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Case Number: TC08583

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Determined on the papers

Appeal reference: TC/2018/06225  
TC/2018/06227  
TC/2019/06234  
TC/2019/06235  
TC/2019/06236  
TC/2019/06340  
TC/2018/06235  
TC/2019/05552

*COSTS – application for unreasonable costs – whether failure by HMRC to adduce evidence in support discovery assessment was unreasonable – yes – whether sufficient to justify cost shifting – yes – reasonable award in the circumstances - £1*

**Judgment date: 01 September 2022**

**Before**

**TRIBUNAL JUDGE AMANDA BROWN QC**

**Between**

**GC FIELD & SON LTD  
GEOFFREY BARNWELL FIELD  
BARNWELL CHARLES FIELD  
GC FIELD & SONS (FELTWELL ESTATE) LTD  
SIMON SHAW  
LISA SHAW**

**Appellant**

**and**

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

## DECISION

### INTRODUCTION

1. This is an application for costs made collectively by GC Field & Sons Ltd, Geoffrey Barnwell Field, Barnwell Charls Field, and GC Field & Sons (Feltwell Estate) Limited (**Field Appellants**) and Simon Shaw and Lisa Shaw (**Shaw Appellants**) pursuant to section 29 Tribunal Courts and Enforcement Act 2007 (**TCEA**) and rule 10(1)(b) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**).

2. The application is made following the judgment issued by Judge Marilyn McKeever dated 19 August 2021 [2021] UKFTT 297 (TC).

### THE APPEAL

3. The joined appeals of the Appellants concerned stamp duty land tax (**SDLT**) avoidance schemes used by each of the Field and Shaw Appellants known as “sub-sale relief”. HM Revenue & Customs (**HMRC**) had not opened enquiries into the SDLT returns rendered by the relevant Appellants within the statutory enquiry window but had raised discovery assessments pursuant to paragraph 28 of Schedule 10 Finance Act 2003 (**FA 03**) to both groups of Appellants on the basis that sub-sale relief was not due. HMRC had also issued determinations on the basis that SDLT was payable on notional transactions under section 75A FA 03.

4. The appeals were lodged and stayed. Following the outcome of other litigation in respect of a similar tax avoidance scheme the Appellant amended its grounds of appeal and HMRC lodged a statement of case.

5. The Field Appellants particularised three amended grounds of appeal. Critically, by these amended grounds the Appellants no longer asserted that they were entitled to sub-sale relief. The first amended ground concerned the validity of the discovery assessment. The Appellant stated: “HMRC have not suggested that the taxpayer was fraudulent or negligent (which would be difficult to sustain as far as the taxpayer was acting on advice).” The grounds were silent as to any negligence or otherwise of the promoter, perhaps unsurprisingly, as, in a contract with the Shaw Appellants, the promoter had not been party to any correspondence with HMRC on behalf of the Field Appellants after the introduction of section 194 Finance Act 2013 (**FA 13**) in which a retrospective requirement to amend the SDLT return was introduced. The ground then went on to address with some particularisation that HMRC could not say within the enquiry window and by reference to the information in the return, that they were not aware of the insufficiency. Ground 2 concerned the validity of the s75A FA 03 determination and ground 3 challenged the assessment on the basis of staleness.

6. The amended grounds for the Shaw Appellants were drafted differently but, as regards the validity of the discovery assessments stated: “the Discovery Assessment is not valid as the restrictions in Paragraph 30 of Schedule 10 Finance Act 2003 have not been met ... A full disclosure letter was sent to HMRC on 20 February 2013”. It is at least implicit that the Shaw Appellants did not consider negligence to have been a basis for the discovery assessments.

7. By HMRC’s statement of case, and on the basis that the Appellants no longer contested their entitlement to sub-sale relief, HMRC confirmed that they no longer relied on the notices of determination. The statement of case identifies the only point at issue as: “whether the Respondents have made discovery with regard to the Discovery Assessments.” However, by the more detailed pleading HMRC stated:

“11.26 ... Section 194(2) FA 2013 imposed a statutory requirement for purchasers to file an amended return, where they have already filed a

transaction return, and where their transaction falls within the retrospective legislation. The Appellants did not do so.

11.27 The Respondents say that by failing to file amendments to their returns under section 194(12) FA 2013, the Appellants acting in a negligent way. As a result SDLT was not paid that should have been paid. This falls within Paragraph 30(2)(b) Schedule 10 FA 2003 as the loss of tax is “attributable to” the negligent conduct of the Appellants.

11.28 The Respondents say that, by advising their clients that they did not need to file an amendment to their return under section 194(12) FA 2013, or by failing to advise them of the requirement to do so, the advisors acted in a negligent way. As a result of that advice SDLT was not paid that should have been paid. This falls within Paragraph 30(1)(b) Schedule 10 FA 2003 as the loss of tax is “attributable to” the negligent conduct of the advisors.”

8. There is no particularisation, nor a formal concession, defending the discovery assessments on the basis of paragraph 30(3) Schedule 10 FA 2003 i.e. that HMRC could not have been aware within the enquiry window of the insufficiency. It is simply not addressed in the statement of case despite being the primary basis of challenge by both sets of Appellants.

9. It is therefore apparent that there was, after pleadings, a mismatch between the parties as to the issue. Both were agreed that there was a requirement on HMRC to establish a discovery, but the Appellant had understood the gateway condition for the assessments to be paragraph 30(3) Schedule 10 FA 03 and HMRC apparently relied on paragraph 30(2) Schedule 10 FA 03.

10. HMRC’s single witness statement addressed only whether a discovery had been made.

11. Skeleton arguments were simultaneously exchanged. The Appellants skeleton stated: “The burden is on HMRC to show that the Appellants (or someone acting on their behalf) failed to take reasonable care. For the reasons below it is submitted that HMRC cannot show this.” The skeleton then particularises the circumstances in which the original SDLT return was submitted and the circumstances pertaining to the introduction of the retrospective provisions of section 194 FA 13. HMRC’s skeleton was verbatim their statement of case.

12. The issues which required to be determined by Judge McKeever therefore centred only on the validity of the discovery assessments (including staleness).

13. As such, HMRC bore the burden of proving firstly that they made a discovery that an amount of tax that ought to have been assessed has not been assessed/that an assessment has become insufficient/relief that has been given is or has become excessive. They had also to establish that the inaccuracy/insufficiency that they discovered came about as a consequence of the fraudulent or negligent conduct of the purchaser or a person acting on the purchaser’s behalf.

14. The standard of proof which had to be met was the balance of probabilities.

15. As set out above HMRC’s case on negligence was predicated on the assertion that negligence followed from the failure to submit an amended SDLT return after the retrospective statutory amendment to section 194 FA 13.

16. The particulars of HMRC’s argument as to the negligence of the Appellants themselves are recorded in Judge McKeever’s judgment as follows:

“108. [HMRC] ... submits that one must identify the failure to take reasonable care which causes the loss and that can include an omission. In this case, it is the failure to amend the SDLT returns which, he says, constitutes the negligence. ...

109. [HMRC] submits that the Field Appellants and the Shaw Appellants failed to take reasonable care because they did not submit amended returns and pay the tax as required by section 194. Both Mr Field and Mr Shaw said in their witness statements that once the original return and the disclosure letter had been submitted, their understanding was that their retainer with [the promoter] came to an end save that [the promoter] would continue to correspond with HMRC if there were enquiries that arose from the transaction. This is consistent with the scope of the work set out in the Client Care Letters.

110. No enquiry was opened and the Field Appellants received no other correspondence from HMRC concerning the arrangements.

111. [HMRC] submits that, given that this was an acknowledged attempt at tax avoidance it was not reasonable for the taxpayers or their advisors to assume that would be the end of the matter and to absolve themselves of any responsibility for monitoring developments during the enquiry window. He argued that Parliament cannot have intended that a taxpayer could circumvent the requirements of section 194 by failing to take the action the legislation required them to take.

112. Further the Shaw Appellants were made aware of their obligations to amend the returns as HMRC wrote to tell them this and, he suggests, they chose not to do so.

...

114. The Field Appellants received no correspondence from HMRC about section 194, nor did [the promoter] tell them about it. [The Field Appellants] submit that [they] had no obligation to ask for advice or to check whether the law had changed after the transaction completed.”

17. As regards negligence caused by the promoter as a party acting on behalf of the Appellants, HMRC submitted that the promoter was acting on behalf of all the Appellants and that the promoter was negligent. The particulars of negligence were recorded in the judgment as:

“140. [HMRC] submits that both the Appellants and [the promoter] were negligent and that the negligence consisted of the failure to amend the SDLT returns and pay the additional tax as required by section 194. He also takes the view that [the promoter] was acting on behalf of the Appellants.

141. [HMRC] points to HMRC’s letter to Mr Shaw of 5 September 2013, requiring him to amend his SDLT return and pay the tax and [the promoter’s] letter to HMRC of 8 October 2013 stating that their client does not need to amend his SDLT return as evidence that [the promoter] were aware of the retrospective changes. That was the case. He goes on to contend that any adviser of reasonable competence would alert all their clients to the impact of section 194.

142. [HMRC] contends that it was not reasonable for the Appellants and their advisors to absolve themselves of responsibility during the enquiry window. It was not reasonable of them to assume that the submission of the return and disclosure letter would be the end of the matter and it was unrealistic to say they did regard it as the end of the matter. The onus was on [the promoter] to advise their clients about section 194.

...

147. ... [HMRC] argues that it would have been reasonable for [the promoter] to review the schemes that had implemented to see if [section 194] FA 2003 applied to them. IN HMRC’s view it was obvious that the schemes fell within

Section 194. It follows that [the promoter] was careless in not telling the Appellants of the need to amend their returns.

18. As Judge McKeever determined that HMRC had made a relevant discovery in respect of each of the Field and Shaw Appellants, it was necessary for her to consider whether the failure to assess for the tax on the SDLT return or to claim excessive relief had been caused by the negligence of the Appellants or someone acting on their behalf.

19. In this regard the judge concluded:

“125. In the case of the Shaw Appellants, HMRC informed them about the retrospective legislation but they were advised by [the promoter] that it did not apply to them. A person who relies on the advice of someone they reasonably believe to be competent to give advice will normally be regarded as taking reasonable care (see Atherton above). The question whether the individual is liable because of a failure to take reasonable care by the advisor is a separate issue, which I consider below.

126. In any event, the burden lies on HMRC to prove, on the balance of probabilities that the Appellants were negligent. [HMRC] has produced no evidence to this effect. He asserts that the Appellants ought to have been monitoring the position after completion and the fact that the Appellants failed to file amended returns amounts to acting in a negligent way.

127. I prefer [the Appellants’] contentions. Using the distinction in *Neal*, this is not a case of basic ignorance. The possibility that retrospective legislation might require you to revisit a transaction that had been returned under advice and disclosed is not something that a reasonable lay taxpayer would reasonably be expected to be aware of.

...

151. HMRC asserted that [the promoter] was negligent in not advising the Appellants to amend their returns but, as [the Appellants] said, they have not provided any evidence of what a reasonably competent tax advisor would have done or whether a reasonably competent tax adviser would have taken the view, at the time, that section 194 applied to this case. HMRC have not discharged the burden of proving on the balance of probabilities that [the promoter] was negligent.”

## LEGISLATION

20. Section 29 TCEA provides:

29 Costs or expenses

(1) The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal, and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may

...

(b) (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.”

21. Rule 10(1) FTT Rules provides:

“10. Orders for costs

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses):

(a) under section 29(4) of the 2007 Act (wasted costs) ...

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;’

## **PARTIES SUBMISSIONS**

### **Appellant’s claim**

22. The Appellant claims costs under rule 10(1)(b) and not 10(1)(a) FTT Rules. Their claim is predicated on the basis that HMRC bore the burden of proving negligence and the Tribunal found that they had failed to lead any evidence as to the negligent conduct of either the Appellants or the promoter. They acknowledge that the fact that HMRC’s arguments on negligence failed is not sufficient to constitute unreasonable conduct and emphasise that the unreasonable conduct relied on was a failure “to make any attempt to satisfy their burden of proving that the Appellants or [the promoter] acted negligently”.

23. The Appellant notes that HMRC’s statement of case asserts negligence in the form of a failure to amend the SDLT return following the legislative change and also asserts that the loss of tax was attributed to that negligent conduct. In respect of the promoters again the statement of case made a simple assertion.

24. The Appellant also relies on the complete absence of any evidence from HMRC’s witness as to negligence. The statement addressed only the question of discovery.

25. It is contended that there is, and can be, no explanation for a party adducing no evidence and advancing their case on bare assertion where that party bears the burden of proof. In this regard it is contended that HMRC’s conduct was not within a range reasonable conduct – the obligation on HMRC was to particularise their case and adduce evidence.

26. A parallel is drawn by the Appellant to the conclusion of the FTT in the matter of *Gardiner v HMRC* [2015] UKFTT 0115. That case concerned the imposition of a penalty predicated on taxpayer negligence. The taxpayer in that case had put HMRC to strict proof and HMRC led no evidence raising a prima facie case of negligence. The FTT considered such conduct to be unreasonable and awarded costs against HMRC.

### **HMRC’s objection**

27. HMRC’s objection narrates at some length the history of the dispute between the parties making particular reference to the underlying issue that the Appellants had participated in an unsuccessful tax avoidance scheme. A point which the Appellants conceded more than 2 years after bringing the appeals.

28. Reliance is placed on the FTT’s conclusion that the Appellants were required pursuant to the retrospective amendment to section 194 FA 13 to have rendered amended returns but they did not do so. HMRC also emphasise that the Tribunal did not find the Appellants to be credible witnesses. They also point to the introduction of the later abandoned claim that the discovery justifying each assessment was stale.

29. HMRC contend that they did produce evidence to demonstrate that the promoter was aware of the potential impact of section 194 FA 13 by reference to the correspondence from HMRC in connection with the Shaw Appellants and a ministerial statement concerning the

amendment and it was simply a case of the Tribunal concluding that the evidence provided was insufficient to meet the burden of proof.

30. In the circumstances, HMRC contend that it was not unreasonable for them to defend the appeals and that whilst finding against HMRC that negligence was proven Judge McKeever had not indicated that HMRC's position had been unsustainable.

31. HMRC distinguish *Gardiner* on the basis it concerned penalties in circumstances in which the underlying tax had been paid and that the taxpayer in that case had put HMRC to strict proof. In the present case it is asserted that a prima facie case of negligence was made out on the evidence, particularly in the context of the allegation of negligence on the part of the promoter.

#### **TEST TO BE APPLIED IN A CLAIM FOR UNREASONABLE COSTS**

32. In the first instance it is to be noted that the FTT Rules do not provide for the payment of costs in standard category appeals. As noted by the Upper Tribunal in *MG v Cambridgeshire County Council* [2017] UKUT 00172 (ACC) at paragraph [26] "... the general rule ... is that there should be no order for costs".

33. Where the Tribunal identifies that there had been unreasonable conduct in the proceedings it is established that there is a discretion and not an obligation for the Tribunal to award costs (see *Tarafdar v HMRC* [2014] UKUT 0362 (TCC)).

34. The question of the threshold for unreasonableness has been considered in the context of the tax tribunal by the Upper Tribunal in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) (**MORI**). In that case the Upper Tribunal endorsed the summary by the FTT of what might constitute unreasonable conduct. As far as relevant in the present application unreasonable conduct was identified as:

- (1) Requiring a lower threshold than the award of costs by the Special Commissioners which required "wholly unreasonable" conduct.
- (2) Acting unreasonably may take the form of a single piece of conduct and may include an omission.
- (3) The test does not preclude the possibility that there were a range of reasonable ways of acting rather than only one.
- (4) Wrong assertions are not automatically unreasonable.
- (5) Rule 10(1)(b) FTT Rules is not to be used as a backdoor to cost shifting not otherwise permitted under the FTT Rules.

35. The leading authority on the circumstances in which costs are payable pursuant to rule 10(1)(b) FTT rules in the Tax Chamber is to be found in the Court of Appeal judgment in *Distinctive Care v HMRC* [2019] EWCA Civ 1010. The issues which arose in that case are not, in the main, pertinent to the present application for costs. However, and of relevance to the present application, the Court endorsed the approach adopted in *MORI*.

36. It also endorsed, at least in the limited circumstances in which it was relevant, the analysis of the president of the Upper Tribunal Asylum and Immigration Chamber, sitting as a FTT judge in *Cancino v Secretary of State for the Home Dept; Cancino (Costs – First-tier Tribunal – new powers)* [2015] UKFTT 59 (IAC) (**Cancino**).

37. On the basis of this endorsement, and the standing of the panel considering the costs application in *Cancino*, this Tribunal considers the views adopted in that case are highly relevant and persuasive on the approach to be adopted. They also largely apply the binding authority of *Ridehalgh v Horsefield* [1994] Ch 205 (**Ridehalgh**) to the Tribunal.

38. In *Cancino* the Tribunal reinforced the discretionary nature of a wasted or unreasonable costs order identified in paragraph [33] above.

39. The Tribunal considered in some detail provisions similar to rule 10 FTT Rules which, as set out above, provides for a discretion to make an award of costs where costs have been wasted and/or where conduct is unreasonable. By reference to the Court of Appeal judgment in *Ridehalgh* the Tribunal (at paragraph [16]) identified the mischief intended to be addressed by the wasted costs rules as:

“the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their or the other side’s lawyers. Where such conduct is shown, Parliament clearly intended to arm the Courts with an effective remedy for the protection of those injured.”

40. Wasted costs were identified in *Ridehalgh* (at page 232d-h, quoted in *Cancino* paragraph [16]) as payable where there was improper, unreasonable or negligent conduct which were defines as follows:

“Improper means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgement limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code. ...

Unreasonable also means what it has been understood to mean in this context for at least half a century. The expression 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 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. ...

We are clear that negligent should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. ...We would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence.”

41. As noted in *Cancino*, the Court in *Ridehalgh* went on to apply the decision of the House of Lords in *Saif Ali v Sydney Mitchell* [1980] AC 198, in this context “negligent” conduct arises where a solicitor (or representative) in respect of “advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well informed and competent would have given or done or omitted to do.”

42. *Ridehalgh* also recognised that a “Court’s satisfaction that a legal representative has acted improperly, unreasonably or negligently and that such conduct has caused the other side to incur an identified sum of wasted costs, is not bound to make an order, but in that situation it would of course have to give sustainable reasons for exercising its discretion against making an order.” (*Ridehalgh* page 239e quoted paragraph 18 of *Cancino*).



43. The Tribunal also endorsed the application of a three-stage test when exercising the discretion to award wasted costs as set out in *Ridehalgh*:

- (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
- (2) If so, did such conduct cause the applicant to incur unnecessary costs?
- (3) If so, is it, in all the circumstances of the case, just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

44. In the context of a wasted costs order it was also noted (again applying *Ridehalgh* at page 234):

“A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail”.

45. In the context of wasted costs (which are awarded against the legal representative of a party rather than the party who they represent) the rationale for this conclusion is that legal representatives may advise their clients of the weakness of a position but may nevertheless be instructed to run the case.

46. Having undertaken a thorough exposé of the history, rationale and theoretical application of the equivalent to rule 10(1)(a) FTT Rules, the Tribunal went on to consider the equivalent provision to 10(1)(b). At paragraph [23] it states (as it would apply to rule 10 FTT Rules):

“... [10(1)(b)] is concerned only with one species of unacceptable conduct, namely that which is unreasonable. We consider that the question of whether conduct is unreasonable under this limb of rule [10] is to be determined precisely in accordance with the principles which relate to unreasonable conduct under rule [10(1)(a)]. We find nothing in the 2007 Act or the rule itself to suggest otherwise. Thus the basic test will be whether there is a reasonable explanation for the conduct under scrutiny. ...”

47. On the question of the threshold, again by reference to *Ridehalgh*, the Tribunal stated that the cost shifting rule was to be used in only the clearest of cases and should not be invoked without good reason (see paragraph [27]).

48. Finally, when considering the reasonableness of a party’s conduct, the Tribunal considered that the conduct of a litigant in person cannot be evaluated by reference to the standard of qualified lawyers, but neither may that be permitted to operate as a carte blanche to misuse the process of the Tribunal.

49. In that context the Tribunal also has in mind the considerations of the Supreme Court in *BPP Holdings International Ltd and others v HMRC* [2017] UKSC 55. In the context of a debaring decision issued against HMRC, Counsel for HMRC invited the Supreme Court to take account of the fact that the debaring order prevented HMRC from discharging its public duty and could lead to the public interest being harmed. Lord Neuberger (with whom the other justices agreed) considered that to so hold would set a dangerous precedent and would discourage public bodies from living up to the standards expected of individuals and private bodies. He considered that there was “at least as strong an argument for saying that the courts should expect higher standards from public bodies than from private bodies or individuals”. However, he went on to determine that all courts and tribunals should hold all parties to the same standard.

50. *BPP* is the later of these authorities and the Tribunal considers, in the context of a jurisdiction in which parties more commonly represent themselves and/or are not legally

represented (including where HMRC conduct litigation through non-legally qualified litigators), the standard to be applied for a wasted costs order, personal to the representative, is that of reasonable competence by reference to their skills and experience.

51. By reference to the analysis provided in *Ridehalgh* and considered as applicable to the Tribunal costs regime in *Cancino*, the Tribunal distils the test to be applied in determining whether an unreasonable costs order should be made as follows:

(1) Where a case is allocated to the standard category the cost shifting regime provided under rule 10(1)(a) and (b) should be applied only where the conduct of the party (in the case of an unreasonable costs order) and the representative (in the case of a wasted costs order) should, on the facts, be reserved for the clearest of cases and only where there is good reason to make an award of costs justifying cost shifting.

(2) The circumstances in which an award of costs is to be made under rule 10(1)(b) is unreasonable conduct. Whilst it should readily be concluded that improper conduct (within the description provided in *Ridehalgh*) would naturally fall within unreasonable conduct (as improper conduct is likely to also to be considered vexatious) the same is not true for negligent conduct (in an “untechnical” way). The inclusion of negligence within a waste costs order can be reconciled with the fact that a wasted costs order imposes a costs penalty on a representative and not on the party appointing the representative.

(3) The acid test for unreasonable conduct is whether the conduct permits of a reasonable explanation.

(4) There is a three-stage approach to exercising the Tribunal’s discretion when awarding unreasonable costs as identified in paragraph [43] above. It is the overriding objective of acting justly and fairly in all the circumstances which underpins that three-stage approach.

## **DISCUSSION**

### **Has there been unreasonable conduct**

52. It is clear, in the view of the Tribunal, that HMRC have behaved arrogantly. An assertion as to negligence was made predicated on a statutory amendment which was publicly promulgated but in circumstances, as identified by Judge McKeever, which did not specifically address the situation of the Appellants.

53. HMRC’s case was predicated on the bold proposition that the public announcement of the legislative amendment which referenced closing out two particular schemes, neither of which were the scheme adopted by the Appellants, was sufficient to establish negligence. It is apparent that they assumed that the Tribunal would thereby accept, without more, that either the Appellants or the promoter had been negligent in not rendering an amended SDLT return. The statement was their only “evidence” of negligence in the case of the Field Appellants.

54. HMRC are wrong to assert that they established a prima facie case of negligence for either Appellant or the promoter in the present appeal. Had HMRC established a prima facie case they would have met the burden of proof and the appeal would have failed. On the contrary, no prima facie case was established in the judgment of Judge McKeever.

55. The burden of proof lay on HMRC. By the amended grounds of appeal it was plain that the Appellants understood that the discovery assessments had been raised on the basis of paragraph 30(3) Schedule 10 FA 03 and not paragraph 30(2). They did not even consider negligence to be in issue and thus, at least by implication, HMRC were put to strict proof on the question of negligence. HMRC put negligence in issue by their statement of case but then, and by reference to the findings of Judge McKeever, HMRC produced “no evidence” of

negligence by the Appellants (see paragraph [126]) and “did not produce any evidence of what a reasonably competent tax adviser would have done or whether a reasonably competent tax adviser would have taken the view at the time, that section 194 applied to the scheme” (see paragraph [151]). Contrary to HMRC’s submission there was a complete paucity of evidence as to negligence.

56. Without such evidence the underlying nature of the insufficiency in tax is immaterial because the discovery assessments are reliant on a combination of a discovery and either negligent/fraudulent conduct or meeting the condition in paragraph 30(3) Schedule 10 FA 03. For these discovery assessments, it was accepted that paragraph 30(3) Schedule 10 FA 03 was not in issue due to the disclosure made, fraudulent conduct was not asserted and there was no evidence to support the assertion of negligence.

57. The Tribunal bears in mind that for a wasted costs order it is sufficient that the conduct of the representative is negligent in the sense of failing to act with the competence reasonably expected of ordinary members of the profession, or in the case of a litigant in person, the conduct that may be so expected.

58. This case has been presented throughout by Mr Goulding a litigator of HMRC. The Tribunal understands that litigators are not legally qualified but are entrusted by HMRC with the conduct of a significant volume of litigation matters. Indeed, HMRC appear to choose between the appointment of counsel and litigators. The Tribunal, on balance, does not consider that Mr Goulding failed to act with the competence of an unqualified representative. However, and on balance, the Tribunal considers that HMRC, as the party to the litigation, has acted unreasonably. It prosecuted a matter in respect of which it bore the burden of proof in circumstances in which, without evidence meeting that burden, there could never have been any reasonable prospect of success for the appeal.

59. By reference to the acid test as to whether the conduct permits of reasonable explanation the answer is no. The Appellant had not understood negligence to be in issue until the statement of case. The Tribunal found that no evidence had been led, the explanation is arrogance on the part of HMRC that the Tribunal would offer latitude on the basis that the tax insufficiency arose as a consequence of engagement in an accepted and unsuccessful attempt to avoid SDLT. That is not a reasonable explanation.

**Did the unreasonable conduct cause the Appellants unnecessary cost?**

60. HMRC’s decision to call no evidence to support their case on negligence, in the circumstances of this case, essentially rendered the hearing pointless putting the Appellants to the unnecessary costs of preparing for and attending a hearing that had only one possible outcome. It was irrelevant whether there was a discovery because without established negligence (or any articulated case on paragraph 30(3) Schedule 10 FA 03) the discovery assessments failed and it did not matter that there was an insufficiency, it was an irremediable insufficiency.

**In all the circumstances is it just to order costs?**

61. In relation to this part of the test the Tribunal has regard to:

- (1) the requirement that cost shifting is appropriate only in the most clear of cases and is contrary to the general rule that in standard category appeals each side bears their own costs;
- (2) HMRC’s unreasonable conduct in failing to prove the negligent conduct particularly in the circumstances in which the Tribunal noted that expert or other evidence could relatively simply have been called as to the reasonable conduct to be expected of an advisor in the position of the promoter;

(3) in view of that conclusion the Tribunal must have a sustainable reason for not making a costs order;

(4) the tax planning engaged in by the Appellants has, through procedural failure, resulted in a tax benefit of £1,275,113 in the case of the Field Appellants and £58,750 in the case of the Shaw Appellants to which they acknowledge they were not entitled;

(5) the total quantum of costs, without assessment as to reasonableness (and which is challenged by HMRC), including counsel's fees, is £80,478.

62. Taking all these factors into account the Tribunal considers that it is just and fair to make an award of costs. This Tribunal sees very many costs applications from HMRC made pursuant to rule 10(1)(b). In the vast majority of instances it is the Appellant which bears the burden of proof and HMRC, rightly, puts Appellants to strict proof, particularly where an Appellant makes allegations against assessing officers. It is wrong that taxpayers are held to a different standard to that expected of HMRC when it is HMRC which bears the burden of proof.

63. However, these Appellants have benefited from a lucky strike. Relief to which they know they were not entitled has been secured. An award of substantive costs in such a situation would be to compound their luck and to doubly jeopardise the general body of taxpayers for HMRC's failure.

64. The application is therefore allowed, and quantum assessed at £1.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

65. 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.

**AMANDA BROQN QC  
TRIBUNAL JUDGE**

**Release date: 01 SEPTEMBER 2022**