Tax Chamber
First-tier Tribunal for Scotland

[2022] FTSTC 5

Ref: FTS/TC/AP/19/0030

***Land and Buildings Transaction Tax* – expenses application – Rule 10 – act, omission or conduct cause of expenses that it would be unreasonable to bear – no – appeal dismissed**

DECISION NOTICE

IN THE CASE OF

Wind Energy Renewables LLP

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR

The hearing took place at George House, Edinburgh, in person, on Wednesday 11 May 2022

Gordon Watt, Counsel, for the Appellant

David Thomson, QC, for the Respondent

DECISION

Introduction

1. The hearing was to consider the Appellant's application for the expenses of the appeal. It is not disputed that the primary elements of that application include:

(a) that Revenue Scotland be found liable to the Appellant in the expenses of the appeal (including those of its representatives, Mazars LLP), as taxed by the Auditor of the Court of Session;

(b) that, in respect of the entire proceedings, taxation be on the agent client, client paying scale;

(c) failing taxation on the agent and client, client paying scale in respect of the entire proceedings, that taxation on that scale be awarded in respect of the issue of the characterisation of the wind turbines;

(d) that the Auditor be directed to treat Mazars LLP as though they were solicitors for the purpose of taxation;

(e) that the appeal should be certified as suitable for the employment of junior counsel; and

(f) that Cameron Sutherland of Greencat Renewables LLP should be certified as an expert witness for the purpose of the entire proceedings.

2. Revenue Scotland opposed the application in its entirety on the basis that, in terms of Rule 10 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") no act, omission or conduct of Revenue Scotland had "caused … the Appellant to incur expense which it would be unreasonable for the Appellant to be expected to pay".

3. Revenue Scotland's alternative position is that if the Tribunal considers that any award of expenses ought to be in favour of the Appellant, any such award should be restricted in the following respects:

(a) Taxation should be on the party and party, rather than the agent and client, client paying scale; and

(b) Any recoverable expenses so far as the involvement of the Appellant's representatives, Mazars LLP, is concerned should be restricted to the charges of one adviser from that firm.

4. We paraphrase Mr Thomson in terms of the references to the Rules but orally he stated that his tertiary position was that the Tribunal should consider the application in the light of Rule 2 and using its case management powers in Rule 5 and should dispose of the application justly and appropriately.

The hearing

5. We had a Joint Hearing Bundle extending to 1267 pages, a Supplementary Hearing Bundle extending to 124 pages and an Authorities Bundle extending to 748 pages. Thankfully we were not referred to all of the Authorities.

6. We also had Submissions and Supplementary Submissions from both parties extending in total to 19 pages for the Appellant and to 17 pages for Revenue Scotland.

7. We heard no evidence.

Background

8. The parties have engaged in two appeals about the same subject matter.

9. The history of, what we describe as the First Appeal, is that on 9 May 2019, the Appellant had lodged with the Tribunal an appeal against a Closure Notice under Section 93 Revenue Scotland and Tax Powers Act 2014 ("RSTPA") issued by Revenue Scotland on 20 December 2018. That Closure Notice ended an enquiry instigated by Revenue Scotland on 24 August 2016 under Section 85 RSTPA in relation to a Land and Buildings Transaction Tax ("LBTT") return by the Appellant.

10. That return related to the assignation of a lease (relating to a wind turbine) which apportioned £832,001 of the purchase price of £7,669,650 as chargeable consideration and £6,837,649 as relating to non-chargeable assets. LBTT of £27,690 was declared on the return and was paid timeously.

11. On 11 July 2019, Revenue Scotland lodged its Statement of Case. The next step of significance is that on 17 October 2019 the Appellant lodged a witness statement with both the Tribunal and Revenue Scotland.

12. 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 First Appeal on the basis that there was no longer an appealable decision.

13. On 11 November 2019, Revenue Scotland lodged a submission dated 8 November 2019 with the Tribunal stating that it had cancelled the decision in the Closure Notice and requesting an Order dismissing the appeal, as there was now no appealable decision, and undertaking to meet the Appellant's reasonable expenses.

14. On 14 November 2019, Revenue Scotland raised a new assessment under Section 98 RSTPA. It is not in dispute that that is the equivalent of a discovery assessment in the UK jurisdiction and that there is significant jurisprudence on issues relating to those assessments.

15. That assessment was in exactly the same sum as had been assessed in the Closure Notice (£194,805) and is the subject matter of this appeal ("the Second Appeal"). The Notice of Appeal was lodged with the Tribunal on 13 December 2019. The

Statement of Case was lodged on 9 March 2020 and narrated in detail matters which had arisen in the First Appeal. That included the Appellant's letters dated 27 January 2016 and 16 May 2017, Revenue Scotland's instructions to the Valuation Office Agency ("VOA") dated 23 November 2017 and the subsequent VOA report dated 21 August 2018. It also referenced the Closure Notice dated 20 December 2018.

16. Various procedure followed including a sist and ultimately on 30 March 2021, a joint Statement of Agreed Facts was lodged by the parties.

17. The First Appeal had been sisted until 3 September 2020 to allow for negotiation between the parties on the quantum of expenses and that bore no fruit. On that date Revenue Scotland made an application to the Tribunal for expenses to be awarded against them. That led to a hearing on expenses on 16 February 2021.

18. At paragraph 3.18 of his submissions, dated 19 November 2020, for that hearing, Mr Watt had argued, for the first time, that it was not open to Revenue Scotland to unilaterally withdraw the Closure Notice and he cited *HMRC v Bristol & West plc*[1] ("B & W").

19. Both Ms Lumsdaine and I, who heard the First Appeal, have it noted that Revenue Scotland stated explicitly that the decision to cancel the Closure Notice had been made on the basis that it was arguable that that Closure Notice was not valid. They stressed at a later stage that they were not stating that it was invalid but that it was "just debateable". That was supported by their initial submissions for that hearing where they stated at paragraph 81:

> "The respondent makes no concession as to the validity of the enquiry. Further, in determining the respondent's application anent the expenses of this appeal, the FTTS ought not to determine any question as to the validity of the enquiry. That issue is live in the separate appeal before the FTTS at which evidence will be led. To make findings relative to the validity of the enquiry would prejudice those proceedings. In any event it would be inappropriate to make such findings, no evidence having been led on the subject in these proceedings."

In their supplementary submissions at paragraph 31 they argued that the validity of the enquiry was a neutral matter in the First Appeal and a live issue in the Second Appeal so it was only a matter of context for the First Appeal.

20. By contrast, at paragraph 20.1 of the Appellant's supplementary submissions, when addressing Revenue Scotland's argument at paragraph 31, Mr Watt stated:

> "The respondent is called on to explain in what respect the issue of the validity of the Closure Notice arises in the appeal against the respondent's assessment under Section 98? The issue in the appeal against the Section 98 assessment is whether the appeal against that assessment should succeed, not the validity of the Closure Notice."

[1] [2016] EWCA Civ 398

21. In the course of the hearing in the First Appeal both parties agreed that the issue of validity of the Closure Notice was not a matter to be considered by the Tribunal since it was not relevant to the discrete issue for decision which was the quantum of expenses that would fall due in terms of what was described in the Decision in the First Appeal as the Undertaking by Revenue Scotland. Having "parked" the issue of validity of the Closure Notice the parties agreed that the appeal should be dismissed since, *ex facie*, there was no extant appealable decision.

22. The Decision in the First Appeal was issued on 31 May 2021 with an amended decision under the Rule allowing correction of clerical errors etc issued on 8 July 2021.

23. On 9 August 2021, the Appellant applied to the Tribunal for an Order under Rule 6 and following consideration of Revenue Scotland's answers dated 25 August 2021 and the Appellant's response thereto dated 9 September 2021, on 14 September 2021, I issued an Order stating that Revenue Scotland should lead evidence first as to the competency and timing of the assessment at issue in the Second Appeal. I appended to that Order a Note in the following terms:

> "**NOTE**
>
> (1) This assessment is the equivalent of a discovery assessment in terms of section 29 Taxes Management Act 1970 and therefore *Burgess & Another v HMRC* [2015] UKUT 578 (TCC) is in point. Unless the competence and time limit issues, on which the Respondent bears the burden of proof, are established to the satisfaction of the Tribunal then the substantive issue, on which the Appellant bears a burden of proof, does not arise ...".

24. The August application by the Appellant in regard to the leading of witness evidence was predicated on the basis that:

> "For the assessment under Section 98 of the 2014 Act to be competent, section *(sic)*102 of the 2014 Act requires that the alleged loss of tax must have been brought about carelessly or deliberately by the taxpayer …"

and the onus of proof in that regard lay with Revenue Scotland.

25. Revenue Scotland's answer did not reference any issue of competence.

26. On 25 October 2021, Revenue Scotland lodged with the Tribunal an application dated the previous day seeking permission to lead evidence from an additional witness from the VOA. At paragraph 31 of that application, referencing the previous paragraphs under the heading "Relevant law", Revenue Scotland argued that the law that they had summarised covers "both the preliminary issue of competency and timing and the substantive issue …". The only references in that law are to careless or deliberate inaccuracies on the part of a taxpayer.

27. The Appellant responded on 5 November 2021 and the only reference to competency in that 8 page response was:-

> "10. For the assessment under section 98 of the 2014 Act to be competent, section 102 of the 2014 Act requires that the alleged loss of tax must have been brought about carelessly or deliberately by the taxpayer or someone acting on its behalf. The onus is on the Respondent, it is for it to prove carelessness bringing about a loss of tax. This has been clear to both parties from the outset".

28. On 23 November 2021, I issued a Decision refusing Revenue Scotland's application. Because it was relevant to the grounds advanced by Revenue Scotland, I again pointed out the burden of proof in terms of competence and timing and pointed out that in the hearing for the First Appeal, Mr Watt had made it clear that the cancellation of the Closure Notice would be a preliminary matter in the substantive hearing. Thereafter there was some correspondence between the parties and the Tribunal in regard to the forthcoming hearing.

29. As I recorded in the Decision in the Second Appeal at paragraph 26, on 16 December 2021, I emailed the parties answering a number of Covid related issues but also pointing out that, having reviewed my notes from the hearing in the First Appeal, I had observed that counsel for the Appellant had presaged a situation where the Appellant would argue, as a preliminary matter, that there was no appealable decision given the terms of RSTPA.

30. I pointed out that, whether or not the Appellant did so, it raised the issue as to whether or not there was an appealable decision and if not, then the Tribunal would have no jurisdiction and must *ex proprio motu* consider the issue. I raised that because it was plainly a preliminary issue and if, as seemed likely, jurisdiction had to be considered on the first day, then that would impact on the necessity for expert witnesses to be present, or not.

31. Revenue Scotland responded asking a number of questions and I confirmed to both parties that I had it noted that the issue was "The suggestion/warning by the appellant's counsel that there was an argument that having opened what transpired to be an incompetent enquiry, Revenue Scotland had no right to revisit the matter". I pointed out that I stressed that I had not considered the matter beyond noting that it was a potential issue. Revenue Scotland responded stating that "neither of the parties anticipated this being raised as a further preliminary issue in the present appeal, and the Respondent understands that this is not a point that is to be advanced by the Appellant". That prompted a response from the Appellant on the same day stating that the onus was upon Revenue Scotland to establish not only that the conditions in Sections 98 and 102 RSTPA were met as well as "any other jurisdictional considerations".

32. The Skeleton Arguments were duly lodged timeously and, as we note below, the Appellant again raised the issue as to whether the assessment was valid.

33. At the outset of the hearing, Revenue Scotland's Skeleton Argument not having addressed the *B & W* issue, the Tribunal explained that on the face of it there appeared to be a possible problem. The Tribunal explained the law on the subject as we

understood it. The parties were granted an adjournment to take instructions. They reverted requesting that the issue be decided as a preliminary matter.

34. The Decision was issued orally, followed by a written Decision dated 14 January 2022 ("the Second Decision") finding that the Closure Notice could not be unilaterally withdrawn and therefore Revenue Scotland had no power to raise a Section 98 assessment since there was no loss of tax. The appeal was allowed. That Decision has not been, and will not be, appealed. This application for expenses followed.

Overview of the Appellant's arguments

35. The Appellant argues that the first time that Revenue Scotland addressed *B & W* was when the Tribunal raised it at the outset of the hearing on 10 January 2022; it not having been addressed in the lengthy Skeleton Argument which extended to more than 27 pages. That Skeleton Argument assumed at paragraph 49.5 that the Section 98 assessment was competent.

36. The Appellant had intimated at paragraph 1.6 of its Skeleton Argument that the Section 98 assessment was not competent on the basis of *B & W*.

37. The decision in *B & W* was issued in 2016 and the Appellant alleges that it should have been apparent to Revenue Scotland at all times, that it could not withdraw a Closure Notice and that that would render the Section 98 assessment invalid. Revenue Scotland had failed to give the issue proper consideration at the outset of the proceedings or to have kept the matter under review throughout. That failure meant that Revenue Scotland had defended proceedings on a basis which could never have reasonably succeeded. That was unreasonable and the Appellant had been put to expense in pursuing its appeal which it was not reasonable for it to incur.

38. Furthermore, Revenue Scotland had certainly been aware of the issue ever since the submissions in the First Appeal had been lodged in 2020.

39. The Appellant relied on the Upper Tribunal decision in *Distinctive Care Limited v HMRC*[2] ("Distinctive") and, in particular, to the statement at paragraph 44(4) that "(4) A failure to undertake a rigorous review of the subject matter of the appeal when proceedings are commenced can amount to unreasonable conduct".

40. Although the majority of the work in respect of the Second Appeal had been completed prior to the issue of the Decision in the First Appeal on 31 May 2021, Revenue Scotland had never engaged with the issue of competency.

41. In summary, Revenue Scotland had behaved unreasonably and that "opened the gate" to it being unreasonable to expect the Appellant to have to incur expense.

42. In regard to quantum the Appellant relied, as it had in the First Appeal, to *Ahmed-Shekh v Scottish Solicitors Discipline Tribunal*[3] for the proposition that a finding that

[2] [2018] UKUT 155 (TCC)
[3] [2020] SLT 1

proceedings had been conducted unreasonably justifies an award on an agent and client, client paying basis.

43. The Appellant's alternative argument, if unsuccessful in regard to an award of expenses of the entire appeal, is that the expense incurred by the Appellant in rebutting the allegation of carelessness in the characterisation of components as moveables, should be awarded on the basis that Revenue Scotland had only withdrawn its argument on a failure to take reasonable care in that regard at paragraph 24 of the Skeleton Argument dated 22 December 2021. That was very late and unreasonable. It had therefore caused expense that it was unreasonable for the Appellant to bear.

Overview of Revenue Scotland's arguments

44. Whilst it was accepted that the questions of competency and timing had been raised from an early stage in the proceedings in the Second Appeal, it was only in the Appellant's Skeleton Argument dated 31 December 2021 that the reliance on *B & W,* prompted by the Tribunal, had been raised and it was not an issue that Revenue Scotland had faced from the outset.

45. If the Appellant is correct in stating that Revenue Scotland's behaviour was unreasonable because they could never have succeeded in the Second Appeal if they could not withdraw the Closure Notice, then why did the Appellant wait until the Skeleton Argument to raise the *B & W* issue in these proceedings?

46. If one looked at the totality of the proceedings why would the Appellant have instructed experts if there was an obvious point on competency?

47. The Appellant is incorrect to say that at the hearing of the Second Appeal, Revenue Scotland had limited their arguments to a suggestion that Revenue Scotland could not withdraw Closure Notices because the Tribunal would be flooded with appeals. As paragraphs 36 to 41 of the Decision in the Second Appeal make clear, more substantive arguments were advanced.

48. Given that the decision in *B & W* was based on an agreement by the parties that a Closure Notice could not be unilaterally withdrawn, and that was not part of the *ratio decidendi*, it was perfectly proper for Revenue Scotland to argue that *B & W* was an authority that could be distinguished.

49. As far as the issue of the withdrawal of the argument on carelessness is concerned, Revenue Scotland's position had changed on the advice of counsel looking at all of the available evidence and the application of the law. The behaviour of Revenue Scotland in the First Appeal, which was found to be an unreasonable abandonment, could not be equiperated with a question of competency which was the issue in the Second Appeal.

50. In summary, Revenue Scotland's arguments were reasonable albeit unsuccessful and a mere lack of success does not mean that expenses follow.

51. Lastly, as far as quantum is concerned, the application for taxation on the agent and client, client paying scale was a very severe sanction and not appropriate.

The Law

52. As this Tribunal has frequently stated, and made explicit at paragraph 20 of the First Appeal, it is a creature of statute, and quoting from that decision:

> "20….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—
>
> (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."

Discussion

53. We have set out the history in this matter in considerable detail because, even at this hearing there was little common ground, in regard to what had been said about competence and when.

54. The first point we make is that the Appellant is entirely incorrect to suggest that in argument at the hearing in the Second Appeal, Revenue Scotland had advanced only limited argument. We agree with Revenue Scotland that the Decision makes that explicit.

55. Whilst it is true to say that Revenue Scotland did not address the *B & W* issue in their Skeleton Argument, it is equally true to say that Revenue Scotland's Skeleton Argument was lodged in advance of that for the Appellant. The Senior Counsel then instructed by Revenue Scotland had not been present at the hearing in the First Appeal and therefore did not have the benefit of knowing that that matter had even been raised. Although the emails from the Tribunal obliquely reference those issues, clearly she was not instructed on that matter. Nevertheless, we confirm that she dealt with it entirely properly and at some length in the hearing.

56. The Appellant's primary argument is that the impact of *B & W* should have been obvious to Revenue Scotland at all times and so they should have known that they could never have succeeded.

57. Bluntly, we disagree. In preview prior to the hearing, because we did not know what arguments or authorities Revenue Scotland might advance, we decided that we were prepared to take the issue to *avizandum*, if necessary. It is certainly arguable that our analysis of *B & W* might have been incorrect, although, of course, we do not think so! However, that analysis was only arrived at after hearing argument from the parties.

58. Had we thought that the issue was beyond any doubt, the Tribunal would not have simply raised the issue with parties, but would have listed it for a hearing as a preliminary

matter. We note that the Appellant argues on the basis of *Wrottesley v HMRC*[4] at paragraph 28 that that should rarely happen but, again, we disagree. Preliminary hearings certainly do happen particularly where it is a matter of pure law and not mixed fact and law.

59. Rather more pertinently, if it was beyond doubt that a Closure Notice cannot be withdrawn, then the Appellant should have raised *B & W* as an issue in the second Appeal long before it did so in its Skeleton Argument. The fact that it was raised but not pursued in the First Appeal does not assist. Indeed as can be seen from paragraph 20 above, the Appellant expressly distanced itself from *B & W* and there are a number of other examples, such as at paragraph 27.

60. Of course, in relation to the merits of the substantive case the Appellant wished to instruct expert evidence. Nevertheless, we understand Revenue Scotland questioning why they did so if there was an obvious point, as the Appellant argues, that the appeal would never get to consideration of the merits because of the Closure Notice issue. We understand why there would have been no incentive for the Appellant to have argued the point in the First Appeal since, if they had been successful, they would have faced a tax bill. That is a matter of tactics for them.

61. We rely on paragraph 7 in *Distinctive* which reads:

> "(7) the fact that an argument fails before the FTT does not necessarily mean that the party running that argument was acting unreasonably in doing so; to reach that threshold, the party must generally persist in an argument in the face of an unbeatable argument to the contrary;"

for the proposition that Revenue Scotland had the right to argue that *B & W* could be distinguished.

62. The Appellant's argument that Revenue Scotland's behaviour was unreasonable is not entirely well founded. The wording of the Rule is very clear and there has to be an act, omission or some other conduct which has been the cause of expense which would be unreasonable for the Appellant to bear. That is not the same thing, in that, for example, a party could act reasonably but the consequences could give rise to what would be considered unreasonable expense for the other party. However, quite apart from the Upper Tribunal in *Distinctive* another useful authority is the Upper Tribunal decision of *Willow Court Management Company v Alexander*[5], where the Tribunal cited with approval the definition of unreasonable in the context of an application for a wasted costs order provided by the Court of Appeal in *Ridehalgh v Horsefield*[6].

> "The expression [unreasonable] aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal

[4] [2015] UKUT 637 (TCC)
[5] [2016] L&TR 34
[6] [1994] Ch 205

representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

63. We find that Revenue Scotland acted reasonably in arguing that they could withdraw a Closure Notice; the problem is that, in our view, that argument was ill-founded.

64. For all these reasons we find that Rule 10(1) is not engaged. We do not therefore have to consider the question of quantum.

65. Lastly, we turn to the Appellant's argument that Revenue Scotland, in withdrawing its argument on a failure to take reasonable care, albeit belatedly, did not behave unreasonably. It was a measured decision based on the advice of counsel, the application for admission of further evidence having failed. It should be noted in that regard that the final paragraph in the Decision refusing that application has expressly stated that if the timing and competency issues were established then Revenue Scotland would be at liberty to renew the application. That Decision was issued on 23 November 2021 and the Skeleton Argument submitted less than a month later. We assume that Senior Counsel had weighed that in the balance.

66. We therefore reject that argument also.

67. 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: 18 May 2022