{2015} UKFTT 0473 (TC)

TC04640

Appeal number: TC/2014/03528

PROCEDURE – Costs – Whether on facts respondents acted unreasonably by withdrawing decision to impose penalty a day before hearing – No – Application dismissed – Rule 10(1)(b) Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

EXECUTIVE CAR RENTALS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Fox Court, Brooke Street, London EC1 on 15 September 2015

The Appellant did not appear and was not represented

Pat Roberts, of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by Executive Car Rentals Limited ("ECR") for its costs following the decision by HM Revenue and Customs ("HMRC") to withdraw its decision to impose a penalty under schedule 24 to the Finance Act 2007 in respect of a "careless" error contained in ECR's VAT return for the quarter ended 30 November 2013 (11/13) the day before the appeal was due to heard following the provision by ECR's representatives, CTM Litigation and Tax Services ("CTM"), of a schedule showing an amended 11/13 VAT account earlier the same day.

2. Although HMRC were represented at the hearing by their Presenting Officer, Ms Pat Roberts, ECR were not. However, CTM had sent an email to the Tribunal on 9 September 2015 in the following terms:

> Please bring this to the urgent attention of the judge in next week's hearing.
>
> Further to the submissions and papers submitted by the Respondents, the Appellant, given the relatively small amounts involved, cannot justify instructing our Ipswich based firm to attend a hearing in London to deal with this matter.
>
> The issues are very straight forward and we respectfully ask the Tribunal to deal with the matter in our absence.
>
> The Appellant's case is simple and well detailed in the Application. HMRC's skeleton (Para 10) prior to the hearing stated that a tax advantage would have been incurred and the (sic) was a direct response to the claims made by the Appellant that the error would have, in effect, been neutral revenue wise. We know from the withdrawn penalty that they had this evidence all along and clearly did not check properly or did not check at all at the time of the appeal, or at any later point.
>
> It is wholly unreasonable for the Respondent's to hear this point loud and clear in the 26 June 2014 Notice of Appeal ("*The Appellant appeals on the grounds that the errors were genuine mistakes and not tax advantage at all would have been gained from them*") and not to bother to check if this was accurate, or, at least, not check properly. And this is with the backdrop of their being only 5 invoices in the whole period; hardly a challenging task. How it was missed is a total mystery, but whatever the reason, it is totally unreasonable and the Appellant should not have to incur costs as a result. The Appellant submitting a schedule to make this clear, but this should not have been the trigger to investigate the matter properly, it should have been done much earlier and the schedule should have been no surprise at all.
>
> To be clear, the Appellant will not be represented at the hearing or appearing and will accept the decision of the Tribunal in its absence.

3. In the circumstances I was satisfied that ECR had been notified of the hearing and, as I considered it was in the interests of justice to do so, proceeded with the hearing in its absence.

4. In addition to being provided with a bundle of documentary evidence which included details of the hearing listed for the withdrawn hearing I heard from Ms Reena Patel, the HMRC Officer who had issued an assessment and the Notice of Penalty assessment on ECR.

Background

5. On examining the records of Everycar Contracts Limited ("Everycar"), which has a director in common with ECR, in relation to an input tax claim, HMRC Officer Patel identified five invoices from ECR for the supply of cars to Everycar which ECR had not declared as output tax on its 11/13 VAT return. An assessment, against which there has been no appeal, was raised in respect of this output tax on 29 January 2014. A letter, also dated 29 January 2014, from HMRC to ECR advised that:

> The behaviour that caused the inaccuracy [in the VAT return] was careless, therefore, a decision has been made to charge a penalty.

6. On 8 May 2014, a Notice of Penalty assessment was issued in the sum of £4,685 under schedule 24 to the Finance Act 2007 on the basis that the error in the VAT return was careless and prompted.

7. On 26 June 2014 ECR appealed to the Tribunal on the grounds that the errors were "genuine mistakes and no tax advantage at all would have been gained from them" and that the penalties were "grossly disproportionate". As the Notice of Appeal submitted to the Tribunal was more than 30 days after the penalty assessment an application was made on behalf of ECR on 4 August 2014 for it to be served out of time.

8. On 1 September 2014 the Tribunal wrote to the parties notifying them that the appeal had been assigned to the "basic" category and would therefore proceed straight to a hearing and that the application for permission to make a late appeal would be considered at the hearing with the appeal to follow if permission were granted. The Tribunal wrote to the parties again on 18 September 2014 giving notice of the hearing to take place on 18 November 2014.

9. HMRC served its skeleton argument on ECR and the Tribunal on 5 November 2014. On 17 November 2014, the day before the hearing, CTM sent an email to HMRC enclosing a schedule which indicated that both output tax and input had been omitted from ECR's 11/13 VAT return with the result that no payment of VAT was due. It was apparent to HMRC that as there was no potential lost revenue (which is necessary to determine the quantum of the penalty under schedule 24 to the Finance Act 2007) the penalty would be have to be withdrawn.

10. In the circumstances HMRC contacted CTM by telephone in an attempt to agree to stay proceedings but as agreement could not be reached an email was sent to the Tribunal at 16:02 withdrawing the Notice of Penalty assessment. ECR subsequently withdrew its appeal at 22:11 the same day.

Law

11. The ability of the Tribunal to make an order in respect of costs is derived from s 29 of the Tribunals Courts and Enforcement Act 2007 ("TCEA") which provides:

> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

As is clear from s 29(3) TCEA, the power of the Tribunal to award costs is also subject to Tribunal Procedure Rules.

12. Insofar as it applies to basic category cases, such as the present, rule 10 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") provides:

> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;…
>
> (c) …
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

13. In *Shahjahan Tarafder v HMRC* [2014] UKUT 0362 (TCC) the Upper Tribunal (Judge Berner and Judge Powell) considered the approach to be taken when deciding an application under rule 10(1)(b) of the Tribunal Procedure Rules stating, at [34]:

> "In our view, a Tribunal, faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from an appeal should pose itself the following questions: -
>
> (1) What was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?"

Discussion and conclusion

14. Adopting the approach of the Upper Tribunal in *Tarafder* it is clear that HMRC withdrew the Notice of Penalty assessment as a result of receipt of the schedule from CTM indicating that there was no potential lost revenue.

15. Could HMRC withdrawn the penalty sooner?

16. CTM contend that information to have enabled HMRC to withdraw the penalty sooner was in its possession before the provision of the schedule, as the output tax for the supply to Everycar had been included in ECR's 02/14 VAT return in error (rather than correctly in its 11/13 return). However, Officer Patel explained that she was not, and could not, have been aware of the error in ECR's VAT 11/13 VAT return, which had not been explained either by or on behalf of ECR, until receiving the schedule the day before the hearing.

17. If I were to accept that, as CTM contend, the information contained in the schedule was available to HMRC, albeit in a different form, it is necessary to consider the third question in *Tarafder*, whether it was unreasonable for HMRC not to have withdrawn the penalty at an earlier stage in the proceedings?

18. It is clear that when the assessment – as opposed to the penalty assessment – was issued ECR was aware, as a result of the letter from HMRC of 29 January 2014, that a decision had been made to issue a penalty in respect of the undisputed error in the 11/13 VAT return. Also, as the penalty was issued on 8 May 2014 it would have been possible for ECR, or CTM on its behalf, to have identified and alerted HMRC to the correct position with regard to the 11/13 and 02/14 VAT returns at a much earlier stage in the proceedings than the afternoon before the hearing was due to take place.

19. In my judgment it is not sufficient in a claim for costs under rule 10(1)(b) of the Tribunal Procedure Rules for the grounds of appeal in an appellant's Notice of Appeal to refer to the errors in the VAT returns being "genuine mistakes and no tax advantage" being gained as a result relying on HMRC to ascertain from information that may be in its possession as to why this might be the case without providing any further explanation until the day before the hearing.

20. Therefore, having regard to all the circumstances of the case, I do not consider that ECR has established that HMRC, by withdrawing the penalty assessment the day before the hearing rather than at an earlier stage in the proceedings, has acted unreasonably and dismiss its application for costs.

Right to Apply for Permission to Appeal

21. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 12 SEPTEMBER 2015