



Neutral Citation: [2025] UKFTT 00066 (TC)

Case Number: TC09411

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2024/02526

COSTS – appeal against refusal of application for approval under the Alcohol Wholesaler Registration Scheme - notification by Respondents that refusal decision withdrawn but application not approved – late application for costs by Appellant under rule 10(1)(b), (3) and (4) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on ground that Respondents acted unreasonably in defending or conducting of proceedings – Martland considered – permission to make a late application refused

Judgment date: 24 January 2025

Decided by

TRIBUNAL JUDGE SINFIELD

Between

BERLIN TRADING COMPANY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the application on 17 January 2025 on written submissions only

DECISION

INTRODUCTION

1. This decision concerns an application by the Appellant ('BTC') under section 29 of the Tribunals, Courts and Enforcement Act 2007 ('the TCEA') and rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') for an order that the Respondents ('HMRC') pay BTC its costs in relation to its appeal which amounted to £20,364. In summary, BTC claims that it is entitled to the costs as a result of the unreasonable conduct of HMRC in conducting the proceedings. HMRC oppose the application on the ground that they did not act unreasonably and, in any event, the costs claimed are excessive. BTC's applied for its costs after the 28 day time limit for making such applications had expired. BTC applied for permission to make a late application.

2. For the reasons given below, I have refused to grant BTC permission to make a late application for costs. In any event, had I allowed BTC to make a late application, I would have refused it as I do not consider that HMRC acted unreasonably.

BACKGROUND TO THE APPEAL AND APPLICATION

3. There does not appear to be any material dispute between the parties about the events leading up to BTC's appeal and the application for costs. The relevant facts may be summarised as follows.

(1) On or about 14 December 2023, BTC applied for approval under the Alcohol Wholesale Registration Scheme ('AWRS'). BTC provided various documents in support of the application and responded to follow up enquiries from HMRC. HMRC informed BTC that part of the application process was to establish whether BTC was fit and proper to be granted AWRS approval.

(2) On 17 January 2024, HMRC explained to BTC that unmanaged debts would affect the decision whether or not to grant AWRS approval. HMRC continued to work with BTC's accountant in gathering all the necessary information.

(3) After considering the available information, HMRC concluded that BTC had not passed the fit and proper test because of unmanaged debts and, on 24 January, HMRC issued a decision refusing to approve BTC under the AWRS. The decision letter offered BTC an opportunity to request a statutory review or to proceed straight to an appeal to the FTT.

(4) On 29 January, BTC requested a review of the decision which was carried out and, on 12 March, HMRC notified BTC that the review had upheld the decision not to approve BTC under the AWRS.

(5) BTC's legal representative filed a Notice of Appeal with the FTT on 17 April. In its appeal, BTC challenged the reasonableness of HMRC's decision to refuse the AWRS approval and/or the conclusion on review that the decision should be upheld.

(6) The FTT acknowledged receipt of the appeal and notified it to HMRC on 1 July. The FTT pointed out that the appeal was made late and stated that, if there was no objection, HMRC must serve their Statement of Case ('SOC') within 60 days, ie by 30 August.

(7) On 28 August, HMRC applied for an extension of time until 30 September to serve the SOC on the grounds that they were taking instructions and needed further time to settle the SOC. The FTT granted the application on 2 September, unless BTC objected with 14 days. On 3 September, BTC's representative confirmed that they did

not object to the application but raised an issue regarding the lack of information supplied in the grounds for the extension of time.

(8) On 26 September, HMRC wrote to the FTT to say that the decision to refuse AWRS approval would be withdrawn.

(9) On 27 September, HMRC wrote to BTC as follows:

“This letter is to confirm that I have withdrawn my decision letter dated 24/01/2024 to refuse your application to carry on a controlled activity, in this case the wholesale of alcohol.

Withdrawing my decision does not amount to an approval.

A different HMRC Officer with no previous involvement will now look at your application and consider the information you have provided along with any new information you wish to provide and issue a new decision letter. I cannot speculate on the outcome of this decision, as it will be based on the fit and proper criteria outlined in Excise notice 2002.”

(10) On 4 October, the FTT wrote to HMRC and BTC (but not to BTC’s representative) stating that, as HMRC had withdrawn the disputed decision, the FTT no longer had any jurisdiction and the appeal would be struck out unless either party objected within 28 days, ie by 1 November.

(11) On 6 November, BTC served its application for costs, with a schedule of costs, on the FTT and HMRC.

LEGISLATION

4. Section 29 of the TCEA provides that the Tribunal 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 FTT Rules. Section 29 relevantly provides:

“(1) The costs of and incidental to—

- (a) all proceedings in the First-tier Tribunal, and
- (b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.”

5. So far as material to this application, rule 10 of the FTT Rules rule provides:

“(1) The Tribunal may only make an award in respect of costs ... –

...

- (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting proceedings

...

(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.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person ('the paying person') without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means."

6. Rule 10(4)(b) of the FTT Rules provides that an application for an order for costs under rule 10(1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the FTT sends notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings. In this case the FTT sent the notice of withdrawal to BTC on 4 October 2024 but did not send any notice to BTC's legal representative. Any application under rule 10(1) should therefore have been made by no later than 1 November. As stated above, the application was made on 6 November and was, therefore, five days late.

7. Rule 11(4)(a) of the FTT Rules states:

“(4) A person who receives due notice of the appointment of a representative

—
(a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party ...”

APPLICATION FOR COSTS

8. BTC submits that, where a party has a representative, rule 11(4)(a) of the FTT Rules requires the FTT to send any notice of withdrawal to that representative and, as the FTT did not do so in this case, time for submitting an application under rule 10(1) had not started to run. I do not accept this submission. I accept that the FTT was under an obligation to provide a copy of the notice of withdrawal to that representative and that it failed to do so, which is a matter for regret. However, rule 11(4)(a) explicitly envisages that the FTT may also provide documents to the represented party which is what happened in this case. Rule 17(2) requires the FTT to notify each party of the withdrawal and the time limit for an application for costs runs from the date of such notification. Although it failed to notify BTC's representative, the FTT notified BTC and that was a valid notification for the purposes of rule 17(2) and rule 10(4)(b). Accordingly, I find that the application for costs was made outside the time limit in rule 10(4)(b).

9. In the event that I find that the application was made late, BTC applies for relief from sanction – in effect for permission to make a late application. HMRC have not made any submissions or comments in relation to the lateness of the application for costs or BTC's application for relief from sanction. However, where one party does not object to an application by another party for permission to make a late appeal or application, the FTT

must still consider whether it is appropriate and consistent with the overriding objective to grant permission.

10. The Upper Tribunal ('UT') has given guidance on the correct test to be applied when considering an application for permission to make a late appeal in *Martland v HMRC* [2018] UKUT 178 (TCC) ('*Martland*') at [23] – [47], the essence of which is summarised at [44]:

“When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in [*Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926]:

- (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
- (2) The reason (or reasons) why the default occurred should be established.
- (3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.”

11. It seems to me that the same approach as applies to applications to make a late appeal should apply when considering whether to give permission to make a late application in or after an appeal. It follows that I will apply the three stage process endorsed by the UT in *Martland* in considering whether to grant BTC permission to apply for costs after the time limit in rule 10(4)(b) has expired.

12. The first stage is to consider the length of the delay in notifying the appeals. The relevant time limit is 28 days from the date of notification of the withdrawal of the disputed decision. The purpose of the time limit is to promote the efficient disposal of proceedings and provide some finality to litigation in the FTT. In this case, the delay was five days. BTC contend that such a delay was neither serious nor significant in the context. I do not agree. In my view, a delay of five days in the context of a time limit of 28 days is serious and significant. If I were to grant permission the effect would be to extend the time limit to 33 days an increase of 17.5%.

13. The second stage is to consider the reason for the delay. BTC advances two reasons for the delay. The first is that the FTT did not send a copy of the notification of the withdrawal to its legal representative. The second reason for the delay was that BTC’s legal representative had instructed counsel to prepare an application for costs which was subject to negotiation of the appropriate fee. Although the negotiations took place and were concluded within the 28-day period, uncharacteristically, counsel’s clerk did not inform counsel that the fee had been agreed and, accordingly, counsel did not finalise the costs application until after the time limit had expired.

14. I do not accept that BTC has shown that it had a good reason for the delay in making the costs application. BTC was legally represented by solicitors experienced in appeals in the FTT. BTC does not say when its legal representative first became aware of the FTT’s

notification of the withdrawal of the disputed decision. However, it is clear that BTC's representative was aware of the FTT's notification in sufficient time before the 28 day deadline had expired to instruct counsel to prepare a costs application and negotiate a fee for the work. BTC has not stated when the fee negotiations were completed or what steps the representative took to ensure at that point that counsel's clerk (and thus counsel) was aware of the urgency of the matter. BTC states, somewhat cryptically, that that the "discovery" (presumably, that fees had been agreed) was made at around 3:00am and counsel prepared the costs application and sent it to BTC's representative for review at 6:20am. BTC's representative filed the application with the FTT on the same day, namely 6 November. BTC does not explain why, having agreed counsel's fee, its legal representative did not chase counsel to provide the draft application within the time limit (or apply to the FTT for further time) but waited until five days after the 28 day period had expired. It seems to me that the time limit was simply ignored and allowed to expire without any action being taken to comply for five days thereafter.

15. It is well established that "when considering applications for permission to make a late appeal, failures by a litigant's adviser should generally be treated as failures by the litigant" (see the UT's decision in *HMRC v Katib* [2019] UKUT 189 (TCC) ('*Katib*') at [54]). In *Katib*, the UT had to consider the extent to which reliance on an adviser was a justifiable reason for failing to make an appeal in time. In that case, the adviser did not provide competent advice to Mr Katib, misled him as to what steps were being taken to appeal and failed to appeal on Mr Katib's behalf. On the facts of the case, the UT concluded that failings by the appellant's agent could not be relied upon by the appellant at any stage in the *Martland* analysis. In the circumstances of this case, the fact that counsel had not drafted a costs application because of a misunderstanding about fees and BTC's representative, for whatever reason, failed to appreciate that the time limit had expired until five days later cannot be a good a good reason for the delay.

16. The third stage is to consider all the circumstances of the case, balancing the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission. The UT observed at [45] of *Martland* that the balancing exercise in stage three of the process should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. BTC submits that there would be no prejudice to HMRC if the costs application is considered by the FTT and that it would be in the interests of justice to consider whether HMRC should be required to pay the BTC's costs. It seems to me that the balance of the merits and prejudice in this case fall in favour of HMRC. I accept that a decision not to allow BTC to make a late application means that it is denied the opportunity to obtain its costs but against that must be set the fact that HMRC would be prejudiced if I were to allow the application to proceed in circumstances where HMRC might understandably have believed that no application had been made. On the merits, it seems to me that, for reasons explained below, BTC's application for costs would be refused.

17. In conclusion, having applied the three stage process in *Martland*, I refuse to grant BTC permission to make a late application for costs.

18. In case I am wrong not to allow BTC to make a late application for costs, I now consider whether I would have granted the application were I to have permitted it. That turns on whether HMRC acted unreasonably in relation to the proceedings.

19. If a party is found to have acted unreasonably in bringing, defending or conducting proceedings, the FTT has a discretion, but not an obligation, to award costs to the other party

which like other discretions that the FTT has must be exercised judicially (see *Shahjahan Tarafdar v HMRC* [2014] UKUT 0362 (*'Tarafdar'*) at [25]).

20. The relevant legal principles to be applied in deciding whether a party had acted unreasonably were discussed by the UT in *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) (*'MORI'*) at [22] and [23]. The UT summarised those principles in *Distinctive Care Ltd v HMRC* [2018] UKUT 155 (TCC) (*'Distinctive Care'*) at [44]:

- “(1) the threshold implied by the words ‘acted unreasonably’ is lower than the threshold of acting ‘wholly unreasonably’ which had previously applied in relation to proceedings before the Special Commissioners;
- (2) it is possible for a single piece of conduct to amount to acting unreasonably;
- (3) actions include omissions;
- (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
- (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
- (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;
- (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and
- (8) the power to award costs under Rule 10 should not become a ‘backdoor method of costs shifting’.

21. In [45] of *Distinctive Care*, the UT added the “small gloss” to the above summary that questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight.

22. Where, as in this case, the issue is whether a party who has withdrawn from proceedings has acted unreasonably, the correct approach was set out by the UT in *Tarafdar* at [34] and subsequently endorsed by the UT in *Distinctive Care* at [48]. That approach requires the Tribunal to ask 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?

23. BTC submits that HMRC had “adopted a deeply unreasonable stance” throughout the case and that HMRC did not give it any opportunity to comment prior to the issue of the decision letter refusing AWRS approval. BTC also says that there was no change in any fact or circumstances between the date of the disputed decision and 26 September 2024 when HMRC decided to withdraw the decision apart from the fact that BTC had made an appeal to the FTT.

24. HMRC contend that BTC was provided with an opportunity to comment after the decision was made by way of a statutory review. In relation to the three *Tarafdar* questions, HMRC submit as follows:

(1) An HMRC litigator identified that the decision letter fell short of the required standard because of the absence of reasons given for the refusal and, after a conference with colleagues, requested legal advice which, it seems, confirmed the view that the decision should be withdrawn and the matter considered again by a different HMRC officer. This was the reason for the application to for more time to submit the SOC. Once the view was confirmed, the decision was withdrawn without delay.

(2) HMRC could not have withdrawn the decision at an earlier stage. HMRC were notified of the appeal on 1 July 2024, had internal discussions with stakeholders and withdrew on 27 September without even submitting a SOC.

(3) HMRC contend that the decision could not have been withdrawn an earlier stage. HMRC say that they took appropriate action in a timely fashion and after full consideration of all the issues, concluded that the decision must be withdrawn.

25. In my view, BTC has not shown that HMRC's conduct in relation to the proceedings was unreasonable. One of the examples of potentially unreasonable conduct given in *Distinctive Care* is a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced but that is exactly what HMRC did in this case shortly after the appeal was notified to them by the FTT. BTC seeks to look at the circumstances more broadly: essentially, it contends that it should never have had to appeal. This amounts to saying no more than the disputed decision was wrong and should never have been made. That was the issue in the appeal and, even if proceedings had continued and BTC had been successful, that does not show unreasonable conduct save in exceptional circumstances such as where HMRC had continued to oppose an appeal where they knew the appellant had an unbeatable argument. In this case, HMRC identified a fatal procedural flaw in their case, namely a lack of adequate reasoning in the decision. Having identified that flaw, it seems to me that HMRC acted with reasonable speed to confirm the position and notify the withdrawal. I do not consider that the period between 1 July and 27 September was an unreasonable length of time (especially over the summer holiday period) to take to review the matter and conclude that the decision had to be withdrawn. I accept that, in theory, HMRC could (and, ideally, should) have realised that the reasoning in the original decision was inadequate when it was reviewed. However, I do not consider that failure to appreciate the decision was flawed at that stage was unreasonable behaviour in conducting the proceedings. As they should have done, HMRC carried out a rigorous review of the matter when the appeal was notified to them and then acted with reasonable speed to bring the proceedings to an end. In conclusion, I do not consider that the threshold for an award of costs under rule 10(1)(b) of the FTT Rules is met in this case.

26. HMRC also object to the amount of costs claimed which they consider to be excessive. In view of my decision not to allow the application to be made late and that I would not have granted the application in any event, I do not need to comment on the reasonableness or otherwise of the amount claimed by BTC.

DECISION

27. For the reasons set out above, I refuse permission for BTC to make a late application for an order that HMRC pay its costs of the proceedings.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

**JUDGE GREG SINFIELD
CHAMBER PRESIDENT**

Release Date: 24th JANUARY 2025