



TC03018

Appeal number: TC/2013/03993

COSTS –misleading statements by HMRC causing appeal to be submitted in error – despite that tribunal has no power to award costs.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR R M DEHN and MRS DEHN

Appellant

- and -

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

TRIBUNAL: JUDGE RICHARD BARLOW

Sitting in public at Manchester on 30 September 2013

Mr Hammad Baig appeared for the Appellants (by telephone)

**Mr Ralph Kesteven of the office of the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an application for costs by the appellants in respect of an appeal they
5 lodged against two penalties for excise matters. The substantive appeals in respect of those excise matters are not subject to this appeal, which relates only to the penalties.

2. In fact no penalties were imposed. The facts are as follows.

3. The Commissioners sent the appellants two letters dated 26 January 2011 referring to penalties of £1,133 and £13,774. It is true that a close reading of those
10 letters would have indicated that the penalties had not by then been imposed and that the Commissioners were only seeking the prior agreement of the appellants to the calculation of assessments that they then intended to issue. That somewhat extraordinary procedure was adopted for reasons best known to the Commissioners.

4. On 14 February 2011 the appellants' then advisers wrote to the Commissioners
15 disagreeing with the assessments because they claimed there was a reasonable excuse consisting of the fact that the excise duty underpayment alleged by the Commissioners was the fault of a fraudulent third party.

5. On 24 February 2011 the Commissioners wrote back saying that they did not
20 accept that the fraud of a third party was a reasonable excuse because the appellants could have carried out due diligence on their supplier. At that stage it was reasonable for the appellants and/or their advisers to think that the penalties would be imposed but equally the then adviser was apparently aware that the penalties had not actually been imposed and no appeal was submitted.

6. Nothing more happened about the penalties between 24 February 2011 and
25 some date which is not precisely known but which fell between 23 May 2013 and 10 June 2013. The Commissioners never informed that appellants that they had decided not to issue any penalties. On that unknown date a witness statement was served in respect of the related excise appeals referred to in paragraph 1 of this decision.

7. The witness statement was that of officer Kevin DGLISH and in it he said:

30 "On 26 January 2011 I sent two letters to Mr Dehn detailing the penalties due, one for £1,133 and the other for £13,774. These I produce as exhibits KD11 and KD12".

8. By this time the appellants' former adviser had died and, upon seeing the
35 witness statement and reading the letters attached thereto, the appellants' current advisers wrote to the Commissioners on 10 June 2013 saying that the appellants themselves had not seen the letters referring to the assessments of penalties and that they therefore proposed to submit out of time appeals against the assessments to penalties. They submitted a notice of appeal on 10 June 2013.

9. It should be noted that Mr Daghish's statement refers to "penalties due" and although the letters attached, if read carefully, could be seen to be saying that penalties were only proposed as at 26 January 2011 rather than that any had been imposed, Mr Daghish's statement by referring to penalties due suggests that the penalties had in fact been imposed at some date between 26 January 2011 and the date of the witness statement.

10. I would add that referring in that witness statement to penalties that had not been imposed but which the Commissioners had considered imposing and had then decided not to impose, was a statement that seems to have been added for purely prejudicial reasons. When I asked about that Mr Kesteven said that they had been referred to as background information, the Commissioners' customary excuse for making such prejudicial statements. Mr Kesteven was repeating what the Commissioners had said in correspondence namely that they had been referred to "simply to add to the full picture of events pertinent to the Excise appeal". These were not events that were pertinent to the excise appeal and reference to them was clearly prejudicial whether or not that was the intention of the witness.

11. I do not think the appellants or their representative can be criticised for submitting an out of time appeal as soon as they had received Mr Daghish's statement. Whatever the letters attached to it might have meant, the statement itself strongly implied that penalties had been imposed and the appeal would have been approximately two years out of date if that had been the case so the representative's prompt action was both understandable and appropriate.

12. However, there was in fact no appealable decision. The Commissioners informed the appellants' representative of that fact on 22 July 2013 and invited the appellants to withdraw the appeal or, as might be said the purported appeal, in respect of the penalties. The appellants have expressed their willingness to withdraw the appeal but only if the Commissioners agree to pay their costs.

13. The Tribunal's powers to award costs are strictly limited and are limited to those given by or under statute. The costs powers are contained in section 29(4) of the Tribunals, Courts and Enforcement Act 2007 and rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

14. Section 29(4) of that Act only applies to "wasted costs" where the Commissioners' legal representative (i.e. the solicitor to the Commissioners) has acted improperly, unreasonably or negligently. No such allegation could be made in this case. The solicitor's office acted promptly and appropriately in pointing out that the appeal was misconceived and cannot be held responsible for Mr Daghish's misleading statement.

15. The Tribunal Rules allow costs to be awarded against a party, which includes the Commissioners, but only where the party or its representative has acted unreasonably in "bringing, defending or conducting the proceedings". Clearly the Commissioners did not bring the proceedings. They did not act unreasonably in defending them because the proceedings were misconceived and they pointed that out

as soon as they became aware of them or at least within a reasonable time of doing so. They have not done anything unreasonable in conducting the proceedings because they were entitled to resist an order for costs and asked the appellants to withdraw the appeal as soon as it became apparent that an appeal had been submitted in error.

5 16. The Commissioners' conduct in serving a witness statement that gave the impression that assessments had been issued when they had not is no doubt a cause for complaint on the part of the appellants but it does not give rise to any ground for an award of costs by the tribunal.

10 17. The application for costs is therefore dismissed albeit that the Tribunal would have been minded to make an award had it had the power to do so.

15 18. 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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**RICHARD BARLOW
TRIBUNAL JUDGE**

RELEASE DATE: 29 October 2013

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