[2018] UKFTT 0273 (TC)

TC06503

Appeal number: TC/2016/03408

PROCEDURE – whether HMRC required to plead an issue the burden of proof resting on appellant – yes - whether HMRC had pleaded the issue – no – whether HMRC should be permitted to amend statement of case-no, as amendment unparticularised

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALLPAY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 15 May 2018

Mr C Bradley, Counsel, for the Appellant

Mr B McGurk, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 21 January 2016, HMRC issued the appellant with a decision that its 'bill payment' services were subject to VAT, and not exempt as they had been treated by the appellant in the past. That decision and various assessments were upheld on review by letter of 23 May 2016. On 17 June 2016, the appellant appealed the decision letter and assessments to this Tribunal.

2. HMRC provided their statement of case on 6 December 2016 and the parties proceeded to exchange evidence in accordance with case management directions: lists of documents were provided by both parties and the appellant served two witness statements. HMRC chose not to rely on witness evidence, but they did ask for further and better particulars of the appellant's case. By agreement between the parties, this application was dealt with by additional evidence being inserted by the witnesses into their witness statements.

3. On 17 November 2017, HMRC wrote to the appellant and asked whether it would withdraw its appeal on the basis of the 2016 decision by the CJEU in *Bookit* [2016] EUECJ C-607/14 and the application of that decision by the FTT in May 2017 in the decision in *Paypoint* [2017] UKFTT 424 (TC).

4. On 30 November 2017, the appellant replied to state that not only would it not withdraw its appeal, but it did not consider that HMRC could rely on the issue (I will refer to it as the 'payments services' issue) at the root of the *Bookit/Paypoint* decisions because it was not pleaded in HMRC's statement of case.

5. HMRC did not accept that the payments services issue was not pleaded or that it required pleading but (they said) 'out of an abundance of caution' they applied to amend their statement of case. The application was opposed and today's hearing was called to resolve the issue. So I have to decide:

> (a) Is the payments services question at issue in this appeal *without* any amendment to the statement of case being necessary; and if not
>
> (b) Should I permit the amendment to the statement of case?

The payments services issue

6. I'll start this decision by explaining what I mean by the 'payments services' issue. Both parties were agreed that, so far as this appeal was concerned, UK law was in accordance with the binding Principle VAT Directive 2006/112/EC ('PVD') and in particular that the UK provisions on exemption for financial services reflected those contained in Art 135(1)(d). Therefore, for the sake of simplicity, I will refer only to Art 135(1)(d) which provided exemption from VAT for:

> 'transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection'

7. The appellant claimed its bill payment services were exempt under this provision. To be right, that meant that its services would have to meet two conditions and those were that

> (a) the services would have to be 'transactions....concerning ....payments, transfers, debts, cheques'; and
>
> (b) the services must not be 'debt collection'.

8. I refer to the question whether the appellant's services were 'transactions...concerning ....payments, transfers, debts, cheques...', which was also referred to by the parties as being the question of whether the appellant's services were 'prima facie' within Art 135(1)(d), as the 'payments services issue'. I will refer to the question whether they amounted to debt collection as the 'debt collection' issue.

What is in issue in this appeal?

9. The starting point seems to be to ask and answer the question of what is in issue in this appeal on the basis of the existing notice of appeal and statement of case, before moving onto the question of whether HMRC need to and should be allowed to amend their statement of case.

10. HMRC's position was:

> (a) They did not need to plead that the appellant's services were not 'payments services' within the meaning of Art 135(1)(d) because the burden of proof in this appeal was on the appellant; and
>
> (b) In any event, they had pleaded it.

Does a point need to be pleaded to be in issue?

11. Mr Bradley relied on the Tribunal's Rules (Tribunal Procedure (FTT) (Tax Chamber) Rules 2009/273) which provided as follows:

> **Rule 25 Respondent's statement of case**
>
> **...**
>
> (2) A statement of case must –
>
> (a) in any appeal, state the legislative provision under which the decision under appeal was made, and
>
> (b) set out the respondent's position in relation to the case.

12. He also referred me to what I had said in *BPP* [2014] UKFTT 644 (TC), which was a case concerning the adequacy of HMRC's statement of case:

> [73] There is very clear prejudice to the appellant in not knowing HMRC's case. Litigation is not to be conducted by ambush. The appellant has the right to be put in the position so that it can properly prepare its case: it needs to know HMRC's case not only before it gets

> to the hearing but before it prepares its witness statements and really before it prepares its list of documents.

13. I was not referred to it but the authorities on the CPR on this say as follows:

> [185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him.
>
> Lord Millett in *Three Rivers District Council v Bank of England* [2001] UKHL 16:
>
> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. .... This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."
>
> Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A

14. While the rules governing the courts are not directly applicable in the Tribunal, I consider that they are a guide to what is appropriate in a tribunal, particularly when dealing with issues of procedural fairness, which is as important in a tribunal as in a court. The Tribunal's rules require HMRC to set out its position in respect of a case; what that means is that HMRC should explain its position in sufficient detail to enable the appellant to properly prepare its case for hearing. Anything less may lead to injustice.

15. HMRC's position was that their statement of case did not need to specifically plead their case in relation to, nor even refer to, the payments services issue, but that nevertheless the issue was in dispute between the parties, and HMRC would be entitled (a) to make submissions at the hearing to the effect that the appellant's services were not payments services and (b) to cross examine the appellant's witnesses on the matter. As I understood it, HMRC took this stance because they did not have the burden of proof in this appeal.

16. Mr McGurk referred me to the cases of *Brady v Lotus* [1987] 3 All ER 1050 at 1065, *Haythornethwaite* (1927) 11 TC 657 at 667, *Khan* [2006] EWCA Civ 89 at [70] and *Ingenious Games* [2015] UKUT 105 (TCC) at [15]. All these cases state that the burden of proof is on the taxpayer to prove that the assessment and/or decision is wrong. I did not find these cases helpful: the proposition that the burden of proof lies on the appellant to prove that its supplies were exempt is not in dispute but it is also not really relevant to the question of what the statement of case must contain.

17. Firstly, if HMRC were right, the above citations from *Three Rivers* and *McPhilemy* would not have expressly required both parties to lay out the parameters of the dispute between them. As one of the two parties to a dispute will always bear the burden of proof, if there was a rule that the party without that burden did not need to state its case, then those citations would have said so.

18. And there is no logic or justice in HMRC's suggestion in any event. If the person with the burden of proof was required to prove *everything*, even those matters which the other party had not clearly disputed, then preparation for, and hearings of, appeals would be much longer and a great deal of time and money would be wasted. Moreover, trial by ambush is not justice: each party should be able to prepare to meet the other party's case in advance of the hearing to increase the likelihood that the outcome of the appeal will be in accordance with the true facts of the case. Each party must therefore state in advance in summary terms what is in dispute and why.

19. It was not cited to me but the decision of the Upper Tribunal in *Fairford Group plc* [2014] UKUT 329 (TCC) seems in point here. In that case, it was accepted that HMRC had the burden of proof. The taxpayer's attitude had been to state that HMRC was put to strict proof of every part of its case. The Upper Tribunal said:

> [48] ... Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.

20. In other words, it is not procedurally fair for the party without the burden of proof to do no more than say the other party must prove every part of their case. Both parties should set out the key parts of their legal and factual case in advance.

21. I have also taken into account the Upper Tribunal decision in *Burgess & Brimheath* [2015] UKUT 578 (TCC), which was also not cited to me. In that case the Upper Tribunal said:

> [43] In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of [the appellants] to raise those issues. ...[45]..... Those issues were issues with respect to which HMRC had the burden of proof, and which, for HMRC to succeed, had to form part of HMRC's own case. They were not issues that the appellants had to raise or argue, and cannot therefore be regarded as points not taken by the appellants before the FTT for which permission of this tribunal is now required.

> [49] For HMRC to succeed before the FTT, either the competence and time limit issues had to be determined in their favour, or those issues had to have been conceded by the appellants. There was no such express concession and, in our judgment, none can be inferred. HMRC were wrong to assume, as it appears from their statement of case that they did, that the absence of reference by the appellants to the competence and time limit issues in their respective grounds of appeal, meant that those issues, on which HMRC's case depended, did not have to be determined in their favour. Those matters formed an essential element of HMRC's case, on which HMRC bore the burden of proof, and which if not proved would fail to displace the general rule that the assessments could not validly have been made. They were wrong too, once the appellants' first skeleton argument had been received, not to have appreciated that, far short of there being any concession on matters relevant to the competence and time limit issues, those matters were clearly the subject of dispute.

22. While at first glance this case might appear to support HMRC's contention that the party without the burden of proof can simply say that they put the other party to strict proof of their case and do no more, I do not think that the Upper Tribunal actually said that. It is only authority for the much narrower point that, where a party expressly (and perhaps impliedly) disputes a matter sought to be proved by the other party, the Tribunal cannot assume, when that issue is not referred to at the hearing, that it has been conceded.

23. It may be that the appellant's pleadings in *Burgess & Brimheath* were defective in not setting out in summary form the key objections to HMRC's allegations, but if so, HMRC had the chance to raise the matter at or before the hearing. Instead they said nothing but proceeded in the hearing on the assumption that the point had been conceded despite the express statement by the appellant that it had not been. *Burgess & Brimheath* is not about the adequacy of the pleadings, it is about the effect of (inadequate) pleadings being ignored by the other party and the Tribunal; on reflection, it is not relevant here and of no assistance to HMRC's case in this application that not having the burden of proof relieves them from the need to plead their case.

24. Mr McGurk also suggested that HMRC could not usefully plead anything as they did not have the burden of proof and were not leading any evidence (just intending to challenge the appellant's). His position was that it was not possible to 'plead a negative' and in particular it would be pointless to plead the facts as outlined in the appellant's evidence and say none of them amounted to payments services. But I think HMRC ought to plead their case on payments services if they wish to make an issue of it at the hearing: they ought to specify in summary terms what element of the facts (as they see them) mean that the appellant's services are not payment services and why.

25. For the reasons given above, my conclusion is that it is not enough for HMRC to say that the appellant bears the burden of proof and must prove everything, including those matters which are neither expressly nor impliedly in issue in HMRC's

statement of case. On the contrary, HMRC's statement of case should outline the issues which are disputed and outline the facts relied on to support their position.

What is in issue in the statement of case?

26. That leads me to the question of whether the payments services issue was disputed (expressly or perhaps impliedly) in the statement of case.

27. I find it was not expressly disputed in the statement of case. For instance, the first paragraph contained (in summary) the statement that Allpay's services were not exempt because their services were of debt collection. Thereafter, a great deal of the statement dealt with the *Axa* case [2010] STC 2825 and what it was understood to mean so far as the exclusion for 'debt collection' was concerned. And while I recognise that a number of paragraphs, to which Mr McGurk referred me, included the statement HMRC considered the appellant's services to be standard rated, either no explanation was given for why HMRC took that view or the explanation given was that it was because the appellant's services were debt collection. The Statement's conclusion was brief, reflected what had been said within it, and was:

> "For the reasons set out above, the supplies made by Allpay plainly fall within the concept of debt collection as explained by the CJEU in *Axa*. The Tribunal is therefore invited to dismiss the appeal."

Nowhere in the statement of case was there a reference to the payments services issue or any kind of express statement that the appellant's services were standard rated because they did not even get over the first hurdle of being within the general description of Art 135(1)(d). Therefore, the payments services issue was not expressly pleaded.

Was the issue impliedly in dispute?

28. The HMRC decision letter of 21 January 2016 which triggered the dispute was detailed: it specifically stated that the officer did not accept that the appellant's services were exempt because (a) the officer considered that they did not fall within the exemption at all (the payment services issue) and (b) because even if they were payments services, the officer considered they were excluded as debt collection (the debt collection issue). Reasons were given for both conclusions.

29. Allpay's grounds of appeal against this decision (not surprisingly in these circumstances) contained a rebuttal of both views stating (with brief reasons) that its services were within Art 135(1)(d) and that they were not debt collection.

The failure of the statement of case to refer to one of these two issues that was so clearly expressed in both HMRC's original decision letter and the notice of appeal, so far from meaning that the issue impliedly remained in dispute, must be taken by implication as meaning that HMRC had decided to concede the point. The only reasonable reading of the statement of case is that the only dispute between the parties was over whether the appellant's services were ones of debt collection. For that to be the only dispute between the parties, by implication HMRC must have conceded that

the supplies fell within Art 135(1)(d) but for the debt collection point. Therefore, the payments services issue was not implicitly pleaded.

Conclusion

30. I find that the only question put in issue by HMRC's statement of case was whether the appellant's services amount to debt collection. It did not expressly nor impliedly put in issue the payment services issue. And as the appellant had expressly averred that its services were payments services within Art 135(1)(d), HMRC's failure to challenge that must be taken as acceptance of it.

31. Rule 25 requires the Statement of Case to contain HMRC's position in respect of the case: that position was that the appellant's bill payment services were not exempt because they were excluded from exemption by being debt collection services. That was the issue that should have been prepared for hearing and that is the issue on which the Tribunal would be required to rule at the substantive hearing.

Should HMRC now be given permission to amend their statement of case?

32. That conclusion is not the end of the matter. The question is now whether HMRC should be now allowed to bring into the appeal the payment services issue by amending their statement of case.

33. The larger part of the submissions were devoted to this issue. Some time was spent on the question of whether the application was 'very late' or merely 'late', and other matters. But it seems to me that the answer to the question is straightforward.

34. And that answer is, whether or not it would be appropriate in principle, taking all relevant factors into consideration, to permit HMRC to amend its statement of case at this point in proceedings, it would only be fair to permit an amendment which fulfils the requirement of Rule 25 by setting out HMRC's position in relation to the payments services issue. But I find that the amendment sought does no such thing and for that reason it should be refused.

35. HMRC sought to make a virtue out of the fact that the changes they seek to make to their statement of case are very short: that indicated, they said, that the changes would not have a substantial effect on the case or its preparation.

36. I find, on the contrary, that the change is substantial: it doubles the legal issues in dispute: it takes the appeal from having one central legal issue to having two significant legal points in issue.

37. The draft changes to the statement of case are short, it seems to me, because they do not set out HMRC's case on the payments services point. On the contrary, they do nothing but briefly state that the payment services issue is in dispute. The extra text merely adds to the summary of the officer's decision a quotation showing she did not consider the services fell in Art 135(1)(d) at all, and then states at §43:

> 'As to [the payments services point], the burden of proof is on Allpay to demonstrate that it prima facie comes within the exemption in [Art 135(1)(d)]. HMRC contends that it cannot discharge that burden such as to prima facie bring itself within the exemption.'

Curiously, HMRC did not even seek to change the conclusion of their Statement of case (set out at [27] above) to bring in both issues. In any event, it is clear that HMRC did not attempt to explain any of their legal or factual reasons for believing that the appellant's services were not payment services. Like the appellants in *Fairford*, they just sought to put the party with the burden of proof to strict proof.

38. As I have said at [25], that is not permitted. It leads to trial by ambush.

39. A simple example of this can be given. The HMRC officer's reason for her view that the appellant's services were not within Art 135(1)(d) at all was based on the decision in *Tierce Ladbrooke SA* and her view that the appellant's services were principally the collection of monies; yet it is clear from HMRC's letter of 17 November 2017 that HMRC then considered the cases of *Bookit* and *Paypoint*, and the question of whether title was taken to the money, central to their view that the appellant's services were not within Art 135(1)(d).

40. Is the appellant meant to guess which of these two lines of argument HMRC now relies on for its view that its services are not payment services? Perhaps both? And should the appellant guess whether there may be other reasons HMRC might have for advancing that view at the hearing? I do not think so. I consider that what I said at §73 of *BPP* is correct ([12] above). In my opinion, the amendments sought are inadequate as a pleading on the payments services issue as they not state HMRC's case either legally or factually and for that reason the application should be refused.

Should an amendment be permitted in principle?

41. HMRC did not consider their proposed amendment inadequate to state their case; the appellant considered it would not be right for the Tribunal to permit the amendment in its current form but recognised that I could give permission for HMRC to amend the statement of case in principle, giving HMRC a limited time in which to flesh out their position with the necessary detail. Mr Bradley suggested if I did this it should be coupled with an unless order.

42. However, I do not consider it an appropriate course of action. I agree that the appellant is in no position to judge how disruptive the amendment would be to the course of the appeal, such as how much, if any, extra evidence would be required, without knowing what the amendment is. Moreover, there is nothing to prevent HMRC making another application with a proposed amended statement of case which properly sets out their case on Art 135(1)(d) (although I make no comment on whether the application would be allowed if made).

43. That is really the end of the application but (as submissions were made) I refer to the other matters in relation to whether the amendment should be allowed.

No further evidence is required?

44. HMRC not only fail to explain their legal reasons for thinking the appellant's supply is not a payments service, they fail to explain what facts they rely on for this view. This is a particularly curious omission coming as it does after service by the appellant of its evidence and after the appellant's witnesses had replied to specific questions put to them by HMRC.

45. In my view this also puts the appellant in difficulties in responding to the case. It does not know if it needs to consider calling further evidence.

46. Mr McGurk was very dismissive of the suggestion the appellant might need to call further evidence: his position was that the same evidence was relevant to both the question of whether its services were payment services and the question of whether it services were debt collection services. It is the nature of the appellant's services which must be considered by the Tribunal in answering both the first and second issues, and nature of the appellant's services is the very matter addressed by the appellant's witnesses' evidence.

47. He also pointed out that the appellant had never suggested the nature of what other evidence it could serve which would be relevant to the payment services issue. In short, he did not expect the appellant to have any further evidence to serve if the amendment to the Statement of Case was permitted.

48. While I accept that what Mr McGurk says here might be right, nevertheless the appellant cannot be certain of the extent of HMRC's case on the payments services issue, as HMRC have not chosen to enlighten the appellant. It is therefore possible that there is further relevant evidence but the appellant cannot know this until it has an outline of HMRC's case on the payment services issue.

49. Had HMRC properly pleaded their case on the payments services issue, I would have expected the appellant to be able to indicate whether in practice it intended to call further evidence. Taking into account the inadequacy of the draft new pleading, I did not expect that. I do not therefore accept HMRC's point that no further evidence could be called in defence of this new issue: it is unknown at this point.

Deciding the appeal on its merits

50. Fundamentally, the role of a tribunal is to give a just outcome to a dispute: ordinarily that would mean deciding the case in accordance with the rights and wrongs of the underlying dispute. But it also means administering procedural justice: ensuring that the dispute resolution process is fair. And sometimes that means the underlying merits of an appeal cannot be considered because that would result in an unfair legal process.

51. Here it may be debatable whether the appellant's services are within Art 135(1)(d) at all: if I refuse HMRC permission to amend its statement of case, I prevent the Tribunal hearing this appeal considering that issue. Instead, that Tribunal will have to assume that the services are within Art 135(1)(d) and decide only whether

or not they amount to debt collection. That is unsatisfactory, particularly as the evidence the Tribunal will consider is likely to be relevant to both issues.

52. On the other hand, the unsatisfactory nature of that position is brought on HMRC by itself. It chose, impliedly, to concede the issue by exclusively concentrating on the debt collection issue in its statement of case. It now seeks an amendment that still fails to explain its position on the payments services issue. A party cannot justify bringing in a new, unparticularised ground of dispute at any point in proceedings and rely on being allowed to do so simply because otherwise the Tribunal may not determine the dispute in accordance with the underlying merits of it: so it follows that a person can be refused permission to make an unparticularised amendment and that the effect of such a refusal will be to prevent that issue being considered, however unsatisfactory that might be. In my view in this case that position is preferable to the alternative course of action which is to allow trial by ambush.

Is the application 'very late'?

53. There was a dispute over whether the application was 'very late' within the meaning of *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14. Mr McGurk's point was that the application could not be described as 'very late' as no hearing date was compromised because no hearing date had ever been set: Mr Bradley's point was that the Tribunal had been on the brink of listing the final hearing to take place in March this year when it was overtaken by this disputed application.

54. While I accept Mr McGurk's point, I also accept the appellant's point that the application has delayed resolution of this appeal and moreover (if allowed) might make at least some of the time already spent by the appellant in preparing their evidence wasted because the entirety of the evidence would need to be re-visited if a second disputed issue were now added to the appeal. Mr Bradley's point was that costs would not be an adequate compensation.

55. In any event, I do not need to decide whether, if the application had fully set out HMRC's new case, it was nevertheless too late to be admitted, as I have decided not to admit it because it did not contain HMRC's case. I am not really in a position to take a view on this in any event, because not knowing what HMRC's new case is, the appellant is not in an informed position to make submissions on how much extra work it would actually cause the appellant, nor the Tribunal in a position to take a view on it.

Is the application to reintroduce a claim previously abandoned?

56. The appellant also relied on the case of *Hague Plant* [2014] EWCA Civ 1609. Mr Bradley's point was that HMRC should show 'sufficient explanation' for why an element of its defence (the payments services point), which it had raised in the officer's decision letter, but then dropped from its statement of case, should now be re-introduced. He said no explanation had been given.

57. Mr Bradley's point was that if the explanation was that HMRC were prompted by *Bookit* and *Paypoint* to argue the payment services point, HMRC had been very slow to do so (*Bookit* was decided 6 months before the original statement of case and and *Paypoint* 9 months before the application to amend it). This was not, in his view, a sufficient explanation for introducing a late amendment to a statement of case, causing evidence to be revisited and the hearing significantly delayed (perhaps by over a year).

58. Even if Mr Bradley is right on this, which I do not need to decide, it does not matter as I have already decided not to admit the amendment for reasons given above.

Ulterior motive?

59. Mr McGurk also said that (in his opinion) the appellant's objection to the statement of case was not that it procedurally prejudiced them, but because it now knew that there was (in light of *Paypoint* and *Bookit)* no chance of its case succeeding.

60. By this comment therefore, it seemed that the grounds of HMRC's belief that the appellant's services were not payment services was based on these two cases: it is therefore somewhat inexplicable that neither case was mentioned in the amended statement of case and no explanation was given by HMRC of what facts they relied on as indicating that appellant's services were (similarly) not payment services.

61. In any event, Mr Bradley (as might be expected) did not concede that either of these two cases were determinative of this appeal. And it is certainly not for me to reach a conclusion on this at this stage nor am I in a position to do so. Whether or not the appellant has an ulterior motive, I am clear that HMRC's proposed amendment to its statement of case would not enlighten the appellant on what HMRC's reasons are for saying that the appellant is not prima facie within art 135(1)(d) and because of that the amendment is not permitted.

Conclusion

62. The application is refused.

63. I recognise the possibility that HMRC could make a further application for amendment of its statement of case, setting out in sufficient detail for the appellant to understand why it is HMRC do not think the appellant's services are payment services and including an outline of the facts relied upon to support their view. Such an application would be a different application to the one before me and I do not prejudge it.

64. I will say that the later any such application is left the less likely it is to succeed; but it would not necessarily succeed even if made today, nor even if it had been made instead of the application that actually was made.

Directions

65. The parties now have 14 days to provide their dates to avoid and time estimate for a hearing in the period July – December 2018.

Costs

66. HMRC wanted their costs on the basis the application was wholly unnecessary. As is clear from the above, I do not agree and I have refused their application. This is a complex case which is not opted out: I consider that it was unreasonable for HMRC to apply to amend their statement of case without properly explaining what their amended case was to be and for that reason its reasonable costs of this application are awarded to the appellant, irrespective of the outcome of the appeal, to be summarily assessed if not agreed.

67. Both parties applied for their costs in their skeleton arguments: I waive the requirement for either of these applications to be accompanied by a schedule. Nevertheless, I direct that the appellant is to provide its schedule of costs for this hearing to HMRC within 28 days of the date of this decision or shall be taken to have withdrawn its application.

68. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2018