TC04222

Appeal number: TC/2012/03270 & TC/2012/03272

COSTS – PROCEDURE - applications for costs by appellants and respondents - application to amend decision

FIRST-TIER TRIBUNAL
TAX CHAMBER

BIFFA (JERSEY) LTD
BIFFA HOLDINGS LTD

Appellants

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Applications decided on the papers on 8 January 2015 under rules 10(5) and 29(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

DECISION

Introduction

1. In 2007, Biffa (Jersey) Limited ("BJL") bought 200 million of its own shares from Biffa Holdings Limited ("BHL") for £200 million and, one year later, BHL bought 200 million BJL shares from another group company for £214 million. The Respondents ("HMRC") made amendments to BJL's corporation tax self-assessment return ("CTSA") on the ground that that BJL was liable to tax on £14.1 million that section 730A of the Income and Corporation Taxes Act 1988 ("ICTA 1988") deemed to be interest paid by BHL on a deemed loan by BJL. HMRC also made amendments to BHL's CTSA to deny it a deduction of £14.1 million as deemed interest. BJL and BHL appealed to the First-tier Tribunal ("the FTT").

2. On 30 April 2014, Deloitte LPP, wrote to HMRC to point out that the most that could be assessed as interest income in the period 12 to 30 September 2008, which was the period to which the closure notice under appeal related, was in the region of £500,000. BJL's skeleton argument included submissions on this point. In their skeleton argument dated 21 May 2014, HMRC accepted that they were limited to recovering tax in relation to the deemed interest accruing during BJL's accounting period from 12 to 30 September 2008. On that basis, the amount of interest to be brought into account was only approximately £500,000 rather than £14.1 million that had accrued during an earlier period.

3. In a decision, released on 23 October 2014 with neutral citation [2014] UKFTT 982 (TC) ('the Decision'), the FTT (myself and Mr Ian Menzies-Conacher) dismissed BJL's appeal. In doing so, the FTT rejected BJL's submissions that section 195(2) Finance Act 2003 meant that BJL must be treated as not having acquired the BJL shares from BHL. The FTT held that section 730A(1) ICTA 1988 applied to BJL as it did to BHL. The FTT rejected HMRC's alternative argument that section 27 Finance (No 2) Act 2005 applied to the £214,108,391 paid by another Biffa group company to BJL because one of the conditions in section 26(3) was not satisfied.

4. In March 2014, HMRC had also confirmed that they were no longer contesting the appeal by BHL. HMRC accepted that BHL was entitled to deduct £14.1 million as deemed interest in computing its profits for corporation tax purposes. As a consequence, the FTT held at [72] of the Decision that BHL's appeal was allowed.

5. Both appeals had been allocated as complex cases under rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and neither BJL nor BHL had opted out of the costs regime. At [76] of the Decision, the FTT gave the parties 28 days from the date of release to make any application as to costs.

6. This decision concerns three applications made after the release of the Decision which are as follows:

(1) an application by Deloitte LLP, acting on behalf of BJL, in a letter dated 20 November, asking for the Decision to be amended to "[spell] out that the

appeal against the assessment has been allowed in part (with the matter adjourned for the parties to try to agree figures on the basis of the decision);

(2) an application by Deloitte LLP, acting on behalf of BJL and BHL, undated but received on 20 November, for an order that HMRC pay BJL and BHL the costs of their respective appeals; and

(3) an application dated 20 November by HMRC for an order that BJL pay 65% of the costs of HMRC in relation to BJL's appeal under reference TC/2012/03270, to be assessed on the standard basis if not agreed.

Application to amend the Decision

7. The basis of BJL's application to amend the Decision was that BJL had appealed against an amendment to its CTSA increasing its profit for the accounting period of 12-30 September 2008 by £14,108,391. In fact, the majority of the deemed interest accrued in an earlier accounting period. Before the hearing, HMRC conceded that, as the earlier accounting period was closed without adjustment on 9 September 2011, only interest that accrued in the period of 12-30 September 2008 could be assessed. The parties agreed that the amount of deemed interest that fell within the period and could properly be assessed was approximately £500,000. Both parties asked the FTT to decide the appeal in principle. The FTT did so and dismissed BJL's appeal. The FTT did not allow BJL's appeal against the assessment in part and it would not be appropriate to amend the Decision to say that it did. For that reason, this application is refused.

Applications for costs

8. BJL and BHL apply for an order that HMRC pay their costs on the basis that they succeeded in their appeals. BJL contends that because it appealed against an amendment to its CTSA of £14.1 million and, in the event, was only liable to tax on interest of approximately £500,000, it succeeded to the extent of more than 95% of the tax at stake. BJL also argues that it succeeded in relation to HMRC's alternative argument and so should be awarded its costs in full, subject to a detailed assessment if not agreed. BHL contends that it succeeded completely in its appeal and should be awarded its costs.

9. HMRC apply for an order that BJL pay 65% of HMRC's costs in relation to BJL's appeal and oppose BJL's and BHL's applications. HMRC contend that BJL and BHL were participants in the same scheme and that it would be inappropriate to treat the two appeals as separate and independent. HMRC submitted that its arguments against BJL and BHL were in the alternative and success in either argument meant that HMRC succeeded. HMRC accept, however, that they conceded their argument against BHL only a few months before the hearing and that this should be recognised in the order for costs.

10. HMRC submit that the starting point for an award of costs is to award HMRC their costs in relation to BJL's appeal but reduced as appropriate. HMRC say that it would not be appropriate to award BHL its costs in relation to its appeal. HMRC

suggest that their costs should be reduced by 35% to reflect the fact that they conceded one of their three arguments against the scheme, ie the section 730A ICTA 1988 argument in BHL's appeal. HMRC contend that this is appropriate because:

(1) HMRC were successful in defeating the scheme;

(2) the arguments against BJL and BHL were in the alternative;

(3) HMRC's suggestion would lead to a just and fair result;

(4) there must have been a significant overlap in the work done on both appeals; and

(5) there was a significant overlap in the documentation for both appeals.

11. HMRC acknowledge that the alternative approach would be for BJL to be ordered to pay HMRC's costs in relation to BJL's appeal and for HMRC to be ordered to pay BHL the costs of its appeal. HMRC note that this could result in HMRC paying more than they receive.

12. Both parties sought to rely on the decision of Judge Berner in *Versteegh Ltd v HMRC* [2014] UKFTT 397. That case concerned a tax scheme, not dissimilar to the one in this case, which was designed to achieve a corporation tax deduction in one group company ("the Borrower") for the costs of an intra-group borrowing but without any concomitant taxable accrual or receipt in the group company making the loan ("the Lender") or in the group company which received an amount of preference shares issued by the Borrower equivalent to interest on the loan ("the Share Recipient"). The arguments in relation to the Lender and the Share Recipient (that they should be taxed) were in the alternative. The case against the Borrower (that it should not obtain a deduction) was made irrespective of whether either the Lender or the Share Recipient should be taxed. The FTT in that case allowed the appeals of the Lender and the Borrower but dismissed the appeal of the Share Recipient. The scheme failed as the Share Recipient was taxed on the receipt of the preference shares but the Borrower still obtained a deduction.

13. In *Versteegh*, Judge Berner accepted (as do I) that, in the absence of detailed guidance in the FTT Rules, the Civil Procedure Rules ("CPR") provided helpful guidance on the principles to be applied. CPR Part 44 contains the general rules about costs. The parts of CPR 44.2 relevant to the applications in this case state that:

> "(2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

…

(5) The conduct of the parties includes –

…

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

…

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only; …"

14. As the appeals are complex cases and the appellants did not opt out of the costs regime, I consider that it is appropriate to make an order or orders about costs. It seems to me (and no party has suggested to the contrary) that there is no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party in this case. Each party considers that it has been successful and, accordingly, is entitled to all or some of its costs.

15. I do not agree that BJL succeeded in the appeal. HMRC were unable to assess the full amount of £14.1 million as interest income because they overlooked a time limit. The error was only pointed out just over one month before the hearing and HMRC accepted the point just three weeks later. I do not consider that the fact that HMRC accepted that, if the appeal was dismissed, they could only hold BJL liable for some £500,000 should lead to any reduction in the costs awarded. The fact that the amount at stake for BJL reduced substantially did not affect the issues in the appeal, which were purely points of law, the way that BJL conducted its case or the length of the hearing as there was no dispute as to the facts. Further, HMRC's acceptance that BJL was only liable to pay a reduced amount of tax would not have led to BJL's appeal being withdrawn on the ground that the amount at stake did not justify the expense of proceedings because this was a lead case and there were substantial amounts still at stake in the related cases, as both parties acknowledged at the hearing.

16. BJL did not succeed in the appeal but it succeeded on the alternative argument. I do not consider that the fact that HMRC did not succeed in relation to the alternative argument based on section 27 Finance (No 2) Act 2005 should result in any reduction in the costs awarded. The two arguments were explicitly stated to be in the alternative and it was always the case that if HMRC succeeded on the section 730A ICTA 1988 argument then the other argument fell away. In the circumstances, I do not consider that BJL can be regarded as the successful party. For that reason, my view is that it would not be appropriate to award BJL its costs.

17. In my view, HMRC were the successful party in the BJL appeal as they succeeded in their primary case and defeated the scheme that was the subject of the appeal. Without more, I would order BJL to pay HMRC's costs of the appeal on the standard basis, to be assessed if not agreed. However, there is more, in the form of BHL's appeal, which I must consider.

18. HMRC contend that the two appeals should be regarded as one because they related to the same scheme. HMRC submit that the outcome of BJL's appeal means that the scheme did not work and HMRC were the successful party in relation to both appeals. HMRC rely on *Versteegh* where Judge Berner, at [29], held that "the appeals of the Lender and the Share Recipient [should] be regarded as a single appeal, and in that respect … HMRC [should] be regarded as the successful party who has simply failed to succeed on all issues". In my view, that does not assist HMRC in its application. In *Versteegh*, HMRC's case was that one of the Lender or the Share Recipient was liable to tax. The arguments in relation to each were strictly in the alternative: as Judge Berner pointed out at [28], HMRC did not seek to tax both the Lender and the Share Recipient but only one or the other. The position of the Borrower was different: it was, as Judge Berner said at [25], a discrete issue, in that it related to deduction not income, and it was pursued irrespective of the outcome of the cases against the Lender and the Share Recipient. That seems to me to be the situation in relation to BHL.

19. I consider that the appropriate order to make in relation to BHL's appeal is that HMRC should pay BHL's costs of its appeal on the standard basis, to be assessed if not agreed.

20. As I have concluded that BJL should pay HMRC's costs in relation to BJL's appeal and HMRC should pay BHL's costs in relation to its appeal, I now consider whether I should make a different order in order to reflect the overall justice of the case (see Gloster J in *HLB Kidsons (a Firm) v Lloyds Underwriters* [2008] 3 Costs LR 427, at [10], cited by Judge Berner in Versteegh at [12]). HMRC contend that an order that BJL pay HMRC 65% of their costs in relation to BJL's appeal with no order in relation to BHL's appeal would be appropriate. HMRC are concerned that separate orders in relation to each appeal such as I have suggested above would lead to HMRC paying more than it receives. HMRC do not say how that reduction was calculated. There is a suggestion that the argument in relation to BHL was one of three but I cannot see any justification for a 35% reduction of HMRC's costs in relation to the BJL appeal on that basis. There were two appeals. HMRC won one and lost one. A more straightforward calculation would be that HMRC is entitled to 50% of its costs in relation to both appeals. An alternative view would be that HMRC only succeeded in relation to one of three arguments and should only receive 33% of their costs. I do not think that such an approach would be fair or just to BHL. BHL incurred expense in relation to an appeal based on a case that HMRC conceded just a few months before the hearing. HMRC's concern that the costs incurred by BHL in relation to its appeal are greater than HMRC's costs in relation to BJL's appeal may be justified. However, I do not consider that is an argument for not awarding BHL its costs. The fact that those costs may exceed HMRC's costs is simply an aspect of litigation risk. That risk could have been eliminated or reduced if HMRC had

conducted a review and conceded the case against BHL at an earlier stage. In my view, there is no reason to depart from the straightforward approach of ordering the unsuccessful party in each appeal to pay the costs of the successful party, even where the two appeals are connected.

Disposition

21. BJL's application to amend the Decision is refused.

22. BJL shall pay HMRC's costs of and incidental to and consequent upon the appeal by BJL, such costs to be the subject of detailed assessment by a Costs Judge of the High Court on the standard basis if not agreed.

23. HMRC shall pay BHL's costs of and incidental to and consequent upon the appeal by BHL, such costs to be the subject of detailed assessment by a Costs Judge of the High Court on the standard basis if not agreed between the parties.

Right to apply for permission to appeal

24. This document contains full findings of fact and reasons for the decision. Any party to this appeal 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 ("FTT Rules"). 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: 9 January 2015