



Appeal number: FTC/03/2014

Costs – withdrawal by HMRC of case before First-tier Tribunal – whether HMRC acted unreasonably in defending or conducting the proceedings – Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 10(1)(b) – appellant argued that VAT assessment was fatally flawed – whether assessment made to best judgment – whether FTT erred in law in refusing appellant’s application for costs

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

SHAHJAHAN TARAFDAR

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ROGER BERNER
JUDGE JUDITH POWELL**

Sitting in public at 45 Bedford Square, London WC1 on 14 July 2014

Kevin Andrews, VAT Consultants Limited, for the Appellant

Galina Ward, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the appeal of the Appellant, Mr Tarafdar, against the decision of the First-tier Tribunal (Judge Malcolm Gammie) (“FTT”) released on 22 July 2013, by which the FTT refused Mr Tarafdar’s application for costs of an appeal from which HMRC had withdrawn. The appeal is brought with permission given by this Tribunal (Judge Colin Bishopp) on 8 January 2014.

The facts

2. The investigation into Mr Tarafdar’s VAT returns began with an unannounced information-gathering visit by HMRC’s Officer Reed to Mr Tarafdar’s restaurant/take-away business on 24 May 2007. In Officer Reed’s visit report, he noted that the restaurant appeared busier than would be suggested by the figures in Mr Tarafdar’s VAT returns, and notified Mr Tarafdar that he would write to him to arrange an appointment to examine his business records.

3. That appointment took place at the offices of Mr Tarafdar’s accountant on 11 July 2007, at which Officer Reed was provided with various documents and took away a full set of meal slips for August 2006 and February 2007 in order to complete a full analysis of them.

4. Officer Reed’s initial calculation suggested a significant underpayment of VAT. This was notified to Mr Tarafdar by a letter dated 8 August 2007, enclosing various calculations in support of Officer Reed’s conclusions. Officer Reed agreed that Mr Tarafdar’s accountant could have an additional month to consider the calculations, but notified Mr Tarafdar on 28 August 2007 that, for time limit reasons, protective assessments would be issued, based on Officer Reed’s original calculations, but subject to review when the response of Mr Tarafdar’s accountant was received. The assessments were raised on 30 August 2007.

5. On 5 September 2007, Mr Tarafdar’s accountant wrote to Officer Reed setting out that he understood “the reasoning behind the calculations”, but was unhappy with the approach; he took issue with the calculation of the average mark-up, and asserted that adjustments should be made to account for staff consumption, wastage, returns and complimentary drinks. The accountant attached schedules of his own calculations, which assumed an average mark up of 125% as being representative of the year as a whole. An offer of £2,500 was made, expressed to be in full and final settlement.

6. Officer Reed replied to that letter on 13 September 2007, making a number of specific comments about the accountant’s analysis and refusing to accept the offer of £2,500. In response, the accountant asserted in a letter (clearly misdated 4 September 2007 but received by HMRC on 21 November 2007) that, due to the extensive provision of complimentary drinks to customers set out in that letter, there was in fact no significant under-declaration of VAT, as shown by further schedules attached by the accountant. The offer of settlement was withdrawn.

7. That letter was acknowledged by Officer Reed on 5 December 2007, but it was not until his letter of 11 April 2008 that the officer sought to continue his investigation by seeking further records from Mr Tarafdar; Mr Tarafdar did not reply to Officer Reed’s letter. Officer Reed moved to a different position in September 2008 and passed the case to a different team to finalise. Mr Tarafdar changed

accountant, and was not able to provide copies of the records held by his previous accountant. Mr Tarafdar's representative, Mr Andrews of VAT Consultants Limited, wrote to Officer Reed on 18 December 2008 requesting relevant information, including full details of the assessments and the calculations and workings. Officer
5 Reed replied on 5 January 2009 acknowledging receipt and saying that the request for information was receiving attention. Following a chasing letter from Mr Andrews of 23 January 2009, Officer Lewis, who had taken over the matter, telephoned him on the 27 January 2009 to say that she would send him copies of the documents.

8. On 24 April 2009, Mr Andrews wrote to Officer Lewis (but addressed to
10 Officer Reed) asserting that the assessment was "fatally flawed" due to the approach adopted to calculating the average mark up. He said:

"You have calculated an average mark-up based upon the purchase and
selling price of several lines irrespective of volumes purchased. The
effect of this is that products of small purchase volume but high mark-
up are having a vastly disproportionate effect on the resultant figure.
15 For this reason the assessment is wholly unsafe and should be
withdrawn with immediate effect."

In a further letter dated 29 April 2009, Mr Andrews clarified that he was not simply
saying that the mark up was too high, but that the methodology was fatally flawed as
20 it was "totally unsound mathematically".

9. Officer Lewis reviewed the matter and on 8 September 2009 sought to arrange a meeting with Mr Tarafdar and his representative. That meeting did not take place.

10. Mr Tarafdar appealed to the First-tier Tribunal by a notice dated 28 September
2009. The grounds of appeal were that "Assessment calc fatally flawed. Mark up
25 calculation based only upon buying and selling price average – no weighting. No ground to indicate VAT declaration faulty." The notice of appeal applied for both an extension of time for the making of the appeal and a direction that the appeal be considered without payment or deposit of the disputed tax on grounds of hardship. This was consented to by HMRC following the production of evidence in support of
30 the application in March 2010.

11. Prior to service of HMRC's statement of case, on 23 August 2009 Mr Andrews was sent a copy of further calculations that had been made by Officer Lewis. Those revised calculations set out a weighted mark-up exercise resulting in a calculation of an average mark-up of 171% in August 2006 and 158% in February 2007. Although
35 slightly below the 177% calculated by Officer Reed, this still indicated a significant alleged under-declaration of VAT.

12. HMRC then produced a statement of case dated 22 September 2010. The statement referred to the fact that Officer Lewis' revised calculations had been sent to Mr Andrews, but made no other reference to those calculations as forming part of
40 HMRC's case. Instead, HMRC's case focused exclusively on the analysis of Officer Reed, and sought to uphold the assessments on that basis. The statement also included HMRC's case that in performing his function Officer Reed had performed his function honestly and bona fide and had come to a decision that was reasonable and not arbitrary; furthermore the case was put that the assessment "was not made
45 dishonestly, vindictively or capriciously, nor is it a spurious estimate or guess in which all elements of judgment are missing, nor is it wholly unreasonable."

13. Directions were made on 8 December 2010 providing for the exchange of witness statements within 28 days and various other procedural steps leading up to a hearing. Following several applications for extension of time, made on the basis that Mr Tarafdar was out of the country, a witness statement dated 27 June 2011 was served by him on 4 July 2011. The appeal was then stayed for a further period before being listed for hearing on 1 March 2012.

14. HMRC were represented at the hearing before the First-tier Tribunal on 1 March 2012 by Mr. Philip Rowe. No witness evidence had been served, and no officer attended to give evidence. The hearing was adjourned, with the Respondents ordered to pay Mr Tarafdar's costs, and with a direction that Officer Reed attend the adjourned hearing to give oral evidence as to his calculation of the assessed tax.

15. As set out in Mr. Rowe's subsequent letter to the First-tier Tribunal, dated 25 October 2012, he then contacted Officer Reed, who was not able to recall the case in any detail, and did not feel that he could be of any help. Mr. Rowe then discussed the case with Officer Lewis's manager, who advised that documentation regarding test purchases, and Officer Reed's notebook, could not be found. The decision was therefore taken to cease to defend the appeal. HMRC notified Mr Tarafdar and the First-tier Tribunal of this by letters dated 13 September 2012.

The application for costs

16. It was in those circumstances that on 30 September 2012 Mr Tarafdar made an application to the FTT for costs. The grounds on which a costs order was sought were as follows:

(1) The fatal flaw in the assessment had been pointed out to HMRC in April 2009 when a request had been made that HMRC withdraw the assessment. HMRC did not do so, but continued to defend a hopeless action.

(2) Repeated requests were made by Mr Tarafdar's representative for the assessment to be withdrawn, but it never was. HMRC, in defending such a wholly unsafe assessment, were acting wholly unreasonably.

(3) There was never any evidence that Mr Tarafdar had understated his VAT liability and no objection had been raised against Mr Tarafdar's witness statement in which he had stated:

"I cannot see how Mr Reed can come up the (sic) figures of £211,000 for the business over 3 years, as I have not understated my turnover from the business. The accounts that are submitted are the only figure (sic) and the correct figures."

(4) It was apparent at the hearing (1 March 2012) that was adjourned and as was apparent throughout, that HMRC's case was ill-conceived.

The law

17. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides that all costs of and incidental to proceedings in the FTT shall be in the tribunal's discretion, subject to Tribunal Procedure Rules. So far as relevant, rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides as follows:

(1) The Tribunal may only make an order in respect of costs...

(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;

(c) if [the proceedings have been allocated as a Complex case] ...

5 18. It was common ground that, as this appeal was not categorised as Complex, and there is no application for “wasted costs” as defined by the 2007 Act, the only basis upon which an application could be made in this case is in respect of unreasonable conduct. The scope of that criterion has been discussed in this Tribunal in *Catanã v Revenue and Customs Commissioners* [2012] UKUT 172 (TCC), where Judge
10 Bishop, at [14], described it as covering:

15 “cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side.”

19. The costs “of and incidental to the proceedings” cover only those costs incurred in the course of preparing and pursuing the appeal (*Catanã*, at [7], as explained in *Stomgrove v Revenue and Customs Commissioners* (PTA/480/2014), at [11]), and, on
20 an application by an appellant, it is only the reasonableness of HMRC’s conduct in defending or conducting the proceedings that falls to be considered. The reasonableness of the original decision against which the appeal has been made is not directly in point, but is relevant to the question whether it was reasonable of HMRC to defend, or to continue to defend, the appeal.

25 20. Even if the tribunal is satisfied that a party has acted unreasonably in the terms of rule 10, the tribunal nevertheless has a discretion whether or not to make a costs order, or as regards the extent of a costs order. Such a discretion, like any other discretion conferred on the tribunal, must be exercised judicially.

21. Before us, Miss Ward was disposed to submit that the power of the First-tier
30 Tribunal to award costs under rule 10(1)(b) should be regarded as exceptional. She pointed out that the general rule within the tribunal was one of no costs-shifting, with only the exceptions we have described above. We do not consider it is helpful to view the tribunal’s powers to award costs in this way. The power to award costs in cases of unreasonable conduct is not an exception; it is simply one incident of the
35 rules. A costs-shifting power in those cases where it is provided for under the rules is just as unexceptional as the absence of a costs-shifting power in other cases. There need be no gloss on the plain meaning of rule 10(1)(b). The only criterion is whether there has been unreasonable conduct in the circumstances described by the rule.

The FTT decision

40 22. As the FTT records it, the basis on which Mr Tarafdar sought to show that HMRC had acted unreasonably, and that a costs order was appropriate in this case, was that the calculation methodology applied by Officer Reed was fatally flawed. Judge Gammie, having commented at [12] that for the tribunal to reach a conclusion on that issue it would effectively have to hear Mr Tarafdar’s appeal, decided, at [13],
45 that the application must fail. He held that the grounds on which Mr Tarafdar had made his claim could, practically speaking, no longer be determined, and that

whatever mathematical flaws could be drawn to his attention, those flaws could not of themselves lead him to determine the application in favour of Mr Tarafdar.

23. The judge then went on to say, at [15], that the proper enquiry would be whether HMRC had unreasonably prolonged matters once they were in the FTT or should have withdrawn the case at an earlier stage. But he said that, even if he were to have concluded that HMRC should have done so, he would nevertheless have refused to exercise his discretion in favour of Mr Tarafdar. He said:

“Having regard to the basis on which the application is made and to the disproportionate enquiry that would be needed to resolve the matter, it is not something that I am prepared to do. On what I know of the matter, there is no reason to think that HMRC should have abandoned the case before it entered the Tribunal or at any earlier stage of the Tribunal proceedings. The fact that they eventually took that decision is not a reason for saying that they should have taken it at an earlier point in time.”

Discussion

24. An appeal to the Upper Tribunal lies only on a point of law arising out of the decision of the FTT (s 11 of the Tribunals, Courts and Enforcement Act 2007). In the context of a decision in relation to costs, for an appeal to succeed it must be shown that the judge exercised his discretion in an unreasonable manner, by failing to apply the correct law, by taking into account something that was not relevant, by failing to take into account a relevant consideration or by reaching a conclusion which no judge, properly exercising his discretion, could reasonably have reached.

25. The burden of Mr Andrews’ argument before us, as it was before the FTT, was that the assessment made by HMRC was unreasonable when it was issued, in that the assessment was arithmetically unsound and thus fatally flawed. He also adopted what Judge Bishopp had said when granting permission to appeal:

“If ... there is substance in [Mr Tarafdar’s] case that there was no evidence available to HMRC on which an assessment could properly be founded and that the assessment which was made was arithmetically unsound and could not be justified (I add that I do not know, and have no means of knowing, whether that is so), HMRC might be well advised to consider their own position before the matter goes further.”

Mr Andrews’ submission is that there is no such evidence upon which an assessment could properly be founded and that the assessment is arithmetically unsound.

26. Nonetheless, the starting point for us is whether an error of law can be identified in the FTT’s decision. Judge Gammie considered Mr Andrews’ arguments to the effect that Officer Reed’s calculation methodology was fatally flawed at [12] and [13] of the decision. He identified as the real issue whether the assessment was made to the officer’s best judgment, and pointed out that the fact that an assessment might be mathematically flawed would be relevant to such a determination, but not determinative. The judge found that the grounds on which Mr Tarafdar was seeking to rely in making his claim for costs could no longer, in practice, be determined.

27. The reference here to “best judgment” is derived from s 73(1) of the Value Added Tax Act 1994, which relevantly provides:

“... where it appears to the Commissioners that [VAT] returns are incomplete or incorrect, they may assess the amount of VAT due from him **to the best of their judgment** and notify it to him.” (emphasis added)

5 28. The meaning of that highlighted phrase has been considered in a number of cases. Thus, it has been held that the word “best” does not imply a higher standard than usual; it recognises that the result may necessarily involve an element of guesswork. It means simply “to the best of (their) judgment on the information available” (*Argosy Co v IRC* [1971] 1 WLR 514, per Lord Donovan at p 517).

10 29. In what was described by Carnwath LJ in *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] STC 1509, at [22], as an “authoritative statement of the law”, Chadwick LJ in *Rahman (No 2) v Customs and Excise Commissioners* [2003] STC 150 dealt with a submission for the taxpayer in that case that, because the tax due had been found to be less than half the amount of the assessment, the assessment
15 could not have been to “best judgment”, in the following way (at [32]):

“But non sequitur: on a true analysis all that can be said is that the fact that, on considering the same material, the tribunal has reached a figure for the VAT payable which differs from that assessed by the commissioners requires some explanation. The explanation may be that
20 the tribunal, applying its own judgment to the same underlying material at the second, or 'quantum', stage of the appeal, has made different assumptions—say, as to food/drink ratios, wastage or pilferage—from those made by the commissioners. As Woolf J pointed out in *Van Boeckel* ([1981] STC 290 at 297), that does not lead to the
25 conclusion that the assumptions made by the commissioners were unreasonable; nor that they were outside the margin of discretion inherent in the exercise of judgment in these cases. Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake—that they have misunderstood or misinterpreted the
30 material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. In such cases—of which the present is one—the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no
35 officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed arbitrary.”

30. It can thus be seen that the real test as to whether an assessment has been made
40 to best judgment is whether it was an honest and genuine attempt to make a reasoned assessment, or whether it is one that no officer seeking to exercise best judgment could have made. An assessment which is, or because there is no explanation can properly be inferred to be, arbitrary will not be to best judgment.

31. That is not to say that in every case concerning an assessment for what is
45 claimed to be under-declared VAT a prior question must be addressed as to whether the assessment is to best judgment. As Carnwath LJ explained in *Pegasus Birds*, at [29]:

“In my view, the tribunal, faced with a 'best of their judgment' challenge, should not automatically treat it as an appeal against the assessment as such, rather than against the amount. Even if the process
50 of assessment is found defective in some respect applying the *Rahman*

5 (2) test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the tribunal finds to be a fair figure on the evidence before it. In the latter case, the tribunal is not required to treat the assessment as a nullity, but should amend it accordingly.”

The point was emphasised at [38] when, in giving general guidance to the tribunal, Carnwath LJ said:

10 “The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment.”

15 32. In our judgment, the judge in the FTT was right to regard the real issue raised by Mr Tarafdar on the costs application as being whether the assessment was to Officer Reed's best judgment, and right to conclude that, to the extent that this would effectively mean that the tribunal would have to determine the appeal, the grounds raised by Mr Tarafdar could not themselves lead to a determination of the costs issue
20 in his favour.

33. The proper enquiry, as the judge correctly stated at [15], was whether HMRC had unreasonably prolonged matters once they were in the tribunal, or whether they should have withdrawn the assessment at an earlier stage. The judge then properly directed himself that, even if he were to have concluded that HMRC might have done
25 so, the question of costs was in his discretion. He concluded that, having regard to the basis on which the application had been made, and to the “disproportionate enquiry” that would be needed to resolve the matter, he was not prepared to exercise his discretion in Mr Tarafdar's favour. He found that, on what he knew of the matter, there was no reason to think that HMRC should have abandoned the case at any
30 earlier stage of the tribunal proceedings.

34. Those are findings with which we can interfere only if they disclose an error of law. Whilst agreeing with the general thrust of the judge's reasoning in this respect, we are bound to say that we do not consider he was right to regard the necessary enquiry as encompassing the resolution of the best judgment issue, irrespective of the
35 way in which the application had been put. In our view, a tribunal faced with an application for costs on the basis of unreasonable conduct where a party has withdrawn from the appeal should pose itself the following questions:

- (1) What was the reason for the withdrawal of that party from the appeal?
- (2) Having regard to that reason, could that party have withdrawn at an earlier
40 stage in the proceedings?
- (3) Was it unreasonable for that party not to have withdrawn at an earlier stage?

If the judge had approached the question in that way, we do not consider that he would have regarded the necessary enquiry as disproportionate.

45 35. On this basis, we consider that there was an error of law in the FTT decision. In those circumstances we have to consider whether the decision should be set aside. We address that question by asking ourselves whether, on application of the approach

we have identified to be the correct one, the conclusion reached would have been different.

36. As to question (1), we have referred earlier to the fact that it was the inability of former Officer Reed to be of assistance in giving the witness evidence, and the fact that certain supporting documentation could not be found, that led to the withdrawal of HMRC form the proceedings. This was more fully explained in the letter to the First-tier Tribunal from Mr Rowe of HMRC dated 25 October 2012, which was before Judge Gammie on the costs application. In relation to the missing documentation, regarding test purchases at the restaurant and one of Officer Reed's notebooks, the letter explained that these had not been signed over to Officer Lewis when she had taken over the case, and that subsequently they could not be found.

37. Question (2), in our judgment, must be answered in the affirmative. Having regard to the fact that it was missing evidence that led to the withdrawal, it is apparent that such evidence was missing at an earlier stage. Mr Rowe's letter demonstrates, first, that former Officer Reed's evidence was unlikely, at any stage in the proceedings, to have been of assistance. He had retired some two years before the date of Mr Rowe's letter, and prior to that – from the time he had ceased to have day to day control of Mr Tarafdar's case in September 2008 - had become "out of the loop" (as he put it himself), and relatively unfamiliar with the work he had been doing in 2007. Secondly, as we have noted, the missing documentation had never been in the possession of Officer Lewis, and so had been unavailable from January 2009 at the latest.

38. The determination of the issue therefore turns on the answer to question (3). That in turn turns on whether it was unreasonable for HMRC not to have had regard at an earlier stage to the need, as directed by the First-tier Tribunal following the hearing on 1 March 2012, to provide evidence in respect of the making of the assessment.

39. We have concluded that HMRC cannot be regarded as having acted unreasonably in this respect. In our judgment, having regard to the law surrounding issues of best judgment in the making of an assessment, and the grounds put forward by Mr Tarafdar for disputing the assessment, at all stages up to the hearing on 1 March 2012 HMRC could reasonably have considered that the focus of the First-tier Tribunal would be, as Carnwath LJ made clear in *Pegasus Birds*, on the finding of the correct amount of tax, and not an attack on Officer Reed's exercise of best judgment.

40. In our view, the grounds on which Mr Tarafdar sought to attack the assessment were not such as to raise an issue of best judgment so as to require the basis on which the assessment had been made to be defended on that basis. The complaint was, in essence, that the methodology adopted by Officer Reed had been flawed. That, as appears from the judgment of Chadwick LJ in *Rahman (No 2)*, could only amount to a failure to exercise best judgment if it was inconsistent with an honest or genuine attempt to make a reasoned assessment, or was one that could not reasonably have been made.

41. Despite the forceful arguments put by Mr Andrews for Mr Tarafdar, we do not consider that HMRC could reasonably have been expected to have regarded this case as one where the honesty or genuineness of Officer Reed's approach was called into question. No such allegation was made by Mr Tarafdar. Officer Reed's calculations were based on records provided by Mr Tarafdar's accountant, and the calculations were expressed by Officer Reed in his letter of 8 August 2007 to be "preliminary".

They nonetheless had to form the basis of the assessment in order that the assessment would not be out of time. The calculations were supported by an analysis of meal slips for the relevant base periods, which were then extrapolated over the assessed periods. Even if the methodology could be exposed as faulty, this appears to us to be a classic case of an officer doing his best to come to a reasoned judgment on the information available. In our view there is no basis on which it could be said that this was a judgment that no officer could reasonably have made.

42. Although neither party made any express reference to it, we have considered whether the inclusion by HMRC in their statement of case of a case in relation to the making of the assessment by Officer Reed alters in any way the conclusion we have reached. In our view it does not. The mere fact that HMRC chose to address the issue of best judgment in the statement of case in the way in which they did does not indicate any more than that they wished to demonstrate that the grounds put forward by Mr Tarafdar, which were limited to the absence of weighting in Officer Reed's calculations, did not provide a basis for rejecting the assessment as not being to best judgment. That was essentially a legal argument which HMRC could have made, and which HMRC could reasonably have expected the tribunal to have accepted, having regard to the guidance given by Carnwath LJ in *Pegasus Birds*, without evidence being needed from Officer Reed concerning his original calculations.

43. Having regard to the legal principles applicable to best judgment assessments, the issue of weighting was material to the ascertainment of the correct amount of tax. That was something to which the making of the assessment was secondary, particularly having regard to the fact that the assessment had been made on a protective basis, because of impending time limits, and the underlying figures had, by the time of the statement of case, been superseded by the revised calculations of Officer Lewis. If the tribunal had decided that a particular weighting was appropriate on the facts of the case, the assessment could, on that basis, have been discharged or modified so as to give rise to the correct amount of tax. That would not, however, have been a reason to conclude that the assessment had not been made to best judgment, and would have been a conclusion the tribunal could have reached without consideration of the circumstances of the making of the assessment, and consequently without the need for evidence from Officer Reed. The direction of the tribunal, that Officer Reed attend to give oral evidence, could not, in our judgment, in those circumstances, have reasonably been anticipated by HMRC.

44. In the result, therefore, we find that the earliest time at which it was reasonable for HMRC to withdraw was when they actually withdrew. It was not unreasonable of HMRC not to have withdrawn at an earlier stage.

Conclusion

45. For these reasons, although we have taken the view that the FTT erred in law in not adopting the correct approach to the determination of an application for costs following the withdrawal of a party, and that it should not have been deflected from considering whether it was unreasonable of that party not to have withdrawn at an earlier stage on the basis that this would involve a disproportionate enquiry into the merits of the underlying case, we have concluded that adoption of the correct approach would not lead to any different result. We do not therefore set aside the FTT's decision.

Decision

46. For the reasons we have given, we dismiss this appeal.

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ROGER BERNER

JUDITH POWELL

UPPER TRIBUNAL JUDGES

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RELEASE DATE: 8 August 2014