[2016] UKFTT 702 (TC)

TC05434

Appeal number: **TC/2011/02542**
TC/2013/08062
TC/2013/08066
TC/2015/02871
TC/2015/02872

PROCEDURE – whether Tribunal has power to award costs – whether Tribunal can, or should, extend time limit to opt out of costs-shifting regime

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE AQUARIUS FILM COMPANY LLP (IN LIQUIDATION) **Appellants**
ADRIAN GARTH CADE
ROBERT BARNETT

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice on 12 October 2016

Rebecca Murray, instructed by Keystone Law and Matheu Smith of Keystone Law for the Appellant

Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. This appeal concerns the right of a taxpayer, under Rule 10(1)(c)(ii) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"), to "opt out" from the costs-shifting regime applicable to complex cases in relation to two appeals made in 2013. The Aquarius Film Company LLP (in liquidation) ("Aquarius") has made an application (the "Application") asking the Tribunal to confirm that the Tribunal has no power to award costs in those appeals (because, among other points, it argues that a valid in-time opt-out has been made). In the alternative, Aquarius asks the Tribunal to exercise discretion to permit a late opt-out. HMRC argue that no valid opt-out has to date been made in relation to the 2013 appeals, that the Tribunal has no discretion to extend the time for making an opt-out or, to the extent it has discretion, it should not exercise it.

2. The Tribunal directed both parties to serve a skeleton argument no later than 7 days prior to the hearing. HMRC complied with this direction, but Aquarius did not and no very good reason was given for this failure. Mr Smith handed me a skeleton argument on behalf of Aquarius (which Ms Murray of Counsel had prepared) at the hearing itself and Ms Nathan informed me that HMRC had received that the day prior to the hearing.

3. Unfortunately, Ms Murray, who was due to represent Aquarius at the hearing was taken unwell and could not attend. Mr Smith, who is Aquarius's duly appointed representative, attended the hearing and applied on Aquarius's behalf for a postponement of the hearing of the Application. Ms Nathan opposed that application on the grounds that, if the hearing were postponed, the appellant would derive a benefit from the late service of its skeleton argument. Having considered the parties' respective arguments and the overriding objective set out in Rule 2 of the Tribunal Rules, I decided not to grant the postponement. It seemed to me desirable that there should be an early determination as to whether the 2013 appeals were within the costs-shifting regime or not, not least since the Tribunal had just made directions designed to set those appeals on a path towards hearing and the parties would therefore be incurring costs in complying with those directions. I also felt that the Tribunal could decide the Application with the benefit of both parties' skeleton arguments. Finally, I noted that the Appellant was not unrepresented at the hearing: Mr Smith was present and had shown that he had a good knowledge of the appeals and procedural issues by the way he rose admirably to the task of making submissions earlier in the hearing as to appropriate case management directions.

Facts

4. On 25 March 2011 Aquarius submitted a notice of appeal to the Tribunal (the "2011 Appeal"). In essence, the 2011 Appeal was concerned with the question of whether Aquarius was, in its partnership tax return for the year ended 5 April 2003, entitled to claim a deduction as a trading expense for costs incurred in connection with film finance activities. The 2011 Appeal was submitted at the same time, and by the same adviser, as a number of other appeals brought by other LLPs which I will

refer to as the "Zodiac Appeals". The Tribunal allocated the 2011 Appeal the reference TC/2011/02542 and, in accordance with Rule 23 of the Tribunal Rules, the 2011 Appeal was allocated to the "standard" category.

5. On or around 20 November 2013, Aquarius made two further appeals (the "2013 Appeals") that related to the treatment of film finance activities in different tax years. Both of those appeals were signed by Aquarius Film Consultants Ltd ("Aquarius Consultants") which, ticked a box to describe itself as Aquarius's "legal representative" for the purposes of Rule 11 of the Tribunal Rules which defines a "legal representative" as follows:

> A person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act, an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland.

6. In the hearing bundle were copies of the letterhead of Aquarius Consultants dating from the relevant time. That letterhead made no reference to regulation by any professional authority such as the Bar Council or the Solicitors' Regulation Authority. It made no claim of legal expertise. Mr Smith made no submissions to the effect that Aquarius Consultants satisfied the definition of "legal representative". I was not satisfied, on the evidence in front of me, that Aquarius Consultants was, therefore, a "legal representative" as defined.

7. The Tribunal allocated the 2013 Appeals the references TC/2013/08062 and TC/2013/08066. On 3 December 2013, the Tribunal acknowledged receipt of the 2013 Appeals by sending two letters to Aquarius at the address Aquarius had given in the relevant notices of appeals. It did not copy or send those letters to Aquarius Consultants. In those letters of 3 December 2013, the Tribunal stated that both of the 2013 Appeals had been assigned to proceed under the "complex" category.

8. Mr Smith accepted that Aquarius had received the letters of 3 December 2013 but submitted that, owing to poor advice from its then advisers, it did not understand the costs consequences of the 2013 Appeals being categorised as "complex" or that Aquarius had only 28 days from receiving those letters to opt out of the costs-shifting regime in relation to the 2013 Appeals. It was common ground that no notification was given to the Tribunal within 28 days of receipt of those letters of an intention to "opt out" of the costs-shifting regime in relation to the 2013 Appeals as permitted by Rule 10(1)(c)(ii) of the Tribunal Rules.

9. In 2015, two members of Aquarius, Mr Barnett and Mr Cade, submitted appeals to the Tribunal (the "2015 Appeals"). Those appeals were allocated Tribunal references TC/2015/02871 and TC/2015/02872. By letters dated 29 May 2015, the Tribunal acknowledged receipt of those appeals and allocated them to the "standard" category.

10. On 6 October 2015, Judge Poole made case management directions in relation to the 2015 Appeals that included the following:

> 1. The above appeals [being the 2015 Appeals] shall be combined, case managed and heard together with the existing appeals of the Aquarius Film Company LLP (in liquidation) and others under reference TC/2011/02542 (and others).

11. In the autumn of 2015, Keystone Law were appointed as Aquarius's duly appointed representative. On 25 April 2016, Mr Smith wrote to HMRC setting out his understanding that the 2011 Appeal and the 2015 Appeals were classified as "standard" but the 2013 Appeals as "complex". He mentioned the difficulties he was experiencing in seeing all documents relevant to the appeals and asked the Tribunal to confirm whether notices opting out of the costs-shifting regime were ever served in relation to the 2013 Appeals.

12. On 3 May 2016, the Tribunal responded to Mr Smith's letter of 25 April 2016. The Tribunal's letter attached copies of the Tribunal's letters of 3 December 2013 referred to at [7] (which allocated the 2013 Appeals to the "complex" category) and confirmed that no opt-out from the costs-shifting regime had been served since the date of those letters.

13. On 11 May 2016, Judge Poole endorsed directions relating, among other matters, to Rule 18 of the Tribunal Rules. Included with those directions were the following:

> 1. Pursuant to Rule 5(3)(b) of the Tribunal Rules, the appeals of [Aquarius] for the year 2002/2003 (TC/2011/2542), for the year 2007/2008 (TC/2013/08062) and for the year 2008/2009 (TC/2013/08066) shall be combined, case managed and heard together by the same Tribunal (the "Joined Aquarius Appeals").
>
> …
>
> 5. The appeals of [Mr Cade and Mr Barnett] which were directed to be combined, case managed and heard together with [among others the Zodiac Appeals] shall be combined, case managed and heard together with only the Joined Aquarius Appeals.

14. On 18 May 2016, Mr Smith wrote to HMRC to inform them that Aquarius was considering applying to the Tribunal to recategorise the 2013 Appeals as "standard" and enclosed a draft of the application that was contemplated. On 20 May 2016, HMRC indicated that they would oppose any such application. It was not clear to me whether Aquarius ever made the application it was proposing. I was not shown a final application made to the Tribunal and nor was I asked to determine any such application at the hearing. In the circumstances, it seems clear to me that Aquarius did not make any such application possibly because, as noted at [15], matters were overtaken by events when the Tribunal decided to recategorise the 2011 Appeal and 2015 Appeals as "complex" demonstrating that it was adopting an approach that was the complete opposite of recategorising the 2013 Appeals as "standard".

15. On 31 May 2016, Judge Poole made further directions. These directions in their heading referred to the 2011 Appeal, the 2013 Appeals and the 2015 Appeals and quoted the five separate Tribunal references for those appeals. Those directions provided, relevantly, as follows:

> Now that the terms of an appropriate Rule 18 Direction have been settled and endorsed, it is appropriate to progress these five appeals (which, pursuant to the Directions issued on 11 May 2016 are now to be combined, case managed and heard together.
>
> IT IS ACCORDINGLY DIRECTED that
>
> …
>
> 2. I note that appeals TC/2011/02542, TC/2015/02871 and TC/2015/02872 have been allocated to the standard category, whereas appeals TC/2013/08062 and TC/2013/08066 have been allocated to the complex category. It is clear to me that the combined appeals should properly be allocated to the complex category and I accordingly hereby re-allocate TC/2011/02542, TC/2015/20871 and TC/2015/02872 to the complex category. The Appellants in those appeals are reminded of the time limit to opt out of the costs regime contained in Rule 10 of the Tribunal's procedure rules.

16. By letter dated 9 June 2016, Keystone Law wrote to the Tribunal to "opt out" of the costs-shifting regime in relation to all of the 2011 Appeal, the 2013 Appeals and the 2015 Appeals. However, acknowledging that there was at least an argument that it was now too late to opt-out of the costs-shifting regime in relation to the 2013 Appeals (given the points made at [8] above), Aquarius requested that even if its claim to opt-out in relation to the 2013 Appeals was not accepted, it should nevertheless be taken as opting out in relation to the 2011 Appeal and the 2015 Appeals.

The Tribunal Rules relating to the right to "opt out"

17. Rule 10 of the Tribunal Rules provides, relevantly, as follows:

> **10 Orders for costs**
>
> (1) The Tribunal may only make an order for costs…
>
> (c) if –
>
> (i) the proceedings have been allocated as a Complex case under Rule 23 (allocation of costs 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…
>
> (8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax duty levy or penalty to the proceedings relate or part of such tax, duty levy or penalty, or whose liability to do so is in issue in the proceedings.

Discussion

18. There was no dispute that Keystone Law's letter of 9 June 2016 constituted a valid notice to opt out of the costs-shifting regime in relation to the 2011 Appeal and

the 2015 Appeals. Both parties were agreed that those appeals only became categorised as "complex" on 31 May 2016 when Judge Poole made the directions referred to at [15]. Keystone Law sent their letter of 9 June 2016 less than 28 days after receiving notice that the 2011 Appeal and the 2015 Appeals had been categorised as "complex" and so was sent within the time limit prescribed by Rule 10(1)(c)(ii).

19. However, the parties were not agreed as to whether a valid opt-out had been made in relation to the 2013 Appeals or whether the Tribunal could, or should, exercise its discretion to permit a late opt-out in relation to those appeals. In order to determine the Application, I consider I need to address the following issues:

(1) I must decide whether the Tribunal's failure to send its letters of 3 December 2013 to Aquarius Consultants meant that Aquarius was not, on that date, given notice that the 2013 Appeals had been allocated to the "complex" category so that the 28-day time limit for opting out of the costs-shifting regime did not start to run from the date Aquarius received those letters.

(2) I must decide whether, as Mr Smith submitted, the effect of Direction 1 of the Directions of 11 May 2016 (referred to at 13] above) was that the 2013 Appeals and the 2011 Appeals were consolidated into a single appeal, the 2011 Appeal, with the result that, since the 2011 Appeal was at that point categorised as "standard", the 2013 Appeals also became "standard" at that point. If that were the effect of this direction, then Mr Smith submitted that the single consolidated appeal only became recategorised as complex on 31 May 2016 (at the time when Judge Poole made further directions on that date) with the result that a valid opt-out was made on 9 June 2016 in relation to that single consolidated appeal.

(3) I must deal with an argument that Ms Murray raised in her skeleton argument as to the definition of "taxpayer" for the purposes of Rule 10 of the Tribunal Rules.

(4) I must decide whether the Tribunal has discretion to extend the 28-day time limit referred to in Rule 10(1)(c)(ii) of the Tribunal Rules.

(5) If the Tribunal has such a discretion, I must decide whether to exercise it.

The failure to send correspondence to Aquarius Consultants

20. As I have found at [6], I am not satisfied that Aquarius Consultants could validly claim to be a "legal representative" when it submitted the 2013 Appeals. For reasons set out below, that is an important finding.

21. Rule 11(1) and Rule 11(2) of the Tribunal Rules provide as follows:

> (1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.
>
> (2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to

> the Tribunal and to each other party to the proceedings written notification of the representative's name and address…
>
> (4) A person who receives due notice of the appointment of a representative –
>
> (a) must provide to the representative any document which is required to be provided to the represented party and need not provide that document to the represented party…

22. It follows from the Tribunal Rules that while a legal representative may notify the Tribunal of its own appointment, a party appointing a non-legal representative[1] must notify the Tribunal of that appointment. I was not shown any evidence that, at or around the time Aquarius Consultants sent the 2013 Appeals to the Tribunal, Aquarius sent written notification of the appointment of Aquarius Consultants as a non-legal representative. It follows that I have concluded that, by 3 December 2013, Aquarius Consultants had not been validly appointed as Aquarius's representative under Rule 11 of the Tribunal Rules and, accordingly, there was no question of the Tribunal being obliged to send correspondence to Aquarius Consultants under Rule 11(4).

23. Ms Nathan argued that even if Aquarius Consultants had been validly appointed as a representative, the Tribunal's letter of 3 December 2013 was still validly served on Aquarius since it had been sent to Aquarius at the address that Aquarius gave on its Notice of Appeal and it was not suggested that Aquarius had not received it. Therefore, Ms Nathan argued that, when Aquarius received the letter of 3 December 2013 it "receiv[ed] notice that the case had been allocated as a Complex case" for the purposes of the Tribunal Rules and the deadline for opting out expired 28 days later.

24. I do not need to determine whether Ms Nathan's argument is correct given the findings that I have made at [22]. I will say, however, that I regard the point as debatable. Rule 11(4) of the Tribunal Rules is in mandatory terms: it requires "a person" who receives due notice of a representative's appointment to send documents to that representative. It is not absolutely clear whether the Tribunal is a "person" who is required to comply with this rule and there are other parts of the Tribunal Rules that make it absolutely clear when rules that the Tribunal must itself follow are set out (see for example Rule 13). However, it would be odd indeed if Rule 11(4) was envisaging that parties had to communicate with representatives whereas the Tribunal was entitled to communicate only with the parties themselves and I doubt that such a practice would contribute to the efficient conduct of litigation. Therefore, I consider it likely that Rule 11(4) does apply to the Tribunal and, if Aquarius Consultants had been validly appointed as a representative, the question would be what consequence should follow if the Tribunal did not comply with that rule. The effect of Ms Nathan's argument would be that no consequence at all should flow from a failure to send a highly important document to a representative (who might be presumed to be in a good position to realise the importance of that document). Having said that, Mr Smith accepted that Aquarius had received the Tribunal's letters of 3 December 2013 and it

[1] The Tribunal Rules do not actually use this expression but I will use it to mean a representative that does not satisfy the definition of "legal representative".

would be odd if the Tribunal Rules had the effect that documents that plainly were received were to be treated as if they were not received. If I had to express a conclusion on this issue (which I do not) I would probably have concluded that, even if Aquarius Consultants had been duly appointed as a representative, the letters of 3 December 2013 were still validly served on Aquarius. However, in such a circumstance, the Tribunal would need to take into account the fact that the letters were not sent to Aquarius's representative in deciding whether to exercise the discretion to extend time referred to below.

25. Finally, I note that even if the letters of 3 December 2013 were not properly served on Aquarius, on 3 May 2016 the Tribunal sent Mr Smith, Aquarius's duly appointed representative, a copy of letters that confirmed the 2013 Appeals were categorised as "complex". Therefore, on any view, the time limit set out in Rule 10(1)(c)(ii) expired 28 days after Mr Smith received those letters. Mr Smith only sent his letter purporting to opt-out of the costs-shifting regime on 9 June 2016 therefore, even on Aquarius's arguments, that opt-out would still be out of time.

Whether the 2013 Appeals were consolidated with the 2011 Appeal on 11 May 2016

26. It is important to keep in mind the difference between the "consolidation" of appeals and a direction that appeals be heard together, a distinction that is made in Rule 5(3)(b) of the Tribunal Rules. Under the Tribunal's procedure, when two appeals are consolidated, they become a single appeal with a single appeal reference and lose their identity as separate appeals. It follows that appeals made by different taxpayers cannot be consolidated since appeals made by different taxpayers could never be regarded as a single appeal. By contrast, under the Tribunal's procedure, when appeals are directed to be "heard together", they retain their identity as separate appeals even though for convenience or other reasons they may be case-managed together and heard together at the same time and by the same Tribunal panel.

27. The Tribunal has, on a number of occasions in its directions referred to appeals being "combined, case managed and heard together by the same Tribunal". At first sight, the use of the word "combined" might appear to be suggesting that appeals are to be consolidated. However, once the directions are considered in context, I consider that it is clear that the Tribunal has at no point consolidated any of the relevant appeals.

28. As noted at [10], the Tribunal referred to the appeals by Mr Cade and Mr Barnett (the 2015 Appeals) being "combined, case managed and heard together" with appeals brought by Aquarius, a different appellant. The Tribunal cannot have intended this as a reference to consolidation since, as noted, it would not be possible to consolidate appeals brought by different appellants. Without anything more, that would be a strong indication that, when the Tribunal referred to appeals being "combined, case managed and heard together", it intended those appeals to retain their individual identity. Other indications only serve to reinforce that conclusion. For example:

(1) The direction is for appeals to be "case managed and heard together". If this meant that the appeals were to be consolidated into a single appeal, there would be no need to say that they should be case managed and heard "together" as, following consolidation, there would only be a single appeal in existence.

(2) Direction 2 of the Tribunal's directions of 31 May 2016 clearly envisaged that there were five separate appeals in existence and that each of these appeals were capable of being categorised differently.

(3) Even after making directions for appeals to be "combined, case managed and heard together", subsequent Tribunal directions continued to quote the different Tribunal references for those appeals (rather than a single consolidated appeal reference).

29. For all of those reasons, I consider that the 2011 Appeals, the 2013 Appeals and the 2015 Appeals have retained their identity as five separate appeals. I have therefore concluded that there was no question of the 2013 Appeals being categorised as "standard" once more following an averred consolidation with a "standard" appeal pursuant to the Tribunal's directions of 11 May 2016.

The definition of "taxpayer"

30. Ms Murray's skeleton argument contained a number of submissions related to the definition of "taxpayer" set out in Rule 10(8) of the Tribunal Rules. Firstly, she argued that the Tribunal only has power to award costs in cases involving more than one "taxpayer" if one of the taxpayers has not opted out. We agree with that submission: once all of the double negatives in Rule 10 have been resolved, the position is that, if there is a single "taxpayer" who has not opted out, the Tribunal may award costs. Put another way, in order for the Tribunal not to be able to award costs, all "taxpayers" must opt out.

31. Ms Murray went on to argue that Aquarius is not a "taxpayer" as defined since it is transparent for the tax purposes relevant to this appeal and, even on HMRC's arguments as set out in their Statement of Case, Aquarius would not have any tax liability. Rather, any tax liability associated with Aquarius's activities would be payable by Aquarius's members.

32. We doubt that, the Tribunal Rules should be construed by reference to concepts of fiscal transparency in the way that Ms Murray suggests not least since those concepts may apply differently to different taxes that are within the Tribunal's jurisdiction. For example, a limited liability partnership ("LLP") such as Aquarius may be appealing against a determination that it is not trading for income tax purposes and a determination of its VAT liabilities. The LLP may well be "transparent" for income tax purposes but would not be for VAT purposes. We doubt that the Tribunal rules would be intended to treat the LLP as a "taxpayer" for VAT purposes, but not for the purposes of the income tax appeal.

33. However, there is a more fundamental reason why Ms Murray's argument does not assist Aquarius. Nothing in Rule 10 states that an order for costs can be made only against a "taxpayer". Rule 10 provides only that a failure by a "taxpayer" to submit an

election that the proceedings be excluded from the costs-shifting regime is a necessary precondition to an award of costs being made in a complex case. Moreover, even if Aquarius is not a "taxpayer", and the "taxpayers" are the members of Aquarius, in order for Ms Murray's argument to avail, she would need to demonstrate that every member of Aquarius had, within the appropriate time limit, made an election to opt out of the costs regime. There was no evidence that any member of Aquarius, still less all of them, had submitted any election to opt out.

Whether the Tribunal has power to extend the time limit in Rule 10(1)(c)(ii) of the Tribunal Rules

34. Rule 5(3)(a) of the Tribunal Rules expressly gives the Tribunal power to:

> extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit.

35. On its face, Rule 5(3)(a) would give the Tribunal discretion to extend the time limit for serving an opt-out under Rule 10(1)(c)(ii) beyond the 28-day deadline set out in that rule. However, Ms Nathan submitted that, when due regard is had to the purpose of the time limit and the decisions of the Upper Tribunal in *HMRC v Atlantic Electronics Limited* [2012] UKUT 45 and *Hills v HMRC* [2016] UKUT 266 and of this Tribunal in *N Brown v HMRC* [2016] UKFTT 445, it becomes clear that the Tribunal has no such discretion.

36. I do not agree with Ms Nathan. While I certainly agree that the Tribunal should be cautious about exercising its discretion given the statements as to the purpose of the 28-day deadline in *Atlantic Electronics Limited,* it is overstating matters to say that there is no discretion at all. Moreover, the reason why the Tribunal decided in *N Brown* that it had no power to permit a party to withdraw an opt-out from the costs-shifting regime was because there was no provision providing for this in the Tribunal Rules. Here, there is an express general power contained within the Tribunal Rules that permits time limits to be extended.

37. I therefore conclude that the Tribunal does have power to extend the time limit in Rule 10(1)(c)(ii). Whether it should exercise that power is a different matter.

Whether the Tribunal should exercise the power to extend the time limit

38. In her skeleton argument, Ms Murray submitted that, if the Tribunal refused to exercise its discretion to permit a late opt-out, the Tribunal would have a "power to award costs in relation to the whole proceedings (i.e. all of the appeals without any apportion[ment] mechanism) and without any reference to the taxpayer against whom costs can be awarded". She went on to submit that it would be unjust to penalise Mr Cade and Mr Barnett for any failure by Aquarius to opt out in relation to the 2013 Appeals. She also argued that it would be unjust to give HMRC the prospect of recovering costs in relation to the 2011 Appeals and the 2015 Appeals which were categorised as "standard" until 31 May 2016. I believe those submissions stem from a

misunderstanding of what the Tribunal did when it directed that the various appeals be "combined, case managed and heard together". As I have found, the Tribunal has not consolidated all appeals into a single appeal that is subject to the costs-shifting regime. Rather, there remain five separate appeals. Mr Cade and Mr Barnett have validly opted out of the costs-shifting regime in the 2015 Appeals and Aquarius has validly opted out of the costs-shifting regime in the 2011 Appeal. Therefore, it is only Aquarius (in its capacity as appellant in relation to the 2013 Appeals) that is exposed to the risk of a costs award being made against it or has the prospect of recovering costs from HMRC.

39. At the hearing, Mr Smith put matters somewhat differently. He argued that there would be difficulties of apportioning costs as between the various appeals and, given those difficulties it was difficult for him to advise the liquidator to Aquarius as to what its exposure to costs might be. In those circumstances, it was difficult for the liquidator to assess whether to continue with the litigation with a consequent risk of a denial of access to justice.

40. I accept that some difficult questions of apportionment may arise depending on what the final conclusion is in the substantive appeals. However, I do not see why those difficulties of apportionment should result in a conclusion that Aquarius or HMRC (as the case may be) should be precluded from recovering costs associated with the 2013 Appeals.

41. No good reason has been put forward as to why Aquarius did not opt out of the costs-shifting regime in time. I have concluded that, for whatever reason, Aquarius was either not aware of, or was not informed that, in complex appeals such as the 2013 Appeals, the Tribunal would have jurisdiction to award costs unless an opt-out was submitted in 28 days. Even so, Aquarius would have known when it made the 2011 Appeals and the 2013 Appeals that it was engaging in litigation of some complexity involving a large amount of tax. Appellants who commence such litigation should expect to inform themselves of the costs risks of doing so. I do not consider it is fair in the circumstances to make a direction that would deprive HMRC of the ability to recover their costs if they were successful in the 2013 Appeals on the grounds that Aquarius failed to inform itself as to the costs risks associated with those appeals.

42. I do not consider that the Tribunal's failure to send its letters of 3 December 2013 to Aquarius Consultants alters matters. Most importantly, as I have found, the Tribunal had no obligation to send those letters to Aquarius Consultants who was not duly appointed at the relevant time. Moreover, there was no doubt that Aquarius received those letters. It is reasonable to expect Aquarius and Aquarius Consultants would, as costs started to be incurred over the next year, turn their mind to questions of costs and the consequences of the Tribunal's letter since they would clearly have known that they were engaged in complicated litigation involving a large amount of money.

43. Both Mr Smith at the hearing and Ms Murray in her skeleton argument suggested that there was a middle ground: namely that the Tribunal could make a

direction permitting Aquarius to make a late opt-out but that this would not affect costs accrued or incurred to date. I will not make such a direction firstly because it would involve Aquarius being given the opportunity to wait and see how its case is progressing before deciding whether it wishes to be exposed to future costs – precisely the kind of behaviour that Warren J determined in *Atlantic Electronics* should not be permitted. In addition, a direction that takes effect only in relation to future costs has the capacity to be unjust. The 2013 Appeals were made three years ago and HMRC will already have made certain decisions as to how they wish to approach those appeals, not least by formulating the arguments that they have set out in their Statements of Case. The full costs consequences of those decisions may not have been incurred yet and will only be known following the hearing of the appeal (and the result of that appeal). In those circumstances, and given the importance that Warren J attached to the parties knowing "at an early stage, which costs regime is to apply [so that they can] run their cases accordingly", I consider it would be unjust to deprive HMRC of their ability to recover costs that have yet to be incurred should they be successful in the 2013 Appeals.

Conclusion

44. My conclusion, therefore, is as follows:

(1) The 2011 Appeal, the 2013 Appeals and the 2015 Appeals are separate appeals, although they are to be case-managed and heard together.

(2) The Tribunal has no power to award costs under Rule 10(1)(c) of the Tribunal Rules in relation to the 2011 Appeal and the 2015 Appeals.

(3) The Tribunal has power to award costs under Rule 10(1)(c) of the Tribunal Rules in relation to the 2013 Appeals and I will not extend the period within which Aquarius could opt out in accordance with Rule 10(1)(c)(ii) in relation to those appeals.

45. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 20 OCTOBER 2016