



TC01307

Appeal number TC/2010/3534 & 2170

Costs- appeal by the Appellant on the basis that the Respondents had acted unreasonably- but alleged unreasonable behaviour took place before the start of the proceedings - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

OATS SERVICES LTD

Appellant

- and -

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

Respondents

TRIBUNAL: S.M.G.RADFORD(TRIBUNAL JUDGE)

Sitting in public at 45 Bedford Square, London WC1 on 8 June 2010

Having heard Mr Maunsell managing director of the Appellant and Mr Fell instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This application relates to the appeal by the Appellant against decisions by HMRC to designate two consignments of wheat imported by the Appellant as low quality and to charge customs duty of £38,472.97.

2. On review of the decisions HMRC upheld the C18 demand notes issued by them in respect of the consignments of wheat but by letter dated 13 May 2011 HMRC withdrew the appealed decisions and agreed to repay the customs duty in respect of the relevant consignments.

3. The Appellant now seeks a costs order against HMRC and asks whether HMRC should pay interest on the customs duty to be repaid to it.

Background and facts

4. In August 2009 the Appellant imported two consignments of wheat which after sampling HMRC designated as low quality. The Appellant contended that in the sampling HMRC broke its own rules by using a short handled scoop instead of a sampling probe.

5. Additionally HMRC only drew a sample of one out of eight containers in one case and two out of ten containers in the second case.

6. The Appellant sent samples of the wheat to the official laboratory which was contracted by HMRC and the report from the official laboratory stated that the HMRC results were atypical.

7. On 9 December 2009 the Appellant requested a formal departmental review by HMRC and submitted to HMRC all the results including those from an independent surveyor in Argentina.

8. On 26 January 2010 the Appellant was notified by the HMRC reviewing officer that she upheld the HMRC findings.

9. On 16 February 2010 the Appellant appealed to the Tribunal against these findings.

10. The Appellant was notified by the Tribunal that a response from HMRC in respect of the two cases must be received by 15 May 2010 and 20 June 2010 respectively.

11. On 10 June 2010 HMRC requested an extension in order to amalgamate the cases. The statement of case was finally received on 7 July 2010.

12. At a preliminary hearing on the matter on 29 November 2010 the Appellant and HMRC were directed to serve expert witness statements by 4 February 2011 and 11 March respectively.

13. HMRC subsequently requested an extension to 13 May 2011 which was granted.

14. On 14 May 2011 the Appellant received a letter from HMRC stating that they were withdrawing their review decisions.

The Law

5 15. Under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which came into force on 1 April 2009, costs are governed by rule 10. Rule 10 (1)(b) states that the Tribunal may only make an order in respect of costs if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting of proceedings.

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Appellant's submissions

16. The Appellant submitted that there were major failings by HMRC which could be termed unreasonable. This was not a case where the dispute centred around an interpretation of the legislation but from an early stage the Appellant made it clear that HMRC had not complied with its own rules.

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17. The Departmental Good Practice Guide stated that "In accordance with EC Directive 76/371, using a sampling probe/spear extract incremental samples from throughout the consignment noting on the examination form as to where each sample was drawn from" but HMRC had not used a sampling probe/spear to extract the samples.

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18. The Appellant had immediately produced evidence and photographs to demonstrate that HMRC had used a short-handled scoop in direct contravention of their own regulations.

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19. The Appellant submitted that as soon as HMRC were made aware of this fact they should have overturned their review decision within a reasonable short period of time thereby saving both the Tribunal and the Appellant further time and costs as this breach of the regulations would have adversely have affected the sampling of the wheat.

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20. Additionally the reviewing officer had entirely missed the fact that the sampling officer had incorrectly stated the container numbers on his documentation and despite both the Appellant and the original bill of lading stating the correct numbers she continued this mistake.

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21. The Appellant submitted that it suspected that the review had not been carried out in a sufficiently rigorous and professional manner to identify failings in the sampling of the consignments. Had this been done there would have been no requirement for the Appellant to appeal to the Tribunal. The Appellant submitted that this was not reasonable behaviour by HMRC in defending their case.

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22. The Appellant submitted that samples were sent by the Appellant to the official laboratory which stated that the HMRC results were atypical.

5 23. The Appellant submitted that it was a small company to which £38,472.97 was a very significant sum to have unexpectedly removed from its assets for just under two years.

10 24. At every stage of the preliminary matters HMRC had failed to meet the deadlines and this was unreasonable.

15 25. Council Regulation EC No. 2913/92 enshrines “the right of traders to be treated fairly” and the Appellant submitted that with respect to both these cases the actions of HMRC had resulted in the Appellant being treated unfairly. Firstly by HMRC not recognising at an early stage that they had transgressed their own regulations and therefore their decision was likely to be flawed. Secondly by their inability to comply with the time limits either imposed by themselves or the Tribunal.

20 26. The Appellant submitted that this had unreasonably delayed the resolution of the matter thereby withholding monies from the Appellant for an unreasonable period of time.

25 27. In conclusion the Appellant was seeking two costs which were the additional costs of testing a large number of samples to provide the evidence to the Tribunal amounting to £1,923.58 and the cost of the expert witness evidence directed by the Tribunal which amounted to £1,200.

HMRC’s Submissions

30 28. HMRC submitted that no costs order should be made against them. HMRC submitted that by virtue of Rule (10)(1)(b) as set out above the Tribunal could only make an order for costs if HMRC had acted unreasonably in defending or conducting the proceedings. Some of HMRC’s conduct which the Appellant contended was unreasonable predated the Appellant’s appeal which was deemed to be the start of the proceedings.

35 29. HMRC submitted that the appeals were concerned with two basic questions of fact. Firstly whether the first consignment of wheat should be classified as medium or high quality on the basis of its protein content; and secondly whether the second consignment of wheat should be classified as medium or high quality on the basis of the besatz content. This was a question of fact which could only be determined by reference to expert evidence.

40 30. HMRC instructed an expert and following the expert’s report a decision was taken to withdraw the review decisions.

31. HMRC submitted that the appeals could not be determined or properly assessed without expert evidence. Accordingly HMRC could not be said to have acted

unreasonably in withdrawing their review decisions only after receipt and consideration of the expert report.

5 32. Insofar as the interest was concerned H,RC submitted that the Tribunal could only consider this if an appeal had been made to them on the matter of interest and the Appellant had not submitted such an appeal to the Tribunal. The appeals made to the Tribunal related only to the classification of the consignments.

Findings

10 33. The Tribunal found that HMRC had not acted unreasonably once the proceedings commenced. The extra costs incurred by the Appellant and sought by them from HMRC all related to the testing of the wheat.

15 34. The Tribunal however had sympathy for the Appellant who had been without the monies expended on the customs duties for some two years until HMRC repaid them. Additionally the Appellant had expended the costs claimed as a direct result of what appeared to the Tribunal to be a less than thorough review by HMRC of its original decision. The Tribunal suggests that this matter be pursued by the Appellant through the complaints procedure of HMRC.

35. The Tribunal is unable to make a finding on the matter of interest until the Appellant makes an appeal in respect of the interest.

Decision

20 36. The appeal in respect of the Appellant's claim for costs is dismissed and it is recommended that the Appellant makes an appeal to the Tribunal in respect of the interest.

25 37. 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.

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TRIBUNAL JUDGE
RELEASE DATE: 7 July 2011

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