

***HMRC v Atlantic Electronics Limited: Costs Shifting, in Transitional Cases,
before the Tax Chamber of the First-tier Tribunal -***

Certainty and Access to Justice

APPEAL BY HMRC DISMISSED; the discretion under paragraph 7(3) of the Transfer Order is to be applied with reference to fairness and justice including legitimate expectations of the taxpayer and delay in seeking a directions as to the costs regime to apply.

On 6 February 2012, the Upper Tribunal of the Tax Chamber dismissed HMRC's appeal against the First-tier Tribunal's refusal to exercise its discretion under paragraph 7(3), Schedule 3 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (the "Transfer Order"), to disapply Rule 10 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "2009 Rules") and apply Rule 29 of the Value Added Tax Tribunals Rules 1986 (the "1986 Rules").

In short, the 1986 Rules provided for a full costs shifting regime, whereas the 2009 Rules, which came into force on 1 April 2009, preclude the making of a costs order except in three defined circumstances: (i) wasted costs; (ii) where a party of his representative has acted unreasonably; and (iii) where a case has been allocated as a Complex case under Rule 23 of the 2009 rules, unless the taxpayer had opted out of the costs shifting regime (within 28 days of allocation as Complex). Atlantic's appeal would have been a Complex case.

Mr. Justice Warren, president of the Upper Tribunal, stated that this opt-out provision promotes access to justice by reflecting the fact that different taxpayers may have different views on what they find acceptable, in terms of costs they may recover if they win, or opposition costs they may incur if they lose. It further reflects that Government's position during the consultation on

the 2009 Rules, during which it stated the costs regime should ensure that “taxpayers are not deterred from taking their case to the tribunal because of a fear of incurring HMRC’s costs”. There was a clear policy decision that, in Complex cases, the taxpayers’ choice is to prevail. The 28-day deadline also highlights a further policy, the need for certainty, which includes ensuring that taxpayers do not adopt a ‘wait and see approach’.

It was recognised that the transitional cases most likely to cause difficulties in terms of the paragraph 7(3) discretion, are those such as Atlantic, which ‘straddle’ 1 April 2009. Paragraph 7(3) provides that “the tribunal may give any direction to ensure that proceedings are dealt with fairly and justly”. This is a wide discretion. In relation to its scope regarding costs, Mr. Justice Warren concluded that it can be used to make a ‘Prospective Direction’ fixing the costs regime which is to apply. Again providing certainty. The option of splitting the regime to apply to different time periods was also recognised.

HMRC submitted to the Upper Tribunal, that Judge Wallace of the First-tier Tribunal, erred in law by taking into account ‘irrelevant considerations’ such as the ‘legitimate expectation’ of Atlantic that the 2009 Rules would apply, and the lapse of time before HMRC’s application for a direction that the 1986 Rules should apply.

It is clear from the decision of the Upper Tribunal that ‘legitimate expectation’ is to be read in a colloquial or commonsensical way and can be formed as a result of words, actions or inactions of an opposing party. An expressed intention that costs will be in the case in relation to interim applications however did not equate to an expressed intention that such an approach would be applied to the entire proceedings.

The Upper Tribunal held that if such an expectation can be found it is something that can correctly be taken into account. Judge Berner’s judgment

in *Hawkeye communication Ltd v Revenue and Customs Commissioners* [2010] UK FTT 636 (TC) was considered. Mr. Justice Warren further clarified that:

“The reasonable expectation arises because of the way that the taxpayer is entitled to expect that the discretion will be exercised; it is not the case that the discretion must be exercised in favor of the application of Rule 10 because there is a reasonable expectation that it will be”

HMRC argued that Judge Wallace erred in holding that delay was a decisive factor in the exercise of his discretion. It is clear however that Judge Wallace held that it was decisive on the facts of this case. The consideration of delay is linked to the certainty and if neither party applies for a Prospective Direction certainty is to be found in the default rules (the 2009 Rules). The passage of an unreasonable amount of time since 1 April 2009 renders a departure from the default position more difficult to justify. It was further noted by the Upper Tribunal that even if an application is made by HMRC within a reasonable period of 1 April 2009 and is met by opposition from the taxpayer, it should be rejected, as due to policy taxpayer's choice is to prevail.

Lastly, Mr. Justice Warren rejected HMRC's submission that there would remain a residual power under paragraph 7(3) for the tribunal to make a different costs order in exceptional circumstances even where the tribunal had made a Prospective Direction. He stated that this would lead to considerable uncertainty and as a matter of policy there could be no reason to detect a residual power in transitional cases when in appeals commenced after 1 April 2009, it is clear that the costs regime will be fixed one way at an early stage under Rule 10.

The key consideration is therefore that cases be dealt with justly and fairly, and which costs direction will best achieve this aim. This is clearly a wide

discretion, however the decision of the Upper Tribunal demonstrates that it is to be exercised in line with the policy considerations in implementing the 2009 Rules as well as the conduct of the parties.

Tribunal:

The Chamber President, The Hon Mr. Justice Warren

For the Appellant (HMRC):

Mr. Jonathan Swift QC, instructed by the General Counsel and Solicitor to HMRC

For the Respondent (Atlantic Electronics Ltd):

Mr. Abbas Lakha QC and Mr. Edmund Vickers, instructed by Jeffery Green Russell Solicitors

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