



TC03547

Appeal numbers: TC/2012/11138

***COSTS – application by Appellant for costs on ground of unreasonable behaviour
by Respondent - application refused***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MIDI LOC SARL

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

TRIBUNAL: JUDGE GREG SINFIELD

Application determined on 7 May 2014 on written submissions only pursuant to rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, each party having consented to the matter being decided without a hearing.

DECISION

Introduction

1. This decision concerns an application by the Appellant (“Midi Loc”) for an order that the Respondent should pay Midi Loc £17,500 in respect of its costs in relation to this appeal. The application was made under section 29 of the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”) and Rule 10(1)(a) and/or (b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the FTT Rules”).

2. In summary, Midi Loc claims that it incurred costs in relation to these proceedings as a result of the unreasonable behaviour of the Respondent detailed below. The Respondent opposes the application and contends that each party should bear its own costs. For the reasons given below, I do not consider that the Respondent has acted unreasonably in defending or conducting these proceedings and, accordingly, Midi Loc’s application for costs is refused.

Brief history of the proceedings

3. On 14 December 2012, Midi Loc appealed to the Tribunal against the Respondent’s decision, contained in a letter dated 15 November, confirming an earlier decision not to restore a seized vehicle. The vehicle, a tractor and trailer unit, had been seized on 4 July on the ground that it contained imported excise goods in respect of which duty had not been paid. Midi Loc did not challenge the seizure but, on 7 September, requested restoration of the vehicle. The request was refused, in a letter dated 25 September, on the ground that the request was made late and the vehicle had already been sold by the time the request was made. The letter stated that there were no exceptional circumstances that would justify restoration contrary to the Respondent’s normal policy and the Respondent could not restore something that it no longer held. Midi Loc asked for the decision to be reviewed which led to the decision that was the subject of the appeal.

4. On 6 February 2013, the Respondent produced a statement of case which was served on Midi Loc on 13 February. On 15 March, Midi Loc applied to the FTT for a direction that the Respondent provide further and better particulars and complete a notice to admit facts. The applications were refused by the FTT at a hearing on 25 June 2013. At the hearing, the FTT gave Midi Loc permission to amend its grounds of appeal to make clear that it was appealing against the Respondent’s refusal to make any payment in lieu of restoration of the vehicle that had been sold.

5. On 29 August 2013, Midi Loc submitted amended grounds of appeal. The Respondent served an amended statement of case on 25 October. Midi Loc states that there was a delay in it receiving documents at this stage but it makes no criticism of the Respondent for such delay.

6. On 11 November 2013, the Respondent served its list of documents on Midi Loc in accordance with directions issued by the FTT on 6 September. The list included a document described as “valuation details provided by Wilsons for the Unit

and trailer”. Midi Loc considered that this indicated that the Respondent had sold the vehicle for value, which the Respondent had not formally accepted at that time. On 22 November, Midi Loc wrote to the Respondent asking for further details in relation to the disposal of the vehicle by 13 December. On the same day, Midi Loc wrote to
5 the FTT to request that the appeal be stayed until the Respondent replied to Midi Loc’s letter. On 4 December, the FTT notified Midi Loc that its request for a stay had been refused but that it could apply for a direction that the Respondent provide further and better particulars. The FTT’s letter was copied to the Respondent.

7. By letter dated 11 December 2013, the Respondent served a short witness
10 statement from the officer who had conducted the review that led to the decision under appeal. On 12 December and before the expiry of its time limit for the Respondent to provide further details in relation to the disposal of the vehicle, Midi Loc applied to the FTT for a direction that the Respondent amend its statement of case to provide further information in relation to the disposal of the vehicle. Midi Loc
15 also applied for its costs of making the application. On 18 December, and before receiving any response to its application of 12 December, Midi Loc applied for a direction that the appeal be allowed on the papers.

8. On 9 January 2014, the FTT sent a letter to the Respondent asking for
20 comments on Midi Loc’s application for the appeal to be allowed. In fact, the Respondent had already replied by letter dated 8 January. The Respondent confirmed that the vehicle had been sold and gave the amount that had been obtained. The Respondent criticised Midi Loc for making four applications which, the Respondent alleged, had delayed the hearing of the case. The Respondent sent a further letter, dated 10 January, in response to the FTT’s letter of the previous day. The Respondent
25 stated that Midi Loc was trying to litigate the appeal on the papers and stated that the Respondent considered that there should be a formal hearing with live evidence.

9. In the absence of the consent of the Respondent, which is required under Rule
30 29(1)(b) of the FTT Rules before the FTT can make a decision that disposes of proceedings without a hearing, the FTT could not allow Midi Loc’s application of 18 December 2013. The FTT refused the application in a letter dated 16 January 2014. The FTT also refused Midi Loc’s application of 12 December 2013 on the basis that the points could be dealt with in evidence or submissions at the hearing. The FTT asked the parties to provide dates to avoid and time estimates so that the case could be listed for hearing.

35 10. In a letter dated 29 January 2014, the Respondent confirmed that, having re-appraised the policy guidance in Public Notice 12A, the review officer had conducted a re-review of her original decision. On the basis that Midi Loc was not at fault in relation to the seizure and the vehicle had been sold at the time of appeal, the Respondent had decided to make an offer of compensation in lieu of restoration to
40 Midi Loc. Accordingly, the Respondent no longer contested Midi Loc’s appeal.

11. On 8 March 2014, Midi Loc made its application for costs. The Respondent provided a note in response on 8 April and Midi Loc provided some further submissions on 15 April.

Legislation

12. Section 29 of the TCEA provides that the FTT has power to determine by whom and to what extent costs of and incidental to proceedings shall be paid but this power is subject to the FTT Rules.

5 13. Rule 10 of the FTT Rules rule provides:

“(1) The Tribunal may only make an award in respect of costs ... –

(a) under section 29(4) of the 2007 Act (wasted costs);

10 (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting of proceedings; or

(c) ...”

Rule 10(1)(c) relates to proceedings that have been allocated as a Complex case and is not relevant to this appeal.

14. Section 29 of the TCEA provides as follows in relation to wasted costs:

15 “(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may

(a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

20 the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) ‘wasted costs’ means any costs incurred by a party

25 (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

30 (6) In this section ‘legal or other representative’, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.”

15. In summary, the FTT can only award costs in relation to these proceedings if Midi Loc can establish that

35 (1) it has incurred costs as a result of “any improper, unreasonable or negligent acts” of the Respondent’s legal or other representative; or

(2) that the Respondent has “acted unreasonably in bringing, defending or conducting these proceedings”.

Submissions

16. Midi Loc made its application for costs under rule 10(1)(a) and/or (b) of the FTT Rules. Its primary submission was that costs should be awarded under rule 10(1)(b) because the Respondent acted unreasonably in defending or conducting these proceedings.

17. Midi Loc submitted that the Respondent's case was always unarguable. Until the review in January 2014, the Respondent had sought to maintain that it was reasonable not to restore the vehicle to Midi Loc, acknowledged to be an innocent party, because of the delay in asking for restoration. Further, the Respondent maintained that it was entitled to retain the proceeds of selling the vehicle. Midi Loc submitted that the Respondent had a duty to consider its decisions carefully at an early stage. Midi Loc contended that the Respondent conducted the review at too late a stage. Midi Loc submitted that the Respondent ought to have realised that there was no reasonable justification for refusing to pay the proceeds of sale of the vehicle to Midi Loc and withdrawn the disputed decision:

(1) at the date of Midi Loc's request for a review of the decision not to restore; or

(2) when the Respondent drafted the statement of case;

(3) at the very latest, when Midi Loc served its amended grounds of appeal.

Midi Loc further contended that the Respondent had acted unreasonably in opposing and then continuing to oppose the appeal until 29 January 2014.

18. The Respondent submitted that it has acted reasonably throughout and that any delay and increased costs were caused by Midi Loc's applications to the FTT. The Respondent submitted that the original decision was reasonable at the time and in the circumstances. Following the decision, the Respondent acted reasonably in relation to the appeal.

Discussion

19. An order for costs under rule 10(1)(b) of the FTT Rules can only be made if Midi Loc can show that the Respondent has acted unreasonably in bringing, defending or conducting the proceedings. Midi Loc can only obtain a wasted costs order under section 29(4) of the TCEA and rule 10(1)(b) of the FTT Rules if it can establish that the Respondent acted, or omitted to act, improperly, unreasonably or negligently which caused Midi Loc to incur costs. Midi Loc relies on the same behaviour of the Respondent in relation to both applications.

20. Whether the Respondent's decision not to restore the vehicle was wrong or weak is not relevant to the costs application: the purpose of the appeals system is to allow weak or wrong decisions to be challenged. The issue is whether, once the proceedings had been brought by Midi Loc, the Respondent acted unreasonably in not conceding the appeal and offering to pay Midi Loc an amount in lieu of restoration of the seized vehicle before 29 January 2014. Midi Loc does not allege any other

unreasonable conduct by the Respondents. Midi Loc contended that maintaining a weak case was acting unreasonably in conducting or defending the proceedings. Midi Loc points out that, when it focussed on the issues raised by Midi Loc, the Respondent changed its policy and stopped opposing the appeal.

5 21. The fact that the Respondent reviewed its policy on payment in lieu of
restoration where a vehicle has been sold, withdrew the disputed decision and offered
to make a payment in lieu to Midi Loc cannot be said to be unreasonable and, indeed,
Midi Loc do not suggest that it was. In my view, the fact that the Respondent did not
concede the appeal earlier but maintained its case does not mean that the Respondent
10 acted unreasonably in defending or conducting these proceedings. Unreasonableness
in this context must require more than failing to realise the weaknesses of a case or
maintaining a weak case, otherwise many (if not most) unsuccessful parties would be
exposed to claims for costs. In my view, something more must be required: for
example, the party knew that its case was unarguable but, nevertheless, continued to
15 pursue or defend it; or the party did something that no reasonable person could have
thought was a reasonable way to conduct or defend proceedings. Midi Loc has not
demonstrated that the Respondent acted unreasonably in those terms. I do not regard
the fact that the Respondent changed its policy and conceded the appeal, without
more, as indicating that the Respondent acted unreasonably in defending or
20 conducting these proceedings.

22. Was it unreasonable of the Respondent not to have reviewed its policy of not
making a payment in lieu and conceded the appeal sooner than it did? In my view,
delay can be unreasonable conduct but it is a question of degree. I do not consider
that the Respondent can be criticised for not reviewing its policy sooner in this case.
25 The issue of payment in lieu only really came into focus at the hearing before me on
25 June 2013 and was made explicit in the amended grounds of appeal served on
29 August. There was further correspondence leading to the application by Midi Loc
on 12 December for a direction that the Respondent amend its statement of case to
provide further information. I do not criticise Midi Loc for making the different
30 applications which were, I accept, designed to define the issues in the appeal and
bring the proceedings to a resolution. Indeed, it appears that, following the
application in December, the Respondent reviewed its policy guidance and the
Review Officer re-reviewed the decision under appeal. That does not seem to me to
be an unreasonable delay. Even if, as Midi Loc would no doubt submit, the need for
35 the review should have been clear from the amended grounds of appeal served at the
end of August 2013, I would not regard the delay between then and January 2014 as
unreasonable in the circumstances, which include the Respondent having to deal with
various applications by Midi Loc.

23. In conclusion, although I understand the frustration that must be felt by a party
40 to an appeal when the other party repeatedly rejects arguments only to concede them
at a late stage, I do not consider that the Respondent has acted unreasonably in
defending or conducting these proceedings.

Decision

24. For the reasons set out above, the application by Midi Loc for costs is refused.

Right to apply for permission to appeal

25. This document contains full findings of fact and reasons for the decision. Any
5 party dissatisfied with the Tribunal's 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)"
10 which accompanies and forms part of this Decision Notice.

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**GREG SINFIELD
TRIBUNAL JUDGE**

RELEASE DATE: 9 May 2014