TC02370

Appeal number: TC/2010/06255

PROCEDURE - COSTS – appeal in standard category - appellant's application for costs on the basis that HMRC had acted unreasonably in not settling case sooner– period over which costs may be incurred and period over which unreasonable conduct may be assessed considered – whether HMRC acted unreasonably in not settling case before service of appellant's witness statements – no- whether HMRC acted unreasonably in not considering witness statements sooner – yes – application granted for costs incurred after point in time by which witness statements ought to have been reviewed – application allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

SOUTHWEST COMMUNICATIONS GROUP LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

UPON the appellant's application for costs under Rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

Sitting in public at 45 Bedford Square, London on 29 June 2012

Mr G. Fraser of Thompson Jenner LLP chartered accountants for the Appellant

Mr S. Foxwell, officer, HMRC appeals and reviews unit, for the Respondents

IT IS DIRECTED THAT:

HMRC pay to the appellant the costs of and incidental to the proceedings which the appellant incurred from 20 July 2011 onwards in an amount to be assessed on the standard basis by a costs judge if not agreed.

DECISION

Introduction

1. This matter concerns the appellant's application for an order that HMRC pay the appellant's costs on the grounds that HMRC acted unreasonably. The costs are in relation to an appeal in the standard category lodged on 27 July 2010 which HMRC subsequently settled on 30 January 2012 some 3 weeks before the substantive hearing of the appeal was due to take place on 20 and 21 February 2012.

2. The appellant argues HMRC acted unreasonably because it ought to have settled the appeal well before 30 January 2012 on 6 July 2010 following the HMRC internal independent review process, there being no new information before HMRC that was not already before them at the time of that review.

3. HMRC say that it was not until they were able to appraise the appellant's witness statements that they were able to decide that the case should not go ahead and that although it was unfortunate that there were delays in considering the witness statements these were due to the officer handling the appeal being absent on sick leave.

Legislation

4. Section 29 of the Tribunals Courts and Enforcement Act 2007 which provides the basis for the First-tier Tribunal's ability to make a direction in respect of costs states:

> "(1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal…
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

5. In so far as is relevant to this application, Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Procedure Rules") provide as follows;

> "10. – (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –

(a) …

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

Background / Chronology

6. In order to understand and assess the significance of the witness statements the appellant served it is necessary to set out a little of the background of the appeal.

7. The appellant's main business is the sale, supply, installation and maintenance of communications to business customers. On 6 September 2005, the appellant entered into a written sponsorship agreement with Exeter Chiefs Rugby Club ("the Rugby Club") under which the appellant was to pay £200,000 to the Rugby Club. The substance of the appeal related to a further amount of £100,000 paid by the appellant to the Rugby Club and whether this was laid out "wholly and exclusively" for the purposes of the appellant's trade under section 74 of the Income and Corporation Taxes Act 1988. The appellant maintained the £100,000 payment was negotiated together with a £200,000 sum set out in the written sponsorship agreement to form a sponsorship deal of £300,000, and that the payment of both sums was wholly and exclusively for the purposes of the appellant's trade.

8. Mr Rowe, a director and controlling shareholder of the appellant was also the Chairman and Chief Executive of the Rugby Club. HMRC took the view that the overriding motive and intention for paying the sum was to allow Mr Rowe to contribute funds to the Rugby Club in response to the Rugby Club's request to the appellant. HMRC maintained that even if there was a business advantage to the appellant of the £100,000 assisting the Rugby Club's financial position in order to further the appellant's objective of being associated with a successful team, assisting the Rugby Club's financial position disclosed a dual purpose. Therefore they said the payment of £100,000 was not "wholly and exclusively" for the purposes of the appellant's trade.

9. The chronology of the dispute was as follows:

(1) On 20 May 2008 HMRC opened the enquiry into the Corporation Tax Return of the appellant for the year ended 31 December 2006 following which there were numerous letters between HMRC and the appellant.

(2) On 21 November 2008 there was a meeting attended by Mr Rowe, Mr Langley (the Managing Director of the appellant and who from 2000 to 2006 was Commercial Director of the appellant), three representatives from Thompson Jenner, the firm representing the appellant, including Mr Fraser who appeared at the hearing and two officers from HMRC (Mr Wilton and Mr Oakes).

(3) On 21 April 2009 there was a meeting attended by the same representatives from the appellant and two officers from HMRC (Mr Wilton and Mr Weeks).

(4) On 10 March 2010 HMRC issued a notice of amendment for the accounting period ending 31 December 2006.

(5) On 6 July 2010 HMRC concluded the independent review process which had been requested by the appellant.

(6) On 27 July 2010 the appellant notified its appeal to the Tribunal.

(7) On 6 October 2010 HMRC submitted its Statement of Case.

(8) On 29 November 2010 HMRC filed its List of documents.

(9) On 28 February 2011, pursuant to a time extension the appellant filed its List of documents.

(10) On 21 March 2011 the Tribunal issued directions requiring amongst other things that witness statements be filed by 3 May 2011. The appellant's request for an extension was granted and the deadline was extended to 31 May 2011.

(11) On 31 May 2011 the appellant served 3 witness statements on the Tribunal. These comprised a 15 page statement from Mr Langley, an 8 page statement from Mr Rowe and a 3 page statement from Ms Flowers, Sales Director of the appellant.

(12) On 22 June 2011 the Tribunal sent copies of the witness statements to HMRC as copies had not been served on HMRC.

(13) On 22 September 2011 the Tribunal notified the appellant through its representative that a hearing had been fixed for 20-21 February 2012 having earlier written to the parties to ask for listing information on 2 August 2011 and received HMRC's provisional dates to avoid on 3 August 2011.

(14) On 30 January 2012 HMRC informed the appellant by telephone and letter that HMRC had decided not to contest the appeals set down for hearing and the Tribunal had been informed of the position. The letter written by Mr Foxwell went on to explain:

> "It is unfortunate that it is so late in the day but as I explained I have been off work with a torn achilles tendon for 10 weeks. Normally it would have been possible to make this important decision earlier and I can only apologise that the witness statements were not considered in more detail sooner.
>
> As explained in the phone call, the crucial new evidence introduced in the witness statements from Harry Langley and Sarah Flowers, along with a detailed reconsideration of all evidence in the case resulted in HMRC altering its view of the main issues. It is now felt that HMRC has a no better than 50% chance of success on the balance of probability in this appeal. HMRC was also mindful of a possible inappropriate use of resources with both the costs involved in a two day hearing and the amounts at stake. It is therefore considered wise to concede…"

Period over which costs may be incurred and period over which unreasonable conduct may be assessed

10. The costs the appellant is seeking include an element of costs which are stated to be after HMRC's internal review "in July 2010". It is not therefore clear to what extent if any these costs include costs incurred prior to notification of the appeal.

11. At the hearing the parties' attention was drawn to the Upper Tribunal case of *Cataña v HMRC* [2012] UKUT 172(TCC). This considered the Tribunal's power to make an order in respect of costs "of and incidental to" the proceedings and whether there was power to make an order in respect of the investigation of the appellant's tax affairs which preceded the proceedings before the Tribunal. After considering the High Court decision of *Gamble v Rowe* [1998] STC 1247 (which had dealt with a similar restriction to the costs ordering power of the Special Commissioners) Judge Bishopp quoted with approval the First-tier Tribunal decision of *Bulkliner Intermodal Limited v HMRC* [2010] UKFTT 395 (TC). *Bulkliner* had considered the effect of the transfer of the Special Commissioners' jurisdiction to the First-tier Tribunal on the cost direction making power. At [9] Judge Bishopp approved the following proposition from *Bulkliner:*

> "… one thing that has not changed is that the Tribunal's jurisdiction continues to be limited to considering actions of a party in the course of 'the proceedings', that is to say proceedings before the Tribunal whilst it has jurisdiction over the appeal. It is not possible under the 2009 Rules, any more than in was under the Special Commissioners' regulations, for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the Tribunal does have jurisdiction, can costs incurred before that period be ordered. In these respects the principles in *Gamble v Rowe* … remain good law. That is not to say that behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform actions taken during proceedings, as it did in Scott and another (trading as Farthings SteakHouse) v McDonald [1996] STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal."

12. Judge Bishopp went on at [10] to hold:

> "It follows that so much of Mr Cataña'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."

13. The Tribunal's power to make an order in respect of costs "of and incidental to" proceedings was also considered in the First-tier Tribunal decision of *G Wilson (Glaziers) Limited v HMRC* [2012] UKFTT 387.

14. In *G Wilson* the Tribunal analysed the High Court decision of *In re Gibson's Settlement Trusts, Mellors & Another v Gibson & Others* [1981] Ch. 179 which was a

decision in the context of a taxing master under what was then RSC Order 62. The High Court had considered that the words "incidental to" extended the ambit of the costs order and had also made observations on how one might indentify whether certain costs were truly incidental to the proceedings. Having regard to *In re Gibson's Settlement Trusts* the Tribunal at [12] of its decision rejected HMRC's contention that costs incurred before commencement of the appeal proceedings could not be costs incidental to the appeal proceedings and found that the matters in the applicant's appeal (being several VAT default surcharges) :

> "…were sufficiently well defined so that all the costs incurred before commencement of the appeal proceedings do constitute costs incidental to the appeal proceedings…".

15. There is nothing in the decision in *Cataña* to suggest that the judge was referred to *G Wilson* or to *Gibson's Settlement Trusts* and in any event neither of the decisions are binding authority on the interpretation of the particular legislation relevant here. I think I must proceed on the basis that *Cataña* as an Upper Tribunal decision is binding authority for the proposition that I cannot make an order in relation to costs incurred before the proceedings before the First-tier Tribunal were brought.

16. If I am wrong, and for any reason I am not so bound, I would find, in line with the approach taken by the Tribunal in *G Wilson* that the matters in this appeal were, at the stage of HMRC's review on 6 July 2010, sufficiently well defined so that the costs incurred from that point were costs which were incidental to the appeal proceedings.

HMRC's conduct

17. In relation to the issue of the period over which HMRC's conduct is relevant this issue was also considered by the Tribunal in *G Wilson.* I agree with Judge Kempster's conclusion at [19] that:

> "..the words in Rule 10 that are relevant to the Respondents are "defending or conducting the proceedings". I conclude that the actions of the Respondents at a time before there were any proceedings are not relevant for the purposes of Rule 10."

18. This is consistent with the excerpt from *Bulkliner* at [8] above which was approved in *Cataña* but I also take note of the caveat set out there that behaviour or actions before proceedings commence should not entirely be disregarded as it might well inform actions that were taken during proceedings.

Did HMRC act unreasonably in defending or conducting the proceedings?

HMRC independent review

19. The appellant says a review of evidence should have been carried out in a much more detailed manner at the independent review stage.

20. In written submissions the appellant says that as at the point "a decision was taken to list matters for hearing before the Tribunal" HMRC had failed to consider all the information available to them at that point.

21. As HMRC point out it is not up to HMRC to decide to list the matter for hearing, but rather the appellant's notification of appeal to the tribunal which starts proceedings. As discussed above the relevant conduct or acts for the Tribunal to consider are acts and conduct after such notification. Nevertheless the fact the appellant has sought to start HMRC's "conduct clock" running earlier than the point in time when the Tribunal can consider it for the purposes of the costs order does not detract from what I understand to be the appellant's underlying grievance. This is that HMRC ought to have settled the matter in advance of receiving the witness statements because, as at the date the appeal was notified, HMRC had in their possession all the relevant information that would have enabled them to settle the appeal from the letters and meetings between the parties that had taken place before.

22. I do not therefore consider whether HMRC, in not settling at the independent review stage (which happened prior to the appeal being notified), amounted to HMRC unreasonably defending or conducting the proceedings. The earliest acts I may consider, (whether these are framed as HMRC continuing to defend the appeal, or as an omission in not settling the case sooner) following from what is said above, are those arising from when the appeal was notified.

23. I may, having regard to the caveat discussed at [19] nevertheless consider whether the behaviour before the proceedings informs the actions taken during the proceedings. However, on the facts of this matter, there does not appear to me to be anything material in the behaviour of HMRC which informs actions taken during the proceedings. There is certainly no indication that the enquiry or amended assessment which gave rise to the appeal were made in bad faith.

24. Mr Foxwell referred me to a First-tier Tribunal decision *Thomas Maryan v HMRC* [2012] UKFTT 215 (TC) which also considered an application for costs under Rule 10(1)(b) of the Tribunal Procedure Rules and in particular the following excerpt from the decision at [110].

> "The question, therefore, for the Tribunal is whether the fact that the disputed decisions giving rise to the Appeal were flawed constitute on its own unreasonable behaviour within the meaning of rule 10(1)(b) of the 2009 Tribunal Rules. The Tribunal thinks not. The wording of rule 10(1)(b) is about the conduct of the case before the Tribunal rather than the quality of the original decision. It is the standard of the handling of the case not the decision that gives rise to a potential liability for costs under rule 10(1)(b)."

25. To the extent the appellant's case entails a complaint about the quality of the original decision in this case I would agree that is not relevant not least, because if as discussed above, conduct before the notice of appeal is not relevant then the quality of HMRC's decision before that point in time cannot therefore be relevant. However, the nub of the appellant's case as I see it is about HMRC not taking a decision to settle

the case sooner whether that was at the review stage or at a slightly later point in time once proceedings had begun. While the underlying subject matter of that issue may overlap with issues to do with the quality of HMRC's original decision there cannot in my view be any dispute that the issues of whether HMRC acted unreasonably in continuing to defend proceedings or in not settling the matter sooner are squarely within the remit of "defending or conducting the proceedings" for the purposes of Tribunal Procedure Rule 10(1)(b).

26. In relation to the appellant's argument that there was no new information I was referred in particular by Mr Fraser to the two meetings that took place (one on 21 November 2008, at which Mr Langley and Mr Rowe were present and the other which appears from the documents bundle to have taken place on 21 April 2009 and which was attended by only the appellant's representatives and HMRC). I have also following the hearing reviewed the bundle of correspondence between the appellant's representatives and HMRC put before me.

27. Although three witness statements were served on HMRC on 22 June 2011 which HMRC subsequently in its letter of 30 January 2012 letter referred to as "crucial new evidence", Mr Foxwell highlighted at the hearing that it was Mr Langley's statement in particular which led to the appeal being settled.

28. Mr Foxwell drew attention to the following matters in Mr Langley's witness statement:

(1) That sponsorship was Mr Langley's sole responsibility. HMRC had thought Mr Rowe was the "driving force" in that area.

(2) The statement provided clear evidence that there had been a verbal agreement to pay £300,000 for sponsorship.

(3) The explanation in the statement that the appellant had made a conscious effort to distance Mr Rowe from dealings between the appellant and the Rugby Club.

(4) The fact the written agreement had been drafted without formal legal assistance although Mr Foxwell conceded this point probably had been mentioned before but had not been given sufficient weight.

29. Mr Foxwell thought the explanation given for the way in which the deal was structured, namely to deal with the uncertainty of the Rugby Club's move to new grounds, was reasonable and noted there did not appear to be evidence to challenge the commerciality of the approach taken.

30. At the hearing Mr Foxwell described the significance of the witness statements as altering the weight of different matters and in his written submissions he accepted that most of the facts were known to HMRC prior to closing the enquiry. The written submission went on to say that the facts were given piecemeal at meetings and in various correspondence and that "once presented as a whole in the witness statement it clarified the position…".

31. Mr Fraser emphasised that the appellant disputes the suggestion that the witness statements raised matters that were not already known to HMRC as of the outset of the proceedings. The witness statements did not contain "crucial new evidence". Mr Fraser said he was at the November meeting and that every statement in Mr Langley's witness statement had been made orally at the meeting or in writing. The witness statement said nothing new and 4 different inspectors had seen the information. Any fundamental points in Mr Langley's statement were already known as at July 2010.

32. The appellant also says the inspector already knew that monthly instalment payments of £25,000 had been sent to the Rugby Club and he could have looked at those to see that from "day 1" that the series of monthly payments in that amount over the year from the appellant to the Rugby Club would add up to £300,000.

33. Mr Foxwell confirmed to me that papers he received in order to produce the statement of case would have included notes of the November 2008 and April 2009 meetings and all the relevant correspondence between the parties.

Discussion

Impact of the witness statements

34. In an application of this kind it is not in my view necessary for me to consider whether it was correct for a party, in this case HMRC, to settle the matter. Indeed entering onto that terrain would risk pronouncing on the merits of an appeal which, following settlement is not before the Tribunal. It is nevertheless clear to me that this was a case where the nature of whether there was an oral agreement as to the amount of £100,000 paid from the appellant to the Rugby Club and the contents of any such agreement were to be key issues in determining the strength or otherwise of the merits of the appeal.

35. I have considered Mr Langley's witness statement, those of Mr Rowe and Ms Flowers, the notes of the various meetings and the subsequent correspondence between the appellant's representative and HMRC. I can well see how at a general level that it would seem from the appellant's point of view that there was nothing hugely revelatory in Mr Langley's witness statements or the other witness statements, that could not have been apparent from notes of meetings and correspondence already within HMRC's knowledge from the time at which proceedings were begun.

36. But, to approach the matter simply at the level of whether there was new information would, in my view, overlook important distinctions between contentions that parties make, evidence that the parties put forward, and the likelihood in appraising the merits of a case of whether a Tribunal will make findings of fact which support the party's contentions on the basis of the evidence.

37. A note of a meeting stating what a person has said, correspondence between the parties about the meeting, correspondence from a party's advisor reporting a party's contention of fact, and a signed witness statement by their nature may carry different evidential weight. That a party may assert a particular fact does not mean a Tribunal

will make that finding of fact without assessing the supporting evidence. A note of what someone has been reported as saying in a meeting or what their advisor has said they said is going to be viewed differently to a signed witness statement from that person.

38. Although at a general level the factual contentions at play may not have been new, the weight of the evidence that had been put forward to support those contentions shifted materially when it was confirmed what witnesses the appellant would be relying on and what they would say in evidence.

39. The test of whether a party has acted unreasonably does not preclude the possibility of there being a range of reasonable ways of acting rather than only one. In a case such as this where an assessment of the strength of oral evidence was going to be key, I do not consider that a party can be said to have acted unreasonably in not settling the appeal on the basis of notes of what had been stated at meetings, or stated in correspondence by representatives but instead doing so as a result of their appraisal of the anticipated evidence indicated by the witness statements. It is clear from the correspondence from HMRC subsequent to the meeting on 21 November 2008 that despite what had been said by Mr Rowe and Mr Langley at the meeting certain matters of fact e.g. Mr Rowe's involvement in the negotiations, were in dispute.

40. In relation to the appellant's argument that it must have been apparent to HMRC that the sponsorship agreement covered £300,000 because of the series of £25,000 instalment payments I do not think this helps. In and of itself the fact instalments were made of £25,000 did not exclude the possibility that some element of the payment was for a purpose other than a purpose "wholly and exclusively" for the purposes of the appellant's trade.

41. Looking at the meeting notes and correspondence that were available to HMRC at the time the appeal was notified it does not appear to me that it was unreasonable for HMRC to have taken the view that the case should continue to be defended. Once the witness statements were received, that, I think, put a different complexion on the potential facts that a Tribunal might find.

42. For instance a statement in a signed witness statement that "Mr Langley was the only person to be involved" in the negotiations might well be viewed differently from discussion in a meeting to the effect that it would have been improper for Mr Rowe to be involved. To the extent meeting notes and subsequent correspondence between the appellant's representatives canvassed an oral agreement or its content that might well carry lesser weight when compared to the references in the witness statement to there being an agreement albeit an oral one to pay £100,000 in relation to sponsorship. In his witness statement Mr Langley states unequivocally that he was not instructed to make the payment by Mr Rowe. The weight of that is different to that which may be drawn from the records of meetings and subsequent correspondence.

43. The evidence given in the witness statements could of course be challenged in the course of cross examination at a hearing or through putting in alternative evidence. I do not need to express a view on whether HMRC were right to have

settled on the basis of the witness statements. Equally I do not need to rule out the possibility that HMRC could have settled the case sooner than when it received the witness statements. The test is whether HMRC acted unreasonably and that, as discussed above, admits the possibility of there being a range of reasonable ways of defending or conducting the proceedings.

44. In view of the different complexion the witness statements put on the possible findings of fact a Tribunal might make, I do not consider HMRC acted unreasonably in defending or conducting the proceedings prior to receiving the witness statements because they did not settle the appeal before that point in time.

45. I ought to mention that in reaching this conclusion I reject HMRC's argument to the effect that it was not until the witness statements drew together matters which it said had been presented in a "piecemeal" fashion that HMRC was in a position to settle. While it is no doubt a welcome bonus for HMRC if the evidence the appellant chooses to rely on is draws matters together in a comprehensive and well structured way for HMRC to consider, that is not the function of witness statements. Rather it is to be assumed that HMRC will once proceedings are started review all the relevant material that has been put before it, something which it will need to do in any event to finalise a Statement of Case and List of Documents, and will make an ongoing assessment of whether a case should continue to be defended.

HMRC's conduct after receiving the witness statements

46. Mr Foxwell told the Tribunal that he is a "part-year" worker and does not work in August. The copies of the appellant's witness statements were not sent to him until 22 June 2011 and he says it was not possible for him to consider the statements straightaway, given his other work, and his other commitments before the tribunals. He decided to leave consideration of the witness statements until a firm date had been set for the hearing. By 22 September 2011 following a notification from the Tribunal he knew the hearing was to be in 5 months time. In scheduling his work own work he said he decided to leave consideration of the witness statements until November 2011. Unfortunately in November 2011 he tore his Achilles tendon and was off from 21 November 2011 to 23 January 2012. He was initially signed off for 6 weeks, but the period was later extended to 8 weeks and then later again to 10 weeks. Mr Foxwell's manager had faced the dilemma of whether it made sense to reallocate the case or await his return. In the New Year with the hearing fast approaching on 20-21 February 2012, Mr Foxwell's manager started to look at the papers. Following Mr Foxwell's return on 23 January 2012 HMRC informed the appellant on 30 January 2012 that it had decided not to contest the appeal. Mr Foxwell's letter of that date apologised for the fact the witness statements had not been considered sooner. At the hearing of this application Mr Foxwell accepted that the decision not to settle could have been taken before 21 September 2011 or in November 2011 before he suffered his injury.

47. Mr Foxwell's handling of the matter looked at in isolation does not appear to be a particularly unreasonable given competing priorities, his working arrangements, and an absence due to an unforeseen injury. However, what I must consider is whether

HMRC's conduct was unreasonable. Also I do not think I should consider the conduct in isolation but in terms of the impact on the other party, in this case the appellant, and also on the Tribunal and the overriding objective of the Tribunal in the Tribunal Procedure Rules to seek to deal with cases fairly and justly in exercising powers under the Rules.

48. In my view an approach of waiting until a hearing date has been fixed to consider the appellant's witness statements was not a reasonable way for HMRC to have conducted or defended proceedings.

49. In common with directions issued in many other cases the Tribunal's directions in this case left a period of time in between service of witness statements and provision of listing information (which information includes the need to provide time estimates of the hearing). The timetable assumes that parties will perform some level of consideration of the witness statements that have been served in order to be able to provide an estimate of the length of the hearing given that the hearing length will amongst other matters be affected by the length of time a party anticipates needing for cross-examination. It might also be expected that parties will consider the evidence to check that it is not so adverse that there would be no point in listing the hearing.

50. The party receiving the statements would in any event want to look at the statements to see what difference it made to its assessment of the merits and to see if any applications to adduce further evidence might need to be made. Absent communications to the contrary the appellant might, as was the case here, set about making further preparations for taking its case to hearing.

51. In listing a matter for hearing the Tribunal will want to know that the estimate is valid given the amount of evidence in issue. Furthermore, aside from the administrative resource taken up in fixing a hearing date, there is an impact on hearing capacity and delays to other appeals and other parties once a hearing slot is taken up that might otherwise be available. The situation where a hearing turns out to be listed unnecessarily because there had not been timely consideration of whether the appeal ought to continue to be defended is to be avoided.

52. The witness statements in this case were not particularly lengthy or complex and it was in my view unreasonable for HMRC not to have organised itself in such a way that the statements were reviewed within 28 days of service of the statements there being a 28 day gap provided for in the Tribunal's directions between service of witness statements and provision of listing information.

53. I should make it clear that I do not mean to single out the conduct of Mr Foxwell, who in June / July 2011 it appeared was juggling other work priorities and who by all accounts acted speedily in reviewing the statements on his return in January 2012 after his absence due to his injury. The unreasonable conduct arose from HMRC allocating and organising the resources it had to deal with its appeals workload in such a way that the appraisal of evidence, which was not overly voluminous or complex did not take place until shortly before the substantive hearing.

Conclusion

54. I have accordingly directed that HMRC pay to the appellant the costs of and incidental to the proceedings which the appellant incurred from 20 July 2011 (being 28 days after the witness statements were sent) in an amount to be assessed on the standard basis by a costs judge if not agreed.

55. The appellant's application for costs is therefore allowed but in relation to a lesser period than that sought by the appellant.

56. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 14 November 2012