Appeal number: TC/2015/03827

CAPITAL GAINS TAX – claim for relief, subsequently withdrawn – penalty under Schedule 24 Finance Act 2007 for inaccuracy in return – whether taxpayer careless – yes – taxpayer moving abroad – whether "no reasonable prospect" of the balance of the loss claimed being used – yes – potential lost revenue recalculated and penalty reduced

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIMON FRY **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MS JANET WILKINS

Sitting in public at Fox Court, London on 6 June 2016

Ms Zizhen Yang, of counsel, instructed by Legal Consult, for the Appellant

Mrs Gill Carwardine, presenting officer, for the Respondents

DECISION

Introduction

1. By notice of appeal dated 17 June 2015 the Appellant appealed to this Tribunal against the Respondents' review decision, dated 19 May 2015, to impose a penalty under Schedule 24 of the Finance Act 2007 ("Schedule 24") upon the Appellant, in the sum of £163,192.65, for a careless inaccuracy in his tax return submitted for the tax year 2009/2010.

Background

2. The Appellant's tax return for the tax year 2009/10 contained a claim for relief under Section 253 Taxation of Capital Gains Act 1992 ("TCGA 1992"). This claim, in the sum of £10,736,038, was based upon a "loan of £10,736,038 to KXDNA Ltd which became irrecoverable with effect from December 2009". £202,071 of the relief claimed by the Appellant in his tax return was set against chargeable gains accruing to the Appellant in 2009/10; the Appellant carried forward the loss balance of £10,533,967.

3. In February 2013 the Respondents wrote to the Appellant's agent stating that they proposed to disallow the Appellant's claim for relief under Section 253 TGCA 1992. After correspondence between the parties, in May 2013 the Appellant withdrew his Section 253 TGCA 1992 claim. In February 2014 the Respondents issued an assessment under Section 29 Taxes Management Act 1970 to recover the tax of £34,554.78 which came into charge as a result of the claim being disallowed. The Appellant did not appeal against this assessment.

4. Following further correspondence and a formal information request, the Respondents concluded that the Appellant had been careless in submitting an incorrect tax return for 2009/10. On 27 February 2015 the Respondents issued the Appellant with a penalty under Schedule 24. The Appellant was given 95% reduction for the quality of his disclosure and so the penalty was calculated at 15.75% of the potential lost revenue. The Respondents calculated the potential lost revenue as all of the tax which came into charge as a result of the inaccuracy being corrected, plus 10% of the unused balance of the £10,736,038 relief claimed in the Appellant's tax return. The Appellant sought a review of this penalty.

5. On 19 May 2015 the Respondents upheld the decision to impose a penalty but reduced the percentage to 15% of the potential lost revenue and corrected a mathematical error in the original calculation. This reduced the penalty to £163,192.65. On 17 June 2015 the Appellant appealed to this Tribunal.

Appellant's submissions

6. In his Notice of Appeal the Appellant accepted that there was an inaccuracy in his tax return but he contended that he had taken reasonable care in completing his

return and so no penalty was due. In the alternative, the Appellant contended that the penalty was excessive and also that it was eligible for suspension.

7. Before us the Appellant did not contend that the penalty, if due, was eligible for suspension but he expanded upon his argument that the penalty imposed was excessive: arguing that the potential lost revenue (and hence the penalty) had been miscalculated, and also that if the penalty had not been miscalculated then the penalty was disproportionate to the carelessness alleged and so should be reduced, either because it was disproportionate or as a special reduction.

Respondents' submissions

8. The Respondents submitted that the Appellant had been careless in submitting his return for 2009/10. The Respondents had undertaken considerable investigation but the figures were still not completely clear.

9. The Respondents submitted that the potential lost revenue had been correctly calculated, that special reduction had been considered and that suspension would have been inappropriate in this case.

Facts

10. We heard no witness evidence. On the basis of the documents in the bundle, we find the following:

a) KXDNA Limited was incorporated in October 1999. From its incorporation until December 2003 the Appellant was the sole director of KXDNA Limited. The Appellant was also the sole shareholder, holding 100 ordinary shares of £1 each. The accounts of KXDNA Limited for the year ended December 2003 show that in 2003 the Appellant loaned £9,968,753 to KXDNA Limited. These funds were required to finance the administrative and management costs in opening a related company, KX Gym UK Limited.

b) By 2004 KXDNA Limited required further funds to continue trading and the Appellant sought outside investment. As part of the agreement securing that outside investment, an additional director of KXDNA Limited was appointed and, on 23 December 2004, the Appellant was issued with 9,068,853 deferred shares of £0.000000001 each in KXDNA Limited. These shares were issued in conversion of the Appellant's 2003 loan to the company of £9,968,753.

c) In the year ended December 2009, the directors of KXDNA Limited agreed to waive an inter-company loan of £7,700,606 owed to it by KX Gym Limited. The Appellant was a director of KX Gym Limited at that time.

d) In January 2011 the Appellant's then tax advisor, Mr Offord, wrote to the Appellant, in connection with the Appellant's tax return for 2009/10. Mr

Offord requested further information from the Appellant in order to make a claim for a loss arising to the Appellant as a result of KXDNA Limited waiving its loan to KX Gym Limited. Mr Offord stated that the debt written off was £10,736,038 and that it "came from funds you had loaned to the company way back".

e) On 11 February 2011 the Appellant submitted his tax return for 2009/10. This return contained a claim for relief under Section 253 TCGA 1992 in the sum of £10,736,038. This claim for relief was said to arise upon the Appellant's loan to KXDNA Limited having become irrecoverable in December 2009.

f) In February 2013 the Respondents extended an already open enquiry into another tax return of the Appellant's into the Appellant's tax return for 2009/10. There was correspondence between the parties concerning various aspects of the Appellant's tax return including the Section 253 TCGA 1992 claim for relief. The Respondents informed the Appellant's agent that they intended to refuse the Appellant's Section 253 TCGA 1992 claim on the basis that the company accounts of KXDNA Limited showed that a loan of £9,968,753 from the Appellant to the company had been converted into shares in 2004. In May 2013 the Appellant withdrew his claim to relief under Section 253 TCGA 1992.

g) In May 2013 the Appellant's agent informed the Respondents that the Appellant was resident in the United States of America but working in Switzerland. The agent stated that the Appellant was unlikely to return to the UK.

h) From May 2013 the Respondents and the Appellant's agent corresponded regarding the imposition of a penalty upon the Appellant for submitting an inaccurate return. In October 2013 the Appellant submitted a P85 form to notify HMRC that he had left the UK in March 2013 and was no longer resident in the UK. The Appellant gave an address in Switzerland as his permanent address. In January 2014 the Appellant's agent informed the Respondents that the Appellant had been resident in Switzerland since March 2013 but would become resident in the United States from the end of March 2014.

i) In February 2014 the Respondents raised an assessment to tax in the sum of £34,554.78 on the Appellant, to recover the tax which came into charge as a result of the Appellant withdrawing his claim for relief under Section 253 TCGA 1992. The Appellant did not appeal against this assessment; he paid the tax and interest due.

j) Correspondence between the parties continued with regard to the imposition of a penalty for an inaccuracy in the Appellant's tax return. In September 2014 the Appellant's agent confirmed that the Appellant still resided in Switzerland. In December 2014 the Respondents issued the

Appellant with a formal notice under Schedule 36 of the Finance Act 2008 to provide documents and information. The Appellant did not provide the material requested.

k) In February 2015 the Respondents assessed the Appellant to a penalty under Schedule 24 in the sum of £168,806.24 on the basis of a careless inaccuracy in his tax return for 2009/10. The Appellant sought a review of this penalty. On 19 May 2015 the Respondents upheld the imposition of a penalty in the reduced sum of £163,192.65. The Appellant appealed.

Decision

11. In an appeal against the imposition of a penalty the onus of proof is first upon the Respondents to establish that a penalty may, on the face of it, be imposed. The onus then shifts to the Appellant to satisfy us that he is entitled to any defence which may be available.

12. For a Schedule 24 penalty the Respondents must demonstrate that there is an inaccuracy in a document submitted by the Appellant, that the inaccuracy has led to a false statement of a loss, and that the inaccuracy was careless. The parties are agreed that there is an inaccuracy in the Appellant's tax return for the tax year 2009/10 in that a loss of £10,736,038 was incorrectly claimed in that year. The first issue for us to determine is whether that inaccuracy was due to carelessness on the part of the Appellant. As we set out above, with regard to this aspect of the appeal the onus of proof is upon the Respondents. The standard of proof is the balance of probabilities.

Carelessness

13. The incorrect claim made in the Appellant's 2009/10 tax return relates to events which happened a few years before the claim was submitted but in respect of companies of which the Appellant was a director. The trigger for the Appellant making his claim for relief under Section 253 TCGA 1992 appears to have been the suggestion from Mr Offord, the Appellant's previous agent, that KXDNA Limited's decision in 2009 to waive an intercompany loan to KX Gym Limited would give rise to a capital loss of the Appellant. It is clear from his letter of 13 January 2011 that Mr Offord required further information from the Appellant to check this claim. We do not know what response the Appellant gave to Mr Offord but there are handwritten notes on the copy of the letter we have in our bundle indicating that the Appellant provided Mr Offord with some of the information requested.

14. In correspondence the Appellant's agent made the point that the notes on Mr Offord's letter suggested that the Appellant had given honest answers to the questions asked by Mr Offord. However, it ought to have been clear, to both Mr Offord and to the Appellant, that more checking was required in order to be confident that a loan waived by KXDNA Limited did result in the Appellant suffering a capital loss. The securing of outside investment in 2004 was a significant event for the Appellant, requiring him to convert his loan to KXDNA Limited, of more than £9.9 million, into shares in KXDNA Limited with a nominal value of less than £1. We do not expect

the Appellant to recall the finer details, some six years later, but we would expect the Appellant to remember that a restructuring of this magnitude took place. This is particularly so given the Appellant's submission – see below – that the business was in financial difficulty at that time and the conversion was necessary to secure outside funding. A check of the KXDNA Limited accounts would have confirmed that the Appellant's loan was converted to shares in 2004. We consider that a prudent taxpayer would have undertaken these checks to establish the loan history before submitting his tax return. We consider that the Appellant was careless to submit a tax return which claimed a substantial amount of relief to which he, or his agent, had not checked he was entitled.

15. Ms Yang sought to persuade us that there was a genuine loan which became irrecoverable in 2004 and so the Appellant was entitled to make a claim for relief; the only error was simply that the Appellant's claim for relief had been made outside the four year period permitted for making claims. We do not agree that this analysis is correct. Quite apart from it being clear that the Appellant's loan of £9,968,753 to KXDNA Limited was converted into shares in KXDNA Limited, the amount of relief claimed by the Appellant was £10,736,038. There is no explanation for why this claim was £767,285 in excess of the loan converted. Ms Yang submitted that, in 2004, the Appellant was obliged either to give up the business altogether or to give up his loan in exchange for what were effectively worthless shares. We take the view that for the purposes of making a claim for relief under Section 253 TCGA 1992 there is a clear difference between a loan conversion and a loan becoming irrecoverable but, even if the Appellant took the view that his receipt of shares in 2004 was analogous to a loan becoming irrecoverable and that this entitled him to make a claim for relief, we would have expected the Appellant to have checked that he was claiming the correct amount of relief and that he was still in time to make such a claim before he submitted his tax return. We consider a taxpayer's failure to check, either that he was still in time to make a claim for relief under Section 253 or that he was claiming the correct sum by way of relief, would amount to carelessness.

16. We are satisfied that the inaccuracy in the Appellant's tax return for 2009/10 arose as a result of the Appellant's carelessness. We agree with the Respondents that the conditions are met for a penalty to be imposed under Schedule 24.

The size of the penalty imposed

17. In his notice of Appeal the Appellant argued that there was no carelessness but that if it was correct to impose a penalty then the penalty imposed was excessive and should also be suspended. Before us the Appellant did not make any submissions in respect of suspension but raised three arguments in relation to the size of the penalty imposed by the Respondents. The Appellant's first point was that the amount of the penalty was disproportionate to the Appellant's carelessness, the Appellant's second point was that special reduction should be given, and the third point was that the penalty had been miscalculated as the Appellant was entitled to the reduction set out in paragraph 7(5) of Schedule 24. We consider this third point first.

The potential lost revenue

18. In order to determine the amount of a penalty imposed under Schedule 24, it is necessary to calculate the potential lost revenue (or PLR). This is usually calculated in accordance with Paragraph 5 of Schedule 24 but where the inaccuracy has led to the taxpayer claiming a loss then the PLR is calculated in accordance with Paragraph 7. We set out the relevant parts of each of these paragraphs below.

Potential lost revenue: normal rule

5 (1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to-

(a) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and

(b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.

Potential lost revenue: losses

7 (1) Where an inaccuracy has the result that a loss is wrongly recorded for purposes of direct tax and the loss has been wholly used to reduce the amount due or payable in respect of tax, the potential lost revenue is calculated in accordance with paragraph 5.

(2) Where an inaccuracy has the result that a loss is wrongly recorded for purposes of direct tax and the loss has not been wholly used to reduce the amount due or payable in respect of tax, the potential lost revenue is-

(a) the potential lost revenue calculated in accordance with paragraph 5 in respect of any part of the loss that has been used to reduce the amount due or payable in respect of tax, plus

(b) 10% of any part that has not.

(3) Sub-paragraphs (1) and (2) apply both-

(a) to a case where no loss would have been recorded but for the inaccuracy, and

(b) to a case where a loss of a different amount would have been recorded (but in that case sub-paragraphs (1) and (2) apply only to the difference between the amount recorded and the true amount).

...

(5) The potential lost revenue in respect of a loss is nil where, because of the nature of the loss or P's circumstances, there is no reasonable prospect of the loss being used to support a claim to reduce a tax liability (of any person).

19. In this case the loss claimed was a capital loss, and capital losses may be carried forward to any future tax years in order to reduce liability to capital gains tax. The Respondents took the view that, although the Appellant left the UK in March 2013, there was insufficient evidence that the Appellant would not return to the UK at a future date and (had the inaccuracy not been discovered) the Appellant would be in a position to carry forward the loss to reduce any future capital gains occurring after such a future return to the UK. Therefore the Respondents calculated the PLR as 100% of the additional tax which came into charge (under paragraph 5) and 10% of the unused loss claimed (under paragraph 7(2)). The Appellant's submission is that paragraph 7(5) applies so that the PLR to be taken into account is only the additional tax brought into charge of £34,554.78.

20. In considering this point, both parties were agreed that we should consider the position as at the date of the imposition of the penalty. The penalty was imposed on 27 February 2015 and upheld (with a slight variation) in the review decision of 19 May 2015. Therefore we consider the position at 19 May 2015.

21. We did not hear evidence from the Appellant but we have evidence of his intentions from the correspondence between the parties until 19 May 2015. In November 2013 the Appellant's agent submitted a completed form P85 informing the Respondents that the Appellant had ceased to be resident in the UK. On his P85 the Appellant provided an address in Switzerland as his new address. The Appellant stated that he had left the UK on 15 March 2013. The covering letter states that the Appellant had taken up full time employment in Switzerland. On 30 January 2014 the Appellant's agent emailed the Respondents stating that the Appellant's wife, an American citizen, and their son had moved to the USA, the Appellant's son (at that time aged 14) had been enrolled in a school in California, the Appellant and his wife had sold their home in the UK, and they were negotiating the purchase of a property in California.

22. As at 19 May 2015, when the Respondents came to review the penalty, the Appellant had been resident in Switzerland for a little over two years. He was still residing at the address provided on the P85. It appears that the Appellant was endeavouring to secure employment in the USA so as to be able to join his family. By May 2015 the Appellant's wife and son had been resident in the USA for more than a year, and the Appellant's son was in school in the USA. Although the point was not made explicitly in the agent's email of 30 January 2014, we consider it implicit that the Appellant's wife and son would not move from the USA while the son remained in school. While it would have been possible for the Appellant to return to the UK without his family, we consider that there was no reason for him to do so and this was clearly not his intention.

23. We also bear in mind that the test is whether there is "no reasonable prospect of the loss being used". While he remained non-resident (either in Switzerland or in the USA), the Appellant was very much less likely to become liable to capital gains tax in the UK. In any situation where, due to his non residence, the Appellant was not liable to capital gains tax on any gain made then the Appellant would have no need of a carried forward capital loss. So, even if the Appellant were to consider a return to the UK after his son had completed his education, it is likely that the Appellant could manage his affairs in such a way that no gains which he made would give rise to a liability to capital gains tax. Therefore the Appellant would have no need of the loss which he had erroneously claimed.

24. The Appellant addressed us on what amounted to "no reasonable prospect", referring us to *Trustees of the Weld Tennis Club v McCarthy & Stone (Developments) Ltd* [2000] L & TR 249. We agree with the Appellant that "no reasonable prospect" does not amount to no prospect at all.

25. In the circumstances of the Appellant's case, we conclude that as at 19 May 2015 there was no reasonable prospect of the remainder of the loss being used. The Appellant was not resident in the UK, he was unlikely to return to the UK in the foreseeable future and, even if a return to the UK were contemplated at some point in the more distant future, it was unlikely that the Appellant would wait until that point to realise capital gains.

26. Therefore we consider that there was no reasonable prospect of the remainder of the loss being used to reduce the Appellant's liability to capital gains tax. As a result the unused part of the loss which had been claimed should be reduced to nil in accordance with Paragraph 7(5).

27. It follows that the PLR, correctly calculated, is solely the additional tax of £34,554.78 which came into charge as a result of the Appellant withdrawing his claim for relief. Applying the same penalty percentage as the Respondents of 15%, we calculate the penalty to be £5,183.21.

Disproportionality and special reduction

28. As we noted above, the Appellant's second submission on the size of the penalty was that a penalty of £163,192.65 was disproportionate to the carelessness which had occurred. In making this submission Ms Yang accepted that a penalty of about £5,000 would not be disproportionate to the carelessness alleged. Therefore, given our decision in relation to paragraph 7(5) and the revised calculation of the PLR, we do not intend to consider the proportionality arguments raised.

29. The Appellant also submitted that we should set aside the Respondents' decision not to grant a special reduction (under paragraph 11 of Schedule 24) and ourselves grant a special reduction. Ms Yang submitted that, if we decided to grant a special reduction, this should reduce the penalty to the size it would be if the PLR was calculated without reference to the unutilised losses. Therefore we do not intend to consider this point given our decision in respect of the PLR – even if we had

concluded that we were able to set aside the Respondents decision not to grant a special reduction, we do not consider that there are any special circumstances which would make it right to further reduce the penalty below £5,183.21.

Summary of conclusions

30. We agree with the Respondents that the inaccuracy in the Appellant's tax return for 2009/10 was occasioned by the Appellant's carelessness and that a penalty may be imposed under Schedule24. In calculating the penalty we consider that there is no reasonable likelihood of the unused portion of the claimed loss being used, and so we calculate the penalty upon the used portion of the loss only. Therefore the potential lost revenue is £34,554.78, and the penalty, at 15% of the PLR, is confirmed at £5,183.21.

31. 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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 9 FEBRUARY 2017

Appeal number: TC/2015/03827

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIMON FRY **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MS JANET WILKINS

Sitting in public at Fox Court, London on 6 June 2016

Having heard Ms Zizhen Yang of counsel for the Appellant and Mrs Gill Carwardine, presenting officer, for the Respondents at the oral hearing, and having also read the written submissions of the Respondents dated 27 June 2016 and of the Appellant dated 7 and 12 July 2016

1. The Tribunal decided that the Appellant's first and third applications for costs would be allowed but that the second application would be dismissed.

Introduction

2. This decision concerns three applications made by the Appellant to recover separate aspects of the costs he incurred in relation to an adjourned hearing of his appeal to this Tribunal. The Appellant's substantive appeal is dealt with in a separate decision.

Background facts

3. The Appellant's appeal was submitted to the Tribunal in June 2015. Standard directions were issued to the parties on 23 September 2015. A stay of two months was granted in November 2015 for the Appellant to instruct counsel but it seems that

nothing came of that at that time. Preparation of the appeal resumed and the appeal was listed for a substantive hearing in London on 3 May 2016.

4. The September 2015 directions provided that copies of any authorities relied upon should be exchanged no later than the 14th day before the hearing, i.e. by 20 April 2016, but did not make provision for either party to file a skeleton argument. However, having instructed counsel on 20 April 2016, on the morning of 27 April 2016 the Appellant filed a skeleton argument with the Tribunal and served a copy on the Respondents. At the same time the Appellant also filed and served an index to the bundle of authorities set out in counsel's skeleton argument and upon which the Appellant would be relying at the hearing.

5. In the afternoon of 27 April 2016, having received the Appellant's skeleton and index, the Respondents applied to the Tribunal for an adjournment of the hearing on 3 May 2016. This was sought on the basis that the Respondents had not been given adequate notice of the authorities and, due to other work commitments of the presenting officer, there would be insufficient time to locate these decisions and consider their impact upon the appeal before the date of the hearing.

6. On 28 April 2016 the Appellant opposed the adjournment arguing, in essence, that no new evidence had been disclosed, that the skeleton argument gave advance warning of the arguments to be put, that copies of the authorities relied upon had been emailed to the Respondents and that in any event the Respondents ought to have been aware of those cases given the nature of the appeal.

7. On 29 April 2016 Judge Morgan refused the request for an adjournment, agreeing with the Appellant that the Respondents ought to have been aware of least some of the authorities cited and concluding that the balance was in favour of retaining the hearing date of 3 May 2016. This refusal was communicated on 29 April 2016 to the Respondents and to the Appellant's solicitor (though it appears that he did not forward this decision to the Appellant's accountant or counsel).

8. Having been notified that the adjournment had not been granted, on 29 April 2016 the Respondents' presenting officer, Mrs Carwardine, took the file home with her in order to prepare over the bank holiday weekend for the hearing which was due to take place on the next working day.

9. At 8.59 a.m. on 3 May 2016, an officer in the Respondents' Bristol office emailed the Tribunal, stating that the presenting officer for the case was unwell and there was no one else able to attend and so a postponement of the hearing was requested. At the venue on 3 May 2016, the Tribunal panel was shown the message from Mrs Carwardine's colleague. In the absence of representation from the Respondents, Judge Staker postponed the hearing. The hearing was subsequently relisted to 6 June 2016.

10. Later on 3 May 2016 the Appellant's legal representative emailed the Respondents seeking evidence to support the contention that Mrs Carwardine was unwell and drawing the Respondents' attention to the High Court decision in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch). The Appellant also sought an explanation as to why another officer of the Respondents could not have attended, and reserved the right to seek the costs occasioned by the adjournment.

11. On 6 May 2016 the Respondents explained to the Appellant that as the files were with Mrs Carwardine in Bristol, there was insufficient time for another officer to pick up the file and travel to the hearing in London in time for a hearing starting at 10 a.m. The Respondents also explained that Mrs Carwardine had suffered a migraine but declined to provide medical evidence of Mrs Carwardine's sickness. In accordance with the Respondents' policy on sickness, Mrs Carwardine had self certified her absence on medical grounds on 4 May 2016 when she returned to work.

12. On 23 May 2016 the Appellant filed and served two applications for costs. A third application was filed on 24 May 2016.

Our decision in respect of the Appellant's applications

13. As all three of the Appellant's applications are made under Rule 10(1)(b) of Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 ("Tribunal Procedure Rules"), it will be convenient to set out this rule at the outset. Rule 10(1)(b) of the Tribunal Procedure Rules 2009 provides as follows:

> **Orders for costs**
>
> **10.**-(1) The Tribunal may only make an order in respect of costs-
>
> (b) if the Tribunal considers that a party of their representative has acted unreasonably in bringing, defending or conducting the proceedings;

14. As we consider each of the applications it will be necessary for us to consider, by reference to the authorities, whether the Respondents' conduct of the proceedings was such that it could be categorised as unreasonable.

The Appellant's first application for costs

15. In his first application the Appellant sought the costs of and incidental to his counsel's and instructing solicitor's attendance at the hearing on 3 May 2016. This application was made on the basis that the Respondents had acted unreasonably on 3 May 2016 in failing to notify the Appellant that Mrs Carwardine was unwell and that a postponement application would be made. The notification emailed by the Respondents to the Tribunal on the morning of the hearing had not been copied to the Appellant.

16. The costs sought were in the sum of £2,550. The Respondents offered no opposition to this application.

17. Given that the Respondents have accepted that their conduct on 3 May 2016 was unreasonable in failing to notify the Appellant that they could not attend the hearing and would seek an adjournment, we grant this application. The Appellant has provided a schedule of the costs incurred. We allow the Appellant's first application and order the Respondents to pay costs in the total sum sought of £2,550.

The Appellant's second application for costs

18. In his second application, the Appellant sought to recover the costs of counsel responding to the Respondents' postponement application of 28 April 2016, including of preparing to respond orally to the application at the hearing on 3 May 2016. This

costs application was made on the basis that the Respondents had acted unreasonably, first in making their postponement application and secondly in failing to notify the Appellant that they would no longer be pursing their application. The costs sought by this application were in the total sum of £3,925, again supported by a schedule.

19. In making this application on behalf of the Appellant, Ms Yang stressed that the criticisms made were of the Respondents and not of Mrs Carwardine personally. However, it was submitted that none of the reasons set out in the postponement application were good enough reasons for the Respondents to seek a postponement. All the points in the Appellant's skeleton argument should have been considered by the Respondents before the imposition of the penalty appealed against, and were not new points. If the Respondents were concerned about not having copies of the authorities then they could have contacted the Appellant to ask for copies. Similarly bundle concerns could have been alleviated by discussing the issue with the Respondents.

20. This application for costs was resisted by the Respondents. Mrs Carwardine submitted that the Appellant had delayed in appointing counsel, despite the appeal having earlier been stayed to allow counsel to be appointed, and that delay on the part of the Appellant had resulted in the skeleton being submitted so close to the hearing date. Mrs Carwardine explained that she was due to attend a training event on 28 April 2016 and this event, combined with travelling time, would leave her with very little time to consider the Appellant's skeleton argument. The Respondents did not have the resources for another officer to pick up an appeal at such short notice. Mrs Carwardine explained that she had been concerned in particular that the skeleton raised an issue not dealt with in the Respondents' Statement of Case and so she had worked over the weekend to respond to this point. In the circumstances it was submitted that it was not unreasonable to have made the postponement application.

21. In considering this application, we note that it was submitted on the basis that a part of the Respondents' behaviour which was said to be unreasonable lay in not notifying the Appellant that they had withdrawn their application of 27 April 2016 to postpone the hearing on 3 May 2016. However, as set out in the chronology above, and as we confirmed to the Appellant's counsel at the hearing before us, the Respondents' postponement application of 28 April 2016 was determined by Judge Morgan on the morning of 29 April 2016 and that decision was notified to both parties by the Tribunal just after noon that day. It appears from the Appellant's schedule that costs were incurred through counsel preparing for an oral hearing of the 27 April postponement application. We consider that this element of the costs incurred is attributable to the Appellant's solicitor's failure to communicate rather than to any behaviour of the Respondents.

22. Therefore this application for costs can only be based upon the Respondents' making of their application to postpone, and not their (non-existent) failure to communicate the withdrawal of that application.

23. We agree with the Appellant that a delay in this appeal which occurred some months earlier is not relevant here. We also agree that the Respondents should have contacted the Appellant before making their application in order to ascertain whether the application could be agreed or if any of their concerns could be alleviated.

24. There was some dispute about whether the Respondents had copied their application to the Appellant when it was sent to the Tribunal on 27 April 2016, with the Appellant arguing that it was not until the following day that a copy of the application had been provided to the Appellant's counsel. However, from the documents in our bundle it appears that Mrs Carwardine emailed the Appellant's solicitor on 27 April 2016, attaching copy letters. As Rule 11(4)(c) of the Tribunal Procedure Rules requires any document which is to be sent to a party to be sent to that party's representative, we conclude that by sending a copy of the application to the Appellant's solicitor on 27 April 2016, the Respondents did send a copy of their application to the Appellant at approximately the same time that they sent their application to the Tribunal. Any further delay suffered by the Appellant's counsel in obtaining a copy of that application is due to the action, or inaction, of the Appellant's solicitor.

25. Looking at the application itself, the Appellant's submission is that none of the Respondents' reasons for making the application was good enough. Judge Morgan concluded that the Respondents ought to have been aware of the authorities raised by the Appellant as they should have consulted them as part of their own preparation for the hearing. We note that the Respondents were a party to four of the six authorities cited by the Appellant, and that a fifth case (*Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223) is so well known that it is inconceivable that the Respondents were not aware of it.

26. The Respondents submitted that Mrs Carwardine did not have time to consider the arguments raised in the skeleton argument due to the shortness of time between receiving the skeleton argument and the hearing itself. The skeleton argument was 12 pages long with a two page appendix. Two and a half working days were available to the Respondents upon receipt of the skeleton. This time was reduced to one and a half days due to the Respondents' decision to continue with Mrs Carwardine's attendance on a pre-booked training event. Ms Yang referred us to *Thomas Holdings Limited v HMRC* [2011] UKFTT 656 (TC) where Judge Clark noted his view that HMRC officers ought to be available immediately in advance of a hearing in order that contact could be made.

27. The Respondents submitted that the arguments set out in the Appellant's skeleton argument raised one new point, namely Special Reduction, which required consideration. However, as the Appellant submitted, this point would have been considered by the Respondents as part of the decision to impose the penalty which was the subject of the appeal. Therefore, although it had not been covered in the Respondents' Statement of Case, it was not a new point.

28. The Respondents also submitted that their concerns regarding receipt of the additional authorities bundle made it not unreasonable for them to have sought a postponement. In their application the Respondents referred to the absence of any post handling facilities at Mrs Carwardine's office, leading to their concern that bundles would not be accepted. At the hearing before us, Mrs Carwardine accepted that the bundles had been safely received.

29. We have considered this costs application at great length. We have already rejected the two procedural points made in the Appellant's application (that the Respondents did not serve a copy of the application and that they did not notify their withdrawal of the application) and so what remains is the question of whether the

Respondents were unreasonable to make their application. Every day a number of postponement applications are made to the Tribunal, for a variety of reasons, and some of those applications are refused. The fact that they are refused does not, of itself, make it unreasonable for those applications to have been made. In considering this costs application we ask ourselves not whether the Respondents' application should have been refused (as already decided by Judge Morgan) but whether the application was so weak that it was unreasonable to have made it at all.

30. We consider that this was close to the line but we have ultimately concluded that it was not unreasonable for the Respondents to have sought a postponement in the circumstances of this case. We agree with Judge Morgan that an adjournment was not necessary as the Respondents did find the time to prepare (as proved by subsequent events). However, the Appellant was late in providing his list of authorities and, although no new points were raised, the skeleton argument did reveal a different emphasis in the arguments to be made. The Respondents might have been bolder and more confident in their response to receiving that skeleton and list of authorities but the fact that they might have behaved in another way does not make their decision to seek a postponement unreasonable.

31. Therefore we dismiss the Appellant's second application.

The Appellant's third application for costs

32. In his third application, the Appellant sought to recover the additional costs he had incurred as a result of the hearing of 3 May 2016 being re-listed. This application was made on the basis that the Respondents had acted unreasonably in failing to justify their non-attendance at the hearing on 3 May 2016. As no medical evidence had been supplied, the Appellant contended that the reason given by the Respondents for non-attendance on 3 May 2016 remained an unsupported assertion. The Appellant sought costs in the total sum of £12,475, supported by a schedule.

33. Ms Yang again made it clear that the Appellant was not seeking to criticise Mrs Carwardine personally, but the conduct of the Respondents. It was submitted that the Respondents had behaved unreasonably in failing to provide medical evidence to justify their absence on medical grounds from the hearing on 3 May 2016. That unjustified absence had caused the relisting of the appeal and therefore the Appellant had incurred further costs. The Appellant submitted that although the Respondents had explained that Mrs Carwardine had been absent because of a migraine, they had not provided (either on 3 May 2016 or retrospectively) medical evidence to support the contention that she was too unwell to attend the hearing. It was clear from the authorities that evidence from a medically qualified person was required to understand whether a person was too ill to attend a hearing, and that had not been supplied in this case, not even when prompted by the Appellant.

34. Mrs Carwardine explained to us that she had spoken to her manager at 7:30 a.m. on 3 May 2016 to notify her illness, but she was too ill to leave the house or drive and she was not well enough to telephone her GP. Mrs Carwardine told us that she was not aware of the requirement to provide medical evidence when seeking an adjournment on medical grounds, and that she had never previously not attended a hearing. If she had been aware of the requirement then she would have attempted to seek a medical certificate on the day. A migraine was not an illness she could have

anticipated. Mrs Carwardine told us that she was doubtful that her GP would provide a retrospective certificate.

35. Having had the benefit of oral submission from the parties on 6 June 2016, at the conclusion of the costs hearing, we issued directions giving the Respondents the opportunity to file retrospectively medical evidence, if they so desired, by 18 July 2016. The Appellant was given the opportunity to respond to any material filed by the Respondents.

36. On 27 June 2016 the Respondents filed a written submission indicating that they would not be producing medical evidence. The written submission reasserted Mrs Carwardine's oral submission that HMRC internal procedures had been followed. HMRC's procedure – of requiring employees to self-certify absence on medical grounds where the absence from work was of no fewer than seven days – was submitted to be standard employment practice. Mrs Carwardine submitted that if she had sought a medical certificate after the event then this would result in her relaying details of her illness to her GP and that any certificate so produced could carry limited weight. Mrs Carwardine also submitted that if she had attended her GP on the day of the illness then it would not have been possible for her to have obtained a certificate by the time that her colleague communicated to the tribunal that Mrs Carwardine was too ill to attend the hearing. Finally it was submitted that Mrs Carwardine had sufficient knowledge of her illness to be able to self-medicate without seeing a GP, had she even been able to obtain a GP appointment at such short notice.

37. On 3 July 2016 the Appellant filed written submissions in response to the Respondents' written submissions. The Appellant made a number of points which we accept as correctly setting out the legal position.

38. It is a general principle that medical evidence is required for the Tribunal to be satisfied that it was reasonable for a party not to attend a hearing on medical grounds. This is set out clearly in the decision of Norris J in *Levy v Ellis-Carr* [2012] EWHC 63(Ch) where the level of evidence required is also, helpfully set out (at paragraph 36):

> Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply a part of the material as a whole (including the previous conduct of the case).

39. We consider it is not sufficient and – critically, from a costs perspective – it is not reasonable, for a party to fail to attend a hearing and then seek to rely upon a representative's self-certification of that absence. Medical evidence alone can justify a party's absence from a Tribunal hearing on medical grounds. This is the case

irrespective of what procedures the Respondents may have in place to manage the absences of the employees due to ill health.

40. The Respondents' written submissions contend that any retrospective medical evidence would carry little weight. As set out in *Levy*, it is for the court or tribunal to decide what weight it places upon any evidence which is produced. Had the Respondents chosen to provide retrospective evidence then we would have considered it in the light of the guidance in *Levy* and bearing in mind all the circumstances of the case. The Respondents' written submissions also contend that it would be difficult to obtain a GP appointment but no evidence was produced of any attempts made. It appears that the Respondents have chosen not to produce any medical evidence to support their assertion that Mrs Carwardine was too ill to attend the hearing on 3 May 2016. No weight can be placed upon an assertion of inability to attend through ill health which is unsupported by any medical evidence at all.

41. The Respondents also submitted that Mrs Carwardine had sufficient knowledge of her own illness to be able to self-medicate without seeing a GP. In response the Appellant makes the point, also set out *Banerjee v HMRC* [2015] UKFTT 0085 (TC), that medical evidence is required due to the difficulties for a non-medically trained person in appreciating the severity of his or her own illness and how this will affect capacity to attend a hearing. We agree with the Appellant. The issue is not whether medical attention is required to determine treatment but of whether there is evidence to support an assertion of inability to attend. The authorities make it clear that medical evidence is required to enable the panel to make a decision as to the extent to which an illness has affected a person's capacity to attend. The Appellant in *Banerjee* was very clear on the treatment she required, but that did not prevent the Tribunal from concluding that the medical evidence available did not support the submission that the Appellant could not attend the hearing.

42. We are bound by the decision in *Levy v Ellis-Carr*, and in the absence of any medical evidence to support the assertion that Mrs Carwardine's ill health prevented the Respondents attending the hearing on 3 May 2016, we conclude that the Respondents have failed to justify their non-attendance. We consider a party's failure to attend a hearing without justification to be unreasonable, and we grant the Appellant's application.

43. The Appellant seeks costs in the total sum of £12,475. At the hearing on 6 June 2016 we queried the inclusion of the Appellant's solicitor's fees. On 12 July 2016 the Appellant's solicitor confirmed to the Tribunal that these fees had been incurred. We are satisfied that all items listed in the schedule have been incurred. We allow the Appellant's third application and order the Respondents to pay costs in the total sum sought of £12,475.

Conclusion

44. The Appellant is successful in two of his three applications. The Appellant is awarded costs of £2,550 in respect of the uncontested first application, and costs of £12,475 in respect of his third application. The Appellant's second application is dismissed.

45. The Respondents are directed to pay the Appellant his total costs of £15,025 within 28 days of the release of this decision.

46. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 9 FEBRUARY 2017