



TC02514

Appeal numbers: TC/2010/06808 & TC/2010/06809

Procedure – costs – late application for costs order – no representations received from Appellant – time limit extended – costs schedule attached to application – no representations on costs schedule received – summary assessment issued in the amount claimed – indication given of willingness to make an “in principle” costs order in appropriate circumstances if receiving party applies for order waiving requirement to provide a schedule of costs with its application for an order

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**VARDY PROPERTIES (1) Appellants
VARDY PROPERTIES (TEESSIDE) LIMITED (2)**

-and-

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

Costs order made after receiving an application dated 16 November 2012 from the Respondents and having given the Appellants the opportunity to make representations.

DECISION

Introduction

1. This decision concerns an application for costs arising out of an unsuccessful
5 appeal, in a situation where the appeal had been allocated as a complex case and the taxpayer had not opted out of the costs-shifting regime under rules 23 and 10(1)(c)(ii) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (“the Rules”).

The facts

10 2. The Appellants appealed against amendments made by HMRC to returns in relation to stamp duty land tax (“SDLT”) delivered by the Appellants. HMRC had made amendments to two SDLT returns (one from each Appellant) but had made it clear that the amendments were made “in the alternative” – i.e. they were not certain
15 which of the amendments was correct but they accepted that if one of them was found to be correct, the other would automatically fail.

3. During the course of the appeals (which were case managed and heard together, effectively as a single appeal), the Appellants applied for them to be allocated to the complex category under rule 23 of the Rules and this was done on 27 June 2011. The Appellants did not send or deliver to the Tribunal any written request that the
20 proceedings be excluded from potential liability for costs under paragraph 10(1)(c)(ii) of the Rules. Their intention was clearly to bring the appeals within the costs-shifting regime, with a view to recovering their costs in the event of succeeding in the appeals.

4. Ultimately the appeal of the first Appellant was dismissed and the appeal of the second Appellant was allowed, in a decision of this Tribunal released on 6 September
25 2012.

5. On 13 November 2012 HMRC wrote to the Tribunal by email, applying for an order for the first Appellant to pay their costs of the appeal.

6. In their application, HMRC acknowledged that they were submitting it outside the deadline laid down by rule 10(4) of the Rules. They requested the Tribunal to use
30 its powers under rule 5(3)(a) and/or 7(2)(a) of the Rules to extend the time limit or waive compliance with it. The reason for the lateness was “due to the lawyer who had conduct of the appeal moving teams within this Office at the time the decision was released”.

7. Strictly, the time for receipt of the costs application at the Tribunal under rule
35 10(4) of the Rules was 4 October 2012. HMRC were therefore 40 days late in making their application.

8. HMRC sent a copy of their application direct to the first Appellant’s representatives. On 16 November 2012, the Tribunal sent a further copy to them, giving them 14 days to make any representations that they wished to make before the

Tribunal reached a decision on the application. No representations have been received from them.

Discussion and decision

5 9. After considering all the circumstances (including the length of the period of delay, the amounts involved, the prejudice caused by the delay, the reason given for it by HMRC and the fact that the Rules require (in Rule 10(3)(b)) any application for costs to be accompanied by a schedule of the costs claimed “in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs... if it decides to do so”), I consider it to be fair and just to make an order extending the time limit for
10 delivery of the costs application and/or waiving compliance with the strict deadline set out in the Rules, and I therefore do so.

15 10. Proceeding to consider the substantive application, I note that it is for a total sum of just under £30,000. It includes fees charged in respect of the services of fee earners (and a costs draftsman) within the Solicitor’s Office of HMRC as well as counsel’s fees. It has been made largely in the format set out in Appendix 3 to the Guide to the Summary Assessment of Costs 2005 Edition (Civil Procedure Rules, 48.16 onwards) (“the Costs Guide”), and that is the format in which the Tribunal would expect to see such schedules produced to it.

20 11. First, I consider there is no reason not to follow the usual course in such matters of making an order for costs in favour of the successful party and against the losing party. In principle, I see no reason why HMRC should not be entitled to their costs against the first Appellant.

25 12. As the Appellants have not made any representations, no attempt has been made to differentiate the position of the second Appellant from that of the first Appellant. It might perhaps have been argued that as the second Appellant had been successful in its appeal, not only should HMRC not be able to recover some proportion of their total costs but they should be required to pay the second Appellant’s costs in addition.

30 13. In the circumstances of this case, however, I see no valid basis for such an argument. The appeal was viewed by all parties as a single composite appeal in relation to the Appellants’ tax planning arrangements. Those arrangements were found to fail, and I would consider it entirely inappropriate to penalise HMRC in costs for the fact that one of the two alternative appeals was technically allowed when the overall arrangements were found to fail. I bear in mind also that if the first Appellant’s arguments had succeeded at the hearing, the Tribunal found that the
35 second Appellant’s appeal would then have failed.

40 14. I therefore order that the first Appellant must pay HMRC’s costs incurred in the combined appeals. HMRC have not stated whether they are claiming costs on a standard or indemnity basis, but as the point has not been raised, I assume they are only claiming on a standard basis. I leave open the question of whether an indemnity basis might be argued for where admittedly artificial tax planning arrangements fail on appeal.

15. It is clear (see *Re Eastwood deceased* [1975] Ch 112 (Court of Appeal) that HMRC may recover costs in respect of their Solicitor's Office employees, and the hourly rates claimed are in line with the relevant Guideline Hourly Rates set out in Appendix 2 to the Costs Guide.

5 16. In the absence of any representations from the first Appellant to the contrary, I consider the fees claimed to be reasonable on the standard basis, applying hourly rates of £317 for "Grade A" fee earners, £242 for "Grade B" fee earners and £126 per hour for "Grade D" fee earners and "Law Costs Draftsman" within the Office of the
10 Solicitor to HMRC in Bush House, London WC2. The time spent, as summarised in the schedule of costs, seems to me to be perfectly sensible in the context of an appeal of major significance to both parties where the hearing was spread over four separate days.

17. Rather than refer the matter for detailed assessment I therefore consider it appropriate to make a summary assessment of the costs in the amounts claimed by
15 HMRC and I therefore order the first Appellant to pay to HMRC, within 28 days of the date of release of this decision, the sum of £29,901.23 in respect of their costs of the appeal.

18. I would also mention in passing a point that arises from my detailed consideration of this application. The Rules require that any party seeking an order
20 for costs must send with its 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". For the vast majority of cases dealt with by the Tribunal, this procedure is appropriate. However, where the amount of time and effort involved in drawing up the appropriate schedule may be large, it appears
25 unfortunate that a party should be put to the time and effort of doing so before establishing an "in principle" entitlement to costs, especially if there are potential complications or disputes about the precise terms of any order (e.g. as to an allowable proportion, as to the basis of assessment or even as to the appropriateness of an order at all).

30 19. In this connection, I would point out that the Tribunal has a general power, under rule 7 of the Rules, to waive a requirement of the Rules if it considers it "just" to do so – but only after there has been a breach of the requirement. It also has a general power to extend time limits under Rule 5. There is also, of course, the overriding objective of fairness and justness contained in Rule 2.

35 20. Taking all those matters into consideration, it may be helpful for me to indicate that in the circumstances of this case, if HMRC had submitted a prompt costs application without the appropriate schedule attached (but including an application to dispense with the requirement for the schedule), I would have been prepared to waive the requirement to deliver the schedule of costs with the application. I would have
40 given appropriate directions to enable the costs application to be determined "in principle" before requiring HMRC to deliver a detailed schedule of costs at a later date if the figures could not be agreed between the parties. For situations where the

amounts of costs involved are large and complex, this seems to me to be a sensible step which is only likely to save potential wasted time and costs for all parties.

21. Clearly every case is different and I cannot bind any future Tribunal but I trust that parties in future complex appeals will find my comments helpful.

5 22. 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
10 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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**KEVIN POOLE
TRIBUNAL JUDGE**

RELEASE DATE: 1 February 2013

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