[2016] UKFTT 260 (TC)

TC05035

Appeal number:LON/2007/793

VAT – PROCEDURE – Costs – transitional rules in SI2009/56 for "current proceedings" – appeal heard over 17 days before 1 April 2009, decision released awarding costs - then remitted by Upper Tribunal and 2 further days' hearing in 2012 – whether old cost Rules should apply to the 2 day hearing. Application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

S&I ELECTRONICS PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at The Royal Courts of Justice, Strand, London on 12 February 2016

Michael Collins instructed by The Khan Partnership LLP for the Appellant

Aidan Robertson QC, instructed by Howes Percival, for the Respondents

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DECISION ON COSTS

1. Following 17 days of hearing during 2008 (the “Original Hearing”) before the VAT and Duties Tribunal, the tribunal released a Decision (the “Original Decision”). (There is some uncertainty as to when the Decision was released: it is stamped 18 March 2009, but this tribunal’s website records it as released on 18 May 2009. The tribunal administration have not been able to provide any further information.) By paragraph 228 of that decision S&I was directed to pay 80% of HMRC’s costs.

2. On 1 April 2009 the VAT and Duties Tribunal was abolished and replaced by the First-tier Tribunal (the “FTT”). The FTT had different rules about costs.

3. Both sides appealed against the Original Decision to the Upper Tribunal. By a decision released on 12 March 2012 (the “First UT Decision”) the Upper Tribunal remitted the appeal to the FTT to make further findings on the basis of the evidence heard at the Original Hearing.

4. Following a two day hearing in October 2012 (the FTT Hearing”) the FTT released its decision (the “Second Decision”) on 5 April 2013.

5. On 18 April 2013 HMRC applied for its costs in relation to the FTT Hearing.

6. S&I appealed against the Second Decision to the Upper Tribunal. In a Decision of 31 March 2105 (the “Second UT Decision”) the Upper Tribunal dismissed its appeal.

7. HMRC’s application for the costs of the FTT Hearing was held over pending the Second UT Hearing, and came before me on 12 February 2016.

The Different Costs Rules

8. Rule 29 of the Value Added Tax Tribunal’s Rules 1986 (SI 1998/590) (the “Old Rules”) provided that a tribunal could direct that one party should pay to the other such costs as it determined or were assessed or agreed. Costs were in the discretion of the tribunal.

9. Leaving to one side wasted costs and costs in relation to unreasonable conduct, which are irrelevant to the current application, Rule 10 of the Rules of the FTT limits the FTT’s power to award costs to costs in cases which have been categorised as Complex, and in relation to such cases permits the FTT to award costs only if within 28 days after the notice of allocation of the appeal as a Complex case, the taxpayer does not give notice that the costs shifting regime should not apply. Thus for a case within the FTT Rules the default position is that if the case is Complex the costs shifting regime may apply but the taxpayer may opt out if he gives notice in good time.

10. Rule 23 of the FTT's Rules requires the FTT to give a direction allocating an appeal to a category (Complex, Standard, Basic or Default Paper) when it receives notice of appeal. There was no such provision in the Old Rules for such allocation. As a result S&I's appeal was not allocated to any category. No application was made for such allocation. There is a divergence of judicial opinion as to whether the FTT could make a categorisation direction in relation to a case which had started before the VAT and Duties Tribunal: Judge Mosedale in *Hewlett Packard* suggesting that it could, and Sir Stephen Oliver in *Surestone Ltd v HMRC* [2009] UKFTT 352 (TC), concluding otherwise. But for present purposes that matters not because as no allocation was made, the appeal was not categorised as Complex. As a result the terms of Rule 10 prohibit the awarding of ordinary costs.

11. But Paragraph 7(3) of Schedule 3 of the Transfer of Tribunal Functions and Revenue and Customs Order 2009 (the "2009 Order", or the "Order") permits the FTT to give a direction in relation to "current proceedings" to apply the provision of the Old Rules and to disapply the FTT Rules to the extent necessary to ensure that the proceedings are dealt with justly and fairly. Thus so long as the FTT Hearing was part of "current proceedings" this tribunal may apply Rule 29 of the Old Rules in the place of Rule 10 of the FTT's Rules. That is the direction sought by HMRC in this application.

12. By paragraph 1(1) of schedule 3 of the Order there are "current proceedings" if one party has served notice for the purpose of bringing proceedings before an existing tribunal and by 1 April 2009 the "existing tribunal has not concluded proceedings arising by virtue of that notice". It was implicit in the parties' submission before me that the FTT Hearing was part of "current proceedings" for this purpose. In the present application I think that is correct because the Original Decision (on the basis that it was released on 18 March) dealt with issues in principle and gave leave for the parties to return to agree amounts and to argue a further point of EU law. Thus even if the Original Decision was released before 1 April 2009 the proceedings which arose by virtue of the notice commencing the appeal were not concluded on 1 April 2009.

13. Thus the question addressed by this decision is whether it would be just and fair to apply Rule 29. The parties agree that to answer this question the tribunal must perform a balancing act by reference to all the circumstances.

The Authorities

14. None of the cases cited to me are on facts similar to those in this application, but there is some help to be gleaned from them as to the factors to be considered and the weight to be attached to them.

15. The leading case is the decision of the Upper Tribunal in *Atlantic Electronics v HMRC* [2012] STC 931. In that decision the UT gave guidance on the approach to be taken.

16. That case concerned proceedings started before 1 April 2009 but not heard until after that date. Considerable work had however been undertaken before 1 April 2009.

Before the hearing took place the taxpayer applied for a direction that the costs shifting regime should not be applied, and HMRC for a direction that Old Rule 29 should apply. The FTT declined to apply the Old Rule. It did so despite the fact that in its Statement of Case, delivered under the Old Rules, HMRC sought its costs and despite interlocutory directions in which costs had been awarded. The UT held that decision was within the range of permissible decisions.

17. In reaching his decision Warren J said that:

(1) There were two policies underlying the FTT Rules. The first was to give the taxpayer the choice in a Complex case as to the applicable costs regime; the second was to provide certainty as to the applicable costs regime at an early stage in the proceedings. He notes that one of the reasons for the second policy was to prevent a party from electing for a regime at a late stage in the proceedings when it knew which regime was likely to be more favourable because of the course the proceedings had taken. The taxpayer was not to be allowed to wait and see;

(2) it was the nature of the case as complex rather than its formal categorisation which was relevant to the exercise of the discretion under para 7(3) of the Order;

(3) there was something artificial and contrary to common sense in expecting a taxpayer who wants to rely on the default regime to make an application for that regime rather than the onus being on the party who wants the discretion to be exercised to make that application [51];

(4) the conduct of a party – it actions or inactions which could lead the other party reasonably to expect that one or other set of rules was sought could certainly be taken into account in the exercise of the 7(3) discretion ([26])

(5) delay in making an application for the Old Rules beyond a reasonable time after 1 April 2009 was relevant to the exercise of the discretion, "after a reasonable time has passed, parties who wait and see how a case develops before making an application should not ordinarily expect their application to succeed ([68]);

(6) where delay is present, the reasonable expectation is that the discretion will not be exercised to disapply the default position [66]. That was not because of any reasonable expectation that the default regime will apply, but because that is what the second policy, that of certainty, requires [50];

(7) a taxpayer could reasonably assume that the default position would apply unless and until HMRC indicated to the contrary in which case they ought to make an application; and it would be for HMRC to justify a departure form the default regime [60];

(8) the expectations of the parties as to which rules should be applied were relevant to the decision of which rules to apply only in so far as they reflected the factors which the tribunal would consider, and should not be given separate weight in that decision [56];

(9) the tension between the policy of the FTT Rules applicable to a new case and the fairness and justice of maintaining the old regime could be avoided by making a split order applying the different regimes to the periods before and after 1 April 2001. That could at least be a starting point [45, 46].

18. These remarks were made in the context of an application for a prospective direction in relation to costs which had and would be incurred, but it seems to me that the principles are equally applicable to an application which relates, as does the one in hand, to an application to fix the costs regime at a later stage.

19. Warren J considered three examples. In the first the vast majority of the costs would be incurred after 1 April 2009, in the second the vast majority were incurred before that date, and in the third example where there was a split across 1 April 2009.

20. In the first example he regarded the 2009 rules as a starting point: he would generally expect the tribunal to make a prospective direction reflecting the taxpayer's choice, and if an application were not made in good time he would expect the default regime to be applied; in the second he said that in the absence of special circumstances it would be fair to apply the old rules, and in the third, that if a split regime were not imposed that a major factor would be the amount of time and money spent before and after 1 April 2009.

21. Both parties rely on these examples. S&I says that the FTT Hearing was conducted wholly after 1 April and falls with in the first example; HMRC say that the vast majority of the time and costs which gave rise to the final determination of the appeal arose before 1 April and the second example is apposite. Mr Collins says that if, where there is a single hearing, it is fair to have a split regime then it is all the more so in this application where there were two separate hearings: thus he says the third example weighs in his favour.

22. HMRC rely on Judge Bishopp's decision in *Mynt Ltd v HMRC* [2103] UKFTT 635 TC. In that case the appeal was brought before 1 April 2009 but heard afterwards. The tribunal dismissed the appeal; HMRC made an application for costs. This was a retrospective application like the one in the present application. The FTT considered that the conduct of the parties was a relevant consideration. Although neither party seemed to have turned its mind to the question of costs, HMRC had sought costs in their statement of case (served before 1 April) and in their skeleton argument (served after 1 April) and there had been agreed directions after 1 April 2009 providing for costs in cause. Judge Bishopp came to the conclusion that there must have been a time no later than the service of the skeleton arguments when it must have been obvious to Mynt that the issue of costs had to be addressed, and that by failing to grasp the nettle Mynt was aiming to recover its own costs if successful and probably to pursue an argument for no cost if unsuccessful. On that basis he decided that the Old Rules should apply.

23. Mr Collins notes that in the present application HMRC do not point to any adversion to costs in the material for the FTT Hearing.

The Balancing Exercise

24. The following facts seemed to me to be relevant:

(1) This was plainly a complex case although not categorised as such.

(2) The issue of costs was raised in the Original Hearing and dealt with in the Original Decision.

(3) Costs were not raised as an issue by the parties after 1 April 2009.

(4) The FTT Hearing was directed to decide facts on the basis of evidence heard at the Original Hearing. At the FTT Hearing some time was spent considering new legal arguments advanced by Mr Patchett-Joyce. These were not dependent on the work done for the Original Hearing. The main argument however was related to the factual findings which should follow from evidence at the Original Hearing.

(5) The Original Hearing took 17 days and involved considerable preparatory work; the FTT Hearing was over 2 days and clearly involved less.

(6) HMRC's application for costs was made after the FTT had released a decision in its favour at the FTT Hearing, over a year after the release of the Original Decision and some 6 months after the FTT Hearing.

25. Mr Robertson argues that had the result of the FTT Hearing been in its favour S&I would surely have sought its costs in relation to the Original Hearing – and to reverse the costs order made in the Original Decision. Mr Collins conceded that if the result had been that the Original Decision had been set aside the taxpayer would have sought an order using the 7(3) discretion for its costs in relation to that hearing.

26. But there is to my mind a difference between seeking the reversal of a costs order made in relation to that part of the proceedings in which both parties were fully exposed to costs, and where it would not have been just for the winner to pay the loser's costs, and seeking costs of a later hearing at which the default position was the absence of cost shifting absent the exercise of the para 7(3) discretion. Accordingly I do not regard Mr Collins' concession as weighing in favour of exercising the discretion in relation to the costs of the Second FTT hearing.

27. Although the policy of the FTT Rules suggests that cost shifting should apply to a case *of a complex nature* unless the taxpayer elects otherwise, it seems to me that the absence of a plain mechanism for the making of such an election in relation to a case which has not been classified as complex, when taken with Warren J's remark that that there is something artificial and contrary to common sense in expecting a taxpayer who wants to rely on the default regime to make an application for that regime, indicates that little weight is to be given to the complex nature of the case.

28. In the absence of intimation that HMRC wished for the old Rules to apply, it seems to me that it would not have been unreasonable for the taxpayer to assume that the default no costs position would apply after 1 April 2009. This does not seem to me to be a case where the taxpayer can be said to have been waiting to see what would happen before making an opportunistic application. Taken with the comments in the

preceding paragraph it seems to me that the taxpayer cannot be regarded as having delayed in making an application to secure the default regime.

29. On the other hand, it does not seem to me that, given the change in the Rules, HMRC could have had a reasonable expectation that, absent an application and direction to that effect, the old regime would be applied to the costs of the FTT Hearing. The FTT Hearing was some three and a half years after 1 April 2009 and the release of the Original Decision. It is true that the Original Decision awarded them costs, but they received no intimation that the taxpayer wished otherwise than for the default no costs regime after 1 April 2009. It seems to me that HMRC can fairly be said to have delayed making an application for the application of the old regime to the FTT Hearing.

30. Warren J suggests that a split costs order would be a good starting point in cases where costs were split over a period, reflecting the policy of the rules after and before 1 April 2009. That was in the context of a prospective direction, but I see no reason why the same starting point is not apt for a retrospective direction. If I start there, is there any reason for moving away from that point? The principle factors seem to me to be these: on the one hand, seen as a whole, the vast majority of the work for the final result was done before 1 April 2009, on the other hand there was delay in seeking the application of para 7(3) in relation to the work done after 1 April 2009. To my mind those factors do not weigh in favour of moving away from a split order.

31. For all these reasons it seems to me that a split order would be fair and just and that I should not exercise the discretion under para 7(3) of the Order.

32. I therefore decline to make a direction in relation to the costs of the FTT Hearing.

33. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 19 April 2016