TC02444

Appeal number: EDN/2006/7004

Procedure - Costs/Expenses - Transitional case - old expenses regime –Atlantic Electronics considered - directed Rule 29 - remitted for taxation

FIRST-TIER TRIBUNAL
TAX CHAMBER

USHA MARTIN (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP

Sitting in public at George House, 126 George Street, Edinburgh on 29 June 2012

Nigel Gibbon, Solicitor, for the Appellant

Douglas Pate, Solicitor, Office of the Advocate General for Scotland, for the Respondents

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DECISION

1. This is an Application by the Appellant for a Direction that Rule 29 of the Value Added Tax Tribunals Rules 1986 ("the 1986 Rules") be applied to these proceedings, and that consequently Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the 2009 Rules") should be disapplied.

2. The history of the appeal in this case is set out at paragraphs 11-15 below but, in summary, the appeal commenced in the Vat and Duties Tribunal by Notice of Appeal dated 22 June 2006 and concluded (subject to resolution of the question of expenses) on 24 January 2012, when the appeal was withdrawn, HMRC having withdrawn the assessment under appeal the previous day. Accordingly, this case commenced before the abolition of The VAT and Duties Tribunal, which had a different regime for expenses to that which came into force with the introduction of The First-tier Tax Tribunal on 1 April 2009.

3. It is a matter of agreement between the parties that in the first instance, since this case was concluded after 1 April 2009, the 2009 Rules would apply to the proceedings. That is the default position (see paragraph 10 below).

The Legal Framework

4. The general powers of the Tribunal in regard to expenses are contained in Section 29 of the Tribunals, Courts and Enforcement Act 2007 (TCEA) which provides that expenses of all proceedings are in the discretion of the Tribunal and that the Tribunal has full power to determine those expenses subject to the Tribunal Procedure Rules. Section 29 TCEA reads as follows:

> 29. Costs or expenses
>
> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> 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.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may—
>
> (a) disallow, or

(b) (as the case may be) order the legal or other representative concerned to meet,

the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.

(5) In subsection (4) "wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

(6) In this section "legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.

(7) In the application of this section in relation to Scotland, any reference in this section to costs is to be read as a reference to expenses.

5. As indicated in paragraph 3 above the default position is that the 2009 Rules apply to these proceedings. That position is set out in Rule 10 which reads as follows:

10—(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under section 29(4) of the 2007 Act (wasted costs);

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; or

(c) if—

(i) the proceedings have been allocated as a Complex case under Rule 23 (allocation of cases 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 or expenses under this sub-paragraph.

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so.

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) …

(b) notice of a withdrawal under rule 17 (withdrawal) which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (6)(c) the paying person or the receiving person may apply—

(a) …

(b) in Scotland, to the Auditor of the Sheriff Court or the Court of Session (as specified in the order) for the taxation of the expenses according to the fees payable in that court; or

(c) … (8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings;

6. However, this appeal is subject to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ("the TTFO"). Schedule 3 of TTFO contains transitional provisions which apply in relation to the new Tribunal structure. Schedule 3 paragraph 7(3) ("paragraph 7(3)") applies in relation to "current proceedings" such as the present appeal which commenced before 1 April 2009. It is that provision which gives this Tribunal jurisdiction to make a Direction such as that sought by the Appellant. Paragraph 7(3) reads:

"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 [1 April 2009] or

(b) disapply any provision of the [2009 Rules].

7. It is a matter of agreement that the procedural rules referred to in sub-paragraph (a) immediately above are the 1986 Rules. The relevant section of those Rules is Rule 29:

Award and direction as to costs

29(1) A Tribunal may direct that a party or applicant shall pay to the other party to the appeal or application —

(a) within such period as it may specify such sum as it may determine on account of the costs of such other party of and incidental to and consequent upon the appeal or application; or

(b) the costs of such other party of and incidental to and consequent upon the appeal or application to be taxed by a Taxing Master of the Supreme Court or a district judge of the High Court of Justice in England and Wales or by the Auditor of the Court of Session in Scotland or by the Taxing Master of the Supreme Court of Northern Ireland or by the Taxing Master of the High Court of Justice of the Isle of Man on such basis as it shall specify.

(2) Where a Tribunal gives a direction under paragraph 1(b) of this rule in proceedings in England and Wales the provisions of Order 62 of the Rules of the Supreme Court 1965 shall apply, with the necessary modifications, to the taxation of the costs as if the proceedings in the Tribunal were a cause or matter in the Supreme Court of Judicature in England.

(3) Where a Tribunal gives a direction under paragraph 1(b) of this rule in proceedings in Scotland the provisions of chapter 42 of the Act of Sederunt (Rules of the Court of Session) 1994 shall apply, with the necessary modifications, to the taxation of the costs as if those proceedings were a cause or matter in the Court of Session in Scotland.

(4) Where a Tribunal gives a direction under paragraph 1(b) of this rule in proceedings in Northern Ireland the provisions of Order 62 of the Rules of the Supreme Court (Northern Ireland) 1980 shall apply, with the necessary modifications, to the

taxation of the costs as if those proceedings were a cause or matter in the High Court of Northern Ireland.

(5) Any costs awarded under this rule shall be recoverable as a civil debt.

8. If this appeal, having been lodged before 1 April 2009, had been concluded before that date, then the 1986 Rules would have applied in relation to both procedure and expenses. Expenses awards under the 1986 Rules are in the discretion of the Tribunal and a Tribunal would normally award expenses in line with the expectations of the parties: the party which wins the appeal would normally expect an order of expenses in their favour. However, an Appellant who loses an appeal would not expect an award of expenses against them where the Sheldon Statement applies. There was no suggestion that there was anything in this case which put it outwith the ambit of Sheldon. It is reasonable to assume that HMRC would not have sought expenses from the Appellant in this case had the Appellant lost.

9. If this appeal had not been lodged with the Tribunal until after 1 April 2009, then the 2009 Rules would have applied. This appeal would then have been "allocated" under Rule 23. Where an appeal is allocated to the "Complex" category, then an Appellant has 28 days within which to "opt out" of the expenses regime. In terms of the 2009 Rules unless an appeal is allocated to the Complex category then there is no power to award expenses (unless a party has acted unreasonably or there is a wasted costs order and there is no suggestion of that in this case).

10. In summary if the 1986 Rules are applicable in this case then an order awarding the Appellant its expenses can be made, whereas if the 2009 Rules apply then no such order can be made. The default position, described by Warren J in the Upper Tribunal in *HMRC v Atlantic Electronics* (2012) UKUT 45 TCC ("*Atlantic 2")* is that the 2009 Rules will apply unless there is a Direction of the Tribunal pursuant to paragraph 7(3). Both parties agreed that paragraph 7(3) gives the Tribunal discretion as to the application of the appropriate costs regime. The wording of that paragraph is very simple indeed but it gives rise to difficult issues of principle in deciding what amounts to a fair and just approach to expenses in this, and any other case. The principles to be applied in exercising that discretion are nowhere set out in the legislation or in the Rules. However, the central question answered in *Atlantic 2* is "When is it right for the First-tier Tribunal to exercise its discretion to disapply, in transitional cases, the costs provisions of ….the 2009 Rules…and apply the ….1986 Rules?" In the lengthy judgement, which contained a detailed analysis of this issue, Warren J identified a number of the difficulties in exercising the discretion not least because the Tribunal has an unfettered power to act fairly and justly (paragraph 19). He went on to identify the jurisdiction of the Tribunal and the approach to the exercise of the discretion. Both parties relied on *Atlantic 2*. That case is binding upon this Tribunal insofar as the principles applicable to the exercise of the Tribunal's discretion are identified. That case also gave guidance as to the exercise of the discretion but that is persuasive rather than binding. *Atlantic 2* is referred to at greater length below, distinguished and founded upon. One important point that should be noted at the outset, however, is that *Atlantic 2* involved an Application for prospective costs rather than, as in this instance, a retrospective Application once the substantive proceedings had been completed.

11. Both parties referred to *Sri International v The Commissioners for Her Majesty's Revenue and Customs* FTC/72/2010 ("*Sri*") released 3 January 2012. HMRC's stance was that that decision was wrong and *Atlantic 2*, which was released later, should be preferred. The Appellant also referred to *Test Claimants in the Franked Investments Income Group Litigation v Commissioners of Inland Revenue and Anr* [2012] UKSC 19 ("*Test Claimants*").

History of the Appeal

12. The primary facts, and in particular the timing of the procedural stages in this case are not in dispute.

13. The Notice of Appeal in this case was dated 22 June 2006 and it related to a disputed decision dated 24 March 2006, reviewed but unchanged on 26 May 2006. That decision related to the imposition of a charge in respect of definitive Anti Dumping Duty (ADD) of £85,689.71 and related (Import) VAT of £14,995.70: a total of £100,685.41 notified in a Post Clearance Demand Notice (C18 duty demand). HMRC formed the view that steel wire rope (SWR) imported into the UK did not, for the purposes of the Community Customs Code have a place of origin in Dubai but rather a place of origin in India and was therefore subject to ADD whereas the Appellant contended that the SWR had undergone a manufacturing process in Dubai which was sufficiently substantial to change the country of origin. The basis for HMRC's stance was that there was an alleged contravention (as deemed by the European Anti Fraud Office (OLAF)) of Article 24 Council Regulation 2913/92 and therefore a customs debt under article 201 of the Council regulation. The review decision set out in some 31 paragraphs the technical reasons as to why the Respondents believed that the goods were liable for anti dumping duty.

12. On making the appeal the Appellant entered into negotiation with the Respondents in regard to a Hardship Application. The outcome of that was that on 25 October 2006 the Respondents issued a Certificate pursuant to Section 16(3)(a)(i) Finance Act 1994. The effect of that was that although the £100,685.41 remained outstanding, the appeal could proceed because HMRC were satisfied that they held adequate security from the Appellant.

13. At the outset, both parties sought an extension of time to comply with the standard procedural matters, and on 15 August 2006, the appeal was sisted at the Appellant's request, with the consent of HMRC, pending their appeal to, and the decision of, the European Court of First Instance Court in case reference T119/06 as that apparently related to the same issue. On the Application of the Appellants to the First-tier Tribunal dated 21 September 2010, to which HMRC took no objection, on the basis that the Judgment in Case T119/06 on 9 September 2010 was not relevant to these proceedings, that sist was recalled and HMRC lodged their Statement of Case on 31 December 2010. On 10 January 2011, HMRC requested a further sist of the proceedings in order to further consider matters and as no objection was received, the case was sisted. Further sists, with the consent of the Appellant, were sought by HMRC and granted on three further occasions. On 26 October 2011, before the then sist was due to expire on 31 October 2011, the Appellant sought a sist on the basis that there was a possibility of negotiation of resolution of the appeal. HMRC consented and a sist was granted until 31 January 2012.

14. On 23 January 2012, HMRC intimated both to the Tribunal and to the Appellants that they had "withdrawn the assessment under appeal". In consequence, on 24 January 2012 the Appellants applied to the Tribunal to withdraw their appeal "pending the parties agreeing the issue of costs". The parties did not reach agreement and that is the subject matter of this decision.

15. At the outset of the Hearing, Mr Gibbon sought leave to amend paragraph 26 of the written submission for the Appellants to delete the references to 11 August 2009. That was not opposed and it was a matter of agreement that, if HMRC had withdrawn the assessment at an earlier date, then the appeal would have been withdrawn earlier but always subject to an Application for expenses. The formal Application for expenses in the sum of £47,102.29 was accompanied by supporting documentation, which did not allocate the expenses between the periods before and after April 2009. It was not disputed that the Application for expenses was lodged within the time limits prescribed by the 2009 Rules.

The Arguments and Reasons for Decision

Summary of Arguments for the Appellant

16. The Appellant's primary arguments included the propositions that (a) both in EU and UK law, as at the date that the appeal commenced, the Appellant had had a legitimate expectation that if it succeeded then it could apply to the Tribunal for payment of expenses in terms of Rule 29 and that as a department of the State HMRC could have no such expectation, (b) that there was no time limit specified in paragraph 7(3) TTFO, (c) that although the impact of the decision in *Atlantic 2* is that consideration must be given to the elapse of time from 1 April 2009 that should not be considered to be authority for a general proposition that the Tribunal is barred from using its discretion simply because of elapse of time, (d) that looking to *Atlantic 2* and *Sri*, the complexity of an appeal suggests that a Direction should be made because an Appellant who has proceedings which straddle 1 April 2009 cannot have an appeal categorised as Complex and such an Appellant should be in the same position as an Appellant who commenced a case after that date, (e) that this case would have been categorised as Complex, and (f) the case should be dealt with fairly and justly.

Summary of Arguments for HMRC

17. HMRC's primary arguments included the propositions that (a) it was too late to request that the 1986 Rules apply, (b) the Appellant has no legitimate expectation in the public law sense or in accordance with the EU principle of legitimate expectations, (c) whilst it is accepted that there is no explicit time limit which applies to paragraph 7(3), *Atlantic 2* is authority for the proposition that delay beyond a reasonable time after 1 April 2009 is relevant to the exercise of discretion, (d) this case straddled 1 April in a substantial way, which failing it was in fact conducted almost entirely under the 2009 Rules, and (e) HMRC had a reasonable expectation that the 2009 Rules would apply in the absence of an Application by the Appellants for a prospective Direction.

Reasons for decision

18. As indicated in paragraph 10 above Warren J in *Atlantic 2* sets out the approach to be adopted in Applications for Directions involving paragraph 7(3). Firstly, and most importantly, "When it comes to exercising the discretion under paragraph 7(3) in making an order for costs, the Tribunal must, of course, act judicially and apply the correct principles whatever they may be" (paragraph 55).

19. He identifies a number of issues relevant to the exercise of that discretion and they may be summarised as follows:-

(1) The discretion cannot be exercised in an arbitrary manner (paragraph 48).

(2) The Tribunal should not lose sight of the fact that in exercising its discretion the Tribunal must do what is fair and just in all the circumstances of the particular case (paragraph 52). That discretion is wide (paragraph 27) and "there can be no hard and fast rule about which costs regime is to apply to 'current proceedings'." (paragraph 30)

(3) "The policy of taxpayer choice is not determinative of the costs regime which should apply although the taxpayer's preference is one fact which needs to be taken into account." (paragraph 33)

(4) Two policies can be identified in Rule 10 of the 2009 Rules. First, the taxpayer in a Complex case is given a choice as to the applicable expenses regime, and second that choice must be exercised at a very early stage thereby providing certainty. (paragraph 33)

(5) If *Surestone Limited v HMRC* [2009] UKFTT 352 ("*Surestone*") is correct, "current proceedings" cannot be allocated to the Complex category. It is the nature of the case rather than its categorisation as a Complex case, which is relevant to the exercise of discretion. (paragraph 38).

(6) Once a reasonable time after 1 April 2009 has passed, there is no longer a policy imperative to give a taxpayer a choice; on the contrary, the second policy of certainty suggests strongly that he should no longer have a choice. "He could not, seeing the wind blowing strongly in his favour, after the passage of time seek an order for costs when he actually wins his appeal" (paragraph 41).

(7) The third example to which Warren J refers is current proceedings where a substantial amount of work and considerable expense has been incurred both before and after 1 April 2009. In that instance, appeals to policy cannot resolve the problem of what is fair and just but that can be resolved by adopting different regimes. (paragraphs 45-46)

(8) If a single regime is to be imposed, a major factor in the exercise of discretion will be the relative amount of time and money spent on the proceedings before and after 1 April 2009. The actual duration of the proceedings "should carry very little weight compared with the actual work", although there will usually be a correlation. (paragraph 47)

(9) It is incumbent upon the party who wishes to operate in a cost shifting regime to make an Application disapplying Rule 10 and applying Rule 29 (paragraph 49).

(10) "Ideally, any Application to depart from the default regime ought to be done within a reasonable time after 1 April 2009." Passage of time, in light of the policy of certainty, will make it more difficult to obtain a prospective Direction. If neither party makes such an Application, certainty is to be found in the default regime and passage of time makes a departure from that more difficult to justify. (paragraph 50).

(11) The fact that either party could make a prospective Application confirming the default position under the 2009 Rules means less weight should be attached to delay, but this must not be pressed too far. There is something artificial and contrary to commonsense to expect a party to make an Application to confirm the default position (paragraph 51).

(12) The use of the expression "legitimate expectation", to describe the reasonable expectations of the parties as to the expenses position in a case which straddled 1 April 2009 was misleading, as such assumptions cannot amount to a legitimate expectation in the sense "in which it is understood in public law cases nor in the sense of the EU principle legitimate expectations". (paragraph 25)

(13) Both parties have a reasonable expectation that the relevant procedural rules, which for "current proceedings" are the 2009 Rules read with paragraph 7(3), will be applied and have the right to have them applied. Any expectation of the parties that the discretion in paragraph 7(3) will be exercised in a particular way must arise from the circumstances of the case and is not a separate factor to be taken into account over and above those circumstances. It is not the case that the discretion must be exercised in favour of the application of Rule 10 because there is a reasonable expectation that it would be: the reasonable expectation arises because of the way that the party is entitled to expect that discretion to be exercised. (paragraph 53-56).

(14) Delay beyond a reasonable time after 1 April 2009 is relevant to the exercise of discretion. After a reasonable time has expired, "parties who wait and see how the case develops before making an Application should not ordinarily expect their application to succeed." (paragraphs 66 & 68).

(15) Delay is something that falls to be taken into account, and where it is present, the reasonable expectation is that discretion will not be exercised to disapply the default position. (paragraph 66).

20. Warren J indicated that these various factors must all be weighed in the balance and none is predominant. Each case must be considered on its own facts and circumstances.

21. The clear implication of the reasoning in *Atlantic 2* is that it was generally desirable for a party to make a prospective Application in relation to costs rather than to wait until after the determination of the appeal, and that should be done as soon as possible after 1 April 2009. However, Sadler J in *Sri* states at paragraph 46 "I agree … that in most cases the proper time for a party to apply for a costs order is when the proceedings have been determined in its favour. I also agree with him that, in most cases, the proper time for that party, if it has engaged in proceedings to which paragraph 7 applies, to apply for a Direction under

paragraph 7(3) so that a costs order can be made, is when it can apply for a costs order. Only at that point, when matters have been resolved, is the Tribunal in a position to assess whether such a Direction is required, in all the circumstances of the proceedings and their determination, to ensure that those proceedings are dealt with fairly and justly." As indicated, HMRC argue that this decision is wrong and *Atlantic 2* is to be preferred. Of course, the Appellant relied on this case as authority for the proposition that it was wholly appropriate to make the Application for expenses when they did so and that a prospective Direction was not required.

22. Neither party applied for a prospective Direction. It is very clear why HMRC did not do so since, because the case could not be allocated as Complex there was no potential exposure to costs for their part. It is equally clear that the Appellant did not do so since they were unaware of the change in the expenses regime. In *Sri*, one of the factors that the Upper Tribunal found persuasive was that at all times the Appellant had made it explicit to HMRC that they would seek costs, if successful. That was not the case in this instance and the question of expenses only arose after the assessment had been withdrawn. However, *Atlantic 2*, at paragraphs 41 and 66 (see paragraphs 19(6) and (14) above), when referring to an Application once proceedings had been completed, does so in the context of a party waiting to see if they had been successful and effectively deferring matters until then.

23. Did the Appellant adopt a "wait and see" approach in regard to expenses? It seemed clear from the history of the appeal, the correspondence with HMRC on that point copied to the Tribunal and the submissions from the Appellant that the Appellants were wholly unaware that the costs regime had changed. The facts in this case are quite exceptional and very different to the other cases cited where there were substantive proceedings. A significant factor in this case is that the case was sisted for very long periods, both before and after 1 April 2009, and that primarily at the request of HMRC. In fact, in the five years and seven months from the Notice of Appeal to the withdrawal of the appeal the case was only "live" for less than two months at the outset and just over three months at the end of 2010. In the latter three-month period, HMRC were required to lodge their Statement of Case, which they did only days before requesting a further sist.

24. Further, the appeal was withdrawn as soon as the assessment was withdrawn. Mr Pate for HMRC very fairly confirmed that HMRC's "hands had been tied" and they had been unable to withdraw the assessment any earlier because they needed confirmation of the views of their colleagues in Europe. This is not a case where the outcome turned on the introduction of new evidence or indeed a substantive hearing or negotiations. There were no negotiations between January 2011 and January 2012. The proceedings moved at the very slow pace they did as a result of matters over which neither party had any control.

25. The amount of work and cost undertaken or incurred in the pre and post 1 April 2009 periods is an important factor to be weighed in the balance. In this case it was not possible to establish exactly what the position had been. On the one hand the Appellant argued that approximately 50% of the costs had been incurred after 1 April 2009 but on the other hand argued that, because of the repeated sists of the appeal, very little had been done after that date. HMRC were not prepared to agree that the allocation of costs or work was 50%. It was agreed that as a very rough guide the invoices probably could be divided as to 50% for each period but HMRC submitted that there was an overlap between the issues in the Tribunal and

in the European Court of First Instance so perhaps not all the invoices related to these proceedings. The Tribunal finds that, insofar as these proceedings could be called substantive, then, on the balance of probabilities, it may have been approximately 50% before and 50% after 1 April 2009. Regardless of the allocation of the invoices, both parties argued that this case straddled 1 April 2009 in a substantial way. That argument is accepted by the Tribunal in the particular circumstances of this case.

26. It was argued for the Appellant that because the appeal was lodged when the 1986 Rules were in force, it had a legitimate expectation of recovering its costs, were it to succeed in the appeal. HMRC referred to and relied on paragraph 25 of *Atlantic* 2 (see paragraph 19(12)) above. The Tribunal agrees that there can have been no legitimate expectation in the sense in which it is understood in public law or in the sense of the EU principle of legitimate expectations.

27. However, as can be seen from paragraphs 19 (12-13) above, the Tribunal must consider the reasonable expectations of the parties when exercising discretion. HMRC's position was very clear. They were aware of the change in the expenses regime, that paragraph 7(3) could be invoked and that it was possible to apply for a prospective Direction. In the absence of an Application for a prospective Direction, their reasonable expectation would have been that there would be no exposure to expenses in the event that they lost. Undoubtedly, the Appellants would have commenced proceedings in the reasonable expectation that they would be entitled to recover their expenses in the event that they were successful. However, that changed with the abolition of the VAT and Duties Tribunal. The Appellant was aware of the existence of the First-tier Tribunal, no later than September 2010 when they applied to the Tribunal to lift the sist. The Appellant argued that, because they had not been aware of the nuances of the new regime, they had a legitimate expectation, in this context, reasonable expectation, that expenses would follow success.

28. Their further arguments were that HMRC should have issued guidance on the change in the costs regime or that they were put at an unfair advantage because they were or should have been aware of the new regime. The Tribunal is not persuaded by those arguments. The Appellant was at all times professionally represented. The Appellant was aware, or should have been aware, that the VAT and Duties Tribunal had been abolished with effect from 1 April 2009. The Appellant applied to the First-tier Tribunal on 10 September 2010 for a lift of the sist. At that stage they were, or should have been, aware of the new regime. As from 1 April 2009 the default position was that Rule 10 of the 2009 Rules governed this appeal. Therefore, after that date, the assumption should have been that Rule 10 (and not Rule 29) would apply in the absence of a Direction from the Tribunal. Any expectation or assumption that the costs shifting rules of Rule 29 would apply should have ended on 1 April 2009. The Appellant could have made an Application for a prospective Direction on expenses when applying for the sist to be lifted. It did not. The fact that the Appellant was under a misapprehension as to the expenses regime cannot be relevant to this Tribunal. HMRC might reasonably have expected that in the absence of an Application for a prospective Direction the default regime would apply.

29. In the oral submission for the Appellant, reliance was placed on the judgement in *Test Claimants* to support, in broad terms, the contention that the Appellants legitimate (in this context reasonable) expectation that expenses could be awarded should not be effectively

retrospectively abridged thereby penalising the Appellant, for example, by the imposition of a *de facto* time limit. The reasoning behind that was that *Atlantic 2* effectively imposed a *de facto* time limit because of the issues identified in paragraph 19 above. Each case must be decided on its merits and in particular its own circumstances. Although delay is undoubtedly a factor to be weighed in the balance, it is just that ….a factor. It is clear from *Atlantic 2* that no one factor can predominate and that there are no hard and fast rules. Even if there is substantial delay, the import of that is that a departure from the default regime is “more difficult to justify” (paragraph 50). Further the wording in regard to parties who wait and see how a case proceeds is that their Application would not ordinarily be expected to succeed (paragraph 68). Even in those cases it is anticipated that success is a possibility. The Tribunal finds that there is not a *de facto* time limit.

30. The Appellant argued that the underlying substantive issues were complex and if the case had commenced under the 2009 Rules then it would have been categorised as Complex. HMRC’s stance on that was that they did not concede the point but that they were not hostile to that approach. However, the fact is that since the appeal did not commence under the 2009 Rules, it was not categorised as Complex. In *Hawkeye Communications Limited v HMRC* [2010] UKFTT 636 (“*Hawkeye*”), a case in which Judge Berner referred to and endorsed the rationale in *Surestone*, he stated at paragraph 6: "Cases that were current proceedings remain without categorisation under the 2009 Rules, unless a judge has made a specific direction in an individual case." There was no direction in this case. Further, for the reasons set out by Judge Berner at paragraph 10, with which this Tribunal agrees, a case that commenced before 1 April 2009 cannot be categorised as Complex. Lastly as is indicated above at paragraph 19(5), it is the nature of the case and not the classification that is relevant. At the outset of this appeal, partly because of the underlying complexity, the appeal was sisted. Evidently, given the reasons for the delay in withdrawing the assessment, it was not a straightforward matter. The Tribunal finds that the subject matter of this appeal was certainly Complex.

31. Whether or not the case would have been classed as Complex, had it been initiated after 1 April 2009, and it may very well be that it would have been so allocated, the issue is that it is impossible to say, even with the benefit of hindsight, whether the Appellant would or would not have exercised the right to opt out of the costs regime within the 28 day period from receiving notice that the case had been allocated to the complex category (Rule 10(1)(c)(ii)). The opt out would have had to have been exercised at a very early stage. Mr Gibbon was asked about opt out and indicated that he had no instructions as to what the Appellant’s stance on that might or would have been. In any event, since they were unaware of the 2009 Rules, any expression of opinion on that would necessarily have been with the benefit of hindsight. Therefore, although the Appellant placed great stress on the argument that the case would have been categorised as Complex and consequently would have fallen within the expenses regime for the 2009 Rules, the uncertainty on the question of opt out is a factor to be taken into account in the balancing exercise to be carried out in order to determine whether or not the Tribunal should exercise discretion in terms of paragraph 7(3).

32. It has never been contended by either party that there had been any explicit or implicit representation as to how expenses would be dealt with so this case is distinguished from *Sri* on that point: in *Sri* (at paragraph 48-49) it was found that there would be no prejudice to HMRC if a Direction were granted since they had always known that, if successful, the Appellant would seek costs.

33. It is open to the Tribunal to make a Direction allocating different expenses regimes to different periods if it considered that this would produce a just and fair result (paragraph 19(7)). The Tribunal could make such a Direction even if neither party argued for this approach. The Tribunal could not be "compelled to accede to the parties' wishes." However, Warren J also indicated that the alternative approaches should be considered and raised with the parties, "if only to be rejected in light of the parties' clearly expressed wishes." In correspondence between the parties, dated 23 April 2012, produced to the Tribunal, the Appellant referred to *Atlantic 2* and to the possibility of "costs" being split between the two regimes and intimated to HMRC, that they saw no reason for the costs to be split. HMRC's position was that there had been no Application to split expenses so it was unnecessary to comment other than also to refer to *Atlantic 2*. The Tribunal did decide to consider whether there should be an allocation between the two regimes since there are considerable attractions in that approach as it would reflect the reality of the two regimes. However, firstly, it was noted that neither party deemed such a "split" Direction to be appropriate and, indeed, the Appellant was very clear that it would be inappropriate. Secondly, since this case could never have been allocated as Complex simply because the Appeal started before 1 April 2009, if there were to be an allocation to both regimes the Appellant would effectively be prejudiced purely by the timing of the legislative change: the whole function of paragraph 7(3) is to deal with such potential unfairness. Accordingly, it was decided that the fair and just decision would be to impose a single regime in this case.

34. What then is that regime? In making the decision, the Tribunal has conducted a balancing exercise in order to weigh the questions of fairness and justice in all the circumstances of the case, including any prejudice or other consequences for the parties of making, or refusing to make, an order, all as identified in *Hawkeye* and *Atlantic 2*. As indicated, the facts in this case are quite exceptional. The length of the proceedings *per se* does not have a direct correlation to the work done or the expense incurred. However, allowing for public holidays, the appeal was not sisted, and therefore "live" for roughly the same length of time both before and after 1 April 2009.

35. It is a matter of agreement that there is no time limit in paragraph 7(3), however *Atlantic 2* is certainly authority for the proposition that delay is a material factor in deliberating whether or not to exercise discretion. In most cases, a delay of almost three years would almost certainly be fatal. The long periods of delay in this case were for reasons which were outwith the control of either party. If matters had been clarified in Europe earlier, the assessment would have been withdrawn and Application made for costs much earlier. Effectively, in the unique circumstances of this case, the appeal was dormant for a very long time. HMRC requested a further sist days after lodging their Statement of Case, in a holiday period and before the Appellant would have had the opportunity to consider same in detail. This was not a case of the Appellant waiting to see which way the wind was blowing. In August 2009 and February 2011 the Appellant asked HMRC to reconsider their position following the release firstly, of Council Regulation 283/2009 relating to Usha Martin Limited and secondly, the Judgement in *HEKO Industrieerzeugnisse GmbH* which they considered to be on all fours with this appeal. If anything, as proved to be the case, these bolstered their perceived position. HMRC were unable to respond until January 2012 since they required confirmation from their European colleagues.

36. Of course, the Appellant could have made an Application for a prospective Direction in September 2010, or indeed at any time, but did not do so because of a lack of knowledge and that lack of knowledge is not something with which this Tribunal can be concerned. The arguments for the Appellant to the effect that there should have been guidance issued or latitude extended are not accepted for the reasons set out in paragraphs 27 and 28 above. However, the reality of the situation in this most unusual case is that after 1 April 2009, apart from approximately three months, which included the Christmas period, the case was dormant whilst HMRC were awaiting clarification, which clarification they were powerless to expedite. As soon as HMRC withdrew the assessment, for reasons which have not been communicated formally to the Appellant, but which related to clarification of OLAF's views, the Appellant immediately informally intimated an intention to seek expenses. Subsequently, albeit, not with the appropriate statutory references, the Appellant formally sought expenses timeously. In these circumstances, solely because of the facts that the case was sisted for almost the entire period and because of the reasons for those sists, the Tribunal finds that there was not an unreasonable delay in seeking expenses.

37. In summary, the default position can and should be displaced where to do so ensures that the proceedings are fair and just. In this instance, for all the reasons set out above, the Tribunal finds that (a) the proceedings "straddled 1 April 2009 in a substantial manner, (b) it would not be fair to allocate expenses between the regimes, and neither party seeks to have the expenses, if any allocated, (c) the perceived delay in these proceedings was not the fault of either party, (d) the reality is that the effective delay in the particular circumstances of this case was only a matter of approximately three months, so the justification for the delay is that the case was effectively dormant for most of the time, (e) since the passage of time has been largely discounted, it is not as material as it might be in other circumstances. Looking to the totality of the evidence, and the unique factual background, the Tribunal weighed the other factors described above, such as the complexity, the fact that it was HMRC who requested most of the sists, that apart from a prospective Application in regard to expenses which would not have impacted on the proceedings themselves, that there was nothing the Appellant (or indeed HMRC) could do to expedite matters. The *status quo* was exactly as it had been at the outset. The Tribunal has decided that in order to achieve fairness and justice, in the particular and unusual circumstances of this case, the 1986 Rules should apply and that therefore the Appellant's Application should be granted.

38. HMRC objected to the quantum of the claim for expenses *inter alia* on the basis that it was not clear which elements were (a) truly agent and client items, and (b) party and party items. Further, they averred that there was an overlap between the issues in the Tribunal and in the European Court of First Instance. Accordingly, they invoked Rule 29(1)(b) if the 1986 Rules applied and sought that the expenses be taxed by the Auditor of the Court of Session. Although the Appellant opposed that motion, the Tribunal finds that the claim submitted is of a magnitude and complexity which makes it appropriate to be remitted to the Auditor.

Conclusion

39. The Appellant's Application for a Direction that Rule 29 of the 1986 Rules be applied to these proceedings and consequently that Rule 10 of the 2009 Rules be disapplied, pursuant to paragraph 7(3), is granted.

40. Accordingly, HMRC shall pay the Appellant's expenses incidental to and consequent upon this appeal, which expenses will be as taxed by the Auditor of the Court of Session to whom the account of expenses for the Appellant is remitted for taxation.

41. 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.

ANNE SCOTT, LLB, NP
TRIBUNAL JUDGE

RELEASE DATE: 20 December 2012