



**TC04018**

**Appeal number: TC/2014/01090**

***COSTS – application by Respondents for costs on ground of unreasonable behaviour by Appellant and/or its adviser in bringing and conducting proceedings - application granted***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TAYLOR MADE CONSULTING LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD**

**Application determined on 11 July 2014 on written submissions only.**

## DECISION

### Introduction

1. This decision concerns an application by the Respondents (“HMRC”) for an order that the Appellant (“TMC”) should pay HMRC £1,598.40 in respect of their costs in relation to these proceedings. The application was made under section 29 of the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”) and Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the FTT Rules”).

2. In summary, HMRC claim that they incurred costs in relation to these proceedings as a result of the unreasonable behaviour of TMC and/or its adviser, Baxendale Walker Limited, detailed below. TMC opposes the application. For the reasons given below, I consider that TMC and/or its adviser acted unreasonably in bringing and conducting these proceedings and, accordingly, HMRC’s application for costs is granted.

### Brief history of the proceedings

3. On 12 December 2013, HMRC issued an information notice under paragraph 1 of Schedule 36 to the Finance Act 2008 to TMC. The notice required TMC to produce certain documents to HMRC by 15 January 2014, namely:

- (1) copies of any report to the directors of TMC by Baxendale Walker LLP or any other party relating to a remuneration trust arrangements;
- (2) an unredacted copy of the engagement letter between Baxendale Walker MDP and TMC; and
- (3) all correspondence relating to the remuneration trust arrangements.

4. Paragraph 23 of Schedule 36 provides that a person is not required to provide any part of a document that is privileged. On 8 January, TMC wrote to HMRC and claimed that certain documents that were included in the information notice were legally privileged. Those documents were emails and postal correspondence between TMC and its advisers, Baxendale Walker MDP. HMRC replied in a letter dated 23 January 2014. The letter stated that HMRC did not consider that the documents were legally privileged on several grounds, including because:

- (1) the decision of the Supreme Court in *Prudential plc & Anor, R (on the application of) v Special Commissioner of Income Tax & Anor* [2013] UKSC 1 confirmed definitively that legal advice privilege did not extend to advice given by non-lawyers;
- (2) Baxendale Walker MDP was not a firm of lawyers regulated by the Law society but a provider of wealth management services;

5. Regulations made under paragraph 23 of Schedule 36 (the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009) set out the procedure for resolving disputes where a claim that a document is privileged is not accepted by HMRC. On 21 February 2014, TMC filed a notice of appeal with the

FTT appealing against the information notice by making an application under the 2009 Regulations. The grounds of appeal simply stated:

“That all of the documentation requested by HMRC is subject to legal professional privilege and need not be disclosed to HMRC.”

5 The notice of appeal was signed by Baxendale Walker Limited as “the legal representative of the Appellant”. As the notice of appeal makes clear, “legal representative” is defined in rule 11(7) of the FTT Rules.

6. On 11 March 2014, the FTT issued directions in relation to the application. The first direction was that TMC should serve on HMRC and the FTT further particulars  
10 of its claim and, specifically, details of the status of Baxendale Walker MDP and Baxendale Walker LLP relating to the availability of legal advice privilege in respect of advice provided by them. The time limit for providing such further particulars was 25 March. The second direction was that, not later than 14 days after TMC complied with the first direction, HMRC should serve a reply to the further particulars on TMC  
15 and the FTT. The third direction required both parties to provide listing information to the FTT not later than 7 days after HMRC complied with the second direction. The fourth direction was for the parties to serve on each other bundles of documents and authorities not less than two weeks before the hearing.

7. TMC did not comply with the first direction by 25 March 2014. On 28 March, the FTT sent a letter to TMC asking it to comply. On 3 April, the FTT received a  
20 letter from Baxendale Walker Limited containing a form, signed by TMC, authorising Baxendale Walker Limited to act on TMC’s behalf in the appeal. The form is issued by the FTT. It states that “this form is not required if your representative is a legal representative (normally a firm of solicitors)”.

25 8. Not having received any further particulars in compliance with the first direction, the FTT issued a further direction on 9 April 2014 stating that unless TMC complied with the direction within seven days, the application would be struck out. On 10 April, the FTT received an email from Baxendale Walker Limited with a copy of a letter dated 3 April from Baxendale Walker Limited to HMRC. HMRC’s  
30 application for costs states that they received this letter on 7 April. This letter purported to comply with the first direction in providing further particulars. The letter stated that the Solicitors’ Regulation Authority (“SRA”) had recently indicated that a solicitor, regulated by the Law Society, employed by Baxendale Walker Limited is working as an in-house solicitor. It also said that advice provided by or under the  
35 supervision of such a solicitor is subject to legal advice privilege. The letter then stated that the same principle applied to advice provided by Baxendale Walker MDP and Baxendale Walker LLP to TMC. The letter concluded with the statement (emphasis supplied) that:

40 “The SRA further noted that all members of staff in a firm or in-house practice owe a duty of confidentiality to clients and it is irrelevant that *the employer client* is not regulated by the SRA.”

9. HMRC’s application for costs refers to a letter, dated 10 April 2014, from HMRC to the FTT making certain points about TMC’s letter of 3 April. There is no

such letter on the FTT's file relating to these proceedings nor is there any reference to such a letter in the file until the costs application.

5 10. On 22 April 2014, the FTT wrote to Baxendale Walker Limited acknowledging receipt of the letters and saying that it considered that TMC had complied with the first direction.

10 11. On 6 May 2014, HMRC filed a response to the further particulars provided by TMC in compliance with the second direction. The response stated that none of the Baxendale Walker entities were regulated as firms of solicitors and made further points. The second direction required HMRC to serve a response not later than 14 days after TMC complied with the first direction, ie by no later than 21 April. No explanation was given for the delay and no application was made by HMRC for an extension of time. In the application for costs, HMRC state that, in the letter dated 10 April which does not appear in the FTT's file for this matter, they asked the FTT to confirm whether it considered that TMC's letter of 3 April complied with the first direction. It appears that HMRC assumed, in the absence of any response to their letter of 10 April by the FTT, that TMC had not complied and that the time limit for HMRC to comply with the second direction had not begun to run. Subsequently, HMRC understood the FTT's letter to Baxendale Walker Limited on 22 April to be confirmation that TMC had complied with the first direction. HMRC complied with the second direction 14 days after that letter.

15 12. The third direction required the parties to provide listing information not later than seven days after HMRC complied with the second direction, ie no later than 13 May 2014. In compliance with the third direction, HMRC provided listing information to the FTT on 9 May. TMC did not provide any listing information. In a letter dated 15 May but only received by the FTT on 19 May, TMC notified the FTT that it had withdrawn its appeal. The letter was copied to HMRC. The FTT confirmed that the appeal had been treated as withdrawn in letters dated 23 May to the parties.

25 30 13. On 9 June 2014, HMRC made their application for costs under Rule 10(1)(b) of the FTT Rules. TMC provided a response by letter dated 24 June.

### **Grounds for the application and response**

35 14. HMRC contend that costs should be awarded under rule 10(1)(b) because TMC and/or its adviser, Baxendale Walker Limited, acted unreasonably in bringing and conducting these proceedings. HMRC make numerous complaints about the way in which TMC and its advisers conducted the proceedings. In response to HMRC's complaint that TMC failed to comply with the first direction on time, TMC says that it did not receive the directions until 1 April 2014 when it received the FTT's letter 28 March and it complied with the direction two days later. In relation to the complaint that TMC asserted legal professional privilege when it was not in possession of the full facts, TMC says that it regards this ground for the application as incomprehensible. Finally, TMC rejects HMRC's complaint that Baxendale Walker Limited's withdrawal of an appeal in relation to legal professional privilege by

another client in another case showed that it was unreasonable to persist with TMC's appeal. TMC makes the point that there could be any number of reasons why the other appeal was withdrawn and it cannot be assumed that the reason was that Baxendale Walker Limited had concluded that the other client's appeal was without merit.

### Discussion

15. An order for costs under rule 10(1)(b) of the FTT Rules can only be made if the FTT considers that TMC and/or its representative, Baxendale Walker Limited, has acted unreasonably in bringing or conducting the proceedings. I do not need to discuss all of HMRC's criticisms of TMC and Baxendale Walker Limited as it appears to me that there is one point, not addressed by TMC in its reply, which amply justifies an award of costs in favour of HMRC. That point is that TMC and/or Baxendale Walker Limited must have known from before 21 February 2014 when TMC lodged its appeal against the information notice with the FTT that there were no grounds on which a claim of legal professional privilege could be made and, accordingly, that the appeal never had any reasonable prospect of success.

16. It is clear that Baxendale Walker MDP was not a firm of lawyers. It is also clear from the decision of the Supreme Court in *Prudential* in January 2013 that legal advice privilege does not attach to communications between non-lawyers and their clients. Even if TMC and Baxendale Walker Limited had been unaware of the *Prudential* case when TMC first claimed the documents in the information notice were privileged, they could not have been unaware of it after receiving HMRC's letter dated 23 January 2014 which specifically referred to the case.

17. Baxendale Walker Limited's letter of 3 April 2014 does not provide any plausible justification for the claim that the documents sought were legally privileged. The letter refers to a statement by the SRA that advice provided by an in-house solicitor can be privileged, that Baxendale Walker Limited employed an in-house solicitor and that the same principle applied to advice provided by Baxendale Walker MDP and Baxendale Walker LLP to TMC. This letter was, at best, disingenuous. The in-house solicitor's client is the employer, as the passage quoted from the SRA's letter makes clear, and it is only communications between the solicitor and the employer client that are potentially subject to legal advice privilege. Communications between the employer and its clients, even if they are the product of the employed solicitor, are not privileged. In any event, there is no suggestion that the in-house solicitor was employed by Baxendale Walker MDP and Baxendale Walker LLP or ever provided advice to TMC or produced the documents requested by the information notice. In view of the SRA letter and the absence of any suggestion that the in-house solicitor was employed by Baxendale Walker MDP and Baxendale Walker LLP, whose documents formed the subject matter of the information notice, I conclude that Baxendale Walker Limited must have known that TMC did not have any grounds for claiming that the documents sought by the information notice were legally privileged.

18. It is clear that TMC did not have any grounds for claiming that the documents in the information notice were legally privileged and that the appeal never had any prospect of success. Given the fact that HMRC had pointed out the *Prudential* case which clearly showed that legal privilege did not attach to the documents in the information notice and the terms of Baxendale Walker Limited's letter of 3 April, I conclude that TMC and its adviser knew from the outset that claim to legal privilege was groundless and the appeal did not have any reasonable prospect of success. For those reasons, I find that TMC and Baxendale Walker Limited behaved unreasonably in bringing and conducting this appeal and that, under rule 10(1)(b) of the FTT Rules, I should order TMC to pay HMRC's costs of the proceedings.

19. TMC has not made any representations as to amount of costs sought by HMRC. I have considered schedule of costs and the hourly rates and time shown appear to me to be reasonable to me. Accordingly, I award HMRC their costs in relation to the appeal, summarily assessed under rule 10(8)(a) of the FTT Rules, in the amount of £1,598.40.

### **Decision**

20. For the reasons set out above, HMRC's application for costs is granted and TMC is directed to pay £1,598.40 to HMRC not later than 28 days after the date of release of this decision.

### **20 Right to apply for permission to appeal**

21. This document contains full findings of fact and reasons for the decision. Any 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)" which accompanies and forms part of this Decision Notice.

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**GREG SINFIELD  
TRIBUNAL JUDGE**

**RELEASE DATE: 18 July 2014**

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