



[2012] UKUT 172(TCC)

Appeal number: FTC/69/2011

COSTS — appeal in standard category before First-tier Tribunal — appeal compromised on day of hearing — direction in favour of appellant in respect of costs refused — whether refusal incorrect exercise of discretion — no — appeal dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

GHEORGE CALIN CATANA

Appellant

- and -

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

Respondents

Tribunal: Judge Colin Bishopp

Appeal determined on written submissions only

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DECISION

1. This is an appeal by Mr Gheorge Călin Catană against the refusal of the First-tier Tribunal to make a direction in his favour in respect of the costs Mr Catană incurred in the context of an investigation into his tax affairs in the year 2006-07, and in respect of an appeal against HMRC's determination, effected by amendment to his self-assessment return, of the tax due from him for that year. The appeal was compromised on the day of the hearing before the First-tier Tribunal, and a decision was released recording various findings of fact about the history of the matter, but concluding with a note about the agreement reached between the parties. The decision was silent about costs.

2. Mr Catană was dissatisfied with the agreement since it did not have the result he thought it would have (there appears to have been a misunderstanding on that point between him and HMRC's representative) and the decision was later set aside. The appeal is to be heard again by the First-tier Tribunal. I do not need to deal with the merits of the appeal and will say nothing about them, though I shall need to borrow a little from the tribunal's description of the history.

3. After the First-tier Tribunal's decision was released Mr Catană made an application for a direction in respect of his costs. The application was dealt with by Judge Kempster (who had not heard the appeal itself) and he refused it, though he also gave permission to appeal to this tribunal. Although the First-tier Tribunal may, if it sees fit and there are grounds for doing so, make a direction in respect of the costs of the re-hearing, and might possibly be able to deal with the costs of and leading to the first hearing, Mr Catană prefers to pursue his appeal to this tribunal in respect of those costs and in my view he is procedurally right to do so.

4. Both parties asked that the appeal be determined on the basis of written submissions alone. I have therefore considered a lengthy submission by Mr Catană, with the various documents and other material referred to in it, and a rather shorter submission prepared by Ms Beatrice Collier of counsel, for the Commissioners. I have, of course, also read the First-tier Tribunal's decision in respect of the appeal itself, and I have considered the material which was available to it.

5. The First-tier Tribunal's ability to make a direction in respect of costs finds its origin in s 29 of the Tribunals, Courts and Enforcement Act 2007, which reads:

“(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.

(4) 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.

(5) In subsection (4) ‘wasted costs’ means 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.

(6) In this section ‘legal or other representative’, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.”

6. Subsections (1) and (2), taken alone, give a tribunal the power to make a costs direction in respect of proceedings in that tribunal without limitation, save that the “discretion” to which the provisions refer is judicial discretion. That is to say, a tribunal asked to make a costs direction may properly do so only when it is appropriate, taking into account all of the relevant circumstances and leaving out of account the irrelevant. There are, however, two important limitations to the power.

7. First, the tribunal may make an order in respect of costs “of and incidental to” the proceedings. There is no power to make an order in respect of anything else, and particularly, in the context of this case, in respect of the investigation into Mr Catanã’s tax affairs which preceded the proceedings. The similar restriction on the power of the Special Commissioners (one of the bodies whose jurisdiction was absorbed in 2009 by the Tax Chamber of the First-tier Tribunal) was considered by the High Court (which had the same standing in the judicial hierarchy as the Upper Tribunal has now) in *Gamble v Rowe* [1998] STC 1247. At p 1257 the court said

“The second restrictive point is that the party must act wholly unreasonably ‘in connection with the hearing in question’. The commissioners [that is, the Special Commissioners] may or may not take the view that the party concerned acted unreasonably or wholly unreasonably at some earlier stage in the history of the tax affairs of the person in question. But if that earlier stage was before the matter was either before the [Special] commissioners and being heard or was being prepared for a hearing before the [Special] commissioners, they have no power to award costs.”

8. The question whether the transfer of the Special Commissioners’ jurisdiction to the First-tier Tribunal and the consequent re-writing of the relevant legislation had the result of changing the power to make a costs direction in any significant way was considered by the First-tier Tribunal in *Bulkliner Intermodal*

Limited v Revenue and Customs Commissioners [2010] UKFTT 395 (TC), in which it said, at [11],

5 “... one thing that has not changed is that the Tribunal’s jurisdiction continues to be limited to considering actions of a party in the course of ‘the proceedings’, that is to say proceedings before the Tribunal whilst it has jurisdiction over the appeal. It is not possible under the 2009 Rules, any more than in was under the Special Commissioners’ regulations, for a party to rely upon 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. In these respects the principles in *Gamble v Rowe* ... remain good law. That is not to say that behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform 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 behaviour in the continued defence of an appeal.”

20 9. I respectfully agree with that proposition. The First-tier Tribunal is a creature of statute, with no inherent power—that is to say, it may do only those things which Parliament has authorised it to do. This tribunal has a wider jurisdiction but, in respect of an appeal from a First-tier tribunal’s decision, it may do no more than that tribunal might have done. In other words, if the First-tier tribunal could not make a costs direction, this tribunal may not do so either. That is the plain effect of s 12(4) of the Tribunals, Courts and Enforcement Act 2007, which provides that

30 “In acting under subsection (2)(b)(ii) [*ie* when re-making a decision of the First-tier Tribunal] the Upper Tribunal—

- (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
- (b) may make such findings of fact as it considers appropriate.”

35 10. It follows that so much of Mr Catanã’s application as respects any costs he incurred before the proceedings before the First-tier Tribunal were brought cannot succeed, irrespective of its underlying merits which, consequently, I shall not explore.

40 11. The second, and for present purposes very important, restriction is to be found in sub-s 29(3) of the 2007 Act, which makes sub-ss (1) and (2) subordinate to tribunal rules. In this case the relevant rule is rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which, so far as relevant to this appeal, is as follows:

“(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

- (a) under section 29(4) of the 2007 Act (wasted costs);

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;

(c) if—

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

10 (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph....

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative....

15 (8) In this rule ‘taxpayer’ means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings.”

20 12. There is, therefore, no general power to make a costs direction; the tribunal may do so only if one of the prescribed conditions is met. The simplest of the conditions, that the proceedings have been allocated to the complex category, is not met in this case because the proceedings were allocated to the standard category. Nor is the condition which may allow the tribunal to make a wasted costs order, since I find nothing in the material produced by Mr Catanã, including
25 his 74-page skeleton argument, to suggest any “improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative”, to adopt the words of s 29(5)(a) of the 2007 Act. The purpose of a wasted costs order is to require a representative—usually but not always a solicitor or barrister—either to pay the costs of his client’s
30 opponent, or to forego costs which might otherwise be recoverable, because of his own inadequate conduct. It is a means of sheltering the client from the consequences of his representative’s failings, and it has no place where it is a party to the litigation who has himself behaved badly.

35 13. It is rule 10(1)(b) which is engaged (if Mr Catanã is right) in this case. It will be seen that this rule, too, allows for a costs direction when it is a representative whose conduct is in question, but in this case it is the party for whom the representative is acting who is subject to the direction. The rule thus caters for the case, for example, where the representative has acted as he has because of the party’s instructions to him. Those considerations are not relevant
40 here; it makes no difference who within HMRC acted unreasonably (if anyone did) since the person who represented HMRC before the First-tier Tribunal was himself an HMRC officer.

45 14. Mr Catanã has made a number of points about the phrase “bringing, defending or conducting the proceedings”. It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably

resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.

5 15. I cannot see that there is any possible criticism to be made of Judge Kempster's interpretation or application of the phrase. He quite clearly asked himself whether there was anything in HMRC's conduct, in resisting the appeal or in dealing with the matter before the tribunal, which merited the making of a costs direction against them, and decided that there was not. Thus he asked himself the right question, and answered it.

10 16. The principal difficulty facing Mr Catanã in this appeal is the fact that, as I have mentioned above, the making of a costs direction is a matter for judicial discretion. If I am to allow this appeal I have to be satisfied, not that I would, or even might, have made a different direction myself, but that Judge Kempster exercised his discretion in an unreasonable manner—that is, he failed to apply the correct law, took into account the irrelevant, ignored the relevant or reached a conclusion which no judge, properly exercising his discretion, could reasonably have reached. That is, plainly, a difficult task.

15 17. For the reasons I have already given, Judge Kempster could make a costs direction in Mr Catanã's favour only if he was satisfied that HMRC had unreasonably resisted the appeal before the First-tier Tribunal, or conducted themselves during the course of those proceedings in an unreasonable manner. Mr Catanã has made a great many detailed complaints, in his skeleton argument and elsewhere, about HMRC's conduct, both in the course of the enquiry which led to the amendment to his return, and in the course of the tribunal proceedings, but even if I assumed in his favour that his complaints are all justified, they do not seem to me to help him, as they are based on a misunderstanding and in consequence are misplaced.

20 18. The duty imposed on a taxpayer is to make an honest and complete return and, when called upon to do so, to demonstrate that the income and gains shown on the return are correct and that the allowances and reliefs claimed are justified in principle and in amount. It is, and always has been, for the taxpayer to produce the evidence which supports his return. When he cannot do so, for example because papers have been destroyed or lost, HMRC may, and one might say should, accept reasonable secondary evidence, or make reasonable estimates from historical patterns, but there must nevertheless be some material before them from which a reasonable estimation can properly be made.

25 19. It is true that in some respects Mr Catanã complains that documents he has produced have been disregarded, and I am willing to assume for present purposes (though without making such a finding) that the complaint is justified. But that does not help him since it is apparent from what he says himself, and from the First-tier Tribunal's decision, that he did not produce all of the documents relevant to the verification of his return promptly, and it is moreover clear from the decision that he was still producing them in the course of the hearing. This is not a case in which it could justifiably be said that all the relevant material was in HMRC's hands yet they unreasonably disregarded it when making the amendment, and continued to disregard it during the course of the tribunal

proceedings. Indeed, it does not seem to me that HMRC were doing anything other than undertake their statutory duty to verify Mr Catanã's tax return.

20. Against that background I do not see how it can properly be said that Judge Kempster exercised his discretion incorrectly. On the contrary, it is difficult to see
5 how he could reasonably have made the direction Mr Catanã seeks.

21. The appeal must be dismissed.

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COLIN BISHOPP
Upper Tribunal Judge
Release date: 25 May 2012