FIRST-TIER TRIBUNAL **Appeal number: TC/2016/01479**
TAX CHAMBER **TC/2018/00728**

COSTS - judicial discretion - complex case - what is success? - was withdrawal of defence reasonable and timely – yes - application refused

Heard on: 24 April 2019
Judgment date: 24 April 2019

Neutral Citation: [2022] UKFTT 425 (TC)

Case Number: TC08643

BETWEEN

SPRING CAPITAL LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on 24 April 2019

Mr Michael Upton, Advocate instructed by Russel + Aitken LLP, for the Appellants

Mr Graham McIver, Advocate, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The appellant had lodged an application in respect of costs relating to:

   (a) Appeal reference TC/2016/01479 in regard only to the respondents' ("HMRC's") conclusions in its Closure Notice dated 5 October 2015 for the period ended 30 April 2010 assessing £3,454,913 as chargeable profits ("the substantive appeal"); and

   (b) Appeal reference TC/2018/00728, against the penalty of £537,667.39 imposed by the Penalty Notice dated 24 November 2016 ("the penalty appeal").

2. The application was made under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and was vigorously opposed.

3. The parties sought a decision in principle only.

Summary of the appellant's argument

4. Although the paperwork was voluminous with the appellant's bundle relating to the costs application extending to some 37 folios with further representations referring thereto extending to 11 pages, nevertheless the essence of the appellant's case was relatively straightforward, albeit in the context of complex appeals.

5. In summary it was argued that:-

   (a) These two appeals were categorised as complex cases in terms of the Rules.

   (b) The Notice of Appeal dated 8 March 2016 had indicated that:

   > "There is no reasonable basis for construing that the sums injected by the shareholders (and associate) into the company in the year were anything other than loans. … The company invites the Tribunal to accept the appellant's evidence and dismiss the Revenue's recategorisation (sic) of the shareholder loans as income".

   (c) In the Stated Grounds of Appeal lodged by the appellant in response to Tribunal Directions dated 9 October 2017, Ground 3 read: "3.H.M.R.C. (sic) erred in treating the injections of shareholder funds in 2010 as income."

   (d) Although the Closure Notice issued by HMRC dated 5 October 2015 was issued on the ground that the appellant had not provided information in relation to shareholders' funds the appellant argued that that information was outwith the scope of what was required by both the original Notice of Enquiry and the formal Information Notice.

   (e) HMRC's original Statement of Case dated 31 May 2016, at paragraph 31, referring to the appellant's Ground of Appeal stated "It is the respondents' contention that the source of the sums recorded as having been introduced by shareholders remains unclear." and that was restated as follows in the consolidated Statement of Case dated 21 December 2017 at paragraphs 93 and 94 which read:-

   > Injection of shareholder funds – the Respondents' Case
   >
   > 93. It is the Respondents' contention that the source of sums recorded as having been introduced by shareholders remains unclear or otherwise must be evidenced by the appellant to the satisfaction of the Tribunal.
   >
   > 94. The Respondents have reviewed the income declarations made within the shareholders' personal tax returns and have been unable to identify or verify any likely income stream or savings that would enable them to transfer the amounts in question to the Appellant. It is submitted that, until such time that the Respondents' (sic) have been able to fully trace the origin of the amounts in question they should be treated as taxable income to the Appellant."

It was unreasonable of HMRC to maintain that stance in the face of the decision of the Tribunal in *Spring Capital Limited v HMRC*[1] ("the 2016 Decision").

(f) The appellant had furnished HMRC with all relevant information by no later than December 2016 having provided information in emails dated 24 and 25 March 2015, 24 July 2016, 24 November 2016 and 9 December 2016.

(g) It was only on 20 June 2018 that HMRC, at paragraph (h) on page 5 of a very long letter, intimated that £2,153,713 would not be treated as income of the appellant. There remained the issue of two payments of £650,000 and, following correspondence on 12 July 2018, 12 days before a hearing, HMRC wrote to the appellant stating:

> "I can now confirm that HMRC will in respect of Spring Capital Ltd not be contending that these three transactions allocated to capital introduced were income of Spring Capital Ltd.
>
> HMRC will not therefore be pursuing this argument and the resultant tax and penalties that arose on the treatment of this being Company income will now fall away".

That was far too late.

(h) In terms of Section 54 Taxes Management Act 1970 ("TMA") the matter was therefore treated as settled and therefore "… the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Tribunal had determined the appeal".

(i) The appellant having succeeded, then costs should follow success.

(j) Those costs should include the costs of the appellant's application to strike out HMRC's defence on this issue (being paragraphs 93 and 94, see (e) above).

Summary of HMRC's argument

6. HMRC lodged a four page letter dated 25 September 2018.

7. HMRC's argument is more straightforward and that is that the *2016 Decision* made it explicit that the appellant had not furnished the relevant information and that it was only in July 2018 that HMRC had sufficient information to come to an informed view that there was evidence of the source of the funds.

8. HMRC had therefore only been successful in eliciting the relevant information after more than six years and three litigations. They had been put to considerable cost due to the dilatory behaviour of the appellant. (At the Case Management Hearing on 24 July 2014 the appellant withdrew their then incomplete Costs Application and HMRC intimated that they were considering whether to lodge a counter application. In the event they did not.)

The Law

9. Both parties relied on *Versteegh Ltd and Others v HMRC*[2] ("Versteegh") at paragraphs 9, 10 and 11, the relevant parts of which read as follows:-

> "9. Each of the appeals was designated as a Complex case in respect of which none of the Appellants has opted-out. Accordingly, under Rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tax Tribunal Rules"), this Tribunal has a full costs-shifting jurisdiction. The matter is therefore one of discretion for the Tribunal.
>
> 10. … it is clear to me, and indeed it was common ground, that the principles applicable under the Civil Procedure Rules ('CPR'), and the relevant authorities in that respect, are equally applicable to the

[1] [2016] UKFTT 232 (TC)
[2] [2014] UKFTT 397 (TC)

exercise by this Tribunal of its power to award costs. These are a reflection of the same overriding objective, namely to deal with cases fairly and justly.

11. I start therefore with the more detailed guidance that is afforded by the CPR. Under CPR 44.2, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, the Court is required to have regard to all the circumstances, including, relevantly, whether a party has succeeded on part of its case, even if that party has not been wholly successful. Conduct is to be taken into account, including whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. Orders may be for a party to pay a proportion of another party's costs or costs relating only to a distinct part of the proceedings."

10. Neither party referred me to paragraphs 20 and 21 which I also consider to be pertinent. The relevant parts read as follows:-

"20. The identification of the successful party is only the starting point. It does not determine the costs order. Whilst the general rule is that a successful party is normally entitled to its costs, it is necessary to take account of all the circumstances. In doing so, it is appropriate, in my view, to consider the individual elements of the case, and the success or failure by each party in those respects.

21. One of the circumstances to which the Court is directed by the CPR to have regard is the conduct of the parties, including, as I mentioned earlier, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue."

11. Of course the exercise of judicial discretion always requires that the Tribunal should have regard to the overriding objective which is set out in Rule 2 of the Rules and a copy is annexed hereto at Appendix 1. I have done so.

The Facts

12. The appellant's Unaudited Financial Statements for the year ended April 2010 were submitted to HMRC on 28 April 2011. At page 9, Note 13 of the Notes to the Financial Statements read:

13	**Other shareholders' funds**	**2010**	**2009**
		£	**£**
	Shareholders' loans to the company secured by debentures and repayable on demand	6,628,707	3,173,794
	Shareholders' loans would be expected to be repaid only as funds permit.		

13. It is apparent from that, that in that year there was an injection of capital from shareholders in the sum of £3,454,913.

14. On 24 February 2012, within the 12 months allowed, HMRC issued a Notice of Enquiry in terms of paragraph 24 Schedule 18 Finance Act 1998. Ten matters were identified for investigation but item 7 is pertinent to this application and reads:-

"Note 9 to the accounts refers to a net increase in shareholders loans of £3,454.913. This is a material sum. Please provide—

(a) An analysis of the net amount of £3,454,913 as between the shareholders.

(b) Copies of the shareholders loan accounts with the company to show the amounts introduced and withdrawn, and the dates introduced and withdrawn.

(c) Your advice as to the source of all introductions/loans over £20,000."

15. On 14 March 2012, the appellant appealed to the Tribunal and the Notice of Appeal stated that the decision being appealed was the said Notice of Enquiry. That appeal[3] (the *"2013 Decision*") is discussed in more detail at paragraphs 61 and 62 below.

16. On 29 March 2012, HMRC issued an Information Notice in terms of paragraph 1 Schedule 36 Finance Act 2008 ("Schedule 36") requesting information about the 10 items specified in the Notice of Enquiry.

17. On 13 April 2012, HMRC applied to strike out the appeal which is the subject matter of the *2013 Decision*.

18. At the hearing of the strike out application on 17 October 2012, both parties confirmed that there had been no compliance with the Information Notice.

19. The decision of the Tribunal in the *2013 Decision,* striking out the appeal, was issued on 28 December 2012.

20. A further Information Notice in terms of Schedule 36 was issued on 5 March 2013. It sought 11 items of information and documents which had to be lodged with HMRC by no later than 14 April 2013.

21. Paragraph 8 of that Information Notice was in precisely the same terms as paragraph 7 of the Notice of Enquiry. That Information Notice required only statutory documents and could not be appealed to the Tribunal.

22. On 30 August 2013, HMRC issued a £300 penalty under paragraph 39 of Schedule 36 on the basis that the appellant had failed to comply with the Information Notice.

23. The appellant appealed to the Tribunal. The hearing was on 22 December 2014 and the decision was released on 12 January 2015 *(*the *"2015 Decision").* Before the appeal was heard, the appellant provided to HMRC the information and documents in items 2, 10 and 11. There was compliance with item 1 in the course of the hearing.

24. The appeal was dismissed and the penalty upheld. I comment on that decision in greater detail at paragraphs 63-68 below.

25. In the face of continued failure by the appellant to comply with items 3-9 of the Information Notice, on 20 February 2015, HMRC issued daily penalties under paragraph 40 of Schedule 36 for the period 20 August 2013 to 19 February 2015 totalling £16,110. The appellant appealed and on review the penalties were reduced to £10,950 covering only the period 20 February 2014 to 19 February 2015 on the grounds that HMRC had been out of time to assess the earlier non-compliance to daily penalties (paragraph 46(2) Schedule 36). HMRC charged the penalties at the rate of £30 a day.

26. In an email to HMRC dated 13 March 2015, the appellant complied with items 3-7 and 9 but claimed to be unable to provide an analysis of the £3,454,913. Indeed it was stated that: "separate analyses of the amounts as between shareholder are not available".

27. However, on 24 March 2015, the appellant wrote to HMRC stating that the following "injections" of capital had been made, namely, Mrs Sarah Thomas had contributed £2,135,713 on 1 February 2010 and £650,000 on 3 February 2010 and Stuart and Rebecca Thomas had jointly injected £650,000 on 3 February 2010.

28. On 24 March 2015, HMRC accepted that the analysis of the £3,454,913 had provided the information required by item 8(a) of the Information Notice but pointed out that items 8(b) and (c) remained outstanding. On the same day, because those were still outstanding,

[3] 2013 UKFTT 041 (TC)

HMRC imposed further penalties at the maximum daily rate of £60 for the period 21 February to 22 March 2015, totalling £1,800.

29. The appellant responded the following day arguing that items 8(b) and (c) could not possibly be viewed as forming part of the company's statutory records and that nothing further was required from them. In those circumstances the penalty notice issued the previous day should be vacated.

30. On 9 June 2015, HMRC wrote to the appellant having reviewed the two decisions imposing daily penalties. That letter quoted paragraphs 13, 25, 36, 45, 48, 52 and 63 of the *2015 Decision* in support of its position that HMRC reasonably required all of the information specified in the Information Notice.

31. In the face of continued failure by the appellant to comply with items 8(b) and (c), further daily penalties at the maximum rate of £60 per day were imposed on 9 July 2015 for the period 25 March 2015 to 9 July 2015, totalling £6,420.

32. On 5 October 2015, HMRC issued a Closure Notice, referring at page 2 to both of the *2013* and *2015 Decisions* and, in particular, to Judge Mosedale's finding in the *2015 Decision*, at paragraph 63, that the appellant did not have a reasonable excuse for its non-compliance with the Information Notice.

33. The Closure Notice made it clear that HMRC still required compliance with items 8(b) and (c) evidencing the sums claimed to have been introduced by the shareholders.

34. The appellant appealed that Closure Notice on 3 November 2015.

35. On 8 February 2016, HMRC wrote to the appellant concluding the review and upheld the relevant part of the Closure Notice. It stated in particular that:

(a) "The onus will be upon the company to prove to the tribunal that the closure notice under appeal is excessive."

(b) "The company have been given ample opportunity to provide evidence to support the accounts entry regarding the shareholder loans during the enquiry."

(c) "Given the company's unwillingness to comply with the information notice, HMRC have been left with no alternative but to conclude the enquiry on the basis that the credit of £3,454,913 has been mis-described as an increase in shareholder loans in the accounts for APE 30/04/10; and should be re-categorised as income."

(d) "It is not for HMRC to demonstrate that the revised figure for the company's income is reasonable; it is for the company to provide evidence to demonstrate that the revised figure is incorrect."

(e) That decision was in line with the findings of the Tribunal in the previous appeals.

36. On 8 March 2016, the present substantive appeal was lodged with the Tribunal.

37. The appellant's appeal against the daily penalties, (the "*2016 Decision*"), was heard by the Tribunal on 6 April 2016 and the penalties upheld. That decision was issued on 13 April 2016.

38. On 7 June 2016, HMRC again wrote to the appellant in relation to the shareholder loan account pointing out that in the *2016 Decision*, Judge Mosedale had found as fact that "item 8(c) remained outstanding to this day" and she had stated at paragraph 110 that "… I do not consider that the appellant had a good reason for 8(c) being outstanding in the period for which the third daily penalties were assessed".

39. On 20 July 2016, the appellant wrote to HMRC in regard to shareholder capital injections stating that it intended to rely on:

(a) a Deed of Assignment between Sarah Thomas and the appellant dated 1 February 2010 "assigning her Nine Regions Ltd loans" to the appellant,

(b) a debenture from the appellant securing amounts owed to Sarah Thomas dated 1 February 2010,

(c) bank statements for the appellant showing receipt of £650,000 from Sarah Thomas on 3 February 2010, and

(d) bank statements for the appellant showing receipt of £650,000 from Stuart and Rebecca Thomas on 3 February 2010.

40. On 21 October 2016, HMRC wrote to the appellant with a Penalty explanation letter stating that penalties of £537,667.39 would be issued for the period 1 May 2009 to 30 April 2010 for deliberate behaviour which was "Failure to disclose source of credits to shareholders loans". The covering letter reiterated the points made in the letter of 7 June 2016 referring to the *2016 Decision* (see paragraph 38 above).

41. The appellant responded at length on the same day stating that it was "…a simple matter of fact that the shareholders injected the capital into the company…" arguing that HMRC had failed to adduce any evidence in support of their stance.

42. On 24 November 2016, a penalty determination in that sum was issued to the appellant.

43. On the same day the appellant sent HMRC three emails. The first of those referred to a £1m mortgage taken out by Mrs Thomas who introduced those funds to TML (see paragraphs 49 and 50 below). The second email enclosed a bank statement dated 31 March 2010. The third email referred to the two earlier emails and asked that the assessment be adjusted or alternatively HMRC should explain why they refuse to do so.

44. Although the email of 20 July 2016 (see paragraph 39 above) referred to bank statements, the appellant enclosed only a copy of one page of a bank statement in the name of Spring Seafoods Ltd dated 31 March 2010 and covering entries from 4 January 2010 to 17 February 2010.

45. However, there had been a change of name to Spring Capital Ltd on 12 February 2010. The statement showed two credits of £650,000 described as "additional new secured shareholder loan advance" from each of Stuart James Thomas and Sarah Jane Thomas but there is no mention of Rebecca notwithstanding the fact that the covering email referred to her again. It is now accepted that she was not the source of any of those funds.

46. There is then an entry for a debit of £2,100,000 on 5 February 2010 which, after a number, reads "… re Nine Regions Ltd Loan Advance in respect of agreement dated 4.2.10". Although there are numerous other entries on that page no other entry except one for bank fees carries an explanation and only eight carry even a name.

47. A copy of the unsigned Deed of Assignment was also lodged (the signed version was provided on 9 December 2016 but I have not had sight of it).

48. The unsigned Deed of Assignment stated at paragraph 2:

> "In consideration for a credit in the amount of £2,135,713 to her shareholder account with the Assignee, the Assignor hereby assigns the Debt, (the value of which is £2,135,731) and all rights in relation to it, with limited title guarantee, to the Assignee".

49. The Schedule to the Deed identified that that "Debt" comprised loans totalling £1,796,525.83 from a Thomas McLennan Ltd ("TML") to Nine Regions Ltd (and two other men). In the email dated 24 November 2016 the appellant had explained that TML had

assigned the Nine Regions debt to cover capital injections by Mrs Thomas into TML and "…thus Spring Capital Ltd".

50. It subsequently transpired that TML was jointly owned by Mr Rod Thomas (a Director of the appellant) and his wife Mrs Sarah Thomas, no company accounts had been filed after 31 October 2008, the appellant had acquired TML's money lending business in February 2010, no accounting records existed and Mrs Thomas had apparently lent TML £1,250,000 in 2007. In February 2010 she was owed £2,135,713. TML had assigned debts due to it by Nine Regions Ltd to Mrs Thomas in consideration of that indebtedness. (No explanation has been provided to me as to the discrepancy between the £2,135,713 and the £1,796,525.83).

51. On 19 December 2016, HMRC responded pointing out that:

(a) Those documents should have been lodged during the course of the enquiry.

(b) This was the first intimation, 13 months after issue of the Closure Notice, that TML had furnished Mrs Thomas with the £2,135,713.

(c) TML had been struck off the company register in February 2011.

(d) The bank statement reflected the loan of £2,100,000 from the appellant to Nine Regions Ltd on 5 February 2010.

(e) Further information was requested such as copies of the loan agreements between TML and Nine Regions Ltd referred to in the Deed of Assignment.

52. On 23 January 2017, the appellant's then agent responded disputing the need for that information.

53. There was correspondence in 2017 including on 8 March 2017 when HMRC wrote to the individual directors.

54. Until March 2018, further correspondence ensued with the appellant and appellant's agent, which has not been produced to the Tribunal but which is referred to in HMRC's submissions and is reported in a letter from HMRC dated 20 June 2018 on which both parties relied and to which no exception was taken. Essentially it appears from the terms of paragraph 24:

> " Subsequent correspondence focussed on the fact that HMRC had seen no evidence concerning the source of the claimed capital introduced and requested this documentation whereas your letters focused on the requirements of Spring Capital Limited."

55. Eventually, on 21 February 2018, HMRC were furnished with unsigned copies of the loan agreements relating to the loan, agreements between TML and Nine Regions Ltd (see paragraph 51(e) above).

56. The original loan agreements were furnished to HMRC at an unspecified date thereafter.

57. The letter of 20 June 2018 made it explicit at paragraph (h) on page 5 that it was only on sight of those signed documents and in the context of information provided latterly that HMRC could accept that the relevant information had been furnished to them.

58. In that letter HMRC yet again requested further information in relation to the two payments of £650,000 referring to, and relying on, paragraphs 50 to 62 of the *2016 Decision*.

59. The relevant information was ultimately provided in the form of a copy bank statement and a bank account number on 29 June 2018 and 10 July 2018.

60. On 12 July 2018 HMRC confirmed that the matter was now settled.

The 2013 Decision

61. The appellant argued that the Notice of Enquiry was both a Notice of Enquiry and a Closure Notice which failing it was an amendment or an assessment and there was a right of appeal. The Tribunal found that:

(a) The Notice of Enquiry did not simultaneously close the enquiry.

(b) There is no right of appeal against a Notice opening an enquiry.

(c) It was not an amendment or assessment.

(d) The appellant had nothing to appeal.

(e) The appeal was struck out for lack of jurisdiction.

62. At paragraph 34, in discussing a possible application for a Closure Notice, Judge Mosedale stated very clearly that "I…note that a Tribunal is unlikely to order closure where it is satisfied that the taxpayer has not yet provided answers to relevant questions about its tax affairs under enquiry.".

The 2015 Decision

63. The appellant argued that:

(a) The Information Notice had been appealed and that the penalty for non-compliance could not be issued until that appeal had been resolved.

(b) Compliance with items 8 and 9 would breach the Data Protection Act ("DPA").

(c) The Information Notice was a "fishing expedition".

(d) There had been partial compliance with the Information Notice and that had been very time consuming.

64. Judge Mosedale confirmed at paragraph 25 that there can be no appeal against an Information Notice and that all of the information demanded at items 3-9 inclusive of the Information Notice comprised part of the appellant company's statutory records. That therefore included item 8.

65. She had also observed at paragraphs 10 and 62 that it was conceded that there had been no compliance with *inter alia* item 8. At paragraph 35 she stated:

> "From what Mr Stewart said at the hearing, it appeared to me that he did have concerns about some of the entries in the accounts which he considered to be unusual (the introduction of £3.5million from shareholders in particular). Mr Thomas considered these concerns groundless as (he said) similar loans had been made in respect of this and other companies controlled by the same shareholders. I do not need to decide the point, because I do not consider it relevant. HMRC do not need suspicions in order to lawfully issue an information notice. They are entitled to check <u>any</u> taxpayer's tax return and to reasonably require reasonable information to that end."

66. At paragraph 44 Judge Mosedale concluded that compliance with the Information Notice would not involve a breach of the DPA.

67. At paragraph 60 Judge Mosedale stated:

> "While it is clear from the correspondence that from the first the appellant had questioned HMRC's right to demand the information, nevertheless I had no evidence the appellant genuinely believed HMRC did not have the right to demand the information. And I do not accept that even if it genuinely believed this, that it was reasonable for it to believe this. There is no evidence that it took any steps to check what HMRC was entitled nor did it present a case to me at Tribunal as to why HMRC should not be entitled to randomly check their accuracy of tax returns. ".

68. Lastly, in the context of a possible reasonable excuse for non-compliance, at paragraphs 61 and 62 Judge Mosedale rejected the argument that the appellant had not had the time to comply with items (3)-(9). Item 1 had been complied with at the hearing in one sentence.

The 2016 Decision

69. The relevant issues in this context were:

(a) Whether there was no non-compliance with item 8(b), and

(b) Whether there was no non-compliance with item 8(c).

Item 8(b)

70. It was a matter of agreement that individual shareholder loan accounts did not exist. The appellant had hinted at that on 13 March 2015 and said so outright on 2 April 2015. Judge Mosedale found that item 8(b) asked for documents that did not exist and therefore could not be produced (paragraph 29). Accordingly the appellant could not be in breach.

Item 8(c)

71. At paragraph 49 Judge Mosedale found that the appellant could not argue that item 8(c) was invalid.

72. At paragraph 55 in looking at what was required by item 8(c) she stated:

> " … the natural meaning of the words …is that HMRC wanted to know from where the company obtained the money".

She saw nothing ambiguous in item 8(c) and said it had the meaning stated at paragraph 52 namely:

> "…to know the origin of the credit and in particular whether it was transferred in from an outside source or was money already held by the company."

73. At paragraph 62 she indicated that, at most HMRC had suggested that production of bank statements alone might not suffice and that, as at the date of the hearing the appellant had not specified the source of the funds shown as loans from shareholders.

74. At paragraph 68 she stipulated that: " …item 8(c) did not require the company to state from where its lenders obtained the funds, only from where the company obtained the funds."

75. At paragraph 110 she stated:-

> "110. However, item 8(c) remained outstanding as it does to this day. The appellant actively disputed with HMRC what 8(c) required, giving it the wider meaning they put in this hearing and refusing to provide what Mr Stewart said it meant, which is what I have found it meant. I see no good reason why the appellant did not provide the more limited information which is what Mr Stewart said, and I have found, the information notice required to be provided. It said it found it ambiguous but I consider that no explanation of (a) why it did not seek to clarify the meaning much earlier and (b) why it did not provide HMRC with the information on the basis of the narrow meaning HMRC ascribed to it. In conclusion, I do not consider that the appellant had a good reason for 8(c) being outstanding in the period for which the third daily penalties were assessed."

Discussion

76. At first glance, and at a superficial level, it appeared that the appellant had been successful in that at, effectively, the "eleventh hour" HMRC had withdrawn their defence so the effect was that the appellant's appeal on Ground 3 succeeded. Closer examination, and in particular the litigation history, showed that that was far from the whole story. It is for that reason that I have therefore set out the history at length and in detail.

77. As paragraph 20 of *Versteegh* makes clear, the starting point is to identify the successful party. Although in one sense the appellant is successful, nevertheless there is an argument that, in fact, HMRC were successful. Their objective in instigating the enquiry on the shareholder point was to obtain answers to relevant questions about the appellant's tax affairs.

78. That was made explicit in the *2013 Decision* (see paragraph 62 above). The appellant should have been aware of that since 28 December 2012.

79. Furthermore, from the date of the issue of the *2015 Decision* on 12 January 2015, which was almost ten months before the issue of the Closure Notice, the appellant should also have been aware that the Tribunal considered that the request at item 8(c) was not only relevant but valid; as was the request at item 8(b) since at that juncture the appellant had not disclosed that no shareholders' loan accounts existed.

80. I am clear that the *2016 Decision*, which was issued on 13 April 2016, should have left the appellant in no doubt about what was required and HMRC pointed that out on 7 June 2016 (see paragraphs 38 and 72 above).

81. Whilst I understand Mr Upton's argument that HMRC were at all times looking for the source of the source of the funds, I do not accept that and for the same reason that Judge Mosedale did not accept that. It seems to me that all HMRC has ever wanted to establish is that the money came from an external source; in other words that the shareholders had indeed provided the funds. That is a subtly different point.

82. I have no information on the point, and simply do not understand why the appellant stated in March 2015 and July and November 2016 (see paras 27, 39 and 45 above) that some of the funds were derived from Rebecca Thomas. Furthermore, the argument (see paragraph 41 above) that HMRC should simply accept a bald statement that it was a fact that shareholders had injected capital into the company (without any evidence), is indefensible in a context where the statements made repeatedly by the appellant about Rebecca Thomas were quite simply inaccurate and unsupportable.

83. In the same email as Rebecca Thomas was mentioned for the second time on 20 July 2016 (see paragraph 39 above), the reference to the assignment of the Nine Regions Ltd loan did not make the link to the associated company, TML (see paragraphs 49 and 50 above) and that link only became apparent in November 2016.

84. If everything had been at arm's length there might well have been no need to mention TML. However, it is unsurprising that HMRC had reservations about the quality or accuracy of the information that was belatedly provided. The context is that it had been made explicit by the Tribunal that HMRC were entitled to establish that the injection of funds had come from the shareholders and, by implication, not circuitously from the appellant, and not only that it had been established that the information about Rebecca Thomas was inaccurate but that all of the parties named were closely linked.

85. There has been no explanation why, for example, on 21 October 2016 (see paragraph 41 above), the appellant was still declining to produce evidence of the shareholder injection. Instead the appellant continued to rely on mere assertions and did so in the face of Judge Mosedale's commendably clear statements six months earlier that that would not suffice.

86. I am wholly unsurprised that HMRC wished, and were entitled to request, evidence establishing that the funding had been provided by Mr Stuart Thomas and his sister-in-law Mrs Sarah Thomas and had not been provided by the appellant whether directly or indirectly.

This is a specialist Tribunal and in my experience, even where everything is at arm's length, bland assertions, unsupported by solid evidence will rarely suffice.

87. The evidence of the appellant's bank statement (see paragraphs 45 and 46 above) is not proof of anything beyond the fact that quite possibly, and in my view on the balance of probability, the appellant had furnished the information to the bank. The Bank is unlikely to have been aware of the agreement or the date of it or why the monies had been advanced.

88. In the absence of verification that it was indeed Mrs Thomas who had provided the funds, in a situation where there was very limited information about TML and indeed what was available raised what appear to be relevant questions (see paragraph 50 above) it was reasonable for HMRC to seek clarity as to source of the funds to the appellant.

89. I do not accept that by the end of 2016, HMRC had credible evidence showing from whence the appellant had derived the funds.

90. I find that it was only when the signed loan agreements were produced in 2018 that HMRC could reasonably find that Mrs Thomas was in fact the source of the major part of the funds.

91. The provision of the evidence that the two payments recorded on the appellant's bank statement came from Mr and Mrs Thomas was only produced thereafter. It was suggested that HMRC should have specifically asked for that long before then. I do not accept that, not least because Judge Mosedale had put the appellant on clear notice that there was a possibility that something more than the appellant's own bank statements alone might be required.

92. The appellant has been successful but only to the pyrrhic extent that by producing information that the Tribunal had repeatedly stated was reasonably required by HMRC, HMRC no longer required to litigate on that point. In reality, it was HMRC who were ultimately successful. They acted promptly once they had the relevant information and their withdrawal of the defence was timely.

Decision

93. In all these circumstances the application for costs is refused.

Right to apply for permission to appeal

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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 24th APRIL 2019

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.