TC03526

Appeal number: TC/2010/5569, TC/2010/5558, TC/2010/5563 & TC/2010/5227

COSTS – Complex appeals- appeals from group companies concerned in a scheme designed to achieve a deduction for a loan relationship debit in one (the Borrower) without giving rise to a corresponding taxable amount in the Lender or another group company (the Share Recipient) – Tribunal allowed appeals of Lender and Borrower, but dismissed appeal of Share Recipient – costs order – identification of successful party – whether successful party should recover in respect of all issues – whether costs awarded to a successful appellant should be paid by HMRC or by the unsuccessful appellant – applicability of Bullock or Sanderson order

FIRST-TIER TRIBUNAL
TAX CHAMBER

VERSTEEGH LIMITED
NESTRON LIMITED
SPRITEBEAM LIMITED
PROWTING LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 17 April 2014

Kevin Prosser QC, instructed by PricewaterhouseCoopers Legal LLP, for the Appellants

Julian Ghosh QC and Elizabeth Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Consequent upon the decision of the Tribunal (myself and Judge Brannan) in these appeals, which was released on 6 November 2013, I have before me applications for costs from both the Appellants and the Respondents.

2. The appeals were lead case appeals in relation to a scheme entered into by a number of corporate groups, 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").

3. In these appeals, three of the Appellants were members of one group, the Commercial Estates group. Versteegh Limited was the Lender, Nestron Limited was the Borrower and Spritebeam Limited was the Share Recipient. The fourth Appellant, Prowting Limited was a member of another group, the Westbury group, and was a Share Recipient by reference to the same scheme undertaken by that group.

4. It will be apparent that, from the perspective of the Appellant groups, the scheme would achieve its tax objective only if the Borrower was entitled to a tax deduction, and neither the Lender nor the Share Recipient was taxable on the corresponding amount.

5. HMRC sought to attack the scheme on all those fronts. They argued that the Lender ought to have brought the value of the preference shares issued to the Share Recipient into account as a taxable profit either under the loan relationships provisions of Chapter 2 of Part 4 to the Finance Act 1996 ("FA 1996") or under s 786(5) of the Income and Corporation Taxes Act 1988. They argued that the Share Recipient was taxable on the value of the preference shares under Case VI of Schedule D. And they argued that, on the basis of agreed facts, the unallowable purpose provision in para 13, Schedule 9, FA 1996 applied to the Borrower so as to preclude any deduction in respect of a debit for the Borrower under the loan relationships rules.

6. Of these arguments, those in respect of the Lender and the Share Recipient were at all times (and were expressed as such in the lead case direction) in the alternative. HMRC were not arguing that both of the Lender and the Share Recipient should be taxed on the same receipt or value. By contrast, the case on unallowable purpose and the denial of a deduction to the Borrower was made irrespective of whether either the Lender or the Share Recipient was liable to tax.

7. We allowed the appeals of the Lender and the Borrower, but dismissed those of the two Share Recipients. The effect was that the scheme had failed in its objective, as the value of the preference shares was held to be taxable in each Share Recipient.

8. It is in that context that the applications for costs have been made. The application of HMRC is that, as the Crown has been the successful party overall, the Appellants should pay HMRC's costs of all four appeals. By contrast, whilst accepting that HMRC should recover their costs in respect of the Share Recipient appeals, the Lender and the Borrower apply for an order that HMRC pay their costs, again on the basis that the Lender and the Borrower were each the successful party in respect of those individual appeals.

9. Each of the appeals was designated as a Complex case, in respect of which none of the Appellants has opted-out. Accordingly, under rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tax Tribunal Rules"), this Tribunal has a full costs-shifting jurisdiction. The matter is therefore one of discretion for the Tribunal.

The relevant principles

10. In the context of the First-tier Tribunal as a whole, a full costs-shifting jurisdiction is an unusual feature. There is, as a consequence, no detailed guidance in the Tax Tribunal Rules as to the exercise of the Tribunal's discretion in this respect. This particular costs jurisdiction has more in common with that applicable in the courts, and accordingly it is clear to me, and indeed it was common ground, that the principles applicable under the Civil Procedure Rules ("CPR"), and the relevant authorities in that respect, are equally applicable to the exercise by this Tribunal of its power to award costs. These are a reflection of the same overriding objective, namely to deal with cases fairly and justly.

11. I start therefore with the more detailed guidance that is afforded by the CPR. Under CPR 44.2, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. However, the court is required to have regard to all the circumstances, including, relevantly, whether a party has succeeded on part of its case, even if that party has not been wholly successful. Conduct is to be taken into account, including whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. Orders may be for a party to pay a proportion of another party's costs or costs relating only to a distinct part of the proceedings.

12. The applicable principles have been neatly summarised by Gloster J (as she then was) in *HLB Kidsons (a Firm) v Lloyds Underwriters* [2008] 3 Costs LR 427, at [10]:

> "The court's discretion as to costs is a wide one. The aim always is to "make an order that reflects the overall justice of the case" (*Travellers' Casualty v Sun Life* [2006] EWHC 2885 (Comm) at para 11 per Clarke J. As Mr Kealey submitted, the general rule remains that costs should follow the event, i.e. that "the unsuccessful party will be ordered to pay the costs of the successful party": CPR 44.3(2). In *Kastor Navigation v Axa Global Risks* [2004] 2 Lloyd's Rep 119, the Court of Appeal affirmed the general rule and noted that the question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole; see para 143, per Rix LJ. The court may, of course, depart from the general rule, but it

> remains appropriate to give "real weight" to the overall success of the winning party: *Scholes Windows v Magnet (No. 2)* [2000] ECDR 266 at 268. As Longmore LJ said in *Barnes v Time Talk* [2003] BLR 331 at para 28, it is important to identify at the outset who is the "successful party". Only then is the court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense": *BCCI v Ali (No. 4)* 149 NLJ 1222 , per Lightman J. Success, for the purposes of the CPR, is "not a technical term but a result in real life" (*BCCI v Ali (No. 4)* (supra)). The matter must be looked at "in a realistic … and … commercially sensible way": *Fulham Leisure Holdings v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch) at para 3 per Mann J."

The successful party

13. The starting point, therefore, is to identify the successful party.

14. Whilst it may be technically correct to say that, in the individual appeals, the Lender and the Borrower were successful parties, and that HMRC was the successful party in respect only of the Share Recipient appeals, that it seems to me would be to elevate "success" to a level of technicality that is not consistent with the applicable principles. In real life, having regard to the litigation as a whole, and looking at the position in a realistic and commercially sensible way, the decisions of the Tribunal on the individual appeals had the overall consequence that the scheme failed, and the taxpayer groups did not succeed in their objectives. Looking at the matter overall, where the scheme would succeed only if there were both a deduction in the Borrower and no taxable profit in either the Lender or the Share Recipient, HMRC was the successful party by virtue of the single finding that the Share Recipient was taxable.

15. For the Appellants, Mr Prosser argued that, in deciding who is the successful party, it would be wrong to accept the submission of HMRC that the Appellants should all be considered together, as in effect a single party. I agree with him that certain factors have no relevance to the process. These are that, first, the appeals were conducted as a single case and were managed and heard together; secondly that the Appellants were jointly represented; and thirdly that the appeals were lead cases. Nor is the description of the scheme as one of tax avoidance material to this issue.

16. On the other hand, although the mere fact that the Appellants (ignoring for this purpose Prowting Limited) were members of the same group, would not have led, on a common sense view, to the conclusion that the transactions should be regarded as a whole, that factor plays a part in the overall assessment of the outcome of the appeals. The fact that the relevant companies were members of a group was one element of the scheme. These were not independent parties. There was a single scheme, which of its nature involved all the Appellants, each of whom was knowingly engaged, even if there was no finding as to the main purpose of the Borrower. The individual findings in relation to each of the Appellant were not what mattered in real life; it was the overall success or failure of the scheme.

17. In reaching this conclusion, I do not accept Mr Prosser's submission that this is to adopt the claimant's perspective. The fact that my conclusion happens to accord with the perspective of HMRC does not mean that I have adopted that perspective as the appropriate test. I have not done so. In my view, the proper perspective is not that of the claimant (or, as in this case, HMRC) or that of any other party. The perspective to be taken is an objective one, taking a common sense, realistic and commercially sensible view.

18. I therefore do not accept Mr Prosser's submission that the circumstances of this case are analogous to that of the victim of a road accident who makes a claim against two parties. Whilst the normal rule might be that such a victim who successfully recovers damages from one defendant but is unsuccessful against another defendant cannot resist the latter's claim for costs on the ground that, so far as he was concerned, the litigation against both defendants was about a single issue, namely whether he was entitled to compensation for his loss, and he succeeded on that issue, those circumstances are, in my view, very different from this case. The fact that, taking a realistic view, a court might in the circumstances outlined by Mr Prosser conclude that success or failure should be evaluated on the basis of each individual claim, does not dissuade me from the view I have taken on the facts and circumstances of this case.

19. For that reason, the narrow exception identified by Mr Prosser in the sort of cases he proposed as analogous, namely the making by the court of a *Bullock* or *Sanderson* order, are of no assistance to the question of the successful party in this case. I will consider the principles underlying such orders a little later, in a particular context. However, as I have taken the view that no proper analogy can be drawn between this case and the particular type of cases referred to by Mr Prosser in determining the successful party, the exceptional orders that might be made in such cases cannot assist his argument in this respect.

The exercise of discretion

20. The identification of the successful party is only the starting point. It does not determine the costs order. Whilst the general rule is that a successful party is normally entitled to its costs, it is necessary to take account of all the circumstances. In doing so, it is appropriate, in my view, to consider the individual elements of the case, and the success or failure by each party in those respects.

21. One of the circumstances to which the court is directed by the CPR to have regard is the conduct of the parties, including, as I mentioned earlier, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. Mr Prosser argued that HMRC had acted wholly unreasonably in what he described as a "misconceived claim" by HMRC against the Borrower; he argued that such a claim was always doomed to fail. Further, he argued that HMRC acted unreasonably in continuing to pursue the accounting issue against the Lender after receiving the report of the Lender's expert on 15 July 2013.

22. I do not consider that HMRC's conduct in pursuing the issues it did against the various Appellants can be described as unreasonable. The scheme relied for its efficacy on a combination of a deduction for tax purposes of a loan relationship debit in the Borrower, and the absence of a taxable credit or profit in the Lender and the Share Recipient. The issues to be considered were agreed by the parties, and approved by the Tribunal, in the form of the lead case directions. I do not consider, in all the circumstances of the case, that the conduct of HMRC in pursuing those issues on which the Tribunal found that they had failed was unreasonable so as to affect the question of costs.

23. I have regard to the fact that, as Gloster J said in the *Lloyds Underwriters* case (at [11]), there is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as was the case in *Lloyds Underwriters* and is so in these appeals, any winning party is likely to fail on one or more issues in the case (see also *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125, per Simon Brown LJ at para 35, and *Travellers' Casualty v Sun Life* [2006] EWCA 2885 (Comm), per Clarke J at para 12). But it remains necessary to take account of the circumstances in exercising discretion to reach a fair result in terms of costs.

The Borrower issue

24. Although, as I have indicated, I do not consider that, in arguing that the loan relationship debit should be denied to the Borrower, HMRC was no acting unreasonably, the fact is that HMRC lost on that issue.

25. The Borrower issue was a discrete one, both in the sense that it related to the deductibility side of the scheme equation, and it was pursued irrespective of the outcome of the cases against the Lender and the Share Recipient. It was therefore always the case that, even if either the Lender or the Share Recipient (as was found to be so) was taxable on the value of the preference shares issued to the Share Recipient, HMRC sought to deny a deduction to the Borrower for the cost of its borrowing. The fact that HMRC successfully undermined the scheme as a whole, by succeeding in its case against the Share Recipient, would not have resolved their claim against the Borrower. I do not therefore accept, as Mr Ghosh argued, that this factor should have decisive weight in considering the issue of costs of the Borrower's appeal.

26. In these circumstances, although it remains the case that HMRC has been successful overall, I consider that greater weight should be given to the individual success of the Borrower's appeal. The Borrower should, accordingly, be entitled to be paid the costs of its appeal, and HMRC should not recover its own costs of that appeal. I consider later whether it follows that in principle HMRC should bear the Borrower's costs, or that those costs should effectively be borne by the Share Recipient, or the group as a whole.

The Lender issues

27. Looking at the Lender's individual appeal, the Lender succeeded on both the issues on the question of its liability to tax. However, I do not consider that the circumstances are the same as those of the Borrower so as to result in a similar conclusion.

28. In contrast to the Borrower, the case of HMRC was, in relation to the Lender and the Share Recipient, put in the alternative. HMRC was not seeking to charge the same amount to tax in both the Lender and the Share Recipient. If the liability of the Share Recipient to tax had been conceded, no action against the Lender would have been taken.

29. In those circumstances, it is right, in my view, for the appeals of the Lender and the Share Recipient to be regarded as a single appeal, and for HMRC in that respect to be regarded as the successful party who has simply failed to succeed on all issues. Although the basis for the individual cases made by HMRC against the Lender and the Share Recipient respectively were different, that was of necessity, having regard to the different statutory provisions applicable in each case. That does not, in my judgment, detract from the essential singularity of the two appeals taken together. Nor does it mandate, in my view, different orders being made in respect of the different issues raised, even though HMRC was successful only in respect of one of them. In these circumstances, the fact that HMRC was successful in its case that one of the Lender and Share Recipient was liable to tax is the paramount consideration.

30. The consequence is that, in principle, I consider that HMRC should recover their costs of the Lender's appeal as well as that of the Share Recipient, and the Lender should not recover its costs. The question then arises as to which of the Appellants should bear those costs, although I accept that, in this particular case, having regard to the fact that these are companies within a group, the answer is unlikely to be material.

31. I was referred to *Vardy Properties and another v Revenue and Customs Commissioners* [2013] UKFTT 96 (TC), where, in the context of a scheme to avoid stamp duty where claims were made by HMRC in the alternative, the tribunal (Judge Poole) decided that the unsuccessful appellant should pay HMRC's costs of the combined appeals. Although the judge did not have the benefit of representations from the appellants in that case, his conclusion seems to me to be a perfectly acceptable approach.

32. It would, it seems to me, be equally acceptable, in the circumstances of this case, for an order to be made that the costs of HMRC in respect of the Lender's appeal should be borne by the Lender, even though looking at the Lender's individual appeal, the Lender was itself successful. The Lender was the parent company of the Borrower and the Share Recipient, and it was the Lender, and not the Share Recipient, which was a party to the loan agreement on which the scheme was founded.

33. In my judgment, in a case such as this, where HMRC is the successful party overall and the Lender and the Share Recipient have been party to a joint enterprise to

avoid a taxable profit on that side of the scheme equation, and have failed in that endeavour, the proper course in respect of both the Lender's and the Share Recipient's appeal is that the Lender and the Share Recipient should jointly bear HMRC's costs in respect of both appeals.

The Borrower's costs: paying party

34. I have concluded, with regard to the Borrower, that HMRC should bear their own costs, and that the Borrower should recover its costs. The question remains: which party should bear the Borrower's costs? Should it be, as the general rule would normally dictate, HMRC as the losing party in respect of that individual appeal, or that discrete issue, or should it be the Share Recipient, as the losing party overall, or having regard to my conclusion in relation to the Lender's and the Share Recipient's appeals, the Lender and the Share Recipient jointly? In those latter two events, it is accepted that, in the circumstances of the group, the appropriate order would be no order for costs.

35. This is where I return to the question of *Bullock* and *Sanderson* orders. In essence those are orders in cases where there are multiple defendants, one or more of which is successful and one of which is unsuccessful. A *Bullock* order is one under which the costs of a successful defendant are added to the costs which the claimant is entitled to recover from the unsuccessful defendant; the expression is derived from *Bullock v London Omnibus Co* [1907] 1 KB 264. A *Sanderson* order is where the costs of a successful defendant are paid directly by the unsuccessful defendant; that expression derives from *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

36. The jurisdiction to make a *Bullock* order and a *Sanderson* order has been described by Peter Gibson LJ in *Irvine v Commissioner of Police for the Metropolis and others* [2005] 3 Costs LR 380, at [22], as a useful one, designed as it is to "avoid the injustice that when a claimant does not know which of two or more defendants should be sued for a wrong done to the claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful defendant eroded or eliminated by the order for costs against the claimant in respect of his action against the successful defendant or defendants."

37. In *Irvine*, Peter Gibson LJ, set out a useful summary of the factors to be taken into account in determining whether such an order might be applicable. However, he emphasised, at [23], that even in the cases described above, there is no rule of law that compels the court to make either a *Bullock* or a *Sanderson* order.

38. The relevant factors can be described as follows:

(1) Whether the claimant sues two (or more) defendants in the alternative. Although this is not exhaustive of the circumstances where a *Bullock* or a *Sanderson* order might be made, it is the ordinary circumstance where such an order will be applicable (*Irvine*, at [25] and [26]).

(2) Whether the causes of action relied upon against the defendants are connected with each other. The case of *Mulready v JH & W Bell Ltd* [1953] 2

All ER 215 concerned claims by an injured plaintiff. He was successful on a claim against a factory owner for breach of duty under the Building Regulations, but unsuccessful against his employer for breach of duty under the Factories Acts. The Court of Appeal set aside a *Bullock* order because the causes of action against the defendants were different and depended on different facts.

(3) The reasonableness of the claimant's conduct in pursuing a claim against the successful defendant. Although the fact that one defendant might seek to put the blame on another, that does not in itself make the joining of multiple parties reasonable. It depends on the particular facts (*Irvine*, at [31]).

39. I have determined earlier that there was no unreasonableness in the conduct of HMRC as regards its case against the Borrower. However, that case was not, in contrast to the cases in respect of the Lender and the Share Recipient, put in the alternative. Although that does not preclude the making of a *Bullock* or *Sanderson* order (see, for example, *Moon v Garrett and others* [2007] 1 Costs LR 41, per Waller LJ at [39]), it is a material factor. Furthermore, although the argument of HMRC that the Borrower should not be entitled to a loan relationship debit was born out of the same overall scheme, it was a separate and independent claim that did not depend on the outcome of other aspects of the appeals.

40. Accordingly, I conclude that, as regards the costs of the Borrower, there is no basis on which I should exercise my discretion to make a *Bullock* or a *Sanderson* order. The proper order to make in these circumstances is an order that HMRC pay the Borrower's costs of the Borrower's appeal.

Summary

41. The parties agreed that my decision in this respect should be one of principle only. Although I had a witness statement of Ms Carmel Weitzmann of PricewaterhouseCoopers Legal LLP, exhibiting certain calculations and a spreadsheet to assist me in making an appropriate order, I heard no argument on that, the parties preferring to have my decision in principle, before attempting to agree on that basis the final form of the order.

42. In principle, therefore, I can summarise my conclusions as follows:

(1) Prowting Limited shall pay the costs of HMRC of and incidental to the Prowting Share Recipient's appeal.

(2) Versteegh Limited (the Lender) and Spritebeam Limited (the Share Recipient) shall pay the costs of HMRC of and incidental to:

(a) the Spritebeam Share Recipient's appeal; and

(b) the Lender's appeal.

(3) HMRC shall pay the costs of Nestron Limited (the Borrower) of and incidental to the Borrower's appeal.

43. I will hear further representations from the parties on the appropriate form of order, which hopefully they will be able to agree, having regard to my decision in principle. If it can be avoided, it will be preferable not to express the order so as to require the costs of each individual appeal to be identified on detailed assessment. So far as practicable, I envisage the order being in the form of a global order that Versteegh Limited and Spritebeam Limited pay either (a) a proportion of HMRC's costs of the Lender's appeal and the Spritebeam Share Recipient's appeal (reduced from 100% by taking into account the effect of HMRC bearing the costs of Nestron Limited in relation to the Borrower's appeal), or (b) HMRC's costs of the Lender's appeal and the Spritebeam Share Recipient's appeal, less a monetary amount agreed as the costs due from HMRC to Nestron Limited in respect of the Borrower's appeal.

Application for permission to appeal

44. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 28 April 2014