[2016] UKFTT 764 (TC)

TC05491

Appeal number: TC/2015/04523

COSTS – whether costs application procedurally correct – no – whether HMRC behaved unreasonably by not withdrawing its decision before proceedings initiated – no – whether review costs 'incidental' - no. Application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DISTINCTIVE CARE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Royal Courts of Justice, London on 4 November 2016

Mr M Firth, Counsel, for the Appellant

Ms S Choudhury, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. On 3 March 2015, HMRC issued the appellant with an information notice under Schedule 36 Finance Act 2008 paragraph 1. The appellant appealed this to HMRC on 25 March 2015, and following a review, to the Tribunal on 24 July 2015. The Tribunal notified HMRC of the appeal on 7 September 2016. On XXX September 2015 HMRC withdrew the information notice and notified the Tribunal it would not defend the appeal. The Tribunal allowed the appeal on 16 November 2016.

2. On 3 December 2015 the appellant submitted to the Tribunal a claim for costs in the sum of £2,500 on the basis of unreasonable behaviour by HMRC. The appeal was categorised as 'basic' so unless there was unreasonable behaviour, or wasted costs, the Tribunal has no jurisdiction to award costs. The appellant did not alleged there were wasted costs. The application was accompanied by a 'breakdown of costs'.

3. Rule 10 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009 provided, so far as relevant,:

> (1)The Tribunal may only make an order in respect of costs...
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably bringing, defending or conducting the proceedings;
>
> (3) A person making an application for an order under paragraph (1) must –
>
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
>
> (b)send or deliver with the application a schedule of the costs...claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs... if it decides to do so.
>
> (4) an application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends –
>
> ...
>
> (b)notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.

4. HMRC objected to the application and the hearing today was to resolve it. HMRC objected to the application on a number of grounds:

(1) The application was (says HMRC) not properly made as it was not copied to HMRC and was not accompanied by a proper schedule;

(2) HMRC had not (says HMRC) behaved unreasonably in the conduct or defence of the appeal.

(3) Costs claimed were not (says HMRC) incidental to proceedings

5. I will deal with each issue in turn.

Procedural objection – application not copied to HMRC

6. It was accepted that the appellant had not sent its costs application to HMRC. I find HMRC became aware of the application when the Tribunal copied it to them by email on 15 December 2015.

5 7. The appellant did not consider that it was in breach of Rule 10(3)(a). It considered that it was enough to send the application to the Tribunal within 28 days, and enough if HMRC received it at some point in time.

8. I do not agree. I find the appellant in breach of rule 10(3)(a). That rule required an application to be made by sending or delivering it to both the Tribunal and HMRC. 10 The appellant did not send or deliver it to HMRC. Even if the Tribunal's sending of the application to HMRC on 15 December 2015 should count as compliance with Rule 3(10(a), Rule 10(4) required the application to be made within 28 days. That expired on 14 December 2015 so at best HMRC received the notification late.

9. The appellant's position was that if I found them to be in breach, the breach was 15 trivial and did not need an explanation. It should be excused, said the appellant: it was an oversight that caused HMRC no prejudice.

10. HMRC did not consider the breach trivial: rules of the Tribunal must be complied with unless there is a good reason; it is not enough to show HMRC was not prejudiced in order to be excused a breach of the rules.

20 11. I do not accept that the breach was entirely trivial nor that there was no prejudice: on 14 December HMRC would have been entitled to conclude, having heard nothing, that no costs application was being made. Nevertheless, I do accept it was minor prejudice as HMRC was informed of the application the next day.

12. I was given no explanation for the breach so assume that there was no good 25 explanation; nevertheless because of its relatively trivial nature, I would have been inclined to exercise my power under Rule 7(2)(a) to waive the breach. But it was not the only procedural problem with the application, as I explain below.

Procedural objection – improper schedule of costs?

What details must a costs schedule contain?

30 13. HMRC's case was that the application did not comply with Rule 10(2)(b) in that the 'breakdown of costs' which accompanied it did not state the dates on which the work was carried out, nor the names and grades of the persons performing the work.

14. The appellant pointed out that under the CPR a party claiming costs was not required to state the dates on which the work was carried out. I think HMRC 35 accepted this, and I do not find that the lack of dates made the schedule improper.

15. But, as HMRC pointed out, under the CPR the claimant would have to state the name and grade of the person carrying out the work and this schedule did not. The

appellant's response to that was that the costs claimed were that of tax advisers and not solicitors and they did not have 'grades': and in any event the different rates of pay for the unnamed persons were stated, and the CPR do not apply in the Tribunal.

16. My conclusion was that the schedule was to some extent deficient: it was impossible to tell who had carried out the work and their level of experience: therefore it was impossible to decide if their claimed hourly rate was commensurate with their experience level. I could guess, for instance that 'JL' at £500 per hour was a partner of many years' experience, but this was not stated and might not be the case. Without the information on name/grade/years of experience, it was not possible for me to undertake a summary assessment. The Rule 10(3)(b) requires the schedule to be in sufficient detail to enable summary assessment. As I find that this schedule was not in sufficient detail to enable summary assessment because of these defects, this was a second and more than a merely trivial breach of the rules.

17. The breach of the Rules could, of course, be rectified under Rule 7(2)(b) by a direction that the appellant provide the missing information. Was it appropriate to use Rule 7 to waive/rectify these two relatively minor breaches of Rule 10 and move to consider the substantive nature of the costs application?

Costs claimed actually one-thirtieth of larger costs claim

18. What most concerned me was the information which emerged during the hearing that the schedule did not in fact represent time spent actually working on the appellant's appeal. The appellant's case on this was that their advisers, Cornerstone Tax, had 30 clients in exactly the same position as the appellant: each client had implemented a SDLT avoidance scheme, each client had received a determination, and each client had received a Sch 36 information notice. Cornerstone Tax had dealt with the appeals en bloc and recorded time en bloc. It had then allocated to each client one-thirtieth of the time spent.

19. Whilst it may have been entirely appropriate to deal with the 30 appeals in this manner, my concern was that it was not made apparent to HMRC or the Tribunal that the schedule did not represent actual time spent on the appellant's appeal but merely an apportionment of time spent dealing with 30 appeals en bloc. On the contrary, the 'breakdown of costs' appeared to be an ordinary schedule of costs, listing actual time spent by various individuals on the appeal. So, for instance, the schedule recorded that 'RPC' spent 20 minutes reviewing the legislation solely on behalf of the appellant whereas, it seems from what Mr Firth said, 'RPC' had actually spent 10 hours reviewing the (identical) legislation en bloc for all 30 cases.

20. The schedule was, however inadvertently, misleading. Cornerstone Tax had, on their case, actually spent £75,000 in costs on the 30 appeals; whether that was a reasonable amount of work to carry out on 30 identical appeals being dealt with en bloc was a different question to one of whether it was reasonable to spend £2,500 working on a single appeal. Moreover, it seemed to me, and the appellant's counsel agreed, that the former question was one for detailed assessment on taxation. By presenting a claim for £2,500, however, the appellant submitted a claim for costs in an

amount which parties would reasonably expect to be dealt with on summary assessment.

21. HMRC's grounds of objection had included that a number of other identical claims for costs had been submitted on behalf of other appellants for whom Cornerstone Tax acted. Ms Choudhury complained that the explanation for this recorded at §18 above had not been given to them before the hearing. The appellant's reply, so far as I understood it, was that HMRC had failed to ask for an explanation and the explanation was, in any event, obvious.

Conclusion

22. My conclusion is that, underlying rule 10 and Rule 10(3)(b) in particular, was the intention that the claimant would explain how it arrived at the figure of costs it wished to be awarded, so that the Tribunal could undertake summary assessment. While I had no reason to suppose Cornerstone Tax nor the appellant intended to mislead either the Tribunal or HMRC, the schedule was misleading, as its true basis was not obvious, and neither the Tribunal nor HMRC had actually had the basis on which it was prepared explained to them until the hearing. The appellant should have taken more care to ensure that the basis of how it calculated its costs claim was made clear in its application to the Tribunal and to HMRC.

23. The failure to do so was certainly a breach of the spirit of Rule 10(3)(b). I consider it was also an actual breach of Rule 10(3)(b) because the 'breakdown of costs' was not a schedule of what was actually claimed: what was actually claimed was one-thirtieth of a larger schedule of costs, a copy of which had not been provided. Either way, it is in the Tribunal's discretion whether to award costs and the failure to explain with the application how the costs were actually calculated meant that I would not exercise my discretion in the appellant's favour. Whether or not it was an actual breach of the requirement to provide a schedule of costs, the appellant had not taken care to ensure that the schedule provided gave an accurate picture of how the costs it claimed had been calculated. It should have done so. For that reason I would not exercise my discretion in the appellant's favour, either to waive the various breaches of the rules or to make a costs award in its favour.

24. The application for costs is dismissed.

Unreasonable behaviour?

25. In case this matter goes further, I state my conclusions on the second and third, substantive, objections to the costs application, although these are unnecessary for my decision as I have already refused the application for costs as explained above.

The facts

26. The following summary of the facts is based largely on Mr Kane's evidence. Mr Kane was an HMRC officer in the team responsible for the investigation of the SDLT avoidance scheme utilised by the appellant. I accept his evidence as reliable;

he was a credible witness and his evidence was consistent and reasonable; and in any event, its reliability was not really challenged by Mr Firth.

27. The appellant acquired a property in 2008 in respect of which HMRC considered no SDLT return had been made. This was discovered close to four years later, so to protect HMRC's position on time-limits, an SDLT determination was issued on 12 January 2012. Eight days later, the appellant lodged an appeal with HRMC against the determination.

28. The *Vardy* case in late 2012 confirmed HMRC's belief that the scheme was ineffective but also revealed that they could not be certain who was liable to pay the SDLT in each case without consideration of the transaction documentation. The information notice that was later issued was to demand this documentation.

29. In late 2012, Mr Kane asked HMRC's Central Policy team ('CenPOL') if HMRC were able in law to issue an information notice in circumstances where HMRC had already made a determination. CenPOL advised in early 2013 that they could do so.

30. Mr Kane's team relied on this advice to issue information notices in some 40 other cases. The information notice the subject of this appeal was issued by Mr Kane's team, in reliance on this advice, but over two years later, on 25 February 2015.

31. The information notice was appealed to HMRC on 26 March 2015. The appellant accepted HMRC's offer of a review, and the issue of the information notice was upheld on review by letter dated 26 June 2015. The appellant lodged an appeal with the Tribunal on 24 July 2015.

32. In August 2015, the same team, but in relation to a different taxpayer, were advised by CenPOL that they could not issue an information notice where there was a pre-existing determination. The next day, Mr Kane spoke to the same person in CenPOL who had given the 2013 advice. That person confirmed he had changed his mind but did not indicate to Mr Kane when he had changed his mind.

33. There was a dispute as to when CenPOL changed its view and in particular whether it was before or after the decision and review decision at issue in this appeal. I had no evidence on this: Mr Kane simply did not know. Ms Choudhary's view was that if it was the appellant's proposition that CenPOL changed its view before the information notice was issued, then the appellant had the burden of proof: Mr Firth said HMRC had the burden of proof on this as only HMRC could possess the evidence of this. I agree with the appellant over this for the reasons given by the FTT in the decision of *Royal Borough of Kensington & Chelsea* [2014] UKFTT 729 (TC) at§§60-63. So I find the change of view was sometime before the issue of the information notice as HMRC were the only party who could have known the truth on the date of the change and they adduced no evidence on it.

34. On 7 September 2015 the Tribunal notified the appellant's appeal against the information notice to HMRC. On 22 September 2015, some 15 days later, HMRC

wrote to the Tribunal conceding the appeal and to the appellant withdrawing the information notice.

Unreasonable behaviour if HMRC's assessment/decision unreasonable?

35. HMRC's position at the time they withdrew the information notice and in the hearing before me is that they accepted that the information notice should never have been issued. So I proceed in the next section on the assumption that the appellant was right to say that it was unreasonable to issue it.

36. The appellant's application was based on its allegation that HMRC had acted unreasonably in defending or conducting the proceedings. In reality, the only steps HMRC had taken in the appeal was to withdraw the information notice which was the subject of the appeal, and to notify the Tribunal and appellant that they would not defend the proceedings. Therefore, HMRC did not accept that they had acted unreasonably in defending or conducting the proceedings, even if the appellant was correct to allege that HMRC should never have issued the information notice. The only postive step HMRC had taken was to withdraw.

37. The appellant accepted that the Tribunal only had jurisdiction to make a costs order where HMRC defended or conducted the proceedings unreasonably; it was the appellant's position that by failing to withdraw on review the disputed decision, a decision which it had been unreasonable to issue in the first place, HMRC by omission had acted unreasonably and the omission was operative at the time the appellant lodged the appeal with the Tribunal and during the appeal up to the moment HMRC actually withdrew the decision. HMRC had, therefore, said the appellant, by omission 'conducted' itself in the proceedings unreasonably.

The legal relevance of the quality of HMRC's decisions

38. HMRC considers that the appellant's case amounts to saying the Tribunal has jurisdiction to award costs where the original or review decision is unreasonable, whereas by definition both those decisions precede the litigation.

39. HMRC points to the decision of the FTT in *Bulkliner Intermodal Ltd* [2010] UKFTT 395(TC) where it was, in effect, the appellant's position that HMRC had acted unreasonably in issuing the assessments. HMRC withdrew the assessments, after consulting policy, before issuing a statement of case. The judge commented:

> [11] ...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...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.....

The judge did go on to say that behaviour before the commencement of proceedings was not entirely irrelevant in that it

> ‘might well inform actions taken during proceedings’

On the facts of the case, the judge concluded that HMRC had not acted unreasonably in defending or conducting the appeal when they reviewed the appeal at policy level and then withdrew it before providing a statement of case.

40. The Judge in *G Wilson (Glaziers) Ltd* [2012] UKFTT 387 similarly concluded that HMRC’s actions *before* the notice of appeal was lodged with the Tribunal were irrelevant: [18].

41. This method of approach was upheld in effect in *Tarafdar* [2014] UKUT 0362 (TCC) by the Upper Tribunal. It said at [19] that:

> ...the reasonableness of the original decision against which the appeal has been made is not directly in point, but is relevant to the question whether it was reasonable of HMRC to defend, or to continue to defend, the appeal.

The Upper Tribunal went on to say

> [34] ...in our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from an appeal should pose itself the following questions:
>
> (1) what was the reason for the withdrawal of that party form the appeal?
>
> (2) having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) was it unreasonable for that party not to have withdrawn at an earlier stage?

In that case, HMRC had lost crucial evidence and had lost it long before the appeal was lodged. It meant that when preparing their evidence, they realised they could not defend the assessment on grounds of best judgment and withdrew after service of their statement of case. The answer to (2) was that HMRC could have withdrawn on this basis from the start of the proceedings. The answer to (3), however, was that it was reasonable for HMRC to defend the appeal, including issuing a statement of case, right up to the point when they actually withdrew it, because the appellant had not challenged the assessment on the basis of best judgment and it was only when HMRC came to further prepare the case for hearing did they discover the evidence was missing.

42. The Upper Tribunal in *MORI* [2015] UKUT 12 (TCC) approved a list of factors which a Tribunal could consider when deciding whether there was unreasonable conduct, including (at [22(5)]) that a failure to undertake a rigorous review of the assessments at the time the appeal is lodged with the Tribunal can be unreasonable conduct.

43. It is clear in neither *Tarafdar* nor *MORI* did the Upper Tribunal consider that merely being the recipient of a notice of appeal against an unreasonable decision was sufficient to mean that HMRC conducted or defended the appeal unreasonably. It

seems to me that if the Upper Tribunal in *Tarafdar* had though so, the outcome would have been different. In that case, the assessment could have been withdrawn before the appeal was lodged as the evidence, without which the appeal could not be defended, went missing much earlier. So the assessment was one which could not reasonably have been defended even at the date the notice of appeal was lodged, yet the Upper Tribunal did not find that HMRC acted unreasonably when they did not withdraw from the appeal until after they issued a statement of case.

Conclusion on relevance of decision and review

44. As a matter of law, omissions can be unreasonable, and an unreasonable failure to withdraw a decision can be conduct leading to a costs order. Nevertheless, the omission to withdrew a decision and/or the omission to overturn a decision on review is not behaviour that is 'defending' or 'conducting' an appeal unless and until a notice of appeal is lodged. The quality of the original decision and the review decision only become relevant at that point so far as Rule 10 is concerned. So actually defending an untenable decision may well be or become unreasonable, but withdrawing an untenable decision without taking any active steps in the appeal is not unreasonable conduct within Rule 10: the decision is not defended, nor is a defence conducted.

45. An omission to withdraw such an assessment *after* an appeal is lodged may be unreasonable behaviour for the purposes of Rule 10 but it seems to me that it could only be unreasonable because the behaviour *after* the lodging of the appeal is unreasonable and that means that the defendant has to have a reasonable time to consider the appealed assessment. By any measure, HMRC acted reasonably in this case because they withdraw the information notice two weeks after notification of notification of the appeal and without taking any steps to defend the appeal.

46. Indeed, *Tarafdar* indicates that a decision to defend, or continue to defend, an appeal only becomes unreasonable when HMRC actually have a reason to review the decision. The taxpayer's grounds of appeal may raise an issue that, after allowing HMRC reasonable time to consider, would make it unreasonable for HMRC to continue to defend the decision. In *Tarafdar*, the grounds of appeal did not include the ground on which the appeal was ultimately withdrawn (lack of evidence to prove best judgment) and so it was not unreasonable at that time to continue to defend the appeal [41-44].

47. In this case, the appellant's grounds of appeal was a bare statement that the information notice was 'ultra vires'. No explanation of what the appellant meant by this (if anything) was given to HMRC. In my opinion, the grounds of appeal in this case did not make it unreasonable for HMRC to continue to defend the appeal: but HMRC did not do so because of an internal change of opinion.

48. And while that change of opinion more likely than not predated the lodging of the appeal, and while it may have been unreasonable for HMRC to fail to withdraw affected information notices once HMRC changed their opinion, that unreasonableness is not relevant to Rule 10 as it was not during the course of defending or conducting an appeal.

49. In the circumstances where there was a pre-existing change of opinion so HMRC had formed the view, by the time the appeal was lodged, that such information notices were ultra vires, it may well have been unreasonable to actively defend the appeal: but I find HMRC did not do so in this case. The information notice in this case was withdrawn very shortly after the appeal was lodged without HMRC taking any steps to defend it.

50. I reject the appellant's case: its case amounted to saying that, because the decision and review decision were unreasonable, they led to the lodging of the appeal, so the lodging of the appeal was caused by unreasonable behaviour and therefore from the moment the appeal was lodged, HMRC were unreasonably defending/conducting proceedings. The appellant's case, if correct, would effectively permit a costs award against HMRC for unreasonable decisions and/or reviews: if Parliament had intended the Tribunal to have jurisdiction to award costs on that basis, it would have said so. On the contrary, the Rules provide HMRC is only liable in costs for omissions or acts *after* the appeal is lodged. In this case, because they did nothing after the appeal was lodged, but promptly withdraw the information notice, there were no unreasonable omissions or actions after the notice of appeal was notified to them, so HMRC did not behave unreasonably in conducting or defending the appeal.

51. In terms of the three stage test put forward in *Tarafdar,* the Tribunal does not get beyond question (2). HMRC could not have withdrawn at an earlier stage *of the proceedings* as HMRC effectively withdrew from the proceedings at the first possible opportunity. It was therefore not unreasonable for them not to have withdrawn at an earlier stage of the proceedings.

52. That conclusion would be enough to dispose of this application had it not already been dismissed on procedural grounds and on my refusal to exercise my discretion in the appellant's favour as set out above at §§22-24.

Was it unreasonable to issue the information notice?

53. Nevertheless, in case this goes higher, I mention my findings on whether the information notice and/or review decision were unreasonable. As I said, the previous section was on the assumption that it was unreasonable. While HMRC accepted that on their current understanding of the law, they should not have issued the information notice, they did not necessarily accept that it was unreasonable to have done so. They relied on the meaning of unreasonable given in *Ridehalgh v Horsefield* [1994] Ch 205:

> 'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive....The acid test is whether the conduct permits of a reasonable explanation..... (page 232E-F)

54. I accept the appellant's submission that this is of limited relevance as it was given in a case about wasted costs caused by the claimant's representative and was specifically given with those circumstances in mind: this application is made on the basis of an allegation that a party itself (ie HMRC) acted unreasonably. I don't accept that the respondents could only be unreasonable if they intended to harass the other side rather than resolve the dispute. However, the general statement that the 'acid test is whether the conduct permits of a reasonable explanation' is useful although only in a very general sense. If there is a reasonable explanation for the issue of the information notice and/or its upholding on review, then HMRC have not acted unreasonably in issuing the notice or upholding it.

55. It seems to me that if it would have been reasonable for HMRC to hold the view it was entitled to issue the information notice, then their conduct in issuing was not unreasonable. The appellant did not agree in principle, but I deal with its point of view at §§64-66 below. Looking for whether there was a 'reasonable explanation' I asked the parties for their view of the law on this.

56. Neither party, however, appeared to be in a position to address me on the law on whether or not HMRC had power to issue an information notice to a taxpayer in circumstances where HMRC had already determined the taxpayer was liable to the tax on the transaction in respect of which it sought information by the information notice.

57. Both counsel were agreed there was an FTT case which had said there was no power to do so where there was a discovery assessment, but they could not remember its name, nor the basis of the decision. It was clear that an information notice could not have been issued if the appellant had submitted a land transaction return in respect of the transaction in question (paragraph 21A(1)) but the appellant had not done so. Both were agreed there was no clear authority that it was not lawful for HMRC to issue an information notice in the circumstances in which they had done so in this case.

58. The question was simply whether the information was reasonably required for the purpose of checking the appellant's tax position. 'Tax position' was defined in paragraph 64 as a person's past, present or future liability to pay tax. While the appellant appeared happy to adopt the view of the HMRC CenPOL officer that information was not 'reasonably required' where there was a determination, this view was not so obviously right to me.

59. Mr Kane's position was that HMRC had not fully understood the scheme and had issued the assessment as a precaution because time was running out to make an in-time determination. But HMRC were not certain of the appellant's liability. The information demanded would have allowed them to check the determination was correctly issued on the taxpayer rather than on someone else. It seems to me, therefore, that it would have been a reasonable view that it was proper to issue an information notice in these circumstances as it would enable HMRC to check the appellant's past tax liability in order to ensure the determination (giving a current liability) was correctly issued. At least, it was not obviously wrong to have issued the information notice such that I consider HMRC's behaviour in doing so unreasonable.

60. I note in passing that HMRC clearly have no power to issue an information notice under paragraph 1 of Sch 36 to find out about the tax position of *other* taxpayers but the appellant did not suggest that HMRC had done so in this case.

61. In conclusion, I was not satisfied that the law is so clear that it was unreasonable for HMRC to issue the information notice in any event. So the application for costs would have failed on this ground too.

Whose unreasonableness matters?

62. The above section considered HMRC's actions as a whole; there was an issue between the parties of the extent to which the reasonableness of the actions of individual officers mattered.

63. I find, in so far as it is relevant, that Mr Kane acted reasonably. It is true that when he issued the information notice, he did so in reliance on advice that was two years old, but I accept his explanation that he was familiar with the law and knew there had been no legislative or case law developments in the last two years so he had no reason to suppose the advice had changed in the interim.

64. It was suggested CenPOL had acted unreasonably. They gave advice; later they changed their mind and did not go back to inform recipients of the earlier advice of this. I agree with the appellant that this is a prima facie case of unreasonable behaviour and HMRC have failed to rebut it by giving an acceptable explanation.

65. As a matter of law, the appellant considered that Mr Kane's reasonableness was irrelevant: the question was how HMRC acted as a body. The appellant considered CenPOL's unreasonableness in failing to communicate a change of mind was relevant because HMRC as a body acted on CenPOL's guidance.

66. I would agree with the appellant on this but for the fact, as I have already said at XXX, I am not satisfied that the original advice was unreasonable. It seems to me it was not unreasonable to issue the information notice relying on the original advice as that advice was not unreasonable, even if the person who gave the advice had at the time the information notice was issued, already changed his mind. The Tribunal must look at how HMRC acted as a body, and the fact that at the time the information notice a person in CenPOL did not think HMRC had power to issue the information notice was irrelevant if at the time HMRC reasonably acted in reliance on earlier, contrary advice, and HMRC as a body could reasonably have held the view that they did have power to issue the information notice.

67. So while I do think it unreasonable for CenPOL not to have informed Mr Kane's team of their change of view, because I don't consider either viewpoint unreasonable, I do not find HMRC as a body acted unreasonably in issuing, and later upholding, the information notice. So for this reason too, I would refuse the costs application.

Incidental expenses?

68. Most of the costs claimed by the appellant related to the period before the notice of appeal was filed with the Tribunal. So there was an issue between the parties of the extent to which the appellant was entitled to its costs even if the appellant had satisfied me in principle that a costs order ought to be made.

69. This issue is irrelevant as the appellant has not satisfied me that I should make an order of costs in principle: but I record my views in case this matter goes higher.

70. The appellant's case was that the costs incurred before the appeal was lodged were properly claimed because they were 'incidental' to the proceedings in the Tribunal. As a matter of law, the parties were agreed that the Tribunal had power, subject to the Tribunal rules, to award costs:

> "of and incidental to...proceedings in the [FTT]..."
>
> (S 29(1) Tribunals Courts and Enforcement Act 2007)

They did not agree on the meaning of 'incidental'.

The authorities on incidental

71. In the Courts, where 'incidental' costs are similarly awardable, although under different provisions, the authorities are clear that some costs incurred before the notice of appeal is lodged can be claimed. *In re Gibson's settlement Trusts* [1981] Ch 179 at page184F-G the Judge said 'incidental' expands the scope of what costs may be awarded, and appeared to indicate that costs may be incidental if they were incurred in respect of issued which were in dispute both before and after the start of the proceedings. This followed two much earlier Court of Appeal decisions, *Pecheries* [1928] 1 KB 750 where the claimant was allowed the costs of taking witness statements before the appeal was lodged, and *Frankenburg* [1931] 1 Ch 428 where the appellant was allowed legal and evidence costs incurred before a writ was issued because the material gathered was 'of use and service', and relevant to an issue, in the subsequent litigation.

72. This line of authorities appeared to be applied in the FTT in the case of *G Wilson (Glaziers) Ltd* [2012] UKFTT 387 (TC) where the FTT decided the costs incurred by the appellant before the notice of appeal was lodged with the Tribunal were 'incidental' because the issues in dispute were well defined: [12]. However, there is little detail in the decision on what costs were actually allowed.

73. That decision was inconsistent with the slightly earlier decision in *Maryan* [2012] UKFTT 215 (TC) at [87] which relied on an earlier Special Commissioner decision but did not refer to *In re Gibson's.* In *Maryan,* as in this case, the appellant sought the costs he incurred in between the period of lodging his appeal with HMRC and with Tribunal, as well as the costs thereafter. The FTT in *Maryan* concluded there was no jurisdiction to award costs incurred before tribunal proceedings were lodged with the Tribunal: [88].

74. The question of pre-notice of appeal costs came to the Upper Tribunal in *Catana* [2012] STC 2138. The Tribunal there ruled:

> "[7]..the tribunal may make an order in respect of costs '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 Cantana's tax affairs which preceded the proceedings....
>
> [10] It follows that so much of Mr Catana's application as respects any costs he incurred before the proceedings before the [FTT] were brought cannot succeed....

In re Gibson's was not cited. This decision has been referred to as authority that no costs incurred before the lodging of the notice of appeal can be recovered, in other words, that *Maryan* was right, and *G Wilson (Glaziers)* was wrong. However, the FTT in *R A Drinks Ltd* [2014] UKFTT 304 (TC) considered the ruling in *Catana* and said:

> "[20] It must be remembered that this statement was made in the context of a claim by Mr Catana to recover all costs incurred in connection with the lengthy investigation that had preceded his appeal. I do not think the Upper Tribunal intended its above comment to mean that there should be a 'hard cut-off' which prevented *all* costs incurred before the date of commencement of the appeal to be excluded from any costs order, for instance, the costs of preparing the notice of appeal itself."

75. I agree. In so far as the Upper Tribunal was making a binding ruling on the meaning of 'incidental', that ruling was that the investigation in a taxpayer's tax affairs were not incidental to any subsequent appeal. *Catana* did not rule that no pre-proceedings costs were irrecoverable: there is no necessary inconsistency between what the High Court said in *In re Gibson's* (in which they considered the two Court of Appeal cases mentioned above) and *Catana.*

76. Upper Tribunal Judge Bishopp who gave the decision in *Catana* explained his decision in a permission to appeal application to the Upper Tribunal in the case of *Stomgrove* PTA/480/2014 as follows:

> [10] Mr Catanã was attempting to recover not only the costs of the proceedings but also his costs of what he contended was an unnecessary and intrusive investigation of his returns. What I said at [7] drew a distinction between the proceedings, on the one hand, and the investigation on the other, and it does not seem to me there is anything controversial in that distinction. However, some confusion, not only in this case but in others, seems to have been caused by what I then said, at [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."

> [11] That paragraph has to be understood in its context. Mr Catanã represented himself throughout both the investigation and the proceedings. After he received what he regarded as an incorrect decision from HMRC, he sent his notice of appeal to the First-tier Tribunal; there was no intervening step, nor any need for one. The cost, whether in respect of a litigant in person's own time or in professional fees, of preparing and submitting a notice of appeal is, in my view plainly, "of and incidental to" the proceedings—indeed, it is "of" the proceedings, since it is the necessary first step in the appeal. Thus in Mr Catanã's case the preparation of his notice of appeal was the starting point.
>
> [12] Mr Catanã's position is to be contrasted with that of a litigant who engages a professional representative. The representative needs to take instructions and, perhaps, advise before a notice of appeal is prepared; and work necessarily undertaken as a prelude to the preparation of a notice of appeal must, in principle, be "incidental to" the proceedings. Thus if it is reasonable to instruct a professional representative the costs incurred in instructing him adequately must be costs incidental to the proceedings and, subject to their being reasonable in amount, recoverable from the opposing party.

77. My conclusion on the law is that there is no reason why 'incidental' in the Tribunals, Courts and Enforcement Act should be read any differently to the meaning it is given elsewhere in costs legislation and rules, irrespective of how the old Special Commissioner rules should have been constructed. 'Incidental' therefore extends the scope of the costs which may be awarded beyond those merely 'of' the litigation. Nevertheless, 'incidental' will require the costs to be of use and service in the subsequent litigation.

78. So it seems to me that a necessary step in bringing an appeal, such as preparing the notice of appeal to the Tribunal, will be an 'incidental' cost to the proceedings; moreover, preparation for the proceedings which is actually used in the proceedings even though it takes place before proceedings are commenced, will also be an 'incidental' cost.

79. Costs incurred in dealing with a tax investigation are not, however, incidental to the proceedings, as they are not necessarily incidental to the proceedings: they are incurred to bring the dispute to an end without litigation.

80. What of the costs in lodging the appeal with HMRC and pursuing the review? A direct tax appeal such as this one could not have been lodged with the Tribunal until it had first been lodged with HMRC. The appeal to HMRC is a necessary precondition. On the other hand, it is not necessary to pursue a review with HMRC in order to bring an appeal to the Tribunal.

81. Where the taxpayer lodges an appeal with HMRC one day, and then lodges one with the Tribunal the next, it seems to me that the purpose of the appeal to HMRC was no more than to fulfil the necessary conditions to bring an appeal before the

Tribunal. The costs of lodging the appeal with HMRC could therefore properly be said to be 'incidental' to the appeal.

82. But where the taxpayer lodged the appeal with HMRC in order to pursue the option of a review, his immediate purpose was not to pursue litigation, and the costs of lodging the appeal with HMRC can't be said to be truly incidental to the litigation.

Application to facts.

83. Some of the costs claimed would be clearly costs 'of' the appeal: these are the costs under the heading 'HMRC withdrawal letter'. They relate to actions taken in response to HMRC's withdrawal from the appeal.

84. I consider that the costs claimed on the schedule for preparing the appeal to the Tribunal are properly 'incidental' costs, but not the costs of preparing the appeal to HMRC, because the appellant chose not to lodge proceedings afterwards but to pursue the review option.

85. Nor am I satisfied that the costs incurred during the review process are incidental to the proceedings. I had no explanation of how any of these costs were 'of use and service' in the subsequent litigation and it would be for the appellant to satisfy me of this. Certainly it was nothing that the appellant did that led to HMRC's withdrawal. It was, as explained, a change in HMRC's internal view on the law. No act by the appellant prompted this change: in particular, its grounds of appeal to HMRC were the bare statement, without explanation, that the documents were not reasonably required. This was not a case, such as *G Wilson (Glaziers)* where the issues in dispute were identified before the commencement of the litigation, and pre-litigation preparation on those issues had taken place. So in result my view is the same as that in *Maryan* although for a different reason, being that the costs in between the appeal to HMRC and the appeal to the Tribunal are not 'incidental' as not shown to be of use and service in subsequent litigation, at least in this case.

86. So had I been prepared to award the appellant costs, I would only have awarded it the costs of preparing the notice of appeal and the costs incurred since that date. However, I would not have been prepared to summarily assess them for the reasons given at §16 and §22. The schedule of costs was not what it represented itself to be. Whether the costs claimed were reasonably claimed would depend on whether Cornerstone Tax had reasonably incurred the costs it had actually incurred dealing with the cases en bloc, and then whether it was reasonable to equally apportion these costs in between the various taxpayers. That, it seemed to me, would have been a question to be left to a Costs judge.

87. In the event, of course, I have refused to make the appellant any award of costs for the reason at §§22-24; and if I am wrong on that, then for the reasons given at §§51-52, and, in default of that, at §61.

88. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 15 NOVEMBER 2016