TC02056

Appeal number: MAN/2008/0378

COSTS – transitional appeal – application to disapply the 2009 Tribunal Rules and to apply the 1986 VAT & Duties Tribunal Rules – HMRC v Atlantic Electronics Limited considered – application refused – application for costs pursuant to rule 10(1)(b) of the 2009 Tribunal Rules on the basis of unreasonable conduct – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

AK OPTICAL LIMITED **Appellant**
T/A
HALE EYECARE

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Manchester on 29 March 2012

Mr Jonathan Grierson of counsel instructed by Alan Rashleigh & Associates Ltd for the Appellant

Mr Simon Charles of counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

Introduction

1. The applications before me relate to the costs of the appeal which was itself withdrawn in the circumstances set out below. Put briefly, the appellant claims that it succeeded in the appeal and is entitled to its costs incurred in pursuing the appeal. In order to make that application it must first apply for and obtain a direction of the tribunal disapplying rule 10 of the 2009 Tribunal Rules and applying rule 29 of the 1986 VAT and Duties Tribunal Rules. The respondents oppose those applications. If the appellant is successful in his application to apply rule 29 of the 1986 Tribunal Rules the respondents say that they should be awarded their costs of the appeal. If the appellant is unsuccessful in his application to apply rule 29 of the 1986 Rules they say that they should be awarded their costs of defending the appellant's applications for costs pursuant to rule 10(1)(b) on the 2009 Rules on the basis that the appellant was unreasonable in pursuing the present applications.

2. In order to determine the various applications it is necessary for me to consider the underlying merits of the appeal and the extent to which the parties were justified in maintaining their stances at the time of the original assessments and throughout the course of the appeal against those assessments. I shall therefore set out in some detail the circumstances in which the assessments were made and the course which the appeal proceedings then took. The background set out below is largely non-contentious dealing as it does which the chronology of events which is not in disputed.

3. The evidence before me on these applications comprised witness statements from Lisa Jones and Beryl Jane Blades, both Higher Officers of HMRC. They gave oral evidence and were cross examined by Mr Grierson. I also had 2 short witness statements from Mr Chatterjee, the principal director of the appellant, although Mr Grierson placed little reliance if any on those statements. Mr Grierson also indicated he would seek to adduce evidence from Mr Alan Rashleigh, the appellant's representative during the course of the appeal proceedings. In the event however that application was not pursued.

Background

4. On 4 December 2007 Lisa Jones carried out a pre-arranged visit to the appellant's business premises. The appellant traded as an optician. During the course of the visit she discussed the business activities and also was provided with certain business records. There is an issue as to what records were available to Ms Jones which I deal with below. Ms Jones noted that the appellant was treating 33% of the value of its supplies as standard rated with the balance being treated as exempt. In periods 01/05 to 07/05 the appellant had been using a different bookkeeper and had treated 62.99% of the value of its supplies as standard rated with the balance being treated as exempt.

5. On 18 December 2007 Ms Jones wrote to the appellant indicating that it did not appear to be using a recognised method for determining the split between standard rated and exempt supplies. She did not accept the 33% figure being used and invited the appellant to carry out calculations to support a revised figure. She also indicted that the appellant did not appear to have carried out a partial exemption calculation and invited him to do so. Ms Jones invited the appellant to respond by 14 January 2008.

6. In the absence of a response Ms Jones made assessments and on 31 January 2008 she sent these to the appellant. She stated that the assessments could be amended at a later date if the appellant provided the information she had requested. The assessments were based on a split of 62.99% standard rated supplies and covered both under declared output tax and over claimed input tax. They covered the periods 10/05 to 10/07 for output tax and 01/05 to 10/07 for input tax.

7. The total amount assessed was £68,723 and the appellant appealed to the VAT Tribunal. The grounds of appeal included a challenge to best judgement. It was said that the officer had failed to use information available to calculate a proper apportionment and that the partial exemption calculations did not comply with the legislation. In the circumstances it was said that the assessment was grossly excessive.

8. On 2 April 2008 a review officer wrote to Mr Rashleigh who was acting for the appellant. The letter requested alternative calculations and also copies of records in support of those calculations. This was repeated in a letter dated 8 July 2008 in which Mr Rashleigh was recorded as having said that he had prepared alternative calculations "*to within 5%*". Mr Rashleigh replied on 16 July 2008 saying that he had obtained the accounts for the year ended 31 October 2007 and was commencing work preparing a proper apportionment calculation.

9. The appeal procedure continued. In March 2009 the respondents served a witness statement from Lisa Jones and in April 2009 directions were agreed to take the matter through to final hearing. From then on there was a period of little progress because of the ill-health of both Mr Rashleigh and then Mr Chatterjee. On 11 September 2009 when Mr Chatterjee was recovering from his illness Mr Rashleigh made an application for a short extension of previous standovers. One reason given for that standover was "*in view of the fact that the 'standard of bookkeeping' is not what we had hoped, it is taking somewhat longer to produce the necessary analysis*".

10. On 10 November 2009 Mr Rashleigh sent copies of his calculations of the output tax apportionment. The input tax calculation was left outstanding as it would depend on acceptance of the output tax calculation. Mr Rashleigh's calculations were based on the appellant's accounts for the years ended 31 October 2006 and 31 October 2007 from which he derived a figure of 53.62% to reflect the proportion of standard rated supplies. This reflected Mr Rashleigh's use of a full costs apportionment method described in VAT Information Sheet 08/99 (*Opticians: Apportionment of charges for supplies of spectacles and dispensing*). No records were supplied to support the calculations.

11. Following receipt of Mr Rashleigh's calculations the appeal was stood over by agreement pending consideration by HMRC. They immediately requested detailed working papers to support the figure of 53.62% in a letter dated 20 November 2009 although it subsequently appeared that Mr Rashleigh did not receive this letter. The appeal was then stood over by consent on a number of occasions until September 2010 and very little appears to have happened during this period until, on 16 September 2010 Mr Rashleigh forwarded some revised schedules for consideration by HMRC. These schedules included the same output tax calculations as the previous schedules but also input tax partial exemption calculations. HMRC immediately wrote on 28 September 2010 to say that these appeared to be the same calculations as previously sent.

12. In response Mr Rashleigh stated that he had not received the letter dated 20 November 2009. He gave a short explanation for some of the items in his calculation and the appeal was stood over again. On 9 February 2011 Mr Rashleigh re-sent the previous schedules with no further information. On 14 March 2011 he sent yet further schedules showing the same output tax figures but this time also supported by an analysis in relation to input tax based on Sage VAT reports of the appellant which he argued showed no input tax assessment was necessary. Overall he argued that the assessment ought to be reduced from £68,278 to £38,242

13. By letter dated 14 April 2011 the review officer agreed a reduction in the output tax assessment based on Mr Rashleigh's figures. She did not agree to any reduction in the input tax assessment. Unfortunately the figures stated in her letter were incorrect. The total assessment should have been £49,396 but the review officer mistakenly indentified the total as £28,359. An amended assessment was issued in due course for the correct figure and Mr Rashleigh agreed the amended assessment.

The claim for costs

14. On 25 May 2011 Mr Rashleigh wrote to the tribunal stating that agreement had been reached with the Commissioners. He also intimated in that letter that he would be taking steps to submit a costs claim. That claim was lodged on 14 July 2011. He claimed that the amount assessed had been drastically reduced and was in line with his original "rough calculations" at the beginning of the appeal process. I should add that the appellant has never produced those rough calculations nor identified what records they were based on. He stated that the calculations which were eventually accepted were based on information available to Ms Jones when she first issued the assessments. The costs claimed totalled £6,473.40 and included 31 hours of Mr Rashleigh's time described as "*Preparation of revised schedules to substantiate the reduction in the claim*".

15. There followed correspondence directed towards Mr Rashleigh's claim that the appellant had been successful in the appeal and also that the 1986 Rules should apply. That correspondence has been overtaken by the submissions made to me on these applications. However the respondents rely on one particular letter dated 12 January 2012. In that letter the respondents indicated their view that the appellant had advanced no reasons as to why the 1986 Rules should apply and therefore its

application had no prospect of succeeding. They offered to compromise on the basis that both parties withdraw their costs applications. The offer was expressed to expire on 27 January 2012. The respondents also indicated that if the offer was refused then their view was that the appellant was acting unreasonably and they would rely upon that in their own costs application.

Which rules as to costs should apply?

16. The parties agreed that the first matter for determination by me was whether the 1986 Rules should apply to this appeal. It is well recognised that in general the 2009 Rules apply to an appeal before this tribunal. However this is subject to the *Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009* ("*the Transfer Order*"). *Schedule 3* of the *Transfer Order* contains transitional provisions which apply in relation to the new tribunal structure introduced with effect from 1 April 2009. *Paragraph 7 (3)* applies in relation to "*current proceedings*" such as the present appeal which commenced before 1 April 2009. It provides as follows:

> *"The tribunal may give any direction to ensure that proceedings are dealt with fairly and justly and, in particular, may –*
>
> *(a) apply any provision in procedural rules which applied to the proceedings before the commencement date [1 April 2009]; or*
>
> *(b) disapply any provision of the [2009 Rules]."*

17. The default position, described by Warren J in the Upper Tribunal in *HMRC v Atlantic Electronics [2012] UKUT 45 TCC*, is that the 2009 Rules will apply unless there is a direction of the tribunal pursuant to *Paragraph 7(3)* above.

18. In so far as costs are concerned, rule 10(1) of the 2009 Rules provides as follows:

> *"(1) The Tribunal may only make an order in respect of costs… -*
>
> *(a) …*
> *(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; and*
> *(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 had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph.*
> *(d) …* "

19. There is no doubt that the present appeal was not a complex case or equivalent to a complex case. For present purposes therefore the only power to award costs against a party under the 2009 Rules is if that party has acted unreasonably.

20. In contrast, the position under the 1986 Rules would be a general discretion as to costs governed by Rule 29(1):

> *"A tribunal may direct that a party or applicant shall pay to the other party to the appeal or application –*
>
> *(a) within such period as it may specify such sum as it may determine on account of the costs of such other party of and incidental to and consequent upon the appeal or application; or*
>
> *(b) the costs of such other party of and incidental to and consequent upon the appeal or application to be assessed…by way of detailed assessment.*"

21. I should also note that Rule 2(1) of the 2009 Rules identifies the overriding objective of the 2009 Rules, namely "*to deal with cases fairly and justly*".

22. Both parties agreed that *Paragraph 7(3)* of the *Transfer Order* gives the tribunal a discretion as to the appropriate costs regime. In other words whether to disapply Rule 10 of the 2009 Rules in favour of Rule 29 of the 1986 Rules. The principles to be applied in exercising that discretion and the application of those principles to the facts of the present application were disputed. Both agreed however that the overriding objective set out in Rule 2(1) of the 2009 Rules lay at the heart of the discretion.

Appellant's Submissions

23. Mr Grierson in his skeleton argument described the discretion of the tribunal pursuant to *Paragraph 7(3)* as an absolute discretion. He noted that *Paragraph 7(3)* made no reference to the stage at which a direction under that paragraph should be applied for or given. It was therefore open to the appellant to make an application to disapply Rule 10 of the 2009 Rules and to apply Rule 29 of the 1986 Rules at the final hearing of an appeal. His principal submissions as to why the tribunal should exercise its discretion to apply the 2009 Rules were as follows:

(1) Costs have been incurred by the Appellant both before and after 1 April 2009.

(2) The appellant had an expectation that Rule 29 of the 1986 Rules would apply to the proceedings.

(3) It would be unfair if the *Transfer Order* operated retrospectively in such a way as to frustrate the appellant's expectation.

(4) Issues of fairness and justice can only be determined once the appeal itself has been finally determined.

(5) The timing of the application in the present case, coming as it does after the final determination of the appeal, does not count against the appellant.

24. In making his submissions Mr Grierson relied on an email from the respondents' solicitors to Mr Rashleigh dated 12 March 2012 in which there is reference to certain guidelines published by the respondents in relation to the 2009 Rules. He relied upon the following paragraph which appeared in those guidelines:

> "*Under the transitional provisions to be contained in the [Transfer Order], current proceedings will continue before the new tribunal. In these cases the tribunal will have a wide discretion to determine whether the new Rules of Procedure for the Tax Chamber or any procedural rules that were previously applicable should be applied to the proceedings to ensure fairness.*"

25. He also relied on the absence of any reference in published material from HMRC highlighting the need to make a "prospective application". For these purposes a prospective application is an application to apply the 1986 Rules made during the course of proceedings but before they are finally determined.

26. If I understand Mr Grierson correctly, he criticised the decision of Warren J in *Atlantic Electronics* as being generally too restrictive as to the circumstances in which an application might be successful, and more particularly as to the time at which such an application ought to be made.

27. In making his submissions Mr Grierson invited me to make a direction disapplying Rule 10 and applying Rule 29 to the proceedings as a whole. In the alternative he invited me to make a split direction applying the 1986 Rules to those costs incurred prior to 1 April 2009.

Respondents' Submissions

28. Mr Charles submitted that the default position was that the 2009 Rules apply to this appeal and that it is for the appellant to persuade the tribunal to depart from the default position. He submitted that it was neither fair nor just in the circumstances to apply the 1986 Rules for the following reasons:

(1) The majority of the work done in the appeal was after 1 April 2009.

(2) The appeal concluded a significant period of time after 1 April 2009 and whatever expectations the parties may have had have been substantially diluted by the passage of time.

(3) There were significant delays in bringing the appeal to a conclusion for which HMRC were not to blame.

(4) Applying the 1986 Rules after such a long period of delay would be to sanction the appellant's conduct which was the cause of the delays.

29. Mr Charles relied on the principles and guidance set out by Warren J in *Atlantic Electronics*. I set out below some of the passages to which I was referred. Applying those principles and guidance to the present application he submitted as follows:

(1) The appellant's failure to make an application within a reasonable time of 1 April 2009 leads the parties to a 'legitimate expectation' that the discretion to disapply the default position will not be exercised.

(2) Because of that delay, the appellant should not ordinarily expect its application to succeed.

(3) The relevant policy in a standard case which substantially straddles 1 April 2009 is that of certainty.

30. Mr Charles submitted that the policy of certainty identified by Warren J was the most significant factor in the present application.

Reasons for Decision

31. In *Atlantic Electronics* Warren J sitting in the Upper Tribunal sought to identify the principles applicable to the exercise of discretion pursuant to *Paragraph 7(3)* of the *Transfer Order* in the context of costs. He also gave guidance as to the exercise of that discretion. In so far as he identified the principles applicable to the exercise of that discretion the decision is binding on me. In so far as he gave guidance as to the exercise of the discretion it is not strictly binding but it is of course persuasive.

32. Having considered the legislative framework in detail, at paragraphs 37 and 38 Warren J identified 2 policy considerations in the 2009 Rules as follows:

"37. … One policy is to give the taxpayer in a Complex case a choice as to the applicable costs regime, a choice which a taxpayer must make at an early stage of the proceedings. If he does not elect to opt out, the appeal falls, by default, within a costs shifting regime. The tribunal is not, it is to be noted, left with a power, at the end of the proceedings, to decide whether to apply a costs shifting regime or not. So, it seems to me, there is a second policy which is to provide certainty about the applicable costs regime at an early stage of the proceedings. There is, of course, a reason for this second policy apart from merely putting the parties into a position so that they know where they are. If a taxpayer was able to exercise his right of election at a late stage, or even until the result of the appeal was known, he would be able to elect for the regime which he knew was the more favourable to him; this would amount, effectively, to one-way costs shifting which was obviously never intended as I have said in paragraph 7 above.

38. … I rather doubt, therefore, that it can be said that the default regime under the 2009 Rules reflects a policy which goes beyond giving the taxpayer a choice and providing for certainty…"

33. Warren J considered 3 examples of "*current proceedings*" to which the transitional provisions apply. It is the third example which is relevant for present purposes. That is a case where an appeal was commenced some time prior to 1 April 2009 and straddles that date in a substantial way. In such cases he identified a tension between the policy of the 2009 Rules and the fairness and justice of consistently applying the 1986 Rules under which the appeal had been commenced. One way of resolving that tension would be to apply different costs regimes for work done in the periods before and after 1 April 2009 (see *paras 45 - 47*). He suggested that the time and money spent on the proceedings before and after that date would be "*a major factor in the exercise of discretion*". The ultimate question, however, will be how the interests of fairness and justice are best served. He described this question in the following terms:

> "48. … *It is an easy question to ask, but almost intractable difficulties are met in answering it. For instance, focusing only on work done and expense incurred, does the appropriate costs regime depend simply on whether more than half the time and effort and expense falls one side of that date or the other? Or is there some other test? It cannot, I suggest, be right to say that the matter is one for the discretion of the tribunal without laying down some principles by which that discretion is to be exercised.*"

34. He then went on to lay down a number of principles by reference to which the discretion should be exercised which may be summarised as follows:

(1) It is encumbent on the party who wishes to operate in a costs shifting regime to make an application disapplying Rule 10 and applying Rule 29 (para 49)

(2) Such an application ideally ought to be done within a reasonable time after 1 April 2009. Passage of time, in light of the policy of certainty, will make it more difficult to obtain a prospective direction (para 50).

(3) The fact that either party could make a prospective application confirming the default position under the 2009 Rules means less weight should be attached to delay, but this must not be pressed to far. There is something artificial and contrary to common sense to expect a party to make an application to confirm the default position (Para 51).

(4) The tribunal should not lose sight of the fact that in exercising its discretion the tribunal must do what is fair and just in all the circumstances (Para 52).

(5) The parties have a reasonable expectation that the rules, including the transitional rules, will be applied. Any expectation of the parties that the discretion will be exercised in a particular way must arise from the circumstances of the case and is not a separate factor to be taken into account over and above those circumstances (Paras 53-56).

35. In applying these principles Warren J made a number of observations as to the weight or relevance of various factors. For example he suggested that parties who wait and see how a case develops before making an application should not ordinarily expect their application to succeed (Para 68). The fact that one party has made clear throughout the proceedings that it would be seeking a costs order is also relevant (Para 52). However these are matters which must be taken into account and given appropriate weight depending on all the circumstances of the application.

36. I do not accept Mr Grierson's criticisms of the decision of Warren J in *Atlantic Electronics*. In so far as Warren J set out principles applicable to the exercise of my discretion they are binding on me. In the light of those principles, and with due respect to the guidance offered by Warren J, I set out below the factors I consider to be most relevant to the exercise of my discretion.

37. The appeal commenced in March 2008. By April 2009 certainly some work had been carried out by both parties although probably more by the respondents than the appellants. The respondents had served witness statements in March 2009. It is not clear what work the appellant's advisers had done by this stage but I am prepared to accept that some costs had been incurred. A direction for split costs could therefore be meaningful to both parties. However I do find that most of the Appellant's work was done after 1 April 2009 at a time when the 2009 Rules applied in default of a direction otherwise.

38. The appellant is said to have had an expectation that the 1986 Rules would continue to apply. For the reasons given by Warren J I do not accept that this expectation carries any weight above and beyond the circumstances which are said to give rise to it. My understanding of Mr Grierson's submission on this point is that the expectation derived from the unfairness that would arise if the *Transfer Order* were to operate retrospectively so as to deprive the appellant of the benefit of the 1986 Rules. In my view, however, there is no such unfairness on the facts of the present case. It was open to the appellant to apply in April 2009 or, if the director and adviser were unable to properly conduct the appeal at that time, when the opportunity first arose. That appears to have been in the autumn of 2009. The opportunity to make a prospective application to apply the 1986 Rules means that the *Transfer Order* does not have a prejudicial retrospective effect in any material sense.

39. In my view the timing of the application does tell against the appellant. The more time which has passed without any application, the more weight is to be attached to the policy of certainty described by Warren J. That is a policy which applies for the benefit of both parties and it does not, in my view, require any specific prejudice to be asserted or established by the opposing party. Even if the appellant was not consciously waiting to see if the appeal was successful, it is seeking to claim success in the appeal after the event. It can therefore make the application without any real risk that the Commissioners would obtain their own direction for costs if the 1986 Rules were applied. I appreciate that the respondents have made an application for their costs of the appeal in those circumstances but as Mr Charles readily conceded at

the outset of his submissions without any prompting that application faces an uphill struggle.

40. It is clear from the decision in *Atlantic Electronics* that it is generally desirable for a party to make a prospective application in relation to costs rather than to wait until after the determination of the appeal. I also note that this is not a case where either party after 1 April 2009 had signalled an intention to seek costs if successful prior to the withdrawal of the appeal.

41. I do not think that the email relied on by Mr Grierson takes the matter any further. It merely acknowledges the discretion which Mr Charles accepts the tribunal has to apply the 1986 Rules. It says nothing about the circumstances in which the tribunal will exercise its discretion or the stance which the respondents would take on an application such as the present. I do not regard it as significant that HMRC did not highlight in their guidance the desirability of making a prospective application.

42. In balancing the interests of fairness and justice I do not take into account any period of delay in the progress of the appeal itself during the periods of illness of Mr Rashleigh and Mr Chatterjee. I do not regard the Appellant as being "culpable" in respect of that delay. However there is still a substantial period of time after 1 April 2009 during which the 2009 Rules have applied in the absence of an application to apply the 1986 Rules.

43. The first suggestion by either party that an application would be made to apply the 1986 Rules as to costs was after the appeal had effectively been settled in May 2011. At that stage in the chronology certainty was a significant consideration in the exercise of discretion. By then both parties had apparently proceeded for some 2 years on the basis of the default position.

44. Weighing all these competing interests and circumstances I do not consider it appropriate to make a direction disapplying Rule 10, either for the proceedings as a whole, or in relation to those costs which were incurred prior to 1 April 2009.

The Respondents' Application under Rule 10(1)(b)

45. This is the principal application made by HMRC. It requires HMRC to satisfy me that the appellant was unreasonable in proceeding with its application for costs pursuant to the 1986 Rules. In particular the respondents say that the application had no reasonable prospect of success and the appellant ought to have accepted the open offer contained in their letter dated 12 January 2012.

46. At the time of that letter Warren J had not delivered his decision in *Atlantic Electronics*. It is true that there were two decisions of the First-tier Tribunal (*Atlantic Electronics* itself and *Hawkeye Communications Ltd v HMRC [2010] UKFTT 636 TC*) with which Warren J ultimately agreed. However there was also a decision of the Upper Tribunal in *SRI International v HMRC FTC/72/2010* released on 3 January 2012 in which Judge Sadler stated at paragraph 46 as follows:

"I agree with Mr Ewart that in most cases the proper time for a party to apply for a costs order is when the proceedings have been determined in its favour. I also agree with him that, in most cases, the proper time for that party, if it is engaged in proceedings to which paragraph 7 applies, to apply for a direction under paragraph 7(3) so that a costs order can be made, is when it can apply for a costs order. Only at that point, when matters have been resolved, is the tribunal in a position to assess whether such a direction is required, in all the circumstances of the proceedings and their determination, to ensure that those proceedings are dealt with fairly and justly. "

47. Whilst this passage appears to be inconsistent with the approach of Warren J, I do not consider that it embodies a statement of general principle. It is, in my view, restricted to the particular circumstances of that case where there was an express finding that the appellant had, throughout the proceedings, made clear its intention to seek costs if successful. That is not the position in the present appeal.

48. Notwithstanding the ultimate result and reasoning in *Atlantic Electronics* it does appear from the submissions in *SRI International* and the way in which they were dealt with by the Upper Tribunal that there was a respectable body of opinion that an appellant in a transitional case might at least hope to persuade a tribunal that the appropriate time to make an application was at the conclusion of the appeal proceedings. It is now clear in my view from *Atlantic Electronics* that delaying the application until the conclusion of the proceedings is not usually an appropriate course and in ordinary circumstances would make it much less likely that the tribunal will grant such an application. Once *Atlantic Electronics* had been released on 6 February 2012 the appellant ought to have realised that it was unlikely to succeed in the application.

49. The appellant continued with its application after the release of the decision in Atlantic Electronics. However I would not characterise that as unreasonable conduct such as to warrant an order for costs under Rule 10(1)(b). Even after *Atlantic Electronics* there is a balancing exercise to be carried out and the tribunal has a discretion as to whether the 1986 Rules should be applied – see for example *Eastenders Cash and Carry Plc v HMRC [2012] UKFTT 219(TC).* In that case, which is similar to the present, neither the tribunal nor HMRC appear to have suggested that the appellant's application had no prospect of success.

50. In all the circumstances I will not make a direction for costs pursuant to Rule 10(1)(b) of the 2009 Rules.

Position if the 1986 Rules had applied

51. Given my decision that the 2009 Rules as to costs apply to this appeal I shall deal with this aspect only briefly.

52. Mr Grierson submitted that Ms Jones' assessments were incorrect and unsustainable. The assessments were reduced from £68,723 to £49,396 and therefore in relation to costs he says the appellant should be considered as having succeeded on the appeal.

53. It is true to say that the output tax elements of the assessments were reduced by a significant amount. However the input tax elements of the assessments were not reduced at all.

54. I am not satisfied on the material before me that the information which Mr Rashleigh used to justify a reduction in the output tax assessed was available to Ms Jones at the time of her assessment. The information available to Mr Rashleigh included the accounts for the year ended 31 October 2007. There is no indication when those accounts were produced but it was common ground that they would not have been available to Ms Jones. Ms Jones could not recall whether she had the 2006 accounts at the time of her assessments but even if she did I find as a fact that she did not have the 2007 accounts.

55. I also take into account the admissions during the course of the appeal that the standard of bookkeeping in the appellant's business was not of the required standard. Mr Rashleigh stated that based on what was provided he was able to produce a "*rough and ready calculation*" in a short period of time which proved to be within £1,000 of the final figure agreed. The rough and ready calculation has not been provided to me. The records on which it was based have not been specifically identified. In any event it ignores the fact that the input tax element of the assessments remained in dispute until the appellant conceded them in 2011.

56. It was put to Ms Jones that the appellant's 2006 accounts were available to her. There was no reliable evidence that they were available and Ms Jones couldn't recall whether she had them. She said, and I accept, that what she wanted was the original prime records of the business. It is clear that Ms Jones had some records, but I find that what records she did have were inadequate for the purpose. In my view she was entitled to expect adequate underlying records and in the absence of such records and supporting calculations she was entitled to make an assessment in the way she did regardless of whether the 2006 accounts were available to her.

57. It does appear that Ms Blades, the review officer, eventually agreed a reduction to the assessments without sight of the underlying records. That was done on the basis of Mr Rashleigh's calculation based on the 2006 and 2007 accounts. It was common ground that the 2007 accounts were not available to Ms Jones. In any event it does not follow from the reduction to the assessments that Ms Jones' assessments were unreasonable or unsustainable. On the basis of the evidence produced I am certainly not in a position to say that the assessments were unsustainable, nor that HMRC were acting unreasonably in maintaining the assessments until the reduction was agreed in 2011.

58. In those circumstances I would not regard the appellant as having been successful. The appellant has not established that the assessment was excessive based

on material made available to the assessing officer at the time of the assessment. Even if the 1986 Rules as to costs applied I would not have directed HMRC to pay the appellant's costs of the appeal, or any part of them.

59. If the 1986 Rules had applied, HMRC seek their costs of the appeal. It is fair to say that Mr Charles readily acknowledged that this application faced an uphill struggle. In general under the 1986 Rules HMRC would not make an application for costs unless the principles set out in the "Sheldon Statement" were applicable. That statement reads as follows:

> "*the Commissioners have concluded that, as a general rule, they should continue their policy of not seeking costs against unsuccessful appellants; however, they will ask for costs in certain cases so as to provide protection for public funds and the general body of taxpayers. For instance, they will seek costs at those exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases, unless the appeal involves an important point of law requiring clarification. The Commissioners will also consider seeking costs where the appellant has misused the tribunal procedure – for example, in frivolous or vexatious cases, or where the appellant has failed to appear or to be represented at a mutually arranged hearing without sufficient explanation, or where the appellant has first produced at a hearing relevant evidence which ought properly to have been disclosed at an earlier stage and which would have saved public funds had it been produced timeously.*"

60. If the Commissioners considered that the case was such that they would seek costs pursuant to the Sheldon Statement they would normally indicate that to the appellant at an early stage. I am entitled to take into account the Sheldon Statement in exercising my discretion as to costs. I am not satisfied that the circumstances are such as would justify a direction for costs against the appellant.

Conclusion

61. For the reasons given above I dismiss the appellant's application for costs and I dismiss the respondents' applications for costs.

62. 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.

TRIBUNAL JUDGE

RELEASE DATE: 3 May 2012

5