[2018] UKFTT 0130 (TC)

TC06386

Appeal number: TC/2017/5216

Income tax – costs – Rule 10(1)(b) – unreasonable conduct – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

JACK KELLETT **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at Taylor House London EC1R on 27 February 2018

Keith Gordon instructed by PJD Tax Consultants Ltd for the Appellant

Sophie Rhind, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. This is a decision in relation to Mr Kellett's application for costs under Rule 10 (1) (a) or (b) of the tribunal's rules in an appeal in which HMRC withdrew their opposition to his appeal some three weeks before the date set for the hearing (which was 27 February 2018)

2. Mr Kellett had appealed against a penalty imposed by HMRC under section 208 FA 2014. That section provides that a person becomes liable to a penalty where a follower notice is "given" to him (and not withdrawn) and he fails to take corrective action within a specified time.

3. HMRC had assessed the penalty on the basis that they had sent Mr Kellett a Follower Notice dated 8 May 2015 and he had not taken the necessary corrective action in the specified time.

4. In Ground 1 of his notice of appeal of June 2017 Mr Kellett noted that the penalty assessment referred to a follower notice dated 8 May 2015 and asserted that he had no record of such a notice. The assertion that no such notice had been received had been consistently made in earlier correspondence between HMRC and Mr Kellett.

5. On 20 December 2017 HMRC sent a witness statement to Mr Kellett's advisers which addressed the issue of the dispatch of the following notice, and on 2 February 2017, Mr Kellett's advisers sent two witness statements to HMRC which addressed the question of the receipt of the follower notice. HMRC wrote to Mr Kellett to withdraw their opposition to the appeal on 7 February 2018 as a result of the receipt of those witness statements.

6. Mr Kellett argues that in maintaining the appeal up to 7 February 2017 HMRC acted unreasonably, and accordingly that a direction should be made under Rule 10 (1).

Rule 10 (1).

7. This rule provides:

> "(1) The Tribunal may only make an order in respect of costs ...
>
> (a) under section 29(4) [TCEA] (wasted costs),
>
> (b) if the Tribunal considers that a party or their representatives has acted unreasonably in bringing, defending or conducting the proceedings, or
>
> (c) if the proceedings have been allocated as a Complex Case ..."

8. The appeal was not allocated as a complex case. Thus costs may be ordered only under rule 10(1)(a) or (b).

9. "Wasted costs" as used in 10(1)(a) are defined by section 29(5) TCEA to mean costs incurred:

> (a) as a result of any improper, unreasonable or negligent act or omission part of any legal or other representative or employee of such representative, or

(b) which in the light of any act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect [the party incurring them] to pay.

10. Section 29 permits the tribunal to disallow such costs or to order that they bought be borne by the representative. Although Mr Kellett's application referred to both rule 10(1)(a) and (1)(b), Mr Gordon's submissions were directed towards an order for costs to be paid by HMRC to Mr Kellett under rule (1)(b) on the basis of HMRC's unreasonable defence or conduct of the appeal, rather than towards establishing that a representative of HMRC had so acted as to bring the wasted costs rules into operation. No allegation was made of improper conduct.

The principles to be applied

11. The parties were agreed about the proper approach to considering what amounted to unreasonable conduct for the purposes of Rule 10(1)(b) citing that set out by the Upper Tribunal in *Shahjahan Tarafdar (T/A Shah Indian Cuisine) v HMRC* [2014] UKUT362 (TCC) at [34] and reaffirmed by it in *Market & Opinion Research International Ltd v HMRC* UKUT 12 (TCC) at [18]:

"In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct were 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?

12. In *Market & Opinion* the Upper Tribunal also agreed with a summary of propositions drawn from other cases in relation to the approach to the last of these questions and added a tenth. The list was:

(1) "acted unreasonably" was a lower threshold than that which had previously applied before the Special Commissioners which applied only where a party had acted "wholly unreasonably";

(2) unreasonable conduct could be a single piece of conduct or continuous conduct;

(3) the unreasonableness had to be in the proceedings: it did not extend to matters preceding or otherwise in connection with the proceedings;

(4) actions included omissions;

(5) the failure to undertake a rigourous review of assessments at the time of making (or I would add defending) an appeal to the tribunal can amount to unreasonable conduct;

(6) there may be more than one way of acting reasonably;

(7) the focus should be on the standard of handling of the case (not the original decision);

(8) the fact that a contention fails before the tribunal does not mean that it was unreasonable to raise it;

(9) rule 10(1)(b) should not become a backdoor method of costs shifting; and

(10) the phrase is designed to capture cases where an appellant has brought an appeal he should know cannot succeed or a respondent unreasonably resisted an obviously meritorious appeal or has acted unreasonably in the proceedings..

13. In *Market & Opinion t*he Upper Tribunal also endorsed the warning given by Judge Raghaven that the hindsight provided by a conclusion made at a later time to withdraw should not colour the evaluation of an earlier decision to proceed with the case made on the basis of different information.

The progress towards Mr Kellett's appeal.

14. On 17 December 2014 HMRC's Counter-Avoidance Team 9 in Glasgow dispatched an accelerated payment notice (an "APN") and a follower notice in relation to the 2007/8 year to Mr Kellett at the wrong address. It was returned to HMRC by the Post Office. (A copy was also sent to HMRC to Mr Kellett's accountants but they did not give it to him).

15. On 8 May 2015 HMRC say that their Counter Avoidance Team 9 in Glasgow dispatched an accelerated payment notice and a follower notice to Mr Kellett at (what was accepted as) his correct address.

16. On the same date, 8 May 2015, HMRC say that Counter Avoidance AP Team in Newcastle dispatched a letter to Mr Kellett (at his the correct address) which withdrew the 17 December 2014 APN (and I assume also sent a letter withdrawing the 17 December 2014 follower notice, although that letter was not in the bundle). Mr Kellett's advisers received a copy of this letter.

17. On 27 August 2015, in a telephone call between HMRC and Mr Kellett's accountants, his accoutnants accepted that Mr Kellett was would be liable to a penalty for failing to comply with the follower notice (but it appears that they had in mind the withdrawn 17 December 2014 notice).

18. On 16 September 2015 HMRC's Counter Avoidance AP team in Newcastle wrote to Mr Kellett with the notice of a penalty assessment for failing to make the the accelerated payment required by the APN on time. Mr Kellett received his notice.

19. On 14 October 2015 Counter Avoidance AP in Newcastle wrote to Mr Kellett presaging liability to a penalty for failure to comply with 8 May 2015 follower notice. Mr Kellett received this letter and on 19 October 2015 telephoned HMRC about it.

20. On 24 December 2015 Counter Avoidance AP in Newcastle wrote to Mr Kellett explaining the penalty they intended to charge for failing to comply with 8 May 2015 follower notice and asking him to provide any relevant information.

21. On 20 January 2016 Mr Kellett's accountants replied and said "we cannot trace the receipt of [8 May 2015 follower notice] and neither can our client".

22. On 17 February 2016 HMRC's Counter Avoidance AP team in Newcastle wrote to Mr Kellett with a penalty assessment. On receipt of the assessment the accountants

phoned HMRC to ask if the 20 January 2016 letter had been taken into account. HMRC's officer Roseann Tarr is recorded as saying that it had been.

23. On 14 March 2016 Mr Kellett's accountants wrote to appeal against the penalty. They indicated that Mr Kellett had not received the 8 May 2015 follower notice, only the letter of the same date withdrawing the earlier notice.

24. On 28 February 2017 HMRC replied saying that the 8 May 2015 follower notice had been correctly addressed and therefore had been "validly issued".

25. Mr Kellett sought a review, and on 25 May 2017 HMRC's reviewer upheld the penalty stating that the follower notice "was reissued on 18 May 2015 to your new address". He said that "without proof to the contrary I am satisfied that the follower notice was issued to your last known place of residence" properly prepaid and posted. He said that he had been told that the process within HMRC that the time was to staple together all follower notices APN's and covering letters before they were sent to HMRC's post room. He quoted from an FTT case (*Whittle* [2017] TC 5582) in which the tribunal had found that there was nothing to suggest that HMRC's records were wrong and concluded that it was shown that a notice had been properly despatched so that, unless there was proof to the contrary, service would be held to have been effected. That tribunal did not regard the taxpayer's mere assertion to the contrary as proof that the letter had not been received given that letters from HMRC generally reached the taxpayer.

The Progress of Mr Kellett's appeal

26. In June 2017 Mr Kellett submitted his notice of appeal. That referred to the review conducted by HMRC in May 2017 and set out very clearly the assertion that the 8 May 2015 had not been "given" to Mr Kellett.

27. The facts relevant to assessing whether the conduct of HMRC of the appeal by HMRC was or was not reasonable start with the receipt of the notice of assessment. I take into account the facts related at [14] to [25] above not to assess whether the conduct of any matter so related was reasonable but to explain what material should have been before the officer of HMRC addressing Mr Kellett's notice of appeal (and which might have been put before a tribunal in relation to Mr Kellett's contention that he did not receive the follower notice).

28. I find therefore that on receipt of the notice of appeal a reasonably diligent reviewer of the notice of appeal and the associated materials would have been clearly aware that a fundamental plank of Mr Kellett's appeal was that the 8 May 2014 follower notice was not given to him as was required by section 208 FA 2014, and that that argument had been rejected by other officers on the basis that the follower notice had been properly addressed and would have been stapled to the APN and covering letter and posted.

29. In accordance with the tribunal's directions HMRC served their statement of case on 22 September 2017. There it was contended that the 8 May 2015 follower notice had been given to Mr Kellett because it was properly posted to him at his last known address, and therefore (as a result of section 7 Interpretation Act and section 115 TMA) was to be deemed to have been received unless the contrary was proved. No mention was made of the practice of stapling together the relevant letters or as to

why Mr Kellett's assertion to the contrary was not sufficient proof that the letter had not in fact been received.

30. On 20 December 2006 17 HMRC's officer Roseanne Tarr signed a witness statement in which she addressed the issue of posting of mail by the team responsible for issuing the follower notice to Mr Kellett. She described the "usual " practice of the team and said that that practice was that where a follower notice was withdrawn and a new one issued, the letter of withdrawal would be put in the same envelope with the new follower notice - with the withdrawal letter at the front stapled to the new follower notice at the back. The purpose was to ensure that the documents arrived together and that the withdrawal letter did not arrive after the new follower notice (which might, I infer, possibly give rise to the impression that the new follower notice had been withdrawn as soon as it had been issued).

31. Mr Kellett and Paul Devonshire of his accountants made witness statements on 29 January 2018 and 2 February 2018 respectively. Both dealt with the issue of the receipt or otherwise of the 8 May notice. They were sent to HMRC shortly after they were made. Mr Kellett said that he had received the 8 May 2015 withdrawal of the wrongly addressed follower notice but had not received the 8 May 2014 notice. He spoke of the diligent manner in which he filed and kept correspondence with HMRC and made notes of phone calls. Mr Devonshire in his witness statement said that he had received the 8 May 2015 withdrawal letter but not the 8 May 2015 follower notice and that Mr Kellett had not phoned him or written to him about such correspondence.

32. Shortly after receiving these witness statements HMRC withdrew from the appeal.

The parties' contentions.

33. Mr Gordon says that HMRC were unreasonable in ignoring Mr Kellett's consistent statements that he had not received the 8 May 2014 follower notice. There was no reason for HMRC not to believe him, and indeed, HMRC's Charter tells taxpayers that a taxpayer can expect HMRC to "respect you and treat you as honest". The whole thrust of HMRC's statement of case was that HMRC did not treat Mr Kellett as honest.

34. Mr Gordon notes that Roseann Tarr spoke of HMRC's "usual" practice but gave no indication that Mr Kellett's case was usual, and that HMRC should have recognised what was "usual" meant that there could be exceptions. He notes in this context the fact that the withdrawal letter and a new follower notice appear to have come from different HMRC teams called into question whether the "usual" practices of stapling together the withdrawal and the new follower notice was relevant.

35. Mr Gordon does not suggest that HMRC's conduct was unreasonable in the period between the receipt of the witness statements and their giving notice of withdrawal from the appeal.

36. Miss Rhind says that:

(1) at the time of the statement of case and until HMRC received the two witness statements they reasonably thought there was that this was a usual case

and it was not unreasonable therefore to suppose that the letter had been delivered since they had evidence that been properly posted;

(2) until HMRC got the witness statements all they had was the assertion that the follower notice had not been received. That did not deal with the possibility that it had been delivered but lost in some way. The witness statements provided additional evidence which supported and corroborated Mr Kellett's claim. They were formal and considered statements which carried additional weight and contained weighty new evidence;

(3) whilst, prior the date of receipt of the witness statements, HMRC considered that the issue of whether or not follower notice had been received by Mr Kellett or not to be finely balanced, the witness statements provided new evidence which tipped the scales. Until then it had been not unreasonable to assume that it was more likely than not that the follower notice had been received.

Discussion.

37. The reason for HMRC's withdrawal was plainly the recognition that there was good evidence that the follower notice had not been received by, and therefore had not been "given" to Mr Kellett; and that, as a result, a penalty liability did not arise by virtue of section 208 FA 2014.

38. HMRC could have withdrawn from the appeal earlier if they had reached the same conclusion on the evidence before them at an earlier stage. The evidence before them in earlier stages did not include the corroborative evidence in the two witness statements.

39. Was it reasonable not to come to the same conclusion before the time they received the two witness statements?

40. At those times the relevant officer would have had the following evidence before him or her:

(1) that Mr Kellett contended consistently that he had not received the notice;

(2) that HMRC's "usual" practice was to send out the withdrawal letter, and the new follower notice in the same envelope stapled together (and, I assume, that such practice normally resulted in letters being posted) although Mr Kellett's two letters appeared to come from different offices; and

(3) that other letters recorded as sent to him had been received by Mr Kellett.

41. It seems to me that there may be circumstances other than the pursuit of an unmeritorious defence when the continued conduct of a defence may be unreasonable – for example perhaps where there is an enforceable agreement between HMRC and the taxpayer affecting the subject matter or result of an appeal, or in circumstances in which judicial review of the action would result in an injunction – but n the circumstances of this appeal the only live issue is whether HMRC persisted in an obviously unmeritorious defence – that is to say one which had no reasonable prospect of success.

42. In so putting the case I should say that I reject the proposition that because HMRC's charter might legitimately give rise to an expectation in the taxpayer's breast

that HMRC will, absent proof to the contrary, regard him as honest, HMRC's continuation of the appeal in the face of Mr Kellet's assertion was unreasonable. That is because:

(1) it seems to me that in the absence of other evidence, there is always the possibility that a letter is delivered but lost or accidentally destroyed or disposed of before opening, or that the letters received are misread, misfiled, mislaid or forgotten; and

(2) when a person asserts a fact, doubting his recollection does not necessarily mean doubting that he speaks truthfully of his recollection: recollections can be faulty and incomplete, particularly those relating to events many months ago. A statement that a person does not recall receiving something may be honest even though he actually received it but misunderstood what it was or later confused its receipt with the receipt of something else or even completely forgot about its receipt.

43. With these possibilities in mind, I turn to consider whether on the material before him or her the continued defence of the appeal was so unmeritorious that it was unreasonable to continue it. In assessing that question I find it useful to imagine the officer asking: "is there a reasonable likelihood that this appeal will be dismissed"?. If the answer is no, then it would generally be (and in this case would be) unreasonable to continue to oppose the appeal.

44. In answering that question it will be reasonable to take into account a degree of uncertainty as to the credibility of prospective witnesses, the extent of the evidence they might give (which could extend beyond what they had thitherto said given the flexible and informal procedure of the tribunal) and consequently the weight which the tribunal might attach to their evidence. The question to be asked is not "do I accept the evidence I have at face value?", but: "on the assumption that the taxpayer (or HMRC's officer) is giving an honest recollection (when there is nothing to make me doubt the truthfulness of the taxpayer), what is the range of reasonably likely views which are tribunal will attach to the evidence after it is tested?".

45. When, at the time of preparing the statement of case, the person conducting the appeal for HMRC looked at the evidence before her she would see the consistent account of Mr Kellett that he had not received the follower notice. If the only evidence put before tribunal was witness's statement that he did not recall receiving a letter, a tribunal (like that in *Whittle)* might well a afford so little weight to that statement as evidence that the letter was not received that it would find it not shown that the letter had not been received. But if the taxpayer gave further evidence and stood up well in cross examination the position might be different.

46. It would be reasonable in my view, taking Mr Kellett's recollection as truthful, to anticipate that, after the evidence had been heard (and tested or expanded in questioning by the advocates and the tribunal), a tribunal's conclusions could reasonably lie in a range which started at one end with a conclusion that Mr Kellett was somewhat forgetful and disorganised so that little weight should be attached to his recollection, to, at the other end, a conclusion that he was of a meticulous nature and had a good memory which was supported by other circumstances and recollections to which substantial weight should be attached.

47. In the same way the person conducting the appeal would also see HMRC's assertion that the follower notice had been properly posted. They would have recognised mere assertions to that effect were unlikely to be accorded substantial weight. She would note the recorded usual practice of sending out the withdrawal letter and follower notice together but might discount that because the letters appeared to have been sent out by different offices or want to know whether Mr Kellett's case was a usual one. She might also note that that many other letters had actually been received by Mr Kellett. I think she could fairly have concluded that within the range of reasonably possible outcomes one was that the letter was found to have been so posted (with the effect that that s 7 Interpretation Act applied), although another reasonably possible outcome was that proper posting would not be found to be proven

48. Balancing these reasonably possible results the person conducting the appeal would in my view not have been unreasonable to conclude that there was a real possibility that the tribunal might find that the notice had been given (even though there would also be a real possibility that the tribunal would find it had not)

49. As a result I find that it was not unreasonable to pursue the appeal from the time of the preparation of the statement of case to the time when the witness statement for the appellant fell to be considered.

50. The pursuit of the appeal was not faultless. It would have been preferable to produce the evidence of Roseann Tarr at earlier stage and to seek clarification form the Appellant of his evidence of non receipt, so that the strength of the evidence could be tested before further costs were incurred, but these deficiencies do not seem to me to make the conduct of the appeal unreasonable.

Result

51. As a result I decline to order that HMRC pay the appellant's costs.

Right of Appeal

52. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 12 MARCH 2018