Neutral Citation: [2024] UKFTT 1065 (TC)

Case Number: TC09360

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: LON/2000/00765
LON/2008/02228
LON/2009/0572
TC/2011/03844

PROCEDURE: costs – application for rule 29 VAT & Duties Tribunal costs regime to apply; application of principles derived from Atlantic Electronics *– application denied.*

Judgment date: 27 November 2024

Decided by:

TRIBUNAL JUDGE AMANDA BROWN KC

Between

COLAINGROVE LIMTED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined this application the papers with the consent of the parties and following full representations having been made by each party.

DECISION

INTRODUCTION

1. On 29 May 2024 I issued a decision in which Colaingrove Limited (**Appellant**) was awarded additional interest pursuant to section 84(8) Value Added Taxes Act 1994 (**VATA**) in connection with the repayment of various sums by HM Revenue & Customs (**HMRC**) following appeals made to the VAT and Duties Tribunal (**VDT**) (as distinct from this Tribunal). The Tribunal had only to determine the question of whether additional interest was playable (**Additional Interest Application**) as HMRC had conceded the underlying technical issues pursuant to which the repayments were made. 24 appeals across 4 underlying tax disputes were joined for the purposes of the Additional Interest Application (18 were made pre-1 April 2009 and the remaining 6 were "top up" appeals made post that date).

2. On 26 June 2024 the Appellant lodged an application (**Costs Application**) for an order that HMRC pay the Appellant's costs in the sum of £148,695.70 which had been incurred connection with the Additional Interest Application.

3. By the Costs Application the Appellant contends that it is entitled, pursuant to paragraph 7(3) Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (**TTFO**), to invite an order that cost be paid under rule 29(1) (**Rule 29**) of VAT Tribunal Rules 1986 (**1986 Rules**). This is on the basis that it commenced the proceedings which finally resulted in my decision on the Additional Interest Application before the VAT & Duties Tribunal.

4. HMRC oppose the application.

5. For the reasons set out below I refuse the Costs Application.

LEGAL CONTEXT

6. In the period to 31 March 2009 disputes between HMRC and taxpayers in respect of matters listed in section 83 VATA were litigated by way of appeals bought to the VDT.

7. The costs rules in respect of such proceeding were prescribed in Rule 29 which provided the power for the VADR to direct that "a party or applicant shall pay to the other party to the appeal or application … the costs of such other party of and incidental to and consequent upon the appeal or application". In simple terms the conventional cost shifting rules applicable more widely in the resolution of civil disputes applied in the VDT.

8. Following the reform of tribunals under the Tribunals Courts and Enforcement Act 2007 (**TCEA**) the historic jurisdiction of the VDT was transferred to the First-tier Tribunal Tax Chamber (**Tribunal**). The transfer was effected by the TTFO.

9. Pursuant to section 29 TCEA the Tribunal has the power to determine by whom and to what extent costs are to be paid subject to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**). Rule 10(1) (**Rule 10**) of the FTT Rules preclude the making of a costs order other than in respect of a) wasted costs, b) unreasonable costs and c) where a case has been allocated to the complex category (pursuant to rule 23 FTT Rules) and within 28 days of notification of allocation, the taxpayer has not opted out of the costs shifting regime.

10. This represented a material shift to the default position on costs for VAT appeals. Post 1 April 2009 the default position in the majority of appeals is that each party bears its own costs. As explained in *HMRC v Atlantic Electronics Limited* [2012] UKUT 45 (TCC) (***Atlantic***) the policy underpinning the FTT rules is firstly that there should generally be no power to award costs and where there is such a power (in complex category cases) the appellant taxpayer has a choice whether to be in the cost shifting regime or not but must determine whether it wants to be in or out at an early stage in proceedings thereby facilitating certainty as

to the costs risk in the proceedings for both parties. This latter aspect of the policy ensures that a taxpayer cannot adopt a "wait and see" approach to their accession or otherwise to the costs regime.

11. Paragraphs 6 and 7 TTFO provided for the transitional arrangements from the VDT to Tribunal. So far as relevant, they provide:

> "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.
>
> (2) …
>
> (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 the Tribunal Procedure Rules."

12. In *Atlantic* the Upper Tribunal gave/confirmed the meaning and effect of these provisions:

> (1) Any proceeding commenced prior to 1 April 2009 but not finally determined by the VDT will be "current proceedings" (see paragraph 12).
>
> (2) Whether or not there is a power under rule 23 FTT Rules to categorise current proceedings as complex carried little consequence as ultimately whether and how costs are to be awarded is a matter for the Tribunal's discretion under paragraph 7(3) TTFO (**Paragraph 7(3)**) (see paragraph 13).
>
> (3) Unless the discretion under Paragraph 7(3) is exercised the effect of paragraph 6 is that current proceedings will be subject to the FTT Rules and not the previous 1986 Rules, including as to costs i.e. that Rule 10 will apply (see paragraphs 14, 20, 54).
>
> (4) The complexity of the issues under appeal will be a factor to be taken into account when considering the exercise of the Paragraph 7(3) discretion (see paragraph 14).
>
> (5) Paragraph 7(3) confers an unfettered general power to ensure that current proceedings are dealt with fairly and justly in the context of the policy of the costs regime under the FTT Rules (see paragraph 19, 37).
>
> (6) Factors relevant to determining whether and how to exercise the Paragraph 7(3) discretion, whether before the outcome of the appeal is known (and in the absence of any prospective direction) once the outcome of the appeal is known, will be similar but differing weight will need to be given to them. The factors include a) the complexity of the underlying appeal; b) the level/proportion of costs incurred in the appeal prior to 1 April 2009; c) whether the application under Paragraph 7(3) is brought within a reasonable time after 1 April 2009 and d) the parties conduct vis a vis costs in the appeals (see paragraphs 38 – 47, 55).

13. When determining whether the FTT had correctly decided to refuse HMRC's application in *Atlantic* for the cost shifting rules Rule 29 to apply the judge placed particular weight on the delay (in that case 18 months). The judge comments: "I would agree … that, after a reasonable time has expired, parties who wait and see how their case develops before making an application should not ordinarily expect their application to succeed." (paragraph 68 and 73). Further, the judge did not consider that an indication that costs would be claimed made prior

to 1 April 2009 was sufficient to have communicated an intention to the other party post 1 April 2009 that costs would be sought following the transition to the new regime (paragraph 70).

14. The judgment in *Atlantic* has been considered and applied by the Tribunal in twelve matters which were "current proceedings" before the VDT. Two are pertinent to the Appellant's application:

(1) In the first, *Hewlett Packard Limited v HMRC* [2013] UKFTT 039 (TC) Judge Mosedale considered a costs application made after the underlying appeal had been determined. As the appeal was a follower case under the procedure provided for in rule 18 FTT Rules there had been no hearing of the appeal. In its application the taxpayer contended that it had commenced proceedings with every expectation that costs would be awarded in its favour if it were successful; and the matter was one which would have been allocated to the complex category had the appeal be brought post 1 April 2009. The taxpayer therefore contended that it was only fair and reasonable Rule 29 to apply. The Tribunal refused the application. Judge Mosedale commented that there could have been no reasonable expectation that costs would be paid post 1 April 2009 despite the proceedings having been commenced under the previous cost shifting regime because the law had changed. The only reasonable expectation that the taxpayer could have had was that it was entitled to make an application under Paragraph 7(3) if it wanted to seek to tie itself into the historic costs shifting regime. The judge did not consider that it would be fair and reasonable, once the outcome of the appeal was known, to make an application for Rule 29 to apply. However, she did express the view that had the taxpayer "unambiguously put HMRC on notice before the hearing that it was expecting an open costs regime" the position might have been different.

(2) The second is the appeal by *Mynt Limited v HMRC* [2013] UKFTT 635 (TC). It concerned a costs application made by HMRC. Again the application was made once the appeal had been determined and not on a prospective basis. HMRC had, prior to 1 April 2009, indicated their intention to claim costs in the statement of case. Further, interlocutory matters had been determined both pre and shortly post 1 April 2009 on the basis that the costs of such applications would be "in the case/cause". HMRC repeated their intention to apply for costs in their skeleton argument. Judge Bishopp placed particular reliance on the interlocutory costs orders as indicating that both parties, and not simply HMRC, had conducted themselves on the basis that costs shifting would apply and that the Tribunal must also have done so otherwise the costs in the cause directions were meaningless.

APPLICATION AND OBJECTION

15. By its application and reply to HMRC's objection the Appellant contends:

(1) Each of the appeals in which additional interest was awarded were current proceedings under paragraph 6 TTFO.

(2) The Tribunal has a discretion under Paragraph 7(3) to direct that Rule 29 be applied to permit a claim for costs to be made.

(3) I should exercise that discretion because:

(a) Had the appeals been brought post 1 April 2029 they would have been categorised as complex. In this regard the Appellant recognised that one of the related appeals lodged after 1 April 2029 had been categorised as a standard appeal (the Appellant had been unable to determine the categorisation of the other post 1 April 2009 appeal but through interrogation of the Tribunal system I have established that they were all categorised standard).

(b) The appeals have been long running due to prolonged periods of stays whilst proceedings conducted by others resolved the underlying technically complex issues of liability and thereby determined a right to repayment. As a consequence, there was never a reasonable opportunity to make a Paragraph 7(3) application.

(c) There was a reasonable expectation when the appeals were lodged that costs would be claimable, 9 of the consolidated appeals included claims for costs in the grounds of appeal.

(d) There is no prohibition on an award of costs pursuant to the exercise of the Paragraph 7(3) direction where the application is made only after the appeal has been determined. There was no obligation on the Appellant to make a prospective application

(e) The Tribunal must consider the application and determine the fair and just outcome in all of the circumstances.

(f) The Appellant also appears to infer that it might be open to the Tribunal to treat the Costs Application as an application for the appeals to be categorised as complex under rule 23 with the necessary consequence that the Appellant would be entitled to its costs having no desire or intention to opt out.

(4) Further submissions are made as to the nature and extent of the claim which I do not need to record, or address given my decision to refuse to exercise by discretion under Paragraph 7(3) and for Rule 10 to apply.

16. HMRC accept that the Tribunal has a discretion to direct that Rule 29 applies but contend that I should not exercise my discretion to allow the application. They also address various points as to the quantum of the claim. The basis on which they contend that I should not exercise my discretion are, in summary:

(1) When the principles, considerations and factors identified in *Atlantic* are applied to the facts of this case the Costs Application should be denied. In particular because to allow the application would be contrary to the policy objectives of Rule 10.

(2) Particularly as the Costs Application, made after the outcome of the appeals and Additional Interest Application and 15 years after the change in regime, was the first occasion on which the Appellant made an application under Paragraph 7(3).

(3) In this context HMRC point to the following occasions on which the Appellant made or furthered its Additional Interest Application and did not make any application under Paragraph 7(3):

(a) when an application for the particularisation of additional interest was originally made in respect of some of the underlying tax repayments on 5 March 2015,

(b) the reviving of that application following the outcome of the *Emblaze* litigation on 31 July 2019,

(c) following correspondence between the parties on 9 July 2021,

(d) the supplemental application dated 7 March 2022 for additional interest on other underlying repayments,

(e) particulars of claim for further interest dated 28 March 2023.

(4) Further, the Additional Interest Claim should be considered in the context of the settlement of the underlying claims for repayment some of which were settled pursuant to an agreement which provided that each party would bear its own costs.

(5) All the costs were incurred substantially post 1 April 2009 relating only to Counsel's involvement in the Additional Interest Application.

DISCUSSION

Primary application to disapply rule 10 FTT Rules

17. It is plain, even at this late stage in the dispute between the parties, that I do have a discretion to make a direction that Rule 10 be disapplied with the consequence that the provisions of Rule 29 apply, and the Appellant be entitled to make a claim for costs incurred in the appeal.

18. In deciding whether to exercise my discretion, as explained in *Atlantic*, I am to have in mind that there was a parliamentary policy decision that, as from the formation of the Tribunal, costs incurred in the conduct of tax appeals were not subject to costs sifting except in the limited and identified circumstances specified in Rule 10. I address below whether I have a discretion to recategorise the appeals as complex, but for present purposes, it is plain that the Costs Application was not made within the terms of Rule 10.

19. The Appellant commenced 18 appeals prior to 1 April 2009, advised by professional representatives. As set out in my judgment on the Additional Interest Application the underlying issues in the appeal concerned whether VAT was properly due on removable contents when sold with a caravan, the VAT liability of verandas, bingo, and certain gaming machines. None of the appeals claimed entitlement to additional interest. The value of the claims was significant, and the technical underlying issues were complex requiring lengthy litigation beyond the first level tribunal (VDT/Tribunal) to be resolved.

20. Nine of the pre-1 April 2009 appeals indicated it was intended that a claim for costs would be made. The others did not. Thus, it cannot be said that there was a consistent position adopted that the Appellant would apply for its costs. However, and in any event, an intention under the pre-1 April 2009 regime is not an intention to remain under the costs shifting regime post that date (see paragraph 70 *Atlantic*). As identified in *Atlantic* there may be any number of reasons why it suited the Appellant to move to a non-cost shifting regime; this is so despite the Appellant's bald assertion that there was no indication that they would have opted out of the complex category costs regime had it applied. As it did not apply, and was considered to be inapplicable, it is no surprise that there was no indication they would want to opt out. But it is not indicative that they wanted to make an application under Paragraph 7(3).

21. In 2009 it appears that all of the appeals were stayed pending the outcome of other litigation. Despite the stay the Appellant's advisors would have been well aware of the abolition of the VDT and the transitional rules which applied to proceedings commenced before the VDT. However, I consider that to have not made an application immediately in respect of the appeals may be excused as the effect of a stay is that all matters regarding the conduct of the appeal are suspended whilst the stay subsists. I am prepared to conclude that the stay also applied to any requirement to make an application under Paragraph 7(3) at that time.

22. However, on 5 March 2015 at least some of the appeals were activated as the Appellant made the first application for additional interest, an application which itself relied on the provisions of the TTFO but there was no corresponding application under Paragraph 7(3) as regards the applicable costs regime. It might therefore be reasonably inferred that the Appellant was content with he default position under Rule 10.

23. That there was no application at that time, if there was an intention that Rule 10 be disapplied, is all the more surprising given that the Upper Tribunal, three years earlier, had emphasised that in the interests of justice such applications should be made in reasonably short order and preferably on a prospective basis. The judgments in *Hewlett* and *Mynt* had also been released underlining the risks arising if a wait and see approach were adopted. Accordingly, at law, the Appellant could have been under no misapprehension that without an application made under Paragraph 7(3) the provisions of Rule 10 would apply and the longer they left the Rule 10 application the greater the risk that it would be refused. And yet no application was made at that point. Nor indeed at any point could such an application even be inferred before the service of the skeleton argument on 19 March 2024.

24. When I view the conduct of the parties through the lens applied in *Hewlett* and *Mynt* it is clear that the position is far more closely aligned with *Hewlett* than *Mynt*. The actions of the Appellant were not consistent with its now stated intention that the cost shifting regime of Rule 29 should apply. It had numerous opportunities to make the application from March 2015 onwards but did not do so until 2 weeks before the hearing.

25. In *Atlantic* the Upper Tribunal considered the period of delay in making the Paragraph 7(3) application whilst the proceedings were active as material, describing a "wait and see" strategy as opportunistic and contrary to the policy of Rule 10. In my view, had the Appellant wanted the Rule 29 cost shifting regime to continue to apply to it the Costs Application should have been made in March 2015 or within a reasonable period thereafter. At that point the Additional Interest Application was uncertain (however strong Counsel's opinion may have been). An application limited, as the present application is, to the costs of the Additional Interest Application made at that time could not have been described as opportunistic further it would have been made within a reasonable time after the lifting of the stay in proceedings. But one made 9 years later and after the outcome on all issued was known (even if intimated 2 months previously) is, in my opportunistic and contrary to fairness and justice.

26. I therefore refuse the application.

Application to catagorise as complex

27. In the alternative the Appellant appeared to have applied for the appeal to now be categorised under rule 23 FTT Rules as complex.

28. I have no question that the disputes regarding the underlying VAT liability and associated overpayments were complex and would have met the Tribunal's Practice Direction to be so categorised, even though none of the later appeals were so categorised. As indeed was the Additional Interest Application itself.

29. Whether the Tribunal has the discretion to categorise current proceedings under rule 23 FTT Rules appears to be a vexed issue. In *Surestone Limited v HMRC* [2009] UKFTT 352 (TC) Judge Oliver QC there was no basis of categorising "current proceedings". Warren J in *Atlantic* appeared more ambivalent. However, I am clear that whether there is or is not a power generally to categorise "current proceedings" as defined under TTFO I cannot categorise an appeal which has been disposed of. The FTT retained jurisdiction for ancillary matters such as costs, but I had determined the appeals before the application was made and I therefore have no authority in respect of an application to categorise the appeal retrospectively.

30. Had I had the power however, I would have refused to exercise it for the same reasons as I have rejected the Costs Application perhaps adding that an application to categorise in order to avoid the adverse consequences of a failure to make an application to disapply Rule 10 is an abuse of process.

DISPOSITION

31. For the reasons stated the Costs Application is denied.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

32. 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.

Release date: 27th NOVEMBER 2024