Neutral Citation: [2023] UKFTT 00128 (TC)

Case Number: TC08733

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2013/06509

COSTS – meaning of the Tribunal being unable to "entertain" an appeal – costs incurred prior to determination of hardship – costs incurred prior to allocation to complex track – conduct of the parties – whether schedule of costs complied with Rule 10(3) – Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

Judgment date: 13 February 2023

Decided by:

TRIBUNAL JUDGE ALEKSANDER

Between

BRIJESH PATEL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the application for costs without a hearing under rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 with the consent of the parties and the Tribunal considering that it was able to determine the matter without a hearing. Both parties had made substantive submissions in writing.

DECISION

INTRODUCTION

1. This is an application for costs made by the Appellant, Mr Patel, pursuant to rule 10(1)(c), Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rule 2009 ("FTT Rules").

2. Mr Patel has filed a schedule of costs ("the Schedule") and applies for the Tribunal to assess costs summarily pursuant to FTT Rule 10(6)(a) and submits that all costs in the Schedule were proportionately and reasonably incurred, or proportionate and reasonable in amount. The total amount of the claim is £48,858.

BRIEF CHRONOLOGY

3. From the documents provided by the parties I find that the relevant chronology of events is as follows:

(1) In June 2013, HMRC issued two assessments to Mr Patel for £865,064.00 and £76,692.00 respectively in respect of excise duties.

(2) On 18 September 2013, Mr Patel filed a notice of appeal challenging the assessments. Within the notice of appeal, Mr Patel applied to the HMRC for a hardship certificate.

(3) On 18 February 2014, HMRC refused the application for hardship on the grounds that insufficient evidence was provided by Mr Patel. Accordingly, Mr Patel applied directly to the Tribunal for hardship.

(4) On 1 September 2014 Mr Patel's representatives, Bivonas Law, emailed HMRC as follows:

> We are due to exchange evidence regarding hardship by the 11th September 2014 - however before Christopher left for holiday he indicated that there may be a possibility that HMRC will agree our client's application for hardship. If the hardship can be agreed it would obviously do away with the need and cost of preparing witness statements etc.

(5) On 4 September 2014, HMRC wrote to Mr Patel's representatives stating: "I have taken instruction on this matter and I can confirm that HMRC will not be contesting the application for hardship in this matter."

(6) On 4 September 2012, Mr Patel's representatives emailed the Tribunal stating:

> Please see the email below from the Respondents which is self explanatory.
>
> With reference to directions 11 and 12 we note that the Respondents are now due to serve their Statement of Case on the Appellant within 60 days from today.
>
> We would like to put the parties on notice that the Appellant intends to apply for this case to be allocated to the complex track.

(7) On 14 October 2014, HMRC applied to stay the proceedings on the grounds that:

> whilst the charging decision is being considered, and until the conclusion of the s.59 Criminal Justice and Police Act 2001 proceedings, the Respondents do not consider that it would be appropriate for this appeal to proceed as the charging decision could impact upon it.

(8) On 28 October 2014, Mr Patel objected to a stay on the grounds that:

> The Respondents have failed to explain why providing a statement of case to the Appellant and the Tribunal by the current deadline of 4pm on 3rd

> November 2014 in this appeal whilst the Section 59 proceedings are on-going and any criminal charging decision is considered would be inappropriate.

(9) On 6 January 2015, Counsel for Mr Patel served his Skeleton Argument stating at paragraph 11:

> The respondents have thus far failed to identify what if any prejudice may occur if they were to serve their statement of case

and at paragraph 14,

> Accordingly, it is submitted that the respondent should comply with the directions made and serve their statement of case.

(10) HMRC served their Skeleton Argument on 6 January 2015, requesting that the appeal be stood over for a period of 3 months "in the interests of justice and in furtherance of the overriding interest in Rule 2".

(11) The parties discussed the stay application prior to the hearing, and on 8 January 2015, the day of the hearing, they agreed that proceedings could be stood over for 3 months.

(12) On 12 January 2015, Judge Redston issued written directions. In direction 5 she stated the "costs are reserved pending the classification of the appeal".

(13) The stay was renewed for successive six-month periods from January 2015 until November 2020.

(14) On 6 October 2020, HMRC wrote to Mr Patel to advise him that the CPS had completed its consideration of the evidence and as a result criminal proceedings would not be instigated against him. Mr Patel's representatives were informed of this by HMRC on 16 October 2020.

(15) On 20 October 2020, HMRC wrote to Mr Patel's representatives asking if they were intending to apply to the Tribunal for hardship. HMRC in that email stated:

> […] the Respondents simply take a neutral stance in the matter, leaving the matter between the Appellant and the Tribunal. You will no doubt be aware that it is still for the Appellant to convince the Tribunal that hardship should be granted by taking into consideration his current circumstances […] The Respondents' position is that hardship has been refused by the HMRC and the substantive appeal cannot proceed until either the outstanding amount has been paid to the HMRC or hardship has been granted […] Our records indicate the Appellant has not been issued with a hardship certificate from the HMRC at any point.

(16) On 21 October 2020, Mr Patel's representatives responded as follows:

> As you are aware, on the 4 September 2014 we sent the Tribunal notice that HMRC was not opposing our application, see attached email of the same date copying in HMRC. The Tribunal will only list a hardship application if the Respondent opposes the application. If HMRC was refusing hardship then HMRC would have opposed the application and then it would be for the Tribunal to determine the application. Since HMRC did not oppose the application HMRC has agreed to waive payment of the assessment until the conclusion of the appeal on the basis that paying the tax or putting up a security would cause hardship ... We remind you that HMRC would have had no need to make an application to stay proceeding if the hardship had in fact been refused, indeed the attached email to the Tribunal clearly triggers

> the directions agreed and endorsed by the Tribunal in June 2014, varied in July 2014 and again endorsed at the hearing in January 2015, for HMRC to serve their statement of case. Further, prior to your involvement in this case, HMRC clearly never considered that hardship had been refused otherwise HMRC would have responded to the attached email, putting the Tribunal on notice that the 60 day time limit to serve the statement of case had not been triggered or at the very least raised this issue at the hearing in January 2015.

(17) On 27 October 2020, HMRC responded by re-iterating the need for the hardship application to be determined:

> […] I must re-iterate the points I raised in my previous email in that the Respondents simply take a neutral stance in the hardship application. I cannot see that we have agreed to grant the hardship certificate or that the Tribunal have directed us to do so. Our position remains that in February 2014 the hardship application was refused by the HMRC and it is for the Appellant to convince the Tribunal that it should in fact be granted considering his present circumstances. That being said, it appears the Tribunal presently does not have jurisdiction to entertain this appeal due to section 16 (3) of the Finance Act 1994 […]

(18) On 3 November 2020, HMRC wrote to the Tribunal and informed it that criminal investigations against Mr Patel had concluded and that no further action would be taken by the CPS.

(19) On 23 November 2020, HMRC wrote to Mr Patel's representatives as no response had been received to the earlier emails. HMRC stated:

> I realise that I have not had a response to my email below. Are you able to confirm the following;
>
> 1. Will you be asking the Tribunal to list a hardship hearing?
>
> 2. Will you be making an application to the Tribunal to amend the grounds of appeal? If you are not minded to approach the Tribunal in relation to the hardship then we will be inclined to apply to the Tribunal to strike out this appeal as, in my opinion, it clearly has no jurisdiction as things stand.
>
> I look forward to your response within 14 days of this email.

(20) On 7 December 2020, Mr Patel's representatives wrote to the Tribunal asking for permission to amend his grounds of appeal and for directions. Mr Patel did not make an application to have the hardship application determined.

(21) On 10 December 2020, in the absence of any application by Mr Patel to the Tribunal to determine hardship, HMRC applied for the appeal to be struck out. Later that day Mr Patel's representatives wrote to the Tribunal opposing the strike-out application stating:

> To the extent that the Tribunal accepts the Respondent's submission that the issue of hardship has not yet been resolved, the appropriate course is to set directions for a hardship hearing (including provision as to updated evidence), not to strike out the appeal.

(22) On 18 February 2021, Judge Kempster released his decision on the strike-out application on the papers. In that decision, Judge Kempster refused to strike out the appeal, found that the hardship issue remained to be determined, and refused to determine hardship on the basis on the original hardship application made seven years previously. Judge Kempster gave directions for the determination of the hardship

application, including whether Mr Patel consented to having the application determined on the papers.

(23) On 31 March 2021 Mr Patel's legal representative wrote to the Tribunal with Mr Patel's witness statement and exhibits documents, stating that Mr Patel did not consent to having the hardship application determined on the papers. On the same date they wrote to HMRC asking whether HMRC would agree to issue a hardship certificate based on Mr Patel's updated documentation. On 6 April 2021, HMRC wrote to Mr Patel's legal representative stating they remained neutral in the hardship proceedings and therefore the decision made on 18 February 2014 continued to stand.

(24) Mr Patel subsequently updated his evidence by serving further witness statements dated 18 June 2021 and 20 April 2022.

(25) On 10 November 2021, Mr Patel's representative wrote to the Tribunal asking for the hearing on hardship to be postponed due to Mr Patel contracting COVID-19. On 11 November 2021, HMRC wrote to the Tribunal re-iterating their neutral position in relation to the Hardship Application and referring to the fact that they would not be cross-examining Mr Patel.

(26) On 21 April 2022 the adjourned hardship hearing took place and, in a decision dated 27 April 2022, Judge Short decided hardship should be granted to Mr Patel.

(27) On 23 June 2022, the Tribunal wrote to both parties informing them that the appeal had been categorised into the complex category. Mr Patel did not opt out of the costs regime.

(28) With the agreement of the parties, the Tribunal directed HMRC to file its Statement of Case by 30 September 2022. On 30 September 2022, HMRC wrote to the Tribunal withdrawing the assessments and inviting Mr Patel to withdraw the appeal.

(29) On 4 October 2022, Mr Patel's representative wrote to HMRC requesting that HMRC agree to the payment of the costs set out in an accompanying schedule. On 27 October 2022 HMRC wrote to Mr Patel's representative inviting them to make an application for costs to the Tribunal.

(30) On 31 October 2022, the Tribunal wrote to both parties and informed them the appeal had been allowed and asking for any further correspondence within 28 days. On 11 November 2022, Mr Patel's legal representative wrote to the Tribunal and served an application for costs. On 18 November 2022, the Tribunal wrote to HMRC informing them of Mr Patel's application for costs and asking for any representations within 14 days of the letter.

THE APPLICATION FOR COSTS

4. The grounds for Mr Patel's application are that:

(1) The Tribunal has the power to make an order in respect of the costs of and incidental to the proceedings under s29 Tribunal Courts and Enforcement 2007 ("TCEA") and FTT Rule 10(1)(c)(i);

(2) Under CPR 44.2, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; and

(3) The costs have mainly been incurred because of the HMRC's unreasonable conduct in failing to agree the Mr Patel's hardship application, and the HMRC's misconceived strike-out application which was refused by the Tribunal.

5. HMRC objects to this application on the following grounds:

(1) No costs should be awarded prior to the appeal being allocated to the complex track on 23 June 2022. HMRC note that the majority of the costs in the Schedule were incurred prior to that date and therefore those costs should not be the subject of a costs order under FTT Rule 10(1)(c)(i);

(2) No costs should be awarded before the hardship application was determined on 20 April 2022. The Tribunal only had power to entertain the appeal following the determination of hardship pursuant to s.16(3) of the Finance Act 1994 ("FA 1994"). Accordingly, costs incurred before that date should not be subject to a costs order under either Rule 10(1)(c)(i) or Rule 10(1)(b);

(3) Contrary to the representations in the application, HMRC's conduct has not been unreasonable and therefore no order as to costs should be made under Rule 10(1)(b);

(4) The Tribunal should not exercise its discretion to make a costs order and/or limit any costs order so as to exclude costs in relation to the hardship application, the strike-out application and HMRC's application on 14 October 2014 for a stay pending a criminal investigation. This is because the costs claimed in the Schedule largely arise because of those issues and those costs were incurred as a result of Mr Patel's unreasonable conduct and Mr Patel lost on the issues; and

(5) The Schedule is not sufficiently particularised and too vague for HMRC to understand the nature of the work for which Mr Patel seeks costs. It is therefore impossible for HMRC or the Tribunal to assess the reasonableness and proportionality of the work that was apparently undertaken. Without prejudice to the reasons why the Tribunal should not make a costs award at all, HMRC submit that the Tribunal should decide the principle of costs in the first instance so as to enable the parties to make further representations in relation to the reasonableness and proportionality of the costs apparently incurred if such representations are necessary.

THE ISSUES TO BE DETERMINED

6. I address each of the issues raised by the parties in turn as follows

The award of costs in complex track cases

7. The legislation relevant to the claim for costs is in s29 TCEA and FTT Rule 10. In summary, the award of costs in the Tribunal is more limited than in general civil litigation with the general rule that costs shifting does not apply. However, in the case of appeals allocated to the complex track, the Tribunal has a wide discretion to award costs. In exercising that discretion, the Tribunal will take account of the guidance in the CPR. In In *Versteegh Ltd and others v HMRC* [2014] UKFTT 397 (TC) (not cited to me) the Tribunal held:

> In the context of the First-tier Tribunal as a whole, a full costs-shifting jurisdiction is an unusual feature. There is, as a consequence, no detailed guidance in the Tax Tribunal Rules as to the exercise of the Tribunal's discretion in this respect. This particular costs jurisdiction has more in common with that applicable in the courts, and accordingly it is clear to me, and indeed it was common ground, that the principles applicable under the CPR […], and the relevant authorities in that respect, are equally applicable to the 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.

8. CPR 44.2(2) provides:

> 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.

9. CPR 44.4(4) qualifies the general rule that the unsuccessful party will be ordered to pay the costs of the successful party by the following factors:

(a) the conduct of the parties;

(b) whether a party has succeeded on part of his case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

10. The phrase "conduct of the parties" is defined by CPR 44.2(5) as including the following:

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction Pre-Action Protocol or any relevant pre-action protocol;

(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 his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

11. In conclusion, although the Tribunal has a wide discretion, the general rule (see CPR 44.2(2)(a)) is that the successful party is entitled to its costs.

Costs incurred prior to hardship being awarded

12. Section 16(3) FA 1994 provides as follows:

An appeal which relates to a relevant decision falling within any of paragraphs (a) to (h) of section 13A(2), or which relates to a decision on a review of any such relevant decision, shall not be entertained if the amount of relevant duty which HMRC have determined to be payable in relation to that decision has not been paid or deposited with them unless—

(a) the Commissioners have, on the application of the appellant, issued a certificate stating either—

(i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or

(ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate; or

(b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners.

13. FTT Rule 22 provides as follows:

> (1) This rule applies where an enactment provides, in any terms, that an appeal may not proceed if the liability to pay the amount in dispute is outstanding unless HMRC or the Tribunal consent to the appeal proceeding.
>
> (2) When starting proceedings, the appellant must include or provide the following in or with the notice of appeal—
>
> > (a) a statement as to whether the appellant has paid the amount in dispute;
> >
> > (b) if the appellant has not paid the amount in dispute, a statement as to the status or outcome of any application to HMRC for consent to the appeal proceeding; and
> >
> > (c) if HMRC have refused such an application, an application to the Tribunal for consent to the appeal proceeding.
>
> (3) An application under paragraph (2)(c) must include the reasons for the application and a list of any documents the appellant intends to produce or rely upon in support of that application.
>
> (4) If the appellant requires the consent of HMRC or the Tribunal before the appeal may proceed, the Tribunal must stay the proceedings until any applications to HMRC or the Tribunal in that respect have been determined.

14. It therefore follows that the Tribunal was unable to "entertain" this appeal until hardship was determined in Mr Patel's favour, and that the appeal had to be stayed pending the determination of hardship.

15. HMRC submit that as hardship was not determined until 27 April 2022, there was no valid appeal prior to that date because the Tribunal did not have jurisdiction to entertain an appeal.

16. Although not cited to me, the decision of the Chamber President in *SNM Pipelines v HMRC* [2022] UKFTT 231 (TC) addresses in considerable detail the meaning of "entertained" in s 84(3) VAT Act 1994, which is expressed in similar terms to s16(3) FA 1994. For the reasons given by Judge Sinfield at [36] to [39], I agree with him that "starting proceedings" is not the same as "entertaining" or "proceeding" with an appeal.

17. At [38] Judge Sinfield notes that HMRC cannot just apply for an appeal to be dismissed if an appellant fails to pay the tax in dispute, or make a hardship application, but must apply (as they did in this case) for a direction that proceedings be struck out under FTT Rule 8(1).

18. I therefore find that, whilst the Tribunal was not able to entertain or proceed with this appeal until hardship had been determined, the appeal had nonetheless been started. I therefore disagree with HMRC's submission that there was no valid appeal prior to 27 April 2022. I find that I am not prevented from making an award in respect of costs incurred prior to the determination of hardship.

Costs incurred prior to the appeal being allocated to the complex track

19. FTT Rule 23 requires the Tribunal, when receiving a notice of appeal, to give a direction allocating the appeal to one of four categories or tracks, namely default paper, basic, standard, or complex.

20. In the case of appeals within the scope of FTT Rule 24, Rule 24(4) requires the appeal to be stayed pending resolution of hardship. For this reason, such appeals are not categorised under FTT Rule 23 until either "hardship" has been determined in the appellant's favour, or the tax in dispute has been paid.

21. That is what happened in this case. Following the determination of hardship in favour of Mr Patel, the Tribunal issued a direction under Rule 23 allocating the appeal to the complex track.

22. Mr Patel, in his application, refers to the appeal being "reallocated" to the complex track. For the avoidance of any doubt, that is a misdescription of what occurred. The Tribunal issued its direction allocating the appeal to the complex track on 23 June 2022. This was a direction issued by the Tribunal on its own initiative in accordance with the FTT Rules. Up until that date the appeal had not been allocated to any track. If either party objected to the allocation, they would have had to make an application under FTT Rule 23(3).

23. HMRC submit that the Tribunal should not make a costs award in respect of costs incurred prior to the allocation of the appeal to the complex track - particularly in circumstances where the appeal was issued nine years earlier – and therefore the costs relate to, amongst other things, acts that occurred long before allocation and during a period when the appeal had been stayed (and before HMRC had even filed a Statement of Case). Allocation to a particular track is required to provide clarity for both parties in relation to costs and such clarity did not arise until June 2022.

24. The Upper Tribunal considered the discretion of this Tribunal to award costs prior to the allocation of an appeal to the complex track in its decision in *Capital Air Services v HMRC* [2011] STC 617 (also not cited to me). The panel, comprising the then chamber presidents of both the Upper Tribunal and the First-tier Tribunal held (at [23]) that:

> […] the time for determining whether a costs order can be made is the time when the order is in fact made. If the case has be then been allocated as a Complex case, an order can be made. Similarly, if a case has been allocated as a Complex case and is re- allocated as a Standard case before any costs order has been made, the First-tier Tribunal no longer has any power to make an order. In contrast, if an order is made while the case is allocated as a Complex case, is subsequent re-allocation would not deprive the receiving party of the benefit of the order. We conclude that once a case has been allocated as a Complex case and for so long is remains so allocated, the First-tier Tribunal has power to make an order for costs in the case proceeding before it whenever those costs were incurred.

25. The Upper Tribunal noted at [11] with regard to the Tribunal's power to make an order for costs for periods prior to the allocation to the complex track that:

> No doubt when it comes to exercising its discretion, the First-Tier Tribunal will take account of the retrospective effect of a costs order in deciding whether it is just and fair to make such an order.

26. As the appeal had been allocated to the complex track at the time the application for costs was made, I find that I have discretion to make an award of costs which includes costs incurred prior to the allocation of the appeal to the complex track.

Conduct of the parties

27. Each party complains about the conduct of the other.

28. What constitutes unreasonable conduct for the purpose of Rule 10(1)(b) of the Tribunal Rules was considered by the Upper Tribunal in *Distinctive Care Ltd v HMRC* ([2018] UKUT 155 (TCC) (the decision was upheld by the Court of Appeal in relation to other matters). In its decision, the Upper Tribunal said the following:

> <u>How is conduct to be assessed?</u>

> 44. In *Market & Opinion Research International Limited v HMRC* [2015] UKUT 0012 (TCC) ("MORI") at [22] and [23], the Upper Tribunal endorsed the approach set out by the FTT in that case to the question of whether a party had acted unreasonably. That approach could be summarised as follows:
>
> > (1) the threshold implied by the words "acted unreasonably" is lower than the threshold of acting "wholly unreasonably" which had previously applied in relation to proceedings before the Special Commissioners;
> >
> > (2) it is possible for a single piece of conduct to amount to acting unreasonably;
> >
> > (3) actions include omissions;
> >
> > (4) a failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct;
> >
> > (5) there is no single way of acting reasonably, there may well be a range of reasonable conduct;
> >
> > (6) the focus should be on the standard of handling the case (which we understand to refer to the proceedings before the FTT rather than to the wider dispute between the parties) rather than the quality of the original decision;
> >
> > (7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary; and
> >
> > (8) the power to award costs under Rule 10 should not become a "backdoor method of costs shifting".
>
> 45. We would wish to add one small gloss to the above summary, namely that (as suggested by the FTT in *Invicta Foods Limited v HMRC* [2014] UKFTT 456 (TC) at [13]), questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight.
>
> 46. In assessing whether a party has acted unreasonably, this Tribunal in *MORI* went on to say this (at [49]):
>
> > "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT rules."

29. Mr Patel complains about the conduct of HMRC in relation to its failure to grant a hardship certificate both in 2014, and again in 2020 following Mr Patel serving updated financial information. He also complains about HMRC's application to strike out the appeal in December 2020.

30. HMRC complains that Mr Patel's conduct in relation to the hardship application was unreasonable, as he failed to prosecute the application with diligence. HMRC also complain that Mr Patel refused to agree to the stay application until the day of the hearing in January 2015.

31. I was referred to the decision of Judge Short released on 27 April 2022 deciding that the appeal should proceed without the tax in dispute being paid, and her statement at [26] that

> Therefore, I have concluded that HMRC should not have refused to issue a hardship certificate to the Appellant in March 2014 […]

Mr Patel submits that this demonstrates that HMRC acted unreasonably in not granting a hardship certificate in March 2014. I disagree. I find that at [26] Judge Short was mirroring the language of s16(3)(b) FA 1994, and was not making any comment on the conduct of HMRC.

32. All that said however, the conduct of both parties in relation to the hardship issues is not entirely beyond reproach. Mr Patel in his submissions says that he applied to the Tribunal on 7 December 2020 for directions so that the hardship position could be clarified. This is not a wholly accurate statement. On 20 October 2020, 27 October 2020, and 23 November 2020, HMRC wrote to Mr Patel's representatives, reminding them that the hardship issue had not been resolved, and prompting them to apply to the Tribunal to determine hardship. The response of Mr Patel's representatives was that as HMRC were not opposing Mr Patel's hardship status, such an application was unnecessary. On 7 December 2020, Mr Patel's representatives applied to the Tribunal for case management directions to move the appeal forward, but their application did not include any application in relation to hardship (although they noted in correspondence that HMRC's position was that the appeals could not proceed because the tax in dispute had not been paid). HMRC submit that the only reason the hardship issue was brought to a head was because they applied on 10 December 2020 to strike out the appeal.

33. In his decision released on 18 February 2021 on HMRC's application to strike out, Judge Kempster said in relation to the outstanding hardship issue:

> 17. I agree with the Appellant’s point that an application made but not opposed by the other party will usually be granted by the Tribunal; that is because in those circumstances it will normally appear to be uncontentious, however the Tribunal will always consider whether the application should be granted (applying the overriding objective, per Tribunal Procedure Rule 2). In the current case I consider that the matter of the Appellant’s hardship application is not one where it should be granted purely on the basis that HMRC confirmed in September 2014 that they would not be contesting the application for hardship (see [5] above).
>
> 18. The basis on which the Tribunal should address hardship applications in the context of VAT appeals (the relevant legislation is in s 84 VAT Act 1994) was set out by the Upper Tribunal in *Elbrook (Cash & Carry) Ltd* [2017] UKUT 0181 (TCC) (at [19-31]), (and see also the useful summary by this Tribunal (Judge Poole) in *NT ADA Ltd* [2019] UKFTT 333 (TC) at [33]). I consider the same approach applies in relation to duty appeals and s 16(3) FA 1994. The Upper Tribunal made the following statements:
>
>> (1) At [26]: “... the normal rule is that the tribunal should look at the position [i.e., as to the appellant’s resources and hardship] as at the date of the hearing.”

> (2) At [29]: "Hardship should ordinarily be assessed on the basis of up-to-date information on all aspects of the business of the appellant."
>
> (3) At [30]: "The need for the appellant to provide relevant, and up-to-date, evidence is one aspect of the burden of proof which is on the appellant to establish that the payment or deposit of the disputed tax would cause financial hardship."
>
> 19. The Appellant's hardship application to HMRC was refused by HMRC on the basis of financial information provided to HMRC in early 2014. If that same information were now put before the Tribunal then it would be around seven years out of date. Regardless of HMRC's position of taking "a neutral stance" on the hardship application, the Tribunal needs to see up-to-date financial information in order to be able to determine the hardship application. For that reason, I shall make case management directions below to provide for the Appellant to file a list of his evidence in support of his hardship application; copies will be provided to HMRC but HMRC have already confirmed that they will not be contesting the application.

34. Judge Kempster gave directions for the determination of the hardship issue and invited Mr Patel to have hardship determined on the papers. Although HMRC had informed the parties and the Tribunal that they would not be contesting the application, Mr Patel (as is his right) requested an oral hearing (which was held by video link). As the application was not contested, it would have been more efficient if the application had been undertaken on the papers and would have been considerably faster (even before taking account of the delay occasioned by Mr Patel contracting COVID-19). Once Mr Patel had served his up-to-date evidence, it should have been clear to HMRC that Mr Patel would suffer hardship if required to pay the tax in dispute before the hearing of his appeal. It would have been helpful if HMRC had at that stage issued a hardship certificate, rather than insisting that the hardship issue be determined by the Tribunal.

35. I find that the parties could both have addressed the hardship issue in ways that made more efficient use of their own, and the Tribunal's, resources. Whilst this would not have avoided the need for Mr Patel to adduce evidence as to his assets and means (including updating his evidence, for example, to reflect his divorce), it would have saved some costs for both parties.

36. Mr Patel submits that HMRC's should not have applied in December 2020 to strike-out this appeal. I disagree. HMRC applied to strike out the appeal on 10 December 2020, only after having prompted Mr Patel to make a hardship application on three occasions without success. As Judge Sinfield noted in *SNM Pipelines*, if an appellant fails to make a hardship application, HMRC's only option is to apply for a direction that the appeal be struck out. I find that the strike-out application could have been avoided if Mr Patel had included an application for hardship as part of the application for case-management directions made on 7 December 2020.

37. As regards the stay, HMRC submit that the costs incurred in relation to their stay application should not be included in any award for costs because Mr Patel initially objected to the application, and it was only after HMRC had prepared for a contested hearing, that Mr Patel agreed to the stay on the day of the hearing of the application. Mr Patel says that one of the grounds for his objection to the stay was that the assessments had been based on materiel seized unlawfully by HMRC, and whilst this was raised in his objections to the stay dated 28 October 2015. HMRC did not respond to this point prior to the hearing. I find that the stay could therefore only be agreed following discussions between the parties' respective counsel on the day of the hearing.

Costs' Schedule

38. The Schedule includes a table spread over four pages. Each line of the table gives the date of the entry, the initials of the fee earner concerned, a very brief description of the task, the time taken, an hourly rate, and the total amount claimed.

39. At the foot of the table are a list of three bills described as "counsel's fees".

40. The costs claimed amount to £48,858 – being £6900 (ex VAT) in respect of counsel's fees and £33,815 (ex VAT) in respect of the representative's fees.

41. The three fee-earners engaged on this appeal are designated by initials and described as a partner, an associate, and a paralegal. Hourly rates are given for each, but they are not named and there is no indication of their experience or years' qualification.

42. The description applied to each task in the Schedule is very brief. In many cases it is no more than "Email to X" or "Telephone calls with Y and Z".

43. HMRC submit that the Schedule is too vague and insufficiently detailed for them to be able to sensibly make representations in respect of quantum. They note that counsel's fee notes are not appended to the Schedule. They make a number of observations in respect of entries arising between specific dates which are predicated on whether the work had been reasonably incurred (in the light of the submissions discussed above).

44. There is one further HMRC observation relating to work done between 9 July 2015 and 23 September 2020 (amounting to over £5000 ex VAT). As the appeal was stayed over this period, HMRC query what work needed to be done. The response from Mr Patel's representatives is that costs were incurred during the stay period because every 6 months HMRC applied for a further 6 months stay and costs were incurred by when liaising with the HMRC, the Tribunal and Mr Patel. I am not convinced by this response, as the narrative refers, for example, in July and September 2016 to preparing for and attending a meeting with Mr Patel – with the total costs (ex VAT) incurred exceeding £3000.

45. FTT Rule 10(3)(b) provides that a person making a claim for costs must send or deliver with the application a schedule of costs claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs if it decides to do so.

46. Although the Tribunal is subject to the FTT Rules rather than the CPR it has been consistently accepted by this Tribunal that Part 44 CPR provides helpful guidance on the principles to be applied in connection with the award of costs in the FTT, unless there is a conflict between the provisions of the CPR and the FTT Rules in which case the latter prevail.

47. In *Distinctive Care* the Upper Tribunal provided guidance on the detail required to be provided for a schedule of costs to be compliant with FTT Rule 10(3)(b). At [69] the Upper Tribunal made the following observations as to the "sufficiency of detail" necessary in order for a schedule of costs to comply with FTT Rule 10(3)(b):

> 69. We consider the FTT was correct to indicate that the name of each fee earner should be stated, along with the hourly rate for that fee earner and a sufficient statement of the level of experience and expertise of that fee earner to enable the FTT to form a view of the appropriateness of the hourly rate claimed and to assess whether it was reasonable for the relevant work to have been done by a fee earner of that standing. The fee earner's professional qualification or other status should be identified (e.g. paralegal, trainee solicitor, solicitor, chartered tax adviser, accountancy qualification) and approximate length of experience in that role. The geographical location of the fee earner will also usually be relevant – it is well established that

> appropriate hourly rates vary by location. Clearly, the time spent by each fee earner should also be given, together with a breakdown showing when the time was spent and giving a brief description of the work done on each occasion. Any disbursements claimed must also be clearly identified, giving the amount of the cost incurred, what it was incurred on and how that expenditure relates to the proceedings. The schedule should also make clear the extent to which any VAT charged is recoverable as input tax by the claiming party, so that it should not properly be recoverable from the paying party. Finally, if the figures in the schedule are calculated as some apportioned part of a larger figure, it would always be advisable for details of the apportionment to be included in the application.

48. As noted by the Upper Tribunal in *Distinctive* there is no detailed guidance as to the specifics of what is to be contained in schedule of costs so as to conform to rule 10(3)(b). The Upper Tribunal summarised the requirements as it saw them without explicit reference to the provisions of either PD 44.9.5(2) or to Form 260. However, PD 44.9.5 provides useful guidance on the level of detail required in a costs schedule for a summary assessment. PD 44.9.5(2) requires the written statement show separately: 1) the hours claimed, 2) the hourly rate to be claimed, 3) the grade of the fee earner, 4) the amount and nature of the disbursements (other than counsel's fees for appearing at the hearing), 5) the amount of the representatives' costs for attending the hearing, 6) counsel's fees and 7) any VAT to be claimed on those amounts. 44.9.5(3) then provides that the written statement of the costs "follows as closely as possible" Form N260. Form N260 provides for a description of each fee earner by name, grade and hourly rate claimed. It then provides for a breakdown of the time for each fee earner in respect of: attendance on the party (by reference to a further breakdown of personal attendances, letters/emails out, telephone attendances), attendance on the opponent (by reference to the same further breakdown) and similarly for attendance on others; site inspection and attendance at hearing. There is then a schedule of work done on documents which provides for a description of the work and hours per fee earner. N260 also requires the person signing it to certify that the costs set out do not exceed the costs which the party is liable to pay in respect of the work which the statement covers. This statement gives an assurance to the court that the indemnity principle has not been breached.

49. Under the FTT Rules there appears to be an assumption that all cases may be appropriate for summary assessment whether or not the matter has required a hearing or been determined on the papers, or indeed settled. The rules require the claiming party to produce a schedule of costs so as to facilitate summary assessment, should it be appropriate, and, for the paying party, pursuant to FTT Rule 10(5), to make representations on the schedule prior to any decision being taken on summary assessment.

50. As a consequence, I find that a compliant costs schedule must include as a minimum the level of particularisation as is required under the CPR. More detail may be required where, as here, there has been no judicial determination of the appeal. The schedule of costs needs to provide a sufficient summary of the time and cost incurred in relation to key stages/activities (most specifically critical documents) in the appeal.

51. I therefore find that the Upper Tribunal's guidance that "the time spent by each fee earner should also be given, together with a breakdown showing when the time was spent and giving a brief description of the work done on each occasion" must be interpreted so as to reflect the level of particularisation which would facilitate a rough, but swift assessment of the costs incurred in the appeal.

52. As is apparent from [38] to [42] above the Schedule provided:

(1) the initials of each fee earner, together with their hourly rate and job title;

(2) the hours spent by each fee earner by reference to each line item;

(3) a very brief description of the work done;

(4) the three disbursements incurred by way of counsel's fees thus identifying the relevance of the fees to the proceedings; and

(5) VAT is claimed in full indicating that the Appellant was not entitled to any input tax recovery.

53. It did not however, identify:

(1) The names of the fee earners, their professional qualification, and how long each fee earner had been in grade;

(2) the location of each fee earner;

(3) a sufficient description of the work undertaken to enable a judgment to be made about (a) whether the time taken for the task was reasonable in the circumstances, and (b) whether it was reasonable for the relevant work to have been done by a fee earner of that standing.

54. As is obvious, the substance of N260 has not been followed.

55. I find that the level of detail included in the Schedule is insufficient to enable HMRC to make any representations as to the costs incurred, or for the Tribunal to be able to make a summary assessment.

56. PD 44.9.5(3) provides that a certificate in the form of a statement that "The costs stated above do not exceed the costs which the [party] is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated above and will be paid to the persons stated" as set out in N260 is not required only in identified instances. This certificate preserves the indemnity principle of cost recovery. I consider that it is entirely appropriate that any claim for costs under the FTT Rules should provide an adequate assurance as to the application of the indemnity principle albeit that the precise formulation provided for in N260 need not be followed. The Schedule did not contain such a statement.

57. For the reasons set out in above, I consider that the Schedule is deficient and does not comply with the terms of FTT Rule 10(3)(b).

DISCUSSION

58. I start by noting that entitlement to costs is a distinct exercise from the quantification of those costs.

59. This is a complex track appeal, and the usual rule is that the successful party is entitled to its costs. Subject to the points made below, there is no reason to depart from the usual rule.

60. I have found that an order for costs under Rule 10 is governed by whether the appeal was allocated to the complex track at the time the costs application was made – and not by reference to the date on which such allocation was made. An order for costs would therefore include costs incurred prior to the allocation - although I need to consider whether it is appropriate for the order to do so. In this case, I find that it is so appropriate. It is obvious from the correspondence that Mr Patel was going to make an application for the appeal to be allocated to the complex track if the Tribunal did not make that allocation itself. And Judge Reston's directions of 12 January 2015 anticipate that such an allocation was in contemplation (at the very least). The parties were therefore aware from an early stage in the chronology that the costs shifting rule was in prospect. There can be no assertion by HMRC

that they were not well aware of Mr Patel's right and intention to claim for costs if he was successful.

61. Where there is a defect in a schedule of costs it is a matter for the Tribunal's discretion as to whether to waive the breached requirement, require it to be remedied and/or make such order as to costs as the Tribunal considers appropriate. A failure to submit a compliant schedule of costs could, and has in the civil courts, resulted in a determination that no costs be awarded but only where to do so is in accordance with the overriding objective.

62. I must decide, in all of the circumstances and in accordance with the overriding objective, whether the defects identified in the Schedule has so prejudiced HMRC that it should deprive Mr Patel of an award of its costs.

63. HMRC have not suggested that Mr Patel's application should be dismissed in its entirety because the Schedule is defective. Instead, they submit that the Tribunal should decide the principle of costs in the first instance so as to enable the parties to make further representations in relation to the reasonableness and proportionality of the costs apparently incurred if such representations are necessary.

64. On balance, I consider that the appropriate course of action is to determine the principle that Mr Patel is entitled to costs, but that he is required to produce a compliant schedule of costs, so that the Tribunal can make a summary assessment if the parties are unable to reach agreement.

65. I find that it is fair and just for any order for costs to relate to all reasonable costs incurred in and incidental to this appeal without limitation as to time.

66. I have found that although the Tribunal may not entertain an appeal pending the resolution of "hardship", that does not mean that the appeal was not started when the notice of appeal was filed. I find that the costs relating to the application for hardship were incurred in this appeal, and that they should therefore fall within the scope of the costs order.

67. As regards the conduct of the parties:

(1) As regards the application for a stay on 8 January 2015, Mr Patel had identified to HMRC the grounds for his objections. These were not addressed until the morning of the hearing by discussions between counsel. Although HMRC's application was successful, I find that Mr Patel was not unreasonable in seeking a hearing in order that his objections should be addressed.

(2) As regards the renewals of the stay, reasonable costs incurred by Mr Patel for each renewal are appropriate to be allowed. However not all of the line items listed on the Schedule between 9 July 2015 and 23 September 2020 appear to relate solely to the renewal of the stay. To the extent that costs incurred between 9 July 2015 and 23 September 2020 do not relate solely to the renewal of the stay, Mr Patel will need to provide justification as to why they are reasonable.

(3) As regards HMRC's application for a strike-out. I note that Mr Patel's representatives needed to be prompted to make a hardship application. And even after the prompting, when they applied for case-management directions on 7 December 2020, they did not apply for hardship to be determined. The hardship issue was effectively brought to a head by HMRC's strike-out application of 10 December 2020. The need for HMRC to make that application would have been avoided if Mr Patel had included an application for hardship as part of his 7 December application for case-management directions. I find that the costs incurred by Mr Patel in relation to

opposing HMRC's strike-out application (determined by Judge Kempster on 18 February 2021) were not reasonably incurred.

(4) I find that HMRC required the Tribunal to determine hardship. Although they did not oppose Mr Patel's application, they effectively put Mr Patel to proof as to his hardship claim. I therefore find that the reasonable costs incurred by Mr Patel in evidencing his hardship were reasonably incurred. However, as HMRC did not oppose the application, and notified Mr Patel's representative that they did not propose to cross-examine him, there was no reason why hardship could not have been decided on the papers. I therefore find that the costs incurred by Mr Patel in respect of the hardship hearing itself were not reasonably incurred.

(5) It should go without saying that the costs incurred by Mr Patel in producing a defective schedule of costs (and defending it for the purpose of this application) are not reasonably incurred.

68. I therefore direct that Mr Patel is (subject to the matters stated below) entitled to the reasonable costs incurred in and incidental to the appeal determined on the standard basis, subject to the observations made at [67].

69. I direct that Mr Patel shall prepare an updated schedule of costs which is in sufficient detail to allow the Tribunal to undertake a summary assessment should the parties be unable to reach agreement as to the amount.

70. I direct that the updated schedule shall be filed with the Tribunal (with a copy to HMRC) no later than four weeks following the date of release of this decision.

71. I direct that the parties shall endeavour to reach agreement on the quantum of costs but I give leave to apply if such agreement is not reached within four months of the date of release of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 13th FEBRUARY 2023