge *all* the witnesses in cross-examination, in the light of the evidence of till manipulation and the suppression of takings and taking into account also that the new witnesses were both employed by the Company. In

other words, it would not have been unreasonable for HMRC to continue with the appeal after having received the new evidence.

37. I have no hesitation in concluding that HMRC did not act unreasonably by failing to withdraw when they received the Appellant's first witness statement.

38. For completeness, I note that CDSL also say that HMRC should have withdrawn when they were advised that further evidence would be provided. The only reference to the delivery of further evidence appears to be an oblique mention in the correspondence shortly before the postponement of the hearing. Even had CDSL *explicitly* said they were planning to put forward further evidence, it would clearly be reasonable for a party to wait and see that evidence before deciding whether or not to withdraw.

The lack of a schedule

39. Although the Application contained some detail of the costs claimed, it would have been insufficient to meet the requirement in Rule 10(3)(b) that an application be supported by a schedule of costs. However, as I have refused the Application, this point is academic.

Conclusion and appeal rights

40. I refuse the Application.

41. 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 Rules. 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.

42. 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.

ANNE REDSTON

TRIBUNAL JUDGE

RELEASE DATE: 3 DECEMBER 2020