



TC03441

Appeal number: TC/2013/04388

*Procedure – costs – application made for payment of costs in connection with appeal where HMRC had withdrawn the disputed decision shortly after notification of the appeal – original application deficient by failing to include schedule of costs under Rule 10(3)(b) Procedure Rules – opportunity given to remedy the default – no response from Appellant and therefore application refused – scope of potential costs order considered as part of decision – dicta of Upper Tribunal in *Catana v HMRC* considered and explained, First-tier decision in *G Wilson (Glaziers) Limited v HMRC* approved – costs of preparation of notice of appeal potentially recoverable*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

R A DRINKS LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in chambers in Birmingham on 20 March 2014

Full findings of fact and reasons for a decision issued on 7 February 2014

Rainer Hughes, solicitors for the Appellant

HM Revenue and Customs were not represented in connection with the application

DECISION

Introduction

1. This decision concerns my refusal of an application for an order for costs by
5 the Appellant following the withdrawal by HMRC from the appeal.

The facts

2. On 27 June 2013 the Tribunal received a notice of appeal from the Appellant's
solicitors in respect of an Excise Duty assessment for £113,513 in respect of assorted
beer, cider and wine which HMRC alleged to be in the Appellant's possession in
10 circumstances where the Appellant was liable to unpaid Excise Duty on it.

3. The Tribunal invited HMRC to notify it in due course of the outcome of the
Appellant's hardship application, when notifying the appeal to them on 2 July 2013.

4. HMRC wrote to the Tribunal on 12 July 2013, asking for a two month stay in
order to consider the question of hardship.

15 5. HMRC wrote again to the Tribunal on 30 August 2013, informing it that they
had written to the Appellant on 22 July 2013 to confirm that they had withdrawn their
disputed decision (to raise the Excise Duty assessment). As the Appellant had not
withdrawn its appeal, they requested the Tribunal to contact the Appellant to establish
its intentions.

20 6. On 16 September 2013 the Tribunal wrote to the Appellant's representatives
with a copy of HMRC's letter dated 30 August 2013, asking for their representations
within 28 days.

25 7. On 18 September 2013, the Appellant's representatives wrote to the Tribunal,
submitting a two line application for an order that the Respondents do pay its costs of
the appeal.

8. The application was not made in accordance with the Tribunal's procedure
rules, in particular rule 10(3), in that it did not have attached to it a schedule of costs
claimed in sufficient detail to enable the Tribunal to undertake a summary assessment
of such costs if it chose to do so.

30 9. On 26 September 2013, HMRC wrote to the Appellant's representatives with
reference to their application.

10. On 21 October 2013 the Tribunal wrote to the Appellant's representatives,
asking for an application to be submitted that complied with Rule 10(3) of the
Tribunal's procedure rules by attaching an appropriately detailed schedule of costs
35 claimed.

11. Nothing further having been received from the Appellant or its
representatives, the Tribunal wrote again to the representatives on 10 December 2013,

stating that “unless the Tribunal receives an application in the correct form within 28 days of the date of this letter, we shall assume that you do not wish to pursue the costs application and we will finalise matters appropriately.”

5 12. Nothing further having been received in reply, on 22 January 2014 I prepared a summary decision (which was issued on 7 February 2014), in which I refused the application dated 18 September 2013 on grounds that it did not comply with the requirements of the Tribunal’s procedure rules on the basis mentioned above, and the Appellant had not remedied the failure within the time allowed by the Tribunal for doing so.

10 13. On 4 March 2013, the Tribunal received a request for full findings of fact and reasons for my decision. This decision is issued in response to that request.

The law

15 14. This appeal not having been allocated as a complex case under the Tribunal’s procedure rules, an order for costs may only be made if “the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings” (rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”)).

15. Rule 10(3) of the Rules requires that:

20 “A person making an application for an order under paragraph (1) must –

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that an order be made; and

25 (b) send or deliver with the 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.”

16. Rule 7 of the Rules, headed “Failure to comply with rules, etc”, provides as follows:

30 “(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include –

35 (a) waiving the requirement;

(b) requiring the failure to be remedied;

- (c) exercising its power under rule 8 (striking out a party's case);
- (d) restricting a party's participation in proceedings; or
- (e) exercising its power under paragraph (3)."

5 17. No such schedule was delivered with the application. I took the view, when the application was first received, that it was appropriate to point out the deficiency to the Appellant's representatives and give them time to remedy it (rather than simply refuse the application outright for non-compliance). This action was taken under Rule 7(2)(b) above.

10 18. Having given the Appellant a more than adequate opportunity to remedy the deficiency in its application, without receiving any response within the 28 days specifically allowed to do so, I took the view that it was just to refuse the application. In doing so, I noted that HMRC had informed the Appellant of their withdrawal of the disputed decision within three weeks of being notified of the appeal, and the amount
15 of any costs in respect of which an order could be made was therefore likely to be small, even if unreasonable conduct could be established; thus it was not appropriate, in my view, for any further amounts of judicial and administrative time to be spent on the matter.

20 19. In considering the likely size of any possible costs claim, I bore in mind the guidance given by the Upper Tribunal in *Catana v HMRC* [2012] UKUT 172 (TCC) at [10], where it was made clear that any costs order could not apply to "pre-appeal" costs:

25 "…so much of Mr Catanã's application as respects any costs he incurred before the proceedings before the First-tier Tribunal were brought cannot succeed, irrespective of its underlying merits…"

30 20. It must be remembered that this statement was made in the context of a claim by Mr Catana to recover all his costs incurred in connection with the lengthy investigation that had preceded his appeal. I do not think the Upper Tribunal intended its above comment to mean that there should be a "hard cut-off" which prevented all costs incurred before the date of commencement of the appeal to be excluded from any costs order, for example the costs of preparing the notice of appeal itself. The First-tier Tribunal (Judge Kempster) has considered the point in detail (see *G Wilson (Glaziers) Limited* [2012] UKFTT 387 (TC) at [7] to [12]) and reached a similar conclusion. For my part, I would consider that the costs of preparing a notice of
35 appeal should be capable of inclusion within any costs order – such costs would certainly seem to me to be properly described as being "of or incidental to" the proceedings (as contemplated in s 29 of the Tribunals, Courts and Enforcement Act 2007, which provides the statutory origin for any costs application). Of course, in the Courts analogous costs can be recovered.

Decision

21. However, even with this in mind, it seemed to me that any prospective claim for costs was still likely to be comparatively small and therefore it was appropriate to close the door to any costs application after giving one fair opportunity to remedy the deficiency in the original application.

22. The Appellant's application for costs is therefore REFUSED.

23. 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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**KEVIN POOLE
TRIBUNAL JUDGE**

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RELEASE DATE: 25 March 2014