



**Appeal numbers**  
**FTC/04/2009**  
**FTC/05/2009**  
**FTC/28/2009**  
**FTC/32/2009**

*COSTS of Upper Tribunal hearing – percentage order*

**UPPER TRIBUNAL  
(TAX AND CHANCERY CHAMBER)**

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

**Appellant**

**- and -**

**MARKS AND SPENCER PLC**

**Respondent**

**TRIBUNAL: The President, the Hon Mr Justice Warren  
Judge Edward Sadler**

**David Ewart QC and Sarah Ford counsel, instructed by the General Counsel and  
Solicitor to HM Revenue and Customs for the Appellant**

**Nicola Shaw counsel, instructed by Dorsey & Whitney (Europe) LLP and Paul Farmer  
counsel, of Dorsey & Whitney (Europe) LLP for the Respondent**

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DECISION

- 5 1. We now deal with a number of consequential matters arising from our decision released on 21 June 2010 (“**the Decision**”).

**Clarification**

- 10 2. HMRC seek clarification of a number of points which they say are not clear. We decline to give the clarification sought. This is for two reasons.
- 15 3. First, having delivered the Decision, we do not consider that we have any power to clarify it even if we thought that that was desirable. This is not a case where what is sought is a correction of clerical mistakes, accidental mistakes or omissions. There is no suggestion that the request for clarification can be brought within Rule 43 of the Upper Tribunal Rules. Nor, plainly, is the case within the review provisions of Rule 44. It may be, where a court or tribunal has not addressed or answered a question which it was asked to address at all, or where a further question arises as a result of a decision which is made, that the court or tribunal can give a further ruling without putting the parties to the time, trouble and expense of a new case, but that is not what is sought by HMRC in the present case. We see HMRC as attempting almost to re-argue certain aspects of the case.
- 20 4. Secondly, we do not, in any event, consider that the Decision is unclear in the way which HMRC suggests:
- 25 a. As to quantification, as we stated in paragraph 215 of the Decision, our understanding of Method E is that it takes account of the differences between different tax regimes as set out in paragraph 214. There is no need for clarification on the basis of that understanding.
- 30 b. As to the losses of MSB for the year ending 31 March 2002, we do not see any need for clarification here either. We concluded that the later claims for the 2002 losses of MSB met the no possibilities test; but applying Method E, which we held later in the Decision to be the correct Method, no losses remain for that year.
- 35 c. As to the second group relief claims for MSG and third group relief claims for MSG, we see no need for clarification concerning these claims. Our conclusion on the admissibility of sequential claims is clear. We have decided that the last claims were all valid: see paragraph 175. That made it unnecessary to decide whether the no possibilities test was satisfied at the time of the earlier claims: see the first sentence of paragraph 176. Had it been necessary, we expressed our agreement with the Tribunal’s conclusions. We do not, accordingly, see that there is anything to clarify.
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**Setting aside and remaking the decision of the Tribunal**

- 5 5. HMRC suggests that it is now necessary for us to set aside and remake the decisions of the Tribunal in order to give effect to our decisions. We do not consider that this is necessary. Our conclusions are summarised at (1) to (3) of paragraph 219 of the Decision.
- 10 6. Our first conclusion related to the self-assessment years. HMRC's appeal was dismissed. Our answers to the questions referred appear sufficiently from the Decision. There is no need for us to make a direction setting aside the Tribunal's answers; our answers, to the extent to which they differ from those of the Tribunal, supersede the latter without any direction to that effect.
- 15 7. Our second and third conclusions related to the pay and file years. Our decisions were that the claims in relation to these years could not be made either because the no possibilities test was not satisfied (in relation to the earlier years) or because they were out of time. The Tribunal dismissed the MSB claims for group relief for 1998 and 1999, a conclusion with which we agreed.
- 20 8. In relation to MSG, we also agreed that the Tribunal was correct to dismiss the appeal against the refusal by HMRC of the claims for 1996 and 1997. We also agreed with the conclusion dismissing the appeal against the refusal of the claims for 1998 and 1999 made in March 2000 and March 2001. Where we differed from the Tribunal was in relation to the claims for 1998 and 1999 made in March and December 2007 which we considered were out of time and in respect of which M&S was not entitled to special treatment. The Tribunal had allowed the appeal against refusal of the claims for 1998 and 1999 made in March and December 2007. In allowing the appeal against the Tribunal's decision in relation to those appeals, it follows that the original appeal against the refusal of those claims should be dismissed.
- 30 9. We should mention here one matter one matter which we did not cover in the Decision. The Tribunal was dealing with, among other things, a refusal by HMRC to allow the claims for group relief made in March and December 2007 in relation to MSG. These claim were refused by HMRC and came before the Tribunal by way of appeal in relation to the pay and file years and by way of joint referrals pursuant to paragraph 31A Schedule 18 Finance Act 1998 in relation to the self-assessment years.
- 35 10. We do not really see the need for any further direction or order from us. We have given our decision and the reasons for saying that there is no entitlement to group relief in respect of MSG for the years 1998 and 1999. Further, Miss Shaw says that nothing else is necessary and it is her client's interest to formalise our decision in some way.
- 40 11. Having said that, we nonetheless observe that section 12(2) Tribunals, Courts and Enforcement Act 2007 gives us power to set aside the decision of the Tribunal and, if we do so, to re-make the decision. It seems to us that it would be sensible
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for us to set aside that part of the decision of the Tribunal which allowed the claims for 1998 and 1999 in respect of the losses of MSG.

**Conclusion on setting aside and re-making the decision of the Tribunal**

5 12. We hereby set aside that part of the decision of the Tribunal which allowed the claims for 1998 and 1999 in respect of the losses of MSG; and we hereby re-make the decision by dismissing the appeals against the refusal of the claims made on 20 March 2007, and in the alternative 12 December 2007 for those years.

10 **Costs**

13. We are concerned principally with the costs of the appeal before us and to a very limited extent with costs in the Tribunal. We are not concerned with the costs of the proceedings in the High Court and the Court of Appeal, or in the Court of Justice, a matter which is to be dealt with separately by one of us, Mr Justice Warren, in his capacity as a High Court judge.

14. So far as costs in the Tribunal are concerned, the Tribunal itself refused to make any order. It was (and remains) common ground that the Tribunal did not have any power to award costs under domestic law since the rules do not provide for costs in these transitional cases coming to the Tax Chamber from the Special Commissioners. However, M&S sought costs on the ground that the absence of a power to award them breaches the principle of effectiveness.

15. The Tribunal considered that a reference to the Court of Justice would be necessary before making any costs award since the Court has never given any decision on this point. We too take the view that a reference would be necessary. We have not yet been asked to make a reference. If there is to be an appeal from the Decision, then a reference at this stage is premature in any case.

16. Accordingly, we make no order in relation to the costs below.

17. In relation to the costs of the appeal to us, Miss Shaw asks, who is the successful party? She identifies the issues this way:

35 a. M&S's appeal, that is to say to the Tax Chamber from the HMRC's decision to refuse group relief, concerned claims for the losses of MSG and MSB of the years 1997 to 2002.

40 b. The effect of our decision is that M&S is entitled to relief for over £18.5 million when HMRC's position was that M&S was entitled to nothing.

c. The winner, she says, is therefore clearly M&S so that M&S should be entitled to its costs.

45 d. This is so even though M&S lost on the time limit issue. Miss Shaw says that the time limit issue was simply one of a number of issues in dispute.

Other issues included (i) the validity of the group relief claims (ii) the adapting of the UK group relief rules to allow for cross-border claims (iii) the application of the no possibilities test to the facts of the case and (iv) quantum. She says that M&S was wholly successful on these issues.

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- e. She says the appeal was concerned overwhelmingly with these other issues. She carries out an examination of the time spent at the hearing (by reference to the transcripts) and a comparison of the number of pages of the skeleton argument and the number of paragraphs of the Decision which related to the time-limit issue, coming up with about 16% of the effort being devoted to that issue. These matters are no doubt to be taken into account, but the appropriate costs order is not to be determined in the way that this analysis might suggest.

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- 15 18. Mr Ewart submits that M&S was unsuccessful in respect of a number of significant aspects of its case, including whether the no possibilities test was satisfied in respect of the first group relief claims and whether the time limits for the out-of-time group relief claims for the pay and file years should be extended. The time-limit issue was not, he says, of the limited scope and import which Miss  
20 Shaw would attribute to it. M&S was also unsuccessful in its relation to its initial group relief claims. He submits that a direction that HMRC pay 50% of M&S's costs before us would be an appropriate reflection of the level of M&S's success.

- 25 19. It is important to remember that we are concerned with the costs of the appeal to the Upper Tribunal. It is not right to say that M&S are the winners simply because HMRC were contending that no group relief was available whereas M&S have succeeded in establishing that a significant amount of relief is available. M&S did not succeed in the claims for the pay and file years. This was for two  
30 reasons: first the later claims were out of time and secondly, the early claims were made at a time when the no possibilities test was not fulfilled. We think the arguments concerning the pay and file years were of more significance than Miss Shaw allows. For our part, we found the time limit issue one on which we spent a considerable time in arriving at our decision even if, in terms of the number of words, it amounts to only 16% or so.

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- 40 20. The Civil Procedure Rules ("**the CPR**") do not apply to proceedings before the Upper Tribunal; the costs rules applicable under the Upper Tribunal Rules do not contain the detail which is to be found in CPR 44.3. Under the CPR, where an issue-based order is appropriate, the court should in preference make an order, instead, allowing only a proportion of the costs (thus obviating difficult apportionment issues for the Costs Judge). But even where an issue-based order is not appropriate at all, the Court can award a party a proportion only of his costs.

- 45 21. It is clear to us that HMRC should not be ordered to pay all of M&S's costs. We see HMRC as having had a real measure of success as reflected by the outcome of the pay and file years: in that context, we understand from Miss Shaw that the benefit to M&S of £26 million which resulted from the Tribunal's decision is

reduced to £18.5 million as a result of our decision in HMRC's favour. We consider that HMRC's liability should reflect the distinct issues which resulted in that measure of success. We consider that the figure of 16% is too low for the appropriate attribution to that success. Instead, we consider that the figure should be 25%.

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22. One result of this attribution of success is that M&S will have its recoverable costs reduced by 25%. The question then arises whether HMRC should in turn be entitled to recover from M&S a proportion of its own costs. It is instructive to consider how the CPR, applicable (as we have mentioned) to costs in the courts but not the tribunals, would apply. An order under CPR 44.3(6)(a) for the recovery of a proportion of a party's costs would not have that result. But an issue-based order under CPR 44.3(6)(f) could well have that result since it will usually be possible, where an issue-based order is appropriate at all, to identify the winner in relation to each issue and to make appropriate costs orders in each direction. The same financial result ought to follow where, for convenience, the court makes a percentage order rather than an issue-based order, with the percentage reduction reflecting success and failure on each issue.

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23. There is much to be said for applying the same approach in the present case. We have arrived at 25% as the appropriate reduction in M&S's costs to reflect its lack of success on those issues where it was not the winner. But that percentage reduction does not take account of HMRC's own position. We consider, likewise, that HMRC is entitled to a costs order which reflects in terms of its own recovery of costs, its success in relation to the pay and file years. It should recover, on that basis, 25% of its own costs. There is no reason to think that the costs of each side assessed on the standard basis would not be broadly similar. The net result, therefore, is that M&S should receive 50% of its costs, to be taxed on the standard basis if not agreed.

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24. Miss Shaw asks us to make a summary assessment of costs. This is not an appropriate case for summary assessment. The hearing took place over three days; and we can see that many items of cost might be open to challenge. The figures are large. We consider that HMRC should be entitled to raise objections on a detailed assessment. This is particularly so given our comments in the penultimate paragraph of this decision.

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25. We have not been asked to make an order for interim payment and doubt, in any event, that we have power to do so. An application can be made for an interim costs certificate within the assessment if agreement cannot be reached.

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26. We cannot leave the issue of costs without further comment. The total costs of the appeal to the Upper Tribunal claimed by M&S are just over £433,000. This is a breathtaking amount for an appeal in circumstances where the Tribunal gave full and carefully reasoned decisions on all the issues in dispute, and where the arguments of both parties before us very substantially followed those put to the Tribunal. Although very large amounts of money are at stake, there must come a

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limit beyond which costs become disproportionate. This is a case where the Costs Judge will need to consider most carefully the question of proportionality under CPR 44.4.(2)(a) as well as examining in depth the reasonableness of the time spent and work done. It is not immediately apparent to us how two Grade A solicitors could spend respectively 221.5 hours and 181.5 hours on this appeal – that is to say on this case since the time of the decisions of the Tribunal – at a cost of over £231,000 spending 90 and 98 hours on documents and 55 and 41 hours attending on clients. That does not take account of other members of the team, with one Grade B solicitor spending a total of 233.6 hours at a cost of £87,600.

**Conclusion on costs**

27. Our decision is that HMRC should pay 50% of M&S's costs of the appeal to the Upper Tribunal to be subject to a detailed assessment if not agreed on the standard basis.

**Mr Justice Warren**  
**President**

**Edward Sadler**  
**Upper Tribunal Judge**

**Release Date: 12 August 2010**