



**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**[2016] UKUT 257 (TCC)
Case number: UT/2014/0081**

SHOSHANA PINE

Appellant

-and-

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

Respondents

Tribunal Judge: Colin Bishopp

Sitting in London on 21 March 2016

It is directed as follows:

1. The tribunal consents to the withdrawal by the appellant of her appeal;
2. There shall be no direction in respect of the costs of and incidental to the appeal including (for the avoidance of doubt) the appellant's unsuccessful application for a direction that the tribunal shall make no direction in respect of costs.

**Colin Bishopp
Upper Tribunal Judge**

Release date: 29 March 2016

REASONS FOR DIRECTION

1. This decision notice relates to what I hope is the final stage in the unhappy history of this appeal. Most of what follows has been said before, but I think it worth setting out a brief summary.
2. The appellant was required by notice served on her accountant, Mr Michael Weissbraun, to file a self-assessment return for the tax year 2011-12. Mr Weissbraun took the view, after having considered HMRC's website, that notwithstanding the notice the appellant need not file a return, and she did not do so. Once the due date for the filing of the return had passed, HMRC imposed a late filing penalty of £100, which prompted Mr Weissbraun to file a return on the appellant's behalf. No tax was due.
3. An appeal against the imposition of the penalty was made. There were two grounds of appeal: that service of the notice to file on an agent is insufficient, and that even if a valid notice was served, the appellant had a reasonable excuse for her failure to file the return on time. Both of those arguments failed before the First-tier Tribunal.
4. The appellant secured permission to appeal to this tribunal in respect of both arguments. For reasons which I do not need to develop, she decided not to proceed with the argument that she had a reasonable excuse, but to focus instead on the argument that service of the notice to file a return on a taxpayer's appointed agent does not satisfy the statutory requirements.
5. The appellant was, understandably, concerned about the fact that by appealing to this tribunal she had exposed herself to the risk that an adverse costs direction might be made. Mr Weissbraun thereupon made on her behalf an application for a protective costs direction, that is to say a direction that whatever the outcome of the appeal no costs award should be made. HMRC resisted the application.
6. It was suggested that the application might be dealt with on the basis of written submissions alone but I took the view that it was not appropriate to deal with a matter of such a kind on that basis. The application had the potential for establishing a principle; it was not a case in which the tribunal was being asked to apply an established principle to the circumstances of an individual taxpayer. In the event, I did refuse the application and my reasons for doing so may be taken by others as having established the principle that a protective costs direction will be made only in limited circumstances, and usually, though not invariably, when HMRC are the appellants.
7. HMRC now seek a direction in their favour in respect of the costs of the application for a protective costs direction. Mr Weissbraun resists the application, in part because the appellant did not ask for a hearing and in part because, he says, the hearing of the substantive appeal would have taken no longer than that application. On the latter point I think he is mistaken; a perusal of the decision of the First-tier Tribunal in *Tinkler v HMRC* [2016] UKFTT 0170 (TC), starting at [90], will reveal to him that the matter is considerably more difficult than he appears to believe.
8. However, and despite an earlier tentative indication which I gave when providing my reasons for refusing the protective costs application, I have decided that it would not after all be appropriate to make a direction in respect of the costs of the hearing of that application. There was no prior authority directly in point and HMRC have, therefore,

established the principle for which they argued, that a protective costs direction should be made only in exceptional circumstances. For that reason I am now of the view that it would not be appropriate to direct the appellant to pay or contribute towards the costs of their doing so. I should add that I am willing to arrange for my reasons for refusing the application to be published if so requested.

9. I declined when giving my reasons for refusing the protective costs direction to consent to the appellant's withdrawal of her appeal, prompted by her reluctance to expose herself to a costs risk, because I was not persuaded at that time that she, or Mr Weissbraun on her behalf, fully understood the implications of her doing so. As I have now concluded that there should be no direction in respect of the costs of the protective costs application there are no such implications; withdrawal of the appeal will see the end of the matter with no further exposure to risk. In those circumstances I do now consent to the withdrawal of the appeal.

Colin Bishopp
Upper Tribunal Judge