TC02459

Appeal number: LON/2008/1902

VAT – costs – whether "old" or "new" costs regime – application for old costs regime made after release of Tribunal's decision in substantive appeal – application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEWLETT PACKARD LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 14 November 2012

Mr G Tack, solicitor of D L A Piper UK LLP and Mr E Strickland, of Thomas Legal Costs, both for the Appellant

Mr O Thomas, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant lodged its appeal with the VAT & Duties Tribunal on 28 August 2008. By a direction issued on 12 January 2011 the case of Harrier LLC TC/2010/5337 ("Harrier") was made a lead case under Rule 18 and this appeal was stood behind that of Harrier.

2. The case of Harrier was heard on 24-25 October 2011 and the Tribunal's decision released on 10 November 2011. There was no appeal. As this appeal was a related case under rule 18, the parties were agreed that the decision in *Harrier* determined this appeal in favour of the appellant.

3. By application dated 22 May 2012 the appellant applied for its costs in this appeal under Rule 29 of the VAT Tribunal Rules 1986, and therefore impliedly applied for the Tribunal to direct that Rule 29 would apply to this appeal.

4. The hearing was before me on 14 November 2012 at which I announced my decision that I would not disapply rule 10 or apply 29 to the whole or part of this appeal. I did not go on to consider the appellant's application for costs. I am now asked for my reasons in writing.

The law

5. The effect of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ("the 2009 Order") was that any appeal lodged under the VAT & Duties Tribunal was, from 1 April 2009, governed by the rules contained in the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) 2009, which I shall refer to as the "new rules".

6. This is because of paragraph 7 to Schedule 3 to the 2009 Order which provides as follows:

> **"Current proceedings**
> 6. Any current proceedings are to continue on and after the commencement date as proceedings before the tribunal.
>
> 7.—(1) This paragraph applies to current proceedings that are continued before the tribunal by virtue of paragraph 6.
> …….
>
> (3) 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; or
> (b)disapply any provision of Tribunal Procedure Rules.

> (4) In sub-paragraph (3) "procedural rules" means any provision (whether called rules or not) regulating practice or procedure before an existing tribunal.
>
> …….
>
> (7) An order for costs may only be made if, and to the extent that, an order could have been made before the commencement date (on the assumption, in the case of costs actually incurred after that date, that they had been incurred before that date)."

7. Paragraph 1(2) defined as "current proceedings" any appeal in which a notice of appeal had been served before 1 April 2009 but which were not concluded before that date. This appeal was therefore current proceedings.

8. The effect of paragraph 6 is that cases which straddle the 1 April 2009 date were from that date governed by the rules of the First-tier Tribunal. These rules include Rule 10 which provides that the Tribunal has no power to award costs other than:

(a) in a case categorised as complex (Rule 10(1)(c));

(b) for wasted costs (rule 10(1)(a)); or

(c) for unreasonable behaviour (Rule 10(1)(b)).

9. It was also agreed that the effect of paragraph 7 of Schedule 3 to the 2009 Order was that this Tribunal has the power in a VAT case that was lodged with the VAT & Duties Tribunal, to direct instead that some or all of the rules which applied in the VAT & Duties Tribunal would apply. In other words, I had the power to substitute the open costs rule of Rule 29 of the VAT Tribunal Rules 1986 ("the old rules") for the limited costs regime of Rule 10 of the new rules.

10. The question before me was whether I should make such a direction in relation to all or some of the appellant's costs.

Appellant's case

11. The appellant has won its case. Had the appeal been determined by the VAT & Duties Tribunal, and rule 29 of the old rules applied, it would have been entitled to its costs. Its position is that it commenced proceedings with every expectation that costs would be awarded in its favour if it were successful. It was therefore only fair and just that this Tribunal make the order to apply Rule 29.

Complex case?

12. It was also the appellant's case that, being a transitional case, it could not have been categorised as complex and thereby be in an open costs regime. It's view was that it was therefore only fair that Rule 29 of the old rules should apply.

13. Even if the appellant were right and it could not apply for complex categorisation, it could apply for Rule 29 to be directed, so there is nothing in this:

the appellant has not been deprived of the opportunity to apply for an open costs regime. It could have applied at any time after 1 April 2009.

14. And I make the comment in passing that I consider that transitional cases *could* be categorised as complex for the reasons given by Judge Clark in *Babergh DC* [2011] UKFTT 341 And I note that that has happened in order to permit a case be referred to the Upper Tribunal: *John Wilkins (Motor Engineers) Limited & Others* [2009] UKUT 175 (TCC). However, apart from the very rare situation where it is appropriate for a case to be heard in first instance by the Upper Tribunal, I can see no reason why a transitional case would be categorised as complex. If the intention is to apply an open costs regime, the right course is simply to apply for a direction to apply rule 29.

15. Mr Justice Warren in *Atlantic Electronics Limited* [2012] UKUT 45 TCC indicated that, in a transitional case of a type that would have been allocated as complex if lodged after 1 April 2009, this would be a reason for making an order for the old costs regime if the appellant applied for it, even if the majority of the work in the appeal was done after 1 April 2009. However, he clearly limited his comments to applications made within a short time of 1 April 2009 and certainly before the decision was released. See his comments at paragraph 41.

16. Therefore, whether or not this was the sort of case to be classed as complex has become of little moment because of the passage of time since 1 April 2009 and the date the application for the old costs regime was made.

Atlantic should be distinguished?

17. In any event, the appellant also considered that its appeal was distinguishable from the case of *Atlantic Electronics Limited* [2012] UKUT 45 TCC. Its grounds of distinction were:

(a) *Atlantic* involved an allegation of fraud;

(b) In *Atlantic*, the appellant applied for Rule 10 and HMRC applied to disapply Rule 10;

(c) The application in *Atlantic* was made before the case went to hearing;

(d) The application in *Atlantic* was for a prospective order for costs.

Relevance of allegation of fraud?

18. *Atlantic* is a case which involves an allegation of fraud and that is not true of the appellant's case. Allegations of fraud against the appellant affect the burden of proof, moving it from the appellant to HMRC. But I cannot see that that should make any difference to the question of the costs regime and it was certainly not a factor considered to be relevant by the Upper Tribunal in its decision.

19. Putting it at its strongest, I can see that a case with an allegation of fraud against an appellant is more likely to be categorised as complex and therefore to be (with the right of the appellant to opt out) in an open costs regime. Therefore, an appellant in a transitional appeal in which such an allegation is made might argue that by analogy it should have a similar right to "opt out" so a Tribunal should be reluctant to make an order for Rule 29 if the appellant opposes it (as it did in *Atlantic Electronics).* However, this argument was (so far as I am aware) not put in that case and certainly was not the basis of the decision of the Upper Tribunal. So it is not a ground on which I could distinguish this case from *Atlantic.*.

Application for Rule 10

20. It is the case that both the parties to *Atlantic* appeared confused as to the law on applicable costs regimes. HMRC appeared to consider that it was for the appellant to apply for Rule 10, which it did. However, the law is that Rule 10 applies unless disapplied; and therefore the case was treated both at first instance and in the Upper Tribunal as an application by HMRC to disapply Rule 10 in favour of old rule 29. It is therefore indistinguishable on these grounds from this case.

Prospective order for costs?

21. *Atlantic* did not, unlike the appellant's assertions, involve an application for a prospective order of costs. It was (or was treated as) an application that Rule 29 would apply to the appeal. This is the identical application to that made in this case. *Atlantic* was not an application for an award of costs prospective or otherwise: it was an application that the Tribunal direct that the appeal be in the open costs regime (no doubt with the view that ultimately the successful party could make an application for its costs.)

Timing of application

22. The only real distinction between the application in this case and the application in *Atlantic* is that in that case the application was made well before the hearing took place (indeed I believe it is the position that it has still not taken place), whereas in this case the application was made after resolution of the appeal. This is a very real distinction but it does not work in the appellant's favour as I explain below.

Not opportunist?

23. The appellant's position is also that it was always confident of success in this appeal and was ultimately proved right. It proceeded on the assumption (which, it says, was reasonable) that it would be entitled to its costs; and HMRC in asking for further and better particulars of its costs claim was proceeding on the same assumption.

24. In short the appellant's case is that it should not count against them that they were unaware of, or failed to appreciate the significance of, the change in Rules on 1 April 2009 applying to appeals lodged before that date as well as after it. The

appellant, it claims, was not an opportunist waiting to see the outcome of the case before making its application.

Decision

25. In so far as the appellant's claim was for Rule 29 to apply to the entire appeal, I announced my decision against the appellant at the time without hearing HMRC. The appellant's position was, in my view, untenable.

26. Whether or not the appellant actually appreciated the law on costs regimes as from 1 April 2009, it should have done so. It cannot plead a reasonable expectation that it would get its costs if it won. Such an expectation was not reasonable: it should have known of the change in law. It should have made its application for the old costs regime to apply long ago, and certainly long before the outcome of the proceedings was known. The appellant is in effect (if not intentionally) in the position of an opportunist.

27. I note that Mr Justice Warren in the *Atlantic* case said at paragraph 37:

> "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…"

28. The only reasonable expectation either party could have had within a reasonable time period after 1 April 2009 was that the appeal as a transitional appeal was now within the limited costs regime of Rule 10 (albeit with the right for either party to apply for the old regime) because that was the legal position. Passage of time with the absence of such an application could only mean that it should have been less and less an expectation of either party that such an application would be made.

29. Certainly once the hearing had taken place under the limited costs regime, and even more so after the decision was announced, it would not be fair and reasonable for a party to apply for different costs regime. While HMRC's application for further & better particulars of the appellant's costs claim itself might give rise to some sort of expectation on the appellant's part that HMRC accepted liability for costs per se, it could not possibly have been relied on by the appellant in failing to make an earlier application, as it occurred only after its application was made.

30. It would be relevant if the appellant had unambiguously put HMRC on notice before the hearing that it was expecting an open costs regime. But I find it did not do so. Although it indicated it would be seeking costs of an applications hearing in 2010 this was stated by the appellant's to be on the basis of HMRC's "unreasonable conduct". When the hearing proved unnecessary, it indicated it might seek these costs

later. But as Rule 10 permits an order for costs for unreasonable conduct in the appeal, this was not an unambiguous representation that the appellant expected an open costs regime.

31. This is also a case where the majority of the costs were incurred after 1 April 2009 and for that reason too it should on balance be more fair and just to apply the new costs regime rather than the old one.

32. So applying the policy of certainty from *Atlantic*, I refused the appellant's application as it was made after the release of the decision and was made too late.

Split costs award?

33. The appellant's default position was that it would be absurd if they did not get their costs at least for the 8 month period between lodging the appeal and the new rules coming into force on 1 April 2009.

34. The appellant's position was that probably less than one third of the costs were incurred before 1 April 2009. HMRC's position was that very little work was done on the appeal before 1 April 2009. The Notice of Appeal was filed, and HMRC filed their Statement of Case in December 2008 but an application to stand over the appeal was made in January 2009. Directions were not agreed until December 2009 and by then the appeal had been in the new costs regime for some months.

35. HMRC drew my attention to the case of *AK Optical Limited t/a Eyecare* [2012] UKFTT 372 (TC) in which the Judge declined a split order on the basis of the passage of time since 1 April 2009 in which no application for the old costs regime had been made.

36. The appellant's position was there was a presumption in favour of a split: the amount of work done before or after 1 April 2009 was irrelevant to the question of principle of whether there should be a split regime as that would be dealt with in quantum (ie the less work before 1 April 2009 the less costs to be awarded under the old costs regime).

37. I did not agree with the appellant that there was a presumption in favour of a split. Mr Justice Warren in his decision emphasises the need for certainty and that a passage of time renders it less likely it will be appropriate to apply rule 29:

> [68] It will be apparent from what I have already said that I agree broadly with the view that delay beyond a reasonable time after 1 April 2009 is relevant to the exercise of the discretion. And I would agree with Judge Wallace to this extent namely that, after a reasonable time has expired, parties who wait and see how a case develops before making an application should not ordinarily expect their application to succeed.

38. This is relevant to consideration of making split cost regime orders as well as a applying a single regime to the entire appeal. The appellant, whether deliberately or because they did not appreciate the change in the law, waited too long to apply for the

old costs regime. There would have to be exceptional circumstances (perhaps such as a clear indication to and from the other party at intervals throughout the appeal that costs were expected) to make even a split costs regime order once the appeal had been determined. There were no exceptional circumstances: fairness in this case was against changing the applicable costs regime at these late stage in the proceedings and I declined to make even a split costs regime order.

Third party costs

39. Because I did not make the direction that Rule 29 would apply to all or some of the appellant's appeal I did not need to take a view on the appellant's costs application itself. It was clear that there was a dispute between the parties, amongst other things, over whether some of the costs claimed by the appellant were third party costs. As I understood, the position was that Harrier was a sub-contractor to the appellant in the production of the photo books which were the subject of the appeal. For tactical reasons relating to the persons best placed to give evidence about the nature of the photo-books, it was decided Harrier's appeal should be the one heard by the Tribunal. The same solicitors represented both parties and it seems, to some degree or another, the appellant was involved in Harrier's appeal. It was nevertheless the appellant's position that the costs it incurred were in respect of pursuing its own appeal stood behind *Harrier* and were not third party costs.

40. I did not hear the rival contentions on this and take no view either way, but I comment in passing that had I been minded to make the direction for Rule 29 to apply I would have made it subject to the proviso that no costs incurred by the appellant in respect of the Harrier appeal could be recovered.

41. Putting aside the issue of third party costs, it is the case that Harrier's appeal was lodged in 2010 and was always subject to Rule 10. This Tribunal has no power to substitute Rule 29 in that appeal. It was the appellant who wished that Harrier's appeal and not the appellants should be the lead case and it must abide by the consequences, one of which is that *any* costs incurred in respect of the Harrier appeal fall under Rule 10. The power to this Tribunal to make an order to apply Rule 29 in the stood-over appeal cannot be used as a backdoor route to obtain costs that, by the decision that Harrier's appeal was to be the lead appeal, became irrecoverable.

42. 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.

BARBARA MOSEDALE

TRIBUNAL JUDGE

RELEASE DATE: 27 December 2012