Appeal number: TC/2018/08155

VALUE ADDED TAX – costs – Rule 10(1)(b) of the Tribunal Rules – withdrawal by Respondents – whether extension of time should be granted for Appellant to make application for costs more than 28 days after the appeal had been allowed – yes – whether Respondents acted unreasonably in defending or conducting the proceedings – yes – order for costs made

FIRST-TIER TRIBUNAL
TAX CHAMBER

ECLIPSE CONSULTANCY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the application for costs on 20 April 2021 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, both parties having consented and Judge Morgan having determined that this matter could be determined without a hearing.

DECISION

Introduction

1. This decision is in respect of the Appellant's application for their costs incurred as a result of (what the Appellant argues) is the unreasonable behaviour of the Respondents in defending or conducting these proceedings.

2. The Appellant's costs schedule, and both parties' submissions in respect of this application, appear to be on the basis that this appeal has been joined with a number of other appeals. However, there is nothing on the Tribunal file to indicate that this appeal has ever formally been joined. Therefore, this decision relates only to the appeal of the Appellant. The parties are strongly encouraged to use this decision to assist them in reaching agreement regarding costs in respect of other related appeals. If that is not possible then the applications of those other appellants must be referred to the Tribunal.

Facts

3. On the basis of the documents on the Tribunal file, including the submissions of the parties, I find as follows:

4. On 23 December 2016, the Tribunal released its decision in *Doran Bros (London) Limited v HMRC* [2017] UKFTT 829 (TC). This decision was that input tax incurred by a taxable person on professional fees relating to advice on providing tax efficient incentives for its director was recoverable by that taxable person when the advice was given for the purpose of the business. It was held irrelevant that the director also gained a personal benefit from the implementation of that advice. HMRC did not seek to appeal this decision.

5. On 7 December 2018, the Tribunal received an appeal from the Appellant against an assessment to VAT in the sum of £2,120. That assessment, dated 7 November 2018, for the period ended 03/15 had been issued as a result of HMRC's decision to disallow an amount of input tax. That input tax was incurred on professional fees that related to advice about a tax planning arrangement known as "Call Spread Options", also known as "Alchemy". No HMRC decision letter was provided by the Appellant but it was said that the input tax had been disallowed on the basis that HMRC considered the advice the Appellant had received was not for the purpose of the Appellant's business but for the benefit of certain employees and directors. In its grounds of appeal, the Appellant relied, in part, upon *Doran Bros*.

6. The Appellant's appeal was notified to HMRC on 21 December 2018. The appeal was stayed pending resolution of the issue of hardship. On 20 March 2019, the Appellant paid the tax in dispute in order that the appeal could proceed. On 8 April 2019, the Tribunal assigned the appeal to the Standard category, and directed HMRC to file and serve their Statement of Case no later than 60 days, i.e., by 31 May 2019.

7. On 15 May 2019, HMRC made an application to the Tribunal for a stay of this appeal behind *Root 2 Tax Limited v HMRC* (TC/2016/06377) then proceeding as the informal lead appeal in a group of appeals known as the "Alchemy appeals". The basis of HMRC's stay application was that the current appeal "concerned the same arrangements" as the Alchemy appeals, that all of the Alchemy appeals "give rise to common or related issues of fact and or law" and that the "determination of the Alchemy appeals is likely to have a significant impact on the outcome of this appeal".

8. HMRC's application was copied to the Appellant. On 25 June 2019, the Appellant emailed the Tribunal to state that it opposing the proposed stay. The Appellant's agent explained that the Appellant's appeal was one of 67 related appeals filed, that it did not oppose a stay in (apparently any of the other) 66 appeals but that *Root 2 Tax*, a direct tax appeal, had no bearing on the outcome of the current appeal because the current appeal concerned only whether the Appellant was entitled to claim the VAT incurred on the advice, not the effectiveness of the underlying tax arrangement upon which the advice had been given. The Appellant opposed the stay in respect of the current appeal as it would cause unnecessary delay.

9. It is unclear whether this email was placed on the Tribunal file at the appropriate time. On 16 August 2019, the Tribunal (Judge Morgan) directed the Appellant to file submissions within 21 days in response to HMRC's application.

10. On 6 September 2019, the Appellant filed further submissions. In those further submissions the Appellant explained the background to its appeal, and suggested that the current appeal be a lead appeal in respect of the several appeals against the refusal of input tax on the professional fees incurred. The Appellant also submitted that *Root 2 Tax* was the lead appeal in respect of the PAYE and NICs consequences of the Alchemy arrangements but argued that HMRC's application for a stay did not explain how *Root 2 Tax* would have any impact on the Appellant's appeal. The Appellant noted that, in the absence of a Statement of Case, HMRC had yet to particularise their case. The Appellant submitted that there was no overlap between the issues in *Root 2 Tax* and in the Appellant's appeal, or the amounts involved, and there was no justification for the stay of the Appellant's appeal.

11. On 14 October 2019, the Tribunal (Judge Morgan) directed HMRC to confirm if they still wished to pursue their application for a stay.

12. On 15 October 2019, HMRC made an application to the Tribunal for the current appeal to be stayed behind both *Root 2 Tax* and *Praesto Consulting UK Limited v HMRC* [2019] EWCA Civ 353 in which there was an outstanding application by HMRC for permission to appeal to the Supreme Court against the Court of Appeal's decision. (*Praesto* concerned a company's entitlement to claim the VAT incurred on legal fees it paid defending legal proceedings against the company's director.) In addition to this stay application, HMRC also suggested, in a letter to the Appellant copied to the Tribunal, that if the Appellant did not agree to a stay then, in order to avoid the Appellant unilaterally selecting a lead appeal, HMRC would reconsider seeking to have the stay lifted in the other related appeals.

13. On 18 October 2019, the Appellant informed the Tribunal that it objected to HMRC's second stay application. The Appellant noted that there was no explanation of how the current appeal would benefit from being stayed behind either *Root 2 Tax* or *Praesto*, and no explanation of why there was no mention of *Praesto* in the original application. The Appellant noted the time that had already passed, and asked for HMRC's stay applications to be determined on paper to avoid further delay.

14. On 6 November 2019, the Tribunal began listing HMRC's stay applications for oral hearing. On 7 January 2020, the parties were notified that the two stay applications had been listed for a half day hearing on 30 April 2020.

15. Meanwhile, on 13 November 2019, the Tribunal issued its decision in *Taylor Pearson Construction Limited v HMRC* [2019] UKFTT 691 (TC). In *Taylor Pearson*, the Tribunal decided that professional advice given to the appellant on how to reduce its tax and NICs liabilities when rewarding its directors was a service supplied for the purposes of the appellant's business. The Tribunal noted the similarities with *Doran Bros*, and commented adversely upon HMRC's apparent re-running of the same arguments.

16. On 10 December 2019, the Tribunal issued its decision in *Root 2 Tax Limited v HMRC* [2019] UKFTT 0744 (TC). In *Root 2 Tax*, the Tribunal decided, in HMRC's favour, that the Alchemy arrangements resulted in payments that were liable to income tax on the basis that they were earnings from an employment.

17. On 6 March 2020, HMRC applied to the Tribunal for the hearing of their stay application to be vacated, and the appeal stayed for 30 days, in order for HMRC to reconsider its position with regard to this appeal (and the appeals stood behind *Root 2 Tax*) in light of the decision in *Taylor Pearson.* No mention was made of the released decision in *Root 2 Tax* or any effect that might have. On 13 March 2020, the Appellant confirmed that it had no objection to the hearing being vacated or the appeal being stayed for 30 days for HMRC to reconsider its position.

18. On 27 March 2020, the Tribunal cancelled the hearing of the stay application due to the imposition of the first Covid-19 lockdown. On 2 April 2020, the Tribunal wrote to both parties to try to arrange an alternative hearing; this was in the mistaken belief that an oral hearing was still required by the parties. On 27 April 2020, the Tribunal agreed that there was no need to re-list the application hearing, and informed both parties that it would take no further action in that regard.

19. On 14 August 2020, the Tribunal wrote to both parties seeking an update. On 17 August 2020, the Appellant wrote to the Tribunal with a copy of a letter from HMRC to the Appellant's agent dated 5 June 2020.

20. In their 5 June 2020 letter, HMRC notified the Appellant that was withdrawing its non-business argument. HMRC stated it would continue with its argument that the VAT incurred was exempt, with the result that affected businesses would be partially exempt. However, as a result of a de minimis rule, exempt input tax under £7,500 could be recovered as if it was taxable input tax. Therefore, HMRC agreed that the Appellant

(and 31 other appellants) could recover the disputed amount of VAT claimed in full. As a result, HMRC conceded the Appellant's appeal. Although, in this letter to the Appellant, HMRC stated that they would write to the Tribunal to say they would no longer defend the Appellant's appeal, no such correspondence had been received by the Tribunal when it sought an update.

21. On 28 August 2020, the Tribunal sent a copy of the Appellant's letter to HMRC and asked for their comments. On 31 August 2020, HMRC wrote to the Tribunal stating that it would not maintain its defence of the Appellant's appeal.

22. On 15 September 2020, the Appellant made an application to the Tribunal for Directions that:

- the conceded appeals be allowed by the Tribunal,
- another named appellant be the lead case in the appeals that HMRC had not conceded, and that that lead appeal proceed, and
- the time limit for the Appellant (and other appellants in the conceded appeals) to make a costs application be extended until the final determination of the lead appeal.

23. On 22 September 2020, the Tribunal wrote to the parties stating that the Appellant's appeal had been allowed and that any further applications with regard to this appeal must be made within 28 days, i.e., by 20 October 2020.

24. Although the Tribunal's first letter of 22 September 2020 effectively granted the first part of the Appellant's application, the Tribunal sent a second letter on 22 September 2020 seeking HMRC's comment upon the Appellant's application.

25. On 2 October 2020, HMRC emailed the Tribunal in response to the two 22 September 2020 letters. HMRC accepted that 32 appeals had been conceded because they were no longer pursuing the "purpose of the business" argument but, as their first point, HMRC argued that the affected appellants, including the Appellant, should withdraw their appeals rather than the appeals being allowed by the Tribunal. Whatever the merits of that point by HMRC, the Tribunal had already allowed the Appellant's appeal.

26. With regard to the proposed extension of time to make a costs application, HMRC noted that they had withdrawn their defence "at an early stage of the litigation, i.e., pre Statement of Case" and suggested that therefore costs were not applicable. HMRC also submitted that there was no reason for any application for costs to be delayed. With regard to the continuing appeals, HMRC suggested an alternative appellant as the lead appeal, and suggested alternative directions for the progress of the remaining appeals.

27. On 1 December 2020, Judge Morgan directed the parties to provide further submissions with regard to the contents of HMRC's 2 October 2020 email, and set out a timetable for those submissions.

28. On 4 December 2020, the Appellant made its application for costs. This application was made in the name of the Appellant and the other 31 appellants whose appeals had been conceded. However, as noted above, the Appellant's appeal has not been joined to any other appeal. Given that HMRC could not have been in any doubt that it was the agent's intention to claim costs for each of the 32 named appellants, I treat the application as being 32 applications in identical terms, one for each appellant. As stated above, this Decision is in respect of the Appellant only. The attached schedule provided a global figure of £37,950 for all 32 appellants but also stated that the total figure for the Appellant is £850.

29. In its application for costs, the Appellant set out the history of the appeal and argued that:

- it was incumbent on HMRC to review their position at the commencement of the appeal, if they had done that they HMRC should have appreciated that the Appellant's appeal was identical in all relevant respects with *Doran Bros,* a decision which HMRC had not appealed;

- in *Taylor Pearson*, also materially identical, HMRC had put the same arguments as in *Doran Bros*, and the Tribunal in *Taylor Pearson* had described those arguments as being without "any merit whatsoever";

- an application for costs had been made against HMRC in *Taylor Pearson* on the basis that HMRC had unreasonably defended the appeal;

- HMRC had not conceded the Appellant's appeal until almost two years after the appeal was filed;

- applying the questions asked in *Tarafdar v HMRC* [2014] UKUT 362 (TCC), HMRC had conceded the appeal when they withdrew the business purpose test, they could have withdrawn at an earlier stage and it was unreasonable of them not to have done so. The Appellant had incurred costs as a result;

- alternatively, HMRC acted unreasonably in making two stay applications that were subsequently withdrawn, and the Appellant had incurred costs in opposing these applications.

30. On 5 February 2021, HMRC filed a response to the Appellant's application. After setting out a background, HMRC submitted:

- they still considered the Appellant to be in receipt of exempt input tax;

- they were entitled to apply the law as they understood it in relation to business purpose until their view was changed by the decision in *Taylor Pearson*;

- citing *Catanã v HMRC* [2012] UKUT 172 (TCC) and *Tarafdar v HMRC* [2014] UKUT 362 (TCC), they could not have withdrawn until the decision in *Taylor Pearson* became final, 60 days after its release;

- it was not unreasonable for them to withdraw the business purpose argument at the point it was withdrawn; alternatively, any delay occurred only after 12 January 2020 (60 days from the release of the decision in *Taylor Pearson*) and was not unreasonable given the need to consider:

    - the partial exemption de minimis limit and consequent calculations, and

    - the number of affected appellants;

- the effect of the covid 19 pandemic should also be taken into account when considering whether there was unreasonably delay; and

- the Appellant's schedule was insufficient as it did not set out the status of the fee earner, the hourly rates, the number of communications or the time spent on individual acts.

31. On 4 March 2021, the parties were asked by the Tribunal to confirm that they were willing for the costs application to be determined on paper. On 10 March 2021, the Appellant gave this confirmation.

32. On 11 March 2021, HMRC also confirmed it was content for the application to be determined on the papers but requested that they have the opportunity to make submissions on quantum if the Tribunal was minded to make an order for costs.

33. On 11 March 2021, the Appellant filed further submissions in response to HMRC's reply. In these submissions the Appellant argued that:

- The sole issue in dispute had been the business purpose test. While HMRC had delayed unnecessarily following the release of *Taylor Pearson*, it was unreasonable of HMRC to have issued assessments or defended the appeal at all given the decision of *Doran Bros* issued in December 2016. HMRC ought to have been aware that their case was without merit;

- The Tribunal in *Taylor Pearson* had described HMRC's argument in relation to business purpose as being without merit;

- In *Taylor Pearson*, HMRC had conceded that they had acted unreasonably in defending the appeal, on the basis of *Doran Bros* and had conceded a costs application made in that appeal;

- It also relied upon HMRC's delay in its conduct of the appeal as being unreasonable;

- *Catanã* was not relevant as HMRC had been aware of the Appellant's position at all times; and

- If the costs schedule was insufficient for the Tribunal to make summary assessment then the Tribunal could direct detailed assessment.

Relevant Tribunal rule

34. The relevant parts of Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") provide:

> **10.**-(1) The Tribunal may only make an order in respect of costs … -
>
> > (b) if the Tribunal considers that a party of their representative has acted unreasonably in bringing, defending or conducting the proceedings;
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
>
> (3) A person making an application for an order under paragraph (1) must-
>
> > (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
> >
> > (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.
>
> (4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends-
>
> > (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
> >
> > (b) notice under rule 17(2) of its receipt of a withdrawal which ends the proceedings.
>
> (5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first-
>
> > (a) giving that person an opportunity to make representations;

Discussion and decision

35. A number of issues are raised in this application. The first two points which it is necessary for me to consider, and which I cannot see that either party has commented upon, is whether the application was made in time and, if not, whether time should be extended.

Was the Appellant's costs application made within time?

36. The Tribunal allowed the appeal on 22 September 2020 and stated that any further applications should be made within 28 days. Although the Appellant had already put HMRC on notice (on 15 September 2020) that it would be seeking its costs, the application was not made until 4 December 2020.

37. Rule 10(4) provides that an application for costs must be made within 28 days of the decision notice that finally disposes of all issues in these proceedings.

38. It appears that both parties have taken the view that the "proceedings" are still ongoing, apparently on the basis that there are a number of related appeals that are still continuing. However, there is nothing on the Tribunal file for this appeal to indicate that those still proceeding appeals have ever been joined to the Appellant's appeal. The relevant proceedings here can only be the Appellant's appeal. That was finally determined by the Tribunal's first letter of 22 September 2020 that allowed the Appellant's appeal.

39. Therefore, I conclude that the deadline for the Appellant to have filed an application for costs was 20 October 2020 (as set out in the Tribunal's letter of 22 September 2020).

Should time be extended for the Appellant to make its costs application?

40. Applying the guidance in the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178 (TCC), in deciding whether to grant an extension of time, I should consider the length of the delay, the reasons for the delay and any other relevant circumstances in this case.

41. The application was filed on 4 December 2020. Therefore, the delay here is 45 days. Delay of more than 24 days has previously held to be "serious".

42. There is no explanation for the Appellant's delay (presumably because neither party has appreciated the application might be late). The parties' practice of referring to multiple (related but not joined) appeals in their correspondence appears to have confused both parties into thinking that "the proceedings" were still continuing because other related appeals had not been conceded and were continuing. The Appellant had earlier sought to have the time for making its application extended and HMRC had opposed that application on 2 October 2020. It seems that it was not until Judge Morgan's letter of 1 December 2020 that the Appellant appreciated that it would be in a better position if it filed its costs application rather than wait until the determination of the appeals of other appellants.

43. I consider it relevant that neither party has referred to the application being late. HMRC have been on notice since 15 September 2020, prior to the appeal being formally allowed, that the Appellant would be seeking its costs. If I do not grant the Appellant an extension of time, then HMRC will have benefitted from an error under which both parties had operated. Although extensions of time should be granted as the exception, not the rule, I consider the circumstances of this case make it appropriate to grant the Appellant an extension of time to make its application for costs.

Is the application deficient by reason of the schedule providing insufficient detail?

44. The next point to consider is whether the application is deficient by reason of the limited detail in the schedule provided by the Appellant.

45. Paragraph 3 provides that a schedule must be provided and that the costs claimed must be sufficiently detailed for the Tribunal to make a summary assessment if it decides that would be appropriate.

46. I agree with HMRC that the schedule provided by the Appellant does not contain details of the fee earner, the number of communications or the time spent on individual acts. The hourly rate does appear to be included but there is no information about when the costs were incurred, what the "legal fee contributions (fixed cost)" relates to, or what role was played by the two different organisations whose fees are set out given only one appears to have represented the Appellant before the Tribunal.

47. Nevertheless, despite this lack of detail, I have concluded that this does not render the application as a whole deficient. I am capable of taking an overall view of the costs claimed, refusing aspects I do not consider properly incurred in these proceedings, or I can direct that the costs go to detailed assessment. I conclude that the application is valid despite the limitations of the schedule.

48. Having reached those conclusions, I can now consider the substantive points relevant to this application.

The relevant test to apply

49. Both parties have referred to *Tarafdar* as setting out the relevant test for whether conduct is unreasonable where one party has withdrawn. At paragraph 34 of that decision, the Upper Tribunal set out the following guidance:

> In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:
>
> (1) What was the reason for the withdrawal of that party from the appeal?
>
> (2) Having regard to that reason, could that party have withdrawn at an earlier stage in the proceedings?
>
> (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?

50. I agree with the parties that this is the relevant test. Once I have answered those questions, I must then decide, as an exercise of discretion, whether or not to make an order for costs.

What was the reason for HMRC's withdrawal?

51. The parties appear to be agreed that the reason for HMRC's withdrawal in this appeal originated in HMRC's acceptance that they could no longer reasonably put forward the argument that there was a non-business purpose for the relevant payment. The parties disagree on when that acceptance could reasonably have occurred.

Could HMRC have withdrawn at an earlier stage?

52. HMRC argue that they could not have withdrawn any earlier than the date when the decision in *Taylor Pearson* became final. HMRC argue that it was only when that

decision became final, i.e., when they themselves decided not to appeal, that they knew that the non-business purpose could no longer reasonably be argued in the Appellant's appeal. Having reached that conclusion, HMRC then considered the other aspects of the appeal, appreciated that the de minimis rule was relevant and understood that the Appellant's appeal must succeed.

53. I would ordinarily agree that a party could not know whether their arguments are likely to be successful until they have been tested before the Tribunal. However, in this case, the arguments that HMRC put in *Taylor Pearson* are the same arguments that were put in *Doran Bros* three years earlier. Two differently constituted Tribunal panels reached the same conclusion on the same arguments.

54. HMRC did not appeal the decision in *Doran Bros*. While a party may choose not to appeal without accepting the correctness of a decision (for example, because of the peculiarity in the facts found), it does not appear that HMRC made any attempt to distinguish *Doran Bros* when arguing their case in *Taylor Pearson*. HMRC have not explained why they did not appeal *Doran Bros* yet put forward the same arguments to another Tribunal panel three years later.

55. I conclude that HMRC could have withdrawn their non-business purpose argument at an earlier stage than they did. Had they done so, then they would have realised at an earlier date that the de minimis rule meant that the Appellant's appeal could no longer be defended.

Was it unreasonable for HMRC not to have withdrawn at an earlier stage?

56. At paragraph 31 of *Distinctive Care Limited v HMRC* [2019] EWCA Civ 1010, the Court of Appeal stated:

> It is the tribunal itself that gives notice of the proceedings to the respondent under r 20(5). At that point HMRC must consider their position in relation to the case in order either to notify the appellant of any new grounds under r 24(4) or to deliver the statement of case to the tribunal and the appellant within the 60 days allowed by r 25(1)(c). HMRC must act promptly, once notified, if it becomes clear that the appeal cannot properly be defended.

57. Once HMRC had been notified of the Appellant's appeal, the decision in *Doran Bros* would have come to their attention (even if it had not before). HMRC should have appreciated that *Doran Bros* was directly relevant and they should have considered at that time whether the non-business purpose argument could reasonably still be made, and whether any other arguments could proceed if the non-business purpose argument was withdrawn.

58. By the time the Appellant's appeal was notified to HMRC, the appeal in *Taylor Pearson* was well under way. Taylor Pearson had filed their appeal to the Tribunal in February 2017. By April 2019, when HMRC was directed to provide their Statement of Case in the Appellant's appeal, Taylor Pearson's appeal was only seven months away from hearing.

59. If HMRC had good reason for thinking that the arguments they intended to put in *Taylor Pearson* would result in a different outcome from the decision in *Doran Bros*, then it would have been possible for HMRC to have applied for the Appellant's appeal to be stayed behind *Taylor Pearson*, and to have explained why they anticipated that the arguments they intended to make in *Taylor Pearson* would result in a different outcome. Such an application could have been made on 15 May 2019. HMRC did not do that. HMRC's stay application was first for the appeal to be stayed behind *Root 2 Tax*, a completely unrelated appeal, and then *Praesto*, which had some relevance but obviously was not as relevant as *Taylor Pearson*. It is difficult to escape the conclusion that HMRC did not properly consider whether it was reasonable for them to defend the Appellant's appeal. HMRC's unfocused stay applications, particularly their first stay application, give the appearance that either HMRC had not considered the detail of the Appellant's appeal, or that HMRC were unaware of *Taylor Pearson* at that time. On 15 May 2019, if HMRC had either withdrawn or sought a stay behind *Taylor Pearson*, the Appellant would not have incurred the costs of opposing HMRC's first two stay applications.

60. The decision in *Taylor Pearson* was released on 13 November 2019. This reiterated the decision in *Doran Bros* and commented upon the lack of merit to HMRC's arguments. I consider it was reasonable for HMRC to take some time to consider whether they wished to appeal against that decision, though such consideration does not necessarily take the 56 days permitted to file an application for permission to appeal. By 8 January 2020, at the latest, HMRC would have known that they would not be seeking to appeal against the decision in *Taylor Pearson*.

61. However, it was not until 5 June 2020 that HMRC wrote to the Appellant, conceding the appeal. HMRC have explained that it was necessary for them to consider the partial exemption point and the de minimis rule, and to undertake the necessary calculations. As noted above, HMRC were directed to file their Statement of Case in April 2019. HMRC could have, and should have, reviewed their position at that time and before seeking a stay behind *Root 2 Tax* on 15 May 2019. Even taking into account the difficulties caused by Covid-19, it was not reasonable for HMRC to take until 5 June 2020 to inform the Appellant that they would concede the appeal.

62. Furthermore, it was not until 31 August 2020, that HMRC notified the Tribunal that they were conceding the appeal. There is no explanation for why HMRC wrote to the Appellant on 5 June 2020 but did not inform the Tribunal of that decision until almost three months later. The Appellant was obliged to incur further costs in this period, responding to Tribunal correspondence.

63. I conclude that it was unreasonable for HMRC not to have withdrawn at an earlier stage. By 15 May 2019, HMRC should have considered their defence and either withdrawn, on the basis of *Doran Bros*, or sought a stay behind *Taylor Pearson*. Either course of action would have prevented the Appellant incurring the unnecessary additional costs of opposing the first two stay applications. Once *Taylor Pearson* had been decided, HMRC also took an unreasonably long time to notify the Appellant that they were withdrawing, and then a further unnecessarily long time to notify the Tribunal.

Exercise of discretion

64. Having applied the test in *Tarafdar*, I now consider whether it would be appropriate for an award of costs to be made in favour of the Appellant. Having regard to HMRC's conduct of this appeal as a whole, including the apparent failure to consider withdrawal once notified of the appeal, the unfocussed stay applications and the various periods of delay, I have concluded that an award of costs would be appropriate.

Quantum

65. As noted above, the Appellant has filed a schedule but there are deficiencies in that schedule. For example, the dates on which the costs were incurred have not been provided so I do not know when the costs are said to have been incurred. Some of those costs may have been incurred prior to 15 May 2019, the date on which I consider HMRC reasonably should have withdrawn.

66. I have also noted that HMRC express the wish to make submissions regarding the amount of costs sought by the Appellant. Therefore, rather than make a summary assessment of the costs in this appeal, I will make an order under Rule 10(6)(c) for the costs to be assessed if not agreed. Either party can make an application under Rule 10(7) if they are unable to agree the costs incurred by the Appellant from 15 May 2019. The Appellant can (and should) particularise the costs it has incurred in these proceedings (not its share of the costs of other appeals to which this appeal was not joined) and HMRC will be able to make submissions about the proportionality of those costs.

Conclusion

67. The application for costs succeeds. The Appellant's costs are to be assessed under paragraph (6)(c), if not agreed by the parties.

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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 01 JUNE 2021