



TC03385

Appeal number: TC/2012/08254

PROCEDURE – costs – whether Respondents conduct in defending appeal against second decision not to restore vehicle was unreasonable – yes – application by Appellant for costs allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LOGISTIKA PEKLAJ AS

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 19 February 2014

Mr Benjamin Douglas Jones, Counsel, instructed by Miller Rosenfalck, for the Appellant.

Mr William Hays, Counsel, instructed by the General Counsel and Solicitor to the Director of Border Revenue, for the Respondents.

DECISION

Introduction

5 1. This decision relates to an application for costs made by Logistika Peklaj AS d.o.o. (“the Appellant”) consequent upon its successful appeal against the decision of the Director of Border Revenue (“the Respondents”) to return the Appellant’s seized tractor and trailer upon payment of a fee of £32,285.

10 2. Following the Tribunal’s direction, set out in its decision released on 29 October 2013, (the “October 2013 Decision”) that the Respondents carry out a review of its decision I am told that the vehicle has now been restored to the Appellant.

15 3. The Respondents’ decision only to restore the vehicle on payment of a fee followed a previous direction of the Tribunal in its decision released on 25 May 2012 (“the May 2012 decision”) that a further review of the Respondents’ original decision not to restore the vehicle be carried out, taking into account the Tribunal’s findings of fact in its first decision. Amongst the Tribunal’s findings of fact in its first decision was a finding that the Appellant was honest and had taken reasonable steps to prevent smuggling by its drivers.

Basis of the Appellant’s application

20 4. The Appellant applies for its costs in respect of its second appeal, in respect of which the Tribunal made the October 2013 Decision, under Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. This provision allows the Tribunal to make an order in respect of costs:

25 “..if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings”

30 5. The Appellant contends that the Respondents have acted unreasonably in defending the second appeal. Mr Douglas Jones in his opening set out succinctly why the Appellants contended that the Respondents acted unreasonably. His starting point was the unreasonableness of the decision of Mr Brenton, the Respondents’ Officer who carried out the review which was the subject of the second appeal, as found to be the case by the Tribunal in the October 2013 Decision.

35 6. The foundation of this review was to go beyond not only the May 2012 Decision, but also the position taken by the Respondents on the first appeal, which was to concede that the Appellant was honest and not complicit in the smuggling which led to the seizure of the vehicle. The Respondents had the opportunity to cross examine the Appellant’s principal witness but did not do so. In those circumstances, it was unreasonable to defend the proceedings. Mr Brenton’s case theory, which was that the due diligence carried out by the Appellant was a smokescreen to hide its own complicity, was perverse and to have defended the proceedings in those circumstances
40 was unreasonable.

The Respondents' position

7. Mr Hays submitted that it was important to separate the unreasonableness of Mr Brenton's decision (which was now with the benefit of hindsight accepted) and the question as to whether it was reasonable to defend the second appeal. There was a public interest in being able to resist appeal proceedings without fear of being penalised in costs and in defending an officer's decision. Mr Hays pointed out that in its decision on the second appeal:

- (1) it was common ground that there should be no further oral evidence which shortened the proceedings;
- (2) the Tribunal found that Mr Brenton acted in good faith;
- (3) Mr Brenton acted with the benefit of experience;
- (4) although the first decision of the Tribunal recommended restoration of the vehicle it did not explicitly recommend it should be done free of charge;
- (5) the Tribunal did not accept the Appellant's submission that there had been an abuse of power.

In the light of all of these factors, it could not, Mr Hays submitted, be said that the decision to defend the proceedings was unreasonable.

Discussion

8. In my view it is correct, as Mr Hays submits, to separate the decision which was the subject of the review which was accepted to be unreasonable, from the decision to defend the proceedings. It is clear that the Tribunal has no power to award costs in relation to matters occurring before the proceedings commenced: see my recent decision in *Stomgrove Limited v HMRC* [2014] UKFTT 169 (TC) where I reviewed the relevant authorities.

9. However, in my view the correct approach is for the Tribunal to put itself in the shoes of the Respondents' officer who, on reviewing the notice of appeal has to consider whether to defend the appeal or concede that a further review should be undertaken with a view to restoring the vehicle.

10. In my view a person in that hypothetical officer's position, acting reasonably, would have reviewed Mr Brenton's decision and considered the prospects of success on the appeal. In my view such an officer would have had no hesitation in concluding that the appeal should not be defended. It should have been readily apparent to such an officer that Mr Brenton's approach was perverse, essentially failing to take proper account of the findings of fact made by the Tribunal in its first decision. No reasonable officer could have concluded that the recommendation in the first decision was pointing to anything other than restoration without a fee; indeed the Respondents' policy in the light of the Tribunal's findings of fact would indicate strongly such an outcome.

11. I reject Mr Hays' submissions on the chilling effect of a threat of a costs order. Rule 10(b) is designed to strike a balance between not imposing a costs penalty on a

party who defends proceedings whilst protecting the other party against unreasonable behaviour. The Respondents should be in no better position than any other party in this regard just because it is a public body. Indeed, perhaps higher standards should be expected because of its status. The fact that Mr Brenton may have acted in good faith and did not abuse his power is irrelevant; the test is whether the decision to defend was unreasonable in the light of the basis on which the decision was made and the prospects of success on appeal. It is plain to me that the appeal should never have been defended and in those circumstances the Appellant is entitled to its costs.

12. The Respondents represented to me after the hearing that there was no public interest in publishing this decision. I disagree. It is important that the public understands the circumstances in which costs orders may be made in the (fortunately) rare occasion where a public authority defends proceedings of this kind unreasonably. Hopefully this will assist in encouraging a higher standard of rigour and objectivity in the future to prevent similar sorry episodes occurring.

15 **Amount of costs to be awarded**

13. The parties have requested that I carry out a summary assessment of the costs set out in the schedule filed with the Appellant's application, as supplemented by a further application for disbursements and the costs incurred in relating to the hearing of this application.

14. In my view the costs on the schedule are reasonable. Accordingly I award the full amount of £3,725 in respect of solicitors' fees and £2,500 in respect of counsel's fees. To these fees must be added solicitors' costs of £400 and Counsel's fees of £750 for the costs application.

15. With regard to disbursements, I allow the translator's fees of £530.40 and solicitors' travel expenses of £10.10 and the Appellant's travel expenses of £457.03. I allow one night's hotel accommodation of £92.65.

16. I therefore direct that the Respondents pay the Appellant its costs and disbursements amounting to £8,465.18 in total.

17. 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.

**TIMOTHY HERRINGTON
TRIBUNAL JUDGE**

RELEASE DATE: 6 March 2014