FTC/45/2010
[2011] UKUT 484 (TCC)

COSTS – appeal in respect of case allocation – allocation to Complex case – whether jurisdction to award costs in First-tier Tribunal – Yes exercise of discretion over costs in First-tier Tribunal and Upper Tribunal – no award of costs

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CAPITAL AIR SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: Mr Justice Warren, President
Sir Stephen Oliver

DECISION

Application for Costs

1. CAS now applies for an order that HMRC pay its costs of (i) the appeal to the Upper Tribunal and (ii) the costs of the hearing concerning case allocation before Judge Avery Jones in the FTT. Since there is an issue about the extent of our powers, it is necessary for us to look at the both the primary legislation, the Tribunals, Courts and Enforcement Act 2007 (the "TCEA"), and the two sets of Tribunal Procedure Rules, The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") and The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules")

The jurisdiction to make an award of costs.

2. We start with the relevant provisions of section 29(1) – (3) TCEA which provide as follows:

> "(1) The costs of and incidental to—
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> (a) all proceedings in the First-tier Tribunal, and
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> (b) all proceedings in the Upper Tribunal,
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> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

3. It can be seen that the Upper Tribunal has no power under this section to make a costs order in relation to costs incurred in the First-tier Tribunal. The "proceedings" are not some overarching proceedings which include dealing with the entire case in both the First-tier Tribunal and the Upper Tribunal and, indeed, the Court of Appeal and Supreme Court if the matter were to go that far.

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4. Tribunal Procedure Rules have placed limitations on the power to award costs in both the First-tier Tribunal and the Upper Tribunal.

5. In the First-tier Tribunal, the procedure is governed by the FTT Rules. Rule 10, so far as relevant to the present case allows (see Rule 10(1)(c)) an order for costs to be made only if:

> "(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
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> (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."

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6. Rule 23(1) of the FTT Rules requires the First-tier Tribunal to give a case allocation direction when it receives a notice of appeal. This is a decision of the tribunal itself and will usually be done without any involvement of the parties. However, under Rule 23(3), the Tribunal may give a further direction re-allocating a case to a different category at any time, either on the application of a party or on its own initiative. The present case was allocated as a Standard case; CAS made an application for re-allocation, which it was entitled to do by virtue of Rule 23(3), which application was refused by Judge Avery Jones. It was that application which we dealt with on appeal.

7. If a case is allocated as a Complex case, Rules 23(5) provides that Rule 10(1)(c) (costs in Complex cases) applies to the case. It should be noted that Rule 23 is concerned with the allocation of a "case". The word "case" is to be understood by reference to the opening words of Rule 23(1) which itself refers to a notice or appeal, notice of application or notice of reference.

8. Rule 10 uses a different word, namely "proceedings". We do not think that there is any significance to be attached to the use of different words in Rule 10 and Rule 23. Thus, in Rule 10(1)(b), the phrase "bringing, defending or conducting the proceedings" shows that the word "proceedings" is being used in the sense of "case". The same use is to be found in Rule 10(1)(c). Indeed Rule 10(1)(c)(i) refers to the **proceedings** having been allocated as a Complex **case**.

9. We do not consider that it would be right to read Rules 10 and 23 together as leading to the conclusion that each step in a case is not be seen as a separate "proceeding" or each hearing of an interim application as a set of separate "proceedings". The Rules do not envisage any particular part of a case as requiring separate allocation under Rule 23. Thus, to take by way of example an application for disclosure, the application does not amount to separate "proceedings" for the purposes of Rule 10 or Rule 23. Such an application can, we do not doubt, properly be referred to in some contexts as "proceedings". For instance, it would be a perfectly sensible use of language to say, in respect of that application: "The proceedings in the tribunal today concern revelation of highly damaging material". But that is not the sense in which the word "proceedings" is being used in Rules 10 and 23.

10. Where a case is initially allocated as a Standard case but where a successful application is made to the First-tier Tribunal under Rule 23(5) to re-allocate the case as a Complex case, the extent of the power to award costs incurred prior to the re-allocation is not entirely clear. Such an application could be made months into the preparation of an appeal after the parties had incurred significant costs. It might be thought surprising if a taxpayer could, by achieving a re-allocation in this way, expose HMRC to a potential and retrospective liability for the costs which he had incurred before the re-allocation.

11. It is, however, clear that such costs are within section 29 TCEA and that the First-tier Tribunal can make an order for costs unless the FTT Rules prevent it doing so. We do not consider that the FTT Rules do prevent it doing so. No doubt when it comes to exercising its discretion, the First-Tier Tribunal will take account of the retrospective effect of a costs order in deciding whether it is just and fair to make such an order. But as a matter of jurisdiction, the FTT Rules do not take away the wide power conferred by section 29.

12. The only argument, it seems to us, against that conclusion is the wording of Rule 10(1)(c)(i) of the FTT Rules which only allow an order to be made where "the proceedings have been allocated as a Complex case". For reasons we have given, "the proceedings" refer, we consider, to the statutory appeal and not to the

particular application before the Tribunal (in the present case, the application to re-allocate the case as a Complex case).

13. That leaves as the only argument the proposition that costs can only be awarded in respect of costs incurred once the case has been allocated as a Complex case. However, that is not what the Rule appears to say. Rather, the time for determining whether a costs order can be made is the time when the order is in fact made. If the case has be then been allocated as a Complex case, an order can be made. Similarly, if a case has been allocated as a Complex case and is re-allocated as a Standard case before any costs order has been made, the First-tier Tribunal no longer has any power to make an order. In contrast, if an order is made while the case is allocated as a Complex case, is subsequent re-allocation would not deprive the receiving party of the benefit of the order. We conclude that once a case has been allocated as a Complex case and for so long is remains so allocated, the First-tier Tribunal has power to make an order for costs in the case proceeding before it whenever those costs were incurred.

14. This conclusion is we think supported by a consideration of the costs incurred by an appellant prior to the first allocation of a case. Prior to issue of his notice of appeal, the taxpayer will often take advice and incur legal and other costs which would be recoverable if an order were made. There is no doubt that an appellant would be entitled, in principle, to recover those costs if the case has only ever been allocated as a Complex case. And yet those costs would, *ex hypothesi*, have been incurred prior to the time when such allocation took place. That makes it impossible, we think, to argue that Rule 10(1)(c)(i) is focussing on the time when the costs were incurred or any time other than when the order is made.

15. The costs powers of the Upper Tribunal in relation to proceedings before it are different. The Upper Tribunal Rules apply to all proceedings in the Upper Tribunal, not just to proceedings in the Tax and Chancery Chamber nor, even there, only to tax cases. Rule 10 limits the powers conferred by section 29 TCEA to preclude the Upper Tribunal from making costs orders on appeals from another tribunal except, relevantly, on appeals from the Tax Chamber of the First-tier Tribunal. Accordingly, whether or not the case had been allocated as a Complex

case, the Upper Tribunal can make an order for costs in proceedings on an appeal from the Tax Chamber. The Upper Tribunal can also make a costs award to the extent that the lower tribunal would have been able to do so. These two powers (on appeals from the Tax Chamber and in cases where the lower tribunal had a power) are exercisable only in relation to the costs of the proceedings before the Upper Tribunal: Rule 10 of the UT Rules imposes a restriction on the statutory power under section 29 TCEA which is limited to the costs of proceedings before the Upper Tribunal; the Rules could not give the Upper Tribunal a power to award costs which it does not have under section 29 nor do they purport to do so

16. Section 11 TCEA 2007 provides a statutory right of appeal to the Upper Tribunal from a decision of the First-tier Tribunal (other than an excluded decision). A decision concerning allocation of a case as a Standard case or a Complex case is not an excluded decision so that a right of appeal lies; this is the right which CAS has exercised.

17. There is no doubt that the Upper Tribunal has power to make an award of costs in the present case in relation to the costs of the appeal itself. Those costs clearly fall within section 29(1)(b) TCEA. They also clearly fall within Rule 10(1)(a) of the UT Rules. But equally clearly, the Upper Tribunal has no power to deal with the cost incurred in relation to the proceedings in the First-tier Tribunal under section 29 or the Upper Tribunal Rules. If there is such a power, it has to be found elsewhere.

18. Section 12 deals with appeals to the Upper Tribunal. Sub-sections (1) and (2) provide as follows:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
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> (2) The Upper Tribunal—
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> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
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> (b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.

(3) ……

(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate."

19. In the present case, we decided that there was an error of law. We set aside the decision allocating the case as a Standard case (under section 12(2)(a)). We re-made the decision (under section 12(2)(b)(ii)) by allocating the case as a Complex case. Since Judge Avery Jones had allocated the case as a Standard case, there was no application made to him for costs (there being no power to make an order in the light of Rule 10 of the FTT Rules).

20. We do not consider that we have power to make a costs order in favour of CAS in reliance on section 12(2)(b)(ii). The relevant decision is one concerning allocation and not the costs of a dispute. The FTT Rules, in any case, envisage a costs being dealt with separately, either by the Tribunal of its own motion or on application: see Rule 10(2), (3). However, in acting under section 12(2)(b)(ii) (as we have done) we may make, under section 12(4)(a), any decision which the First-tier Tribunal could have made if it were remaking the decision.

21. The issue then is whether Judge Avery Jones could have made a costs order in favour of CAS if he himself had re-allocated the case as a Complex case. As a matter of power, we conclude that he could have done so. The costs of the application to re-allocate were clearly costs of proceedings before the First-tier Tribunal and so within section 12(1)(a). Having allocated the case as a Complex case, it would have been open to Judge Avery Jones to make an award in accordance with our conclusion at paragraph 13 above.

The exercise of our powers to award costs

22. Having concluded that we have power to make orders for costs in respect of both the costs of the appeal before us and the costs of the application before the First-tier Tribunal, we now come to the exercise of our discretion. We deal with the costs below first.

23. CAS is, of course, correct to say that it has succeeded in its appeal. It does not, however, follow that the starting point when considering the incidence of costs below is that, as winner, it should be entitled to its costs. This is not because of such differences as exist between the approach of the Tribunals and the Courts to costs, but because of the nature of the application. Case allocation is a judicial function. The allocation of a case to one of the four available categories has consequences in terms of case-management and judicial allocation. It is not simply a matter for the parties. Indeed, case allocation is to be assessed, judicially, by reference to the criteria laid down in Rule 23. The application of those criteria may have consequences for the parties, in particular in relation to costs, but those consequences are just that – consequences.

24. The case having been judicially allocated as a Standard case, it was for CAS to persuade Judge Avery Jones that the allocation should be changed. It was not for the parties to agree about the appropriate allocation: it was for Judge Avery Jones to decide. In that context, he was entitled to expect from the parties every assistance in deciding what the case, not the parties, required. HMRC were entitled to place before him such evidence as they thought might assist and to make submissions on the basis of the totality of the evidence before the Judge. We do not consider, in principle, that applications of this sort should normally carry any adverse costs consequences. We are tempted to say "ever" rather than "normally" but we must be careful not to shut out the exceptional case. The present case is not exceptional save in respect, perhaps, of the amount of costs. Thus, had Judge Avery Jones himself allocated the case as a Complex case and so that he would have had power to make a costs order, we would not have made a costs order if we had been in his position. In the exercise of our discretion on this

appeal, we make no order in relation to the costs incurred in relation to the application to the First-tier Tribunal.

25. We turn then to the costs of the appeal. CAS has, of course, been successful in the sense that the case has been re-allocated as it wished. There were two aspects of its success. The first was its success in persuading us that Judge Avery Jones had adopted the wrong approach. The second, following on from that, was its success in persuading us to allocate the case as a Complex case.

26. So far as the first of those is concerned, we are bound to say that we would not have been willing to proceed on the footing that Judge Avery Jones had adopted a wrong approach without hearing full argument on it even if HMRC has agreed that he was wrong. We could not simply have decided to re-make the decision without knowing that he had adopted a wrong approach. Of course, we may have been more ready to detect an error of law in the Judge's approach if both sides agreed that there was such an error. The argument might have been shorter, but the appeal would have had to raise the point and we would have had to decide it. It is not for the parties on appeal, any more than it was below, to determine the basis on which we, as the decision makers, should proceed.

27. So far as the second aspect is concerned, we were entitled to expect the same assistance from the parties in making our decision about allocation as Judge Avery Jones was entitled to expect. HMRC were entitled, indeed should be encouraged in such cases, to assist the Upper Tribunal as much as the First-tier Tribunal in making a case allocation decision. In this context, it is to be noted that the evidence on which we made our decision was different from that before Judge Avery Jones. We take account, of course, of what CAS now says about the additional evidence (namely that it did not really take the matter much further); but we did not, and are unable to, divorce that evidence from the pre-existing evidence in making our decision. It is also to be noted that the time-estimate from CAS had increased between the date of Judge Avery Jones' decision and the hearing before us. Further, it also needs to be recognised that there is often no "right" answer to case allocation. We made the decision which we did; but other judges of the Upper Tribunal hearing precisely the same arguments and receiving

precisely the same evidence might, quite, properly have decided to allocate the case as a Standard case. It is only the unfortunate adoption of a wrong approach, as we held it to be, by Judge Avery Jones that has enabled CAS to obtain a decision from different judges, on different evidence, in its favour. CAS should, it can be said with some force, no more be entitled to its costs in the Upper Tribunal on this second aspect than it would have been entitled to its costs in the First-tier Tribunal if it had succeeded in the first place before Judge Avery Jones

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28. We do not consider that we should allow CAS any of its costs of the appeal which are attributable to the second aspect. The position is not so clear in relation to the costs attributable to the first aspect. However, on balance, we do not think it right to allow any of these costs either.

29. We should add this. It is open to us to make a more limited order for costs, for instance we could order that CAS's costs or a proportion of them should be costs in the appeal so that if it were to succeed on the substantive appeal, it would recover that proportion of its costs but would recover nothing if it were unsuccessful. We have not been asked, in the alternative, to make such an order. Indeed, the logic of the argument by which we have been persuaded really point to the conclusion that we should make no order at all.

30. Our overall conclusion is that we make no order. This makes it unnecessary either for us or a costs judge to embark upon the difficult task of separating the costs attributable to the different aspects of the appeal.

31. We ought to record, however, that the costs claimed are very high and that HMRC would have wanted to raise arguments concerning both proportionality and reasonableness had we decided to make an order and gone on to assess the costs. We do not need to address those aspects of the claim for costs n the light of our decision. But we take this opportunity to remind taxpayers (and their advisers) that they cannot expect to recover from HMRC costs which are disproportionate or unreasonable.

Mr Justice Warren

President

Sir Stephen Oliver QC

Upper Tribunal Judge
Release Date: 22 December 2010