TC07080

COSTS – application by Appellant on ground that appeal allowed – application by Respondents for costs on issue basis because successful ground only introduced in skeleton argument – Appellant's application granted – Respondents' application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06213

BETWEEN

BAV-TMW-GLOBALER-IMMOBILIEN-SPEZIALFONDS **Appellant**

-and-

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

TRIBUNAL: JUDGE GREG SINFIELD

Application for costs determined on 5 April 2019 on written submissions only

DECISION

INTRODUCTION

1. On 22 February 2019, the Tribunal released its decision in *BAV-TMW Globaler Immobilien Spezialfonds v HMRC* [2019] UKFTT 129 (TC) ("the Decision") allowing an appeal by the Appellant ("BTI"). On the subject of costs, the Decision stated as follows:

> "115. This appeal was allocated as a Complex case under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules'). BTI has not made any written request, under rule 10(1)(c)(ii) of the FTT Rules, that the proceedings be excluded from potential liability for costs or expenses under rule 10(1)(c). Accordingly, the Tribunal has the power under section 29 of the Tribunals Courts and Enforcement Act 2007 and rule 10(1)(c)(i) of the FTT Rules to make an order in respect of the costs of and incidental to the proceedings.
>
> 116. Any application for costs in relation to this appeal must be made within 28 days after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(3)(b) of the FTT Rules."

2. On 20 March 2019, BTI applied for an order that the Respondents ("HMRC") should pay BTI's costs in relation to the appeal. As foreshadowed in the Decision, the application was made under section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") and Rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules").

3. On 21 March 2019, HMRC made an application for an order that BTI should pay 95% of HMRC's costs of the appeal in the period to 17 January 2019 and that costs of the proceedings from 18 January 2019 should be split on a 50:50 basis. BTI filed a response to HMRC's application for costs on 24 March 2019.

4. For the reasons given below, I have decided to grant BTI's application for costs and that HMRC's application for costs must be refused. Terms and abbreviations in this decision have the same meaning as in the Decision in relation to the substantive appeal.

LEGISLATION

5. There is no general power to award costs in the FTT. Such power as the FTT has is found in section 29 of the TCEA and rule 10 of the FTT Rules. Section 29 of the TCEA provides that the FTT has power to determine by whom and to what extent costs of and incidental to proceedings shall be paid but this power is subject to the FTT Rules.

6. Rule 10 of the FTT Rules relevantly provides:

> "(1) The Tribunal may only make an award in respect of costs … –
>
> …
>
> (c) if –
>
> (i) the proceedings that have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
>
> (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case has been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph …"

7. As the appeal was allocated as a complex case and BTI did not make a written request to opt out of the costs regime, the Tribunal has the power to make an order or orders in respect of costs in this appeal. The FTT Rules are silent on how the Tribunal should exercise its power to award costs. In the absence of detailed guidance in the FTT Rules, I accept (as did the Tribunal in *Versteegh Limited v HMRC* [2014] UKFTT 397) that the Civil Procedure Rules ("CPR") provide helpful guidance on the principles to be applied. CPR Part 44 contains the general rules about costs. The parts of CPR 44.2 relevant to the applications in this case state that:

> "(2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful …
>
> (5) The conduct of the parties includes –
>
> …
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> …
>
> (6) The orders which the court may make under this rule include an order that a party must pay –
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only; …"

8. Although the CPR do not apply to the FTT, I consider that the principles set out in them are a useful guide to how the costs rules in section 29 of the TCEA and rule 10 of the FTT Rules should be applied although, where there is any conflict, the FTT Rules must prevail. Under these principles the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. There may be cases where the particular circumstances of the cases or the interests of justice require that the general rule is departed from or modified but such cases must be approached with caution (see Norris J in *London Borough of Tower Hamlets v London Borough of Bromley* [2015] EWHC 2271 (Ch) at [9]).

APPLICATIONS FOR COSTS

9. The basis of BTI's application for an order that HMRC pay its costs is that it was successful in its appeal and there is no reason to depart from the general rule (see [7] and [8] above) that the unsuccessful party pays the successful party's costs.

10. HMRC submit that they should be awarded 95% of their costs of the appeal up to 17 January 2019 and that costs of the proceedings after that date should be split on a 50:50

basis. In order to understand the basis of HMRC's application, it is necessary to describe the nature of the appeal and how one of the arguments in the appeal arose in advance of the hearing.

11. The appeal related to a claim by BTI for a repayment of income tax of £625,961.20 in the tax years ending 5 April 2010 and 5 April 2011. The tax liability had arisen on investment income from UK properties ultimately owned by BÄV, a German pension scheme for medical professionals practising in Germany. Investment income received by a UK pension fund registered under section 153 FA 2004 was exempt from UK tax under section 186 FA 2004. The claim was based on the proposition that BÄV, an unregistered non-resident pension scheme and thus unable to obtain an exemption from income tax for its investment income under section 186 FA 2004, should be taxed in the same manner as a UK registered fund.

12. At the hearing of the appeal, BTI's primary case was that the requirement for BÄV to register with HMRC in order to obtain an exemption from income tax under section 186 FA 2004 was an unjustified restriction on the movement of capital prohibited by Article 63 TFEU and thus unlawful. As a secondary argument, BTI contended that BÄV was not eligible to apply to be registered under section 153 FA 2004 because it was not a "public service pension scheme" for the purposes of section 154(2). During the hearing, BTI submitted that if its secondary argument was wrong then that meant that BÄV was deemed to have been registered from 6 April 2006 by transitional provisions in section 153(9) of and Schedule 36 to FA 2004.

13. In the Decision, I did not accept BTI's primary case but concluded that the principal secondary argument was correct. I also held that, if that was wrong, then the alternative secondary argument succeeded. Accordingly, I allowed BTI's appeal.

14. HMRC contend that they are entitled to 95% of their costs of the appeal because BTI failed on their primary argument, which had been the sole basis of their case until shortly before the hearing. HMRC stated that BTI's secondary argument was only introduced one month before the hearing when BTI submitted its skeleton argument on 17 January 2019. HMRC acknowledge that the secondary argument had been referred to briefly in two pieces of correspondence (although no details were provided in the application) and that was said to be the basis on which HMRC proposed that BTI should not be required to pay 5% of HMRC's costs in the period up to 17 January 2019. HMRC assert that the secondary argument had not been articulated to HMRC until that date and, prior to that point, all the evidence and argument had been focussed on BTI's primary argument. HMRC further contend that costs incurred to that point related solely to the issue, ie the primary argument, on which BTI was unsuccessful.

15. HMRC state that the secondary argument took up approximately 50% of the time at the hearing and in the Decision (although I consider that last point can be of no relevance to any application for costs). HMRC further assert, without providing any specific details, that dealing with BTI's secondary argument took considerably more than 50% of HMRC's time in the period between 17 January and the hearing as HMRC had to meet the argument in their skeleton argument and submit a further witness statement alongside that skeleton.

DISCUSSION

16. I consider that, for the purposes of the general rule, BTI are quite clearly the only successful party. This was not a case where the appellant was only successful in respect of certain tax years under appeal or, in the event, was only entitled to a proportion of the amount of tax under appeal. In the appeal, BTI challenged closure notices refusing BTI's claims for repayment of tax paid in the tax years ending 5 April 2010 and 5 April 2011. That challenge was wholly successful. The fact that BTI put forward two separate and distinct arguments in support of its appeal and that HMRC successfully opposed one of those arguments does not mean that BTI were only partially successful in their appeal. On the contrary, BTI only needed to succeed on one of its arguments for the challenge to the closure notices to be upheld and the

appeal allowed. In those circumstances, it is not possible to regard HMRC as having been other than wholly unsuccessful in the appeal and, under the general rule, BTI should be entitled to its costs unless there are other features of this particular case which mean that I should exercise my discretion to depart from the general rule.

17. The foundation of HMRC's application for costs is their complaint that BTI's secondary argument was only introduced one month before the hearing when BTI served its skeleton argument on 17 January 2019. While I accept that the late introduction of a new ground of appeal that required further evidence or new evidence in relation to an existing ground of appeal might be a reason to depart from or modify the general rule that the unsuccessful party should pay the costs of the successful party, that is not what happened in this case.

18. HMRC's application for costs states that the secondary argument was not articulated to them before 17 January 2019 "with the exception of a brief reference in two pieces of correspondence". On this point, BTI submit that it should have been obvious to HMRC that the eligibility of BÄV to register as a pension scheme in the UK was an issue in the proceedings from 1 October 2018 when BTI served its witness evidence or even earlier from references to registration in correspondence. It seems to me that the exact time when HMRC became aware that the eligibility point was in issue is not relevant in this case. I accept, as it seems do HMRC, that it had been flagged as a potential issue in correspondence at an earlier stage. It would be very unwise for any party having seen a flag waved, however weakly and briefly, to ignore it in preparing for a hearing.

19. In any event, BTI did not introduce a new ground of appeal that required new evidence of fact. That is acknowledged explicitly in HMRC's application for costs which stated "… this secondary argument was a legal argument and required no findings of fact". The secondary argument was a point of law and if it was a new one (which it was not – see below) then serving it on HMRC one month before the start of the hearing should (and, in my judgement, did) provide plenty of time for HMRC's legal team to prepare to meet it.

20. In their application, HMRC say that they had to submit a further witness statement alongside that skeleton but, as the secondary argument was a legal argument and involved no findings of fact, it is unclear why a new witness statement was thought to be necessary. No reason why the further witness statement was required or details about it are given in HMRC's application. HMRC must be referring to the second witness statement of their only witness, Judith Goodall. That was a statement of nine pages. It dealt solely with the law relating to the taxation of pension schemes by way of reference to legislation and explanatory notes to it and HMRC opinions about its interpretation as expressed in their published guidance on the subject. Many, if not all, of the points made in Ms Goodall's second witness statement could have been made in submissions by counsel.

21. It seems to me that it is clear that there was no unfairness in allowing BTI to rely on its secondary argument at the hearing. There can, in my opinion, be no objection to a party introducing a new argument or alternative arguments based on interpretation of the legislation at issue at any point in advance of or even during the hearing. The other party, having prepared its case properly, should be able to meet such points. If, for some good reason, the party is unable to meet the point within the time available then the proper course is to apply for an adjournment of the hearing or ask to be permitted to make further submissions in writing after the hearing. HMRC did neither of those things and in my view that was because they did not need to do so. It was clear to me at the hearing that HMRC's counsel were fully prepared to meet BTI's secondary argument in both its forms and that explains why, quite rightly in my opinion, Mr Mehta noted that the secondary argument was new but did not request an adjournment or ask to deal with it in writing after the hearing.

22. For the reasons set out above, I consider that HMRC's application for costs in the circumstances of this appeal was misconceived and should not have been made. Having discussed and rejected HMRC's application for costs and as HMRC do not advance any other argument in opposition to BTI's application, it seems to me that there is no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party in this case.

DISPOSITION

23. I refuse HMRC's application for costs and I grant BTI's application for an order that HMRC pay its costs in relation to his appeal and of this application. I make the order appended to this decision accordingly.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

RELEASE DATE: 09 APRIL 2019

ORDER FOR COSTS

WHEREAS the First-tier Tribunal released its decision in *BAV-TMW Globaler Immobilien Spezialfonds v HMRC* [2019] UKFTT 129 (TC) [2018] UKUT 0382 (TCC) on 22 February 2019 allowing the Appellant's appeal

AND UPON APPLICATION by the Appellant dated 20 March 2019 under rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 for an order that the Respondents pay the Appellant's costs of and incidental to this appeal

AND HAVING CONSIDERED the Respondents' application for costs dated 21 March 2019

AND in exercise of the power under section 29(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 and pursuant to rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

IT IS ORDERED THAT:

The Respondents pay the Appellant's costs of and incidental to the appeal and of this application

Such costs to be the subject of a detailed assessment by a costs judge of the Senior Courts Costs Office on the standard basis if they cannot be agreed between the parties within 28 days of the date of release of this Order.