[2016] UKFTT 445 (TC)

TC05198

Appeal number: TC/2011/01927

PROCEDURE – Complex cases - whether Appellants should be permitted to withdraw notifications requesting appeals be excluded from potential liability for costs - whether letter from Appellants' representative was without prejudice communication

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

N BROWN GROUP PLC
J D WILLIAMS AND COMPANY LIMITED

Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 4 March 2016

Ms Valentina Sloane, counsel, instructed by Eversheds LLP, for the Appellants

Ms Hui Ling McCarthy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to two applications dealt with at a case management hearing of these appeals. The appeals arise from a long-running and complex dispute between the parties. The Appellants are partially exempt and the appeals concern the extent to which the Appellants should be allowed to recover input tax incurred on marketing and other promotional costs. The sums at issue are large: the disputed assessments are for amounts in excess of £26 million in total.

2. The parties entered into negotiations to try to resolve issues. Unfortunately, agreement could not be reached. On 17 April 2015, a fourth Notice of Appeal was lodged and another appeal was lodged on 4 February 2016. The parties are now preparing for the hearing of the appeals.

Issues at the case management hearing

3. By the time of the case management hearing, the parties had largely agreed the case management directions that the Tribunal should issue, subject to some points of detail. In particular, both parties had agreed that there should be a preliminary hearing to determine certain issues relating to the marketing costs. The parties hoped that the Tribunal's determination of the preliminary issues would enable them to resolve the position in relation to other costs. It was agreed that the parties would produce agreed draft directions to take account of points raised at the hearing and submit them to the Tribunal for approval and issue. That left only two matters to be resolved at the case management hearing, namely:

> (1) whether the Appellants could withdraw their written requests to the Tribunal that the proceedings be excluded from potential liability for costs under rule 10(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FtT Rules').
>
> (2) whether HMRC should be permitted to admit into evidence a without prejudice letter from Deloitte, the Appellants' representative at an earlier stage, to HMRC.

Application to withdraw requests to be excluded from potential liability for costs

4. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides that the FtT has power to determine by whom and to what extent costs of and incidental to proceedings shall be paid but this power is subject to the FtT Rules. Rule 10 of the FtT Rules provides for orders for costs. Rule 10(1)(c) relates to proceedings that have been allocated as a Complex case and provides that the Tribunal may make an order in respect of costs in such cases where

> "the taxpayer … has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under [rule 10 (1)] …"

5. The appeals were all allocated as Complex cases. The first appeal was notified by a notice of appeal dated 3 March 2011 and given reference number TC/2011/01927. A second appeal (TC/2013/04481) was lodged on 3 July 2013.

6. In a letter dated 22 January 2014, the Tribunal notified the Appellants' then representative, Deloitte, that both appeals were consolidated under reference TC/2011/01927 and that they had been categorised as Complex. On 17 February 2014, within the 28 days allowed, the Appellants notified the Tribunal that they wished to opt out of the costs shifting regime.

7. The Appellants filed a further notice of appeal on 4 August 2014. The appeal was given the reference number TC/2014/04200 and was consolidated with appeal TC/2011/01927 by a direction issued on 18 September 2014. Although this case was not separately allocated to a category, it took the categorisation of TC/2011/01927 and the opt out made by the Appellants in relation to that appeal also applied to it.

8. In April 2015, the Appellants lodged a further appeal which was given reference number TC/2015/02789. The Appellants made an application to consolidate that appeal with the other appeals. In a letter dated 9 June 2015, the FtT informed the Appellants that the appeal had been allocated as a Complex case but it made no reference to the application to consolidate.

9. The final appeal was notified by a notice of appeal dated 4 February 2016 and given reference number TC/2016/00659. The Appellants applied to consolidate that appeal with the others. The Tribunal wrote to the Appellants on 10 February 2016 to notify them that the appeal had been allocated as a Complex case but made no reference to the application to consolidate. On 11 February, the Appellants representative, Eversheds, wrote to the Tribunal to apply for the 2015 and 2016 appeals to be consolidated with the earlier appeals but made no reference to any opt out from the costs shifting regime.

10. At the time of the case management hearing, the 2015 and 2016 appeals did not appear to have been formally consolidated. In their skeleton argument for the case management hearing, HMRC consented to the Appellants' application for the appeals to be consolidated with the other appeals. In case there is any doubt, I direct that appeals TC/2015/02789 and TC/2016/00659 should be consolidated with appeal TC/2011/01927. It follows that all of the Appellants' appeals are consolidated under reference TC/2011/01927. The consolidated appeals are categorised as a Complex case under rule 23 of the FtT Rules. Further, and subject to the Appellants' application, the proceedings under reference TC/2011/01927 are excluded from potential liability for costs under rule 10(1)(c) as a result of the Appellants' written requests to the Tribunal.

11. It appears that HMRC were not notified that the Appellants had requested that the proceedings should be excluded from liability for costs or, if they had been so notified, HMRC nevertheless proceeded on the basis that the costs shifting regime would apply to the appeals. This could be seen from paragraph 64 of HMRC's re-Amended Statement of Case of 28 July 2015 which stated:

> "As to the costs application, both appeals have been allocated to the complex category and, to HMRC's knowledge, the Appellants have not opted out of the costs regime under r.10(1)(c)(iii) of the [FtT Rules]."

12. In a letter to the Tribunal, dated 2 March 2016, the Appellants sought to withdraw their requests that the proceedings should be excluded from liability for costs. The letter from Eversheds, acting on behalf of the Appellants, stated:

> "We note that the appeals consolidated under reference TC/2011/01927 and associated appeals including TC/2015/02789 and TC/2016/00659 have been categorised as complex in accordance with Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Rules'). The parties have been proceeding on the basis that the costs regime applies (see the Respondents' Re-amended Statement of Case at paragraph 64).
>
> Having gone over the papers we see that the Appellants put in some requests to opt out of the costs regime. In order to formally regularise the position, the Appellants hereby notify the Tribunal that it [*sic*] withdraws those requests as the Appellants do want to take advantage of the costs regime set out in Rule 10 of the Rules."

13. HMRC opposed the Appellants' application to withdraw their requests to be excluded from potential liability for costs.

14. At the hearing both parties referred to the comments of Warren J in *HMRC v Atlantic Electronics Ltd* [2012] UKUT 45 (TCC) ('*Atlantic Electronics*'). At [7] of the decision, Warren J observed:

> "The right to opt out under Rule 10 has to be exercised, as I have mentioned, within 28 days of the allocation of the case as a Complex case. There are, I think, two related reasons for that requirement. The first is to achieve certainty for both parties so that they know, at an early stage, which costs regime is to apply and can run their cases accordingly. The second is to prevent the taxpayer from waiting to see how his case progresses. To take the extreme case, if the taxpayer were entitled to wait until a decision had been given, he would obviously elect for a costs shifting regime if he had won and for a no costs shifting regime if he had lost. This would be effectively a one-way costs shifting which it was never the policy of the Tribunal Procedure Committee to produce. In a less extreme case, say half way through an appeal, the same consideration applies although it has less force; but the policy is that the taxpayer should not be able to wait and see how the wind blows but must make his election early on. The need to make an election within 28 days is well-known and causes no difficulties in practice."

15. Ms Sloane, who appeared for the Appellants, submitted that the Appellants should be allowed to withdraw their written requests to opt out of the costs shifting regime for three reasons. First, the costs shifting regime is the default position in a Complex case. Secondly, the taxpayer alone has a right to opt out of the costs shifting regime and it is not dependent on the agreement of the HMRC. Finally, there is

nothing in the FtT rules which explicitly prevents a taxpayer withdrawing a written request to opt out of the costs shifting regime. Ms Sloane stated that this was not a case where a taxpayer simply changed its view on a whim. The proceedings have grown in scope with each appeal which has increased the level of costs that will be incurred. In light of the change in the proceedings, the Appellants reconsidered the position and now seek to withdraw their opt-out and return to the default costs shifting regime.

16. In relation to the FtT Rules, Ms Sloane submitted that the Tribunal had power to allow a taxpayer to withdraw a written request to opt out of the costs shifting regime under rule 5(3)(c) which provides that the Tribunal may "permit or require a party to amend a document". Ms Sloane said that rule 5(3)(c) should be interpreted to allow the Appellants to withdraw the opt out. She contended that such an interpretation is consistent with the overriding objective in rule 2 to deal with a case fairly and justly, which includes dealing with it in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties while avoiding unnecessary formality and seeking flexibility in the proceedings.

17. Ms Sloane accepted that the Tribunal should not ordinarily permit a taxpayer to withdraw a request to opt out of the costs shifting regime where HMRC had proceeded on the basis that the opt out was effective and had relied upon it potentially to their detriment. She said that was the situation to which Warren J was referring in *Atlantic Electronics*. It was not, however, the situation in this case. HMRC have conducted the proceedings on the basis that the costs shifting regime applies, as can be seen from their Re-Amended Statement of Case. In the circumstances, there was no prejudice to HMRC because they had always assumed that there was no opt out.

18. The primary submission by Ms McCarthy, who appeared for HMRC, was straightforward: the FtT Rules do not permit a taxpayer who has made a written request that the proceedings should be excluded from liability for costs to withdraw that request. She contended that once a party has opted out that is the end of it. Rule 5(3)(c) of the FtT Rules could not assist the Appellant because it only allowed a party to amend a pleading or document whereas the Appellants were seeking not to amend the written requests but to tear them up. If, as a matter of construction, rule 5(3)(c) does not apply in this situation then the overriding objective in rule 2 does not come into play.

19. Ms McCarthy also submitted that, even if the FtT Rules allowed the Tribunal to permit the Appellants to withdraw their requests to opt out, the application to do so was made far too late in this case. Ms McCarthy said that HMRC would be prejudiced financially if the costs shifting regime were to apply and the Appellants win their appeal as HMRC would, in the normal course of events, have to pay their costs. Ms McCarthy accepted that HMRC would not be disadvantaged in relation to their conduct of the appeal as they would have argued and prepared for the case in the same way regardless of which costs regime applied.

20. I agree with Ms Sloane that the costs shifting regime is the default costs regime for Complex cases but, in my view, that does not assist the Appellants. The ability to opt out of the costs shifting regime under rule 10(1)(c)(ii) is a one-off event available for a limited time only (28 days from receiving notification of allocation as a Complex case). There are good reasons for that as Warren J pointed out in *Atlantic Electronics*. It achieves certainty for both parties and prevents a taxpayer from obtaining an unfair advantage in relation to costs by waiting to see how the case progresses before deciding whether or not to opt out. It is clear (and Ms Sloane did not suggest otherwise) that the taxpayer who has made a written request to the Tribunal that the proceedings be excluded from potential liability for costs does not have a right under the FtT rules to withdraw that request. The question that arises in this case is: does the Tribunal have power to permit and Appellant to withdraw a request to opt out of the costs shifting regime? If so, should I permit the Appellants to do so in this case?

21. In my view, rule 5(3)(c) does not give the Tribunal the power to permit the Appellants to withdraw a written request to opt out of the costs shifting regime. First, I am far from certain that "document" in rule 5(3)(c) includes such written requests. It seems to me that, in the context of the other sub paragraphs in rule 5(3)(c) and especially rule 5(3)(d), "document" means a document which is used in the proceedings such as a pleading, application or submission. Even if the written requests are documents for the purposes of rule 5(3)(c), I agree with Ms McCarthy that the Appellants are not asking to amend the requests to opt out of the costs shifting regime but to revoke them entirely. It seems to me that goes beyond what is envisaged by the word "amend" in rule 5(3)(c). Further, the fact that rule 17 of the FtT Rules specifically provides that a party who has given written notice of withdrawal of their case may apply to the Tribunal for the case to be reinstated, ie to revoke the notice, strongly suggests that the absence of such a provision in rule 10 was a deliberate choice. Ms Sloane did not seek to rely on any other provision of the FtT Rules and I cannot find one that would allow the Tribunal to permit the Appellants to withdraw their requests to opt out of the costs shifting regime. Accordingly, I have concluded that the Tribunal does not have power under the FtT Rules to permit the Appellants to withdraw their written requests that these proceedings be excluded from potential liability for costs under rule 10(1)(c) and the application must be refused.

22. Even if I had concluded that the Tribunal has power to allow the Appellants to withdraw their requests to opt out of the costs shifting regime, I would not have permitted them to do so in this case. It seems to me that the application is made far too late, given that more than two years passed between the first request to opt out and the letter of 2 March 2016 seeking to withdraw that request. This is not a case where, to take an example given by Ms Sloane, a taxpayer has sent an email to the Tribunal asking to opt out of the costs shifting regime and then sends another email ten minutes later saying "I made a mistake and I withdraw it." The Appellants were professionally advised and their advisers first applied to exclude the proceedings from any potential liability for costs in February 2014. The Appellants continued to be professionally advised and to lodge further appeals but it was not until shortly before the case management hearing that they sought to withdraw their requests because they

wanted to take advantage of the costs shifting regime. To allow the Appellants to withdraw at that point would undermine the legal certainty that is one of the purposes of rule 10(1)(c). Such an approach would effectively allow the Appellants to extend the 28 day period set by rule 10(1)(c) for choosing which costs regime should apply. I can see no justification in this case for extending the clear time limit in rule 10(1)(c). I accept that HMRC might suffer financial prejudice if I granted the application and the Appellants were subsequently successful in the appeals and obtained an order that HMRC pay their costs. However, I do not give that much weight because HMRC had assumed that the Appellant had not opted out of the costs shifting regime and Ms McCarthy accepted that HMRC would have conducted the proceedings in the same way whichever costs regime applied. In short, even if the Tribunal had power to do so, I cannot see any reason that would justify allowing the Appellants to change their minds and withdraw the request to opt out of the costs shifting regime after such a long period of time when they have been professionally advised throughout.

Whether letter is without prejudice communication

23. The issue is whether a letter of 22 November 2011 from Mark Smith of Deloitte to Carl Wood of HMRC is without prejudice and, therefore, inadmissible.

24. The aim of the 'without prejudice' rule is to enable opposing parties to negotiate without fear that what they say during negotiations may later be relied upon as admissions or otherwise used to their disadvantage. Accordingly, statements made by parties to each other during negotiations conducted with a view to reaching an agreed resolution of the dispute are inadmissible in evidence and are privileged from disclosure, subject to a limited number of narrowly defined exceptions. Both counsel referred to the judgment of Arnold J in *Williams v Hull* [2009] EWHC 2844 (Ch) which contains a comprehensive and useful review of the law in relation to without prejudice communications. The relevant principles to be applied in determining whether a communication is "without prejudice" are well established and may be summarised as follows:

> (1) The without prejudice rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence: *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 per Lord Griffiths at 1299.
>
> (2) A communication which is not expressed to be without prejudice may nevertheless be protected by the rule if it shows a genuine desire to negotiate a settlement of an actual or potential dispute and a communication which is expressed to be without prejudice may nevertheless not be protected by the rule: *Williams v Hull* at [18] and [38].
>
> (3) If a letter is expressly stated to be without prejudice, that gives rise to a rebuttable presumption that the communication is a without prejudice communication within the meaning of the rule unless it is clear that the expression has been used with some other meaning or purpose: *Williams v Hull* at [18].

(4) A communication which is not a negotiating document, but is merely an assertion of a party's rights, is not protected by the 'without prejudice' rule: *Buckinghamshire County Council v Moran* [1990] Ch 623.

(5) The question is whether the communication merely asserts the strength of the case or whether it does so as part of a negotiation with a view to settlement: *William v Hull* at [37].

(6) Whether a particular communication is a without prejudice communication is a question which must be assessed objectively as at the date of the communication having regard to the relevant factual circumstances: *Williams v Hull* at [19].

(7) In assessing whether a communication is protected by the rule, it is necessary to consider the communication as a whole and it should not be dissected into parts unless it is concerned with clearly distinct subjects: *Williams v Hull* at [23].

(8) To determine whether or not a communication is bona fide intended to be part of or to promote negotiations, the court must ascertain what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient: *Schering Corp v Cipla Ltd* [2005] EWHC 2597 (Ch), per Laddie J at [14].

(9) A communication may be protected by the 'without prejudice' rule even if it is the 'opening shot' in negotiations and the rule is not limited to offers, but extends to all documents which form part of negotiations, whether or not they are themselves offers: *South Shropshire District Council v Amos* [1986] 1 WLR 1271 per Parker LJ at 1277-1278.

25. It is, of course, necessary to set the letter in its proper context before considering whether it should be regarded as a without prejudice communication.

26. The first appeal, lodged on 3 March 2011, was stayed to enable the parties to negotiate. The Notice of Appeal explained:

> "The Appellant is in discussions with the Respondents about this matter and a number of other matters as part of a consideration of the Appellant's tax affairs. Those discussions may serve to narrow or resolve the issues between the parties in this Appeal, saving time and expense for the parties and the Tribunal. Thus a standover is appropriate in all the circumstances"

27. The first communication relevant to this application is a letter dated 25 October 2011 from Mr Paul Hammond, a senior manager at Deloitte, to HMRC Large Business Services in Manchester. The letter is not marked "without prejudice". After the usual salutation and a subject line, it states:

> "I am writing further to your decision to assess N Brown Group PLC ('N Brown') in respect of its partial exemption position – and specifically in respect of the period of time covered by the assessment. In our opinion, several periods covered by the assessment contained in your letter dated 9 July 2010 ('the assessment') were 'out of time', and

> therefore the assessment should be corrected to reflect only those periods which were within the statutory time limits set out in the VAT Act 1994 ('VATA 1994').
>
> On a without prejudice basis, I would like to confirm at the outset, that there [sic] purpose of this particular letter is not to challenge the technical basis of the assessment or seek to comment on the accuracy of the assertions made by HMRC with regard to 'use' of input tax."

28. The letter then sets out the background to the dispute and Deloitte's technical analysis of the law and its application to N Brown Group plc before concluding that the assessment was largely out of time.

29. On 27 October 2011, Mr Carl Wood, customer relations manager in HMRC's Large Business Services in Leeds, wrote to Mr Hammond. The letter was stated to be further to a letter from Mr Hammond on 21 April and a meeting on 18 May. The letter sets out HMRC's detailed analysis of the arguments in the case. The letter stated that HMRC were confident of defending their position at the Tribunal, should it be required". On the penultimate page, the letter referred to the fact that Mr Hammond's letter of 25 October had been received the day before and then stated:

> "HMRC are always willing to engage in further discussions if different situations or proposals come to light. Our Mr Todd reiterates that the best solution is to agree an approvable PE Special Method and that he would be happy to discuss a framework to help avoid litigation."

30. Mr Mark Smith, partner in Deloitte, responded in a letter to Mr Wood dated 22 November 2011 with the subject line "N Brown Group plc – Without Prejudice". The opening paragraph of the letter was as follows:

> "Thank you for your letter dated 27 October 2011. Given the length of this dispute, it was extremely helpful to receive a reasoned analysis of your position and your views on how case law should be interpreted, not least because it allows us to pinpoint genuine areas of agreement, difference and misunderstanding."

31. The letter then describes the differences between the parties and HMRC's analysis. Under the heading "Group Strategy" the letter stated:

> "The central point to resolving this dispute is for the Commissioners to obtain a very clear understanding of the Group's strategy in relation to marketing costs, personal accounts and financial income."

32. The letter concluded under the heading "Next Steps":

> "To remedy the fact deficit, we are reviewing the detailed operations of the Group's marketing team and anticipate reporting back to you in writing within three weeks. We would suggest that it may be appropriate to defer the decision re enforcement of the assessment until this new factual information is received and it can be reviewed by the [HMRC] Solicitor's office."

33. Mr Wood replied to Mr Smith by letter dated 22 December 2011. The letter was headed "N Brown Group plc – Partial Exemption – Without Prejudice". Having summarised the issues and the parties' positions, Mr Wood wrote:

> "However, it is acknowledged that it is important that both sides are in agreement as to the particular facts at the heart of the issue.
>
> To date we have conducted extensive investigations to establish the facts and have shared our conclusions with the business at every stage. One of the hoped-for outcomes of these discussions was to enable the approval of a new proposed special method. It remains our hope that this is still attainable. Given that presumably both sides wish to arrive at an approved fair and reasonable Partial Exemption method, it is vital that we work together to resolve issues if at all possible.
>
> There has [sic] already been lengthy discussions with your clients [sic] tax department and marketing representatives as well as two agents, however we appear to be no closer in reaching an agreement, hence HMRC having to take assessment action.
>
> We welcome your proposed review of the operations about the Group's Marketing strategy and note that you intend to supply a report to us within three weeks. To date, nothing has been received.
>
> HMRC will, as we have constantly stated throughout this issue, be willing to consider any information supplied to us in relation to this issue and I would suggest that it would seem appropriate that any review of the Group's marketing team operations includes the Commissioners. The risk otherwise is that work and resources may be unnecessarily duplicated for your client if we need to clarify or check the conclusions. … And we will be in touch shortly to discuss arrangements. I hope that you take away from this HMRC's continued aim to ensure that we are constantly reviewing the issue and willing to consider new points or new information. However, HMRC are content on the actions already taken to raise assessments and are confident of presenting our case at the likely Tribunal."

34. The penultimate paragraph of the letter stated:

> "HMRC have always been willing to consider new proposals or information and if that is enough to change HMRC's views on the assessments raised then we will fully review that situation at the time and if the assessments are reduced, then repayment of that reduction will be made to your client."

35. The issue is whether Mr Smith's letter to Mr Wood dated 22 November 2011, assessed objectively as at the date of the communication and having regard to the relevant factual circumstances, is part of a negotiation with a view to settlement or merely an assertion of a party's rights. The fact that the letter was marked "without prejudice" gives rise to a rebuttable presumption that it was a without prejudice communication but it is no more than that. The use of the phrase "without prejudice" does not mean that the letter is protected by the rule if it does not represent a genuine attempt to negotiate a settlement. In considering the status of the letter of 22 November 2011, I must consider what, on a reasonable basis, Mr Smith intended by

the letter and how it would be understood by a reasonable recipient. In this case, I have taken Mr Wood as a proxy for the 'reasonable recipient'.

36. Ms Sloane submitted that the stay of the proceedings showed that the parties had been engaged in negotiation to resolve the dispute without recourse to litigation. She noted that Mr Wood's reply to Mr Smith's letter was itself headed "without prejudice". She submitted that the use of the heading showed that HMRC accepted that the correspondence was without prejudice and were content to proceed on that basis. The wording of Mr Smith's letter showed that it was intended to form part of a genuine attempt to negotiate a settlement. The opening paragraph of the letter stated that the objective was "to pinpoint genuine areas of agreement, difference and misunderstanding" and the letter later refers to "resolving this dispute". Ms Sloane contended that the fact that the letter of 22 November 2011 did not contain a specific offer of settlement is immaterial nor was it relevant that the letter contained assertions of fact and as to the strength of the Appellants' case. The letter formed part of a negotiation process which continued with the subsequent submission to HMRC, explicitly on a without prejudice basis, of a confidential report setting out further matters specific to the Appellants' marketing operations. In the circumstances, the letter of 22 November 2011 was a without prejudice communication and HMRC should not be allowed to adduce it as evidence in the proceedings.

37. Ms McCarthy submitted that the letter of 22 November 2011 did not contain the language of negotiation nor was it submitted in the context of an attempt to negotiate a settlement. Nothing in the letter represented a genuine offer to settle. The letter simply set out the facts and the Appellants' legal analysis while asserting that HMRC's analysis was wrong. At the highest, expressed the hope that negotiations might take place at some time in the future. The letter of 22 November 2011 is simply an exchange between the parties at the fact-finding stage and is not part of any without prejudice negotiation. Ms McCarthy stated that, in the event that the Tribunal holds that the letter of 22 November is a without prejudice communication, HMRC would submit a request for further and better particulars in relation to the matters stated in the letter.

38. Having reviewed the correspondence, I consider that, on balance, the letter of 22 November 2011 should be regarded as a without prejudice communication. I take account of the fact that the correspondence took place during the period when the first appeal was stayed to enable the parties to discuss matters to narrow or resolve the issues in the appeal. Specifically, the letter was in response to HMRC's offer, in their letter of 27 October, to engage in further discussions and "discuss a framework to avoid litigation". The letter of 22 November was stated to be without prejudice and, while setting out the facts and the Appellants' case, was clearly aimed at determining "genuine areas of agreement, difference and misunderstanding" with a view to "resolving this dispute". I understand the letter to be an 'opening shot' in negotiations. I consider that Mr Wood similarly understood the letter to be the start of negotiations. That is why he marked his reply "without prejudice" and confirmed that HMRC were willing to consider new proposals or information. In conclusion, I confirm that the letter of 22 November is a without prejudice communication and that HMRC are not permitted to adduce it as evidence in the proceedings. If, on further

consideration, they wish to do so then HMRC may submit a request for further and better particulars.

Decision

39. For the reasons set out above:

(1) the Appellants' application to withdraw their written requests to the Tribunal that these proceedings be excluded from potential liability for costs under rule 10(1) of the FtT Rules; and

(2) HMRC's application to admit the letter dated 22 November 2011 from Deloitte as evidence in the proceedings;

are refused.

Right to apply for permission to appeal

40. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2016