TC02876

Appeal number: TC/2010/07107

PROCEDURE – COSTS – appeal in standard category – appellant's application for costs on the basis that HMRC acted unreasonably in defending or conducting proceedings under Rule 10(1)(b) of Tribunal Rules – appeal settled on second day of hearing – whether HMRC acted unreasonably in failing to engage with case which meant case could have been settled earlier in the proceedings – no – whether other acts individually or together amounted to HMRC defending or conducting proceedings unreasonably – no – application for costs dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARKET & OPINION RESEARCH INTERNATIONAL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

UPON the appellant's applications 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 15 April 2013

Mr Tarlochan Lall, Counsel, for the Appellant

Mr Shea, HMRC Officer for the Respondents

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 in conducting and defending proceedings. The costs are in relation to an appeal in the standard category lodged on 9 September 2010. The substantive issue in the proceedings related to a *Fleming* claim for input tax of £126,454.22 for periods ended between 1 January 1986 and 30 April 1997 on the fuel element of mileage allowances reimbursed to researchers engaged by the appellant.

2. The appeal was listed for a hearing on 18-20 June 2012. On the first day the Tribunal dealt with two preliminary issues. First, whether HMRC could amend its statement of case to include an argument that the Tribunal's jurisdiction in the matter was supervisory rather than appellate and second, if it could, what the nature of the Tribunal's jurisdiction in the matter was. The Tribunal permitted HMRC to amend its statement of case but its conclusion, contrary to HMRC's view, was that its jurisdiction was appellate. The reasons for those decisions are set out in *HMRC v Market & Opinion Research International Limited* [2013] UKFTT 007 (TC). Mid-way through the second day of hearing the Tribunal agreed the parties' draft consent order disposing of the proceedings and allowing the appellant's claim in the amended amount of £112,742.52. (The reduction in the amount claimed by the appellant arose from an issue relating to the employment status of the researchers.)

3. The appellant made two applications for costs, the first dealing with the costs in relation to the substantive matter and the second ("the jurisdiction issue") in relation to the preliminary matters.

4. The appellant's complaint is that there was essentially no new information or evidence provided to HMRC at the hearing that they did not have before. They say HMRC did not engage with the submissions and evidence provided by the appellant prior to the hearing, and that if they had done so the case would have settled much earlier in the proceedings. The appellant also points to various other matters, as amounting to HMRC unreasonably conducting and defending proceedings including the fact that HMRC raised the jurisdiction issue late in the proceedings on a misconceived basis.

5. The fact that there were two costs applications in relation to one set of proceedings arose from the different times at which the consent order was made and the decision on the jurisdiction issue given. Both the parties were in agreement that the Tribunal should deal with the two costs applications together. HMRC had filed a written response to the appellant's first application and a further written response on 27 February 2013 which consolidated their response to both the applications. HMRC conceded that if their conduct in relation to the substantive proceedings was found to be unreasonable they would accept that their conduct in relation to the jurisdiction

issue would also be unreasonable. They acknowledged that if their conduct in relation to the substantive issue was not unreasonable it would still be open to the Tribunal to find their conduct in relation to the jurisdiction issue was unreasonable (although they disputed that this was the case).

Legislation

6. 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."

7. 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") provides 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;…"

Exercise of Tribunal's discretion

8. I was taken through a number of First-tier Tribunal decisions and a decision of the Special Commissioners. There was some large measure of agreement between the parties as to the propositions to be drawn from these. These are described and discussed where necessary below.

(1) It was to be noted that the test in the Tribunal Rules that a party or representative had "acted unreasonably" required a lower threshold than the costs awarding power of the former Special Commissioners in Regulation 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 which was confined to cases where a party had acted "wholly unreasonably". This was discussed in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395(TC) at [9].

(2) It was suggested that acting unreasonably could take the form of a single piece of conduct. I was referred to [9] to [11] of the decision in *Bulkliner* by way of support for this proposition. In particular at [10] the decision highlights the actions that the Tribunal can find to be unreasonable may be related to any part of the proceedings

> "…whether they are part of any continuous or prolonged pattern or occur from time to time".

(3) The point is I think mentioned in the context of contrasting the Tribunal's rules in relation to acting unreasonably across the span of proceedings with the former Special Commissioners' costs power which was in relation to behaviour which was "in connection with the hearing in question". Having said that there would not appear to be any reason why the proposition that a single piece of conduct could amount to acting unreasonably. It will of course rather depend on what the conduct is.

(4) Actions for the purpose of "acting unreasonably" also include omissions (*Thomas Holdings Limited v HMRC* [2011] UKFTT 656 (TC) at [39].)

(5) A failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct (*Carvill v Frost (Inspector of Taxes)* [2005] STC (SCD) 208 and *Southwest Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC)) at [45]).

(6) 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 way of acting. (*Southwest Communications Group Ltd* at [39]).

(7) The focus should be on the standard of handling of the case rather than the quality of the original decision (*Thomas Maryam v HMRC* [2012] UKFTT 215(TC)).

(8) The fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it. In *Leslie Wallis v HMRC* [2013] UKFTT 081(TC) Judge Hellier stated at [27]:

> "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong…"

(9) As cautioned by Judge Brannan in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] Rule 10(1)(b) should not become a "backdoor" method of costs shifting.

9. Although there was no fundamental disagreement on these propositions as to the interpretation of Rule 10(1)(b), what was in dispute was the application of Rule 10(1)(b) to the facts of this case and how it was to be applied to cover situations such as the current one where the complaint was that if HMRC had engaged with the case sooner it would have settled sooner.

Issue and procedural history

10. In order to understand the issues raised in the costs application it is necessary to set out briefly what was in issue on the substantive matter and flag some of the features raised in the parties' pre-hearing exchanges.

11. It was agreed between the parties that the substantive issue for determination was whether on the balance of probabilities the appellant could show input tax for the periods ended between 1 January 1986 and 30 April 1997 had not been claimed on the fuel element of mileage allowances reimbursed to researchers engaged by the appellant. A claim for a later capped period had been accepted by HMRC, but HMRC did not agree this gave rise to a presumption of continuity. The appellant was relying on circumstantial evidence. This included witness statements setting out recollections of the two directors who had dealt with a VAT visit in 1990 and their recollections of making VAT claims which were sent by the appellant to HMRC on 5 January 2011 (which both parties accept by themselves were not persuasive), and copies of handbook guides containing claim forms relating to mileage allowances. The 2005 and 2007 versions were provided initially, subsequently the 1995 version was produced. There was also an issue over how various excerpts from HMRC officer reports following visits by HMRC to the appellant were to be interpreted.

12. The substantive issue was one of fact. There was no direct evidence as to the issue of whether the appellant had claimed input tax during the claim period.

13. The Notice of appeal was lodged on 9 September 2010.

14. On 27 January 2011 the appellant requested a further review of their claim.

15. On 3 May 2011 HMRC served its Statement of Case and List of Documents.

16. The appellant served its list of documents on the Tribunal on 30 September 2011 and on HMRC on 11 October 2011. By 23 February 2012 HMRC had received copies of the documents the appellant intended to rely on which would not have otherwise been available to HMRC.

17. Between 23 December 2011 and 2 March 2012 the parties had been corresponding with each other over a draft statement of facts. In reality because of the nature of the deletions made to the draft and the comments and explanations given, the process for agreeing the draft statement became a substitute for discussing the parties' factual and legal contentions. A copy of the handbook for researchers on expenses and allowances that was in force in 1995 was provided to HMRC on 23 February 2012.

18. On 8 May 2012 HMRC wrote a letter to the appellant stating it had considered the evidence supplied, including the additional evidence supplied above but that their decision to disallow the claim still stood.

19. On 6 June 2012 the appellant submitted a comprehensive skeleton argument to HMRC and the Tribunal.

Interpretation of officer visit report

20. At least part of the reason for HMRC's refusal to allow the claim for input tax was based on excerpts from officer visit reports, in particular one on 18 October 1990:

> "Discussed scale charges- satisfied only business mileage claimed- amounts negligible".

21. HMRC's view prior to settlement was that this indicated input tax had been claimed. In their response to the appellant's costs application they explained:

> "Having heard how [the appellant's] arguments related to the visit reports and heard other explanations during the hearing the Respondents accepted that the comments on the visit reports did not show input tax had been claimed on mileage during the claim period".

22. HMRC go on to say this is not the same as accepting that the report showed input tax on mileage was *not* claimed.

23. The appellant's case in relation to the interpretation of the note of the visit was this it could not have been referring to input tax on mileage allowances paid to researchers. Scale charges and mileage allowance related to different things. Scale charges were provided for in statutory provisions and gave rise to output tax whereas at the relevant time input tax on mileage allowances was dealt with by an administrative practice. The expression "business mileage" did not have any particular meaning in VAT and from its context must be taken to have been a reference to private mileage funded by the appellant giving rise to scale charges. On the basis that the costs of the researchers were a principal input, the amount of input tax cannot have been "negligible" and so it is argued the officer could not have been referring to input tax in respect of mileage allowances paid to researchers.

24. Mr Lall helpfully acknowledged in his submissions on this application that his submissions at the hearing had covered a new point which was that because the input tax on mileage allowances was "embedded" in costs incurred by third party researchers it could be missed by the appellant and he submitted it was missed by the appellant. In my view this point, to the extent it factored in any way in HMRC's assessment of the strength of their case, cannot have come as a surprise to HMRC. So I discount the fact it was not mentioned previously in assessing whether it is correct that by the time of settlement no new information had come to light that was not apparent previously.

Researcher Handbooks

25. The issue of the 2005 and 2007 Finance and Admin Guides (Handbook) which had been raised by the appellant was mentioned in the draft Statement of Facts dated 23 December 2011 prepared by the appellant. The guides contained sections on car mileage allowances and indicated that mileage allowances were payable on submission of a claim form.

26. On 17 January 2012 HMRC responded saying there was no evidence that the guides in 2005 and 2007 were similar to those in the *Fleming* claim period.

27. On 10 February 2012 the appellant wrote to HMRC and in its amended draft statement of facts referred to a Handbook issued in June 1995. This referred to a section on the terms of employment and the interviewers' pay and an appendix form for interviewers' claims for fees and expenses together with an example completed form. It was stated in the appellant's draft that "This shows that the Appellant paid mileage allowances to interviewers who claimed them during the claim period."

28. On 22 February 2012 HMRC responded. Its version of the draft statement of facts deleted the references to the 1995 Handbook on the basis HMRC had not seen it.

29. On 23 February the appellant sent HMRC the 1995 Handbook and asked HMRC to consider its draft statement of facts and comments in the light of this.

30. On 2 March 2012 HMRC gave its response on the Handbook. It incorporated descriptions and excerpts from the document and stated that the information showed that mileage costs would have been incurred by the business at the time but that the information did not show that the business did not recover input tax on interviewer mileage claims rendered.

Parties' arguments in relation to HMRC continuing to defend proceedings

31. In essence the appellant argues the same material was put to HMRC earlier and there was no reason the case could not have been settled sooner. HMRC were wholly unreasonable in not carefully considering the case and they had failed to engage with the matter properly. The appellant was, it says, put to the trouble and expense of putting the same points to the Tribunal that it had made much earlier. It cannot be the case that it should make a difference that those points were made at the hearing by counsel rather than the accountant representing the appellant in correspondence prior to the hearing.

32. HMRC draw attention to the fact that in *Fleming* claims the evidence is rarely clear cut and there are difficult questions as to the tipping point on when it can be shown that something is more likely than not to have been found to be the case. In their written response to the costs application HMRC say they did consider the additional evidence put before them. They say it was reasonable for them to say the additional evidence did not advance the claim and it was correct for them to continue proceedings until both evidence and explanations had been provided as to how the evidence supported the appellant's case.

33. Both the review officer and the decision maker looked at the information that was provided to them but did not change their decision until the second day of the hearing. They say the explanation of the 1995 Handbook and the way it operated (while by itself not conclusive) plus the detailed review of visit reports changed HMRC's mind about the meaning of the visit reports which was an issue which was finely balanced. It was only following submissions made at Tribunal by the appellant, some in response to requested clarifications from the Tribunal that the appellant's case became clear. In particular they refer to an explanation prompted by the

Tribunal's question as to why the handbook evidence was relevant to the issue of whether the appellant had made VAT claims during the relevant period.

34. In addition to the reasons for not pursuing the case set out in HMRC's written response, Mr Shea said that having listened to the submissions and explanations given by the appellant at the hearing, and having come to the view it would be willing to accept the claim it would have been wrong of HMRC to continue to argue to the claim just to see what happened. HMRC's main witness, the officer who had made the decision under appeal was in attendance at the hearing and instructed Mr Shea (who was HMRC's representative at the hearing) that if all that had been said at the hearing had been explained in the first place he would have accepted the claim. Mr Shea said HMRC would have been subject to criticism if in these circumstances it had continued with the hearing.

HMRC's reasons for settlement and Tribunal's approach where issue is whether case ought to have been settled earlier

35. Before getting into the substance it is necessary to deal with an argument the appellant made that the Tribunal is restricted to looking at HMRC's written response of 27 February 2013 to see what their reasons were for settling and that it cannot look beyond that as to do so would be speculation.

36. As to the reasons for settlement I was also referred by the appellant to [109] in the FTT's decision in *Thomas Maryan* where it was said for the purposes of the cost application in that matter the Tribunal should not go behind HMRC's decision to abandon its opposition to the appeal and reach its own conclusion on the merits of the decision. It was said there that the Tribunal had to proceed on the basis that HMRC's case against the appellant was weak and the decisions issued by the officer were flawed.

37. I am not persuaded that to the extent it is necessary to understand the reasons why HMRC settled the case I should not be able to take into account Mr Shea's additional reasons beyond what is stated in HMRC's written response. If there is any reason to apply caution it is in relation to the fact that an explanation of why the case settled given after the event is susceptible to subsequent rationalisation and therefore might not accurately reflect the real reasons why the case was settled. That would apply equally to written explanations given after the event as it does to the ones given at this hearing. I see no reason in principle why the Tribunal could not take such explanations into account. If it did have concerns about after the event rationalisations being given it could deal with this appropriately in making its findings.

38. As to Mr Shea's additional submissions these in any case amount to an explanation for why it was not unreasonable for HMRC to have settled when they did. This does not assist HMRC because the issue is not whether HMRC would have been unreasonable if they did not settle when they did, but whether having settled, this indicated that there had been an earlier omission in engaging with the case such that the case could have been settled sooner. For this reason the further argument that

HMRC made which was to say that their action of accepting the claim demonstrated that they acted reasonably does not assist either.

39. In relation to the underlying reason for settlement I agree with appellant's submission that HMRC must be taken to have accepted that on balance, the appellant was more likely than not to be able to discharge the burden of proof to persuade the tribunal to find that the input tax had not been claimed before.

40. In their submissions HMRC refer to various contentions they would not have accepted had the hearing continued. But, the fact is the hearing did not continue. HMRC decided to settle. As set out above having done that it must I think be presumed that they came to the view that the appellant was more likely than not to succeed. If the Tribunal did not make this presumption, and sought to go on to examine whether HMRC were in fact correct to settle it would effectively be giving a view on the merits of the matter without the benefit of the full arguments and the relevant evidence and would be doing so without acknowledging that the parties by settling had chosen not to have the substantive matter resolved by the Tribunal.

41. The upshot is HMRC cannot now suggest their case is not to taken as one which on balance would not have been successful. But, subject to that, I think it is relevant to consider the reasons they put forward as to why they settled when they did and in doing so look at both their written submissions and what was said at the hearing of the costs application.

42. Where the issue is whether the case could have been settled sooner one approach would be to assume that whatever information was available to HMRC at the time of the settlement was enough to mean they had a weak case and then to scroll back along the timeline of the case to consider what if any new material or arguments HMRC could reasonably have been expected to be aware of at a given point in time in order to see whether the case could have been settled sooner. But, in my view to only consider the matter on this basis would be to fail to acknowledge the way in which hindsight may colour an assessment of whether a party acted unreasonably. A party may have acted reasonably in defending proceedings at a given point in time even though with the benefit of hindsight it might be said the appeal could have been settled then. Also as pointed out by the Tribunal in *Eastenders Cash and Carry* there is a need to guard against creating a "backdoor" costs shifting regime.

43. HMRC raised an argument which went along the lines that if the Tribunal through its decisions on costs applications determines that not allowing a case to be tested shows unreasonable behaviour, there is a danger this might encourage parties to continue putting points when otherwise they might have agreed the point. This argument which is at the level of policy raises a wider issue which is whether parties would be less willing to settle if they feared that the act of settling would expose them to costs applications based on having "acted unreasonably" in not settling sooner.

44. The logical implication of this however would be that wherever matters settle the conceding party would be immune from unreasonable costs applications just because it was thought as a matter of policy that it was desirable for cases to settle

rather than to be litigated. That cannot be right in cases where for instance Respondents to proceedings have been (to use the terms referred to in *Lesley Wallis*) persisting in the face of an unbeatable argument and putting the appellant and the Tribunal to expenditure of time and money resources that could otherwise have been avoided. On the other hand there will, as indicated above, be cases where the fact the matter has settled does not mean a party acted unreasonably in not deciding to settle earlier. Along the continuum of behaviour on which these possibilities lie the point at which a party can be held to have acted unreasonably will of course depend on the particular facts and circumstances of the case.

Proposed approach

45. Taking account of the concerns outlined above as to the need to be aware of the effect of hindsight, I will consider whether at the various stages of the proceedings (which the appellant has highlighted as being points in time the case could have settled) it was unreasonable on the part of HMRC to continue to defend the proceedings considering what was reasonably available to them at the time. In doing this I will also take into account what if any new information or arguments which advanced the appellant's case became available to HMRC. This is on the basis that given HMRC's view at settlement must be take to be that its case was weak, if it then turns out they had the same information available to them at the outset then this would tend to support a finding that HMRC ought to have appreciated the weakness of their case sooner and settled earlier.

Appellant's request for further review on 27 January 2011

46. The evidence that was available at this time, in particular the references to recollections of directors going back to the VAT visit in 1990, and excerpts from the VAT officer's report were in my view of limited relevance and weight. The evidence was a long way off from amounting to evidence which would have led to the conclusion that HMRC were unreasonable in not having drawn the conclusion that the relevant input tax had not been claimed before and that they had therefore acted unreasonably in continuing to defend the proceedings at this point.

47. In terms of comparing the material available at this time as compared with what was available at the time of the settlement I was referred by the parties in particular to the following in a letter from Mr Newark of UHY Hacker Young (the appellant's representative) to HMRC dated 27 January 2011:

> "1.The original claim was rejected by Mr Egerton [of HMRC] on the basis that without any concrete supporting evidence either way the Commissioners were of the view that on the balance of probabilities the company probably had claimed the input tax in the past.
>
> 2. The only indications either way were:
>
> i) A very badly worded Officers' visit report from 1990 where one interpretation could be read as suggesting that the said input tax had been claimed. However it was acknowledged that an equally valid alternative interpretation of the Officer's comment would have

> indicated that the Officer was focused on scale charges and output tax not input tax and no such inference could have been drawn…
>
> …The two ex-directors recollected the following: That any enquiry into business mileage would probably have concerned the executive's expenses and whether they had valid receipts for their claims".

48. This letter was reporting Mr Newark's understanding of why the original claim had been rejected. In Mr Newark's earlier letter of 5 January 2011 he states "it was noted by Counsel that the Officer's comment [in the 1990 visit report] could have alternative meanings, particularly since he refers to scale charges (i.e. output tax) and not input tax specifically…"

49. The appellant argues that taken together with the witness statements (which it was accepted were not persuasive by themselves) the case should have settled then.

50. I have compared the contentions made at this stage with those which were known at the time of the hearing in June 2012. I have considered the appellant's skeleton argument filed before the hearing and Mr Lall's submissions from my note of the hearing on the issue of respectively why the reference to "scale charges", "business mileage" and "negligible" meant it was more likely than not that input tax in the claim period was not claimed.

51. In my view the elaboration of the law underlying why scale charges and mileage allowance were different would have been something HMRC knew or ought to have known without having the matter spelled out to them. That was not a new point. Indeed, in their response HMRC say they understood the differences between claiming input tax on mileage and scale charges "but the difficulty arises out of determining what was being referred to by isolated comments in a visit report written years ago for another purpose".

52. However the business mileage point was not made in the same terms, and the point about the significance about the reference to "negligible" was not made at all. That raises the issue of whether the business mileage points and points about "negligible" were things which HMRC ought to have been able to take on board without having the matter spelled out to them.

53. In my view these points were not obvious. It was not unreasonable for HMRC to have taken the view it did that the visit report did not tend to suggest the relevant input tax had not been claimed.

54. The appellant complains that HMRC ought to have considered reviewing the arguments and the evidence upon this request for a second review. However HMRC's response of 8 February 2011 explains why a second review was not undertaken by reference to HMRC's appeal and reviews guidance and advised the appellant that the point raised in the 27 January 2011 letter would be considered as part of the process for drafting the Statement of Case. Having considered the Statement of Case which was prepared this does reflect in my view that HMRC did consider the appellant's points even if did not agree with it as to their significance.

55. As at the time of the Statement of Case on 3 May 2011 I find it was still the case in my view that HMRC did not act unreasonably in continuing to defend the proceedings.

HMRC ought to have engaged with case and settled when they sent their letter of 8 May 2012?

56. The appellant says that by this stage all the relevant material was before HMRC. The officer who had made the decision who had apparently revised his views must have been taken to have been involved all the way through the process. He could have accepted the evidence at this time and should have done so. HMRC in turn say the relevance and significance of various documents in particular the 1995 Researcher Handbook was not adequately explained to them. In particular it did not appear to provide evidence that the input tax on the mileage had not been claimed. They say it was only after the explanation from the Tribunal's question as to how this assisted the appellant's case that HMRC appreciated the appellant's contention. The appellant says an explanation was given in the exchanges which took place over the draft statement of facts.

57. Whether the level of explanation given is adequate will of course depend on the context. There is a line is to be drawn between on the one hand providing enough explanation in correspondence in order for the other side to adequately assess the other side's position and the merits of the case and on the other having to "spoon-feed", as the appellant put it, arguments or issues which ought to have been apparent without detailed explanation.

58. The details of the exchanges between the parties in relation to draft statement of facts relating to the significance of the Handbook are set out above at [25] to [30].

59. On 2 March 2012 HMRC gave its response on the Handbook material saying the information did not show that the appellant did not recover input tax.

60. That was not in my view an unreasonable view to take. It was not unreasonable of HMRC to continue to defend the proceedings.

61. In terms of considering what new information came to light as compared with what was available at the hearing I explain below at [63] onwards why I am not persuaded HMRC were unreasonable in not settling upon receipt of the appellant's skeleton. It follows from those reasons that the information apparent to HMRC at this stage (8 May 2012) was not the same as that at the hearing. The relevance of the 1995 Handbook to the issue of whether input tax had been recovered in the claim period was not addressed in the appellant's exchanges on the draft statement of facts.

62. Further as mentioned above the argument about the significance of the reference to "negligible" in the officer visit report was first raised in the skeleton and not before.

Ought to have settled once skeleton argument received?

63. Barring the point set out at [24] above relating to the "embedded" nature of the costs which I have disregarded the appellant says that nothing new was said at the hearing which would not have been apparent from the skeleton argument or documents which had been produced by that stage. No evidence had been called on behalf of the appellant at the hearing by the time of the settlement.

64. The appellant's skeleton argument included the following:

> "It is said [in HMRC's Statement of Case] that "no evidence has been provided about the different bases of payments before and after this change and there is therefore no evidence upon which to base a claim for this period before the change". The handbook evidence shows that the pattern of payments was the same in material respects…The Appellant submits that its appeal should succeed without that evidence. That evidence strengthens its case…"

65. At the hearing the appellant made comparisons with the claim forms in the 2005 and 2007 Handbook and the 1995 Handbook. Upon being asked for clarification as to the relevance of the 1995 handbook the appellant submitted the behaviour and pattern of activity was constant throughout and within the periods covered by the capped claim and the claim period.

66. A link was being made between it being accepted that if claims for input tax were valid in respect of the capped period (i.e. no input tax claims had already been made in the capped period) even though certain handbooks were in operation, then it was more likely than not, if similar handbooks were in operation in the disputed period, that claims for input tax were similarly not being made in the disputed period. With the benefit of hindsight the link between the capped period and the claim period might have been understood from the appellant's skeleton but it was not an obvious point in my view. (Given I was the tribunal judge on the panel at the substantive hearing who asked for clarification on the significance of the 1995 Handbook claim forms I am conscious it might be said that it is not surprising that I would come to the view that the point was not an obvious one. But even putting that to one side I would still say it was not an obvious point). To say that HMRC ought to have settled on the back of this argument I think the point would need to have been made more explicitly. By the time of the hearing it was in any event a matter of dispute between the parties whether payments of allowances (in relation to which the input tax said to not have been claimed arose) had in fact been made by the company to the researchers.

67. It was not in my view unreasonable for HMRC to have raised the point that the Handbook evidence was not evidence as to whether input was claimed in the claim period. It was within the range of reasonable courses of action for HMRC to take to leave it to the appellant to bring forward evidence and make arguments as to why it should be found that allowances were paid but that input tax in relation to the allowances had not been claimed.

68. I conclude that having received the skeleton argument and without meaning any disservice to Mr Lall's written advocacy it was not so persuasive as to enable me to

find that HMRC ought to have settled the case prior to the hearing. That is particularly so given the jurisdiction point, which would have strengthened HMRC's case, was at large. But, even putting that to one side it was not unreasonable, in my view, for HMRC not to have settled on the basis of the skeleton.

69. It follows from the various point above that I do not agree with the appellant that HMRC had reasonably at their disposal all the materials and arguments before them which were apparent at the time of the hearing at earlier stages of the proceedings. Accordingly I do not accept the appellant's argument that the only difference between what was before HMRC at various stages before the hearing and what was available to them at the hearing was the fact that the arguments were put forward by counsel rather than the appellant's accountant.

70. I also disagree having reviewed the correspondence between the parties that it has been shown that HMRC failed to engage with the issue. They did consider the information provided, and responded with their views. Although the appellant may not have agreed with those views I cannot find that HMRC acted unreasonably in their conduct of the case.

71. The issue in the substantive appeal came down to a determination of fact. As alluded to by HMRC particularly where there is lack of direct evidence the assessment of the strength of such a case is not straightforward and requires the evidence to be carefully assessed and balanced. In my view there was no question of this being the sort of case where HMRC were seeking to defend the indefensible because the evidence clearly pointed against them.

72. Another way of approaching the issue is to start from the position that the case was weak from HMRC's point of view as at the second day of the hearing and then ask what new matter gave rise to that conclusion? While it might well have appeared to the appellant that there was no startling denouement and that no significant new matters had been raised by the time of the hearing, there were in my view shifts and developments in the points being raised such as the interpretation of the visit report and the significance of the handbook evidence to the extent that when viewed together it is possible to see that HMRC were not unreasonable in altering their assessment of the likelihood of success. Looking at any of the given points up to the point HMRC settled I cannot say it was unreasonable of them to continue defending the proceedings.

73. I move on now to consider the other points the appellant has made which it says justify a finding that HMRC acted unreasonably in conducting and defending the proceedings.

Raising the jurisdiction issue on a misconceived basis?

74. The appellant accepts HMRC were not wrong in principle to raise the issue of the nature of the Tribunal's jurisdiction given it was an issue the Tribunal could have raised of its own accord. But, the appellant says it was unreasonable of HMRC to have raised the issue on the misconceived basis that it did and that the misconception

arose from a failure on HMRC's part to engage with the case and in not properly appreciating that their views were wrong on the law given the nature of the decision under appeal. The appellant also highlights that HMRC's written submissions in relation to the costs application have not addressed this point.

75. On this latter point it was clear to me from the terms of concession HMRC made at the hearing at [5] above that they did not accept they acted unreasonably in raising the jurisdiction issue (except to the extent it was found that they were unsuccessful in relation to defending the substantive issue.)

76. HMRC argue that because the Tribunal allowed their application to amend their Statement of Case this shows the Tribunal must have thought their application cannot have been without any merit, but I do not think this can be assumed as there was no explicit consideration of merit in determining that application.

77. The Tribunal came to the conclusion that HMRC were wrong on the jurisdiction issue. However, in my view the legal argument HMRC raised is some distance away from the category of argument mentioned by Judge Hellier in *Leslie Wallis* (see [8(3)] above) which would lead to a party being seen to have been persisting in the face of an unbeatable argument.

78. Although there was ample case law from which principles surrounding the Tribunal's supervisory and appellate jurisdiction could be extracted there was no authority the Tribunal had been made aware of on the particular point of what the Tribunal's jurisdiction was on the issue of whether a taxpayer had previously recovered the input tax which was the subject of the claim.

79. While the Tribunal at [35] and [37] of its decision came to the view that it appeared to it to be self-evident that input tax recoverable under an entitlement could not be recovered again once recovered before, and that the issue of whether claims had been made before and input tax recovered was a matter of objective fact, it was accepted at [39] that issues of fact were not necessarily determinative of the nature of the Tribunal's jurisdiction.

80. I disagree that in raising the jurisdiction issue on the basis that they did HMRC's conduct was unreasonable.

Allegation that jurisdiction issue was raised as a means of excluding Handbook evidence

81. The appellant argues that it was no co-incidence that HMRC chose to raise an argument on jurisdiction shortly after it had received details of the 1995 Handbook evidence. If HMRC had been successful in persuading the Tribunal that its jurisdiction was supervisory this would have had the effect of excluding the Tribunal's consideration of materials which were not before the Commissioners when they had made their decision.

82. However I note that HMRC were consistent in questioning the relevance of handbook evidence from the outset. It was clear HMRC thought the handbook evidence would only be relevant to show the researchers had claimed mileage allowances. In their view it said nothing on whether it was more likely to be the case that the appellant did *not* claim input tax in the *Fleming* period. HMRC had already made this point shortly after receiving the 1995 Handbook evidence on 2 March 2012 which was made a month before their application to amend the Statement of Case on 2 April 2012. As discussed above that view was not an unreasonable one and there was no reason to think that despite what HMRC had said in their correspondence they were concerned that the 1995 Handbook evidence was damaging to their case. There is nothing in the evidence before me which supports the allegation that HMRC had an ulterior motive to do with exclusion of evidence in raising the jurisdiction issue when it did.

Way in which HMRC handled its application to amend its Statement of Case unreasonable?

83. The appellant argues that when HMRC made an application to amend its Statement of Case to cover the jurisdiction issue without any discussion of the issue with the appellant beforehand on 2 April 2012 this was unreasonable conduct. HMRC also failed to provide a properly marked up version of the statement of case so it could be seen what changes were proposed and which meant the appellant had to prepare their own marked up version. The appellant refers to the decision *Thomas Holdings Limited* case which is said to have found that a unilateral application by HMRC to cancel the hearing was unreasonable. The decision explains at [43] how on the last working day before the hearing HMRC sought to withdraw their decision and cancel the hearing unilaterally. The HMRC officer handling the matter was not then available to discuss the case with the appellant later that afternoon.

84. HMRC argue it is a matter for the Respondents as to what goes into their Statement of Case as it is a matter for the appellant as to what goes into their grounds of appeal.

85. I note that the conduct of seeking to cancel the hearing unilaterally in *Thomas Holdings* was not by itself found to be unreasonable. It was the combination of a number of elements. In any event I do not consider the appellant's conduct in not discussing the application to amend its Statement of Case before sending it to the Tribunal to be comparable to the conduct complained of in *Thomas Holdings*.

86. I do not however accept HMRC's argument that it is a matter for them what goes into their Statement of Case (with the implication that there was no need to raise the matter with the appellant). Changes to a Statement of Case may have consequences for the appellant in terms of the evidence it proposes to adduce and the arguments it proposes to make. (In the same way changes to grounds of appeal may have consequences for respondents). In fulfilling their obligation under Rule 2(4) of the Tribunal's Rules to help the Tribunal further the overriding objective and to co-operate with the Tribunal generally, parties should, co-operate and liaise with each other over procedural matters. (See the Upper Tribunal's decision in *Dorset*

Healthcare NHS Foundation Trust v M H [2009] UKUT 4 (AAC), at [13] which was in the context of a First-tier Tribunal with an identical overriding objective to this one). This means parties should normally serve any application on the other party and attempt to agree or narrow down issues before making their application to the Tribunal.

87. HMRC ought to have initiated discussions with the appellant before filing its application and it ought to have made a properly marked up copy available. The way in which HMRC handled its application to amend the Statement of Case fell short of the expected standards. However I cannot say that in looking at the context of the proceedings as a whole this instance of conduct amounted to the Respondents acting unreasonably in their conduct of the proceedings so as to justify a cost order being made.

88. It remains however to be considered if there are any other instances of conduct which fall short of the standards expected which when considered together show a pattern of unreasonable conduct which would justify a costs order.

Other instances of HMRC acting unreasonably?

89. The appellant makes various other complaints as to HMRC's conduct. It says HMRC's conduct was contrary to its own litigation and settlement strategy which (as set out in HMRC's letter of 8 May 2012)

> "requires [HMRC] to manage all disputes to a professional standard, working in a collaborative and non-confrontational way; and to continue throughout the lifetime of a dispute to seek ways to test the strengths and weaknesses of a case and to resolve the dispute if that is consistent with the law and [HMRC's] policy."

90. The appellant also argues that the way in which HMRC handled the agreement of the Statement of Facts was unreasonable. HMRC say it is up to each side to prove its case; there is no particular responsibility on either party to agree any particular fact. The draft was very long; it was only prudent to withhold agreement until their relevance could be understood. They say that where they deleted items on the draft an explanation was provided.

91. I have considered the correspondence in relation to agreement of the statement of facts. As discussed above this became something of a misnomer because it became to some extent a vehicle to exchange submissions. Some proposed facts were disputed on the evidence or HMRC took the view they had not been substantiated. Their consideration and explanation for why facts were not agreed was adequate. I am not persuaded HMRC's acted unreasonably in dealing with the statement of facts.

92. In relation to the way HMRC handled the appeal more generally and whether there was a pattern of acting unreasonably, beyond the way in which the application to amend the statement of case was dealt with, it appears to me that HMRC's consideration and engagement with the materials and arguments put to them was adequate. I cannot say that they acted unreasonably or agree that their conduct was

contrary to their litigation and settlement strategy (to the extent the standard expressed there is relevant to the standard of conduct for present purposes).

Conclusion

93. For the reasons above I am not satisfied that when looking at the proceedings as a whole HMRC acted unreasonably in conducting or defending the proceedings. The appellant's applications for costs are dismissed.

94. 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: 13 September 2013