TC05464

Appeal number:TC/2013/03654

PROCEDURE – application for costs – whether respondents acted unreasonably in not seeking a stay of the appeal whilst they conducted a policy review – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

FOOTBALL MUNDIAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 25 July 2016

Mr Robert Toone of counsel instructed by Ian Spencer & Associates Limited for the Appellant

Mr Julian Winkley of HM Revenue & Customs Solicitor's and Legal Services Office for the Respondents

DECISION

Background

1. This is an application for costs made by the Appellant on 2 July 2016. The Appellant seeks costs pursuant to Tribunal Rule 10(1)(b) on the basis that the Respondents acted unreasonably in defending or conducting the proceedings. The Appellant is in business supplying the use of pitches and league management services for small sided competitive football matches. It operates in a small and very competitive business sector.

2. In September 2012 a decision of this Tribunal ("the F-tT") was released in *Goals Soccer Centres Plc v Commissioners for HM Revenue & Customs [2012] UKFTT 576 (TC)* ("Goals"). Goals was a competitor of the Appellant. The F-tT decided that for VAT purposes Goals made separate supplies of pitches and league management services. The supply of pitches was an exempt supply of land pursuant to Schedule 9 Group 1 Value Added Tax Act 1994. The supply of league management services was a standard rated supply. The F-tT went on to say that if there had been a single composite supply for VAT purposes, which both parties had been contending for, then it would have been an exempt supply of land.

3. Prior to 2012 the Appellant had been accounting for VAT on the basis that its supplies were standard rated. Following Goals, it requested a repayment of VAT of £502,441 on the basis that it was making exempt supplies of land. It also sought to cancel its VAT registration with effect from 2001, when it had first become registered, or to de-register with effect from 2012. Subsequently the Appellant sought to de-register from VAT with effect from 2013. The repayment request and the applications to cancel and/or de-register were all refused by the Respondents and those decisions were confirmed on review. The Appellant then lodged appeals with the F-tT in February and July 2013. The Respondents defended the appeals and the appeals proceeded in the normal fashion.

4. At some stage the Respondents commenced a policy review into the VAT treatment of supplies by businesses of pitches and league management services. The review resulted in the issue of a Revenue & Customs Brief in February 2014 following which the Appellant and the Respondents settled the appeals.

5. The Appellant contends that the Respondents ought to have applied for a stay of the appeals as soon as they were lodged because, unknown to the Appellant and the Tribunal, the Respondents were reviewing their policy in relation to the matters in dispute. Alternatively it is said that the Respondents ought to have told the Appellant and the Tribunal that it was reviewing its policy which would have enabled the Appellant to apply for a stay.

6. Rule 10(1)(b) provides as follows:

> " 10 (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)--

(a) …;

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

7. I was referred to various authorities and other decisions which have a bearing on the jurisdiction of the F-tT to make an order in respect of costs pursuant to Rule 10(1)(b) which I set out below. I have stated the factual background in a nutshell, with some simplification. I set out below my detailed findings of fact and my consideration of whether the conduct of the Respondents was unreasonable so as to engage Rule 10(1)(b).

Authorities

8. The approach to be taken by the F-tT in applications for costs under Rule 10(1)(b) was recently considered by the Upper Tribunal in *Marshall & Co v Commissioners for HM Revenue & Customs [2016] UKUT 0116 (TCC)*. It was summarised at [10] – [13] as follows:

" 10. The scope of Rule 10(1)(b) has been discussed in this Tribunal in *Catanã v Revenue and Customs Commissioners* [2012] UK 172 (TTC), where Judge Bishopp, at [14], stated:

> "Mr Catanã has made a number of points about the phrase "bringing, defending or conducting the proceedings". It is, quite plainly, an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side".

11. The reference to "the proceedings" in Rule 10(1)(b) is to proceedings before the Tribunal which has jurisdiction of the appeal, whilst it has such jurisdiction. In *Catanã* this Tribunal approved (at [9]) the following statements from *Bulkliner Intermodal Limited v HMRC* [2010] UK FTT 395 (TC):

> "….. It is not possible under the 2009 Rules … for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, nor, even if unreasonable behaviour were established for a period over which the Tribunal does have jurisdiction, can costs incurred before that period be ordered. In these respects the principles in *Gamble v Rowe* … remain good law. That is not to say that behaviour of a party prior to the commencement of proceedings can be entirely disregarded. Such behaviour, or actions, might well inform actions taken during proceedings, as it did in *Scott and anor (trading as Farthings Steak House) v McDonald (Inspector of Taxes)* [1996] STC (SCD) 381, where bad faith in the making of an assessment was relevant to consideration of behaviour in the continued defence of an appeal."

12. Where HMRC eventually withdraw from a case against a taxpayer, in relation to the pre-2009 costs regime the Special Commissioners held in *Carvill v Frost* [2005] STC (SCD) 208 that failure by HMRC properly to have reviewed its decision to pursue a claim would be relevant. The Commissioners stated (at [73]):

> "Mr Brennan [counsel for the Revenue] told us that it was no part of our role in a costs application to look into the internal workings of the Revenue and examine the nature and extent of an internal review; if the taxpayer has a claim for administrative or other failing then that must be pursued elsewhere. It seems to us, however, at least in the circumstances of this case, that where we are required to determine the reasonableness or otherwise of the Revenue's conduct in pursuing a case from which it eventually decided to withdraw, internal action, such as the adequacy or otherwise of a review of the issues on which the Revenue's case is founded and which is carried out whilst the appeal is within the jurisdiction of this Tribunal, is directly relevant to the findings we are required to make as to the Revenue's conduct."

13. Again in the context of the withdrawal by HMRC of a case before the FTT, the decision of this Tribunal in *Tarafdar (t/a Shah Indian Cuisine) v Revenue and Customs Comrs* [2014] UKUT 362 (TCC) is relevant. In *Market & Opinion Research International Ltd v Revenue & Customs Comrs* [2015] UKUT 12 (TCC), this Tribunal endorsed (at [18]) the test set out in *Tarafdar* at [34]:

> "In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) What was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?""

9. Mr Toone relied in particular on the passage cited from Carvill v Frost [2005] STC (SCD) 2008. In that case the Special Commissioners were concerned with appeals against assessments to income tax following wide ranging and complex investigations into the taxpayer's income in the United Kingdom. In 2000 the appeals were referred to the Special Commissioners. In December 2003 the Inland Revenue decided not to resist the appeal. The Special Commissioners found that that decision ought to have been taken nearly four years earlier and that the Inland Revenue had acted wholly unreasonably. No new information had come into their hands during that period. Part of the unreasonableness was their failure to conduct an internal review involving a thorough and objective analysis of the assessments.

10. Mr Winkley relied on the decision of the F-tT in Market & Opinion Research International Ltd (MORI). In particular he emphasised the cautionary approach in that decision to guard against the effect of hindsight and against the use of Rule 10(1)(b) as a "backdoor" method of costs shifting. That cautionary approach was endorsed by

the Upper Tribunal in MORI reported at [2015] UKUT 12 (TCC) at [27] and [28]. At [22] the Upper Tribunal also endorsed various propositions set out by the F-tT as follows:

> " 22. The FTT reviewed a number of decisions of the First-tier Tribunal and one of its predecessors, the Special Commissioners, as to the approach to be adopted in determining whether a party's conduct had been unreasonable. There was nothing controversial in these, and we set out the FTT's summary at [8]:
>
> "(1) It was to be noted that the test in the Tribunal Rules that a party or representative had "acted unreasonably" required a lower threshold than the costs awarding power of the former Special Commissioners in Regulation 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 which was confined to cases where a party had acted "wholly unreasonably". This was discussed in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395(TC) at [9].
>
> (2) It was suggested that acting unreasonably could take the form of a single piece of conduct. I was referred to [9] to [11] of the decision in *Bulkliner* by way of support for this proposition. In particular at [10] the decision highlights the actions that the Tribunal can find to be unreasonable may be related to any part of the proceedings "…whether they are part of any continuous or prolonged pattern or occur from time to time".
>
> (3) The point is I think mentioned in the context of contrasting the Tribunal's rules in relation to acting unreasonably across the span of proceedings with the former Special Commissioners' costs power which was in relation to behaviour which was "in connection with the hearing in question". Having said that there would not appear to be any reason why the proposition that a single piece of conduct could amount to acting unreasonably. It will of course rather depend on what the conduct is.
>
> (4) Actions for the purpose of "acting unreasonably" also include omissions (*Thomas Holdings Limited v HMRC* [2011] UKFTT 656 (TC) at [39].)
>
> (5) A failure to undertake a rigorous review of assessments at the time of making the appeal to the tribunal can amount to unreasonable conduct (*Carvill v Frost (Inspector of Taxes)* [2005] STC (SCD) 208 and *Southwest Communications Group Ltd v HMRC* [2012] UKFTT 701 (TC)) at [45]).
>
> (6) The test of whether a party has acted unreasonably does not preclude the possibility of there being a range of reasonable ways of acting rather than only one way of acting. (*Southwest Communications Group Ltd* at [39]).
>
> (7) The focus should be on the standard of handling of the case rather than the quality of the original decision (*Thomas Maryam v HMRC* [2012] UKFTT 215(TC)).
>
> (8) The fact that a contention has failed before the Tribunal does not mean it was unreasonable to raise it. In *Leslie Wallis v HMRC* [2013] UKFTT 081(TC) 30 Judge Hellier stated at [27]:
>
> > "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable…before making a wrong assertion constitutes

unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong…"

(9) As cautioned by Judge Brannan in *Eastenders Cash and Carry Plc v HMRC* [2012] UKFTT 219 (TC) at [91] Rule 10(1)(b) should not become a "backdoor" method of costs shifting.""

11. None of these authoritative statements of the law and the principles to be applied were in dispute and they are binding upon me. I approach this application on the basis of the law and principles stated above.

12. I should add for the sake of completeness that the Upper Tribunal in MORI also identified that the three stage process in Tarafdar is a gateway to the F-tT's discretion as to costs. At [15] it stated:

" 15. The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise."

13. There may be cases where a party is found to have acted unreasonably in some respect, but the F-tT still has a discretion whether to make an order for costs against that party and as to the scope of any such order.

Findings of Fact

14. The approach to be taken in applying Rule 10(1)(b) was not in dispute. The application of the Rule to the facts of the present appeals was very much in issue. I therefore make the following findings of fact as to the circumstances in which the appeals came to be made, the way in which they proceeded before the F-tT and the circumstances in which they came to be resolved. These findings are based on the documents relied on by both parties at the hearing before me. I did not hear any oral evidence.

15. The Appellant had been registered for VAT since 2001 and had been accounting for VAT at the standard rate on its supplies in accordance with HMRC's policy then applicable. At all material times for the purposes of the appeals the Appellant has been represented by Mr Ian Spencer of Ian Spencer & Associates Ltd ("ISA").

16. Following the decision in Goals the Appellant made a repayment claim on 15 October 2012 as described above. On the same date it also applied to be de-registered from VAT with effect from 1 September 2012 and separately applied for its VAT registration to be cancelled retrospectively from the date of registration in 2001. The claim and the applications to de-register and/or cancel the VAT registration were refused by the Respondents and those decisions were upheld following a review on 26 April 2013. On 13 February 2013 the Appellant made a further application to de-register with effect from 6 February 2013 on the basis that it had altered its business structure from that date including using two separate contracts for supplies in place of what had previously been a single contract. That application was also refused with the decision being upheld on a review dated 21 June 2013.

17. In relation to each of these decisions the Respondents' position was that the Appellant made a single taxable supply of "small sided football league management services" which were standard rated.

18. The Appellant appealed all the decisions to the F-tT. Notices of appeal against refusal of the claim and refusal to cancel the registration and/or de-register the Appellant were submitted on 23 May 2013. A notice of appeal against the later refusal to de-register was submitted on 17 July 2013.

19. The grounds of appeal can be summarised as follows:

(1) The Appellant contended that it made a single supply of pitch hire which was exempt.

(2) In the alternative, elements of the supply should be apportioned in accordance with the approach of the CJEU in *Talacre Beach Caravan Sales Ltd v C & E Commissioners Case C-251/05* with the pitch hire being exempt and the league management services standard rated.

(3) The Appellant joined issue with the Respondents in so far as the review decisions sought to distinguish factually the Appellant's position from that of Goals. It also raised issues of equal treatment and fiscal neutrality.

20. By 6 September 2013 all three appeals had been consolidated. On that date the Tribunal directed the Respondents to serve a Statement of Case within 60 days.

21. On 12 September 2013 the Respondents' Solicitor's Office applied for a stay of proceedings until 60 days after the release of a decision in another F-tT appeal of Champion Soccer Ltd. The reasons for requesting the stay were as follows:

> "1) The Commissioners are reviewing a number of appeals concerning the same subject matter following the decision of the [F-tT in Goals].
>
> 2) Following that decision the Commissioners have sought further disclosure of information from appellants and have been involved in considering the further documentation and representations made. The appellants in this appeal will be asked to make similar disclosures."

22. In the event the application for a stay was withdrawn by letter dated 24 September 2013. The Respondents stated that it had been made without knowledge of the direction of the Tribunal dated 6 September 2013 which gave the Respondents 60 days to serve a Statement of Case. I infer that the Solicitor's Office considered that the 60 day period would give the Respondents sufficient time to review the appeals.

23. On 5 November 2013 the Respondents served their Statement of Case. The Statement of Case maintained various factual differences with Goals, including the fact that Goals owned all its sites and hired pitches to customers for a variety of purposes whereas the Appellant did not own any sites itself and hired pitches from local authorities and sports centres. The Respondents asserted that there was a single supply of league management services. In the alternative the Respondents contended

that the Appellant was making an exempt supply of pitch hire and a separate standard rated supply of league management services in line with the decision in Goals.

24. On receipt of the Statement of Case the Tribunal issued standard directions on 12 November 2013 requiring the parties' lists of documents by 20 December 2013 and witness statements by 17 January 2014. The Respondents stated that they would not be relying on any witness evidence. The Appellant's served their witness statements on 11 February 2014 following a short extension of time.

25. On 17 February 2014 the Respondents published Revenue and Customs Brief 8 (2014): Sports Leagues ("the Brief"). I shall return to the terms of the Brief in detail below.

26. On the same date, and presumably without knowledge of the Brief because there was no reference to it, ISA wrote to the Respondents' Solicitor's Office (Ms Bansal). The letter was concerned with the status of supplies since 6 February 2013. The Appellant had changed to some extent the basis on which it operated its business with effect from that date. ISA contended that since that date the Appellant had been making separate supplies of exempt pitch hire and standard rated league management services. It was further contended that the supplies of league management services were below the de-registration threshold and therefore the Appellant should be de-registered with effect from 6 February 2013. The letter concluded as follows:

> "Further, I enclose 3 amended notices of appeal which include the ground of appeal that [the Appellant] has made mixed supplies of exempt pitch hire and standard rated league management services."

27. The draft amended notices of appeal contained in substance the following amendments:

> "Alternatively, the Appellant has made mixed supplies identical or very similar to those supplied by [Goals], that is an exempt supply of pitch hire and a standard rated supply of league management services."

28. In the third notice of appeal the same amendment was made, although it was stated to be "for the avoidance of doubt".

29. ISA copied their letter to the Tribunal and on 5 March 2014 the Tribunal wrote to the Respondents asking whether, in the light of ISA's correspondence they were prepared to agree to de-registration. The Respondents replied on 7 March 2014 stating that they were unclear as to the Appellant's position. They stated as follows:

> "The Appellant also appears to wish to consider an apportionment of income on the basis of the decision in [Goals] which is a decision that is based on an entirely different analysis of the supply of services in question than that pursued in the Appellant's appeal."

30. The Respondents objected to the amendment, but stated that they had asked the Appellant to provide evidence of a fair and reasonable apportionment. They also

suggested that the appeal be stayed for the parties to consider the evidence submitted. In the event the parties continued to negotiate, including the method of apportionment of the income between exempt and standard rated supplies. A joint application for a stay was submitted to the F-tT so that discussions regarding a resolution of the issues could take place. I was not taken to the negotiations in detail but by February 2015 the parties had agreed to settle the appeals on the basis of an agreed apportionment of income. The Appellant remained registered for VAT, which appears in part to have been the result of the treatment of referee fees charged to customers.

31. The above findings deal essentially with the undisputed progress of the appeals. It is now necessary to overlay on that chronology various pieces of correspondence which are relied on by the parties as being highly significant to the issue of costs.

32. When the Respondents withdrew their application to stay the appeal in September 2013 there was a chain of emails and correspondence between ISA and Ms Bansal.

33. On 26 September 2013 ISA asked for clarification of the reference to Champion Soccer Ltd in the application. Ms Bansal stated in reply that the appeal of Champion Soccer was stood over and no decision had been released by the F-tT. She stated that the Respondents' intention was for the Appellant's appeal to be stood over behind Champion Soccer while she got full instructions from her client. ISA also wanted to know what information the Respondents required from the Appellant as intimated in the application. Ms Bansal set out the documentation that was required, if it had not previously been supplied. ISA thought that all information had been supplied save in respect of the arrangements between the Appellant and the persons supplying them with the land and Mr Spencer would chase his client for that documentation.

34. On 9 October 2013 Ms Bansal wrote to ISA. There were other appellants with similar appeals before the F-tT including Champion Soccer and this appears to have been a pro forma letter sent to various appellants. The letter ("the October Letter") is important to Mr Winkley's submissions and I shall quote its contents in full:

> " I am writing to inform you of the outcome of a review of the small sided football leagues following the decision by the FTT in [Goals]. HMRC's view is as follows:
>
> 1) where an appellant providing football league services to its membership is able to establish that they make an exempt supply of land by way of pitch hire, as well as a separate standard rated supply of league management services, the Commissioners will accept an appropriate apportionment of income between the exempt and taxable supplies in settlement of any outstanding assessments, or resultant VAT registration/de-registration issues. This position is in line with the decision of the FTT in [Goals].
>
> 2) where an appellant maintains that they make a 'single composite exempt supply' consisting of pitch hire and league management services to their customers, the Commissioners will defend any appeal based on such grounds. The Commissioners are of the view that any comments in relation to a 'single composite exempt supply' in [Goals] are obiter and pertinent only to the facts of that particular case where the trader operated from his own premises.

> In light of the outcome of the review by HMRC (see above), you and your client may wish to re-consider the position and confirm at this early stage whether you still wish to proceed with your appeal **on the grounds as stated in your Notices of Appeal**."
>
> Emphasis added

35. ISA replied on the same date. Mr Spencer stated that he was having a conference with counsel the following week "but I think I know what the outcome will be". There was a substantive response on 21 October 2013. ISA referred to the first paragraph of the letter as setting out HMRC's change of policy with respect to small sided football leagues. He continued:

> " I presume, therefore, the purpose of your letter is to inform us of that change and thereafter to apply it to my client's position. In light of that change and the documentation provided to you by my client supporting its application for de-registration with effect from 6 February 2013 which clearly demonstrates that it makes separate supplies of league management services and exempt pitch hire, I would therefore be grateful if the Commissioners would now confirm that the decision to reject that application … will be withdrawn and my client will be de-registered with effect from 6 February 2013.
>
> …
>
> I will also be writing to you separately with regard to paragraph 2) of your letter with regard to the other decisions currently appealed against, the contents of which are both disappointing and difficult to follow. I have no doubt that the views of HMRC expressed in it, like the views expressed and urged in the Tribunal in [Goals] will in due course be rejected. For the avoidance of doubt, my client is proceeding with this appeal."

36. The reference to a conference with counsel was a reference to Mr Toone who had been instructed since about May 2013. On 7 November 2013 the Appellant entered into a conditional fee arrangement with Mr Toone.

37. In fact ISA did not write separately in relation to paragraph (2) of the letter. Ms Bansal responded on 12 November 2013 stating that it was not clear whether the Appellant was maintaining its position that it makes a single exempt supply and always has done, or whether it makes separate supplies, and always has done. She invited evidence that since 6 February 2013 the supply of league management services fell below the de-registration threshold. Finally she stated as follows:

> " As regards the period from commencement of registration in 1 June 2001 to 6 February 2013, unless you confirm the position otherwise, we propose to proceed with the appeals to the [F-tT] on the basis that your client contends it made a single exempt supply of small-sided football services."

38. It does not appear that there was any further correspondence between the parties, save in relation to complying with the directions released on 12 November 2013, until the release of the Brief.

39. The Brief, referred to above and published on 17 February 2014, provided as follows:

> " **Introduction**
>
> This brief announces a change in [HMRC] policy following the [F-tT decision in Goals] …
>
> **Decision of the FTT**
>
> The FTT found that there were 2 separate supplies being made:
>
> - a supply of land (the pitches) which was exempt as the relevant conditions were met, and
>
> - a supply of administration and management services which was standard rated.
>
> **HMRC Policy**
>
> HMRC accepts that the decision of the FTT is applicable to all traders who operate in circumstances akin to [Goals]. This includes traders who hire the pitches from third parties such as local authorities, schools and clubs …
>
> **Accounting for VAT**
>
> Where a single price is charged to the customer, businesses will need to determine the value of the 2 different supplies to establish the correct amount of VAT due. Whatever method is adopted to do this, there must be sufficient documentary evidence kept to show how a business has arrived at a fair and reasonable apportionment …"

40. I was told that the Brief replaced a previous Revenue & Customs Brief 04/11. I was not taken to its terms but for the sake of completeness I note that an extract was referred to as follows by the F-tT in Goals:

> " [HMRC] consider that the supplies made by sports league providers consist of a bundle of elements, which are integral to each other, but that it cannot be said that there is one principal element to which all others are ancillary. In these circumstances, it is necessary to establish the character of the overarching supply to determine whether it falls within the exemption. In HMRC's view, the overarching supply is of participation in a sports league, not a supply of land.
>
> It is therefore HMRC's view that the supplies made by commercial sports league providers are liable to the standard rate of VAT."

41. As noted above, ISA emailed Ms Bansal on the same date as the Brief was published raising the multiple supply argument and enclosing draft amended grounds of appeal. ISA then emailed Ms Bansal on 25 February 2014 following release of the Brief. The email was expressed to be without prejudice save as to costs. In light of the Brief ISA sought to clarify that the Respondents accepted that 1) from 6 February

2013 onwards there were clearly two separate supplies and the value of standard rated supplies were below the de-registration threshold, and 2) prior to that date it made two separate supplies. He continued:

> " Therefore whilst we remain of the opinion that the Tribunal will accept our primary argument, ie that our client makes a composite supply of which any ancillary elements are so insignificant to render the supplies it makes … wholly exempt … a practical solution to our client's appeals would be for both the Commissioners and our client to agree a mutually acceptable way forward in line with the Brief 08/14 …"

42. Thereafter negotiations continued and eventually the appeals were settled on the basis that there were two separate supplies and on the basis of an agreed apportionment. In the event the agreed repayment was in the sum of £534,396. The Appellant did not de-register because in the event, as I understand it, charges for referee fees were included in the Appellant's standard rated supplies which meant it remained over the de-registration threshold.

43. Finally I should say something in relation to the Respondents' policy review. For the purposes of the present application the Appellant asked the Respondents to disclose "the internal timetable of discussions which went on within HMRC after the Goals decision, until the issue of Business Brief 08/14". The Respondents declined to disclose any details of their policy review including the timeline on the grounds of confidentiality.

Reasons

44. Having set out the progress of the appeals in detail, the Appellant's case is relatively straightforward. It says that the Respondents ought to have applied to stay the proceedings as soon as the appeals were notified pending the result of their policy review. Alternatively the Respondents ought to have informed the Appellant that they were conducting a policy review in which case the Appellant would have applied for a stay. The failure to do one or the other was unreasonable. The Respondents were in breach of Rule 2(4) of the Tribunal Rules which requires the parties to help the Tribunal to further the overriding objective of dealing with cases fairly and justly. The Respondents' failure led the Appellant to incur costs in pursuing the appeals which would otherwise have been avoided.

45. Tribunal Rule 2(2) provides that the overriding objective of dealing with cases fairly and justly includes:

> " (a) Dealing with the case 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…"

46. Mr Toone submitted that the overriding objective was the touchstone of reasonableness. In the present case the Appellant had been kept out of significant sums of money in the period since 2001 in what was a highly competitive business.

The Respondents ought to have had regard to the Appellant's resources and applied for a stay. Their failure to do so led the Appellant to incur costs in proceeding with the appeal, including the advice of Mr Toone and ISA and preparation and service of its witness statements.

47. The focus of Mr Toone's submissions was the policy review being undertaken by the Respondents. He did not suggest that the Respondents should have disclosed the contents of the policy review, but that they should have disclosed to the Appellant the fact that it was taking place and for the purposes of this application the dates on which it was taking place. In the absence of information from the Respondents as to the dates of the policy review he invited me to accept that the policy was being reviewed at least some time prior to notification of the appeals in 2013 and that the policy review continued until the issue of the Brief.

48. Mr Winkley submitted, that the Respondents are "entitled to do their thinking in private". I accept that broad submission. However Mr Toone was not concerned with identifying the Respondents' thought processes in conducting their policy review. He invited me to assume for the purposes of this application that the policy review was in progress at the time the Appellant lodged its notices of appeal, and that it continued until the new policy was publicly announced. I shall proceed on that basis.

49. Mr Toone relied on the decision of the Special Commissioners in Carvill v Frost, in particular the extract cited at [12] of Marshall & Co v Commissioners for HM Revenue & Customs. The reference to a review in that extract was not to a policy review applicable to taxpayers generally. It was to an internal review of specific assessments. It seems to me that the relevance of Carvill v Frost is simply as part of the development of the law which led to Tarafdar and MORI.

50. The three stage test set out by the Upper Tribunal in Tarafdar requires some modification in the present context. This is not a case where the decisions appealed against were simply withdrawn. The Respondents are not criticised for resisting an obviously meritorious appeal instead of withdrawing earlier. The Appellant's case at the time the appeals were lodged was that there was a single exempt supply. The Respondents' case was that there was a single standard rated supply. The appeals were settled on the basis of separate exempt and standard rated supplies. The real issue before me is the reasonableness or otherwise of the Respondents conduct in relation to obtaining a stay pending the outcome of their policy review. I consider that I should approach that issue by reference to the following matters:

(1) What were the circumstances in which the appeals proceeded and in which the parties came to settle the appeals?

(2) Having regard to those circumstances, should the Respondents have applied for a stay of the appeals pending the outcome of their policy review prior to the time when the appeals were settled? Alternatively should they have notified the Appellant that they were undertaking a policy review?

(3) If so, was it unreasonable of the Respondents not to have applied for a stay of the appeals, or at least notified the Appellant that they were undertaking a policy review.

51. It can be seen by inference from my primary findings of fact that what ultimately prompted the settlement was the issue of the Brief in February 2014. I have set out the circumstances in which the Brief came to be issued, albeit without regard to the internal policy processes of the Respondents. Neither party invited me to have regard to such internal policy processes or to the way in which the policy might have developed. Indeed there was no evidence before me in that regard.

52. On the basis that there was a policy review in progress at the time the appeals were lodged it was clearly an option for the Respondents to apply for a stay of the appeals, or to notify the Appellant that the policy review was taking place. My experience in this tribunal is that on occasion such applications are made by the Respondents. An application for a stay was made on 12 September 2013. Whilst that application made no reference to a policy review, it was clear that the Respondents were at least considering the application of Goals to a number of businesses in the relevant sector with appeals before the F-tT. The reason the application was withdrawn was because the Solicitor's Office considered that they would have enough time before service of the Statement of Case to review those appeals including the Appellant's appeals.

53. Mr Toone did not accept that the October Letter set out the Respondents' position clearly, nor that it expressed the same position as was later set out in the Brief. He pointed to the fact that the Statement of Case served 4 weeks later alleged that the Appellant's circumstances were not identical to Goals and that the supply made by the Appellant was a single standard rated supply. The allegation of a single standard rated supply contradicted the policy later set out in the Brief. Further, the Respondents did not accept in the October Letter that the Appellant's supplies should be apportioned. Mr Toone also submitted that it was not clear whether there had been a policy change between October 2013 and February 2014.

54. I accept that the October Letter required appellants to establish that they were making two separate supplies if income was to be apportioned between exempt and standard supplies. The reference to "an appellant" throughout the letter clearly shows that it was a pro forma letter and was being sent not only to the Appellant but also to other appellants in the same business sector.

55. The October Letter was inviting the Appellant to substantiate its claim that it was making two separate supplies. In other words the Respondents were not accepting that the Appellant did make two separate supplies. However the letter clearly stated in paragraph (1) that the Respondents were adopting a position in line with Goals. In other words subject to the facts, appellants were being given an opportunity to demonstrate that they were making separate exempt and standard rated supplies. It is clear from the October Letter that such an approach would apply not only for the future but in relation to assessments for previous accounting periods and in relation to decisions on registration and de-registration. It is also clear from paragraph (2) of the

October Letter that the Respondents would not accept that any traders made single exempt supplies.

56. Mr Spencer's response on the same date as the October Letter was: "I think I know what the outcome will be". Assuming that to mean that the Appellant was rejecting the view being put forward by the Respondents, the response suggests that the Appellant was steadfastly maintaining its argument of a single exempt supply.

57. I do not find the October Letter "difficult to follow" which was a criticism made of the letter by ISA in their written response. It is evident from ISA's written response on 21 October 2013 that they understood the Respondents were changing their policy with regard to small sided football league businesses. The decisions under appeal did not suggest in terms that Goals was wrongly decided and certainly there had been no appeal against the decision in Goals. Instead the decisions sought to factually distinguish the Appellant's position from that of Goals. Be that as it may, I cannot see why ISA considered that paragraph (1) of the October Letter related only to the question of de-registration, in other words the position for the future. Paragraph (1) said in terms that the Respondents would accept an apportionment of income in settlement of any outstanding assessments where separate supplies were being made.

58. Paragraph (2) of the October Letter concerned only the argument being made by appellants that there was a single exempt supply. In their written response ISA stated that they would address this aspect separately. For some reason ISA considered that paragraph (2) applied to the decisions other than de-registration, which I take to mean the repayment claim and the decision not to cancel the registration with effect from 2001, in other words the historical position. In the event ISA never wrote separately in relation to paragraph (2).

59. It seems to me that ISA misconstrued the October Letter. It was not simply looking at the future, it was looking at the past. Paragraph (1) was not limited to the question of the registration. It was also relevant to the repayment claim.

60. The last paragraph of the October Letter expressly asked the Appellant to confirm whether it wished to proceed with the appeal on the grounds as stated in the notices of appeal. It is unfortunate that the Appellant did not address at that stage the question of whether it wished to amend its grounds of appeal to pursue the multiple supply case. It is not clear what prompted the Appellant to seek to amend its grounds of appeal on 17 February 2014 if, as I have assumed it was not the Brief.

61. The Respondents sought to make clear that the content of the October Letter related to the historical position in their letter dated 12 November 2013. They understandably wanted to clarify the Appellant's position as between single exempt supplies and multiple supplies and as between the past and the present. Apparently there was no response to that letter.

62. I accept that the Respondents' Statement of Case served a few weeks later included as the Respondents' primary argument that there was a single standard rated supply. It seems to me that their approach in the Statement of Case reflected the

grounds of appeal which the Appellant was pursuing, namely that there was a single exempt supply. Having said that, the Respondents put forward an alternative case that there were multiple supplies. To the extent therefore that the primary argument contradicts the policy as ultimately stated in the Brief, it does so in circumstances where the Appellant was maintaining a single exempt supply.

63. Mr Toone submitted that the contents of the Brief came as a complete surprise to the Appellant and that it was a complete departure from the Respondents' case hitherto. I do not accept that was the case.

64. The Brief accepted the application of Goals to all traders operating in "circumstances akin to Goals". That is entirely consistent with the October Letter. The Brief also stated that evidence to support the apportionment of a single price to exempt and standard rated supplies would be required. Again, that is consistent with the October Letter.

65. In my view the position taken by the Respondents in the October Letter was no different, in any material sense, to the policy announced in the Brief.

66. The Brief did expressly provide that traders hiring premises from third parties would be treated as akin to Goals. However it did not say anything about circumstances where a trader had a single contract for the supply of services. Goals involved two separate contracts for pitch hire and league management services whereas until 6 February 2013 the Appellant had a single contract. The extent to which the Appellant might be said to be operating in circumstances akin to Goals therefore remained to be negotiated.

67. The Appellant's application in February 2014 to amend its grounds of appeal recognised the difference between a transaction involving two separate supplies taxable at different rates and a transaction involving a single supply but where different rates apply to different elements in that supply. The latter situation is based on the decision of the CJEU in Talacre, referenced by the F-tT in Goals. Procedurally, however, this was the first time that the Appellant had put forward an alternative case that it made separate exempt and standard rated supplies.

68. I agree with Mr Toone that there was no sensible reason to object to the proposed amendment. But that is not a criticism relied upon by the Appellant in the present application as being unreasonable.

69. It is clear that the Appellant's argument until February 2014 was that it was making a single exempt supply. That was the argument the Respondents were meeting in their Statement of Case. The Respondents identified an alternative position that there may, in the circumstances, be two separate supplies. However it was only when the Appellant applied to amend its grounds of appeal that it sought to put forward the alternative argument of two separate supplies. Even then, correspondence shows that the primary argument remained a single exempt supply.

70. I do not consider it was unreasonable for the Respondents to press on with the appeal without applying for a stay when they were meeting the Appellant's argument

that there was a single exempt supply and no alternative argument had been put forward.

71. The October Letter ought to have been viewed as an invitation to enter into negotiations with the Respondents about multiple supplies and apportionment. Unfortunately ISA did not construe it as such. In light of the October Letter I consider that the Appellant was at that stage in as good a position as the Respondents to seek a stay of the appeal whilst the parties entered into negotiations.

72. If the Appellant was in any doubt that the Respondents were open to negotiations then such doubt ought to have been dispelled when Ms Bansal wrote on 12 November 2013 seeking to clarify the Appellant's position. Again, it is unfortunate that there was no substantive response to that letter.

73. Mr Toone submitted that none of this is of any significance in considering the Appellant's application for costs. I do not agree. The Appellant's case is that the Respondents ought to have applied for a stay pending the policy review or notified the Appellant that there was a policy review. There has never been any realistic suggestion that the policy review might have led the Respondents to accept that any appellants could be making single exempt supplies. The Respondents' position in that regard had been made clear in Goals and in the October Letter. On that basis the Respondents were entitled to continue to defend the appeals. More importantly, a stay would have served no purpose in circumstances where the appeals were being pursued on the basis of a single exempt supply, or a single supply which was partly exempt and partly standard rated relying on Talacre.

74. In the circumstances I am not satisfied that the Respondents should have applied for a stay of these appeals pending the outcome of their policy review, nor that it was unreasonable not to notify the Appellant that it was conducting a policy review.

75. I reach that conclusion without considering as a matter of principle whether the Respondents are entitled to keep confidential the fact that they are conducting a policy review. I can see reasons why that might be desirable but I did not hear full argument on the point. It seemed to me when Mr Winkley submitted that the Respondents are entitled to do their thinking in private he was addressing his submission to the disclosure sought by the Appellant as to the timeline of the policy review. Clearly if the Respondents were expected to apply for a stay because a policy review was being conducted they would have to disclose the existence of that policy review.

76. Finally, even if I was satisfied that the Respondents had been unreasonable in not applying for a stay or notifying the Appellant that it was conducting a policy review I would still have to consider whether, as a matter of discretion, I should direct them to pay any part of the Appellant's costs. Taking all the circumstances into account I would not make such a direction. If the Appellant had fully engaged with the October Letter then I see nothing in the position of either party which would have prevented a settlement at that stage along the lines of the settlement which was eventually agreed.

Conclusion

77. For the reasons given above I refuse application for costs.

78. 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.

JONATHAN CANNAN

TRIBUNAL JUDGE

RELEASE DATE: 1 NOVEMBER 2016