Appeal number: FTC/48/2010

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

TALENTCORE LIMITED (t/a TEAM SPIRITS)

Respondent

TRIBUNAL: The Hon Mr Justice Roth

Mr Adam Tolley and Ms Kate Balmer (instructed by **the General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**

Mr Jeremy Woolf (instructed by **David Jones & Co (accountants)**) for the **Respondent**

RULING: COSTS

1. Following circulation of the decision in this matter in draft, counsel to the Respondent by e-mail applied on behalf of his client for costs. Attached to that e-mail was a document entitled "Respondent's Schedule of Costs". This simply stated:

> "Anthony Weller (accountant to the Respondent) aprox 25 hours @ £100 per hour = £2500
>
> Jeremy Woolf (counsel) brief fee £9000 (aprox 80 hours)"

2. In response, HMRC sent written submissions of 16 paragraphs arguing that the Upper Tribunal should not make a summary assessment of costs in this case because of deficiencies in that schedule and instead make an order for assessment under rule 10(8)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). In the alternative, they contend that the amount claimed should be significantly reduced on the basis that (a) accountant's fees are irrecoverable; (b) a certain amount of time and therefore expense was taken up by the Respondent's application to amend and raise public law arguments (which the Upper Tribunal decided at the outset of the hearing to stand over) and the distinct argument on control, as to which the Respondent was unsuccessful; and (c) the amount claimed is in any event excessive.

3. In response to those submissions, counsel for the Respondent replied by way of observations which included a breakdown of the time spent on the various aspects of the case, explaining how the fees were calculated. HMRC have by letter dated 21 November 2011 taken issue with certain items and also submitted that Counsel's brief fee was unreasonably high. This promoted a further response from Mr Woolf challenging this characterisation of his brief fee.

4. Rule 10 of the Rules deals with costs and includes the following:

> "(5) A person making an application for an order for costs or expenses must-
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> ...
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> (b) send or deliver with the application a schedule of costs or expenses claimed sufficient to allow summary assessment of such costs or expenses by the Upper Tribunal.
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> …
>
> (8) The amount of costs or expenses to be paid under an order under this rule may be ascertained by—
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> (a) summary assessment by the Upper Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses ("the receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses incurred by the receiving person, if not agreed.

(9) Following an order for assessment under paragraph (8)(c), the paying person or the receiving person may apply—

(a) in England and Wales, to the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply; …

5. There is no further requirement in the Rules as to the form of the schedule to be provided under rule 10(5)(b). The CPR do not apply in general to proceedings in the Upper Tribunal. In those circumstances the requirements specified in para 13.5 of the Costs Practice Direction to CPR Part 44 are not mandatory and, in particular, there is no obligation to set out the schedule in a manner that follows Form N260. However, I have no doubt that the matters specified in para 13.5(2) of the Part 44 CPD as having to be shown separately provide an appropriate guide to what is necessary to comply with rule 10(5)(d). That is reinforced by the fact that the CPR will apply ("with necessary modifications") if the costs are sent for detailed assessment: rule 10(9)(a).

6. However, rule 2 of the Rules provides:

"(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction."

7. Little is achieved if the time and expense of preparing a detailed schedule of costs in support of a modest claim for costs should significantly add to the total of those costs. The present case before the Upper Tribunal lasted for almost two days. For a tax appeal of that duration, using specialist counsel, a total bill of costs in the amount of £11,500 is relatively modest. In those circumstances, I can understand why the Respondent did not feel it incumbent to produce a detailed schedule of costs, in the hope that its claim would not be questioned, subject to any matters of principle. However, HMRC have questioned the figures and the Respondent has in response produced a detailed breakdown. That response, signed by counsel, also confirms that the fees claimed have been paid. In those circumstances, I do not think it would be appropriate or proportionate to decline to make a summary assessment and to send the matter for detailed assessment as HMRC suggest.

8. The Respondent's counsel in the present case was instructed directly by the Respondent's accountants; no solicitor was involved. The accountants were the representative of the Respondent for the purpose of rule 11(1) of the Rules and written notice of their appointment was duly sent to the Upper Tribunal pursuant to rule 11(2). It appears that Mr Weller of the accountants was not a "legal representative" as defined by rule 11(9).

9. The power of the Tribunal to order costs derives in the first place from section 29 of the Tribunals Courts and Enforcement Act 2007 ("the TCEA"), which provides insofar as material:

"**29 Costs or expenses**

(1) The costs of and incidental to-

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper 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 the Tribunal Procedure rules.
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> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may-
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> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted cost or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> ...
>
> (6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf."

10. Since under rule 11 a party may appoint a representative who is not a legal representative, and given the breadth of the Tribunal's discretion under section 29(1), it seems to me that the Tribunal has power to order a party to pay the costs incurred by the other party in instructing that representative where that is appropriate. I do not see that there was anything unlawful about the Respondent's accountants acting as they did on behalf of the Respondent with regard to the proceedings before the Upper Tribunal so as to contravene section 20 of the Solicitors Act 1974. Neither party in their observations made submissions regarding the application of *Agassi v Robinson* [2005] EWCA Civ 1507, [2006] 1 WLR 2126, but for the reason I have given I do not think that the restriction on recovery of costs paid to an unauthorised person in respect work which might have been done by a solicitor applies to proceedings before the Upper Tribunal. The provision in rule 10(9)(a) regarding the application of the CPR if the costs are sent for detailed assessment is not inconsistent with this view, since that rule expressly applies the CPR "with necessary modifications" and I consider that in the light of rule 11, this is precisely the kind of modification that is necessary. Accordingly, I see no restriction on the Respondent recovering for the fees paid to its accountant. This conclusion is reinforced by the fact that section 29(4)(b) of the TCEA provides that a representative who is not a legal representative may be subject to a wasted costs order.

11. However, I accept the submission of HMRC that some time and costs were occasioned by the application to amend to take the point under public law, which raised fundamental issues for which HMRC had to prepare. That was a distinct issue, and in principle HMRC would be entitled to some costs on that account whereas a proportion of the Respondent's costs should be disallowed on that score. It would clearly be undesirable to make cross-orders for costs and the more appropriate course is for a single discount from the Respondent's costs. I accept that counsel's brief fee was fixed at the outset and was not affected in its amount by the application to amend and pursue the two issues to which I have referred. However, this did have some

effect on the time spent by the accountants. Having regard also to the effect which it had on HMRC, and taking a broad brush view, I consider that the Respondent should recover 80% of its reasonable costs.

12. Finally, looking at the overall figures for costs and the explanation given in the Respondent's observations, I do not accept that the amounts are in any way excessive, as HMRC contend. I note that HMRC have not produced a schedule of their own costs which could serve as a basis of comparison. Contrary to what is stated in HMRC's letter of 21 November 2011, the Respondent has now provided a breakdown for all the 25 hours billed by its accountants. As regards counsel, I do not agree that £9000 is an unreasonable or excessive brief fee for a case of this nature. The case was of great significance for the Respondent, which may well have gone out of business if the appeal had succeeded; HMRC regarded it as something of a test case and instructed two counsel; the issues raised were not straightforward and the argument lasted two days. Beyond that, I do not think it is appropriate to apply a fine dissection to the hours spent by counsel on the case.

13. Accordingly, there will be an order that HMRC pay 80% of the Respondent's costs, summarily assessed at £9,200. Those costs are to be paid within 21 days of the issue of this ruling.

THE HON MR JUSTICE ROTH

RELEASE DATE: 29 NOVEMBER 2011