Neutral Citation: [2024] UKFTT 00492 (TC)

Case Number: TC09190

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

Appeal reference: TC/2023/09819

VALUE ADDED TAX – CUSTOMS DUTY – PROCEDURE – appeal to Tribunal – HMRC had withdrawn underlying decisions due to calculation error before being notified of the Tribunal appeal – hardship applicable so appeal not categorised by Tribunal – HMRC notified Tribunal that underlying decisions had been withdrawn and asked for appeal to be struck out – Appellant objecting – whether appeal should be allowed or struck out by Tribunal

COSTS – HMRC had withdrawn underlying decisions before being notified of the Tribunal appeal – appeal uncategorised but not meeting criteria for allocation to Complex category – no explanation from Appellant of how HMRC's conduct of appeal was unreasonable – application for costs unsupported by schedule – whether costs to be awarded

Judgment date: 30 May 2024

Decided by:

TRIBUNAL JUDGE BAILEY

Between

CHARLES KENDALL FREIGHT LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 28 May 2024 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, having first read the documents filed on the Tribunal file, including the parties' submissions dated 12 and 19 January 2024, and the further information provided by both parties on 29 April 2024.

DECISION

INTRODUCTION

1. This decision decides two interlocutory issues that remain in dispute between the parties:

    1. how the Tribunal should formally conclude an appeal where the underlying decisions under appeal have been withdrawn, and

    2. whether an award of costs should be made in the circumstances of this appeal.

2. Both parties have agreed that these issues should be decided on the papers as a result of their written submissions.

OUTCOME

3. As this is a lengthy decision, it is appropriate to set out the outcome at the onset.

4. For the reasons set out below, Issue 1 is decided in favour of HMRC. This appeal is struck out under Rule 8(2)(a) of the Tribunal Rules. For all of the reasons set out below, I decide Issue 2 in favour of HMRC. The Appellant's application for costs is refused.

BACKGROUND

5. On 30 August 2023, the Tribunal received an in-time appeal filed on behalf of the Appellant by its solicitor. That appeal was against a review decision dated 8 August 2023, upholding the issue of two Post Clearance Demand Notes (C18s) in the total sum of £54,044.82. Those C18s had been issued to the Appellant as a declarant for a Non Established Taxable Person, on the basis that goods declared on import had been undervalued.

6. In its Notice of Appeal, the Appellant stated that further C18s had been issued and that the total amount in dispute was just under £240,000. Although the amount which the Appellant was required to pay in advance of an appeal was the amount of the two C18s under appeal, the Appellant claimed in its Notice of Appeal that it would suffer hardship if obliged to pay £254,000 before making its appeal to the Tribunal.

7. On 12 September 2023 (although this was unknown to the Tribunal until later), HMRC withdrew the two C18s that were the subject of this appeal. On an unknown date, the Appellant was notified of this withdrawal and informed that the two C18s were being withdrawn for technical, not substantive, reasons and that replacement C18s would be issued in due course.

8. On 21 September 2023, the Tribunal acknowledged and served the Notice of Appeal. As hardship had been claimed by the Appellant, the Tribunal directed HMRC to confirm within 28 days that a hardship application had been received by them from the Appellant. Both parties were informed that the appeal could not proceed until the issue of hardship had been resolved, and that the appeal was stayed until that time.

9. On 25 September 2023, HMRC emailed the Tribunal to confirm a hardship application had been received and was being processed. Later, on 25 September 2023, the Appellant emailed the Tribunal:

> We wish to submit that the Appeal is allowed with the Appellant's costs to be paid. The Respondents has cancelled the 2 C18s that are the subject of this Appeal.

10. On 12 October 2023, HMRC emailed the Tribunal in response to the Appellant's email:

> HMRC confirm that the decision under appeal, that is the decision dated 7 July 2023 to issue two post clearance demand notes, was withdrawn by HMRC on 12 September 2023 due to an error in the assessment calculations. A new decision will be issued in due course.
>
> In light of the foregoing, we request that Tribunal close this appeal.
>
> In relation to the Appellant's request for costs to be paid, we note that the Appellant has not made a valid application for costs. The Respondents would object to any application for costs, particularly considering that this appeal is presently in hardship.

11. It is clear from the Appellant's Notice of Appeal that there were more C18s issued than the two which are under appeal in this specific appeal. As is clear from the review decision supplied with the appeal, and as HMRC have subsequently clarified (in their email of 29 April 2024), the two C18s which are the subject of this appeal were issued on 15 and 19 June 2023, not 7 July 2023. I find that HMRC simply made a mistake in their 12 October 2023 email when specifying the issue date of the withdrawn C18s.

12. The Appellant replied to HMRC later on 12 October 2023:

> Please can HMRC confirm that they agree to allow the Appeal.
>
> In terms of costs we will make an application, In terms of the point made, the costs are for taking instructions, reviewing the papers and drafting/lodging the appeal.

13. HMRC responded on 24 October 2023:

> HMRC do not agree that the appeal should be allowed. As the decision under appeal has been withdrawn, HMRC's opinion is that the Tribunal should strike out the proceedings on grounds of lack of jurisdiction.

14. The Appellant responded the next day:

> We still disagree.
>
> 1. HMRC rejected our client's Request to Review the C18.
>
> 2. HMRC knew that the C18 was disputed.
>
> 3. The Appellant had to lodge an Appeal.
>
> 4. HMRC withdrew after (sic) the C18 after the Appeal was lodged.
>
> 5. It follows that the Appeal has succeeded and should be allowed with costs.

15. As the appeal was filed with a copy of the review decision made by HMRC, it cannot be the case that HMRC rejected the Appellant's request for a review. I find, on the balance of probabilities, that what the Appellant intended to convey at point 1 of its understanding of the history of this appeal was that HMRC had not withdrawn the two C18s under appeal at the review stage.

16. In addition, although the Appellant has noted at its point 4 that the C18s were withdrawn after it had filed an appeal with the Tribunal, it is clear from the parties' statements and HMRC's subsequent clarification email that the C18s were withdrawn on 12 September 2023, prior to this appeal being notified to HMRC on 21 September 2023. Therefore, it does not follow that HMRC's withdrawal of the C18s was as a consequence of the Appellant appealing to the Tribunal – it seems that this would have happened in any event although, of course, the Appellant could not have known this at the time it filed its appeal to the Tribunal.

17. On 7 November 2023, the Appellant filed a Notice of Application. The Appellant sought an order in the following terms:

> 1. The appeal be allowed in relation to the C18 issued 8 August 2023 and all matters relating to it.
>
> 2. The Respondent to pay the Appellant's costs of the Appeal to be assessed if not agreed.

18. As set out in the review decision supplied with the appeal, the two C18s under appeal were issued on 15 and 19 June 2023. I find that the Appellant is here referring to the review decision which upheld the issue of those two C18s.

19. No schedule was attached to this application, and there was no indication by the Appellant about what its costs totalled or any breakdown of any amounts incurred.

20. On 15 December 2023, the Tribunal file was referred to me, and I drafted a letter that was sent to the parties. In that 15 December 2023 letter, I asked the parties whether they were content for the issue of how the appeal should be concluded to be decided on the papers, and also directed them to provide written submissions on this issue. I also noted:

> I can see also that the Appellant is asking that their costs be paid. In this regard I draw the Appellant's attention to Rule 10 of the Tribunal Rules which sets out the requirements for a party applying for costs. The Appellant should bear in mind that this appeal was not allocated to the Complex category. (This appeal had not been categorised, as that was not possible prior to hardship being decided, but it does not fulfil the criteria for a Complex appeal.)

21. HMRC filed their written submissions on 12 January 2024. The Appellant sought additional time, and filed their submissions on 19 January 2024. Both partis agreed to the issue of how the appeal should be determined being decided on the papers.

22. The Appellant concluded its written submissions of 19 January 2024 as follows:

> In relation to costs, it is accepted that the appeal had not been allocated. However, this is one of many Appeals being issued which falls within Method 6 Group. Further, the Appellant has been forced to issue the Appeal as despite having had 18 months to either issue a correct C18 or not issue on at all, it did and it was wrong (sic).
>
> The Appellant asks that the Appeal is allowed with an order for costs.

23. No schedule was attached with those written submissions. The Appellant did not make any submissions setting out why it considered that HMRC's conduct of this appeal was unreasonable.

24. On 8 February 2024, both parties were given the opportunity to file any further written submissions, having by that stage since the submissions of the other party. No further written submissions were received by the Tribunal until 29 April 2024 when the clarification required by the Tribunal (as to which specific C18s had been withdrawn) was provided by HMRC.

ISSUE 1 – THE DETERMINATION OF THIS APPEAL

25. I start by setting out the relevant part of Tribunal Rule 8. Paragraph (2) provides:

> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and

> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

26. This makes clear that the Tribunal has no discretion in this matter. If the Tribunal does not have jurisdiction in respect of these proceedings then the appeal must be struck out. However, to decide whether the Tribunal does have jurisdiction in the circumstances of the present case, it is necessary to consider relevant decisions on the effect of Rule 8 and how the Tribunal should proceed in cases such as this. I apologise in advance to the parties for the length of the extracts from those decisions. In addition, in two of the more recent authorities there is some reference to a much older decision; I will start by considering with *Furtado (Surveyor of Taxes) v City of London Brewery Company* [1914] 1 KB 709.

27. In *Furtado*, the Court of Appeal was asked to decide whether an application made under Section 134 of the Income Tax Act 1842 to the General Commissioners (a predecessor body to this Tribunal), seeking an amendment to the profits stated in an assessment, constituted an appeal within Section 59 of the Taxes Management Act 1880. In giving the judgment of the Court of Appeal, Swinfen Eady LJ summarised some of the legislative background that had given rise to the proceedings:

> By the Income Tax Act, 1842, s. 118, a right of appeal is given to any person thinking himself aggrieved by any assessment, provided it is brought within the time limited. On such an appeal, the appellant disputes the validity of the assessment.
>
> By ss. 183 (since, repealed) and 134 of the same Act, applications may be made for abatement on account of diminution of income, or ceasing to exercise the trade before the end of the year, or from any other specific cause being deprived of the profits or gains on which the assessment was made. On these applications, the validity of the assessment is not disputed, but admitted, the claim for relief being based upon something which has happened since the assessment was made, and which could not have been made the subject of an appeal against the assessment.

28. After considering various provisions, the Court of Appeal stated:

> Sect. 134 gives the right "to make application," not to appeal. There is not anything from which the applicant is appealing. The reference in the same section to causing "the assessment to be amended " is purely consequential.

29. Other applications which could be made to the General Commissioners were considered by the Court of Appeal before they concluded:

> In all these [other] cases, the complaint is against the assessment, and is strictly an appeal against the assessment.
>
> We are of opinion that an application for relief under s. 134 is not "an appeal" under the Income Tax Acts, and is not within s. 59 of the Taxes Management Act, 1880, and the Commissioners have no power to state a case, and consequently that the decision of Scrutton J. was correct.

30. The effect of that conclusion was that the Section 134 application that had been made to the General Commissioners did not constitute an “appeal”. Although an onward appeal could be made against a decision in respect of an appeal, no onward appeal could be made against the General Commissioners’ decision on an application. Therefore, as the General Commissioners’ decision in respect of the application was final, the General Commissioners did not have the power to state a case for the opinion of the High Court.

31. In *Rasam Gayatri Silks Limited v HMRC* [2010] UKFTT 50 (TC), HMRC had withdrawn a decision that was the subject of the appeal to the Tribunal, and suggested to the

Appellant that it should withdraw its appeal to the Tribunal as there was no longer an underlying decision to appeal. The Tribunal (Judge Berner) considered Rule 8(2) and how that applied where HMRC had withdrawn their decision after an appeal had been filed, concluding:

> Rule 8(2) is imperative; if it applies then the appeal must be struck out, and I have no discretion. In my view Rule 8(2) does not apply. This was a valid appeal against a decision that was in force at the time of the appeal. The Tribunal had jurisdiction over those proceedings. While the appeal is outstanding, and before it is determined or one party withdraws, in my judgment the Tribunal continues to have jurisdiction. Without formal withdrawal by a party the appeal remains outstanding and the proceedings have not ended. The argument that "there is no longer a decision to be appealed" is, in my view, misconceived in a case where the decision is not withdrawn before the appeal is made. The fact is that there was a decision to be appealed and a valid appeal was made in respect of which the Tribunal had jurisdiction. The subsequent withdrawal of the decision did not end the appeal proceedings over which the Tribunal continued to have jurisdiction.

32. Judge Berner did not go on to detail how, in practical terms, the Tribunal could progress with the appeal proceedings that he considered still subsisted despite the lack of an underlying decision, or what interest the parties would continue to have in those proceedings. In *Rasam Gayatri Silks* it seems that HMRC had withdrawn their decision for substantive reasons and there was no replacement decision. It is unclear how the parties in *Rasam Gayatri Silks* would have continued if HMRC had maintained the substance of their position where an assessment or decision had been withdrawn for technical reasons but a replacement could not be issued, perhaps because of time limits. It is difficult to believe that the Tribunal would continue to a hearing in order to reach a decision on the issues that were in dispute (as it sometimes must when a respondent is barred from continuing to participate in the proceedings) because, without an underlying decision, that would be a wholly hypothetical exercise. So, although the Tribunal in *Rasam Gayatri Silks* describes the appeal proceedings as not ending simply because HMRC have withdrawn the underlying decision, the fact that the Tribunal then immediately went on to allow the appeal suggests that HMRC's withdrawal of the underlying decision – in circumstances where no replacement decision was issued – does, in fact, mean the end of the appeal proceedings. Therefore, I understand that what Judge Berner meant when he said that the proceedings were not ended was that he considered the Tribunal was not obliged to strike out the appeal when an underlying decision was withdrawn, as HMRC had argued the Tribunal was compelled to do under Rule 8(2). I understand Judge Berner instead considered that the Tribunal retained the power to decide the manner in which the appeal should end. In *Rayam Gayatri Silks,* the proceedings were ended by the Tribunal making an order in the Appellant's favour, rather than the Tribunal striking out the appeal.

33. In *LS v HMRC and RS v HMRC* [2017] UKUT 257 (AAC), the Administrative Appeals Chamber of the Upper Tribunal considered the effect on in-year Section 16 decisions relating to tax credit entitlement when subsequent post-year Section 18 decisions on tax credit entitlement are taken and those Section 18 decisions supersede all or part of the earlier Section 16 decisions. In paragraphs 19-23, the Upper Tribunal considered what could constitute the subject matter of an appeal. At paragraph 20 the Upper Tribunal stated:

> 20. It is the nature of an appeal that it must be against something. According to the Appendix to the Tribunal of Commissioners' decision in R(IS) 2/97:

> "9. Appeal is the process by which the decision of an administrative adjudicating authority is reconsidered and if necessary set aside or altered by a higher determining authority. …"

The Tribunal of Commissioners was referring to an appeal to what is now the First-tier Tribunal. Hence the reference to an administrative adjudicating authority. More generally, an appeal is a challenge to a decision on the ground that it is wrong, either in fact or law. This appears from the analysis in *Furtado v City of London Brewery Company* [1914] 1 KB 709.

The issue there was whether an application under the Income Tax Act 1842 was an appeal. In argument, counsel said (page 710):

> "To constitute an appeal there must be something which he [the taxpayer] says is wrong and desires to have put right."

The Court of Appeal accepted this argument, saying (page 714):

> "There is not anything from which the applicant is appealing."

Without a decision, an appeal has no meaning or substance. It has no subject matter. This is a consequence of the combined effect of the nature of an appeal and the need for a decision as the subject matter of that appeal.

34. The Upper Tribunal then went on to consider the operative effect of a decision. From paragraph 24 the Upper Tribunal stated:

> 24. We have said that if there is no decision there can be no appeal to the First-tier Tribunal. What happens if a decision is changed after an appeal has been lodged against it? The Social Security Commissioners used lapsing to work out the answer. They decided that if the effect of the later decision was "to annul" the earlier decision that was under appeal, the appeal lapsed: *R(SB)* 1/82. As analysed by the *Court of Appeal in Chief Adjudication Officer v Eggleton* R(IS) 23/95, it depends on the earlier decision ceasing, retrospectively, to be of operative effect for any period:
>
> > "In my judgment, whether or not an original decision lapses or is superseded when it is reviewed, depends on the nature and extent of the review. If the whole of the original decision from the date on which it is made is revised or varied, there is nothing left of it and it cannot therefore be appealed. But if it is only varied as to part, or from a particular date or because revision is precluded after a certain date, in the absence of any express provision to the contrary, I can see no logical reason why the original decision should not subsist, save in so far as it has been affected by the review."
>
> It is this loss of all operative effect, and this alone, that generates the lapsing effect. There is no indication in *Eggleton*, or in any of the cases before *RF* and *JY* for that matter, that there was any element of discretion. Nor is there is any indication that an appeal might continue in existence for some practical or potential benefit that this might have.
>
> 25. The reason why the appeal lapses is that there is no longer any decision against which an appeal can be brought and, as a result, the tribunal has no jurisdiction in relation to any appeal that has been lodged. It makes no difference in principle to the reasoning whether the earlier decision ceased to have operative effect before or after the claimant lodged the appeal.

35. The Upper Tribunal analysed the concept of lapsing, rejecting the argument that it only applied when specifically mentioned in legislation; and then went on to consider the effect of

the Tribunals, Courts and Enforcement Act 2007 on the options available to the First tier Tribunal when an underlying decision was no longer in existence:

> 29. … The rules of procedure under the Tribunals, Courts and Enforcement Act 2007 introduced a specific provision dealing with lack of jurisdiction. Rule 8(2)(a) introduced a duty to strike out all or part of proceedings if the tribunal did not have jurisdiction in relation to them. It is impossible to interpret rule 8 as admitting any discretionary element. The terms of rule 8(2) could not be clearer: the tribunal must strike out the proceedings. That is the unmistakeable language of a duty. It is in contrast to rule 8(3), which merely authorises the tribunal to strike out proceedings by providing that it may do so.
>
> 30. The duty imposed by rule 8(2) reflects the tribunal's duty not to act outside its jurisdiction and the requirement that it decide whether it has jurisdiction. …
>
> 31. The introduction of rule 8(2)(a) makes it important to understand the principles upon which lapsing operates. If (as we have decided) it operates by depriving a tribunal of jurisdiction, it imposes a duty on tribunals to dispose of cases by way of strike out rather than by one of the other methods that were previously used. …

36. The Upper Tribunal concluded that an earlier Section 16 decision that was wholly superseded would lapse as it would lose all operative effect. The Upper Tribunal contrasted their own jurisdiction, on an appeal from the First-tier Tribunal, and the First-tier Tribunal's jurisdiction holding that, once a matter was before the Upper Tribunal then it did not matter that a Section 16 decision had lapsed but that the situation was different with an appeal before the First-tier Tribunal:

> 44. As soon as the appeal lapses before the First-tier Tribunal, that tribunal ceases to have jurisdiction and from then on, in Black LJ's words, "was itself only ever engaged upon a determination of hypothetical or academic issues". There is no longer any issue in dispute between the parties in relation to the section 16 decision and it is not permissible to resurrect under the guise of an academic issue any dispute that did at one time exist against a decision that no longer exists.

37. In *Learna Limited v HMRC* [2023] UKFTT 00972 (TC) both *Rayam Gayatri Silks* and *LS and RS* were considered by the Tribunal. The facts of *Learna* were that HMRC had withdrawn their underlying decision and they suggested to the appellant that, as a consequence of HMRC's withdrawal, the appellant should withdraw its appeal to the Tribunal. The appellant disagreed, arguing that HMRC should themselves withdraw from the appeal given they no longer stood by the decision which had been the subject of the appeal.

38. In *Learna* the Tribunal declined to follow *LS and RS*, concluding that the Administrative Appeals Chamber had possibly misunderstood the procedure that applied for tax appeals in 1911 and thus misinterpreted *Furtado v City of London Brewery Company* (1913) 6 TC 382. While I agree with the analysis of *Furtado* set out in *Learna*, I do not agree that the Upper Tribunal in *LS and RS* may have misunderstood this. In my opinion, the Upper Tribunal were using *Furtado* only to emphasise that the parties' dispute must arise out of an appealable decision and that that appealable decision must still be in existence. If that is not the case then there can be no appeal.

39. The Tribunal in *Learna* concluded:

> 18. I find that the withdrawal by HMRC of an appealed decision cannot completely oust the jurisdiction of this Tribunal. If that were correct, then,

> for example, the Tribunal would have no jurisdiction to award costs against HMRC under Rule 10(1)(b) in circumstances where HMRC have acted unreasonably and withdrew an assessment (see for example *First Choice Recruitment v HMRC* [2019] UKFTT 412 (TC)). If the withdrawal of the assessment had the effect of denying jurisdiction to the Tribunal, then no costs awards could ever be made against HMRC in circumstances where they withdrew an assessment which was being appealed before the Tribunal.
>
> 19. I agree with Judge Berner in *Rasam Gayatri Silks* that the mere fact that a decision is withdrawn after an appeal has been validly made does not necessarily mean that this Tribunal no longer has jurisdiction in respect of the appeal.
>
> 20. I find that Rule 8(2)(a) is not engaged, as the Tribunal continues to have jurisdiction in respect of this appeal.

40. Having set out those decisions (to which I will return) this is a convenient point to set out the submissions of the parties.

The parties' submissions on the determination of the appeal

41. In its submissions on this point, the Appellant states:

> The issue is whether to allow the Appeal or for to record it as being withdrawn. The consequence of the Respondents cancelled the C18 and its Assessment is that the Appellant has succeeded with its appeal (sic). Therefore it should be allowed. That is the practice for Appeals that succeed (and we submit this should apply whether there has been a hearing). The issue of the Appeal was valid.

42. I agree with the Appellant that this appeal was validly made but I do not consider that point assists my decision here. The issue for the Tribunal is whether it retains any jurisdiction over a valid appeal once the decision that was the subject of the appeal has been withdrawn. There is no suggestion that the Appellant has made a Rule 17 withdrawal.

43. In their submissions, HMRC rely on *LS and RS*, submitting:

> The Respondents submit that the effect of cancelling the Decision in this appeal is that there is no longer any decision against which an appeal can be brought and, as a result, the tribunal has no jurisdiction. The matter should therefore be struck out pursuant to Rule 8(2)(a).

44. HMRC submitted that *Learna* is not binding on the Tribunal whereas *LS and RS* (being an Upper Tribunal decision) is binding, and added:

> Furthermore, the FTT in *Learna Ltd* distinguished *LS & RS* on basis that HMRC had not issued a new decision which had the effect of replacing the appealed decision, they have merely withdrawn the decision. The Respondents maintain that this appeal is factually similar to *LS & RS* as HMRC have issued a new appealable decision which has in effect replaced the original decision. Although the original Decision was withdrawn, it was withdrawn because of an error in calculating the import VAT, not because the substantive decision to raise the assessment for duty was wrong.

45. In their submissions, HMRC also noted the very limited extent of the Tribunal's jurisdiction before hardship has been decided and they relied on Section 16(3) Finance Act 1994. In this regard HMRC suggested that it is not possible for the Tribunal to allow the appeal as, until hardship has been resolved, the Tribunal does not have the power to make such an order.

46. Subsection 16(3) Finance Act 1994 provides

> (3) An appeal which relates to a relevant decision falling within any of paragraphs (a) to (h) of section 13A(2), or which relates to a decision on a review of any such relevant decision, shall not be entertained if the amount of relevant duty which HMRC have determined to be payable in relation to that decision has not been paid or deposited with them unless—
>
> (a) the Commissioners have, on the application of the appellant, issued a certificate stating either—
>
> (i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or
>
> (ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;
>
> or
>
> (b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners.

47. This requirement that hardship must be decided before the appeal can be entertained by the Tribunal is reflected in Tribunal Rule 22(4) which provides:

> If the appellant requires the consent of HMRC or the Tribunal before the appeal may proceed, the Tribunal must stay the proceedings until any applications to HMRC or the Tribunal in that respect have been determined.

My decision on the determination of the appeal

48. The path through these conflicting decisions has not been clear. I wish to state at the outset that I agree with Judges Berner and Aleksander that, generally, proceedings would be resolved more quickly and with less dispute between the parties if (whenever possible) HMRC were to withdraw from an appeal in accordance with Tribunal Rule 17, instead of only withdrawing the underlying decision. It is not surprising that an appellant who considers they have been successful in their appeal because HMRC has withdrawn the underlying decision, should be frustrated to find the consequence of that success is that HMRC expects them either to withdraw their appeal to the Tribunal or have their appeal struck out.

49. I deal first with the last point raised by HMRC, that of hardship. As a result of Section 16(3) and Rule 22(4), the Tribunal stays all appeals to which hardship applies until such point as hardship is resolved. I agree with HMRC that the Tribunal does not have the power to progress a substantive appeal while hardship is still unresolved, and the Tribunal cannot allow an appeal at this stage.

50. The present appeal was notified to HMRC before the Tribunal was notified that the C18s had been withdrawn. At the time it notified the appeal to HMRC, the Tribunal understood that hardship applied in respect of the underlying C18s. Once it was clear that the underlying C18s had been withdrawn then I do not agree that hardship any longer applied. Once the C18s were withdrawn then there could no longer be any amount due, and thus no amount could remain unpaid. Once hardship is resolved, the Tribunal is able to progress appeals and its jurisdiction is no longer restricted.

51. I do not consider the fact that hardship once applied (or that the Tribunal understood that hardship once applied) has any impact on the issue to be decided here of whether the

Tribunal is compelled to strike out an appeal or has the jurisdiction to make a different order to conclude an appeal once it is understood that hardship no longer applies.

52. Turning now to *Rayam Gayatri Silks*, *LS and RS*, and *Learna*, I understand that in the first and third of these decisions the Tribunal has concluded that, provided there was an underlying decision at the commencement of the proceedings – so that at one time the Tribunal did have jurisdiction – then Rule 8(2) does not apply to subsequent changes to that underlying decision. I do not consider that this is correct. I do not read Rule 8(2) as having effect only at the point that the Tribunal proceedings begin. I consider that Rule 8(2) continues to apply throughout the course of Tribunal proceedings, as the positions of the parties evolve and develop. During the course of the proceedings, a change in events can result in the Tribunal ceasing to have jurisdiction. I consider that if, at any time during those proceedings, it becomes clear that the Tribunal no longer has jurisdiction then Rule 8(2) will still apply. This will be the case even if the Tribunal clearly and unarguably did have jurisdiction at the beginning of the proceedings.

53. I understand the Tribunals in *Rayam Gayatri Silks* and in *Learna* both accepted that Rule 8(2) would apply if the underlying decision had been withdrawn before an appeal was made to the Tribunal. In that case the Tribunal proceedings would be struck out because the Tribunal would never have had jurisdiction. I agree with (and am bound by) the Upper Tribunal's conclusion at paragraph 25 of LS and RS that:

> It makes no difference in principle to the reasoning whether the earlier decision ceased to have operative effect before or after the claimant lodged the appeal.

54. I conclude that if the underlying decision is withdrawn during the course of proceedings then, at that point, the Tribunal ceases to have jurisdiction.

55. The consequence of these conclusions is that, once the Tribunal no longer has jurisdiction in respect of an appeal that was originally validly made then the Tribunal must – in accordance with Rule 8(2) – strike out the appeal. I conclude that the Tribunal does not have the power to allow an appeal against a decision that no longer exists.

56. In reaching this point, I have not ignored the suggestion in *Learna* that if the Tribunal strikes out an appeal where it ceases to have jurisdiction then it will be unable subsequently to make an order for costs under Rule 10(1)(b). However, after consideration of Rule 10, I do not consider that this would be the case. My conclusion that the Tribunal ceases to have jurisdiction once an underlying decision has been withdrawn does not mean that the Tribunal did not have jurisdiction before that point or that there were never any valid proceedings. The Tribunal was once seized of a valid appeal; I do not consider that the withdrawal of an underlying decision has the effect of re-writing this history. As Rule 10 of the Tribunal Rules does not require a valid appeal still to be in place for a costs application to be considered, in my opinion a decision notice which confirmed the striking out of an appeal would constitute a decision notice which finally disposed of all issues in the proceedings (for the purposes of Rule 10(4)(a)).

57. Although this is not the position here, where an appeal has been allocated to the Complex category the usual rule is that costs follow the event (unless the appellant has requested the proceedings be excluded from potential liability for costs). While that might be thought to cause issues for an appellant whose appeal had been struck out, the Tribunal is able to look to the Civil Procedure Rules for guidance, see *Versteegh Limited and others v HMRC* [2014] UKFTT 00397 (TC). CPR 44.2(2)(b) provides that the court may depart from the usual rule by making a different order, and CPR44.2(4)(b) enables the court to look at whether any party has been substantially successful if not wholly successful. In such

circumstances, I consider the Tribunal has the power to make an order for costs in favour of an appellant despite the appeal being struck out if that appeal was struck out only because the respondent withdrew the underlying decision that was the subject of the appeal. It is not inevitable that the "winning" party will be awarded their costs.

58. Therefore, for the reasons set out above, I decide Issue 1 in favour of HMRC. This appeal is struck out under Rule 8(2)(a) of the Tribunal Rules.

ISSUE 2 – COSTS

59. Rule 10(1) of the Tribunal Rules sets out the circumstances in which the Tribunal may made an order for costs. The relevant parts of Rule 10(1) provide:

> (1) The Tribunal may only make an order in respect of costs (or in Scotland, expenses)-
>
> …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;
>
> (c) if-
>
> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
>
> (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case has been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph;

The parties' submissions on costs

60. The Appellant's submissions on costs are set out above. Other than making clear they resist costs, HMRC do not appear to have made any submissions specifically concerning costs.

My decision on costs

61. Above I have set out my opinion that it is possible for the Tribunal to make an order for costs after the conclusion of an appeal, even if that appeal had been concluded by being struck out for want of jurisdiction. However, given that Section 16(3) was raised by HMRC, I note for completeness that the Tribunal does not have the power to make an award of costs when hardship is still unresolved. However, once hardship is no longer in dispute then, as held by Judge Aleksander in *Patel v HMRC* [2023] UKFTT 00128 (TC), the Tribunal has the power to make an award of costs in respect of the period of the proceedings which precedes hardship being decided.

62. The practice of the Tax Chamber is to allocate an appeal to a category in accordance with Tribunal Rule 23 only until after hardship is resolved. (This practice remains unchanged following *SNM Pipelines Limited v HMRC* [2022] UKFTT 00231 (TC).) Therefore, an appeal that concludes before a hardship application has been decided is not categorised. Here hardship was resolved when the C18s were withdrawn but, given the circumstances, this appeal was not allocated to any category.

63. The category of an appeal is relevant when the Tribunal considers an application by either party for an award of costs. In this case, the Appellant was informed that this appeal did not meet the criteria to be categorised as a Complex appeal. These are set out in Tribunal Rule 23(4) and explained in the Tribunal's Practice Direction on categorisation.

64. In its submissions the Appellant suggests that its appeal was one of many allocated to a specific group (although, in fact, this appeal was not so allocated) and also that it was necessary for the Appellant to appeal to the Tribunal because HMRC had not withdrawn its underlying decision. Neither of these factors make it appropriate for this appeal to be allocated to the Complex category.

65. For an appeal allocated to a category other than the Complex category, the onus is on the applicant to demonstrate that the person against whom a costs order is sought:

> acted unreasonably in bringing, defending or conducting the proceedings.

66. In addition, in *Distinctive Care v HMRC* [2019] EWCA Civ 1010, the Court of Appeal noted (at paragraph 31) that the starting point for consideration of the conduct of the respondents to an appeal was the date on which the Tribunal notified them of that appeal. In this appeal HMRC were notified of the appeal on 21 September 2023. The underlying C18s had been withdrawn on 12 September 2023, nine days earlier. The Appellant was aware of the withdrawal by 25 September 2024 (at the latest), four days after HMRC were notified of the appeal. The Appellant has made no attempt to explain why it considers HMRC's conduct to have been unreasonable at any stage of these proceedings.

67. There is one other obvious deficiency in the Appellant's application. Rule 10(3)(b) makes it clear that any application for costs must be accompanied by:

> … 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.

68. Despite the Appellant being legally represented and having its attention specifically drawn to Rule 10, the Appellant's application for costs was not accompanied by a schedule of the costs sought. There has been no indication of the costs that the Appellant incurred in these proceedings, nor any certification that any costs have been incurred, see *Bhargava v HMRC* [2024] UKFTT 00066 (TC). While it is possible to seek dispensation from the requirement to provide a schedule (even though the circumstances here are very different to those that made waiver appropriate in *First Choice Recruitment Limited v HMRC* [2019] UKFTT 0412 (TC)), the Appellant has not made an application for waiver of the requirement to provide a schedule.

69. In *First Choice* Judge Aleksander stated:

> I note that in this case First Choice did not neglect to include a costs schedule, but instead made an application to dispense with one. In consequence, I find that their application for costs was not invalid, notwithstanding the absence of a costs schedule. If their application to dispense with a costs schedule had been unsuccessful, they would have had to provide one.

70. In the absence of either a schedule or application to dispense with a schedule, I conclude that the Appellant's costs application here is invalid.

71. Therefore, for all of the reasons set out above, I decide Issue 2 in favour of HMRC. The Appellant's application for costs is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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: 30th MAY 2024