

Tax Chamber
First-tier Tribunal for Scotland



[2021] FTSTC 2

Ref: FTS/TC/AP/19/0009

***Land and Buildings Transaction Tax – Undertaking to meet expenses –
Rules 10, 5 and 2 of the Tribunal Rules - Application allowed in part -
substantive appeal allowed***

DECISION NOTICE

IN THE CASE OF

Wind Energy Renewables LLP

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: ANNE SCOTT, President
KATRINA LUMSDAINE, Legal Member**

The hearing took place on Tuesday 16 February 2021. With the consent of the parties, the form of the hearing was by WEBEX on the Tribunal video platform

Having heard Mr Gordon Watt, counsel, for the Appellant

Ms Mairi Gibson, Solicitor from Revenue Scotland, for the Respondent

DECISION

Introduction

1. As Alice in Wonderland said – Curiouser and curiouser! This was a most unusual hearing and concerned an application dated 3 September 2020 by Revenue Scotland (“the Application”) for an award of expenses against themselves.
2. The Application reads:

“In light of the Respondent’s undertaking in its application submitted on 11 November 2019, the Respondent respectfully requests the First-tier Tribunal for Scotland Tax Chamber (hereinafter “FTTS”) to make an order under rules 5 and 10 of The First-tier Tribunal for Scotland Tax Chamber Rules of Procedure 2017..., to:

 - i. find the Respondent liable to the Appellant for reasonable legal expenses occasioned by the Appellant in this appeal, said liability to commence from the date of the submission of the Notice of Appeal;
 - ii. in light of the exceptional circumstances, to make an order fixing the amount of those expenses at a specified sum;
 - iii. in the alternative, to direct that the amount of those expenses be as taxed by the Auditor of the Court of Session;
 - iv. to direct the Auditor of the Court of Session that the scale of calculation of the Appellant’s expenses is that chargeable as if the proceedings had taken place in the Sheriff Court as an ordinary action as set out in the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019, that the basis of calculation is to be as between party and party; and to be reduced by such proportion as the FTTS thinks fit;
 - v. to direct the Appellant to prepare an account of expenses and remit same to the Auditor of the Court of Session for taxation, and for intimation of said account to the Respondent; and
 - vi. in the event of opposition to this application or the FTTS wishing to be addressed on it, to direct the parties to provide written submissions, with the Respondent submitting first and to fix a hearing on expenses.
3. Unsurprisingly, the Appellant did not oppose an award of expenses but sought the following Order in terms of Rule 10(1) of the First-tier Tribunal for Scotland Tax Chamber Rules of Procedure 2017 (“the Rules”) namely:

“For the expenses of the appeal (including those pertaining to the involvement of the appellant’s representatives Mazars LLP) on an indemnity basis (agent and client, client paying) which failing, the expenses of the appeal on a party and party basis, as taxed by the Auditor of the Court of Session.

The Hearing

4. Paragraphs I and vi of the Application were not in contention.
5. Although this is the first decision by this Tribunal on expenses, we had extensive written submissions for Revenue Scotland dated 9 October and 16 December 2020 and for the Appellant dated 19 November and 30 December 2020. Those amounted to 72 pages in total. We also had a joint Bundle of documents extending to 267 pages and a joint Bundle of Authorities extending to 42 Authorities and 518 pages.
6. In our view, not all of the arguments or the Authorities were relevant. We, and informed readers of this decision, are fully aware that Tribunals are very different to Courts and that practice and procedure are quite different, and deliberately so. Furthermore these are civil proceedings and have almost nothing in common with either criminal review proceedings or statutory appeals. In oral submissions, Ms Gibson very fairly conceded that although a number of such cases had been referenced in the written submissions they had no application but had simply been included to give a full picture of case law on expenses.
7. Those arguments do not require to be rehearsed here.¹

The Background

8. The Factual and Procedural Chronology produced by Revenue Scotland was agreed and we annex that at Appendix 1.
9. The key issues are that the appeal against the Closure Notice having been lodged with the Tribunal on 9 May 2019, on 8 November 2019, Revenue Scotland wrote to the Appellant stating that the Closure Notice had been cancelled and on the same day applied to the Tribunal for an Order dismissing the appeal on the basis that there was no longer an appealable decision. Revenue Scotland's application included the statements that:

“1. It has come to the Respondent's attention that, following the issue of the Notice of Enquiry dated 24 August 2016, the conduct of the enquiry was partially undertaken by a member of staff of Revenue Scotland who was not a designated officer for the purposes of the Revenue Scotland and Tax Powers Act 2014 [“RSTPA”]....

3. In these circumstances the Respondent agrees to meet the Appellant's reasonable expenses directly incurred in the conduct of its appeals.” (sic).

Hereinafter, we refer to that paragraph 3 as “the Undertaking”.

10. The Appellant opposed that application and on 20 November 2019 the appeal was sisted to allow the parties to negotiate an agreement on the level of those expenses.

¹ Midlothian Council v PD [2021] UT 17

Despite extensive negotiations no settlement was achieved and the Application was lodged by Revenue Scotland.

11. In the interim, on 14 November 2019, Revenue Scotland raised a new assessment under Section 98 RSTPA, in the same sum as had been assessed under the now cancelled Closure Notice.

12. That assessment has also been appealed by the Appellant to the Tribunal and the appeal is ongoing.

Matters that are not disputed

13. Both parties are agreed that if the matter is remitted to the Auditor of the Court of Session (“the Auditor”), then the Tribunal must issue Directions as to both the basis and scale of taxation.

14. Revenue Scotland accepts that in the event that the matter is remitted to the Auditor, that, as sought by the Appellant,

- (a) The period covered by any award of expenses should run from the date of the Notice of Appeal, namely, 9 May 2019,
- (b) There should be sanction for the employment of junior counsel,
- (c) Mazars LLP, as representatives of the Appellant in the appeal, should be treated as if they were solicitors, and
- (d) Cameron Sutherland of Green Cat Renewables should be certified as a skilled person.

15. The first point is uncontentious in that it reflects practice in any Tribunal. We also agree with the latter points. Counsel appear routinely in this Tribunal even in standard cases and this appeal was allocated as complex. That was done for procedural reasons not least of which was the involvement of experts. Like in the UK Tax Tribunal, it is by no means uncommon for appellants to be represented by professionals who are not solicitors. Experts are routinely appointed in tax appeals and it was appropriate in this case.

Matters that are disputed

16. Revenue Scotland’s primary position was that they should fulfil their Undertaking to pay reasonable expenses but that the Tribunal should exercise its discretion to make an Order in terms of Rule 10(2) of the Rules although no actual sum was proposed. The Appellant disagrees. The issue is therefore whether any award should be in a fixed sum or as taxed by the Auditor.

17. Revenue Scotland argues that if this matter is remitted to the Auditor, any award should be on a party and party basis and that it be based on the Sheriff Court scale. The Appellant not only disputes that it should be party and party but if it is remitted, then it should be on an agent and client, client paying basis which they describe as an indemnity basis. Having said that at paragraph 5.4 in their first written submission, they

state at paragraph 5.9 that such expenses are not awards on a full indemnity basis. They are correct in saying that. In *Cabot Financial UK Ltd v Weir*² the Court stated at paragraph 37:

“In summary:-

- An award of expenses on a solicitor/client, client paying basis does not provide an absolute indemnity to the payee
- The expenses recoverable are limited to those which are reasonable”.

18. The Appellant argues that any award should be on the Court of Session scale and that an award on the party and party basis would not give effect to the Undertaking.

19. Ms Gibson made an oral motion that if Revenue Scotland were successful in whole or in part any expenses associated with this application be excluded from any award of expenses.

The Law

20. The Tribunal was created by the Scottish Parliament and is therefore a creature of statute. What that means is that its powers are only those that are given to it expressly by statute. In regard to expenses those powers are initially set out in Section 64 of the Tribunals (Scotland) Act 2014 (“TA 14”) which provides so far as material:

“64 Award of expenses

(1) In connection with proceedings in a case before the First-tier Tribunal or the Upper Tribunal, the Tribunal may award expenses so far as allowed in accordance with Tribunal Rules.

(2) Where such expenses are awarded, the awarding Tribunal is to specify by and to whom they are to be paid (and to what extent).

(3) Tribunal Rules may make provision—

(a) for scales or rates of awardable expenses,

(b) for—

(i) such expenses to be set-off against any relevant sums,

(ii) interest at the specified rate to be chargeable on such expenses where unpaid,

(c) stating the general or particular factors to be taken into account when exercising discretion as to such expenses,

(d) about such expenses in other respects.

(4) Tribunal Rules may make provision—

² [2021] SAC (Civ) 2

(a) for disallowing any wasted expenses,

(b) for requiring a person who has given rise to such expenses to meet them....”

21. The Rules did make limited provision for expenses and Rule 10 of the Rules reads:

“Orders for expenses

10.—(1) The First-tier Tribunal may make an order for expenses as taxed by the Auditor of the Court of Session against a party if that party’s act, omission or other conduct has caused any other party to incur expense which it would be unreasonable for that other party to be expected to pay, with the maximum recoverable expenses being the expenses incurred.

(2) The First-tier Tribunal, of its own initiative or on the application of a party or the parties, may in exceptional circumstances fix by order a sum payable by a party in discharge of an award of expenses.”

22. Section 64 TA 14 makes it explicit that an award of expenses can only be made if there is provision to do so in the Tribunal Rules. Unlike the UK Tribunal Rules the Scottish Parliament decided to depart from the UK position where, in complex cases, expenses follow success and make provision for expenses only in the very limited circumstances set out in Rule 10. The UK jurisprudence on expenses or costs whilst interesting is of limited assistance since the Rules are far from identical.

23. Unlike the Scottish Civil Courts, and deliberately so, the default position in the Tribunal is that there is no award of expenses, regardless of success. That maximises accessibility to justice which is one of the key policies underpinning the Tribunal system.

24. As can be seen from the Application, Revenue Scotland take the approach that Rules 10(1) and 10(2) are “stand alone” alternatives. We disagree. The clue is in the wording of the Rule. Rule 10(2) states that a fixed sum can be awarded “... in discharge of an award of expenses”. The Tribunal can only get to that stage once an award of expenses has been made. Rule 10(2) is a *sequitur* to Rule 10(1), not an alternative. That is a straightforward purposive reading of the Rule. Rule 10(2) can only come into play if Rule 10(1) applies or potentially if Rule 5(3)(g) applies, ie a hearing on the meaning of the Undertaking.

25. Rule 5 sets out the Tribunal’s case management powers, allowing the Tribunal *inter alia* to hold a hearing to consider any matter³ and is uncontentious.

26. Although the parties are agreed that Rule 10(1) has an application (albeit they differ on the interpretation of that) the Tribunal is not bound by that agreement. We, and only we, must decide on the limits, or not, of our jurisdiction. It behoves us to decide whether Rule 10(1) is in point, not least because, for the reasons set out in paragraph 24 and also below, we do not consider that Rule 10(2) comes into play.

³ Rule 5(3)(g)

27. We take the view that Revenue Scotland's statement that they have withdrawn the Closure Notice, irrespective of whether or not they have the power to do so, which is in dispute, is an act or conduct that has caused the Appellant to incur expense which it would be unreasonable to expect them to meet. The simple fact is that that action brought the appeal to an end as both parties are agreed that the substantive issue is no longer in dispute in this appeal. The only extant issue is expenses.

28. That takes the matter within the ambit of Rule 10(1).

29. The other Rule that is relevant is Rule 2 which is the overriding objective to deal with matters fairly and justly which includes dealing with the case in ways which are proportionate to its importance, the complexity of the issues, the anticipated expense and the resources of the parties; and avoiding delay, so far as compatible with proper consideration of the issues.

Discussion

30. Beyond knowing that the reason that Revenue Scotland purported to cancel the Closure Notice was because of an issue in relation to the designated officer, we do not know the detail. What we do know is that the issue of designated officers was discussed at a Board meeting of Revenue Scotland on 30 October 2019 and again on 11 December 2019 and, of course, the cancellation of the Closure Notice was intimated between those meetings.

31. Clearly it must have been perceived that there was a major issue before it was escalated to Board level. However, we agree with Revenue Scotland that since there is an extant appeal in relation to the same transaction then this is not the forum to look at the reasons for the cancellation or whether it was valid.

32. Mr Watt identified very clearly the crux of the matter when he said that "The key thing is that they thought that they had a problem and they therefore abandoned the litigation".

33. We agree with that assessment.

Are there exceptional circumstances?

32. If we are wrong in our view (see paragraph 24 above) that Rule 10(2) is not a "stand alone" Rule then we must consider whether there are exceptional circumstances.

34. This is a specialist Tribunal. In our experience, there is nothing exceptional in Government departments, be it the DWP, HMRC, Revenue Scotland or any other department, or indeed any major corporation, making decisions about their management of an issue that results in expense that was not initially anticipated.

35. The only exceptional matter in this appeal is the Application by Revenue Scotland for an award of costs against themselves!

36. We agree with the only published commentary on the Rules⁴ where Keith Gordon, a very experienced tax barrister, states that Rule 10(2) would be rarely used. He also makes the point that "... the Tribunal will not in general summarily assess any expenses and all such assessment (taxation, to use the Scottish term) is undertaken by the specialist department within the Scottish courts."

37. That is indeed the case since we have no expertise in the assessment of expenses and Revenue Scotland have not even specified the proposed quantum of any award of a fixed sum. Furthermore, although the Undertaking says that they will pay "reasonable expenses" the written submissions ask the Tribunal to fix a nominal sum or to modify any award.

38. Having regard to Rule 2, we take the view that it would not be proportionate or appropriate for the Tribunal to make a decision on expenses other than in the very simplest of cases.

39. Lastly, the wording of Rule 10(2) is that the Tribunal "may" fix a sum and therefore that is a matter for our discretion. Even if Rule 10(2) applies, and we do not think that it does, we would not exercise that discretion.

40. We will therefore make an order for expenses as taxed by the Auditor.

What is the basis for the award of expenses?

41. In the case of *Ahmed-Shekh v Scottish Solicitors' Discipline Tribunal*⁵ the Scottish Solicitors' Discipline Tribunal awarded expenses on a client and agent basis. The paying party appealed to the Court of Session, claiming that an award based on client and agent basis should be quashed. In that case, Lord Ericht upheld the Tribunal's decision to award expenses on the client and agent basis. He held that:

"The conventional line in the Scottish courts is that expenses are generally awarded on a party and party basis, and this applies unless the interlocutor specifies otherwise. However, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused unnecessary expense the court can impose the sanction of expense on the solicitor and client scale."

42. As Mr Watt stated, Revenue Scotland abandoned the litigation but they then issued a new assessment in respect of the same transaction. The fact that they came to the view that they had to withdraw the Closure Notice and offer to pay expenses after witness statements had been served is indicative of what we consider to be unreasonable conduct of the appeal. That justifies a more generous award of expenses in the Appellant's favour.

43. We reject without hesitation Revenue Scotland's arguments that we should take into account the fact that they are public servants acting in the public interest and the public purse will have to meet the expenses. Those are all indisputable facts but they cannot impact on this decision. The Rule is explicit and refers to a party and Revenue

⁴Tax Appeals – Law and Practice at the FTT, 4th Edition

⁵ 2020 SLT 1 at [47]

Scotland will always be a party. Had the Scottish parliament intended to restrict the extent of expenses payable by Revenue Scotland they would have incorporated that in the Rules. The Rule simply says that the maximum payable will be the actual costs incurred.

44. We find it to be only reasonable that an award of expenses should be on agent and client, client paying basis. The Appellant will still not recover all of their costs since it is not a full indemnity. It is also consistent with the wording in the Undertaking.

Which scale applies?

45. The parties agree that the Auditor can tax the expenses on either the Sheriff Court scale or the Court of Session scale.

46. There are three potential levels of appeal beyond the Tribunal as is also the case from the Sheriff Court, whereas there are only two levels of appeal beyond the Court of Session where it is the court of first instance.

47. The Court of Session has more restricted rights of audience than either the Sheriff Court or the Tribunal. The Appellant relied upon the fact that the sums in dispute were, at £194,805, above the privative jurisdiction of the Court of Session, which is currently £100,000. However, the privative jurisdiction operates to restrict cases beneath that threshold being raised in the Court of Session. It is the minimum claim value for cases in the Court of Session. It does not prevent cases involving higher sums being raised in the Sheriff Court.

48. Tax appeals in the Tax Tribunals, both north and south of the border, can, and do, involve sums that can be many multiples of the tax in dispute in this case. As we explain at paragraph 15 above the appeal was allocated as complex but that was for procedural reasons.

49. We find that the expenses should be taxed on the Sheriff Court scale.

The expenses of this hearing

50. We agree with Mr Watt that it was for Revenue Scotland to have stated clearly in their offer to pay expenses the basis on which they were making that offer. They failed to do so and that is the reason why we have had this hearing.

51. We do not accept Revenue Scotland's assertion that if they are successful in whole or in part in respect of expenses then the expenses of this hearing should be excluded. We can see no basis for doing so. They failed in their primary argument on Rule 10(2) and also on the basis for the award.

Disposition of the substantive appeal

52. In the case of an appeal of an appealable decision, Section 244(2) RSTPA provides that:

“The tribunal is to determine the matter in question and may conclude that Revenue Scotland’s view of the matter in question is to be-

- (a) upheld
- (b) varied, or
- (c) cancelled.”

In this case Revenue Scotland, having abandoned their defense of this appeal, we find that Revenue Scotland’s view of the matter is to be cancelled.

Decisions

53. As far as the substantive appeal is concerned, the appeal is dismissed.

54. We make an Order for expenses as taxed by the Auditor of the Court of Session against Revenue Scotland.

55. Those expenses should be taxed on an agent and client, client paying basis on the Sheriff Court scale. Mazars LLP, the Appellant’s representative, should be treated as solicitors, the employment of junior counsel is sanctioned and Cameron Sutherland of Green Cat Renewables is certified as a skilled person.

56. We direct the Appellant to prepare an account of expenses and remit same to the Auditor of the Court of Session for taxation, and for intimation of said account to Revenue Scotland and that within one month of the date of this decision.

57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT
President

RELEASE DATE: 31 May 2021

Appendix

Date	Description
3 October 2011	Lease granted to original tenant, Hatton Windpower Ltd, over land at Mains of Hatton
21 October 2015	Asset Purchase Agreement (“APA”) signed by original tenant and the Appellant for the sale and purchase of windfarm business and assets
23 December 2015	Electronic Land and Buildings Transaction Tax (“LBTT”) return submitted by Appellant in respect of the APA transaction
27 January 2016	Appellant’s agent sets out reasons for the apportionment of the consideration between chargeable and non-chargeable
17 August 2016	Revenue Scotland Board endorse the decision to issue Notice of Enquiry.
24 August 2016	Notice of Enquiry in terms of section 85 of the Revenue Scotland and Tax Powers Act (“RSTPA”) issued to the Appellant in respect of the amount of the purchase price allocated to non-chargeable consideration
6 April 2017	Meeting between Appellant and representatives of Respondent.
6 December 2018	Site visit takes place.
12 December 2018	The Revenue Scotland Board endorse decision to close the enquiry into the Appellant’s LBTT return.
20 December 2018	Closure Notice in terms of section 93 of RSTPA issued to the Appellant concluding that the total consideration for the transaction had not been apportioned by the Appellant on a just and reasonable basis as required by paragraph 4 of Schedule 2 of the Land and Buildings Transaction Tax (Scotland) Act 2013.
18 January 2019	Appellant requests a review by the Respondent of its decision in the Closure Notice.
7 March 2019	Respondent intimates its view of the matter which was to uphold decision in the Closure Notice.

29 March 2019	Appellant provides further comments to the Respondent.
11 April 2019	Respondent notifies the conclusion of its review upholding the decision in the Closure Notice
9 May 2019	Appellant initiates an appeal before the First-tier Tribunal for Scotland (“FTTS”) in respect of the Respondent’s decision in the Closure Notice, upheld on review.
11 July 2019	Respondent lodges its Statement of Case with the FTTS and the Appellant’s agent.
11 July 2019	FTTS issue a Listing Order.
20 August 2019	Respondent lodges List of Documents.
21 August 2019	Appellant lodges List of Documents.
16 September 2019	Appellant submits an application to vary the terms of the Order dated 11 July 2019.
18 September 2019	Appellant intimates its application to vary the terms of the Order dated 11 July 2019 to the Respondent
19 September 2019	Respondent submits its reply to the Appellant’s application, noting no objection with some exceptions.
2 October 2019	Appellant advises FTTS of terms agreed with the Respondent regarding amending the Order dated 11 July 2019.
4 October 2019	FTTS issues an amended Order in the agreed terms.
17 October 2019	Appellant intimates witness statement of fact to Respondent.
8 November 2019	Respondent cancels the decision in the Closure Notice dated 20 December 2018.
11 November 2019	Respondent submits, and intimates, an application to the FTTS for an order dismissing the appeal in light of the cancellation of the decision.
13 November 2019	Appellant makes an application for an award of expenses and opposing the Respondent’s application to dismiss the appeal pending clarification of various matters.
13 November 2019	FTTS proposes that the appeal be sisted pending agreement on expenses.
14 November 2019	Notice of Assessment issued to Appellant in respect of its LBTT liability.

15 November 2019	Respondent replies to FTTS with its view that appeal should be dismissed.
19 November 2019	Appellant intimates to Respondent and the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") its view that the proceedings be sisted.
20 November 2019	Order sisting the proceedings to allow parties to try and reach agreement on level of expenses.
20 November 2019 – 3 September 2020	Appeal sisted and sist extended on several occasions for negotiation.
3 September 2020	Application submitted by Respondents.
10 September 2020	Order requiring Respondents written submissions by 9 October 2020 and if they so intend, from the Appellant by 20 November 2020.
9 October 2020	Respondent's submissions lodged and intimated.