Appeal number: UT/2019/0113

Procedure– costs application based on unreasonable conduct / defence of FTT proceedings - Rule 10(1)b) FTT Rules – jurisdiction to make order in relation to FTT proceedings under s12(4) TCEA when FTT Decision remade by UT – application allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**

-and-

CHESHIRE CENTRE FOR INDEPENDENT LIVING (now known as DISABILITY POSITIVE) — **Respondent**

TRIBUNAL JUDGE SWAMI RAGHAVAN

Sitting in public by way of remote video skype for business hearing treated as taking place in, London, on 9 July 2020

Raymond Hill, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Appellants

Charlotte Brown, counsel, instructed by Excello Law, for the Respondent

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DECISION

1. This is an application by the Cheshire Centre for Independent Living ("CCIL") for an order that HMRC pay CCIL's costs of and incidental to its appeal before the First-tier Tribunal (FTT) in *Cheshire Centre for Independent Living v Revenue and Customs Commissioners* [2019] UKFTT 354 (TC) on the basis that HMRC acted unreasonably in conducting or defending those proceedings. CCIL's case, in essence, is that HMRC unreasonably failed to run what turned out to be a winning argument for HMRC sooner. That failure resulted in CCIL incurring significant costs unnecessarily.

2. CCIL is a charity which promotes the independent living of disabled persons. Its appeal before the FTT concerned the VAT treatment of its supply of payroll services which arose when disabled persons, who had used funding they received for their care needs (Direct Payments), became the employer of their personal assistant carer. CCIL was successful before the FTT. The FTT held the supply of payroll services was exempt because it was ancillary to the exempt care provided by the personal assistant; it was a "supply of services closely linked to welfare work" for the purposes of Article 132(1)(g) of the Principal VAT Directive (PVD)[1].

3. HMRC appealed to the Upper Tribunal ("UT") on two grounds one of which was an entirely new ground ("Ground 2") that the payroll services could not be ancillary to a principal supply of exempt care provided by the personal assistant because the principal supply was not itself exempt. This was because the personal assistant was an employee of the disabled person and as such, pursuant to Article 10 of the PVD, was not a taxable person capable of making a supply within the scope of VAT to their employer. The personal assistant was neither a body governed by public law nor another body recognised by the UK as being devoted to social welfare within Article 132(1)(g) PVD.

4. As reflected by the fact of the subsequent consent order settling the UT proceedings, CCIL ultimately accepted Ground 2 disposed of the appeal in HMRC's favour. However it now seeks its costs, summarily assessed, on an indemnity basis, arguing it was wholly unreasonable of HMRC to not identify their "trump argument", which was available to them since the beginning of the dispute until after the FTT proceedings had ended. Had Ground 2 been raised during the FTT proceedings, CCIL would have withdrawn, and would have avoided the costs that it incurred in successfully pursuing an appeal in response to what it regarded as a differently framed dispute. Those costs total £44,706.21 including VAT.

[1] Council Directive 2006/112/EC

Law

UT's jurisdiction to award costs in relation to FTT proceedings

5. Under the consent order determining the UT proceedings which was made, HMRC's appeal was allowed and the FTT's decision was set aside and remade under sections 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007").

6. There is no dispute between the parties that in remaking the FTT's decision, s12(4) TCEA enables the UT to make any costs order that the FTT could have made. That subsection provides that in remaking the FTT decision "…the Upper Tribunal—(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision". The power to award such costs under s12(4) TCEA was affirmed by the UT in *Capital Air Services Limited v HMRC* [2011] UKUT 484 (TCC) (at [20]). (As explained there (at [15]) while the UT has power to make costs orders in relation to proceedings before the UT under s29 TCEA read with Rule 10 of the Upper Tribunal Rules, it has no power under those provisions to deal with the costs incurred in relation to the proceedings in the FTT.)

7. If the FTT were re-making the decision, the relevant costs rule under the FTT's procedure rules[2] that would apply is set out in Rule 10 which provides:

> **Orders for costs**
>
> 10.—(1) The Tribunal may only make an order in respect of costs…—
>
> …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings."

8. The parties were broadly agreed as to the general case-law principles regarding the threshold contained within Rule 10(1)(b) and the FTT's discretion to make a costs order. For the purposes of this case it is sufficient to note the following:

> (1) The intention behind Rule 10 of the FTT rules is "that the First-tier Tribunal is designed in general to be a 'no costs shifting' jurisdiction … Rule 10 should therefore be regarded as an exception to this general expectation that both sides will bear their own costs, whatever the result of the appeal" (*Distinctive Care v HMRC* [2019] EWCA Civ 1010 per Rose LJ at [7] with whom Lewison and Floyd LJJ agreed).
>
> (2) Whether the threshold condition, of the tribunal considering that a party had acted unreasonably in a relevant respect is satisfied, is a value judgment which depends on the particular facts and circumstances of the case. It

[2] The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

requires 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 HMRC ("MORI")* [2015] UKUT ([15]-[16] and [49]).

(3) "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 v HMRC* Upper Tribunal [2018] UKUT 0155 (TCC) (at [45]).

(4) "the focus should be on the standard of handling the case rather than the quality of the original decision …the 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. (*Distinctive Care CA* (at [25]).

9. To better understand CCIL's case before the FTT and on its costs application, it is helpful to start with the following EU law and domestic law provisions.

10. Article 132 VAT Directive 2006 (Dir 2006/112/EC) provides, so far as relevant:

> "Exemptions for certain activities in the public interest 1. Member States shall exempt the following transactions: … (g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing; …"

11. Point g) above is included in the list referred to in Article 134 VAT Directive 2006 which provides:

> "The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases: (a) where the supply is not essential to the transactions exempted; …"

12. Section 31 VAT Act 1994 provides, "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 …". Group 7 of Sch 9 VATA provides, so far as relevant:

> "Group 7 — Health and welfare Item No … 9
>
> The supply by— (a) a charity, … of welfare services and of goods supplied in connection with those welfare services. …
>
> NOTES (6) In item 9 "welfare services" means services which are directly connected with— (a) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons, …"

13. The full facts found and reasoning of the FTT's Decision are set out in its published decision: *Cheshire Centre for Independent Living v HMRC* [2019] UKFTT 354 (TC).

For present purposes it is sufficient to note that the FTT (at [71]) adopted an approach largely derived from the views of the Court of Appeal in *HMRC* v *Brockenhurst College* [2016] STC 2145 (at [16]).

14. The particular proposition relevant to the current costs application was that "…to be closely linked to a principal exempt supply, the service in question must be an ancillary supply to the principal supply, that is one that does not constitute an end in itself but is a means for better enjoying the principal service supplied". Various CJEU cases were cited in support. (While neither *Brockenhurst* nor any of those cases concerned the welfare exemption, they did concern analogous exemptions :*Horizon College* [2008] STC 2145 (at [28-29]) for education *Christoph-Dornier* Case C-45/01 at [34- 35] and *Ygeia* (Joined Cases C-394/05 and 395/05) at [17-19]) for hospital and medical care. Also, no point was made around the reference to "closely-related" in those exemptions and "closely linked" for the welfare exemption.) Applying that principle to the facts the FTT concluded (at [86]) that the Payroll Service " [did] not constitute an end in itself but [was] instead a means for better enjoying the services of the Personal Assistant, which [was] part of the services required by the individual's care and support plan".

15. The FTT thus found in favour CCIL. It had noted earlier (at [53]) HMRC's acceptance that:

> "…the Appellant [CCIL] was an eligible body for the purposes of art 132(1)(g). Also, that the services of the Personal Assistants to their disabled employers were welfare services (and thus themselves exempt)"

16. At [69]) the FTT noted that it was common ground that:

> "(1) The Appellant [CCIL] is a "recognised body" for art 132(1)(g), and a "charity" for item 9.
>
> (2) The services of the Personal Assistants employed by the disabled people are "welfare work" for art 132(1)(g), and the "provision of care etc" for item 9."

17. HMRC appealed on two grounds. Ground 1 argued the FTT had failed to take account of all of the judgment in *Ygeia* regarding analogous provisions in Article 132 concerning the term "closely-related", specifically, that "only the supply of services which are logically part of the provision of hospital and medical-care services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to 'closely related activities'".

18. Ground 2, the new ground which ultimately led to CCIL conceding HMRC's appeal before the UT was explained as follows:

> "…even if the FTT was right to apply a principal/ancillary test in determining whether the Payroll Service was a supply of services "closely linked to

welfare work" under Article 132(1)(g) PVD, the FTT's decision is, with respect, still wrong in law.

17. Even if the Payroll Service could be regarded as ancillary to the care provided by the Personal Assistant to disabled recipients, an ancillary service cannot be exempt unless it is ancillary to a principal exempt service. That is clear from paragraph 26 of the Court of Justice's judgment in Case C-699/15 *Brockenhurst College*, in which it held (in the context of the education exemption in Article 132(1)(i)) that "both the principal supply and the supplies of services closely related to it must be provided by bodies referred to in Article 132(1)(i) of that directive"

Discussion

19. In order to deal with the parties' respective cases on this costs application, it is necessary to put the FTT proceedings in context and set out briefly how the parties argued their cases. There is no dispute on the key elements of what was put by each, merely on how those fall to be interpreted.

20. CCIL's appeal arose from a ruling it requested from HMRC on whether the payroll services it offered to disabled persons (who used some or all of Direct Payment they received to employ care assistants) was covered by the VAT exemption offered to providers of welfare services. HMRC's decision in its letter of 11 January 2013 was that the supplies were not exempt welfare services but taxable standard-rate supplies. The services were "one step removed" from the actual welfare services and not "directly connected" to a care plan. While it was accepted exempt personal care services could extend to routine domestic tasks which could include bill-paying, form-filling, payroll management was not such a task. The decision, that CCIL payroll services supply was standard-rated, was upheld in HMRC's review decision of 13 May 2013. Again, HMRC explained it did not agree that the provision of payroll services on behalf of an individual was "directly connected to the provision of welfare to them or that such service [was] providing assistance with an everyday task".

21. CCIL appealed to the FTT on 6 June 2013. In its grounds of appeal in support of the services being exempt, it argued that "Without the Direct Payment there would be no welfare service provided, the payment needs to be made for the disabled person to access the care package they need. The Local Authorities have to offer the Direct Payment as a first offering and it requires the disabled person to be an employer". The ground also mentioned HMRCs Notice 701/2 which referred to welfare services being services which were directly connected with the provision of care and the examples given therein to "everyday tasks such as form-filling...bill paying...".

22. HMRC's Statement of Case filed on 4 June 2014 set out the background to the payroll services explaining the circumstances in which the direct payment schemes put the disabled person in the position of any employer and the payroll obligations which went with that. HMRC's response to CCIL's case was that none of the supplies which were the subject of the appeal would fall within the "welfare services" exemption explaining the payroll services were not directly connected (as referred to in Note 6(a)

of Item 9 Group 7) "with the provision of care to CCIL's clients but related to the employment of the care worker (a supply of staff) and not to the actual provision of welfare services themselves". The services could not be regarded as directly connected with the provision of care just because they were provided to the disabled, the services would be required by anyone considering employing staff. The supplies were separate from the supply of care to the client, they did not fall within the definition of care treatment within the law, nor were they directly connected to the care of the client.

23. The case was not listed for hearing until 2017 and even then there was a lengthy stay for the purposes of HMRC carrying out a consultation. The case finally came on for hearing in January 2019.

24. CCIL's case in summary is that HMRC could, and should, have raised Ground 2 sooner. CCIL proceeded on the assumption HMRC had conceded the care supply was exempt, the FTT had understood that too.

25. HMRC argue no such concession was ever made and it was not unreasonable of them not to have addressed the new ground sooner. The case was always focussed on the qualitative nature of the supply – whether the payroll services fell within the ambit of welfare services and in particular the extent to which they involved "general care and domestic help". The issue was about *what* the supply was concerned with (the subject of HMRC's Ground 1). Neither party addressed the *who* question – in other words the status of the person making the principal supply and neither party had raised the issue of whether the payroll services was a supply ancillary to a principal exempt supply. That point, which was addressed through HMRC's Ground 2, only came up, HMRC argue, as a result of oral submissions CCIL made at the hearing before the FTT. HMRC's Statement of Case was correct in simply responding to CCIL's notice of appeal which argued the nature of the payroll services amounted to exempt welfare.

26. Having considered the correspondence between the parties I was referred to, I am satisfied there was no explicit concession made by HMRC that the principal supply was exempt and further that a careful and literal reading of the extracts in HMRC's correspondence could sustain their argument before me that their case was simply about the qualitative nature of the supply. However, it is also the case that the subtlety of that point, was lost on CCIL, who along with the FTT (as it recorded at [53]) clearly proceeded on the assumption that a concession had been made. As I come on to mention below the question of whether any concession had been made remained ambiguous, neither party establishing clarity on the point.

Is the threshold in Rule 10(1)(b) for exercise of the tribunal's discretion met?

27. There is ample case-law concerning the approach to be taken where the alleged unreasonable conduct concerns an unsuccessful party continuing to run what turned out to be a bad argument and not settling sooner. The same is not true of the allegation here,

that a successful party was unreasonable in not revealing a good argument sooner[3]. Nevertheless, the question of what constitutes unreasonable conduct is an open category dependent on the particular facts and circumstances. There is no reason in principle why failing to raise a ground sooner, taking account of the circumstances at the time, might not constitute unreasonable conduct.

28. In terms of the framework to address the issue, in the circumstances of this case where it is plain that HMRC's raising of Ground 2 was the reason for CCIL conceding, I am content to adopt the adaptation which Mr Hill, who appeared for HMRC, proposed, to the three stage approach set out in the case-law (e.g. *MORI* where the complaint is of an unsuccessful party unreasonably not conceding sooner : (1)What was the reason for HMRC raising Ground 2 as a new ground before the UT? (2) Having regard to that reason, could HMRC have raised Ground 2 at an earlier stage in the proceedings? (3) Was it unreasonable for HMRC not to have raised Ground 2 at an earlier stage?

29. As to the first question, HMRC submit it was not until CCIL made its oral submissions arguing that the payroll services were ancillary to a principal exempt supply that the non-exempt nature of that principal supply came to the fore. While there is no transcript or note of proceedings before me, I have no reason to doubt that the account given by Mr Hill, who appeared for HMRC before the FTT, that that was in fact the reason which prompted HMRC to take the course they eventually did with Ground 2. (CCIL's objections on this point were to my mind addressed not the factual issue of what prompted HMRC to raise the ground but to subsequent questions of whether Ground 2 could, and should, have been raised earlier.)

30. Turning then to the second question, having regard to that reason could Ground 2 have been raised earlier? I consider it could. Ground 2 was within the scope of the appeal before the FTT (which concerned whether the payroll services supply was exempt or standard-rated). The ground could have been raised at the outset of HMRC's involvement in the proceedings when it filed its Statement of Case. The reason HMRC advanced - that the turning point was when CCIL mentioned the "principal /ancillary" analysis - did not, in my view, enlarge or alter the scope of the case.

31. In brief this was, as submitted by Ms Brown, for CCIL before me, because the particular context in which the "principal/ ancillary" analysis arose, as explained in established CJEU case-law, was to inform the meaning of the concept of "closely-related" (and its analogue "closely linked"). While CCIL couched part of its arguments in the domestic law terms of "directly connected", the question of whether payroll

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[3] As discussed below while the *MG Rover* and *Sumitomo* do raise this question they do so in the context of a costs discretion which is not conditioned by the threshold of unreasonable conduct

services were "closely-related" was always in substance within the scope of the dispute between the parties.

32. Contrary to HMRC's argument that CCIL's Notice of Appeal was only arguing the payroll services were welfare in quality, the appeal covered two aspects: whether the supplies were themselves welfare, but also whether they were directly connected to the provision of care. That second aspect of the appeal understood together with the relevant case-law apparent at the time, brought into play the notion of principal /ancillary supplies as a frame of reference. While HMRC refer to the CJEU's decision *Brockenhurst* Case C-699/15 in support of Ground 2 (which was decided on 4 May 2017) the relevant proposition in that case (see [24] to [26]) that the principal supply and the supplies of services closely related to it must be provided by bodies referred to in Article 132(1)(i) of the directive derive their support from cases which pre-date the proceedings: see for instances *Horizon College* Case C-434/05 given on 14 June 2007 and the cases referred to there ([28] to [29] and [34]). The significance of the status of the person making the principal supply and the need for it to be exempt was thus established in law and there was nothing in the underlying factual circumstances of CCIL's case to suggest the principal supply made by the personal assistant carers was so exempt. On the contrary, because the supply of payroll services to the disabled person only arose by virtue of the fact the carers were employees of the disabled person, the supply could not be exempt both because of who was making the supply and as the care given in the context of employment was out of the scope of VAT.

33. As to the third question of whether Ground 2 *should* have been addressed earlier, I consider this question must be answered in the affirmative too. In short, that was because the law, the key facts relevant to the law, and the centrality of the point raised by Ground 2 to the dispute sought to be litigated before the FTT, were all in plain sight.

34. I disagree with HMRC's submission that it was necessary to put three different authorities together, *Ygeia*, *Brockenhurst* and *Van de Steen* Case C-355/06 to arrive at the point raised by Ground 2 and that it was only when CCIL mentioned the principal/ancillary analysis in its oral submissions that HMRC could reasonably have then picked up on the point. The case was not, as HMRC sought to depict, one where there had been shifts and developments in the CCIL's case and one where the significance of Ground 2 could only be discerned with the benefit of hindsight. As mentioned above, the relevant legal foundation for Ground 2, was brought into play by the relevance of the concept of "closely-related" and was in place from the outset of the proceedings as a result of cases such as *Horizon College* and the cases referred to there which included *Ygeia* and *Christoph-Dornier-Stiftung* (which HMRC in fact later relied on as regards the interpretation of the term "close-related" albeit with a different emphasis).

35. Similarly, the relevant fact of the employment relationship between the personal assistant carer and disabled person was also apparent at the outset. It was inherent in the nature of the supply to which the appeal related being a payroll service – by definition it could only be relevant to an employer / employee relationship and the

employment relationship was a core element of the factual background. The fact that work provided under a contract of employment was out of the scope of VAT was clear from the terms of the Directive provisions (Article 10 PVD and the equivalent Article 4(4) in the Directive provision referred to in *Van der Steen*).

36. HMRC argue no reasonable defending party would reply to a point a person bringing proceedings had not made. Mr Hill submitted HMRC's responsibility was only to defend the arguments that were being relied on, not all those that an appellant could have made, but did not.

37. In that regard the starting point is the FTT Rules (Rule 25(2)(b) which simply provide that a statement of case must "…—set out the respondent's position in relation to the case". In the particular circumstances of this case, I consider HMRC took too narrow a view of its obligation to set out its position. The appeal here was concerned with the question of whether certain supplies were exempt or standard rated. That was not a dispute to be resolved in the abstract but one which needed to be grounded in the facts of the real-world supplies CCIL actually made. The payroll service could only ever be relevant to an employer / employee relationship placing that feature at the forefront. It was never in issue that the carers were employed and HMRC set the fact out in their Statement of Case. As a matter of the relevant law, it was inherent to the aspect of CCIL's notice of appeal, which in substance submitted its supply was "closely linked", that enquiry was necessary of what it was that CCIL's supply was "closely linked" *to*. The principal /ancillary analysis and an assumption that the principal supply was exempt was not an argument that CCIL could have made but had not; it was wrapped up in at least one part of CCIL's case. The subtle qualitative argument HMRC advanced in response risked posing an academic question to the FTT unless it was assumed the principal supply was exempt (because if that supply was not exempt, the qualitative evaluation of the payroll supply would be of no consequence to the ruling under appeal). It is not therefore surprising therefore that even though there was no explicit concession by HMRC that the principal supply was exempt, CCIL and the FTT reconciled the risk of an academic appeal by assuming such a concession had been made by HMRC.

38. In my judgment, in the circumstances of this case, a party defending and conducting the proceedings reasonably in the circumstances of this case would, in reviewing its position on the case when preparing its Statement of Case, have stood back and dealt with the appellant's grounds of appeal taking account of the wider context of the appeal in which those grounds arose, considering them in accordance with the principles relevant to legislative provision in issue, and applying them to the factual background pertinent to the actual supplies in issue which included the uncontested fundamental fact concerning the employee/ employer relationship. If that been done and the lack of clarity on the parties' position regarding the status of the principal supply in the previous correspondence between the parties had been recognised, the missing building block to CCIL's case, and the therefore academic nature of the appeal would have been exposed. A reasonable party would not thus in such circumstances have restricted its case simply to the nuanced argument on the

qualitative nature of the supply without also flagging its position on the nature of the principal supply. In that light I consider HMRC's conduct, in not approaching its position on the case in that way when setting out its Statement of Case and in continuing to fail to do so subsequently, to amount to unreasonable conduct.

39. That conclusion is sufficient to trigger the tribunal's discretion to make a costs order under Rule 10(1)(b).

Discretion to make costs order and amount

40. HMRC raise a number of matters which they say are relevant in their favour to the Tribunal's exercise of discretion as to whether to award costs. First, they submit it is significant to the exercise of the tribunal's discretion that HMRC are the ultimately successful party relying on the following first-instance tribunal decisions (and also noting the rarity of the situation where costs were awarded against a successful party).

41. In *MG Rover v HMRC* Decision 20871 [2008] Lexis Citation 847, a decision of the VAT and Duties Tribunal, the appellant conceded an appeal in response to HMRC's skeleton filed shortly before the hearing in which HMRC abandoned its original arguments and raised two new arguments. The tribunal rejected the appellant's application for indemnity costs based on HMRC's last minute change arguing that "It might have backed down earlier had HMRC presented a better argument at an earlier date". HMRC's change in position did not displace the fact that the appellant, by withdrawing its claim was the losing party.

42. In *Sumitomo Mitsui Banking Corporation Europe Limited v HMRC* [2010] UKFTT 203, the FTT awarded the appellant 6.4% of the costs it sought against the HMRC where HMRC had won again won after making last minute changes to their case. The FTT explained the award "should be modest having regard to all the circumstances, in particular the eventual outcome of the Appeal and the general rule that costs should follow the event".

43. In my view neither of these decisions advance HMRC's case that their status as the successful party is significant to this tribunal's cost order discretion under Rule 10(1)(b). The costs jurisdiction both those decisions were concerned with was Rule 29(1) of the VAT Tribunal Rules 1986[4] which provided simply that the tribunal could direct that a party or applicant shall pay to the other party to the appeal or application without any threshold condition relating to unreasonable conduct. Taking account of that threshold, the focus of which as pointed out in *Distinctive Care* is the handling of the dispute, and also that, as explained there, Rule 10 reflects the intention that the FTT is designed in general to be a "no costs shifting" jurisdiction, it does not appear that the

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[4] Although *Sumitomo* was litigated before the FTT it was recorded (at [13]) that the "old costs regime" under the VAT Tribunal Rules

normal rule that costs should follow the event should play any significant part in the exercise of the tribunal's discretion.

44. HMRC also argue that it is relevant that Ground 2 was not the sole ground they put forward and that they might in any event have succeeded on their Ground 1. While I agree it is relevant in principle to consider whether the new ground would have needed to have been addressed (if it was not then that would suggest the unreasonable delay in raising Ground 2 might not have caused all the costs sought to have been incurred) I disagree the point has any force in this case. As Ms Brown submitted for CCIL, the issue raised by Ground 2 is logically prior to Ground 1; it would have been dealt with first. Given the clear outcome in HMRC's favour on Ground 2, once that ground was raised CCIL would have been in difficulty in pursuing its appeal.

45. The reasoning in *MG Rover* for why the appellant there did not get their costs does however highlight the potential relevance of the other point, which HMRC argued was relevant to this tribunal's exercise of discretion namely the appellant's responsibility to appraise their own case. Despite accepting that it is was unsatisfactory HMRC had failed to give a proper explanation for their decision refusing the appellant's claim, the tribunal in *MG Rover* considered the appellant's advisers, who were of equal experience and expertise, should have noticed the weakness in the appellant's case, (a regulation which disposed of the appellant's claim) much earlier (at [29]).

46. In my view it is a valid consideration, in the exercise of discretion once the threshold condition unreasonable conduct is met, to consider any such shortfalls in the receiving party's handling of the matter. To the extent the costs sought are attributable to the receiving party rather than the paying party it would not appear to me fair and just in those circumstances to award the receiving party all of the costs it seeks.

47. CCIL submits that because of the concession HMRC made there was no need for CCIL to engage with the weakness highlighted by the point underlying Ground 2. There might be obvious merit in that if CCIL had put the issue squarely on the table at the outset and HMRC had (albeit erroneously) expressly accepted that what the personal carer provided was exempt. But that is not what happened. As mentioned above I consider no explicit concession was made, although I accept HMRC's stance did not rule out such concession and left open the possibility that it had been made. The nature of the principal supply was a fundamental building block to the issue of whether the payroll supply was then exempt. Bearing that in mind and the ongoing obligation on parties to assess the weaknesses in their case, I consider it is relevant, to any award of costs, to factor in that some responsibility lay on CCIL's advisers to establish the position in relation to the principal supply with greater clarity rather than letting it rest in the ambiguous state that it did.

Indemnity costs

48. CCIL maintains that any costs order made should be made on the indemnity basis as referred to in Rule 10(7) of FTT Rules. The relevant threshold for an award of costs

on such basis was considered by the Court of Appeal in two cases I was referred to. In *Kiam II v MGN Ltd.(2)* [2002] EWCA Civ 66 the necessary standard of conduct was expressed as having to be "unreasonable to a high degree" (at [12] per Simon Brown LJ). In *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879 Lord Woolf subsequently explained the standard thus: "there must be some conduct or some circumstance which takes the case out of the norm" (at [32]).

49. CCIL say the norm, in the light of obligation to conduct a rigorous review throughout the proceedings would therefore have been to rely upon Ground 2 from the beginning of the dispute. They highlight that litigation took seven years during which a stay of a period of almost one year was sought to better understand the position, and yet the point (which was not complex) was not raised until the FTT process had ended. HMRC's failure to carry out a review and raise Ground 2 was, CCIL submit, unreasonable to a high degree.

50. While I have concluded above that HMRC's conduct of the proceedings was unreasonable, in my judgement it was not conduct which was unreasonable to a high degree or outside of the norm (in the context that expression is to be understood). Both the above explanations in *Kiam* and *Excelsior* make it clear in my view that it is not enough that the conduct is unreasonable and the difficulty with CCIL's stance is that it seems to me to equate conduct which is unreasonable with conduct which is outside the norm. Although the period of litigation was lengthy some of that was accepted to be due to the CCIL's circumstances and the purpose of the stay to allow for consultation was, as HMRC had explained previously, to see if HMRC's basis of defence could be narrowed which would have been to the CCIL's benefit. I therefore refuse CCIL's application for costs to be ascertained on an indemnity basis.

Ascertainment of costs

51. CCIL seek costs of £44,706.21 inclusive of VAT (as set out their updated statement of costs filed on 7 July 2020) and invite the tribunal to make a summary assessment. I consider the amount of costs is amenable in principle to summary assessment by this tribunal in particular when the deductions and discounts explained below are applied. However, given the lack of information on certain matters, rather than waiting for those be addressed, I consider it preferable that the parties seek to agree an amount of costs between themselves taking account of the matters identified below. (This is on the basis that I would be minded to take account of those matters, together with considerations of reasonableness and proportionality relevant where costs are ordered on the standard basis if it proved necessary to make a summary assessment.)

> (1) I consider that HMRC should not be liable for the costs CCIL incurred in relation to CCIL's evaluation of HMRC's Ground 2. These are the costs of obtaining the advice of different counsel in London, the associated travel and attendance costs and the costs of drafting instructions to that counsel.

This is on the basis that those costs would likely have been incurred even if HMRC had raised that ground earlier.

(2) The resulting amount should be discounted to reflect that CCIL bore some responsibility for not evaluating the strength of its case when viewed in the round and for not taking steps to resolve the ambiguity around whether and if so what concession had been made in relation to a fundamental part of its case that the payroll services was exempt. In my judgment a discount of 30% should be applied.

(3) Any amount in respect of VAT should take account of the extent, if at all, to which CCIL is able to recover all or a proportion of its VAT.

Decision and Directions

52. CCIL's application, that HMRC is liable for its costs of and incidental to CCIL's appeal before the FTT, is allowed.

53. The parties are directed to seek agreement with each other on the amount of costs taking account of the matters set out at [51] above.

54. In the absence of costs being agreed within 28 days of the release date of this decision, the parties shall revert to the tribunal for further direction regarding the ascertainment of costs.

JUDGE SWAMI RAGHAVAN

RELEASE DATE: 15 September 2020