[2017] UKFTT 099 (TC)

TC05616

Appeal number: TC/2014/0506

PROCEDURE - application for costs- rule 10(1)(b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009- whether HMRC acted unreasonably in defending or conducting the proceedings

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRITISH-AMERICAN TOBACCO (HOLDINGS) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

The application was determined on the basis of written submissions

Philip Moser QC, and Brendan McGurk instructed by Hogan Lovells for the Appellant

Melanie Hall QC, Eric Metcalfe and David Gregory, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an application for costs made by the appellant ("BAT") in respect of a case management hearing ("CMH") on 6 June 2016.

2. In short, BAT applies for its costs under rule 10(1)(b) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules"). The appellant argues that HMRC acted unreasonably in bringing or conducting the proceedings.

The statutory provisions and relevant principles

3. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") provides that, subject to a Tribunal's rules, the "costs of and incidental to...proceedings in the First-tier Tribunal" shall be in the discretion of the Tribunal. Rule 10 of the FTT Rules provides, so far as relevant:

> "(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)-
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> …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;"

4. The effect of this provision is, therefore, that it is only if a party has acted unreasonably that a discretion to award costs can arise.

5. The principles to apply in deciding whether a party acted unreasonably were helpfully summarised by Judge Raghavan in *Market & Opinion Research International Ltd v Revenue & Customs* [2013] UKFTT 475(TC) 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].
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> (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
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> "…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 81(TC) 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."

6. This summary was approved by the Upper Tribunal in that case, [2015] UKUT 12 (TC) at [23]. The Upper Tribunal added:

"We would add only what this Tribunal (Judge Bishopp) said in *Catanã v Revenue and Customs Commissioners* [2012] STC 2138, at [14] concerning the phrase "bringing, defending or conducting the proceedings" in rule 10(1)(b):

'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 the proceedings, for example by persistently failing to comply with the rules or directions to the prejudice of the other side.'"

7. The Upper Tribunal went on to describe the test as follows at [49]:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. That is an imprecise standard, but it is the standard set by the statutory framework under which the tribunal operates. It would not be right for this Tribunal to seek to apply any more precise test or to attempt to provide a judicial gloss on the plain words of the FTT Rules."

8. The Upper Tribunal in *Market& Opinion Research* at [55] and [56] also made it clear that the attributes of the party concerned should be taken into account:

> "55. There is one point we should make in this respect. In his skeleton argument, Mr Bremner submitted that if it were suggested that HMRC should be subjected to some higher standard than other litigants, then HMRC would submit that such a suggestion was wrong. There was, it was argued, no justification for subjecting different litigants to different standards.
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> 56. To the extent this argument is concerned with the application of a test of reasonableness, and not some different or higher standard, we agree. However, the test of reasonableness must be applied to the particular circumstances of a case, which will include the abilities and experience of the party in question. The reasonableness or otherwise of a party's actions fall to be tested by reference to a reasonable person in the circumstances of the party in question. There is a single standard, but its application, and the result of applying the necessary value judgment, will depend on the circumstances."

9. I should note two important limitations on the Tribunal's powers under section 29 TCEA and rule 10(1)(b), although I consider that neither limitation is relevant in this case. The power to award costs is limited to costs "of and incidental" to the proceedings, rather than costs in respect of other matters, such as a prior investigation by HMRC: *Catanã v HMRC* [2012] STC 2138 at [7]. In this case this issue does not arise since it is clear that the costs claimed relate to the period after the notice of appeal was filed.

10. Secondly, the power to award costs under rule 10(1)(b) relates to unreasonable conduct in bringing, defending or conducting proceedings. As explained in *Catanã* at [8] and [9], whilst conduct or actions prior to commencement of an appeal might inform actions taken during the proceedings, unreasonable behaviour prior to commencement of proceedings cannot be relied upon to claim costs under rule 10(1)(b). In the present case the conduct of which BAT complains took place after proceedings had been commenced so this second limitation does not apply.

11. Finally, I should also refer to two additional decisions of this Tribunal. First, in *Roden and Roden v HMRC* [2013] UKFTT 523 (TC) Judge Mosedale, having

observed that the Tribunal in *Leslie Wallis* was of the opinion that a party would not be acting unreasonably when pursuing a case without merit unless he ought to have known his case was without merit, stated at [15]:

> 12. "... The Tribunal should not be too quick to characterise pursuing what is found to be an unsuccessful case is unreasonable behaviour: the Tribunal rules provide for a no-costs regime in virtually all tax cases (and the exception for complex cases does not apply in this case). So if in this case HMRC's view had no reasonable prospect of success, HMRC would have been acting unreasonably if they ought to have known this but not otherwise. In considering whether HMRC ought to have known whether the case had a reasonable prospects of success, I consider that I should consider HMRC as a whole and not just the individual officer presenting the case."

13. I respectfully agree with Judge Mosedale's comments.

14. Secondly, in *John Scofield v Revenue & Customs* [2012] UKFTT 673 (TC) I noted that:

> "…Rule 10 (1)(b) must also be read in the light of the overriding objective (Rule 2 (1)) of the Rules which is "to enable the Tribunal to deal with cases fairly and justly." In particular, Rule 2 (4) provides that:
>
> "Parties must
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.""

Background

15. At the CMH on 6 June 2016, I heard three applications: one application was made by BAT (dated 28 April 2016) and the other applications were made by HMRC (dated 1 April 2016 and 23 May 2016). In view of the fact that the substantive hearing was scheduled to take place on 18 – 29 July, I issued brief directions on 9 June 2016.

16. Although originally listed for two days, a number of issues concerning the applications were agreed between the parties and, in the event, the CMH lasted only one day.

17. There were three main issues considered at the CMH.

18. First, HMRC contended that certain Parliamentary Materials (see below) should be excluded from the evidence at trial. BAT's costs application is made on the basis that HMRC's position that this evidence should be excluded was unreasonable. HMRC also sought the exclusion of the evidence of Ms Udicki, one of BAT's witnesses, referring to the Parliamentary Materials.

19. Secondly, whether certain documents which were dated after the issue of HMRC's Penalty Notice (which assessed BAT to a penalty of £650,000) should be excluded, as BAT contended, from the evidence at trial.

20. Finally, HMRC sought a direction from the Tribunal in relation to confidential material relating to a third party tobacco manufacturer, "Company Q".

21. The Parliamentary Materials to which HMRC's application referred included a wide range of documents, as follows:

(1) evidence before Parliamentary committees, records of meetings of those committees and report from a Parliamentary committee;

(2) records of consultations by HMRC with the Tobacco Manufacturers Association ("TMA") at the time of the publication of the Finance (No.2) Bill 2006 (which added the relevant penalty provisions to the Tobacco Products Duty Act 1979), the TMA's responses and correspondence between HMRC and the TMA;

(3) the Explanatory Notes to the Finance Bill (No.2) 2006;

(4) HMRC's Regulatory Impact Assessment in relation to the Finance Bill (No.2) 2006;

(5) extracts from reports and memoranda of the Chartered Institute of Taxation in relation to the Finance Bill (No.2) 2006; and

(6) extracts from *Hansard* of the debate on the Finance (No.2) Bill 2006.

22. I decided to admit the Parliamentary Materials. I rejected HMRC's argument that the volume of Parliamentary Materials was excessive. The relevant extracts from Hansard were potentially admissible under the rule in *Pepper v Hart* [1993] AC 593 and it was inappropriate to exclude this material at a CMH; instead, I decided that BAT should be allowed to advance an argument based on *Pepper v Hart* at the hearing. In relation to the remaining material, I decided that this was admissible either to establish the statutory context or the mischief at which the relevant legislation was directed. In addition, it seemed to me that some of the material could potentially be relevant to the question of the reasonableness of the appellant's actions or to the quantification of any penalty. I regarded it as premature to exclude this evidence at the CMH stage.

23. I rejected BAT's application to exclude evidence upon which HMRC relied comprising documents which post-dated the date of the penalty on the basis that it may elucidate or confirm the reasons for the penalty decision.

24. Thirdly, I gave a direction to the effect that the confidential bundle of documents relating to Company Q should be disclosed on a redacted basis as proposed by HMRC.

25. BAT had also made an application to establish a "confidentiality ring" but, in the event, BAT did not pursue this at the CMH.

26. Finally, BAT gave an undertaking at the CMH to destroy inadvertently disclosed confidential information, having previously disputed that it was obliged to do so.

Correspondence between the parties concerning Parliamentary Materials

27. BAT referred to the correspondence between the parties concerning the use of Parliamentary Materials.

28. In a letter dated 25 January 2016, HMRC expressed concern about quotations in Ms Udicki's evidence from the Regulatory Impact Assessment, from the Explanatory Notes to the Finance Bill (No.2) 2006 and from Parliamentary debates on the Bill. The letter referred to the rule in *Pepper v Hart* and attempted to apply that principle to the Explanatory Notes.

29. Hogan Lovells replied to HMRC on 2 February 2016. Their letter explained that Ms Udicki's evidence referred to the Regulatory Impact Assessment, Explanatory Notes and Parliamentary debates because these "shaped BAT's understanding of the scope and purpose" of the relevant penalty provisions "around the time that these provisions were introduced." Accordingly, Hogan Lovells argued that the documents formed part of the factual context for the discussion between the parties over the years and "for the actions taken by BAT to discharge those obligations". Hogan Lovells believed that these materials would not "necessarily be excluded for the purposes of interpreting the relevant provisions of the TPDA under the *Pepper v Hart* rule. However, this is an issue for submissions and will be addressed in BAT's submissions in due course."

30. HMRC responded on 10 February 2016, stating that HMRC understood from Hogan Lovells' letter that BAT's position was that "the materials relied on by Ms Udicki formed 'part of the factual context' to the obligations imposed on tobacco manufacturers under the TPDA." HMRC, however, said they still did not understand why BAT considered that the Parliamentary Materials were relevant and that "the material referred to by Ms Udicki would be inadmissible [for the purposes of interpreting the penalty provisions]".

31. Hogan Lovells' response to HMRC's further query was dated 15 February 2016. Their letter is merely stated that Hogan Lovells considered that their answer on this point in their letter dated 2 February 2016 "is clear and sufficient for present purposes." The letter proposed that the debate about the admissibility of the Parliamentary Materials would be best dealt with in a legal argument if it should become relevant.

32. On 1 March 2016, HMRC wrote again to Hogan Lovells. HMRC strongly disagreed with the suggestion that the question of the admissibility of Parliamentary Materials referred to in Ms Udicki's witness statement should be dealt with in legal argument. The letter noted that neither BAT's pleadings nor its correspondence asserted that a legislative ambiguity existed in the penalty provisions for the purposes of *Pepper v Hart*. Therefore, in HMRC's view, the proposed use of such materials fell "at the first hurdle". HMRC said they were unclear how any of the Parliamentary Materials would assist the Tribunal in the construction of the penalty provisions.

33. In relation to BAT's assertion that the Parliamentary Materials might provide some background or "factual context", HMRC considered that this was not the

appropriate test under *Pepper v Hart*. HMRC also referred to the decision of Stanley Burnton J in *Federation of Tour Operators & Ors, R (on the application of) v HM Revenue & Customs & Ors* [2007] EWHC 2062 (Admin) in which it was stated [120] that it was important to identify the purpose for which evidence of proceedings in Parliament is relied upon. Stanley Burnton J also observed [120] that the material in question had to be considered in terms of its relevance to the determination of the matters in dispute. I should note that Stanley Brunton J's decision was given in the context of the question whether referring to the material impugned proceedings in Parliament contrary to the Bills of Rights.

34. Next, HMRC indicated that it was important that the issue of admissibility of the Parliamentary Materials should be resolved by the Tribunal prior to the substantive hearing, so that inadmissible or irrelevant materials could be removed from the evidence.

35. Furthermore, HMRC considered that, for example, Ms Udicki's witness statement (paragraph 82) had strayed into expressing an opinion as to the law, which was a matter for the Tribunal.

36. Finally, HMRC stated that if BAT did not agree to remove the offending paragraphs, HMRC would seek to have them struck out at a CMH on the basis that (1) they were irrelevant to the issues in this appeal and (2) inadmissible on the basis of *Pepper v Hart*.

37. In its reply dated 11 March 2016 Hogan Lovells set out BAT's approach to the Parliamentary Materials. That letter explained that BAT relied on the materials for two separate reasons. First, BAT relied on the materials in relation to the question of fact concerning BAT's understanding of the scope of its obligations and the steps that they were required to take to comply with those obligations. BAT noted that HMRC provided BAT with the Parliamentary Materials relating to the Finance (No.2) Bill 2006 prior to its enactment. Secondly, BAT relied on the Parliamentary Materials in relation to the rule in *Pepper v Hart*. The letter asserted that the materials did satisfy the *Pepper v Hart* criteria and stated that BAT relied upon them. I do not, however, consider that that letter clearly explained the ambiguous words or phrases which BAT considered the Parliamentary Materials would elucidate).

38. Hogan Lovells argued that it was necessary to consider the words of the penalty provisions as a whole considered against the relevant background in which those provisions were framed and introduced. If this material was struck out the Tribunal would be deprived of important factual evidence which demonstrated why BAT contended that the legislation was ambiguous. It would also mean excluding admissible documents, such as correspondence and documents relating to HMRC's consultation with the TMA, which would lead to an absurd position.

39. In addition, Hogan Lovells argued that it was inappropriate for the question of the admissibility of the Parliamentary Materials to be considered at a preliminary hearing. BAT relied upon the material in relation to matters of fact (including BAT's own knowledge) in relation to steps that it was required to take to avoid facilitating

smuggling. This was an issue that could not be ruled upon by way of a preliminary hearing. If BAT were only seeking to rely on Parliamentary Materials as an aid to interpretation of the statute, the Tribunal would normally receive the material *de bene esse* and hear argument on its relevance from the parties.

40. In a further letter dated 17 March 2016, HMRC again resisted the inclusion of the Parliamentary Materials insisted that the question of admissibility should be determined at a CMH. HMRC remained of the view that the Parliamentary Materials were irrelevant and therefore inadmissible. HMRC considered that the penalty provisions were clear and unambiguous. Furthermore, HMRC stated that certain paragraphs of Ms Udicki's evidence were inadmissible on the basis that they sought to "usurp the function of the Tribunal." I note that this last argument was not put forward by HMRC at the CMH.

41. HMRC, in a Notice of Application dated 1 April 2016, asked the Tribunal to resolve, at a preliminary hearing, "the admissibility of evidence comprising certain Parliamentary and related materials contained in the Appellant's witness statements."

42. BAT were concerned that HMRC had expanded its attempt to strike out passages from Ms Udicki's witness statements (HMRC had previously only objected to paragraph 76 – 83 of Ms Udicki's first witness statement) and wrote to HMRC on 25 May 2016 seeking clarification.

43. In a letter dated 26 May 2016, HMRC confirmed that HMRC were seeking to exclude paragraphs 50-56, 63-73, 76-86 and 147 and 152 of Ms Udicki's first witness statement and paragraphs 51-54 of Ms Udicki's second witness statement. I agree with BAT that this was a considerable expansion of the evidence which HMRC were seeking to exclude.

BAT's submissions

44. BAT argued that the Regulatory Impact Assessment and the Explanatory Notes did not fall within the rule in *Pepper v Hart*.

45. BAT submitted that Explanatory Notes could be referred to in order to determine the mischief of the legislation. HMRC conceded this point at the CMH. In addition, BAT noted that HMRC were unable to produce any authority which supported the position that the Regulatory Impact Assessment could not similarly be so used.

46. BAT therefore submitted that the only material that fell within the *Pepper v Hart* rule were the passages from *Hansard*. Those passages potentially illuminated the meaning of the word "likely" in the penalty provisions.

47. BAT argued further that in the correspondence between HMRC and Hogan Lovells, HMRC's unreasonable conduct was manifest. HMRC's posture suggested that it had not read Hogan Lovells' explanations of the purpose of the documents in

question and the nature of the arguments being run. In the event, everything stated in those letters was either conceded at the hearing or dismissed by the Tribunal.

48. It followed, BAT argued, that HMRC's conduct needlessly and unreasonably increased the costs of BAT's work on the Parliamentary Materials.

49. BAT therefore invited the Tribunal to order that HMRC pay BAT's costs of addressing the specific issue of the Parliamentary Materials. In a Statement of Costs, BAT estimated its costs attributable to that issue to be £53,174.

HMRC's submissions

50. HMRC submitted that the fact that its submissions in respect of the Parliamentary Materials point had been unsuccessful did not, of itself, constitute unreasonable conduct (*per* Judge Hellier in *Leslie Wallis v HMRC* [2013] UKFTT 081 (TC) at [27]).

51. Secondly, HMRC submitted that the decisions of the Upper Tribunal in *Catanã* and *Market & Opinion Research* indicated that the threshold of unreasonableness for the purposes of rule 10 was a very high one which (according to the appellant's application) was akin to irrationality.

52. Thirdly, HMRC referred to the award of wasted costs for "improper, unreasonable or negligent" acts under section 51(7) of the Senior Courts Act and to the decision of the Court of Appeal in *Patel v Air India* [2010] EWCA Civ 433 which indicated that although a claim had less than 50% chance of success, "that is a long way from the claim being hopeless" and that there had to be something "akin to an abuse of process of the court." In other words, it was by no means unreasonable to pursue a claim simply because it had less than 50% chance of success.

53. HMRC argued that the CMH was a productive hearing which enabled the parties to focus on numerous procedural issues, many of which were narrowed following constructive agreements between the parties. The hearing was necessary and would have taken place regardless of any argument concerning the admissibility of evidence regarding "Parliamentary Materials."

54. HMRC noted that, in any event, BAT had made an application which sought to exclude documents which post-dated the issue of the Penalty Notice and that the appellants persisted in that application notwithstanding HMRC's explanation as to why the evidence in dispute was relevant.

55. HMRC also observed that it was also necessary to deal with the BAT's refusal to undertake to destroy inadvertently disclosed information at the CMH. The appellant insisted until the "11th hour" that it had no obligation to do so. The hearing elicited an undertaking from BAT, which should have been forthcoming at an earlier stage. Costs were wasted in relation to that position but it did not follow, HMRC contended, that BAT should be ordered to pay them.

56. HMRC also argued that the CMH had been necessary to secure a formal statement from BAT to confirm that (contrary to its Notice of Appeal) that it did not invite the Tribunal to exercise any supervisory jurisdiction in relation to the allegation that the Penalty Notice was politically motivated. Once again, the CMH enable the parties to reach a sensible agreement.

57. In addition, HMRC argued that BAT had made a misguided application to the Tribunal in relation to a "confidentiality ring" which, in the event, was abandoned.

58. Finally, HMRC argued that costs were also incurred in relation to a disproportionate witness statement by We Zen Cho on behalf of BAT running to 80 paragraphs, only for the issues addressed in it to fall away at the hearing.

59. In summary, HMRC identified a number of issues raised at the CMH on which BAT took a misguided position and which wasted costs.

60. Furthermore, HMRC argued that BAT's application for costs was founded on a mis-characterisation of what HMRC was seeking in terms of an order from the Tribunal. HMRC's application identified that there were issues in relation to "the admissibility of evidence comprising certain Parliamentary and related materials contained in the Appellant's witness statements." Mrs Hall submitted that *Pepper v Hart* was not mentioned in the application and was irrelevant for most of the "related materials".

61. HMRC acknowledged that the focus of the hearing ("regardless of what had been set in correspondence") was not on the blanket exclusion of certain documents for all purposes but was on the question whether the use to which certain evidence could be put should be restricted. HMRC accepted that the Parliamentary Materials (including *Hansard* debates) could be admitted for the purposes of identifying the mischief of the TPDA. HMRC had sought a ruling on whether those materials were admissible for the purposes of interpreting the word "likely". This was, said Mrs Hall, an arguable issue. The application by HMRC had been made in order to help the Tribunal further the overriding objective. Specifically, HMRC had reasonably considered that the material relied on by BAT was either irrelevant or outside the rule in *Pepper v Hart*.

62. HMRC also noted that my directions issued after the CMH indicated that the material should not be excluded "at this stage".

63. In addition, in the correspondence, BAT failed to specify the nature of its reliance on that Parliamentary Material until the CMH.

64. Finally, HMRC observed that BAT purported to particularise its costs in relation to the issue of the Parliamentary Material. HMRC submitted that it would be inappropriate to attempt to "salami-slice" the question of costs arising from the CMH in this manner on the basis that it would inhibit the co-operation of the parties in future cases (contrary to their duty under rule 2(4)(a)) if an application was made under rule 10(1)(b) in respect of every unsuccessful application of the case management stage.

Decision

65. Having carefully considered the arguments put to me, I have decided not to make an award of costs.

66. Summarising the legislation and authorities in relation to rule 10(1)(b), the determination of an application for costs involves a two-step process. I must first satisfy myself that HMRC's conduct of the proceedings was unreasonable and, secondly, that it would be appropriate to exercise my discretion to award costs. My discretion must, of course, be exercised judicially taking account of all relevant circumstances. An illustration of this two-step process would be a case where a party's conduct was unreasonable but the Tribunal exercised its discretion not to award costs on the basis, for example, that no significant additional costs arose to the other party (see, e.g. *John Scofield v Revenue & Customs* [2012] UKFTT 673 (TC)).

67. I do not consider that the principles outlined by the Court of Appeal in *Patel v Air India* are directly applicable to the interpretation of to rule 10(1)(b). It seems to me that the context in which the word "unreasonable" was used in the statutory wording was materially different. Moreover, I do not consider that the Upper Tribunal in *Market Opinion and Research* set the test as one approaching "irrationality". In this case, there is a simple condition of unreasonableness imposed by rule 10(1)(b). What amounts to unreasonable conduct will vary from case to case, depending on the circumstances. Parliament has left the application of the test of unreasonable conduct to the Tribunal and I do not think it is helpful, as the Upper Tribunal confirmed, to attempt to impose any gloss on the statutory language.

68. As regards the admission of the Parliamentary Materials, a distinction can be made between the *Hansard* debates on the Finance (No. 2) Bill 2006 and the other materials. In connection with *Hansard* debates, it seemed to me that HMRC had an arguable case that there was no ambiguity in the penalty provisions within the *Pepper v Hart* principle which would be clarified by the Parliamentary debates. Moreover, I was not convinced that in the correspondence between the parties BAT had fully or sufficiently explained the provisions which BAT considered were ambiguous and how reference to *Hansard* would improve matters.

69. In relation to the other Parliamentary Materials, I think that HMRC's conduct does come closer to the borderline as regards the test of unreasonableness. It is clear that, for example, Explanatory Notes are always admissible as an aid to determine the mischief at which a legislative provision was aimed (see e.g. *Westminster City Council v National Asylum Support Service* [2002] UKHL 38 *per* Lord Steyn at [5]). Moreover, there seems to be no obvious reason why the same could not be said of the Regulatory Impact Assessment. At the CMH, Mrs Hall accepted that a number of the other Parliamentary Materials were admissible in so far as they illuminated the mischief at which the legislation was directed. On balance, however, I have concluded that HMRC's conduct was not unreasonable. I found Hogan Lovells' explanation in its correspondence with HMRC of the use to which these materials would be put somewhat vague and unspecific. It was, therefore, not unreasonable for HMRC to seek to have the issue thoroughly ventilated at the CMH.

70. For these reasons, I have decided that HMRC's conduct of the proceedings was not unreasonable and, therefore, I refuse BAT's application for costs incurred in relation to Parliamentary Materials at the CMH.

71. I should add that I consider that the Tribunal should not be too ready to make costs orders in relation to parts of case management proceedings where, as is frequently the case, a number of different matters are raised and decided in preparation for a substantive hearing. I would not wish to inhibit the parties from applying to the Tribunal for directions in order to promote the efficient conduct of an appeal. That is not to say that the Tribunal should never make such a costs order, but simply that it should not do so without careful consideration of the consequences.

72. Finally, I should observe (with the benefit of hindsight) that this was an appeal in which there was a definite need for a preliminary hearing, but it was not on the issues raised by the parties. At the substantive hearing, a considerable amount of time was spent debating the nature of the Tribunal's jurisdiction. This was a much more suitable issue for a preliminary hearing because its consequences for the main hearing, the nature of the evidence required and my decision were considerably more important than the argument about the admissibility of Parliamentary Materials.

73. Accordingly, I refuse BAT's application for costs.

74. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 23 JANUARY 2017