Neutral Citation: [2024] UKFTT 1019 (TC)

Case Number: TC09353

FIRST-TIER TRIBUNAL
TAX CHAMBER

London

Appeal reference: TC/2021/00389

COSTS—Application by Appellant for an order for costs—Additional evidence presented by the Appellant at the hearing—Hearing adjourned to enable HMRC to consider its position—Appeal then abandoned by HMRC—Claim by Appellant that HMRC should have realised earlier that its defence of the appeal was unmeritorious—Whether HMRC "acted unreasonably in … defending or conducting the proceedings" (rule 10(1)(b) of the Tribunal's Rules)

Decided on the papers
Judgment date: 8 November 2024

Before

TRIBUNAL JUDGE CHRISTOPHER STAKER
GILL HUNTER

Between

GENERATOR POWER LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Lewis of Mazars LLP

For the Respondents: Saul Stone, Solicitor's Office and Legal Services, HMRC

DECISION

1. The Appellant's application for an order for costs under rule 10(1)(b) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 is refused.

REASONS

SUMMARY

2. The Appellant applies under rule 10(1)(b) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**") for an order that HMRC be required to pay its costs in these proceedings. Under this rule, the Tribunal can make an order for costs "if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings".

3. This appeal was categorised as a complex case, but the Appellant opted out of the costs regime. The substantive hearing of the appeal was listed for three days. On the day before the hearing, and at the hearing, the Appellant produced additional evidence. On the last day of the hearing, it was decided to recall the Appellant's witness who had completed giving evidence the previous day. HMRC requested and were granted a 28-day adjournment to consider the new evidence and to decide whether they wished to cross-examine the witness on the additional evidence given on the last day of the hearing or to make written submissions on that oral evidence. Within that 28-day period, HMRC indicated that they no longer wished to defend the appeal, which was then allowed by consent.

4. The Appellant contends that the new evidence presented at the hearing was not the reason for HMRC's decision to concede the appeal, that it should have been apparent to HMRC much earlier that its defence of the appeal was unmeritorious, and that HMRC acted unreasonably in defending the proceedings for as long as it did. In this decision, the Tribunal refuses the application.

FACTS

5. The Appellant is a generator hire specialist. It hires out generators, and also supplies fuel (red diesel) for the generators.

6. There is broad agreement between the parties that the Appellant supplied fuel to customers under five different scenarios (referred to below as "Scenario (1)" to "Scenario (5)" respectively), as follows:

(1) The customer rents a generator and chooses to provide their own fuel for the duration of the hire, returning the generator with a full tank of fuel.

(2) The customer rents a generator and chooses to provide their own fuel for the duration of the hire, but either the generator tank and/or bulk fuel tank are not returned full. The customer is charged for fuel not returned at the cost quoted on a sale or return basis.

(3) The customer hires a generator and chooses the "fuel management" option, meaning that the Appellant monitors, plans, schedules, procures and delivers the fuel throughout the hire period.

(4) The customer rents a generator and chooses to provide their own fuel for the duration of the hire but requires a one-off delivery at some point during the hire period.

(5) The Appellant supplies fuel only to customers for their own generators.

7. The supply of the generator hire is subject to VAT at the standard rate. The Appellant applied reduced rate (5%) VAT to the fuel element of its supplies, on the basis that the fuel was a separate supply to the supply of the generator hire.

8. On 10 February 2020, HMRC notified the Appellant that it was of the view that the supply of generator hire and fuel should be characterised as a single composite supply subject to VAT at the standard rate. HMRC subsequently issued various assessments to give effect to this decision.

9. The Appellant commenced this Tribunal appeal against the HMRC assessments on 5 February 2021. Scenario (1) was outside the scope of the appeal as it had not been included in the assessments. The appeal was stayed for a period for ADR.

10. It was common ground that the only issue in the appeal was whether (1) as the Appellant contended, there were separate supplies of generator hire and fuel, with the supply of fuel attracting VAT at the reduced rate, or whether (2) as HMRC contended, there was a single composite supply that was standard rated. It was also common ground that the determination of this issue involved the application of established principles, found in cases such as *Card Protection Plan Ltd v Commissioners of Customs and Excise* [1999] ECR I-973, [1999] 2 AC 601, *Levob Verzekeringen v Staatssecretaris van Financiën* [2005] ECR I-9433, and *RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem* [2009] STC 2006. Twelve key principles are identified in *HMRC v The Honourable Society of Middle Temple* [2013] UKUT 250 (TCC) at [60] (the "***Middle Temple* Principles**"). *Middle Temple* Principle 3 is that "There is no absolute rule and all the circumstances must be considered in every transaction". *Middle Temple* Principle 8 is that "There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element". *Middle Temple* Principle 9 is that "A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied". *Middle Temple* Principle 10 is that "The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties".

11. On 13 October 2021, the Tribunal notified the parties that the appeal had been allocated to the complex category. On 10 November 2021, the Appellant opted out of the costs regime pursuant to rule 10(1)(c)(ii) of the Rules.

12. On 22 September 2022, HMRC filed its statement of case, in which it said:

> The supply of fuel is ancillary to its principal supply of plant hire because it "does not constitute for customers an aim in itself". A customer derives no benefit from the fuel without acquiring a plant item. The Appellant's supply of fuel simply allows a customer to operate a plant item at the outset of the hire, or to continue to operate the plant item during the period of hire. Therefore, the provision of fuel is just a means of enabling a customer to better enjoy the principal supply of plant hire.
>
> HMRC accept that [the Appellant]'s customers are not obliged to purchase fuel from [the Appellant], however, on [the Appellant]'s own evidence more than 99% of their customers do so. Fuel is required to power the generators and on any objective view these are single supplies of generators with a power source included to enable use of the supply …

> Whether or not the fuel is itemised or advertised separately from the generators, this does not detract from the economic reality that there is a single supply of plant hire and fuel …

13. On 5 June 2023, the Appellant served a witness statement of Mr Cardwell, the director of the Appellant (the "**First Cardwell Statement**"). This stated amongst other matters that customers may elect to supply their own fuel and manage the frequency of deliveries themselves, and that in February 2023 only some 38% of live contracts included fuel management.

14. On 2 November 2023, a differently constituted Tribunal issued its decision in the unrelated appeal of *GAP Group Ltd v Revenue And Customs* [2023] UKFTT 970 (TC) ("***GAP***"). The appellant in *GAP* was a plant hire company which hired out plant to customers and supplied customers with red diesel to fuel the plant. In that case, the appellant had argued that its supplies of plant hire and its supplies of red diesel fuel constituted separate supplies for VAT purposes, such that the hire of the plant should be standard rated and the supplies of fuel should be at the reduced rate. HMRC had argued that the supply of red diesel formed part of the main supply of plant hire, as a single composite standard-rated supply of plant hire. The Tribunal agreed with the appellant that the supplies of plant and supplies of red diesel constituted multiple supplies for VAT purposes, and the appeal in that case was accordingly allowed.

15. On 22 November 2023, this appeal was listed for a three-day hearing on 30 January to 1 February 2024.

16. On 18 January 2024, the Appellant filed and served a further witness statement of Mr Cardwell dealing with the decision in *GAP* (the "**Second Cardwell Statement**").

17. On 18 January 2024, the Appellant also made an application for the appeal to be reinstated within the costs regime, or alternatively, for costs under rule 10(1)(b) of the Rules. The Appellant has since withdrawn the application to be reinstated within the costs regime, and there is no need to mention it further. The question whether the Tribunal has any power to reinstate a party back into the costs regime was not decided. It was subsequently common ground that any application for costs under rule 10(1)(b) should be made after the Tribunal had given its decision disposing of the appeal.

18. On 19 January 2024, the Appellant served its skeleton argument. On 26 January 2024, HMRC served their skeleton argument.

19. The skeleton argument of the Appellant argued amongst other matters as follows.

    (1) *Middle Temple* Principle 10 (freedom of choice of the customer) is of profound significance. The element of choice is plainly present in this case.

    (2) The existence of Scenario 1 demonstrates that the hire of the generator without fuel is clearly capable of being an end in itself. The customer can *choose* the source of the fuel supply. Such supply is fiscally separate.

    (3) Analytically, the current appeal is indistinguishable from *GAP*, which must be followed as HMRC did not appeal against the decision in that case.

    (4) The following factors are indicative of two separate supplies. The fuel and generators are priced and advertised separately. Fuel may be supplied at a later time. Fuel may be delivered on an ongoing basis therefore supplied separately. Fuel is itemised separately on invoices. The fuel management service is a completely separate service.

20. The skeleton argument of HMRC argued amongst other matters as follows.

(1) The cases are very fact sensitive, and all the circumstances must be considered in every transaction.

(2) An ancillary supply can be something that, "…contributes to the proper performance of the principal service and … takes up a marginal proportion of the package price compared to the principal service [and] … does not constitute an object for customers or a service sought for its own sake, but a means of better enjoying the principal service" (quoting Joined Cases C-308/96 and C-94-97, *Customs and Excise v Madgett* [1998] ECR I-6229, [1999] 2 CMLR 392 at [24], agreeing with Advocate General Léger at [36]).

(3) The element of choice is not decisive, and it is an overstatement to say that it is "of profound significance". Whilst it is accepted that the customer is not obliged to purchase fuel from the Appellant which may be sourced elsewhere, the Appellant's own evidence is that 99% of customers do opt to purchase fuel from the Appellant.

21. On 29 January 2024, the day before the hearing commenced, the Appellant served a third witness statement of Mr Cardwell (the "**Third Cardwell Statement**"), and a framework agreement.

22. On the first day of the hearing, the Tribunal admitted the Third Cardwell Statement and the framework agreement into evidence. In his opening submissions, counsel for the Appellant said amongst other matters as follows. It is not the case (as HMRC contended) that 99% *of customers* purchase fuel from the Appellant. Rather, it is the case that 99% of *the Appellant's fuel sales* fall into Scenarios (2), (3) or (4). Less than half of the Appellant's customers choose the fuel management option (Scenario (3)). Customer choice would be "if not one of, possibly the major analytical bone of contention, both on the facts and on the law between the parties".

23. On the second day of the hearing, Mr Cardwell gave evidence. He gave evidence in chief, and was cross-examined, on specific facts and circumstances of the Appellant's business. Some of the evidence he gave concerned the reasons why customers obtain their fuel from the Appellant rather than from a different supplier, when they have freedom of choice. He spoke of the needs that particular customers might have. For instance, a telephone company might hire one of the Appellant's generators for work on a phone mast in the middle of a muddy field. Some customers needed fuel out of hours or on weekends, or at short notice. He said that:

> There aren't many companies that could provide fuel out of hours … I can do things my competition can't, which is why we win the contracts rather than the competition win the contracts … We use the Land Rover tankers because when you drive into a wet field, you get in and out without making a mess … we operate 24 hours a day. We operate every day of the year. We have a network of depots which allows us to give geographical coverage across the whole of the UK. One of our key customers is the police radio network. We guarantee to attend site in three hours, 24 hours a day, seven days a week. We have engineers on call. If we get a call for fuel, we can provide to just about any UK mainland address within three hours, even on Christmas Day.

Mr Cardwell also gave some evidence about alternative suppliers of fuel in the market.

24. In her closing submissions, counsel for HMRC said that "if there is a lack of choice because there are no other providers in the market, I would say there's no choice at all". Subsequently, the Tribunal asked her to clarify the parties' positions on who else the customers could realistically get their fuel from if they did not get it from the Appellant. It emerged that there was not a common understanding of what Mr Cardwell had said about this in his evidence, and counsel for the Appellant proposed that Mr Cardwell could be asked the next day, as he was no longer in the hearing.

25. On the third day of the hearing, before Mr Cardwell was recalled as a witness, the Tribunal asked counsel for HMRC to clarify HMRC's case. She confirmed that it was HMRC's case that "it has not been established that the hirers of the generators had any real choice but to use the appellant's fuel management option, because as a matter of practical reality there was … no evidence presented by the appellant that they could have got the red diesel from anywhere else". The Tribunal then asked counsel for HMRC whether it was not the case there must be a network of red diesel sellers covering the entire country to supply farms that use red diesel, and that these suppliers are required to be registered with HMRC such that HMRC must know of their existence. If so, the Tribunal questioned whether the Appellant's customers would not have been able to obtain red diesel from any one of them.

26. Counsel for the Appellant then made an application to introduce new evidence, in the form of printouts from the internet. These were said to show "the existence of a highly developed nationwide network of suppliers of diesel, red and white", and "pages and pages of people claiming to offer 24/7 service". The Tribunal thereupon encouraged the parties to see whether they could agree if there is indeed a nationwide network of red diesel suppliers who are willing to supply 24/7. The Tribunal also proposed to ask Mr Cardwell about this when he was re-called. Subsequently, counsel for HMRC said that she was not in a position to cross-examine Mr Cardwell immediately. She said that "My client wants time to properly consider and review the evidence received this morning and the oral evidence that was received, because that is all new to my client".

27. At the conclusion of the hearing, the Tribunal decided, after discussion with the parties, to issue directions requiring HMRC by 29 February 2024 to confirm whether they wished to further cross-examine Mr Cardwell on the oral evidence that he gave on the third day of the hearing or to make written submissions on that oral evidence.

28. On 29 February 2024, HMRC sent notification to the Tribunal and the Appellant as follows:

> The Tribunal and the Appellant will be aware that immediately preceding and during the hearing HMRC were served with a significant amount of new evidence. This included contracts, market analysis, further witness evidence and new oral evidence. This new evidence specifically related to the question of whether customers of the Appellant had a genuine freedom of choice and whether that freedom of choice was realistic, which relates to the question of optionality. This was an issue upon which the Appellant placed great reliance in arguing that it made multiple supplies. This was the first time that evidence of contractual freedom and the options being realistic had been provided by the Appellant.
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> In addition, on the last day of the hearing, Mr Cardwell was recalled as a witness in highly unusual circumstances - during HMRC's closing submissions and after the Appellant had closed its case. This was on the basis that the Appellant had submitted further market analysis evidence overnight. Given the very late stage at which this was adduced, HMRC requested time in which to consider it and, if appropriate, respond. Having considered this late evidence, HMRC no longer wishes to defend this appeal.
>
> Pursuant to Rule 17 of the First Tier Tribunal (Tax Chamber) Rules 2009 ("The Tribunal Rules"), HMRC therefore notifies the Tribunal that it withdraws its opposition to this appeal. We request that the Tribunal acknowledge receipt and direct that this appeal be treated as allowed.

29. The parties subsequently agreed on a consent order, which was issued by the Tribunal on 15 April 2024, allowing the appeal and setting aside the assessments under appeal. The consent order set a time limit for the making of any costs application under rule 10(1)(b) of the Rules.

30. On 22 May 2024, the Appellant made the present application for costs. HMRC subsequently filed a written response, to which the Appellant filed a written reply. The Appellant's request for an extension of time for the filing of the reply is hereby granted.

LEGISLATION

31. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("**TCEA**") relevantly provides:

> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal …
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

32. Rule 10 of the Rules relevantly provides:

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

APPLICATION OF LAW

33. The power under s 29(1) TCEA is subject to the Rules. Rule 10 reflects the intention that the First-tier Tribunal generally be a "no costs shifting" jurisdiction, in which both sides bear their own costs, whatever the result of the appeal. Rule 10 should be regarded as an exception to this general expectation. (*Distinctive Care Ltd v Revenue And Customs* [2019] EWCA Civ 1010 ("***Distinctive Care CA***") at [7], [41], [42].)

34. Rule 10 should not be used as a "backdoor method of costs shifting". (*Distinctive Care Ltd v The Commissioners for HM Revenue and Customs* [2018] UKUT 155 (TCC) ("***Distinctive Care UT***") at [44(8)].)

35. "[T]he jurisdiction to award costs is intended to be exercised in a straight-forward and summary way and should not trigger a wide-ranging analysis of HMRC's conduct relating to the applicant's tax affairs." The focus should be on the standard of handling the case, rather than on the quality of the original decision. (*Distinctive Care CA* at [25], [41], [42]; *Distinctive Care UT* at [44(6)].)

36. The words "acted unreasonably" in rule 10 is an imprecise standard, involving a value judgment upon the particular facts and circumstances of each case, on which reasonable people may differ. These words require the Tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done. (*Market & Opinion Research International Ltd v Revenue & Customs* [2015] UKUT 12 (TCC) ("***MORI***") at [48]-[50].) "Questions of reasonableness should be assessed by reference to the facts and circumstances at the time or times of the acts (or omissions) in question, and not with the benefit of hindsight" (*Distinctive Care UT* at [45]). "A party may have acted reasonably in defending

proceedings at a given point in time even though with the benefit of hindsight it might be said the appeal could have been settled then" (*MORI* at [27]-[28], quoting and approving *Market & Opinion Research International Ltd v Revenue & Customs* [2013] UKFTT 475 (TC) at [42]).

37. "[T]he 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." (*MORI* at [56].)

38. Acting unreasonably may include cases where an appellant unreasonably brings an appeal which they should know cannot succeed, or where a respondent unreasonably resists an obviously meritorious appeal, or either party acts unreasonably in the course of proceedings, for example by persisting in an argument in the face of an unbeatable argument to the contrary, or persistently failing to comply with the rules and directions to the prejudice of the other side (*Distinctive Care UT* at [38] and [44(7)], citing *Catanã v Revenue & Customs* [2012] UKUT 172 (TCC), [2012] STC 2138; *Tarafdar v Revenue & Customs* [2014] UKUT 362 (TCC) ("***Tarafdar***") at [18]). It may include cases where a party fails to appreciate something that would be obvious to the properly comparable reasonable observer, or otherwise acts unreasonably in not applying reasonable diligence, whether by applying their mind to the issue, or by making reasonable enquiries (*MORI* at [48]-[50]).

39. A party does not act unreasonably by pursuing a case without merit unless that party ought to have known its case was without merit. (*Roden and Roden v HMRC* [2013] UKFTT 523 (TC) at [11] to [15].)

40. "[I]t is to be assumed that HMRC will [once HMRC has been notified of proceedings] review all the relevant material that has been put before it, something which it will need to do in any event to finalise a Statement of Case and List of Documents, and will make an ongoing assessment of whether a case should continue to be defended. … HMRC must act promptly, once notified, if it becomes clear that the appeal cannot properly be defended". (*Distinctive Care CA* at [30]-[31], [41], [42], quoting and approving *Southwest Communications Group Ltd v Revenue & Customs* [2012] UKFTT 701 (TC) at [45].)

41. "[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?" (*Distinctive Care UT* at [48]-[49], approving *Tarafdar* at [34].)

42. "Even if the tribunal is satisfied that a party has acted unreasonably in the terms of rule 10, the tribunal nevertheless has a discretion whether or not to make a costs order, or as regards the extent of a costs order. Such a discretion, like any other discretion conferred on the tribunal, must be exercised judicially." (*Tarafdar* at [20].)

ARGUMENTS OF THE PARTIES

43. The Appellant argues as follows.

44. HMRC's conduct and delays prior to the hearing resulted in significant unnecessary and avoidable costs being incurred by the Appellant.

45. This was a very simple case.

(1) There was no debate as to the scope or meaning of the legislation, nor as to the applicable principles (referred to in paragraph 10 above), or the five Scenarios under which the Appellant made supplies of fuel (see paragraph 6 above).

(2) The supplies are made in the context of a well-known sector, of which HMRC will have full visibility, both commercially and given its role in the taxation and licencing of supplies of diesel. HMRC was involved in *GAP*, and, apparently, a number of follow-on cases in the same industry. HMRC had total factual visibility at industry-level, in particular as to alternative sources of supply.

46. HMRC's arguments were hopeless, and this should have been reasonably apparent to HMRC long before it gave up.

(1) The core of HMRC's case was the "facile proposition" there was a single supply of generator-plus-fuel, because the generator could not be used without fuel, which was clearly hopeless, as demonstrated by *GAP*.

(2) The sub-argument that customers had no choice once they took the fuel management option was relevant only to Scenario (3). The first witness statement of Mr Cardwell made plain that only 38% *of customers* took fuel management to any extent, and it was expressly stated that there was no "lock in" agreement under which a customer has to purchase any fuel from the Appellant.

47. The new evidence adduced during the course of the hearing was not the reason why HMRC abandoned their defence of the appeal. All the relevant material to allow proper consideration of the case was available to HMRC before the hearing. No material new evidence was established at the hearing.

(1) The three witness statements of Mr Cardwell made clear that customers had contractual freedom to acquire fuel from a supplier of choice and that the exercise of this freedom was in fact realistic.

(2) The account given in the First Cardwell Statement of how the business operates was no different to all the facts presented to HMRC during the course of the enquiry, and that statement was not challenged by HMRC at the hearing. HMRC had the opportunity to enter ADR to enter further discussions and obtain clarity where it was required.

(3) The purpose of the Third Cardwell Statement was not to provide new evidence, but to respond to inaccuracies in HMRC's skeleton argument, for the assistance of the Tribunal. It would not have been required, if the Respondent had adequately considered the facts prior to the preparing of their skeleton argument. Mr Cardwell made it very clear that the customer was not obliged to acquire fuel from the Appellant, and that some customers do not do so. It was perfectly clear from the evidence already provided to HMRC and also within the bundle that customers had a choice that was "genuine and realistic".

(4) The additional information provided by Mr Cardwell in his evidence on the third day of the hearing was in response to questions from the Tribunal. His evidence supports the evidence he previously provided in his witness statements to help the Tribunal understand the position without having a full background to how the company operates. What he said was not new evidence. The Appellant maintained throughout the enquiry that customers had the right to acquire fuel from a supplier of choice and, in fact, fuel was acquired from other parties.

(5) The new evidence adduced at the hearing could conceivably only have had an impact upon Scenario (4). If HMRC believed that this evidence undermined their position as regards Scenario (4), then it was open to them simply to withdraw their case as far as only that scenario was concerned.

48. Even to the extent that it is considered that there was new evidence, then HMRC's conduct prior to the hearing effectively precluded opportunities for that evidence to be established. Had HMRC engaged more constructively with the Appellant prior to the hearing, then the application of the relevant facts to the scenarios would have been accepted by both parties and there would have been no need for the hearing. HMRC had adequate opportunity to raise further questions and obtain further clarity if it was considered necessary to do so prior to the hearing. There were several opportunities before the hearing for HMRC to identify the evidence that they claim was the trigger to the withdrawal of the claim. HMRC did not have regard to the Appellant's exposure to significant costs. HMRC did not regard the hearing as a last resort.

49. HMRC's continued defence of the appeal became unreasonable once the *GAP* decision was issued.

(1) HMRC could not have had any reasonable basis for assuming that the *GAP* decision did not determine the issues in this appeal.

(a) HMRC did not appeal the *GAP* decision. HMRC must therefore be taken to have treated it as correct.

(b) The facts in the *GAP* were very similar to those in this case, and the point of law was identical. HMRC sought a stay of the *GAP* appeal until after the decision in the present appeal, on the ground that the issue to be determined in the former was "significantly similar" to the issue to be determined in this appeal (*GAP Group Limited v Revenue & Customs* [2022] UKFTT 397 (TC) at [26]).

(2) On 13 December 2023, the Appellant applied for the hearing to be postponed, to give both parties the opportunity to discuss the impact of the *GAP* decision, and HMRC unreasonably opposed the application.

50. HMRC stated in its skeleton argument that the Appellant's own evidence admitted that 99% of customers purchase fuel from the Appellant (see paragraph 20(3)). This is incorrect (see paragraph 22 above).

51. HMRC's withdrawal of their case in relation to Scenario (5) on the first day of the hearing demonstrates inadequate consideration and preparation by HMRC in advance of the hearing, and suggests a very belated realisation that the Appellant's case was unanswerable.

52. All of the Appellant's supplies were business-to-business, such that there was no net tax due, and it is difficult to see the point of spending public money on the litigation at all. There was no wider principle at stake.

53. The true reason behind the HMRC withdrawal was the realisation that the publicity of defeat would not be helpful to the overall HMRC position.

54. HMRC argues as follows.

55. HMRC withdrew from the appeal on 29 February 2024 on the basis of new evidence adduced by the Appellant the day before the hearing commenced and on the last day of the hearing. The new evidence showed that the choices available to typical consumers were genuine and realistic.

56. The *GAP* decision would not definitively resolve all the issues under appeal. That decision was not binding on this Tribunal, and the parties had opposing views as to its significance.

57. The issue of choice was the crux of the dispute between the parties, and the majority of the openings focussed on the law that dealt with this very question. It was clear to the Appellant even before the Tribunal intervened to ask about alternative suppliers (paragraph 25 above), that the element of choice was the key battleground. One of the Appellant's grounds of appeal was that its customers had an element of choice as to whether to purchase fuel from them. All evidence relied upon by the Appellant in this regard should have been provided by the Appellant as part of the disclosure and witness evidence stages.

58. At no point did HMRC prevent the Appellant from providing additional evidence and indeed, HMRC had to repeatedly request supporting evidence throughout the course of its enquiries and sought confirmation of whether there was any outstanding information relied upon by the Appellant.

59. HMRC withdrew from this appeal on the basis of the new evidence produced the day before the hearing and at the hearing. This was material evidence, introduced by the Appellant at the eleventh hour to fill a gap in its evidence.

60. This was not a simple case, as is demonstrated by the size and seniority of the Appellant's legal team. The amount of costs incurred by the Appellant is completely at odds with the assertion that this was a simple case.

61. The HMRC case was not intrinsically hopeless.

DETERMINATION

62. It is for the applicant for an order for costs to identify and establish the facts on which the application is based, and to persuade the Tribunal that the application should be granted. The applicant must do so in the application for costs itself.

(1) In accordance with ordinary principles, the applicant bears the burden of proof and burden of persuasion, and the burden of articulating the grounds for the application.

(2) The costs jurisdiction is intended to be exercised in a straight-forward and summary way (paragraph 35 above). The Tribunal is entitled to decide a costs application without regard to any matter not put before it in the costs proceedings, even if it is the same-constituted Tribunal that dealt with the substantive appeal (*MORI* at [62]).

(3) If an applicant for a costs order claims that information was or should have been known to the other party at a time prior to the hearing, the applicant is expected to set out in the costs application the particular information in question, and the particular time at which and means by which it is said that that information was or should have been known to the other party.

63. In this appeal, new documentary evidence was introduced the day before the hearing started, and at the hearing itself (see paragraphs 21 and 25 above).

64. The new documentary evidence contained evidence of material facts not previously in evidence in the proceedings, in particular that there is a nationwide network of suppliers of diesel, claiming to offer 24/7 service.

(1) The costs application does not demonstrate, or even expressly contend, that this particular information was previously already in evidence before the Tribunal.

(2) This evidence was clearly material to the case. The Appellant relied on *Middle Temple* Principle 10 (freedom of customer choice) (paragraphs 10 and 19(1)

above). The Appellant had to demonstrate "a genuine freedom to choose which reflects the economic reality of the arrangements between the parties". The Appellant therefore arguably had to establish that the customer had both (1) a *legal* choice of supplier (that is, that the customer was not contractually bound to obtain fuel from the Appellant only), and (2) a *practical* choice of supplier (that is, that alternative suppliers could and would supply fuel to the places and at the times required by customers, at a competitive price). The new evidence was relevant to the existence of the latter.

(3) If new evidence is introduced at the hearing as a result of questions asked by the Tribunal, that does not mean that it is not new evidence in the same way as any other new evidence.

65. The costs application does not establish that these material facts were already known to HMRC.

(1) The costs application does not identify any time prior to the hearing at which the Appellant claimed to HMRC, or provided evidence to HMRC, that there is a "highly developed nationwide network of suppliers of diesel … claiming to offer 24/7 service".

(2) In any event, it cannot be said that HMRC knows or should know a fact, merely because that fact has been stated in a witness statement or other document served on HMRC by an appellant. HMRC is generally entitled to dispute or to not admit claimed facts, and to cross-examine witnesses on them. Witness evidence that has withstood the test of cross-examination has greater evidential weight than a witness statement that is untested. HMRC's evaluation of an appellant's evidence may reasonably change once cross-examination of witnesses has taken place.

(3) Furthermore, where a fact claimed by an appellant is of a general nature (such as a claim that customers could realistically get their fuel from another supplier), HMRC is entitled to probe the details of that claim in cross-examination. The fact that HMRC is prepared to accept a such a claim after the hearing does not of itself mean that it was unreasonable of HMRC not to have accepted it before the hearing.

(4) The Tribunal is not persuaded on the basis of what is contained in the costs application that HMRC as an organization would necessarily know that there is a "highly developed nationwide network of suppliers of diesel … claiming to offer 24/7 service". The mere fact that HMRC as an organization must know how many businesses are licensed to sell red diesel would not of itself mean that HMRC must necessarily know the terms on which those businesses are in practice willing to supply fuel to customers.

(5) Moreover, even if it were to be assumed that HMRC as an organization has "total factual visibility at industry-level, in particular as to alternative sources of supply" (see paragraph 45(2) above), this would not mean that every individual HMRC officer must be expected to have such "total factual visibility". In this costs application, the Tribunal is concerned with HMRC's conduct of these appeal proceedings, not with HMRC's handling of the Appellant's tax affairs more generally (paragraph 35 above). The Appellant has not persuaded the Tribunal in the costs application that the individual HMRC officers responsible for the conduct of these appeal proceedings ought to have had "total factual visibility" of this sector.

66. There is no duty on HMRC, as a party to Tribunal proceedings, to point out to the Appellant every possible additional fact that might make a different to the outcome of the appeal, and to invite information from the Appellant in relation to that fact. That is particularly so in a case such as the present, where the appeal must be decided on the basis of the facts and circumstances of the case as a whole (see *Middle Temple* Principle 3, paragraph 10 above).

(1) In a costs application under rule 10(1)(b), the Tribunal is concerned with HMRC's conduct in the appeal proceedings, and not with HMRC's original decision-making in relation to the matter under appeal (see paragraph 35 above).

(2) In a Tribunal appeal, it is for the Appellant to identify its grounds of appeal, and the facts and propositions of law on which the grounds of appeal are founded. Contrary to what the Appellant appears to contend (paragraphs 47(2) and 48 above), it is not for HMRC to seek to identify to the Appellant all potential grounds of appeal, evidence and arguments.

(3) If new evidence is introduced at the hearing as a result of questions asked by the Tribunal, that does not mean that HMRC acted unreasonably by not asking the Appellant the same questions before the hearing.

67. It was not unreasonable of HMRC not to accept that the decision in *GAP* was determinative of the outcome of the appeal.

(1) In a case such as the present, there is no absolute rule and all the circumstances must be considered in every transaction (*Middle Temple* Principle 3, paragraph 10 above). HMRC reasonably proceeded on this basis (paragraph 20(1) above).

(2) In situations where each case turns on its own particular combination of facts and circumstances, prior case law is referred to in order to ascertain the applicable *legal principles*. The parties and the Tribunal are then entitled to apply the legal principles to the specific facts of the case at hand, without having to undertake detailed comparisons of all points of similarity and dissimilarity between the factual circumstances of the case at hand and the factual circumstances of all earlier cases.

(3) In *GAP*, the Tribunal gave long and detailed consideration to the specific facts of that individual case, and to the application thereto of the various principles in *Middle Temple* (paragraph 10 above). The parties and the Tribunal in the present case were similarly required to give long and detailed consideration to the application of those legal principles to the specific facts of the present case. They were not required to give long and detailed consideration to every point of similarity and difference between the facts in this case and those in *GAP*. Even if such a consideration had been undertaken, it could not simply be assumed at the outset that any differences between the facts in this case and those in *GAP* are immaterial. Even in relation to Scenario (2) it cannot simply be assumed that the facts of both cases were necessarily materially identical. This is because the Tribunal in this case would have needed to look at the facts and circumstances of this case as a whole, and not just the facts of Scenario (2) in isolation.

68. The Tribunal is not persuaded that the HMRC case, even at the point that HMRC withdrew from the appeal, was bound to fail.

(1) The Tribunal need not determine how it would have decided the appeal if HMRC had not withdrawn. It need only consider whether it should have been apparent to HMRC, some time before it withdrew, that its defence of the appeal was clearly bound to fail (see paragraph 36, 38 and 39 above). If a party has an arguable case,

albeit one with low prospects of success, it is in principle not unreasonable to ask the Tribunal to decide the matter.

(2) The fact that a party withdraws from an appeal does not mean that that party must be taken to have conceded that it would have been bound to fail if it had continued. A party may decide to withdraw from an appeal because it has reassessed the prospects of success as not being not sufficiently high to justify continuing the appeal, even though there is still some prospect of success. HMRC may withdraw from an appeal because it has been persuaded of the correctness of the Appellant's argument, notwithstanding that a contrary argument would still have some prospect of success. More generally, parties may withdraw from appeals for a wide variety of reasons other than a realisation that their case is hopeless.

(3) The Tribunal considers that the question of how many of the Appellant's customers chose the fuel management option, and how many obtained fuel from other suppliers, was not the key issue in this appeal (compare paragraph 46 above). Those customers who obtained fuel from other suppliers obviously had a realistic choice of suppliers. Those customers who sometimes obtained fuel from the Appellant and sometimes obtained it from other suppliers obviously had a realistic choice of suppliers on the occasions when they obtained it from other suppliers. The Tribunal considers that the question of greater importance to *Middle Temple* Principle 10 was arguably whether customers who *did* obtain their fuel from the Appellant (whether always or sometimes) had such a realistic choice on the occasions when they did so. Even if there is a "nationwide network of suppliers … claiming to offer 24/7 service", that would not mean that there would always be an alternative supplier who could deliver fuel to the place and within the timeframe required by the customer. The evidence suggested that alternative suppliers might not be able to do this (paragraph 23 above). The Tribunal cannot know what further evidence might have been adduced if HMRC had continued with the appeal and had further cross-examined Mr Cardwell. Furthermore, even if the parties were agreed that *Middle Temple* Principle 10 was the main issue in this appeal, the Tribunal when giving a decision in the appeal, would have been required to consider all of the facts and circumstances of the case as a whole, and the application thereto of all of the various *Middle Temple* Principles. Even if only the evidence before the Tribunal is considered, the Tribunal is unable to conclude that it must have been apparent to HMRC at the time of the hearing that the Appellant's argument was unbeatable.

69. The Tribunal is not persuaded that it was unreasonable of HMRC to defend the appeal in relation to all Scenarios until the time of the hearing. In a case of this kind, the Tribunal has to consider all of the facts and circumstances of the case as a whole (*Middle Temple* Principle 3, paragraph 10 above). All of the various Scenarios were collectively part of the overall facts and circumstances of the case.

70. The Tribunal is not persuaded that any misreading by HMRC of the Appellant's evidence was unreasonable.

(1) The "99% error" (paragraphs 20(3), 22 and 50 above) was already contained in the HMRC statement of case (paragraph 12 above). It is not known on what information HMRC based that 99% figure at that time. The costs application does not indicate that the Appellant has sought to elicit an answer to that question from HMRC. The Tribunal therefore cannot find that any misunderstanding by HMRC was an unreasonable misreading of the evidence available to HMRC at that time.

(2) The costs application does not indicate that the Appellant took any steps after the HMRC statement of case was filed to correct any misunderstanding on the part of HMRC in this respect until the Third Cardwell Statement was filed the day before the hearing.

(3) In particular, the First Cardwell Statement says only that "Fewer than half of the customers choose fuel management", and that "38% of contracts are where the customer has elected to purchase fuel from [the Appellant]". This statement appears to be referring to Scenario (3) only. However, customers in Scenarios (2) and (4) also purchased at least some of their fuel from the Appellant. The First Cardwell Statement therefore does not answer the question of what percentage of customers overall in Scenarios (2), (3) and (4) buy all or some of their fuel from the Appellant. Nor does the First Cardwell Statement specifically say that there was an error in the HMRC statement of case in this respect.

(4) The Second Cardwell Statement does not address the 99% error.

(5) Even if it were to be assumed that the "99% error" was due to an unreasonable reading by HMRC of the Appellant's evidence, the Tribunal is not persuaded by what is stated in the costs application that the error caused an unnecessary hearing. The Tribunal does not consider this to have been the critical issue in the case (see paragraph 68(3) above), and the Tribunal would still have been required to consider all of the other facts and circumstances of the case as a whole.

(6) Furthermore, given that the Appellant could have acted much earlier after the HMRC statement of case was filed to correct the misunderstanding, the Tribunal would in any event find in its discretion (paragraph 42 above) that the misunderstanding should not be taken into account when deciding whether there has been unreasonableness within the meaning of rule 10(1)(b).

71. The Tribunal must decide appeals on the basis of their legal merits. The claimed motives of a party in pursuing proceedings are not in principle relevant, other than in exceptional cases, for instance, where it is claimed that the bringing or defence of an appeal is an abuse of process affecting the fairness of the proceedings. The Appellant has not alleged an abuse of process affecting the fairness of the proceedings, and the Tribunal is in any event not satisfied that there has been any such abuse. The Appellant has not provided any other valid reason why a consideration of "motives" of HMRC would be relevant.

72. The Tribunal does not accept the suggestion that it is unreasonable for HMRC to defend appeals involving business-to-business supplies, on the basis that there is "no net tax due" (see paragraph 52 above). It is generally not unreasonable for HMRC to defend appeals involving business-to-business supplies. There is nothing specific about this case that would lead to a different conclusion.

73. The Tribunal finds that:

(1) The reason for the withdrawal of HMRC from the appeal was that material new evidence was introduced at the hearing, which led HMRC to reconsider its position. The Tribunal accepts the statement by HMRC in this respect (paragraphs 28 and 55 above).

(2) Having regard to that reason, the earliest time at which HMRC could have withdrawn was on the third day of the hearing, when the last of the additional evidence was presented.

(3) It was reasonable for HMRC to take a further 28 days before deciding to withdraw from the appeal. The Tribunal had directed, after discussion with the parties at the hearing, that HMRC should be given 28 days after the hearing to decide whether it wished to cross-examine Mr Cardwell on its additional evidence or to make written submissions on that additional evidence. HMRC clearly needed and were entitled to time to consider the new evidence, and 28 days was a reasonable period.

74. The application for a costs order is therefore refused.

75. The Tribunal adds the following.

76. Where a party's case is hopeless, it may become unreasonable for that party to continue with the appeal from the point at which that party should realise that this is so (see paragraphs 36, 38 and 39 above). However, in circumstances where a party's case is not hopeless, such that it would not be unreasonable for that party to continue proceedings to finality, it will in principle not be unreasonable for that party to withdraw at any time prior to finality.

(1) If it would not have been unreasonable for a party to have continued proceedings to finality, it will in principle not be unreasonable for that party to have continued proceedings up to the point at which they were abandoned.

(2) It is not in principle unreasonable for a party to withdraw from proceedings prior to the Tribunal's final decision.

(a) There is no principle that once a party has embarked upon the bringing or defending of an appeal, it will become liable to costs under rule 10(1)(b) if it does not continue with the proceedings to finality, unless it can prove some valid justification for withdrawing beforehand. Any such principle would incentivise a party wishing to concede an appeal to press on nonetheless, merely in order to avoid an adverse costs order in what is meant to be a "no costs shifting" jurisdiction. This would be so especially once the stage has been reached where that party's costs of continuing the proceedings to finality would be less than the amount of the adverse costs order that would likely be made in the event of withdrawal. Such a result would not be in the interests of judicial efficiency, and would be a "backdoor method of costs shifting" in certain cases that are settled (see paragraphs 33 and 34 above).

(b) A party will often have a reason for abandoning proceedings. However, a party need not have any particular reason. A party is entitled to have a change of mind, or even a change of heart. If a successful party would not be entitled to costs after a final Tribunal decision, it should in principle not complain that it is not entitled to costs when success comes some time before the final Tribunal decision. That is simply the effect of a "no costs shifting" jurisdiction.

(3) There might be particular circumstances that make the conduct of abandoning an appeal unreasonable. An example might be where a party reaches a definitive decision to abandon proceedings, but delays in advising the other party and the Tribunal of this, thereby causing the other party unnecessarily to incur additional costs in the meantime. The burden will be on the applicant for costs to establish any such circumstances. The general principle is that the abandonment of an appeal at any time is not unreasonable within the meaning of rule 10(1)(b), if the abandonment occurs at a time when it would not have been unreasonable to continue with the appeal.

77. In this case, the Tribunal is not persuaded that HMRC's defence of this appeal was bound to fail (paragraph 68 above). The Tribunal therefore considers that HMRC's continued defence of the appeal up to the point at which it withdrew was not in principle unreasonable. The Appellant has not established any particular circumstances that made withdrawal at that point unreasonable.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

Release date: 08th NOVEMBER 2024