



[2021] UKFTT 0269 (TC)

TC08214

*COSTS - Complex Track -
Interlocutory Costs Order - Granted -
Costs summarily assessed*

Tribunal reference: TC/2018/06467

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BETWEEN

**(1) BARCLAYS SERVICES LIMITED
(2) BARCLAYS SERVICES CORPORATION** **Appellants**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Considered on the papers on 21 July 2021, including HMRC's application for costs (from a lawyer of its VAT Litigation Team, Solicitors' Office and Legal Services) and emails from the Appellants' representatives, the Contentious Tax team at Simmons & Simmons LLP.

DECISION

Introduction

1. On 29 April 2021, I heard an application by HMRC, made on 13 January 2021, for an order staying the appeal until 60 days after the Upper Tribunal releases its decision in *HSBC Electronic Data Processing (Guangdong) Limited and others v HMRC*: 'the Application'. The Appellants opposed that Application.

2. In my reserved case-management decision, released on 11 May 2021, I granted the Application and ordered a stay as requested.

3. HMRC have now applied for an order that the Appellants pay HMRC's costs of the Application: 'the Costs Application'.

4. The Costs Application is made pursuant to Rule 10(1)(c), on the footing that the underlying substantive appeal has been allocated as a Complex case under Rule 23 (Rule 10(1)(c)(i)) and the Appellants did not give notice that the proceedings be excluded from potential liability for costs or expenses (Rule 10(1)(c)(ii)).

5. The Appellants' response is that the hearing of 29 April 2021 was

"a standard case management hearing to deal with [the Application]; the normal order for such a case management hearing is costs in the case. There are no exceptional circumstances or compelling reasons present here which the Tribunal might consider merit a departure from the normal order and HMRC has not advanced any such reasons in its application. The Appellants were entitled to object to the stay sought and there was no suggestion made by the Tribunal at that hearing that the Appellants had unduly [sic] opposed the Application."

6. HMRC responds by saying that the hearing was specifically listed to consider HMRC's application for a stay, and, apart from a minor direction relating to the timing of skeleton arguments (dealt with by consent), the stay was the only direction made. HMRC add that, had the Appellants agreed to the stay, then there would have been no need for a hearing.

7. The Appellants respond in their email of 5 July 2021. The central thrust of that submission is that there has been no decision of principle in this appeal nor has any preliminary issue been decided - 'a stay application is not a preliminary issue'. It is argued that there has been 'no event therefore which an award of costs ought to follow'.

Discussion on the incidence of costs

8. I have jurisdiction to make an interlocutory costs order. Rule 10(4) provides that an application for costs under Rule 10(1) can be made "at any time during the proceedings."

9. There is no restriction, whether express or necessarily implicit in the Rules, that an interlocutory costs order can only be made following the determination of a preliminary issue, or a like "event". But the determination of a 'heavy' substantive application of this kind is, in my view, an event of the kind which costs can follow.

10. I do not know of any rule - and the Appellant cites neither rule nor any reported decision - whereby the default costs order in relation to case management is costs in the appeal. That may be the course of action pursued by the Tribunal in many cases, but it does not oust my discretion to make a different order.

11. Nor do I know of any rule - the same observations apply - whereby an inter partes interlocutory costs order can be made only where the circumstances are "exceptional" or "compelling".

12. The hearing on 29 April 2021 could not realistically be described as "a standard case management hearing."

13. The very large proportion of case management in this Tribunal is done on the papers, even in relation to matters which are disputed. But this Application was not dealt with on the papers. Instead, it went to a one day hearing (with 3 hours suggested pre-reading), with a bundle exceeding 500 pages, a 12 page Skeleton Argument from HMRC, and a 21 page Skeleton Argument from the Appellants. The Skeleton Arguments were signed by three Counsel for HMRC (a QC and two juniors) and two Counsel for the Appellants (a QC and a junior). On the day itself, I heard the best part of a day of oral argument from both leading counsel.

14. The above is not to criticise, but is simply to give a proper flavour of the amount of the legal firepower and resources directed at the Application (both in favour of it, and in opposition to it). Although the Application was a matter of case management, it was of a substantial and hotly-disputed kind.

15. I accept that the Appellants were entitled to oppose the Application. However, against the background of a costs-shifting regime (especially where that regime was consented to by the Appellants, who were given the chance to opt out but did not) that comes at a price. The price is the risk of an adverse costs order being sought, and made.

16. In my view, it is (and always was) plain that this was an application of a kind which would produce a winner and a loser, and where the losing party would be in jeopardy of an application for costs from the successful party: as has now happened. It would be wrong to go beyond that to speculate whether the Appellants would have made an application for costs had HMRC's application been dismissed.

17. It is correct that, had the Appellants not opposed the Application, then there would have not been any need for a hearing. But that simply feeds into the overall analysis, already set out in the immediately preceding paragraphs. Costs were at large; and both parties were at risk of an adverse costs order being sought, or made.

18. For obvious reasons, it is simply not relevant, one way or the other, that I made no comment at the hearing that the Appellants should not be opposing the Application. My job was to hear the parties out and then to determine the Application, in that order.

19. This was a heavy application, which was hotly contested, which went to an oral hearing, and which produced a clear winner and a clear loser. That decision was an event capable of forming an anchor for its costs to follow the event.

20. In my view, for the reasons set out, costs must follow that event. The Appellants shall pay HMRC's costs of the Application.

Quantum

21. There is a costs schedule from HMRC. I have examined it carefully, and apply my knowledge and experience of the summary assessments of costs which I have conducted in my other fee-paid judicial offices.

22. The schedule is dated 8 June 2021 and comes to £22,193.50 including disbursements. It is supported by an indemnity certificate signed by a legal representative. That is reinforced by the email of 29 June which states that all the scheduled costs "related exclusively to the application for a stay" and were not costs "incurred in the general conduct of the appeal." I am satisfied that costs such as drafting the Application and discussions between HMRC's solicitors and Counsel all relate to the application for a stay.

23. It is entirely appropriate for me to summarily assess the costs rather than send them to a detailed assessment. I heard the Application, and I am in the best position to assess whether the costs claimed for were reasonably incurred and if they are proportionate. A detailed assessment would simply put the parties to further cost which would be disproportionate in relation to a bill for just over £20,000.

24. I have looked at the schedule. Nothing in it, whether by way of rates, description, or time spent strikes me as unreasonable in amount or disproportionate. I also bear in mind that the fees charged by Counsel are not conventional brief fees, of the kind which would be demanded of a private client, but are at fixed hourly rates (£80 per hour for the juniors, coming to £3,872, and £180 per hour for leading counsel, coming to £6,975) which rates and overall sums are, on any view, significantly less than the rates and/or brief fees which would apply to specialist Revenue counsel dealing with other, non-governmental, work.

25. Proportionality overall is easily met. The tax at stake is tens of millions of pounds.

26. I summarily assess the costs shown on the schedule as drawn.

27. The outcome is that, within 14 days of the date of release of this decision on costs, the Appellants shall pay HMRC the costs of the Application, summarily assessed in the sum of £22,193.50.

DR CHRISTOPHER MCNALL
RELEASE DATE: 26 JULY 2021