



Appeal number: TC/2015/02994

Procedure -costs application- basic category case – APN - HMRC failure to issue closure notice –unreasonable actions in forcing bringing of proceedings-delay in issuing notice –Rule 10(1)(b) Tribunal Rules –held- HMRC not unreasonable in defending proceedings – behaviour prior to issue of proceedings not determinative.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr William Archer

Appellant

- and -

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

TRIBUNAL: JUDGE Rachel Short

**Sitting in public at the Royal Courts of Justice, the Strand, London on 5
February 2016**

Mr McDonnell instructed by KPMG LLP for the Appellant

**Mr Boch, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

1. This is a decision on an oral application for costs under Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (“the Tribunal Rules”) made on behalf of the Appellant, Mr Archer.

Background to this application

2. Mr Archer’s self-assessment return for 2005-6 tax year included a claim for losses arising from transactions in certificates of deposit. HMRC issued an Accelerated Payment Notice (“APN”) on Mr Archer relating to the transactions in certificates of deposit to which those losses related on 19 September 2014.

3. The substantive matter to which this costs application relates is an application by the Appellant to the Tribunal for a direction requiring the issuing of a closure notice for the 2005-6 tax year. That application was made on 29 April 2015 under s 28A(4) Taxes Management Act 1970.

4. Under Rule 23 of the Tribunal Rules the closure application was categorised as a basic case.

5. Mr Green, a lawyer from HMRC’s solicitor’s office wrote to the Appellant’s representative on 18 May 2015 in response to the Appellant’s closure application saying that they were not intending to resist closing the enquiry and stating:

“On that basis, I was hoping that the parties would be able to agree a timetable for closure without the need to go to the Tribunal. HMRC are confident that they could close the enquiry within 90 days of the parties reaching agreement. I would be grateful if you could take instructions from your client and let me know if that timetable would be acceptable to your client.”

6. After a telephone conversation on 20 May 2015 between Mr Green and the Appellant’s representative, HMRC wrote to the Appellant’s representative on 3 June 2015 saying:

“During the phone call you asked for an indication of how HMRC are intending to close the enquiry. I can confirm that our current intention remains to close on the basis that the transactions involving certificates of deposit did not generate the claimed losses. I hope that we would now be able to agree a timetable for closure. In that regard, please note that I am on leave from 8 to 26 June inclusive, so if we are not able to reach agreement this week, it will have to wait until I get back. Although that would inevitably cause some delay, I would expect that any agreement would take account of the time elapsed since Mr Archer made his closure application”.

7. HMRC agreed on 6 July 2015 that a closure notice would be issued for the 2005-6 year for Mr Archer. A closure notice was received by Mr Archer dated 7 July 2015.

5 8. The closure notice issued on 7 July concluded that Mr Archer had £6,042,410.32 of additional tax to pay as the result of the disallowance of losses claimed arising from the transactions in certificates of deposit.

9. The Appellant applied to this Tribunal on 25 August 2015 for costs under Rule 10(1)(b) of the Tribunal Rules in respect of the closure application on the basis that HMRC had “acted unreasonably in bringing, defending or conducting the proceedings”.

The law

10. Section 29 of the Tribunals, Courts and Enforcement Act 2007 is the basis for this Tribunal’s ability to make any award of costs:

“s29 (1) *The costs of and incidental to*

15 (a) *all proceedings in the First-tier Tribunal, and*

(b)

shall be in the discretion of the Tribunal in which the proceedings take place.

20 (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 the Tribunal Rules.”*

11. The relevant Tribunal Rules are Rule 10 of the Tribunal Rules under which this application was made:

25 “10 (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; or*

(c) *if -*

30 (i) *the proceedings have been allocated as a Complex case under Rule 23(allocation of cases to categories);and*

(ii)”

12. This closure notice application was categorised as basic under the Tribunal Rules and therefore costs are available only under Rule 10(1)(b) if the Respondents have acted unreasonably in “*bringing, defending or conducting these proceedings*”.

Costs requested

- 5 13. The Appellant’s cost application covers the costs of the preparation and filing of the Appellant’s application of 29 April 2015, counsel’s fees and the costs of correspondence with the Respondents and the Tribunal since 29 April 2015.

Appellant’s arguments

- 10 HMRC’s actions after the closure application was made.

14. The Appellant referred me to the decision in *Catana v Revenue & Customs Commissioners* [2012] UKUT 172 (TCC) setting out the parameters of Rule 10(1)(b): “*cases in which an appellant has unreasonably brought an appeal which he should have known could not succeed, a respondent has unreasonably resisted an obviously*
15 *meritorious appeal, or either party has acted unreasonably in the course or proceedings.....*” paragraph [14]. It is the Appellant’s case that HMRC’s delay in issuing a closure notice for two months after their acceptance in May 2015 that they would not resist the Tribunal application for a closure notice was unnecessary prevarication amounting to unreasonable behaviour.

20 15. HMRC’s only response to the Appellant’s application for a closure notice was their letter of 18 May 2015 saying that they would not formally oppose the application but stating that “*they hoped the parties would be able to agree a timetable for closure*” and “*HMRC are confident that they could close the enquiry within 90 days of the parties reaching agreement*”. The Appellant says that there was no need to agree
25 to a timetable and no need for any further delay by the Respondents at this stage and that this delay amounts to unreasonable behaviour sufficient to trigger Rule 10.

16. The closure notice for which the Appellant was applying was straightforward and reflected a position which HMRC had been taking in correspondence for the previous two years. No facts were in issue and there was no dispute about quantum. In
30 those circumstances HMRC should and could have issued a closure notice immediately on receipt of the Appellant’s application. It was unreasonable for HMRC (i) not to issue a closure notice as soon as the application was made by the Appellant and (ii) to respond to the Appellant’s application with a proposal for a timetable rather than proceeding to issue the closure notice.

35 17. In these circumstances the Appellant has the right to apply for costs incurred in preparing the appeal as well as the costs of pursuing the appeal as made clear in the *Catana* decision referred to above and also in *Shahjahan Tarafdar v Revenue and Customs Commissioners* ([2014] UKUT 0362(TCC) in which the judge stated at paragraph [19]: “*The costs of and incidental to the proceedings cover only those costs*
40 *incurred in preparing and pursuing the appeal*”. The Appellant also refers to the

decision in *Stomgrove Limited v Revenue and Customs Commissioners* ([2014] UKFTT 169 (TC)) in which it was common ground that the costs of preparing a notice of appeal were within the ambit of Rule 10.

HMRC's actions prior to the closure application

5 18. Secondly, the Appellant says that it should not have had to incur the costs of making the closure application in the first place. The Respondents delayed for eight years before issuing the closure notice, which was itself unreasonable. Mr Archer filed his tax return for the 2005-6 tax year on 7 June 2007 and HMRC opened an enquiry on 20 July 2007. Three issues remained outstanding on that return at the end
10 of 2007; (i) A question concerning a partnership in which Mr Archer was a partner; this issue was closed on 29 August 2013; (ii) brought forward capital losses from 2004-5; a closure notice was issued in respect of the 2004-5 capital losses in April 2012 and (iii) a claim for loss relief against Schedule D VI income for 2005-6, which was the only remaining matter outstanding by April 2015. In respect of that issue,
15 HMRC had consistently denied these losses since July 2013. Those losses arose from transactions in certificates of deposit and an APN was issued to Mr Archer in respect of the transaction giving rise to those claimed losses.

19. The Appellant had requested a closure notice from HMRC for the 2005-6 tax year on 8 January and 17 February 2015 to which no response had been received. This
20 had left the Appellant with no real choice but to issue the application for a closure notice on 29 April 2015.

20. It was unreasonable for HMRC (i) to keep Mr Archer's enquiry open for eight years (ii) not to issue a closure notice when one was requested in early 2015 (iii) not to respond to Mr Archer's request for a closure notice in a timely manner, meaning
25 that Mr Archer had no choice but to make an application to the Tribunal.

21. The actions of HMRC prior to the issue of these proceedings are relevant to the extent that they "inform actions taken during proceedings" as stated in the *Bulkliner Intermodal Ltd v HMRC* decision ([2010] UKFTT 395 (TC)) at paragraph [11]:

30 *"It is not possible under the 2009 Rules, any more than it was under the Special Commissioners' regulations, for a party to rely on the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the Tribunal does have jurisdiction, can costs incurred before that period be ordered..... That*
35 *is not to say that the behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform the actions taken during proceedings, as it did in Scott and another (trading as Farthings Steak House) v McDonald [1996]STC(SCD) 381, where bad faith in the making of an assessment was relevant to consideration of*
40 *behaviour in the continued defence of an appeal."*

HMRC's arguments

22. In HMRC's view, Rule 10(1)(b) has a restricted application and costs should only be awarded in basic appeals such as this in "exceptional" circumstances.

23. Rule 10 only applies to unreasonable conduct in the "bringing, defending or conducting of the proceedings"; only HMRC's actions after the closure application
5 had been made to the Tribunal are within the scope of Rule 10. HMRC's actions after receiving the application for a closure notice on 29 April 2015 were not unreasonable.

24. "Unreasonable" means conduct which is "*vexatious, designed to harass the other side rather than advance the resolution of the case..... The acid test is whether the conduct permits of a reasonable explanation*" as explained by the Court of Appeal
10 in *Ridehalgh v Horsefield* ([1994] Ch 205). HMRC's behaviour in Mr Archer's case was not vexatious and was made in the spirit of co-operation and the furtherance of the overriding objective. Mr Boch accepted that a timetable was not a usual part of HMRC's closure notice procedure, but said that the timetable suggested by HMRC for this closure notice did have a reasonable explanation; this was a closure notice in a
15 complex and contentious case which needed to be approved by a number of people at HMRC and settled by counsel.

25. In order for costs to be awarded under Rule 10, there has to be a link between the Appellant's costs and HMRC's unreasonable behaviour. HMRC say that here, there is no relationship between the costs being claimed by the Appellant and any
20 unreasonable behaviour. The fact that HMRC failed to issue a closure notice as soon as one was requested by the Appellant did not force the Appellant to make an application to the Tribunal; the Appellant could have pursued correspondence with HMRC at that stage, rather than immediately make an application to the Tribunal.

26. Mr Boch also suggested that the Appellant's letters of January and February
25 2015 were not clear requests for a closure notice and in any event there is no obligation on HMRC to agree to a request to close an enquiry. Failure to issue a closure notice immediately on request cannot amount to unreasonable behaviour.

Discussion

27. It is important to bear in mind that despite the fact that this cost application and
30 the closure application to which it relates are part of a much bigger dispute between HMRC and Mr Archer, we are considering only the application of Rule 10(1)(b) to a discrete element of that dispute which has been treated as a basic category application; the closure application of 29 April 2015. The only question for me is whether there has been unreasonable behaviour by HMRC by reference to those
35 proceedings.

Were HMRC's actions after the proceedings were brought unreasonable?

28. It is the prevarication and delay by HMRC in the face of the 29 April 2015 closure application to which the Appellant points to suggest that HMRC's actions were unreasonable. HMRC confirmed on 18 May that they would not resist the
40 closure application, but it took them until 7 July, nearly two months, to actually issue the closure notice.

29. The Appellant suggests that this delay was itself a tactic by HMRC and that the reference to the need to agree a timetable before issuing a closure notice was part of that tactical delay for which the Appellant considers there is no reasonable explanation. HMRC respond that they could not be expected to issue a closure notice
5 instantly and that since this was a complex and contentious case, it was important that they took time to consider the drafting of the notice properly.

30. My view is that while HMRC might not have acted particularly efficiently in issuing the closure notice, there is nothing in HMRC's actions during this period which is vexatious or for which there is no reasonable explanation. On the facts as I
10 understand them, HMRC reacted relatively quickly to the issue of proceedings on 29 April 2015, effectively indicating that they were withdrawing any opposition to the application in their letter of 18 May.

31. As for HMRC's actions after 18 May 2015, I accept HMRC's point that this was a very significant case for them with a large amount of tax at stake and they were
15 bound to need to go through some internal processes to obtain clearance to issue the closure notice, hence the reference to the timetable cited in their letter of 18 May and the telephone conversation of 20 May.

32. It is also relevant, as HMRC's letter of 3 June to the Appellant's representative makes clear, that the HMRC lawyer involved was on leave from 8 to 26th June which
20 was likely to slow the process down. It does not seem to me that there is anything unreasonable in HMRC's processes being slowed down as a result of key personnel taking annual leave.

33. Counter to the Appellant's suggestions, it is my view that there is little evidence to suggest that HMRC were intentionally delaying the issue of this closure notice. For
25 these reasons my view is that HMRC's actions between 29 April 2015 and the issue of the closure notice on 7 July were not unreasonable.

Can HMRC's actions prior to the issuing of the closure application "inform" their later behaviour?

34. The Appellant argued that while not strictly within the ambit of Rule 10(1)(b),
30 HMRC's previous actions and their lengthy delay in issuing a closure notice should be taken account of in determining whether costs should be ordered in respect of the closure application itself.

35. I have considered the Appellant's reference to the much cited *Bulkliner* case and the relevance of HMRC's previous behaviour, but have concluded that it is not
35 legitimate, in a costs application under Rule 10(1)(b), to simply import into HMRC's actions after proceedings have been issued, any alleged unreasonable behaviour prior to the start of the relevant proceedings. The judge's reference in *Bulkliner* to the earlier behaviour of a party "informing actions taken during proceedings" suggests only that it is one element which needs to be taken account of in determining whether
40 HMRC's actions are reasonable. Previous unreasonable behaviour is not enough, in

itself, to change the character of HMRC's behaviour after the issue of proceedings from reasonable to unreasonable.

5 36. Looking at this question in the round, it does seem anomalous that HMRC can put a taxpayer such as Mr Archer in the position of having to take proceedings in order to force HMRC to issue a closure notice after a lengthy period of delay and still not be able to claim for the costs of doing this. However, my view is that taking account of HMRC's actions before the issuing of the proceedings which are the subject of this costs application would entail a risk of applying the rule at Rule 10(1)(b) to circumstances in which it was not intended to apply.

10 37. For these reasons the Appellant's application for costs in respect of the 29 April 2015 closure notice application is denied.

15 38. 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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Rachel Short

TRIBUNAL JUDGE

RELEASE DATE: 29 FEBRUARY 2016

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