

The £1 costs award to the taxpayers (Lecture P1343 – 9.09 minutes)

Background

In most First Tier Tribunal cases, taxpayers and HMRC pay only their own costs (or 'expenses' in Scotland), regardless of whether the appeal is won or lost. Normally, the losing party can't be made to pay the costs of the other party.

First Tier Tribunal cost awards

The primary legislation for the award of costs (the Tribunals, Courts and Enforcement Act 2007, s 29) provides that the costs of proceedings in the First Tier Tribunal and Upper Tribunal shall be in the discretion of the relevant tribunal. In addition, secondary legislation (in the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules, SI 2009/273) states (at rule 10) that the First Tier Tribunal may only make an order for costs in certain limited circumstances.

One such circumstance is if the tribunal considers that a party or their representative has acted unreasonably in bringing, defending, or conducting the proceedings. Another instance might be if HMRC persistently failed to comply with the rules and the tribunal's directions to the detriment of the taxpayer. The First Tier Tribunal can make a costs order on an application by one of the parties, or on its own initiative.

Another of the circumstances in which the First Tier Tribunal may award costs is where the proceedings have been allocated as a 'Complex case' under the tribunal rules, and the appellant has not given a written notice to the tribunal within 28 days of being informed about the case being allocated to the Complex category requesting that the proceedings be excluded from potential liability for costs or expenses. Alternatively, the First Tier Tribunal can make a 'wasted costs' order against a party where their representative has acted improperly or unreasonably or has been negligent if the tribunal considers it unreasonable to expect the other party to pay their resulting costs.

How much?

The general rule (in the Tribunal, Courts and Enforcement Act 2007, s 29(2)) is that the tribunal shall have full power to determine to what extent a party's costs are to be paid.

Before the tribunal makes a direction as to costs, the other party will be given the opportunity to make representations, and if that other party is an individual, the tribunal must consider the individual's financial means (SI 2009/273, r 10(5)). The amount of costs to be paid by a tribunal order can be arrived at in one of three ways:

1. By a decision of the tribunal;
2. By agreement between those who are paying and receiving; or
3. Where an agreement isn't reached, by an assessment of all or part of the costs incurred by the receiving person.

The First Tier Tribunal does not necessarily need to award an amount equal to the costs actually incurred. This point was illustrated very strikingly in the case.

“Arrogant” behaviour by HMRC

For example, In *G C Field & Son Ltd & Ors v Revenue and Customs* [2022] UKFTT 314 (TC), the appellants had used stamp duty land tax (SDLT) avoidance schemes. HMRC had not opened enquiries into the appellants’ SDLT returns within the statutory enquiry window but had raised discovery assessments instead. HMRC had also issued determinations on the basis that SDLT was payable on notional transactions (under the SDLT general anti-avoidance rule in FA 2003, s 75A). The appellants appealed.

The First Tier Tribunal ([2021] UKFTT 297 (TC)) had to consider the validity of the discovery assessments. As such, HMRC bore the burden of proving that they had made a ‘discovery’. HMRC also had to establish that the inaccuracy or insufficiency purportedly discovered came about due to the fraudulent or negligent conduct of the purchaser or a person acting on the purchaser’s behalf. The First Tier Tribunal concluded that HMRC hadn’t discharged that burden of proof.

The appellants subsequently claimed costs under the First Tier Tribunal Rules. The unreasonable conduct relied on was a failure “to make any attempt to satisfy their burden of proving that the appellants or [the promoter] acted negligently”. The tribunal then went on to consider whether there had been unreasonable conduct by HMRC. The tribunal stated HMRC had been “arrogant” in assuming that they’d be offered latitude on the basis that the tax insufficiency arose as a consequence of engagement in an accepted and unsuccessful attempt to avoid SDLT. That was not a reasonable explanation.

HMRC’s decision to call no evidence to support their case on negligence essentially rendered the hearing pointless, which had put the appellants to the unnecessary costs of preparing for and attending a hearing that had only one possible outcome. Thus, the First Tier Tribunal considered it just and fair to make an award for costs against HMRC.

“Lucky strike”

However, the First Tier Tribunal stated that the appellants had benefited from a “lucky strike”, because relief to which they knew they weren’t entitled had been secured. The tribunal considered that an award of substantive costs in such a situation would be to compound their luck and to doubly jeopardise the general body of taxpayers for HMRC’s failure. Consequently, the taxpayers’ application was allowed, but the quantum of costs was assessed at only £1.

HMRC’s procedural failure in *G C Field* had resulted in a tax benefit for the taxpayers amounting to well over £1.3 million, to which the taxpayers acknowledged they were not otherwise entitled. So, costs estimated by the taxpayers at over £80,000 would have been the icing on the cake. But the tribunal refused it.

Contributed by Mark McLaughlin