Neutral Citation Number [2025] UKUT 00410 (TCC)

Appeal number: UT/2020/000370

UPPER TRIBUNAL TAX AND CHANCERY CHAMBER

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

- and -

SUKHDEV MATTU **Respondent**

TRIBUNAL: **Judge Timothy Herrington**

Judge Rupert Jones

Decided on the papers without a hearing following written submissions on behalf of HMRC on 2 November & 15 December 2021 and submissions on behalf of the Respondent dated 1 December 2021

Ben Elliott and Laura Ruxandu, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants

Geraint Jones QC, Counsel, instructed by Rainer Hughes solicitors, for the Respondent

COSTS DECISION

Deciding the applications on the papers

1. We are satisfied that it is in accordance with the overriding objective, just and fair, to determine this application on the papers without an oral hearing. We take account of the fact that neither party sought an oral hearing. We have all the information, both evidence and submissions, that we consider reasonable and necessary to determine the issues. Both parties have had a fair and reasonable opportunity to present their respective cases in writing. The sums at stake are small and it is proportionate to proceed in this manner.

The application and cross application for costs

2. In our decision ('the UT decision') dated 4 October 2021, released as *Revenue and Customs v Sukhdev Mattu* [2021] UKUT 245 (TCC), we granted HMRC's application for a penalty under paragraph 50 of Schedule 36 to the Finance Act 2008. We ordered that the Respondent pay HMRC a penalty in the sum of £350,000.

3. On 2 November 2021, HMRC ('the Applicants') applied for the Respondent to pay part of their costs of making the successful penalty application. HMRC sought a direction that the Respondent pay £5,000 towards their costs of making the application, the total sum they incurred being set out in a statement of costs at £50,114.50.

4. HMRC make their costs application pursuant to paragraph 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules') on the basis that the Respondent has acted unreasonably in conducting proceedings. In accordance with Rule 10(3)(d) of the UT Rules, the Upper Tribunal may make an order for costs on an application of one of the parties "*if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings*". Furthermore, pursuant to the overriding objective in Rule 2, the Upper Tribunal is to deal with costs in a way that is fair and just in the circumstances of the case.

5. On 1 December 2021 the Respondent objected to HMRC's costs application, submitting it was unreasonable, and therefore made a cross application for the costs of defending it in the sum of £3,858.

HMRC's costs application and submissions

6. Mr Elliott submits that HMRC were undoubtedly the successful party in the substantive penalty proceedings. He relies on the fact that when the Upper Tribunal granted HMRC's paragraph 50 penalty application, all of the numerous issues in dispute were determined in their favour. The numerous issues are summarised at paragraph 4 of Mr Elliot's submissions dated 2 November 2021.

7. However, Mr Elliott does accept that in deciding the amount of the penalty under paragraph 50(3), the Upper Tribunal rejected HMRC's primary submission that the penalty should be in the full amount of the tax at risk, namely £1,917,578 [see the UT

decision at para 385 - UT/385], but still imposed a significant penalty of £350,000 [UT/390].

8. Mr Elliott submits that the Respondent and/or his representatives have acted unreasonably in conducting the penalty proceedings. He relies on six examples in particular:

(1) The Respondent and/or his representatives were unreasonable in withdrawing from the proceedings without taking reasonable steps to understand the legal position and/or seeking advice in order to understand the legal position, notwithstanding the efforts of both HMRC and the Tribunal to explain the nature of the proceedings to the Respondent in correspondence.

(2) The Respondent and/or his representatives were unreasonable in conducting extensive correspondence with the Tribunal between 20 February 2021 and 25 May 2021, without making a formal application for reinstatement [UT/Appendix to the decision at paras 13-33]. The reasonable approach for the Respondent would have been to obtain appropriate advice and act promptly, particularly in light of the useful guidance Judge Herrington gave in his correspondence – in this regard, it is observed that the Respondent ultimately (but belatedly) did instruct specialist counsel to represent him.

(3) Having applied for reinstatement, the Respondent and/or his representatives were unreasonable in failing to comply with the conditions on which Judge Herrington initially granted their reinstatement [UT/Appendix 34-35, 40].

(4) The Respondent and/or his representatives were unreasonable in introducing new evidence at a very late stage (only 7 days before the hearing) [UT/ Appendix 41-45]. In this regard, Judge Herrington noted that the application was made without any prior notification and without even taking the trouble to perform the simple courtesy of making an application in advance.

(5) The Respondent and/or his representatives acted unreasonably in raising the majority of his arguments very late – since he had not filed a statement of case and had withdrawn from the proceedings, it was only in the skeleton argument 7 days before the hearing that most of his arguments were first articulated. HMRC consented to this procedure only because there was no other option at that stage other than to abandon the hearing.

(6) The Respondent and/or his representatives were unreasonable in advancing arguments based on the existence of an appeal against the Paragraph 39 Penalty when the Respondent has not sought to pursue his appeal against the Paragraph 39 Penalty since June 2020 despite being made aware that it had not been accepted. There was no attempt by the Respondent and/or his representatives to correspond directly with the First-Tier Tribunal, or dispute the conclusion that the appeal was notified late, let alone seek permission for the appeal to be admitted late [UT/82].

The Respondent's response and cross application

The Respondent's response to HMRC's application

9. Since the issue of the UT decision in the penalty proceedings, the Respondent has instructed new representatives – Rainer Hughes solicitors and Geraint Jones QC of counsel. They did not conduct the substantive proceedings on behalf of the Respondent.

10. In his written submissions Mr Jones QC made some general points. He submitted that this kind of costs application involves two stages. The first is to identify and establish alleged unreasonable behaviour; the second is to establish a causative link between that identified behaviour and costs incurred in consequence thereof. He submitted that HMRC had not identified any specific costs that were incurred, but otherwise would not have been incurred, by reason of the alleged unreasonable behaviour.

11. He also submitted that HMRC's application is misconceived because it proceeds on the basis that the UT should award "such an amount as would represent an appropriate sanction for the Respondent's conduct." This fails to recognise that the costs regime is not punitive; but compensatory. HMRC has not quantified, or even sought to quantify, any costs allegedly incurred, let alone wasted, by reason of the alleged unreasonable conduct. Instead, HMRC submits that the UT should make some kind of broad brush assessment, which the Respondent says would be wrong in principle given the absence of any evidence of any causative link between wasted or unnecessarily incurred costs and the six identified grounds.

12. Mr Jones QC then went on to address each of the six grounds upon which HMRC rely to allege unreasonable conduct:

    (1) That the Respondent was said to be unreasonable in withdrawing from the proceedings without taking reason steps to understand the legal position and seeking advice.

        He submitted that this is speculative. HMRC does not know, nor would it be entitled to know, what, if any, advice the Respondent took prior to the withdrawal. The decision to withdraw, even though later regretted and reversed, cannot properly be characterised as unreasonable, quite regardless of whether same was or was not based upon prior legal advice.

    (2) That the Respondent was unreasonable in conducting extensive correspondence with the Tribunal between 20 February 2021 and 25 May 2021.

        He submitted that HMRC have not begun to explain why it was unreasonable for the Respondent to correspond with the Tribunal. It again proceeds on the assumption that the Respondent did not "obtain appropriate advice". However even if the course of correspondence could be characterised as unreasonable, HMRC totally fails to identify what, if any, additional or wasted costs it has incurred by reason thereof. Again, it advocates the broad-brush sanction/penalty approach. It is for HMRC to prove/identify costs that have been unnecessarily incurred and/or wasted as a result of the alleged second reason.

    (3) That after making the application for reinstatement the Respondent unreasonably failed to comply with the conditions upon which it was initially granted.

He submitted that even if the failure to comply with conditions could be characterised as unreasonable, again HMRC fails to forge any causative link between this alleged unreasonable behaviour and any additional or wasted costs incurred by it in consequence thereof.

(4) That the Respondent was unreasonable in introducing new evidence at a late stage.

He submitted that had been causative of an adjournment and costs being thrown away in consequence of any such adjournment, the Respondent might understand the application made by HMRC. However, that is not the factual situation. It may have been discourteous to make the application "without any prior notification" and/or "without even taking the trouble to perform the simple courtesy of making an application in advance", but it needs to be emphasised that this costs jurisdiction is not punitive; but compensatory. Quite how any additional or wasted costs were, or could have been, incurred by HMRC in dealing with a belated application to introduce new evidence, has not been explained, let alone quantified, by HMRC. The hearing of the penalty application was still completed within the two days allotted to it.

(5) That the Respondent "acted unreasonably in raising the majority of his arguments very late", notwithstanding that same were heralded in his Skeleton Argument which HMRC had not less than seven days prior to the hearing.

He submitted that there is nothing unreasonable in advancing a late argument or submission. In respect of the fifth reason HMRC gives no explanation as to why, even if the Respondent's arguments were known to it only seven days prior to the hearing, that has been causative of HMRC incurring additional or wasted costs. If it was proper for those arguments to be advanced, as HMRC concedes in paragraphs 2(2) and 17 of its Application, it is difficult to understand how that could be causative of any additional or wasted costs being incurred by HMRC. If it was proper for those points to be argued (even if not eventually successfully argued), it is almost inconceivable that HMRC incurred any additional or wasted costs in dealing with those points. HMRC does not contend that it did; let alone does it can quantify any such alleged additional or wasted costs.

(6) That the Respondent was unreasonable in belatedly advancing arguments in respect of the penalty.

He submitted that nonetheless, this was dealt with at the hearing before the UT, within the allotted two days for the hearing. HMRC seems to argue that for this point to be raised it should have been heralded with a formal application for permission for the appeal to be heard out of time. Any such formal application would have involved additional costs being incurred whereas the approach taken by the Respondent avoided additional costs being incurred. Again, HMRC fails to identify any additional or wasted costs allegedly incurred in consequence of this delay in seeking permission for the penalty appeal to be admitted out of time. HMRC has not identified any such additional wasted costs because common sense dictates that the reality is that it is unable to do so.

13. Mr Jones objected to HMRC seeking a partial costs order "as would represent an appropriate sanction for the Respondent's conduct." Absent proof of additional or wasted costs being incurred consequential upon any such identified unreasonable conduct, that basis for an award is misconceived. The costs regime is compensatory, not punitive.

14. He accepted that HMRC had attempted, in paragraph 18 of its Application, to identify additional or wasted costs that it has incurred. However, they did so in a manner that would have no prospect of satisfying a Costs Judge to award any sum in respect of the alleged additional costs. That is because the six grounds each proceed on the basis that "HMRC incurred further time and cost in ……", without any attempt whatsoever to identify or quantify the alleged further time and /or the cost associated therewith. It does not assist HMRC to try to rely upon the UT's comment that "Their failure to comply with directions and the making of late applications will undoubtedly increase the cost of these proceedings and have imperilled efficient conduct of these proceedings", absent proof of a causative link between any such failures (if properly characterised as unreasonable) and identified quantum of any such additional cost.

The Respondent's Cross Application for costs

15. Mr Jones QC submitted that in circumstances where HMRC relies upon flimsy or unreasonable complaints of unreasonable behaviour, which are, in reality, no more than a series of contrived criticisms, if they were to have any real prospect of succeeding in the instant Application it was essential for HMRC to prove their quantum case. They have not even set out to do so by reference to any identified and quantified additional or wasted costs.

16. He submitted that it is unreasonable to advance an Application where the party making the application fails to adduce evidence or credible material which would allow it to satisfy one of the essential ingredients to success in its Application; namely, identified and quantified additional wasted costs. The result being that the Respondent has had to incur costs, quantified in its Schedule as £3,858, to resist an Application that never had any real prospect of success. Accordingly, Mr Jones QC submitted that HMRC should pay the Respondent's costs of defending their costs application.

Discussion and Analysis

17. We are satisfied that the Respondent and his representatives have acted unreasonably in conducting the penalty proceedings in the six ways that HMRC have alleged. The UT decision of 4 October 2021 contains an appendix setting out some of the earlier procedural history and case management decisions in the penalty proceedings. In that appendix we have already described the Respondent's conduct and that of his representatives as "*poor*" [UT/Appendix 45(6), 54], "*unacceptable*" [UT/Appendix 45(6)] "*unsatisfactory*" [UT/Appendix 63], constituting "*serious non-compliance*" [UT/Appendix 45(8)], lacking courtesy [UT/Appendix 45(6)] and "*an ambush which is not fair in the context of proceedings of this kind and is inconsistent with the efficient conduct of litigation*" [UT/Appendix 45(4)].

18. We are satisfied that the Respondent's conduct and that of his representatives was in a number of respects unreasonable in conducting the proceedings and therefore the

condition in Rule 10(3)(d) of the UT Rules is satisfied and the Tribunal has jurisdiction to make an order of costs against the Respondent.

19. We reject each of Mr Jones QC's arguments that HMRC have wrongly focussed on costs as being a punitive rather than compensatory measure and failed to prove any causative link between the unreasonable conduct and the incurring of costs. There is no requirement under Rule 10(3)(d) that there must be a direct causal connection between the costs claimed and the unreasonable conduct (and no authority for that proposition is provided by the Respondent).

20. We are satisfied that the Rule 10(3)(d) costs claimed by HMRC are compensatory in that HMRC are not claiming costs over and above what they have reasonably incurred in the proceedings and, in principle, once unreasonable conduct has been identified, the Tribunal has a complete discretion under Rule 10(3)(d) in relation to costs subject to the overriding objective. In exercising that discretion, it is just and fair for an award of costs to be increased by reference to the nature and severity of the paying party's conduct throughout the proceedings.

21. Moreover, in a case such as the present, in which the Respondent has acted unreasonably on a number of occasions throughout the proceedings and HMRC have sought a summary assessment of a small proportion of their costs, it is appropriate, particularly with regard to the overriding objective, for the Tribunal to take a more proportionate (and less rigid) approach to quantifying the costs that ought to be awarded and in considering whether the Respondent's conduct throughout the proceedings has resulted in HMRC incurring some additional costs.

22. In any event, to the extent it is required, the causative link is established. HMRC did identify a causal connection between the Respondent's unreasonable conduct and additional costs being incurred (discussed further below).

Quantum

23. HMRC did not seek all of their costs but only sought a small proportion to reflect the additional costs arising from the Respondent's unreasonable conduct and such an amount as would represent an appropriate sanction for the Respondent's conduct.

24. HMRC have accepted that the Respondent and his representatives were not unreasonable in defending the proceedings (i.e. the Respondent had some reasonable arguments), and that the majority costs in the overall proceedings would have been incurred regardless of the Respondent's conduct and/or that of his representatives. However, we are satisfied that the Respondent's and/or his representatives' unreasonable conduct led to an increase in the time and cost incurred by HMRC.

25. In particular we accept HMRC' submissions on the costs they incurred as follows:

(1) HMRC incurred further time and cost in considering the Respondent's position on withdrawal (see for example HMRC's email dated 21 December 2020 [UT/Appendix

8], HMRC's email dated 22 February 2021 [UT/Appendix 19], and HMRC's email dated 25 May 2021 [UT/Appendix 28]);

(2) HMRC incurred further time and cost in considering and responding to the Respondent's First Reinstatement Application (see for example HMRC's letter of 11 June 2021 [UT/Appendix 36]);

(3) HMRC incurred further time and cost in considering and responding to the Respondent's Second Reinstatement Application [UT/Appendix 46];

(4) HMRC incurred further time and cost in considering and objecting to the Respondent's Additional Evidence Application [UT/Appendix 43];

(5) HMRC incurred further time and cost in considering and objecting to the Respondent's Postponement Application [UT/Appendix 53-55]; and

(6) HMRC incurred further time and cost in responding to and addressing arguments that were raised very late in the proceedings.

26. The fact that the Respondent's various late applications would undoubtedly increase the cost of the proceedings was noted Judge Herrington's case management decision of 24 June 2021: "Their failure to comply with directions and the making of late applications will undoubtedly increase the cost of these proceedings and have imperilled the efficient conduct of these proceedings" [UT/ Appendix 45(7)].

27. We accept HMRC's submission that it would not be practical or necessary to seek to identify the precise costs that flowed from the Respondent's conduct, and neither would that approach be in accordance with the overriding objective. What must be achieved is a fair and just outcome and this should be arrived at by means of a costs order that reflects the Respondent's conduct and that of his representatives.

28. Taking all of the relevant circumstances into account, in particular the Respondent's unreasonable conduct and non-compliance throughout the proceedings, HMRC submit that a fair outcome would be for the Tribunal to award HMRC £5,000, being slightly less than 10% of their total costs incurred in the proceedings (which are £50,114.50). The Tribunal considers this to be fair and just in the circumstances.

The Respondent's Cross-application for Costs

29. It flows from our decision above, that HMRC's application has a clear foundation and is not in any way unreasonable, in particular given the express findings of the Tribunal in relation to the Respondent's costs and the Tribunal's observation that the Respondent's failure to comply with directions had undoubtedly increased the costs of the proceedings [UT/Appendix 45(7)]. Accordingly, the Respondent's cross-application for the costs incurred in answering HMRC's costs application is dismissed.

Conclusion

30. HMRC's costs application is granted and the Respondent is directed to pay £5,000 towards their costs. The Respondent's cross application for costs is dismissed.

JUDGE TIMOTHY HERRINGTON

JUDGE RUPERT JONES

UPPER TRIBUNAL JUDGES
RELEASE DATE: 16 December 2021