



[2021] UKFTT 0480 (TC)

TC 08354/P

PROCEDURE – application by HMRC for costs in relation to previous case management hearing – applications by Appellant to reclassify appeal as “standard”- application to make late notification to opt out of costs regime for complex appeal – Tribunal practice in classifying MTIC appeals – relevance of Martland and BPP Holdings criteria to extension of time for notices under Rule 10(1)(c)(ii) – effect of consolidation - reference to unpublished decision - application for reclassification refused – extension of time for costs opt-out notice granted – directions for HMRC costs application on basis they are for wasted costs or costs in respect of unreasonable conduct

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/02788

BETWEEN

GREENCYC LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE ALEKSANDER

The Tribunal determined the applications without a hearing because I considered that in the circumstances of the COVID-19 pandemic the interests of fairness and justice would be best served by dealing with the applications “on the papers”, and neither party objected to this treatment.

DECISION

INTRODUCTION

1. This decision follows from the case-management hearing held before Judge Poon on 8 December 2020. Judge Poon's decision, setting out her findings of fact and reasons in summary form, was released on 21 July 2021.
2. On 16 August 2021, HMRC made an application for costs in respect of the case management hearing.
3. On 18 August 2021, Greencyc applied for an extension of time to seek permission to appeal against Judge Poon's decision. Greencyc's representative explained that he had not seen Judge Poon's decision until HMRC had sent him their costs application together with a copy of the decision notice. The Tribunal's records show that the decision was sent to Greencyc's representative on 21 July (the same date as it was sent to HMRC). On 23 August 2021, HMRC stated that they took no issue with Greencyc's request for an extension of time.
4. As there is no right to seek permission to appeal in respect of a summary decision, Greencyc's request was treated as a request for a "full findings and reasons" decision, which was released on 10 September 2021: [2021] UKFTT 332 (TC).
5. In the course of the correspondence with the Tribunal, Greencyc's representative raised the following additional matters: (a) the classification of the consolidated appeal as "standard", and (b) Greencyc's election under Rule 10(1)(c)(ii) to opt out of the costs regime.
6. On 7 October 2021, the Tribunal wrote to the parties with my directions:
 - (1) that Greencyc's representative's latest email of 15 September 2021 be treated as:
 - (a) a submission that the 24 August 2018 letter from Greencyc's then representative opting out of the costs regime in respect of appeal TC/2018/04649 should be treated as having effect in relation to the consolidated appeal; or alternatively
 - (b) an application for an extension of time to file notice to opt out of the costs regime in respect of the consolidated appeal;
 - (2) that Greencyc's application for recategorization of the consolidated appeal should be interpreted as having effect retrospectively to the date on which the appeals were filed with the Tribunal; and
 - (3) for the submission of written submissions by the parties.
7. As the basis on which HMRC could make a claim for costs would depend on the outcome of my decision on reclassification and any extension of time to serve a notice under Rule 10(1)(c)(ii), I directed that this would be addressed after I had released my decision in respect of the reclassification and the extension of time for filing a costs opt-out notice.
8. I received the following documents from the parties, which I have considered in reaching my decision:
 - (1) HMRC written submissions (6 pages) dated 11 November 2021, settled by Noelia Corizzo of HMRC Solicitor's Office, together with a bundle of Tribunal orders (14 pages, of which 6 were blank);
 - (2) Greencyc written submissions (15 pages) dated 25 November 2021, settled by Hammad Baig, counsel; and

(3) Witness statement of Steven Simmonite (4 pages) dated 25 November 2021, together with four exhibits (4 pages). Mr Simmonite of SKS (GB) Limited is Greencyc's current representative.

9. References in this decision to a "Rule" are to a rule in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Procedure Rules 2009.

BACKGROUND

10. Before turning to the applications, it is helpful to provide some background to these applications.

11. The underlying appeal relates to three decisions made by HMRC in 2018, dated 20 March, 13 April, and 27 June, that Greencyc was not entitled to its claim for input tax credit in the total sum of £760,022.92. HMRC decided that the input tax related to purchases of goods that were connected with the fraudulent evasion of VAT, and that Greencyc knew or should have known of that connection in accordance with the judgments in *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2008] STC 1537, and *Mobilx Ltd & Others v Revenue and Customs Comrs* [2010] EWCA Civ 517, [2010] STC 1436.

12. Greencyc lodged two notices of appeal against these decisions. The first appeal was filed on 18 April 2018. On 15 May 2018 the Tribunal wrote to Donald Mavin of Mavin & Co (Greencyc's then representative) under reference number TC/2018/02788, acknowledging receipt, and notifying Mr Mavin that the appeal had been allocated under Rule 23 to the standard category.

13. The second appeal was filed on 16 July 2018. Mr Mavin separately emailed the Tribunal on that same date asking that the two appeals be consolidated under TC/2018/02788.

14. On 2 August 2018 the Tribunal wrote to Mr Mavin under reference number TC/2018/04649, acknowledging receipt of the second notice of appeal, and notifying Mr Mavin that the appeal had been allocated to the complex category.

15. On 6 August 2018, HMRC applied for the two appeals to be consolidated.

16. Rule 10(1)(c) of the Tribunal's Rules provides that the Tribunal may make an award of costs in respect of proceedings classified as complex, unless the taxpayer notifies the Tribunal that the proceedings be excluded from potential costs liability. Any such notice must be in writing and delivered to the Tribunal within 28 days of receiving notice of the allocation to the complex category. On 24 August 2018 Mr Mavin wrote to the Tribunal in respect of appeal TC/2018/04649 opting out of the costs regime.

17. On 17 September 2018, the Tribunal wrote to the parties as follows:

A statement of case has been filed by the respondent with the Tribunal. The respondent should have sent a copy to you.

The Tribunal has now re-assigned appeal TC/2018/02788 to proceed under the complex category. Please find enclosed Directions issued by the Tribunal. Please also find enclosed consolidation direction.

In an appeal which has been categorised as "complex" the Tribunal has a general power to award costs and is likely to award costs against the unsuccessful party. If you wish to opt out of this costs regime, you must apply to the Tribunal within 28 days from the date of this letter.

The Tribunal acknowledges receipt of the appellant's notification for appeal TC/2018/04649 dated 24 August 2018 that the case be excluded from potential liability for costs or expenses under sub-paragraph 10(c) of this Tribunal's Rules.

Please ensure through this appeal that when you communicate with the Tribunal you send a copy of the communication to the respondent (at the address from which the Statement of Case was sent) and that you tell the Tribunal that you have done so.

18. The consolidation directions were as follows:

1. The appeals by Greencyc Limited TC/2018/02788 and TC/2018/04649 are hereby consolidated under appeal number TC/2018/02788.
2. Either party may apply at any time for these directions to be amended, suspended or set aside.

19. The Tribunal also issued a separate set of directions for the future case management of the consolidated appeal.

20. On 19 September 2018, Mr Mavin notified the Tribunal by email that he was no longer acting for Greencyc, and that Steven Simmonite of SKS (GB) Limited was their new representative.

APPLICATION TO RECLASSIFY APPEAL AS “STANDARD”

21. Rule 23(1) requires the Tribunal to allocate cases to a category on receipt of a notice of appeal. Rule 23(3) gives the Tribunal discretion to recategorize cases at any time, either on application or on its own initiative. Rule 23(4) states that the Tribunal may allocate a case to the complex category under paragraph (1) or (3) only if the Tribunal considers that the case:

- (a) Will require lengthy or complex evidence or a lengthy hearing;
- (b) Involves a complex or important principle or issue; or
- (c) Involves a large financial sum.

22. The Upper Tribunal provided guidance in *Capital Air Services Ltd v HMRC* [2010] UKUT 373 (TCC) as to the kind of cases that should be allocated to the complex category. At [9] Warren J said that

a case which satisfies any of the criteria is capable of being allocated as a Complex case

and that the criteria should be considered as

part of the defining architecture by which the class of Complex cases can be identified.

At [20], Warren J continues by saying that it would be wrong for a judge to allocate a case as complex

by reference to his or her own subjective view about whether the case is where there should be power to award costs.

23. In *Dreams plc* [2012] UKFTT 614 (TC), Judge Bishop at [19] said that

the gateway in Rule 23(4)(a) can only be sensibly applied only if one starts from the proposition that a case must have some feature out of the ordinary to be considered complex.

and at [24] that “the calling of several witnesses, even including an expert”, is not out of the ordinary.

Submissions of the parties

24. It is Greencyc's position that neither the consolidated appeal nor appeal TC/2018/04649 should have been allocated to the complex category. It submits that the Tribunal was correct in its original allocation of TC/2018/02788 to the standard category. Appeal TC/2018/04649 involves fewer deal chains than the pre-consolidation TC/2018/02788 appeal, a smaller sum, and the remaining facts are simple and identical to those in pre-consolidation TC/2018/02788. In consequence, Greencyc submit that the consolidation of the two appeals ought to bring further simplicity to the case therefore making it even more suitable for the standard category. Greencyc submits that there is nothing in HMRC's pre-consolidation statement of case for TC/2018/02788, nor in its post-consolidation statement of case that points towards a feature that would justify allocation to the complex category.

25. As regards evidence, Greencyc state that the Tribunal will have to consider only nine deals. These are addressed in HMRC's statement of case between pages 12 and 22, and are wholly factual in nature, with no technical legal or tax points in issue. The statement of case lists three issues for the Tribunal to resolve. Greencyc submit that the evidence can be neither lengthy nor complex in circumstances where the burden of proof rests on HMRC, and HMRC's case is capable of being set out in full in around ten pages and concerns only three issues of fact.

26. As regards witness evidence, Greencyc note that there are eight HMRC officers who have provided witness statements. Greencyc submit that:

In an appeal of this nature, it is normal that a number of officers will provide witness evidence, however, their evidence shall be of a factual nature and indeed the witness statements served so far point towards facts relating to the various traders involved in the deal chains and draw inferences to prove that the trader was a missing or contra trader. They highlight how a trader failed to respond to HMRC correspondence or failed to meet with a visiting Officer or failed to return a phone call. These being the common features in the vast majority of Kittel cases.

27. As regards the complexity of the issues, Greencyc submit that HMRC have not identified any complex or important principles that will be considered by the Tribunal.

28. I was referred to *JSM Construction Ltd* [2015] UKFTT 474 (TC), in which £226,845 was held not to be a large financial sum, and to *Dreams plc* in which £5 million was held to be large (but not sufficient of itself to justify the case been allocated to the complex category). In *Capital Air Services* Warren J held that it was not appropriate for the financial circumstances of the parties to be taken into account in considering whether a financial sum was large. Greencyc submit that the tax in dispute in this appeal, £760,022.92, is not a large financial sum.

29. Greencyc submits that (so far as Mr Baig's research has been able to identify) most appeals against *Kittel* decisions are dealt with under the standard category, and there is no reason why this appeal should be dealt with any differently. In their submissions, HMRC say that MTIC appeals should properly be allocated to the complex category and refer to the decision of Judge Mosedale in *First Class Communications Ltd* [2015] UKFTT 511 (TC), and her statement at [53] that the Tribunal's policy is that all appeals raising *Kittel* allegations are categorised as complex. Mr Baig says that this assertion is unfounded, as most *Kittel* appeals are allocated and heard under the standard category. In any event, says Mr Baig, Judge Mosedale's decision (as an FTT decision) is not binding, and there is nothing in any of the Tribunal's other cases which indicates that there is a general policy to allocate *Kittel* cases to the complex category, and HMRC have not referred to any document that identifies this policy.

30. In summary, Greencyc's submission is that there is nothing inherently complex in this appeal. Neither the number of witnesses nor the sum involved are particularly high. Therefore, the Tribunal should re-categorise the consolidated appeals to the standard category.

31. HMRC referred me to Judge Poon's case management decision, and at [24] she sets out the documents disclosed by HMRC:

[24] Rule 27 provides for the normal disclosure in a standard or complex case. HMRC have the burden of proof in this case; HMRC have produced their list of documents on which they intend to rely. Mr Reynolds helpfully took me through the actual documentation of over 4,000 pages that has been disclosed by HMRC to Greencyc. As regards witness evidence, HMRC has served eleven witness statements from eight officers. Two of these eleven statements are from Officer Tanday, and focus directly on Greencyc. One of Officer Tanday's statements dated 15 April 2019 is of 72 pages long, and sets out in detail HMRC's key interactions with Greencyc, including ten site visits. The reports of nine of these visits are disclosed, and the only visit without a report took place on 16 April 2014 for the sole purpose of uploading paper records. Lengthy exhibits to Officer Tanday's 72-page statement have also been disclosed.

32. HMRC referred me to Greencyc's notice of issues, in which they confirm that they will require cross-examination of all eight HMRC officers who provided witness statements. A total of nine witnesses will be called to give evidence, and HMRC's time estimate for the hearing is over two weeks.

Discussion

33. I have no hesitation in finding that the consolidated appeal has been correctly classified as being complex. Greencyc's application to reclassify the appeal to the standard category is refused.

34. The three factual issues identified in the statement of case, are the usual issues arising in *Kittel* appeals, namely:

- (i) Is there a tax loss, and if so, does it result from fraudulent evasion;
- (ii) If there is fraudulent evasion, were Greencyc's transactions connected with the fraud; and
- (iii) If they were connected, did Greencyc know, or should have known, that its transactions were connected with fraud?

35. In the most recent MTIC case on which I was the judge presiding at the hearing, the *Kittel* requirements were set out using virtually the same wording as here, and HMRC's case was expressed in their Statement of Case in roughly the same number of words as in their Statement of Case in this appeal. But there were 27 lever arch files of evidence, six witnesses were cross-examined, the hearing extended over seven days, and my decision was 77 pages long. I am in no doubt that the "complex" classification of that appeal was correct.

36. Contrary to Mr Baig's submissions, I find that just because the *Kittel* issues can be expressed succinctly, it does not necessarily follow that the factual evidence and issues will therefore be neither lengthy nor complex. Nor does it necessarily follow from the fact that HMRC are able to set out the factual basis of their case in "only" ten pages, that the factual evidence is neither lengthy nor complex. That Mr Baig's submission is misconceived is illustrated by the fact that HMRC have disclosed over 4000 pages of documents, and that there are nine witnesses to be cross examined. One of Officer Tanday's witness statements is 72

pages long, and there are lengthy exhibits attached to it. HMRC's estimate for the length of the hearing being at least two weeks, which is on any basis lengthy.

37. Whilst Judge Bishopp in *Dream* says that the calling of "several" witnesses is not itself out of the ordinary, I find that the cross examination of nine witnesses is out of the ordinary – and is all the more out of the ordinary when one of the witness statements of one of the witnesses extends to 72 pages and has a number of length exhibits. I also find that 4000 pages of documentary evidence is "lengthy", as is a hearing with a time estimate of at least two weeks. In considering the three criteria set out in Rule 23(4), I am in no doubt that criterion (a) (the evidence in the case is lengthy or complex or will require a lengthy hearing) is met.

38. I tend to agree with Greencyc's submissions that this appeal does not give rise to any complex or important principles or issues. The circumstances under which a trader in a deal chain can be liable for the defaults of others is now well settled law in the light of the decisions in *Kittel* and *Mobilx*. Criterion (b) is not satisfied.

39. The tax in issue is £760,022.92. Mr Baig referred me to the decision in *JSM Construction*, in which £226,845 was held not to be a large financial sum, and to the decision in *Dreams* in which £5m was held to be large. I find that the amount in issue in this appeal is "large" for the purposes of criterion (c) – although possibly at the smaller end of the range of what constitutes a "large financial sum".

40. I find that this appeal has been correctly classified as complex because it requires lengthy or complex evidence or a lengthy hearing. The quantity and nature of the evidence means that the appeal requires more intensive case management than the case management normally given to "standard" appeals.

41. I have also found that the amount of tax in issue is a large financial sum, and this adds support to my decision as to classification.

42. As the question of the Tribunal's policy of classification of MTIC appeals has been raised by Mr Baig, I would reiterate Judge Mosedale's statement in *First Class Communication* that the Tribunal will, as a general rule, classify MTIC appeals as complex. This is primarily because of the Tribunal's experience of the quantity of evidence produced in MTIC appeals, the need for more intensive case-management than standard appeals, and the resultant length of the hearing. Of course, any initial classification of an appeal as complex can be reviewed in the course of the case management of the appeal, and the case reclassified to the standard category if appropriate. Mr Baig's assertion that most appeals against *Kittel* decisions are dealt with under the standard category is wrong. The initial allocation of appeal TC/2018/02788 to the standard category was an error, which was corrected when the appeals were reviewed by a Tribunal Caseworker in the course of case management at the time they were consolidated. I have found that the decision of the Tribunal Caseworker to reclassify appeal TC/2018/02788 to the complex category was correct.

43. I would make a couple of additional observations. First, the consolidation of the two appeals certainly simplifies the administration of the appeals and the conduct of the hearings (as only one hearing is required, and the witnesses will only need to appear at a single hearing). But the consolidation does not simplify in any way the underlying issues that need to be resolved and determined by the Tribunal, these remain exactly the same.

44. Second, there is a certain irony in Mr Baig's submission that I am not bound by Judge Mosedale's decision in *First Class Communications* (as to which he is correct), yet he refers me to various other decisions of the First-tier Tribunal (such as *Dreams* and *JSM Construction*) in support of his submissions both in relation to recategorization and the extension of time for the service of the costs regime opt-out notice. Although not cited to me, I would note the

comments made by Judge Brooks in *Ardmore Construction Limited v HMRC* [2014] SFTD 1077 at [19] that decisions of the First-tier Tribunal:

[...] constitute persuasive authorities which would be expected to be followed by the FTT. For example in *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) the Tax and Chancery Chamber of the UT, in relation to the decision of one High Court Judge on another (but equally applicable in the case of any persuasive authority), said, at [82]:

“[...] although the decisions were not binding on him in the way that a decision of the Court of Appeal would be binding, the decision of a High Court Judge ought to be followed by another [High Court] judge unless that judge thinks that the earlier decision was clearly wrong”

As Lord Goddard CJ put it in *Huddersfield Police Authority v Watson* [1947] KB 842, at 848:

“I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity.”

LATE APPLICATION TO OPT OUT OF COSTS REGIME

45. Rule 10(1)(c) gives the Tribunal discretion to make an award of costs in cases allocated to the complex category. I refer in this decision to that discretion as the “costs regime”. Rule 10(1)(c)(ii) allows taxpayers to opt out of the costs regime if they file a notice to that effect with the Tribunal within 28 days of being notified of the complex classification. No notice under Rule 10(1)(c)(ii) opting out of the costs regime was filed in response to the Tribunal’s letter of 17 September 2018 in respect of the consolidated appeal.

Submissions of the parties

46. The background to this application is Greencyc’s submission that it was unaware that the consolidated appeal was allocated to the complex category until the claim for costs was served on 16 August 2021. Greencyc submit that it never saw the Tribunal’s letter of 17 September 2018 stating that the consolidated appeals were allocated to the complex category, as that letter was sent to its previous adviser, Mr Mavin, who had resigned from the case at short notice.

47. Further, Greencyc believed that the costs opt out notice made in respect of appeal TC/2018/04659 applied to the consolidated appeal. Mr Simmonite’s witness statement sets out the basis for this belief. The relevant paragraphs of his statement are as follows:

4. On 28 August 2018, I spoke on the telephone to Don Mavin (“DM”) of Mavin & Co, a tax adviser who I had known for many years. I have retained a handwritten note of the call.

5. DM explained that he was about to retire but that he was acting for a client who he named as Greencyc Limited who had been assessed by HMRC under Kittel. DM provided a brief outline of the facts including that there was more than one appeal which HMRC had applied to consolidate. I have noted at the time that he confirmed that he had replied to HMRC on the issue of costs.

6. DM asked if I would be willing to speak to and potentially act for the client in this matter. I asked him to provide me with any papers that he held and agreed to speak to Mr Avtar Sandhu (“AS”) the director of Greencyc Limited.

7. On 13 September 2018 I met with AS and agreed to act in this matter. I learned that there were two appeals in place, the first was TC/2018/02788, and the second was TC/2018/04649.

8. On 19 September 2018 I received an email from DM titled “Greencyc Ltd Costs opt out”. The attached document included the following copies:

a. A letter from the First Tier Tribunal (“FTT”) dated 17 September 2018 to HMRC which refers to a letter from the Appellant dated 24 August 2018. It states that the Tribunal has reassigned appeal TC/2018/02788 to proceed under the complex category. (exhibit 1)

b. A letter from the FTT dated 17 September 2018 to DM alone in relation to both appeals. It states the Tribunal has reassigned appeal TC/2018/02788 to proceed under the complex category. It reads: “... if you wish to opt out of this costs regime you must apply to the tribunal within 28 days from the date of this letter”. However, in the very next paragraph it reads: “The tribunal acknowledges receipt of the appellant’s notification for appeal TC/2018/04649 dated 24 August 2018 that the case be excluded from potential liability for costs or expenses under sub-paragraph 10(c) of this Tribunal’s rules. (exhibit 2)

c. An email from DM to tax appeals dated 24 August 2018 attached to which was a letter described as “Letter to Trib 24.8.18 re costs opt out.” (exhibit 3)

d. A letter dated 24 August 2018 addressed to the FTT. It is responding to a letter from the FTT dated 2 August notifying the appeal TC/2018/04649 (the second appeal) has been categorised as a complex case. In reply DM writes: .. we can advise you that the Appellant wishes to opt out of the costs regime and therefore be excluded from **any potential liability for costs or expenses in this matter** under Rule 10 of the Tribunal Procedure ... Rules 2009”. (emphasis added) (exhibit four.)

9. As the FTT letter of 17 September 2018 included the paragraph “The tribunal acknowledges receipt of the appellant’s notification for appeal TC/2018/04649 dated 24 August 2018 that the case be excluded from potential liability for costs or expenses under sub-paragraph 10(1)(c) of this Tribunal’s rules”, I read it in conjunction with the previous paragraph and understood that the FTT were acknowledging the opt out for both of the appeals.

10. I believe that, as the 17th September 2018 letter quoted and acknowledged the unequivocal opt out position, the 24 August 2018 opt out letter still applied. I could see no other reason for including the opt out paragraph in the 17 September 2018 letter. As far as I’m aware there was no response from any party objecting to the opt out.

11. I have tried to contact DM to see if he has any further insight or understanding. Now retired, his mobile phone is not working, and his email account is no longer active.

12. If I have misread the letters and I should have reiterated the opt out, then it is entirely my misunderstanding and not based on any instruction from the client. I have always believed, from my first call with DM, that the opt out was in place and no further action was required.

48. For the reasons given in Mr Simmonite’s witness statement, Greencyc believed that they had successfully opted out of the costs regime, and that the opt out notice given originally in relation to appeal TC/2018/04649 continued to apply following the consolidation of the two appeals. Greencyc’s written submissions state that it is clear from their instructions to Mr

Mavin that they had always intended to opt out of any costs liability under Rule 10(1)(c)(ii) in respect of any appeal that they made. However, there is no evidence produced to me to support this submission.

49. HMRC submit that the opt out notice filed by Mr Mavin related solely to appeal TC/2018/04649 and did not apply to the separate appeal TC/2018/02788 (into which TC/2018/04649 was subsequently consolidated). Whilst HMRC acknowledge that Greencyc's representative changed shortly after the consolidation, they submit that Mr Simmonite, the new representative, has had ample opportunity since October 2018 to make an application to opt out of the costs regime. It was his duty to Greencyc, when taking over the matter, to take appropriate action in relation to opt-out if that was Greencyc's wish. HMRC submits the delay in opting out of the costs regime is significant and serious. The correspondence from the Tribunal is clear and whilst a short delay may have been acceptable when the new representatives were appointed, this application is made 3 years after the event and after a decision against Greencyc has been issued and in respect of which a costs application has been made.

Discussion

50. I find that the notice given in respect of appeal TC/2018/04649 does not apply to this consolidated appeal. The effect of the consolidation of proceedings is to combine two or more appeals so that they will proceed thereafter as one appeal. It is to be distinguished from a direction that two or more appeals proceed and be heard together. Following a consolidation, the Tribunal has only one file, and only one appeal reference number. In contrast, where appeals proceed and are heard together, separate case files continue to be maintained for each appeal (although those files are notionally tied together), and each appeal retains its separate appeal number.

51. One consequence of consolidation is that only one firm of representatives can have the conduct of the appeal on behalf of all appellants. Where there are several proceedings brought by different appellants (but arising out of the same facts), a direction that the appeals be heard together will allow the appellants to maintain (if they wish) separate representation.

52. Another effect of consolidation is that only one of the appeals "survives" the consolidation – and in this case, it was appeal TC/2018/02788 that survived. Directions given in respect of the other appeal, and notices given in respect of the other appeal, do not automatically carry over to the consolidated appeal. I therefore find that the notice given by the Greencyc under Rule 10(1)(c)(ii) had no effect in relation to appeal TC/2018/02788.

53. I therefore turn to consider whether I should permit Greencyc to serve notice under Rule 10(1)(c)(ii) late in order to allow them to opt out of the costs regime. Rule 5(3)(a) gives the Tribunal discretion to extend the time for complying with any rule.

54. Mr Baig referred me to an unpublished case management decision of Judge Citron in which he applied the three-stage process used in *Martland* [2018] UKUT 178 (TCC) to an application for an extension of time to file a notice under Rule 10(1)(c)(ii). Mr Baig provided the appeal reference number for this decision, but not the name of the appellant.

55. Although not cited to me, I would refer again to the decision of Judge Brooks in *Ardmore Construction Limited* [2014] SFTD 1077. Although the decision in *Ardmore* was subject to further appeal, the citation of unpublished decisions was not considered in either the Upper Tribunal or Court of Appeal. In *Ardmore* HMRC sought to rely on an unpublished decision of the Special Commissioners (prior to 1994, decisions of the Special Commissioners – one of the predecessors to this Tribunal - were confidential and were not published). In consequence, as stated in Judge Brooks' decision:

20. As HMRC (or its predecessor, the Inland Revenue) would always have been a party to a tax appeal the position would be as stated in the letter, of 6 June 2013, sent by HMRC to the directors of Poldi, under its new name, seeking consent to rely on the unpublished decision of the Special Commissioner, ie that:

HMRC has copies of all decisions made in the various tax courts, because, of course, it is always a party to such proceedings. ... This means that HMRC has the ability to draw upon some decisions of the tax courts that are not freely available to the general taxpayer

This clearly raises the question of fairness and whether HMRC should be permitted to rely on an unpublished (as opposed to an unreported) decision not freely available to the general taxpayer, especially as we are obliged to give effect to the overriding objective, contained in Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the “Tribunal Rules”), to “deal with cases fairly and justly” which includes dealing with a case in ways which “are proportionate” to the “resources of the parties”.

21. Given that the judicial function of the Special Commissioners was originally derived from s 130 and s 131 of the Income Tax Act 1842 there must be thousands of unpublished decisions known by and available only to HMRC. In our view, given that a persuasive authority, unless considered to be wrong, will as a matter of judicial comity be followed by the FTT, it cannot be right or just for HMRC to have such an advantage over a taxpayer. As Lord Diplock said in *Fothergill v Monarch Airlines Limited* [1981] AC 251 at 279

“Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.”

22. Therefore, irrespective of any assurance that may be given, we do not consider that it is proper for HMRC to cite an unpublished decision of the Special Commissioners before the FTT.

56. I make two observations. The first is that this Tribunal does not publish all of its decisions. Most case management decisions are not published (such as the case management decision that Mr Baig cited to me). The Tribunal does not publish “short” decisions issued following a hearing where an *ex tempore* decision was given (these - with the agreement of the parties - do not include any statement of findings), nor does it publish summary decisions given under Rule 35(3)(a). Although these decisions are not published, they will be available to HMRC, as HMRC is a party to virtually all tax-related cases before the Tribunal. The same considerations as applied to confidential Special Commissioner decisions therefore should also apply to the Tribunal’s unpublished decisions. Secondly, what is sauce for the goose must also be sauce for the gander – and if it is not proper for HMRC to cite an unpublished decision, fairness dictates that it is also improper for the appellant to cite an unpublished decision.

57. I have therefore not had regard to Judge Citron’s decision.

58. I have considered whether the criteria established in *Martland* are appropriate to the issues in this application. *Martland* considered the grant of consent to make a late appeal to the Tribunal. Such a decision is not a “case management” decision of the kind now before me – rather (as stated by the Upper Tribunal at [18]) the Tribunal was exercising a discretion specifically and directly conferred on it by statute to permit an appeal to come into existence at all. It was not exercising a case management discretion in the conduct of an extant appeal. An application to be allowed to make an appeal out of time does not engage Rule 2, and the

express requirements in that Rule for the Tribunal to deal with cases fairly and justly (although I appreciate that an obligation to deal with cases fairly and justly will arise in such applications otherwise than under Rule 2).

59. Greencyc is making an application for the extension of a time limit imposed by Rule 10, but after that time limit has expired. This is analogous to an application under Rule 3.1(2)(a) of the Civil Procedure Rules. In *R (oao Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 (not cited to me) the Court of Appeal held that such applications had to be determined using the principles governing applications for the relief from sanctions under CPR rule 3.9. I find that I should therefore adopt the approach that the Tribunal would take when faced with an application for relief from sanctions. I will therefore apply the guidance given by the Supreme Court in *BPP Holdings* [2017] UKSC 55 (not cited) which deals with this issue. The Supreme Court in *BPP* implicitly endorsed the approach taken in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 (not cited). I note that the Upper Tribunal in *Martland* decided that the approach taken in the case of applications for late appeals should follow the approach taken in *Denton* in relation to applications for relief from sanctions. So, the practical result is much the same as if I had followed *Martland*, however I reach this conclusion by a different route. I also note that as I am exercising a case management power, I need to comply with the overriding objective in Rule 2 to deal with cases fairly and justly.

60. The three-stage process set out in *Denton* is as follows:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing the application.

61. If I treat Mr Simmonite’s email of 15 September 2021 as the application for an extension of time, the length of the delay is 1066 days (nearly three years) – on any basis this is significant and serious.

62. The reason for the delay is that Greencyc and its representative believed that the notice under Rule 10(1)(c)(ii) given in respect of appeal TC/2018/04694 applied to the consolidated appeal under number TC/2018/02788. I have sympathy with Mr Simmonite’s evidence that the terms in which the Tribunal’s letter of 17 September 2018 was expressed was unhelpful and could legitimately be read as treating the notice given in respect of TC/2018/02788 as applying to the consolidated appeal.

63. As regards all the circumstances of the case, I agree with Greencyc’s submission that until HMRC submitted their application for costs, nothing would have come to the attention of Greencyc which would suggest that they had not successfully opted out of the costs regime. Although, as HMRC submit, Greencyc may have had (in theory) ample opportunity since 2018 to file their notice to opt out of the costs regime, until they received HMRC’s application for costs they were unaware that their notice in respect of appeal TC/2018/04694 had no effect in relation to the consolidated appeal, and that a new notice needed to be filed.

64. Greencyc submit that the prejudice they will suffer is high if the application is refused, as for all intents and purposes it had opted out. If I grant the application (assuming Greencyc’s

then serve the Rule 10(1)(c)(ii) notice), each party will be required to bare its own costs, irrespective of the ultimate outcome of this appeal. If I refuse the application, it is likely that ultimately the “loser” will be ordered to pay the “winners” costs. Whether this would cause prejudice to one party or the other will depend on their respective views as to the prospects of success – and as I have not reviewed the lengthy evidence, I am in no position to make any such assessment (and do not propose to do so).

65. There is no suggestion that HMRC would discontinue the appeal if I granted the application. Indeed, this appeal (pre-consolidation) had been allocated to the standard category (which is outside the costs regime), and when they made their application to consolidate the two appeals, they did not apply for this appeal to be reallocated to the complex category.

66. On balance, I consider that the prejudice that will be suffered by Greencyc in refusing their application outweighs the prejudice that HMRC will suffer if I grant their application.

67. I note that the effect of granting or refusing the application would have no effect on an order for costs under Rule 10(1)(a) or (b) (wasted costs, and party acting unreasonably), which applies to all appeals, regardless of categorisation.

68. The grant or refusal of permission will have no impact on the future progress of the appeal towards its hearing.

69. Greencyc submitted that it never saw the Tribunal’s letter of 17 September 2018 stating that the consolidated appeals were allocated to the complex category. However, this letter was received by Mr Mavin, and he forwarded it to Mr Simmonite – this is evidenced in paragraph 8(b) of Mr Simmonite’s witness statement. Rule 11 provides that documents provided to a duly appointed representative need not be provided to the represented party. Greencyc cannot complain that they never saw the Tribunal’s letter, as it was sent to their representative at the time and forwarded by him to their new representative.

70. Although Greencyc submit that they instructed Mr Mavin to opt out of the costs regime for any appeals made, there is no evidence before me supporting that submission, and I have therefore placed no weight upon it.

71. After taking all these factors into consideration, I have decided to grant Greencyc’s application, and extend their time to give notice under Rule 10(1)(c)(ii). Any such notice must be served on the Tribunal (with a copy to HMRC) within 28 days of the release of this decision.

COSTS

72. In her decision notice following the case management hearing, Judge Poon said the following in relation to costs:

29. The Fairford directions are a case management tool because it is desirable that the duration of the hearing should be as fairly estimated as possible. Efficient case management is not just for the Tribunal to manage its resources efficiently in administering justice, but also essential to the costs budgeting for the litigating parties, so that the engagement of counsel in preparation time and for court attendance can be approximated to the actual requirement.

30. It is only with efficient case management of the appeal proceedings that parties can avoid wasted costs. Now that the Appellant has instructed counsel, Mr Baig is well placed to explain the implications of a potential costs order application in the absence of compliance with the Fairford directions. In the event that the Respondents are minded to make an application under Rule 10 of the Tribunal Rules (in relation to the case management aspects resulting in the applications hearing, not the substantive proceedings which

are categorised as ‘complex’ with a different costs regime), the course of the parties’ correspondence leading to the applications hearing has been outlined in this Decision.

73. On 16 August 2021, HMRC made an application for costs in respect of the case management hearing. The application states that

The claim (TC/2018/02788) was allocated to the complex track and the Respondent is entitled to the costs incurred in dealing with both applications.

74. The costs application refers to Judge Poon’s decision, and the provisions set out in paragraph [30] of the full decision. However, I read paragraph [30] of Judge Poon’s decision as referring to the Tribunal’s discretion to make a costs order under Rule 10 (1)(a) and (b) – as she distinguishes this from the power of the Tribunal to make a costs order under Rule 10(1)(c) in the case of complex appeals. But even if (as is likely) Greencyc file a notice under Rule 10(1)(c)(ii) within the extended time limit, it remains open to HMRC to make an application for costs under Rule 10(1)(a) and (b) in respect of the case management hearing. I have separately issued directions addressing any renewed costs application that HMRC may decide to make.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

Release date: 29 DECEMBER 2021