Appeal number: FTC/36/2010

Expenses, Costs, summary assessment; proper interpretation of Rule 10 of the Tribunal Procedure (Upper Tier) Rules 2008, as amended.

FIRST-TIER TRIBUNAL

TAX

KENNETH COLQUHOUN **Appellant**

- and -

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

TRIBUNAL JUDGE: **J GORDON REID, QC., F.C.I.Arb.**
Member: **Mr Kenneth Mure, QC**

Sitting at George House, 126 George Street, Edinburgh [Papers Only]

DECISION

Introduction

1. This is our decision on the question of expenses following HMRC's successful appeal against the decision of the First-tier Tribunal dated 14 January 2010.

Background

2. HMRC's application for expenses is made under Rule 10(6) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended (the "UT Rules"), and is accompanied by a Schedule of Expenses amounting in total to £3,499.40, which includes fees paid to junior counsel. The only basis upon which expenses, which relate to the appeal before the Upper Tribunal, are sought is that HMRC were successful. HMRC invite us to proceed by way of summary assessment of the expenses claimed in terms of Rule 10(8)(a).

3. Following that application, Mr Colquhoun responded in writing. As a result of certain doubts we had as to the proper interpretation of Rule 10 and the soundness of certain *dicta* in a decision of a differently constituted Upper Tribunal (discussed below), we invited parties to lodge written submissions on the proper procedure, the test for liability and the extent to which we should, if at all, be taking into account Mr Colquhoun's financial means. We also requested parties to inform us of the history of the appeals as we recollected that, at an earlier stage, Mr Colquhoun may have received information or advice from HMRC or their predecessors about his tax affairs which may be relevant or at least have a bearing on the question of expenses.

4. Mr Colquhoun proposes that each party bear their own costs. His reasons are that (i) the appeal was instigated by HMRC and he had no influence over their action or the cost accruing from their chosen approach, (ii) HMRC made no application for expenses following the First-tier Tribunal's decision and (iii) an order for expenses would in effect be a penalty for challenging an uncertain HMRC decision. He submits that an award of expenses against him in the amount claimed would be disproportionately severe. He only wished to pay the proper amount of tax due and had difficulty with HMRC in identifying how the £30,000 exemption should be treated. Instructing Counsel was using a sledgehammer to crack a nut.

5. Following our decision on the merits HMRC have, in support of their application for expenses, intimated and lodged an HMRC letter dated 16 November 1998. Mr Colquhoun had not hitherto seen this letter.

The Relevant Rules

6. In *Capital Air Services Ltd v HMRC UT 22/12/10,* the Upper Tribunal noted that its jurisdiction to award expenses in proceedings before it stemmed from section 29(1) of the Tribunals Courts and Enforcement Act 2007 where it is provided that expenses of and incidental to all proceedings before the Upper Tribunal shall be in the discretion of the Upper Tribunal. Rule 10(1)(a) of the UT Rules, gives us power to award expenses in proceedings on appeal from the Tax Chamber of the First-tier

Tribunal. We are entitled to make an order for expenses on our own initiative or on application (Rule 10(4)). Here, an application has been made timeously, in accordance with Rule 10(6) by HMRC, the successful Appellant in the proceedings before us. Rule 10(3) applies to *other proceedings*, that is to say proceedings not covered by Rule 10(1) or 10(2). Rule 10(2) applies to proceedings under the Forfeiture Act 1982 and is not relevant for present purposes. Rule 10(3) cannot have any application to proceedings in the Upper Tribunal (Tax and Chancery Chamber).

7. Under Rule 10(7) the Upper Tribunal may not make an order for expenses against any person without first (a) giving that person an opportunity to make representations (this has been done and representations have been made by Mr Colquhoun as recorded above), and (b) if the paying person is an individual and the order is to be made under paragraph 3(a), (b) or (d) of Rule 10, considering that person's financial means.

8. As already noted, Rule 10(3) cannot be relevant. In any event, Rule 10(3)(a) relates to judicial review proceedings and so is not relevant. Rule 10(3)(b) originally related to proceedings transferred from the Tax Chamber of the First-tier Tribunal, and so could not have been relevant. In any event, paragraph (b) has been deleted by Article 11 the Tribunal Procedure (Amendment No 2) Rules 2009. Rule 10(3)(b) was short lived as it was only inserted as an amendment earlier in 2009 by Article 7 of the Tribunal Procedure (Amendment) Rules 2009. However, Rule 10(7)(b), in its current form, still refers to paragraph 3(b), which, as we have noted, has been deleted. This must be a drafting error.

9. Rule 10(3)(d) relates to the situation where the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing or defending or conduction the proceedings. That must be a reference back to *other proceedings* at the beginning of Rule 10(3). This provision too, cannot be relevant. In any event, we do not consider (and it has not been suggested by HMRC) that Mr Colquhoun acted unreasonably in bringing, defending or conducting the proceedings.

10. In *Burton v R&CC 2010 STC 2410 paragraph 32* the Upper Tribunal clearly thought that when dealing with an award of expenses against an individual they had to consider his financial means. However, the Upper Tribunal did not appear to note that consideration of the paying individual's financial means was required only where the order for expenses is to be made under Rule 10(3)(a), (b) or (d). None of these sub-paragraphs applied in that case or in the present case. We therefore conclude that the Upper Tribunal misdirected itself on this point, which was probably *obiter*¸ and in respect of which it did not appear to have had the benefit of submissions.

11. The position simply is that that Rule 10(1)(a) & (4) give us the normal discretion a decision maker usually has on the question of expenses.

12. We acknowledge with gratitude the detailed written submissions which HMRC provided on the proper interpretation of Rule 10, which are consistent with our analysis set out above.

Merits of Application for Expenses.

13. We agree with HMRC that the normal exercise of discretion on expenses does not extend to a consideration of the parties' financial means. Moreover, Rule 10, as we have noted, does not embrace the consideration of the paying party's financial means in Upper Tribunal Tax appeals.

14. The fact that Mr Colquhoun did not seek expenses after his success before the First-tier Tribunal is irrelevant. As neither party has accused the other of acting unreasonably, and as the appeal was not categorised as *complex* within the meaning the First-tier Rules, rule 23, no award of expenses could have been made (First-tier Rules, rule 10(1)).

15. Each party relies and to some extent places a different slant on the history leading up to the appeal before the First-tier Tribunal. Although we have not seen all the correspondence, we consider that we can resolve matters without adding further to the expense of the proceedings.

16. It appears that Mr Colquhoun wrote to HMRC on 8 October 2006, seeking some guidance on what he thought might be overpaid tax. Eventually, after considerable delay, for which HMRC apologised at the time, Mr Colquhoun was informed that the only way to resolve the question of the £30,000 exemption, was for him to submit a revised Tax Return and claim the exemption.

17. On 18 June 2007, HMRC wrote to Mr Colquhoun providing a help sheet on how to calculate entries on his already submitted self assessment tax return for 2005-6. On 8 July 2007, Mr Colquhoun sought to amend his self assessment such that the initial £30,000 of the 2005 payment should attract the £30,000 tax free exemption. On 13 December 2007, HMRC wrote to Mr Colquhoun advising him that they intended to enquire into the amended return and requesting information. On 10 January 2008, Mr Colquhoun provided the information requested. On 30 January 2008 HMRC, wrote to Mr Colquhoun advising him that they were amending his return to render the whole £91,594.59 taxable.

18. On 14 February 2008, Mr Colquhoun was informed that the exemption was not applicable. In a letter to HMRC dated 20 February 2008, Mr Colquhoun requested sight of HMRC correspondence with his employer (Babcock). He was informed that it could not be found.

19. HMRC have now produced a letter dated 16 November 1998 from HMRC to Babcock. The letter began by acknowledging that Babcock had been given poor service by HMRC. The letter went on to state that *It is the Revenue view that only one £30,000 exemption is available to each of your employees in the present circumstances. This should be apportioned between the initial buy out payment and later redundancy payments.* Mr Colquhoun says that had he seen that explicit statement when he made his initial enquiries it is *entirely possible* he would not have pursued the matter further or would have done so in a different manner. We note that he uses the phrase *entirely possible* rather than stating he would definitely have

refrained from appealing. This statement demonstrates to us the high degree of honesty and integrity which Mr Colquhoun has displayed throughout. He could easily have said that had he seen this letter he would never have appealed. That would have been difficult to challenge. It seems to us to be entirely to his credit that he put his position more moderately.

20. Moreover, HMRC explain in their submissions to us that the letter dated 16 November 1998 explains the operation of section 148(2) ICTA and why only one £30,000 exemption was available to each employee, as HMRC went on to argue before both the First-tier and Upper Tribunals. As HMRC submit, the letter makes it plain that a concession would be made in respect of employees made redundant up to 28 October 1998, but not to any current employees, which would include Mr Colquhoun. HMRC also explain that they paid compensation to Babcock following complaints made.

21. Mr Colquhoun has since received a demand for interest in the sum of £1382.36.

22. HMRC seek expenses of a few pence short of £3,500 in relation to the appeal before the Upper Tribunal of which £2,740 are attributable to Counsel's fees. We are invited by HMRC to make a summary assessment. Mr Colquhoun did not address this point.

23. We consider that had Mr Colquhoun received the letter dated 16 November 1998, in early 2008 when he requested it, there would have been a significant chance that he would have proceeded no further and would not have appealed. In this whole matter up to the commencement of the Tribunal proceedings, HMRC appear to have conducted themselves in a somewhat dilatory and inefficient manner. Had they explained their position satisfactorily to Mr Colquhoun in 2007 or early 2008, much expense might well have been avoided. We do not consider that all such expense should rest at the door of Mr Colquhoun. We should make it clear that we make no criticism of those within HMRC who undertook responsibility for HMRC's conduct of the proceedings before the Tribunal, both First-tier and Upper Tier.

24. As to the question of this appeal being suitable for the employment of Counsel. HMRC have submitted that all substantive appeal hearings before the Upper Tribunal (Tax and Chancery Chamber) are suitable for the employment of Counsel. We consider that to be too extreme a proposition. Normally, all such appeals will be suitable for the employment of junior Counsel and, depending on the amount of tax at stake, the complexity of the facts and the complexity, novelty or importance of the issues of law, such appeals will often be suitable for the employment of senior Counsel.

25. Here, however, although the facts were brief and they raised a relatively short point of law, we incline to the view, particularly as we were assisted by junior Counsel's clear and succinct presentation, that the employment of junior Counsel can be justified.

26. We are compelled, with reluctance, to find Mr Colquhoun, to some extent, liable in expenses simply because he lost the appeal. However, having regard to all the circumstances outlined above, a substantial reduction should be made. We consider that a proportionate and reasonable award would be no more than £1000. It must be implicit in Rule 10(8)(a) that our summary assessment should be proportionate and reasonable in the circumstances.

27. We accordingly order that Mr Colquhoun pay HMRC expenses of ONE THOUSAND POUNDS (£1000.00) Sterling.

28. 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.

J GORDON REID, QC., F.C.I.Arb.
TRIBUNAL JUDGE

RELEASE DATE: 6 APRIL 2011