



TC04180

Appeal number: TC/2012/02908

*VAT – appeal withdrawn – application by Respondents for expenses –
whether appropriate having regard to conduct of Appeal – Yes – Expenses
awarded*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SIMPLY LOCAL

Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE, QC
 MR S A RAE, LLB, WS
 PETER R SHEPPARD, FCIS, FCIB, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on Wednesday
26 November 2014**

Appellants – Mr O'Brien and Mr Sharp appearing in person

**Respondents – Iain Artis, MBA, Advocate, instructed by Miss Carlin, Office of
the Advocate General for Scotland**

DECISION ON EXPENSES

1. This is an application for expenses at the instance of HMRC, the Respondents in
5 this Appeal. It is in terms of Rule 10(1)(a) or alternatively (b) of the Tribunal
Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. We note that the Appeal
has not been categorised as “complex” and so para (c) is not applicable. The basis of
the application is the unreasonable delay and general conduct of the Appeal by the
Appellants. It should be noted that throughout these proceedings the Appellants
10 represented themselves, with Mr O’Brien acting as spokesman and Mr Sharp (usually)
in attendance.

2. This Appeal has a lengthy history. It has been withdrawn twice by the
Appellants, and then restored. Evidence was led over four days in 2013 and 2014 but
15 was not concluded. Subsequently on 19 May 2014 the continued hearing had to be
adjourned because of the absence of a witness, Mr Mackie, the Appellants’
accountant. Mr Sharp was absent too because of illness. When the Appeal continued
on Monday 2 June 2014 neither Appellant appeared, having intimated on the previous
working day (Friday 30 May) after the Tribunal’s Office had closed, that they (again)
withdrew the Appeal.

3. Earlier in the Appeal the Appellants had indicated that they would probably not
20 give evidence, but simply refer the Tribunal to their Witness Statements. However,
Mr Artis on behalf of HMRC indicated that this was not acceptable as he wished to
cross-examine them.

4. There is a detailed narrative of the Appeal’s procedural history in HMRC’s
25 Application. This according to our recollection is accurate and, in any event, was not
challenged.

5. The *gravamen* of Mr Artis’ complaint was that even after its protracted and
interrupted course, the basis for the Appeal was unclear and appeared to be without
foundation. In short the Appellants had acted utterly unreasonably, he submitted. He
30 referred us helpfully to three authorities relating to “wasted costs” against which the
Appellants’ conduct here might be judged. These were *Gheorge Calin Catana v
HMRC* [2012] UKUT 172 (TCC); *Okondu and Abdussalam v S of S* [2014] UKUT
0377 (IAC); and *Tarafdar v HMRC* [2014] UKUT 0362 (TCC).

6. Para 12 of the Application refers to the Tribunal’s Note attached to its
35 Directions of 9 July 2013. We consider this highly relevant. The Tribunal had in its
view shown a substantial measure of indulgence to the Appellants: neither was
legally qualified (although one is an accountant and the other a surveyor, and neither
is wholly unversed in such proceedings), and there was a substantial sum at stake. In
para 2 of that Note it is stressed by this Tribunal that the basis for the Appellants’
40 complaint seemed to relate to other transactions involving other business entities
controlled by them. The Tribunal stressed (para 3) that no further indulgence would
be shown.

7. As the evidence unfolded allegations of impropriety were put to the
Respondents’ investigating officer by Mr O’Brien. These were never supported or
45 substantiated, and there was no formal response to the Tribunal’s request that a
written explanation for the allegation be provided. The allegation remains

unsubstantiated. The evidence of the Appellants' accountant, Mr Mackie, was led at length by them but to little apparent purpose in the context of the transaction which gave rise to the VAT repayment claim.

5 8. Quite apart from that there have been further delays and failures. Mr Artis encouraged us to have regard to Rule 2 of the Tribunal Rules in terms of which we have to act "fairly and justly" to parties.

9. We have no hesitation in finding that certainly since our Direction and Note of 9 July 2013 the Appellants have acted wholly unreasonably in their manner of conducting the Appeal. At that stage the lack of reasonable prospects for success
10 should have been clear. The issue related simply to a VAT reclaim in respect of one transaction, viz the sale to Simply Local of shop premises at 57 Main Street, Calderbank. Accordingly matters relating to earlier transfers of the property by other taxable entities albeit controlled by the Appellants, were irrelevant. In their response the Respondents reminded the Tribunal that they had taken the advice of
15 Mr Paul Lasok QC and following on that had withdrawn the Appeal. That advice, of course, was sought only towards the end of the proceedings. The Tribunal had earlier in the proceedings explained in some detail the *Kittel* test (founded on by HMRC) and its implications as to actual and imputed knowledge. Again, we would refer to the terms of our Note attached to the Directions of 9 July 2013.

20 10. The Appellants suggested also that their purpose in raising the Appeal was not to gain any financial advantage. Mr O'Brien explained that any VAT recoverable would ultimately have been repaid to HMRC in relation to previous transactions affecting the same property. This explanation is set out in Mr Sharp's letter dated 29 May 2014 to the Tribunal, to which Mr O'Brien in his oral submissions to us made
25 reference.

11. In reply Mr Artis stressed that VAT was paid or was repayable in respect of individual transactions. This Appeal related to one transaction and the legal liabilities should not be distorted by earlier transfers of the same property. All along the transactions had been under the control of Mr O'Brien and Mr Sharp. Mr Artis
30 submitted that the content of para 4 of Mr Sharp's letter was a legal nonsense.

12. The Application is made on an alternative basis, viz paras (a) or (b) of Rule 10(1). The former applies to agents and representatives, the sense of which is not restricted to those legally qualified (Section 29(6), Tribunals, Courts and Enforcement Act 2007). Para (b) relates to parties themselves. In this instance
35 Mr Artis considered the roles of agent and principal blurred. We agree. In our view these capacities overlap in the present case. In addition to their property interests both Mr O'Brien and Mr Sharp have been intimately involved in the conduct of the proceedings, with Mr O'Brien addressing us, and Mr Sharp (usually) in attendance. (He was also the author of the letter dated 29 May 2014 withdrawing the Appeal).

40 13. There are subtleties in the wording of each provision, although these, we consider, are not of consequence in this case. While para (b) provides simply for an award of expenses where a party or their representative "has acted unreasonably in bringing, defending or conducting the proceedings", para (a) provides for "wasted costs". These are costs incurred as a result of "improper, unreasonable or negligent"
45 acts or omissions by a representative, or costs which are considered "unreasonable"

for the incurring party to pay. The conduct faulted in the present Appeal falls within both categories in our view.

14. Accordingly we find that liability in expenses arises under both provisions. We direct that the Appellants, Mr O'Brien and Mr Sharp, are liable on a joint and several basis for the taxed expenses of the Respondents in the Appeal but that only from 9 July 2013 to date. Further, taxation should be made according to the Rules of the Court of Session.

15. 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.

KENNETH MURE
TRIBUNAL JUDGE

RELEASE DATE: 12 December 2014