TC01910

Appeal number: TC 2009/11409 & 11411

PROCEDURE– ***Costs – Whether HMRC acted unreasonably in defending or conducting the proceedings – No – Application dismissed (rule 10(1)(b) Tribunal Rules 2009.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS MARYAN **Appellant**
trading as
HAZELDENE CATERING

- and -

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

TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE

Sitting in public at Social Security & Child Support Appeals Service, City Gate House, 185 Dyke Road, Brighton BN3 on 23 August 2011 which was adjourned part-heard until 14 February 2012 for receipt of the parties' written submissions.

Peter Clarke of Clarke & Co, Accountants and Practitioners in Revenue Law, for the Appellant

Sylvia Lord, Costs Draftsman of A & M Bacon Limited, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Dispute

1. The dispute concerned the Appellant's application for costs on the ground of HMRC's unreasonable conduct of the proceedings. The Appellant and his wife traded as a partnership under the name of Hazeldene Catering. Following enquiries into the partnership returns HMRC made regulation 80 PAYE determinations on the partnership and amended its returns. Further HMRC issued discovery assessments and penalties against the individual partners. The Appellant appealed these decisions. On various dates HMRC abandoned its opposition to the Appeals, which resulted in the Appellant submitting an application for costs incurred in connection with its Appeals against HMRC.

2. The Appellant contended that there was no proper basis for the decisions taken by HMRC and that HMRC had unnecessarily prolonged the dispute. HMRC disagreed, arguing that it was not unreasonable to defend the Appeals if at the time it genuinely believed that tax was due. Equally HMRC acted sensibly by abandoning its opposition when it became clear that there were no grounds to challenge the Appeals. Finally HMRC submitted that the information given in the Appellant's schedule of costs was insufficient for an assessment to be made of the reasonableness of the costs claimed.

3. The dispute commenced prior to the establishment of the First-tier Tribunal on 1 April 2009, which has involved consideration of the correct legal basis for the Tribunal's costs jurisdiction.

The Issues

4. The issues are as follows:

(1) Whether in law the Appellant is entitled to an order for costs, and if so the period covered by such an order?

(2) Whether in fact HMRC acted unreasonably in connection with the proceedings?

(3) Whether the schedule of costs submitted by the Appellant is in sufficient detail?

(4) Whether the Tribunal should exercise its discretion to make an order for costs?

The Hearing

5. The Application came on for hearing on 23 August 2011. The Tribunal decided after hearing from the parties that it had insufficient information with which to make a determination. The Tribunal issued directions for HMRC to provide an agreed comprehensive bundle of documents and for the parties to provide written submissions. The Tribunal stated that it would make its decision on the representations made at the hearing and the further written submissions without

requiring a further hearing. The parties complied with the directions. The Tribunal indicated that it would make its determination by 14 February 2012. The Tribunal apologises for missing this deadline.

The Chronology

6. On 13 July 2004, 12 May 2005 and 13 July 2006 HMRC opened enquiries into the partnership returns for the tax years 2002/03, 2003/04 and 2004/05.

7. On 6 February 2008 HMRC issued determinations under regulation 80 of Income Tax (Pay As You Earn) Regulations 2003 in the sum of £43,328.81[1]. HMRC alleged that the Appellant failed to operate PAYE correctly for the tax years 2001/02 to 2004/05.

8. On 12 February 2008 the Appellant appealed direct to HMRC against the PAYE determinations made on 6 February 2008.

9. On 30 April 2008 Officer Petersen advised the Appellant that enquiries had been opened into the partnership tax returns, and that he was satisfied on the information so far provided that tax had been lost due to his default. Officer Petersen requested additional information and offered the Appellant a meeting with a view to settling the dispute.

10. On 2 May 2008 the Appellant responded, pointing out that he had dealt with the enquiries in previous correspondence and was not prepared to comment further until closure notices had been issued. Finally the Appellant would not attend a meeting and wished to exercise his Common law right to remain silent.

11. On 2 June 2008 HMRC closed its enquiries into the returns, and amended the partnership returns by increasing the partnership profit to £128,445 (2002/03), £157,921 (2003/04), and £468,341 (2004/05). In addition HMRC made a discovery amendment to the return for tax year 2001/02 by increasing the partnership profit £108,450[2].

12. On 2 June 2008 HMRC also raised discovery assessments against each partner, Mr and Mrs Maryan. The assessments against Mr Maryan (the Appellant) were for £21,047.97 (2001/02), £25,886.63 (2002/03), £13,212.58 (2003/04), and £58,209.63 (2004/05). The assessments against Mrs Maryan were for £20,918.17 (2001/02), £25,824.00 (2002/03), £13,200.77 (2003/04), and £58,078.83 (2004/05).

13. On 4 June 2008 Clarke & Co lodged Notices of Appeal with HMRC against the discovery assessments in respect of the Appellant and his wife. The Appellant elected for the matter to be heard by the Special Commissioners. The Appellant argued that the assessments were unlawful and that any liability to tax had been refuted in previous correspondence.

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[1] This figure is given in the Notice of Appeal dated 23 June 2009.

[2] This figure is taken from Officer Petersen's letter dated 30 April 2008.

14. On 9 June 2008 Clarke & Co lodged Notices of Appeal with HMRC against the closure notices in respect of the partnership returns. The Appellant elected for the matter to be heard by the Special Commissioners.

15. On 13 June 2008 Mrs Maryan requested HMRC to disclose copies of all PAYE returns including forms P14, P35, P45 and P46 for the disputed tax years and Notices of Codings in respect of the partnership. On 17 June 2008 HMRC responded and provided the information that was in its possession.

16. On 25 and 26 June 2008 Officer Petersen questioned the partnership's grounds of Appeal against the closure notices and the discovery amendment for 2001/02. Officer Petersen suggested that the Appeals should be withdrawn, and if not he was in the process of referring the Appeals to the Appeals unit which would be conducting HMRC's case at the hearing.

17. On 27 June 2008 Clarke & Co challenged the validity of the PAYE determinations against the partnership.

18. On 30 June 2008 Clarke & Co responded to Officer Petersen stating that it had no idea what Officer Petersen meant by the incorrectness of the grounds of Appeal.

19. On 2 July 2008 Officer Petersen agreed to the postponement of the alleged tax payable under the discovery assessments against the Appellant and his wife.

20. Prior to 1 April 2009 the parties did not serve a notice on the Office of Special Commissioners to bring on the Appeal before the Special Commissioners.

21. On 10 June 2009 Officer Cooper issued penalty determinations against Mr and Mrs Maryan in the respective sums of £59,815 and £23,831 and explained the basis for the determinations.

22. On 15 June 2009 Clarke & Co on behalf of the Appellant appealed against the penalty determinations to the First-tier Tribunal. Clarke & Co pointed out that the penalties were unlawful because the Appeals on the substantive assessments had not yet been heard. Clare & Co also reminded Officer Cooper that it had received no response to its letter of 27 June 2008 challenging the validity of the PAYE determinations.

23. On 17 June 2009 Officer Cooper explained in writing his reasons for issuing the discovery assessments against the partners which were that additional partnership sales had not been included in the self assessments returns and that certain expenses and reliefs appeared to be incorrectly claimed. In respect of the PAYE determinations, Officer Cooper considered that there may be further tax payable. Officer Cooper stated that if the Appellant did not agree with the tax assessments and the PAYE determinations under Appeal, the Appellant could either ask for his decision to be reviewed by an HMRC Officer not previously involved in the Appeal or notify his Appeal direct to the First-tier Tribunal.

24. On 23 June 2009 Clarke & Co on behalf of the Appellant appealed to the First-tier Tribunal against the closure notices, the assessment against the individual partners, and the PAYE determinations. The Appeals were given numbers TC/2009/11409 and 11411. The Tribunal Office wrongly assumed that the Appeals were made out of time and that a hardship application was necessary. Clarke & Co complained about the handling of the Appeals by the Tribunal for which it received an explanation and apology. Copies of these Appeals were sent by the Tribunal to HMRC on 1 July 2009.

25. On 24 June 2009 the penalty appeal was allocated to the standard category and given the number of TC/2009/11076. HMRC was given 60 days to provide a statement of case.

26. On 26 August 2009 Mr Mitchell of HMRC Appeals and Review Unit provided the Appellant with statements of case in respect of the Appeals.

27. Mr Mitchell stated in the case on the PAYE determinations that the Appellant as an employer was obliged to operate the basic rate tax code, where no form P46 had been signed in respect of an employee. HMRC determined the outstanding tax to the best of its judgment.

28. Mr Mitchell stated in the case on the closure notices and assessments against the individual partners that the assessing Officer had concluded that sales and profits had been understated. Mr Mitchell, however, considered that the discovery assessments had been incorrectly made. According to Mr Mitchell, the Officer had followed the wrong procedure. There was no need to issue separate assessments against the partners. Under section 28B(4) of the Taxes Management Act 1970 if the partnership return was amended as a result of the outcome of the Appeal on the closure notices the relevant entries in the individual partner's self assessment tax return would be changed to give effect to the amendments to the partnership returns. In those circumstances Mr Mitchell also decided that the issue of penalty determinations were premature and would be vacated.

29. The outcomes of Mr Mitchell's review were that HMRC abandoned the discovery assessments and the penalty determinations against the individual partners and regarded the Appeals as settled under section 54 of the Taxes Management Act 1970. Mr Mitchell, however, advised the Appellant that the partners may still be liable to pay outstanding tax for the disputed years and be required to meet penalties if he was unsuccessful with the Appeals on the outstanding matters. Mr Mitchell also informed the Appellant that he had asked Officer Cooper to look again at the PAYE determinations.

30. On 2 September 2009 Clarke & Co responded to Mr Mitchell saying that the statements of case were insubstantial and setting out the Appellant's views on the disputed matters. Clarke & Co also advised Mr Mitchell that the Appellant was applying for the Appeals to be heard in the Upper Tribunal in view of their length and complexity and if successful would be applying for costs which were estimated at £35,000 at this point of time.

31. On 3 September 2009 the Tribunal Registrar decided that the Appeals against the completion notices and PAYE determinations should be consolidated, allocated to the standard category, and transferred to London for a Judge to consider case management directions.

32. On 4 September 2009 Clarke & Co on behalf of the Appellant applied to the Tribunal for the Appeals to be allocated to the complex category and be transferred to the Upper Tribunal.

33. On 15 September 2009 Mr Kirk of HMRC Appeals and Review Unit wrote to the Appellant advising that he had taken over responsibility of the Appeals from Mr Mitchell. Mr Kirk stated that he required time to familiarise himself with the papers, and in consequence had requested from the Tribunal an extension of tine to supply the list of documents. Mr Kirk also said that he had no objection to the re-categorisation of the Appeals as complex but objected to the application that the Appeals be transferred to the Upper Tribunal.

34. On 18 September 2009 Clarke & Co objected to HMRC's application for extension of time. Clarke & Co applied to the Tribunal for directions which were:

(1) HMRC comply with the time limit under rule 27 and provide a list of documents by 6 October 2009.

(2) If HMRC fail to provide a list of documents by 6 October 2009, HMRC be barred from taking further part in the proceedings.

(3) HMRC's refusal under rule 28(1) for transfer of the Appeals to the Upper Tribunal be over-ruled.

35. On 21 September 2009 Clarke & Co served the Appellant's list of documents on HMRC.

36. On 25 September 2009 Mr Kirk responded to the Appellant's application for directions pointing out that the case papers were voluminous and that it would not be possible to delegate the review of the Appeals to another Officer. Also Mr Kirk stated his reasons for why a transfer to the Upper Tribunal was inappropriate.

37. On 1 October 2009 the Tribunal Office notified the parties that the directions hearing would be held on 7 January 2010 at Bedford Square, London.

38. On 9 November 2009 Clarke & Co requested an adjournment of the directions hearing until after the end of February 2010 because the representative had just been informed of the date for his long awaited hip replacement surgery.

39. On 8 December 2009 the Tribunal Office informed the parties that the hearing on 7 January 2009 had been postponed and that the Office would be in contact again shortly.

40. On 9 December 2009 Mr McMeeken of HMRC Appeals and Review Unit informed the Appellant that he had taken over responsibility of the Appeals and that

he needed time to review the papers and issue a letter with his thoughts on the matter by 21 January 2010.

41. On 15 December 2009 Clarke & Co expressed its astonishment that Mr McMeeken had taken over from Mr Kirk and that he would require further time. Clarke & Co set out the history of the Appeals and stated that it was patently obvious that the Appeals were being passed round the Appeals Unit like a hot potato with nobody wanting to touch it. In the representative's view that the reasons for the inaction were that HMRC's case was founded on wild guesses and completely unsubstantiated.

42. On 13 January 2010 Clarke & Co requested a response from Mr McMeeken to its letter of 15 December 2009.

43. On 14 January 2010 Mr McMeeken replied saying that he intended to complete his review and give a response by 21 January 2010.

44. On 20 January 2010 Mr McMeeken informed Clarke & Co had completed his review but needed further time to discuss his proposals with Officer Cooper. Mr McMeeken indicated that he would provide his conclusions by 25 January 2010.

45. On 12 February 2010 Clarke & Co responded to a query by Mr McMeeken about capital introduced net of drawings.

46. On 26 February 2010 Clarke & Co wrote to Mr McMeeken pointing out that he had missed his deadline of 19 February to respond with his review. Clarke & Co requested a reply without further delay from Mr McMeeken.

47. On 26 February 2010 Mr McMeeken apologised for the delay but was still awaiting a response from Officer Cooper.

48. On 9 March 2010, Clarke & Co wrote to Mr McMeeken expressing its disappointment with the delay in supplying the outcome of his review. Clarke & Co stated that Mr McMeeken had told it that the PAYE determinations and the closure notices would be withdrawn. Clarke & Co speculated that the delay was a result of Officer Cooper's unwillingness to acquiesce with Mr McMeeken's proposals.

49. On 12 March 2010 the Tribunal Office requested an update on the current position in respect of the Appeals. Clarke & Co responded by stating the Appeals were in the process of being settled and would advise further.

50. On 30 March 2010 Mr McMeeken provided the Appellant with his review of the Appeals. Mr McMeeken evaluated the factors taken into account by Officer Cooper for supporting his view that the sales and profits of the partnership had been understated. Mr McMeeken's conclusions were as follows:

(1) The Appellant's explanation for the credit card discrepancies was feasible.

(2) HMRC did not have sufficient evidence to substantiate its position on the Appellant's living costs.

(3) HMRC's evidence for its revised gross profit rate was insufficient.

(4) HMRC was not in a position to rebut the Appellant's explanation for the capital introduced into the business.

(5) HMRC did not have sufficient evidence to defend the PAYE determinations.

51. Mr McMeeken pointed out that the adjustments in respect of wages, capital expenditure, stock and capital allowances remained outstanding which meant that the Appeals were unresolved and presumably would proceed to a hearing.

52. On 30 March 2010 Mr McMeeken informed the Tribunal that

> "I have written to Mr Clarke following my consideration of the appeals. My conclusion is that most of the matters in dispute are no longer to be taken to a Tribunal hearing. There are still minor outstanding matters to be resolved and I have therefore returned the papers to the enquiry officer to seek agreement over them with Mr Clarke.
>
> I will keep you informed of developments in the case and of any agreement reached between the parties. I also understand from Mr Clarke that he would be unable to attend any Tribunal Hearing in the next three months due to a severe spinal injury. Hopefully the matter will be resolved before then."

53. On 12 April 2010 Officer Cooper informed Clarke & Co that following the decision reached by HMRC's Appeals and Review Unit that HMRC had decided to determine all Appeals in the figures originally returned, which meant that the Appeals could be settled under s 54 of the Taxes Management Act 1970.

54. On 13 April 2010 Clarke & Co wrote to Mr McMeeken enclosing a copy of the costs schedule for its work done from 9 September 2005 to 16 April 2010 and totalling £72,305.25. Clarke & Co expressed the hope that HMRC would settle the matter of costs by agreement. If not Clarke & Co would require a costs hearing which would involve taking a Judge through almost 1,000 pages of the trial bundle in order to establish that HMRC have behaved unreasonably. Clarke & Co would also raise its allegation that Officer Cooper conspired with others to pervert the course of justice when he tried to prevent Clarke & Co from obtaining the Appellant's PAYE records.

55. On 20 April 2010 the Tribunal Office wrote to Clarke & Co acknowledging receipt of its withdrawal letter received on 13 April 2010. The Tribunal advised that if Clarke & Co wished to have the Appeal reinstated it must make application within 28 days from date of the letter.

56. On 22 April 2010 Mr McMeeken informed Clarke & Co that he had forwarded the claim for costs to Officer Cooper's manager for consideration and response.

57. On 22 April 2010 Ms Austin of HMRC Complaints Team advised Clarke & Co that she had recorded its letter of 13 April 2010 and claim for costs as a complaint.

58. On 26 April 2010 Clarke & Co informed Ms Austin that it had not made a complaint but submitted a claim for costs which was a matter before the Tribunal.

59. On 7 May 2010 Ms Kingdom advised Clarke & Co that HMRC would take no further action in connection with the complaint following receipt of Clarke & Co's letter of 13 April 2010.

60. On 10 May 2010 Clarke & Co notified HMRC that if it did not receive agreement of the schedule of costs by close of business on 11 May 2010 it would reinstate the Appeal hearing with regard to the outstanding claim for costs.

61. On 12 May 2010 Clarke & Co notified the Tribunal that it wished to reinstate the Appeal for the purpose of determining its costs application.

62. On 12 May 2010 Ms Kingdom of HMRC Complaints Team informed Clarke & Co that she had taken advice from the Solicitor's Office on the claim for costs. She pointed out that pre-Tribunal costs were dealt with under the complaints process. HMRC reimburse pre-Tribunal costs by way of an ex gratia payment only where HMRC's original view of the law was manifestly flawed or wholly unreasonable at the time it was taken.

63. On 12 May 2010 Clarke & Co expressed its disagreement with Ms Kingdom's view of the Tribunal's powers in respect of an order for costs.

64. On 12 May 2010 Ms Kingdom responded by stating that HMRC Solicitor's Office had advised that the claim for costs did not fall within the jurisdiction of the Tribunal. Ms Kingdom repeated her invitation for the claim for costs to be dealt with under the complaints procedure.

65. On 18 May 2010 the Tribunal informed Clarke & Co that reinstatement was not necessary in order to apply for costs. Further as the Appeals had been allocated to the standard category costs could only be awarded if the Tribunal considers that HMRC acted unreasonably in defending or conducting the proceedings. The Tribunal requested Clarke & Co to give particulars of the alleged unreasonable conduct.

66. On 21 May 2010 Clarke & Co responded by stating that there were so many instances of unreasonable behaviour by HMRC it would not be possible to deal with this by means of written submissions.

67. On 28 May 2010 Judge Berner directed the Appellant to serve on HMRC and the Tribunal full particulars of the grounds on which the Appellant asserted that HMRC acted unreasonably. On 9 June 2010 Clarke & Co for the Appellant complied with the direction.

68. On 18 June 2010 the Tribunal requested HMRC to provide its representations to the Appellant's claims of unreasonable conduct. On 25 June 2010 HMRC requested

an extension until after the Officer's return from holiday on 12 July 2010. HMRC supplied a response[3].

69. On 25 June 2010 Clarke & Co instigated a formal complaint in respect of its allegations of unreasonable conduct on the part of HMRC. On 19 August 2010 Ms Clayton of HMRC responded to the complaint. Clarke & Co was not satisfied with the response with the result that the complaint was escalated to a second review by another member of the complaints team. Mrs Lally conducted the second review and provided her findings to Clarke & Co on 16 September 2010. Clarke & Co expressed its dissatisfaction with the second review. Mr Foster, the Complaints Manager, provided responses on 25 October 2010 and 5 November 2010 concluding that HMRC would be unable to reach agreement on the complaint. Mr Foster advised Clarke & Co of its right to request the Adjudicator to look at its complaint. Mr Foster also informed Clarke & Co that HMRC would await the outcome of the Tribunal costs hearing before considering the question of costs under the complaints procedure.

70. On 6 June 2011 the Tribunal notified the parties of the hearing date of 23 August 2011 at Brighton.

Consideration

First Issue: Whether in law the Appellant is entitled to an order for costs, and if so the period covered by such an order?

71. The first question is concerned with the identification of the correct legal provisions upon which the Tribunal's jurisdiction to award costs is founded. Essentially the choice is between the provisions governing the jurisdiction of the former Special Commissioners or those that relate to the First-tier Tribunal.

72. The Appellant initiated his Appeals against the closure notices, discovery assessments and PAYE determinations before the commencement date of the First-tier Tribunal on 1 April 2009. At that time sections 31 to 31D of the Taxes Management Act 1970 determined the process for appealing direct tax decisions of HMRC. The Appellant, therefore, gave his notices of appeal to HMRC. Under section 31D of the 1970 the Appellant elected for the Appeals to be heard by the Special Commissioners. The effect of sections 31 to 31D of the 1970 Act is that the Appellant's Appeals remained with HMRC and the jurisdiction of the General and Special Commissioners was not engaged until either party gave notice to the Clerk to the Special Commissioners for a hearing date to be fixed (regulation 3 of The Special Commissioners (Jurisdiction and Procedure) Regulations 1994). It was agreed in this Appeal the parties did not give notice to the Clerk prior to the commencement date of 1 April 2009 for the First-tier Tribunal.

73. The status of the Appellant's notices of Appeal was, therefore, governed by the provisions of The Transfer of Tribunal Functions and Revenue and Customs Appeals

[3] The response is undated and appears at pages 223 – 226 of the bundle.

Order 2009. Paragraph 1(2) of schedule 3 of the Order defines current proceedings as:

> " if, before the commencement date –
>
> a) any party has served notice on an existing tribunal for the purpose of beginning proceedings before the existing tribunal, and
>
> b) the existing tribunal has not concluded proceedings arising by virtue of that notice".

74. The Appellant's Appeals under the previous Tribunals regime did not meet the definition of *current proceedings* because no party served notice on the Clerk to the Special Commissioners to commence proceedings. Thus the provisions of paragraphs 6 and 7 of schedule 3 of the 2007 Order did not apply to the Appellant's appeal. Paragraphs 6 and 7 in effect preserved parts of the jurisdiction of the former Tribunals for dealing with *current proceedings.*

75. The Appellant's Appeals were caught by paragraph 5 of schedule 3 of the 2007 Order which applied to the situation of where a notice of appeal had been given to HMRC but no notice had been served on an existing Tribunal for the purpose of beginning proceedings. The effect of paragraph 5 was to give the Appellant a right to request a review by HMRC on the disputed decisions. On 17 June 2009 Officer Cooper informed the Appellant that he could either ask for his decision to be reviewed by an HMRC Officer not previously involved in the Appeal or notify his Appeal direct to the First-tier Tribunal. The Appellant chose to appeal direct to the Tribunal.

76. As the Appellant's Appeals did not fall within the definition of *current proceedings*, the costs regime for the First-tier Tribunal applied to his application for costs. The legislation setting out the costs regime is section 29 of the Tribunals, Courts and Enforcement Act 2007 which provides that

> "(1) The costs of and incidental to -
>
> (a)all proceedings in the First-tier Tribunal, and
>
> (b) not applicable
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules".

77. Thus the extent of the Tribunal's discretion to order costs is defined by rule 10 of the Tribunal Rules 2009 which provides that

> "(1) The Tribunal may only make an order in respect of costs …. –
>
> (a) under section 29(4) of the 2007 Act (wasted costs):

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings, or

(c) if -

(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) not applicable

(2) The Tribunal may make an order under paragraph (1) on an application or of its own motion.

(3) A person making an application for an order under paragraph (1) must –

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made no later than 28 days after the date on which the Tribunal sends –

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice of a withdrawal under rule 17 (withdrawal) which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against the person … without first –

(a) giving that person an opportunity to make representations;

(b) not applicable

(6) The amount of costs to be paid under an order under paragraph (1) may be ascertained by –

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum or a specified part of the costs or expenses incurred by the receiving person;

(c) assessment of the whole or a specified part of the costs or expenses incurred by the receiving person, if not agreed".

78. The Appellant's Appeals were allocated to the Standard category (see paragraphs 25 & 31 above). The Tribunal notes that the Appellant indicated that it would apply for the Appeals to be re-categorised as Complex and that HMRC had no objections to this (see paragraphs 32 & 33 above). The Appellant's application for directions dated 18 September 2009 was not heard by the Tribunal because they were overtaken by the parties' negotiations. The application did not in any event contain a request for a direction that the Appeals be re-categorised as complex. The decision about the appropriate Category for an Appeal rests with the Tribunal whose

jurisdiction in this matter cannot be ousted by an agreement between the parties (see rules 23(3) and 23(4) of the 2009 Tribunal Rules). The Tribunal did not re-categorise the Appellant's Appeals as Complex. The Tribunal's categorisation of the Appeals as Standard has not been challenged by the Appellant. When the Appellant was requested to give particulars of HMRC's unreasonable conduct on the 18 May 2010 (see paragraph 65 above), the Appellant did not demur from the Tribunal's description of the Appeal as *Standard.*

79. As an aside the Tribunal considers it highly unlikely that these Appeals would have been re-categorised as Complex. Although the Appeals involved a large financial sum from the Appellant's perspective and the evidence may have been lengthy, the issues in the Appeals appeared to be straightforward with no complicated issues of law and in many respects the disputes replicated those normally found in *best judgment* Appeals.

80. The Tribunal's jurisdiction to award costs in Standard Appeals is curtailed by rule 10 of the 2009 Tribunal Rules to wasted costs or costs occasioned by the unreasonable conduct of the other party. In this case the Appellant relied on rule 10(1)(b): unreasonable conduct.

81. The next question on the construction of rule 10(1)(b) is for what period can a costs award be considered. The Appellant's position on this issue has vacillated during the course of the proceedings. The Appellant first argued that the Tribunal had power to award costs which had been incurred from the time he lodged the original Appeals with HMRC on 12 February 2008, and 4 and 9 June 2008. Whereas in his most recent submission dated 5 December 2011 it would appear from his schedule of costs that the period is limited to that after 22 June 2009 which was after the date of the first Appeal to the First-tier Tribunal on 15 June 2009.

82. In contrast HMRC's position has been that the entitlement to costs under rule 10(1)(b) dates only from the first notification of the Appeal to the First-tier Tribunal. HMRC relied on the High Court decision in *Gamble v Rowe (Inspector of Taxes)* [1998] STC 1247 and the Special Commissioners' decision in *Carvill v Frost* SPC 0047 which considered the extent of the costs jurisdiction of Special Commissioners under regulation 21(1) of the 1994 Special Commissioners Regulations which provided that

> "Subject to paragraph (2) below, a Tribunal may make an order awarding the costs of, or incidental to, the hearing of any proceedings by it against any party to the proceedings (including a party who has withdrawn his appeal or application) if it is of the opinion that the party has acted wholly unreasonably in connection with the hearing in question".

83. Park (J) in *Gamble v Rowe (Inspector of Taxes)* said at 1257

> "Moreover, that party must have acted wholly unreasonably in connection with the hearing in question. If that party had acted wholly unreasonably at some earlier stage in the history of the tax affairs of the person in question before the matter was either before the

commissioners and being heard or was being prepared for a hearing before the commissioners, they had no power to award costs".

84. The Special Commissioners in *Carvill v Frost* decided at paragraph 11:

> "What that explanation shows is that the draftsman has, by using the expression, "the costs of an incidental to the hearing of the proceedings" been careful to confine those costs incurred while the special commissioners have jurisdiction over the Appeal. Costs incurred in the earlier stages of the appeal proceedings, i.e. while the appeal is being dealt with by the officer of the Board cannot qualify for an award. The expression "costs of, or incidental to, the hearing of any further proceedings" imposes a further qualification. It will not as Park J observed in *Gamble v Rose* [1998] STC 1247 at 1257, cover any costs that in some way arise when the special commissioners have jurisdiction. They have to be costs incurred while the matter is before the special commissioners and the matter is being heard or prepared for a hearing. It follows that if, as here, the appeal hearing has not taken place the costs will nonetheless qualify for an award ……. That construction makes sense of the words in brackets in regulation 21(1)".

85. The wording of regulation 21(1) is not the same as that for the legislative provisions governing the First-tier Tribunal's jurisdiction of costs. HMRC cited the First-tier Tribunal decision in *Thomas Walker v The Commissioners for HMRC* (TC/2009/12751 & 13399) which examined the new costs provisions and ruled at paragraph 42:

> "On the basis of the authorities cited by the parties and by reference to normal rules of interpretation, the Tribunal concluded that the relevant date from which the Tribunal was able to make a costs order was the date when an appeal was notified to the Tribunal, this being the date when proceedings commenced for the purposes of the Tribunal rules"

86. The starting point for Tribunal's consideration of the period for which costs can be awarded is the wording of section 29(1)(a) of the 2007 Act which provides the primary authority for the Tribunal's costs jurisdiction. Section 29(1)(a) limits the jurisdiction to *the costs of and incidental to all proceedings in the First-tier Tribunal.* In the Tribunal's view the use of the words *proceedings in the First-tier Tribunal* limits the Tribunal's power to make a costs order to those costs that have been incurred once the Tribunal has jurisdiction over the dispute. The Tribunal's jurisdiction commences when an Appellant sends or delivers a notice of appeal to the Tribunal (see rule 20 of the 2009 Tribunal Rules).

87. The Appellant in his submissions makes reference to the use of the phrase *and incidental* for his proposition that the Tribunal may consider costs that have been incurred prior to the notification of the appeal to the Tribunal. The Tribunal disagrees. The use of the word *incidental* does not extend the period for when costs can be considered but simply expands the definition of costs to include indirect costs which have been incurred after the commencement of proceedings before the Tribunal.

88. The Tribunal, therefore, decides that its jurisdiction to award costs under section 29(1)(a) of the 2007 Act and rule 10(1)(b) is restricted to the period on and after the date the proceedings had commenced before the Tribunal. In this case the Tribunal is concerned with those costs which were incurred by the Appellant on or after 15 June 2009 which was the date of his first Appeal to the First-tier Tribunal.

89. The next question on construction of the statutory provisions is whether the Tribunal can take account of the alleged unreasonable conduct of HMRC prior to the commencement of the proceedings before the Tribunal. Under the former costs regime for the Special Commissioners Park J *Gamble v Rowe (Inspector of Taxes)* decided at 1247 (see paragraph 83 above) that the Commissioners had no power to award costs in such circumstances. Likewise the First-tier Tribunal in *Thomas Walker v The Commissioners for HMRC* decided in respect of the new costs regime at paragraph 44 that

> "On that basis it was only necessary for the Tribunal to decide whether the actions of HMRC had been unreasonable from the point when the appeal was notified to the Tribunal on 30 July 2009".

90. The Tribunal in *Walker* pointed out at paragraph 43 that the Appellant's remedy in respect of unreasonable conduct prior to the commencement of the proceedings was:

> "If the Appellant wished to complain about HMRC's behaviour prior to that point he should have recourse to HMRC's internal complaints procedure and the tax Adjudicator".

91. The Tribunal agrees with the reasoning in *Walker*. Under rule 10(1)(b) the unreasonable behaviour must relate to the bringing, defending or conducting the proceedings **in** the Tribunal.

92. The Tribunal, therefore, decides on the first issue that

(1) The Tribunal had jurisdiction to consider the Appellant's application for costs under section 29(1)(a) of the 2007 Act.

(2) The Tribunal's jurisdiction was limited to those costs that have been incurred as a result of HMRC's alleged unreasonable behaviour in defending or conducting the proceedings pursuant to rule 10(1)(b) of the 2009 Tribunal Rules.

(3) The Tribunal can only award those costs that have been incurred on and after the date the proceedings commenced before the First-tier Tribunal which in this case was the 15 June 2009.

(4) Under rule 10(1)(b) the Tribunal's consideration is concerned with the reasonableness of HMRC's conduct of the proceedings on and after the date of the Notice of Appeal before the Tribunal, which in this case was the 15 June 2009.

Second Issue: Did HMRC acted unreasonably in defending or conducting the proceedings?

93. The Appellant cited the following actions of HMRC which he regarded as unreasonable and the causes of additional and unnecessary costs on his part:

(1) The levying of penalties which in the Appellant's view was unlawful because the amount of his alleged tax liability had yet to be determined on appeal.

(2) HMRC's statements of case for the Appeals on the closure notices, the discovery assessments and the PAYE notices were insubstantial and failed to address the points at issue.

(3) HMRC failed to send its lists of documents in accordance with rule 27 of the 2009 Tribunal rules. In contrast the Appellant supplied his list on the 21 September 2009.

(4) HMRC mishandled its internal review of the Appeals involving three separate Officers in succession which resulted in delay with each Officer requesting time to conduct his review, and further correspondence at the Appellant's expense.

(5) HMRC took almost two years to abandon the case against the Appellant.

94. In the Appellant's view the facts of his case bore close similarities to those in *Carvill v Frost* where the Special Commissioners held that HMRC had acted wholly unreasonably by delaying settlement of the Appeals until after the Appellant's preparation for the hearing.

95. HMRC argued that it did not conduct the proceedings before the First-tier Tribunal unreasonably. HMRC complied with Tribunal directions in respect of service of the statements of case. The list of documents was not produced because the Appeals were under a review with the intention of bringing them to a conclusion without recourse to the Tribunal. HMRC pointed out that the penalty notices had been issued to speed up the Appeal process so that they could be heard at the same time with the Appeals against the closure notices and assessments.

96. HMRC did not accept that its Appeals and Review Unit had mishandled the Appeals. Officer Cooper was the Enquiry Officer. Mr Mitchell of the Unit became involved on 10 July 2009 and conducted a review of the Appeals informing the Appellant that the penalty notices had been vacated. Mr Mitchell left on 1 September 2009 to go to another office. On 3 September 2009 Mr Kirk took over responsibility for the cases on a temporary basis. On 9 December 2009 the cases were allocated to Mr McMeeken who concluded his review on 30 March 2010. HMRC considered that there were valid reasons for several persons dealing with the review process which in HMRC's view did not cause excessive delay and had the added benefit of involving senior Officers ensuring a more thorough review process.

97. The Tribunal notes that the wording of rule 10(1)(b) is different from that of the former Special Commissioners' costs regime. Under rule 10(1)(b) the Tribunal has to decide whether a party acted unreasonably which is a less exacting standard than

acted wholly unreasonably in regulation 21(1) of the 1994 Special Commissioners Regulations. In the Tribunal's view rule 10(1)(b) permits an award of costs occasioned by an individual act of unreasonable behaviour. In contrast under the 1994 Regulations, the Special Commissioners could only order costs in exceptional circumstances where the entirety of the conduct was unreasonable.

98. In this Application the Tribunal is concerned with HMRC's conduct of the case following notification of the Appeals to the First-tier Tribunal on 15 June 2009. In this respect the Tribunal makes the following findings of fact:

Statement of Case

99. The Appellant contended that the statements of case were insubstantial and failed to address the points in issue. Under rule 25 of the 2009 Tribunal Rules HMRC's statement of case must be with the Tribunal within 60 days from the date when the Tribunal sent the Notice of Appeal. Further the case must state the legislative provision for the disputed decision and set out HMRC's position in relation to the case. In this Application HMRC served its statements of case within the required time limit. The statements were concise setting out the legislative provisions for the disputed decisions and summaries of HMRC's case. The Tribunal has examined the statements of case and decide that they meet the legislative requirements and provide an adequate account of HMRC's position in respect of the Appeals.

List of Documents

100. HMRC accepted that it did not serve the list of documents within 42 days after the date it sent its statements of case in accordance with rule 27 of the 2009 Tribunal Rules. Mr Kirk of the Appeals and Reviews Unit gave the Appellant advance notice on 15 September 2009 which was well within the 42 day time limit that HMRC was unlikely to meet the deadline for service of the documents list, and that he would be applying to the Tribunal for an extension of the deadline (see paragraph 33 above).

101. Although the Appellant objected to the Application, his representative did not request an urgent hearing to determine the outcome of HMRC's application. The hearing was set for the 7 January 2010. On 9 November 2009 Clarke & Co requested an adjournment of the directions hearing until after the end of February 2010 because the representative had just been informed of the date for his long awaited hip replacement surgery (see paragraphs 37 & 38 above). Also it would appear that the significance of the list of documents was overtaken by the parties' discussions with a view to settling the Appeals. The letter of Clarke & Co dated 9 March 2010 indicated that there had been earlier telephone conversations with Mr McMeeken about this topic (see paragraph 48 above).

102. The Tribunal is satisfied that HMRC when faced with the possibility of not meeting the deadline for service of the documents list followed the correct procedures and acted responsibly by notifying the Appellant in good time and making application to the Tribunal. Further the Tribunal finds that the Appellant was not prejudiced by

the non service of HMRC's list of document. The non-service did not hinder the ongoing review of the Appeals and the discussions between the parties which eventually led to HMRC withdrawing the disputed decisions.

The Review Process

103. The Appellant contended that HMRC's conduct of the review process, in particular the separate involvement of three officers, caused unnecessary delay and costs to the Appellant. The Tribunal considers that HMRC gave valid reasons for the involvement of three separate Officers and that HMRC acted promptly in keeping the Appellant informed about the changes in personnel.

104. The Tribunal is satisfied that the changes in personnel did not affect the integrity of the review process. The chronology and the eventual decisions reached demonstrated that the Officers actively examined the quality of the evidence relied upon by HMRC and the Appellant's representations. In all probability the Appellant benefited from the involvement of separate Officers with each bringing a fresh perspective to the case.

105. The schedule of costs for the Appellant's representative did not support the Appellant's contention that unnecessary costs were occasioned by the changes in personnel. The schedule recorded that the Appellant's representative spent 10.5 hours out of total 148 hours claimed dealing with the Officers involved in the reviews of the Appeals. Of the 10.5 hours, 10 hours were spent on perusing and responding to the statements of case, which in the Tribunal's view was necessary and resulted in Mr McMeeken taking a different view from Mr Mitchell on the strength of HMRC's case. According to the schedule of costs, the time spent by the Appellant's representative in dealing with the change in personnel was in fact 0.5 hours.

106. Equally the Tribunal did not consider that the involvement of separate Officers resulted in excessive delay. The time taken by the Officers was a necessary part of preparing HMRC's case and did not cause a change in the hearing date for the substantive Appeal which had not been fixed by the Tribunal. The Tribunal formed the view that the Appellant's representative was content for HMRC to re-examine its case and there was no evidence of the Appellant requesting a hearing date to be fixed.

Excessive Delay

107. The Tribunal is limited to considering delay in respect of the period from when it was seised of jurisdiction which was on the 15 June 2009 when the first Notice of Appeal was lodged with the First-tier Tribunal. HMRC settled the Appeal on 12 April 2010 when Officer Cooper advised the Appellant's representative he had decided to determine all Appeals in the figures originally returned. The total period was, therefore, ten months. Also it would appear from the chronology that the Appellant's representative was aware from the 12 February 2010 that HMRC was likely to withdraw the disputed decisions. Finally the Tribunal has found under the preceding paragraph that the time taken by the HMRC was a necessary part of preparing its case.

The Tribunal concludes that a period of ten months was compatible with the proper consideration of the issues raised in the Appeals.

The Quality of the Decisions

108. The Appellant submitted that Officer Cooper had acted unlawfully in taking action against him. The closure notices were based upon wild guesses of the gross profits for the partnership. The individual assessments and penalty determinations should not have been considered until the dispute regarding the partnership profits had been resolved. Finally Officer Cooper knew that the PAYE determinations had no factual foundation with his refusal to provide the Appellant with the P14 and P35 forms which established the inaccuracy of the determinations.

109. For the purposes of this Application the Tribunal should not go behind HMRC's decision to abandon its opposition to the Appeal and reach its own conclusion on the merits of that decision. The Tribunal has to proceed on the basis that HMRC's case against the Appellant was weak and that the decisions of Officer Cooper were flawed. In this respect HMRC's subsequent justification for the issue of the penalty notices on the ground that all disputed matters should be heard together was not a relevant consideration for this Application.

110. The question, therefore, for the Tribunal is whether the fact that the disputed decisions giving rise to the Appeal were flawed constitute on its own unreasonable behaviour within the meaning of rule 10(1)(b) of the 2009 Tribunal Rules. The Tribunal thinks not. The wording of rule 10(1)(b) is about the conduct of the case before the Tribunal rather than the quality of the original decision. It is the standard of the handling of the case not the decision that gives rise to a potential liability for costs under rule 10(1)(b).

111. The Tribunal considers the Special Commissioners decision in *Carvill v Frost* gives support to its construction of rule 10(1)(b). The Special Commissioners' finding of wholly unreasonable behaviour was based upon HMRC's handling of its case rather than the correctness of its original decision as demonstrated by the Commissioners' reasons at paragraph 48:

> "….. Without hesitation we would decide that Inland Revenue had acted wholly unreasonably in the sense contemplated by regulation 21(1). There should have been a rigorous review of the Appeal assessments at the time when they were referred to the Special Commissioners. …. There is no evidence that such a review took place. Indeed the strong inference is that by then bureaucratic drift had taken over. The Inland Revenue had more than enough information on which to take the view that the most likely outcome was that appeals would succeed on both the validity issue … and liability issue. As it was, they allowed things to run on. They fought skirmish after skirmish at preliminary hearings and invariably lost. In the pleading process they made serious and substantial allegations ….. which they were then forced to withdraw since they had no evidence to support. There is no evidence that they obtained any new information, indeed

> they had all the information by the start of 2000….. Put bluntly the decision taken on 18 December 2003 not to resist the appeals should have been taken nearly four years earlier".

112. The Tribunal disagrees with the Appellant's assertion that the facts of his case were closely similar to those in *Carvill.* In the latter as seen from the above quotation the decisive feature was HMRC's failure to review the strength of its case once the Appeal had been referred to the Special Commissioners. The facts of this Appeal were very different with HMRC conducting rigorous reviews of its decisions once an Appeal had been made to the First-tier Tribunal. The evidence demonstrated that HMRC was not simply going through the motions. The review officers formed their own conclusions on the facts and took on board the additional submissions made by the Appellant's representative which resulted in Mr McMeeken arriving at a different decision from Officer Cooper and Mr Mitchell, the first review officer.

113. The Tribunal concludes that the fact in itself of Officer Cooper's decisions being flawed did not constitute unreasonable behaviour within the meaning of meaning of rule 10(1)(b) of the 2009 Tribunal Rules. The critical issue was how HMRC conducted its case once the Tribunal was seised of jurisdiction. The Tribunal's finding in this respect was that HMRC took active steps to assess the strength of its case and when it realised that the case would not stand up brought the dispute to a relatively swift end. In this case once the proceedings were before the Tribunal HMRC did not allow matters to drift and defend the indefensible. Thus the Tribunal is satisfied that HMRC's handling of its weak case before the Tribunal was reasonable.

Overall Conclusion whether HMRC acted unreasonably in defending or conducting the proceedings?

114. The Tribunal is restricted by the legislation to considering HMRC's conduct of its case after the 15 June 2009 when the first Notice of Appeal was lodged with the First-tier Tribunal. The Tribunal in the preceding paragraphs has examined in turn the Appellant's allegations of unreasonable behaviour on the part of HMRC, and concluded that the allegations were unsubstantiated. The Tribunal is, therefore, satisfied that HMRC did not act unreasonably in defending or conducting the proceedings involving the Appellant. The Appellant's complaints about HMRC's handling of the case prior to the 15 June 2009 including the quality of the original decisions taken by Officer Cooper falls within the remit of HMRC's complaints procedures.

Issue Three: Whether the schedule of costs submitted by the Appellant was in sufficient detail and reasonable?

115. Rule 10(3)(b) of the 2009 Tribunal Rules required the Appellant to deliver a schedule of costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

116. The Appellant's representative, Clarke & Co, with its submissions on 15 December 2011 provided a schedule of costs arranged in three columns headed date,

details of work and hours engaged. The details of work comprised a one line summary ranging between two and seven words. The representative claimed 148 chargeable hours from 22 June 2009 at an hourly fee rate of £120 which totalled £21,312 (VAT inclusive). The Tribunal breaks down the 148 hours into three broad categories which are 109.5 hours on preparing trial bundles and indexing, 21.5 hours on drafting and perusing various documents, and 17 hours preparation for the cost hearing.

117. HMRC argued that the schedule of costs did not give enough information to allow it to determine whether the claim was reasonable. In view of the Tribunal's decision about the reasonableness of HMRC's handling of the case, this particular dispute is somewhat academic. The Tribunal, however, makes the following observations on the schedule of costs:

(1) There was a disparity in the hourly rates claimed in the schedules to the Tribunal dated 15 December 2011 and that to HMRC dated 13 April 2010. In the former it was £120, whilst with the latter the rate claimed was £100 up to 16 April 2010 when it changed to £120.

(2) The representative supplied no invoices and or letters of engagement to substantiate that the costs claimed had been incurred by the Appellant.

(3) A substantial proportion of the costs claimed in 15 December 2011 related to the preparation and indexing of trial bundles, which were completed prior to receipt of HMRC's statement of case, and before the fixing of a timetable for the hearing. The representative stated that he had to carry out this work when he did because he would not have had time after the time table had been set. The Tribunal disagrees. The preparation of a trial bundle in tax appeals is usually a collaborative exercise between the parties, and sufficient time is allowed in the directions to compile a bundle. If the Tribunal had been minded to award costs to the Appellant it would have excluded those charges relating to the preparation and indexing of trial bundles, which in the Tribunal's view were unnecessary and premature.

Decision: Whether the Tribunal should exercise its discretion to make an order for costs?

118. The Tribunal has decided the following:

(1) The Tribunal had jurisdiction to consider the Appellant's application for costs under section 29(1)(a) of the 2007 Act.

(2) The Tribunal's jurisdiction was limited to those costs that have been incurred as a result of HMRC's alleged unreasonable behaviour in defending or conducting the proceedings pursuant to rule 10(1)(b) of the 2009 Tribunal Rules.

(3) The Tribunal can only award those costs that have been incurred on and after the date the proceedings commenced before the First-tier Tribunal which in this case was the 15 June 2009.

(4) The Tribunal concluded that Appellant's allegations of unreasonable behaviour on the part of HMRC were unsubstantiated. The Tribunal is, satisfied that HMRC did not act unreasonably in defending or conducting the proceedings involving the Appellant.

(5) If the Tribunal had been minded to award costs to the Appellant it would have excluded those charges relating to the preparation and indexing of trial bundles, which in the Tribunal's view were unnecessary and premature.

119. The Tribunal finds that HMRC did not act unreasonably in defending or conducting the proceedings in the First-tier Tribunal involving the Appellant. The Tribunal, therefore, makes no order for costs and dismisses the Appellant's application.

120. 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.

TRIBUNAL JUDGE

RELEASE DATE: 26 March 2012