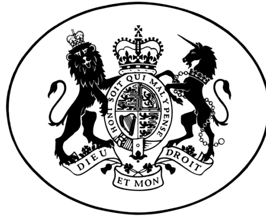
[2014] UKUT 0099 (TCC)



Appeal number FTC/45/2013

WASTED COSTS – section 29(4) of the Tribunals, Courts and Enforcement Act 2007

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BEDALE GOLF CLUB LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public at the Rolls Buildings in London on 18 February 2014

Mr Tony Harris of Harris Taxation & Management Services Limited for the Appellant

Mr Tom Cross, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This case concerns the costs that Bedale Golf Club Limited ("the Club") incurred in an appeal to the First-tier Tribunal ("the FTT"). The Club applied for HM Revenue and Customs ("HMRC") to be ordered to pay its costs, but the application was dismissed by the FTT (Judge Demack) on 13 November 2012. The Club appeals against that decision.

Factual history

2. By August 2010, the Club and HMRC had long been in dispute over whether the Club was entitled to recover input tax that it had incurred when refurbishing its clubhouse. In a letter dated 18 August 2010, however, HMRC agreed to the recovery of the input tax. The letter, which was from officers from "Local Compliance Small & Medium Enterprises", explained:

> "I refer to your recent e-mails concerning … the deductibility of costs relating to the first floor of the club ….
>
> In view of the sums involved it is not considered cost-effective for HMRC to pursue the question of input tax attribution further and in light of this all of the disputed items have now been re-allocated as taxable input tax. It must be stressed that this should not be seen as acceptance of your arguments. It is still our contention that the input tax rightly belongs under the heading of residual. It is merely an economic decision to concede in this case. It must not be seen as agreeing that any such expenditure can be treated as fully taxable."

3. On 15 October 2010, the Club made a complaint to HMRC. The letter of complaint noted that the Club's representative, Mr Tony Harris of Harris Taxation & Management Services Limited, had "agreed a final position on our behalf", but said that the Club felt "justified in bringing a claim against you not only for the readily quantifiable costs incurred by the Club … but for the additional costs that we feel that we have suffered".

4. The Club was sent a substantive response on 24 November 2010. The letter, which was from an Officer Perrin of "Local Compliance Quality Assurance & Complaints", included this:

> "As stated in the letter of 18 August, a pragmatic view has been taken on some issues where the tax involved is minimal to help bring the matter to a conclusion. This does not invalidate the legitimacy of our original enquiries. It should also be noted that the officers involved with the case are still of the opinion that some of the input tax treated as taxable should be apportioned within future calculations. To ensure

> there is no ambiguity on this point I have asked that a further letter is sent to you to confirm our position; this will allow you the option of an appeal should you disagree with the decision."

5. The further letter Officer Perrin had promised was sent on 15 December, by an Officer Turnbull of "Local Compliance Small & Medium Enterprises". The letter concluded:

> "As stated in the HMRC letter of 18 November 2010 some costs were exceptionally treated as fully taxable in order to bring the matter to a conclusion and they must not be treated in this way in future. The costs in question were those relating to connective areas, stairs, corridors lifts etc. and the lounge/dining room, except where directly relating to bar sales.
>
> You have the right to appeal this decision and any appeal must be made within 30 days of this letter following the guidance on the HMRC website."

6. At that stage, the Club prepared a notice of appeal to the FTT. However, in February 2011 the letter of 15 December was withdrawn. In a letter dated 2 February, an Officer Jackson from the "Appeals & Review Team" within "Local Compliance Appeals", wrote:

> "I have considered the Grounds in relation to this appeal and conclude that the letter dated 15 December 2010 should be withdrawn. Officer Turnbull and Officer Spence will issue a new appealable decision letter which fully explains what is considered to be exempt in relation to the lounge/bar area and why, with reference to case law and legislation."

7. A letter from Officer Turnbull followed on 16 February 2011. This went into much more detail than the 15 December letter had. Officer Turnbull ended by saying that she trusted that:

> "this fully explains why we consider that costs incurred in refurbishing the bar area and lounge should correctly be treated as 'residual' input tax and apportioned using the standard method pro-rata apportionment."

8. On 17 March 2011, Officer Turnbull wrote to say that the decision notified to the Club on 16 February was final. She said that, if the Club did not agree with the decision, it could either ask for it to be reviewed by another HMRC officer or appeal to an independent tribunal.

9. The Club having requested a review, Officer Jackson told the Club in a letter of May 2011 that she upheld the decision detailed in the 16 February letter. The last paragraphs of the May letter read as follows:

> "I am unable to comment on future refurbishment, as it would depend on a number of factors at the time the refurbishment took place.
>
> The Commissioners view is that refurbishing of a bar/club house has an immediate and direct link to the exempt supply of providing sporting services to members (under Schedule 9, Group 10 of the VATA 94) and the taxable supplies of providing food and drink. It would be accepted that the bar and kitchen areas were fully taxable and recoverable as relating to taxable supplies. The lounge/dining room is part of an intrinsic supply to the members as part of their golf membership, this area, lift and stairs would not be considered as being exclusively used for taxable supplies. It would be residual and recovered in accordance to the partial exemption standard method calculation at that time. It would be unusual for the lounge/dining room to be only used for eating and drinking and nothing else for example, trophy presentations, AGM's, team meetings and raffle draws.
>
> Right of Appeal
> If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. If you want to appeal to the tribunal, you must write to the tribunal within 30 days of the date of this letter …."

10. On 12 June 2011, the Club lodged a notice of appeal to the FTT. The notice of appeal gave 13 May as the date of the decision appealed. The grounds for appeal explained that on 13 May HMRC had confirmed their decision that "the use of the lounge/dining room is an intrinsic supply to the members as part of their golf membership". The grounds went on to state that the Club "contend that their membership is a single supply … of exempt sport under VAT Act 1994 Sch 9 Group 10 item 3".

11. HMRC served their statement of case in February 2012. This was prepared by an Officer Dayson of the "Local Compliance, Appeals and Reviews Unit" in Manchester. The statement of case began as follows:

> "The disputed decision of the [HMRC] is a ruling that input tax incurred on the refurbishment of the bar/dining area of the clubhouse should properly be treated as residual for partial exemption purposes.
>
> Exceptionally, in view of the length of the dispute and the small monies involved, [HMRC] allowed the input tax in this case to be treated as if it related to taxable supplies for assessment purposes. The ruling therefore has no financial consequences for the club at this time."

The statement of case proceeded to advance contentions in justification of HMRC's view of the Club's VAT position.

12. The appeal came before Judge Demack on 17 August 2012. In advance of the hearing, each side had identified authorities on which it wished to rely. Those listed by Officer Dayson, who was representing HMRC, related to substantive VAT law. They did not include *Odhams Leisure Group Ltd v Customs & Excise Commissioners* [1992] STC 332, a decision of McCullough J.

13. At the 17 August hearing, Judge Demack drew the parties' attention to the *Odhams* case. It was later confirmed to Mr Harris on Judge Demack's behalf that it was Judge Demack who had researched the *Odhams* case and that it had "not [been] brought to his attention by either party present at the hearing". Judge Demack had evidently had *Odhams* cited to him at a hearing relating to Chipping Sodbury and other golf clubs at the end of May 2012. The decision subsequently given in that case, which was released on 30 August, included this:

> "93. Mr Hill [i.e. counsel for HMRC] submitted that the Proprietary Clubs were asking the Tribunal to decide a hypothetical issue. On the facts of both appeals the provisions of the 1999 Sports Order do not affect the tax treatment of the appellants' supplies. He relied on the decision of McCullough J in *Odhams Leisure Group Limited v Customs & Excise Commissioners* [1992] STC 332 to support his submission.
>
> 94. For the reasons we have given above there is distortion of competition. Further it is accepted by both parties that the Proprietary Clubs are profit making bodies. In those circumstances it would be inappropriate for us to say anything about the lawfulness of the 1999 Sports Order. There is no factual basis on which we can judge the effect of the provisions introduced by the 1999 Sports Order. We agree with Mr Hill that in this regard we are being asked to determine a hypothetical issue over which we do not have jurisdiction."

14. In the light of the *Odhams* case, Judge Demack considered that he had no jurisdiction to deal with the Club's appeal to the FTT. As Judge Demack has said:

> "At that stage, there was no tax in issue, and nothing for the Tribunal to adjudicate upon. For an appeal to lie to the Tribunal, there must be an appealable matter, as defined in S.83 of the Value Added Tax Act 1994. In the present case, there was no appealable matter."

15. On 23 August 2012, Mr Harris asked for an order for costs to be made in the Club's favour. He said:

> "Your decision that the Tribunal had no jurisdiction to consider the appeal is accepted.

> Bedale Golf Club has gone to considerable cost to prepare for the case which, HMRC stated was a matter for appeal, on many occasions. The Club requests that you make an order under section 29(4) of the 2007 Act [i.e. the Tribunals, Courts and Enforcement Act 2007] (wasted costs) in favour of the club as it considers that HMRC acted unreasonably in stating that, its decisions were subject to appeal to the tribunal, resulting in a waste of time by all concerned."

16. Officer Dayson responded on HMRC's behalf on 28 September 2012. Among other things, she said that HMRC "would expect that the decision to appeal was made after due consideration by the [Club]", that she "made it clear" in HMRC's statement of case that the decision "had no financial consequences for [the Club]", that HMRC "prepared for the case diligently" and that HMRC "also incurred costs in attending the hearing in Leeds where Judge Demack decided that the Tribunal did not have jurisdiction". She said that HMRC did not consider that they had acted improperly, unreasonably or negligently.

17. Mr Harris wrote to Judge Demack again on 2 October 2012. Having said that the Club considered HMRC to have been unreasonable, to have acted improperly and to have been negligent, Mr Harris referred to the correspondence mentioned in paragraphs 4-9 above. Mr Harris then said:

> "If [HMRC] had prepared the case diligently, they would have known the judgement of the 'Odhams Leisure Group Ltd'. This is a special unit of HMRC who deal with numerous appeal cases each year, and should know better."

18. Shortly after this, the parties asked Judge Demack to deal with the costs application on the papers, without a hearing.

19. Judge Demack ruled on the application in a decision released on 13 November 2012. He said:

> "This Tribunal having considered the written submissions of both parties directs that the said application is dismissed and this tribunal records that [the Club] having throughout its appeal … been professionally advised should have been aware that the Tribunal had no jurisdiction to deal with its appeal."

20. On 7 January 2013, the Club applied for permission to appeal Judge Demack's ruling. Having referred to section 29(4) of the Tribunals, Courts and Enforcement Act 2007, the application stated:

> "HMRC acted both unreasonably and improperly in stating that its decisions were subject to appeal to the Tribunal, when it knew all along that the Tribunal had no jurisdiction to deal with the appeal."

21. On 6 February 2013, Judge Demack declined to grant permission to appeal. He said:

> "4. … [The Club's] appeal was incorrectly accepted by the Tribunal and HMRC. The appeal should not have been made. (Any further decision of HMRC in relation to the residual input tax question on the lounge/dining room refurbishment could be appealed, but only when such decision is made).
>
> 5. The Club has been throughout presented professionally. In those circumstances, I am satisfied that it is not entitled to its costs of the appeal, HMRC not having behaved unreasonably in defending or conducting the proceedings."

22. On 27 March 2013, the Upper Tribunal granted the Club permission to appeal.

The legal framework

23. The FTT's ability to make costs orders is limited by rule 10 of the Tribunal Procedure (First-Tier Tribunal) Tax Rules 2009. An order for costs can, however, be made in the particular cases listed in rule 10(1). Rule 10(1)(a) allows the FTT to make orders in respect of costs under section 29(4) of the Tribunals, Courts and Enforcement Act 2007.

24. Section 29(4) of the 2007 Act is in these terms:

> "In any proceedings mentioned in subsection (1), the relevant Tribunal may–
> (a) disallow, or
> (b) (as the case may be) order the legal or other representative concerned to meet,
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules."

25. The expression "wasted costs" is defined in section 29(5) of the 2007 Act to mean:

> "any costs incurred by a party–
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay."

26. Section 29(6) of the 2007 Act provides that a "legal or other representative" is:

"in relation to a party to proceedings, … any person exercising a right of audience or right to conduct the proceedings on his behalf."

27. Guidance as to the meaning of "improper, unreasonable or negligent" conduct is to be found in *Ridehalgh v Horsefield* [1994] Ch 205, which concerned section 51(7) of the Senior Courts Act 1981, which contains similar wording. In that case, the Court of Appeal said this about the meaning of "improper", "unreasonable" and "negligent":

(i) "improper" "covers any significant breach of a substantial duty imposed by a relevant code of professional conduct" and extends to conduct "which would be regarded as improper according to the consensus of professional (including judicial) opinion … whether or not it violates the letter of a professional code";

(ii) "unreasonable" describes "conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case", and "it makes no difference that the conduct is the product of excessive zeal and not improper motive"; and

(iii) "negligent" is to be "understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession". The Court of Appeal said that it wished "firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: 'advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do;' an error 'such as no reasonably well-informed and competent member of that profession could have made'."

28. It is not entirely clear which officers within HMRC are to be treated as a "legal or other representative" for the purposes of section 29 of the 2007 Act. A solicitor or barrister within the Solicitor's Office is plainly capable of being a "legal or other representative", but an appeal before the FTT can (as I think was the case here) be conducted by an officer with no legal qualification . I am inclined to think that such an officer is to be viewed as a "person exercising a … right to conduct the proceedings on [HMRC's] behalf" in relation to the particular proceedings in question and, hence, a "legal or other representative" for the purposes of section 29 in that context. On the other hand, it cannot, as it seems to me, be the case that every officer of HMRC who has been involved with a dispute that ends up before the FTT is a "legal or other representative" even though all of them could have been (but were not) asked by HMRC to conduct the appeal proceedings.

The present appeal

29. Mr Harris, who represented the Club before me (as he had before Judge Demack), maintained that Judge Demack was wrong to accept that HMRC had not behaved unreasonably. He argued that Judge Demack made an error in law in failing to recognise that it is unreasonable for a Government department to persist in stating that a decision is appealable when it knows that it is not. It was Mr Harris' contention that Judge Demack "knew that 'HMRC knew' that the Tribunal had no jurisdiction to hear the Bedale Golf Club appeal, and yet allowed it to progress to a hearing, wasting the Tribunal's, Bedale Golf Club's, and HMRC's time and money". In oral submissions, Mr Harris confirmed that the Club's appeal rested on the proposition that HMRC was aware of the *Odhams* case but decided to withhold it. More specifically, Mr Harris said that Officer Dayson will have known of *Odhams* both at the time of the *Chipping Sodbury* hearing and when preparing HMRC's statement of case. He suggested that someone at HMRC would have told Officer Dayson prior to the 17 August hearing that, if Judge Demack did not himself refer to *Odhams*, she was to do so. Mr Harris' thesis seemed to be that HMRC had lured the Club into making and pursuing an appeal that HMRC knew to be hopeless.

30. As was pointed out by Mr Tom Cross, who appeared for HMRC on the appeal, one answer to Mr Harris' submissions is that it had not been suggested to Judge Demack when he made his decision that HMRC in general, or Officer Dayson in particular, had known of the *Odhams* decision. That idea appears to have emerged for the first time in the application for permission to appeal to the Upper Tribunal. As mentioned above, the submissions put before Judge Demack on the Club's behalf before he made his decision included the assertion that HMRC would have known of *Odhams* had they prepared the case diligently and the comment that HMRC "should know better". It was not then alleged (as it is now) that HMRC had actual knowledge of *Odhams* but deliberately refrained from disclosing it. In the circumstances, Judge Demack cannot be criticised for not dealing with the issue in his decision of 13 November 2012. The point had never even been raised.

31. In any case, Mr Harris' allegations have no real basis in evidence. I can see no good reason to suppose that Officer Dayson (or anyone else at HMRC concerned with the Club's appeal to the FTT) knew of the *Odhams* case before the 17 August hearing. It was Judge Demack who drew attention to *Odhams*; Officer Dayson had not even included the case among the authorities needed for the hearing. The idea that someone at HMRC had told Officer Dayson that she should raise *Odhams* if Judge Demack did not is, frankly, fanciful. It must be the case that one or more people from HMRC will have learned of *Odhams* by the end of May 2012, when the *Chipping Sodbury* appeal was heard, but it does not follow that anyone dealing with the Club's appeal (in particular, Officer Dayson) knew anything about it. Mr Harris' claims are also hard to reconcile with the fact that the Club's appeal put HMRC, as well as the Club, to trouble and expense. Why would HMRC have allowed the appeal to proceed if it had known that it could stop it by telling Mr Harris of *Odhams*?

Again, were it the case that HMRC had wished to lure the Club into pursuing its appeal, why did Officer Dayson make the point in HMRC's statement of case that the relevant ruling had "no financial consequences for the club at this time"?

32. In the circumstances, it appears to me that Judge Demack was amply justified in taking the view that HMRC had not behaved unreasonably. In my view, there is no question of his having arrived at a perverse or unreasonable conclusion. In fact, Judge Demack could not, as it seems to me, properly have acceded to submissions such as the Club now puts forward. The evidence before him would not have sustained a finding that Officer Dayson or any other relevant "legal or other representative" had known of *Odhams* before 17 August 2012, let alone that that decision had been deliberately withheld from the Club.

33. To my mind, the appeal is misconceived.

Conclusion

34. In the circumstances, I shall dismiss the appeal.

Mr Justice Newey

RELEASE DATE: 3 March 2014