[2019] UKFTT 0350 (TC)

TC07178

COSTS – complex case – whether HMRC substantial victors – whether HMRC entitled to costs of in-house non-legally qualified presenting officer – yes- costs awarded

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/1869

BETWEEN

JOHN PATRICK WALSH **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

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DECISION

INTRODUCTION

1. This decision determines HMRC's application for costs against the appellant.

2. The background to the appeal to the Tribunal is set out in this Tribunal's decision of 29 August 2018 given by Judge Victoria Nicholls. In very brief summary, the appellant sought permission of this Tribunal to be allowed to lodge late appeals against assessments and penalties totalling just over £2 million.

3. The Tribunal's decision, against which it appears there has been no appeal, was that in large part Mr Walsh was unsuccessful. HMRC did agree to vacate assessments totalling slightly less then £70,000. HMRC also agreed that appeals could be lodged against penalties totalling slightly less then £320,000. But rest of the application was dismissed by the Tribunal leaving Mr Walsh liable to pay HMRC just over £1.6 million (plus interest).

4. On 24 September 2018, HMRC applied for their costs.

5. I note, in passing, that unfortunately an administrative error by the tribunal meant that the appellant's new representative was not sent a copy of the decision by the Tribunal when it was released; it was the receipt of HMRC's costs application which alerted the appellant's new advisers to the release of the decision. The decision was re-issued to the appellant's new advisers on 2 October 2018.

Paper decision

6. On 11 October 2018, HMRC then renewed its costs application so that the date of the application post-dated the new release date of the decision. On 19 October 2018, the Tribunal asked the appellant's new advisers for representations on the costs application. Those representations were received on 2 November 2018.

7. HMRC responded to the appellant's objections on 9 November 2018. The appellant's representative responded to that on 19 November 2019

8. The Tribunal wrote to the parties on 3 January 2019 indicating that the application would be determined on the papers unless one of the parties objected. No reply, and therefore no objection, was received from the appellant's representative. HMRC replied on 16 January 2019 consenting to a paper determination.

9. I considered that it was appropriate to decide the matter on the papers as the parties did not object and I considered it fair to reach a conclusion on the papers.

THE TRIBUNAL'S COSTS JURISDICTION

10. Rule 10 of the Tribunal's Rules gives the tribunal power to award costs in any case which had been categorised as complex and the taxpayer had not opted out of the costs regime.

11. This appeal was categorised as complex on 4 April 2017 shortly after it was received; HMRC objected to its categorisation by letter dated 27 April 2017. On 2 June 2017, Judge Kempster refused to re-categorise it as standard. So the appeal remained complex. The tribunal did not receive an opt out of the costs regime. Therefore, the appeal is in the tribunal's open costs regime.

12. The tribunal's ability to award costs is restricted by Rule 10(5)(b) which provides that the Tribunal may not make an order for costs without first:

> …if the paying person is an individual, considering that person's financial means.

13. I proceed on the basis that I have discretion to award HMRC their costs but must take the appellant's financial means into account before doing so.

WHETHER COSTS SHOULD BE AWARDED IN PRINCIPLE

The legal test in awarding costs

14. The Upper Tribunal in *Bastionspark LLP* [2016] UKUT 425 said at [16]:

> …the starting point [for an order of costs] will usually be that if any order for costs is made at all, it will be that costs would follow the event that is that the loser will pay the winner. This is what fairness and justice would seem normally to require.

15. In cases where one party is not an outright winner or loser, it is normal for a court to exercise its discretion, in an open costs regime, in favour of a litigant who is the substantial victor, if there is one. Authority for that is also contained in the *Bastionspark LLP* case.

16. Was HMRC the substantial victor in this matter?

Facts relevant to the decision

17. HMRC point out that there were 33 assessments (for tax and penalties) on the appellant and for which he sought permission to appeal out of time. He was refused such permission in respect of 29 of them. And indeed, HMRC had withdrawn one of the remaining four some years earlier so it was right to see him as having only succeeded on 3 (out of 32).

18. HMRC also point out that by value the assessments in issue totalled just over £2million, while the value of the assessments for which Mr Walsh was not given permission to appeal amounted to just over £1.6 million.

19. HRMC's view is, therefore, by reference to the absolute value in issue or the number of assessments in issue, they were the substantial victors in the proceedings.

20. The appellant does not agree: its response says that HMRC were unsuccessful in respect of £4,000,000 of the claim. This must be a mistake for £400,000.

21. In any event, I agree with HMRC that they were substantially the victors and should in principle have their costs. On either measure, they were more than 80% successful.

THE APPELLANT'S MEANS

22. The appellant's advisers were given the opportunity to make representations on the costs application and indeed were clearly aware of the right to make representations on the appellant's means as they referred to it in their email of 2 October 2018. Nevertheless, no representations on the appellant's means were made.

23. The tribunal wrote to the appellant specifically asking for such representations on 3 January 2019. It did not receive a reply.

24. The Rules require me to consider the appellant's means.

25. The Decision of the FTT in the appeal recorded that Mr Walsh was a man of some means (investing profits of the sale of his business property into 10 investment properties); nevertheless, I note that in the Decision the Judge appeared to consider at [43] that Mr Walsh might have difficulties meeting the full amount assessed (some £2.1 million plus interest) but it is also clear that she did not have the facts and was unable to draw any conclusion other than that meeting the debt would have 'very serious consequences' for Mr Walsh.

26. I am also without evidence of Mr Walsh's means. Having no evidence on what they are, despite the opportunity to provide the evidence, I draw the inference that the appellant has sufficient means to pay an amount of costs of about the sum claimed by HMRC. My conclusion

is therefore, that having considered Mr Walsh's means, they are not a contra-indication to an award of costs.

SCHEDULE OF COSTS

27. A schedule of costs was attached to HMRC's application showing costs in the figure of £13,576.33. Nevertheless, HMRC stated that the application was for an award in principle, with costs to be agreed, or determined by assessment if not. HMRC's view was that the figure of £13,576.33 was conservative and a detailed assessment might result in a higher award.

28. The appellant's view was that HMRC's costs largely related to the time of Mr Brian Horton, who presented the case on behalf of HMRC and who was an HMRC officer and not a qualified lawyer. His view was that HMRC were not entitled to claim for the time of non-legally qualified in-house advisers. HMRC did not agree (citing the 1975 Court of Appeal case of *Eastwood)*: they consider Mr Horton to be 'a fee earner of equivalent experience' to a solicitor. The appellant considers that the principle in *Eastwood* only applies to qualified solicitors.

29. As was summarised by the Court of Appeal in the later case of *Berne Insurance Company v Jardine Reinsurance* [1998] EWCA Civ 220*,* in *Eastwood* it was held that

> … where a party was represented by a salaried solicitor [it is appropriate] to treat it as though it were the bill of an independent solicitor, assessing the reasonable and fair amount of a discretionary item having regard to all the circumstances of the case and to the principle that the taxed costs should not be more than an indemnity to the party against the expense he had incurred in the litigation. There might be special cases where costs awarded on the conventional basis would exceed the principle of indemnity, but it would be wrong and impracticable in cases of a salaried solicitor to require a break down of the expenses of a department in order to insure that the principle was not infringed. …

30. While non-legally qualified persons do not have rights of audience in the courts, that is not the case in a Tribunal. And it is well established that there is no bar on a litigant in a tribunal claiming for the cost of instructing non-legally qualified representatives. It seems to follow, in my view, that the *Eastwood* principle would apply as much to an in-house non-legally qualified representative as to an in-house legally qualified representative, at least in a tribunal where the non-legally qualified representative is undertaking a role that would otherwise be undertaken by a lawyer.

31. I note that the FTT has already considered this matter and reached the same conclusion in the case of *Vardy Properties and another* [2013] UKFTT 96 (TC) where Judge Poole said:

> [15] It is clear (see Re Eastwood deceased [1975] Ch 112 (Court of Appeal) that HMRC may recover costs in respect of their Solicitor's Office employees, and the hourly rates claimed are in line with the relevant Guideline Hourly Rates set out in Appendix 2 to the Costs Guide.

32. It must be the case that the restrictions on claiming the costs of in-house representatives mentioned in *Eastwood* would apply as much to a non-legally qualified representative as a legally qualified representative but I do not consider the restrictions apply here. As was said in *Eastwood,* HMRC do not have to provide a breakdown of all their expenses to show that the indemnity principle is not breached. It seems highly unlikely that it could be breached on the figures claimed by HMRC in this case.

33. In conclusion, I consider the appellant wrong to say that the *Eastwood* principle does not apply to Mr Horton's time: in the Tribunal, I consider that *Eastwood* does apply. The award

of costs should be calculated on the basis that in principle HMRC are entitled to the cost of Mr Horton's time.

34. The appellant's next objection was that some of the costs claimed were unreasonable although it does not explain why. It seems to me that the dispute of exactly which costs HMRC are entitled to recover should be left to detailed assessment if the parties are unable to agree the matter.

DECISION

35. I award HMRC their costs in this appeal on the standard basis to be assessed by a costs judge if not agreed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 31 MAY 2019