## Clarification given on when new costs rules in tax cases can apply

## Prizeflex v The Commissioners for HMRC (Tribunal Ref: LON/2008/1942)

On the 12th October 2010 Judge Roger Berner ruled in favour of the Appellant, represented by Jeffrey Green Russell, at an interim hearing on the issue of which costs regime should apply to the proceedings. Judge Berner held that even though the appeal had been commenced before the 1<sup>st</sup> April 2009 the costs regime under the Tribunal Procedure (First-tier Tax Tribunal) (Tax Chamber) Rules 2009 ("the New Rules") should not apply. This is an important judgment since it paves the way for Appellants, who began their appeal before the 1st April 2009, to take advantage of the new costs regime.

The Appellant's appeal concerns the denial of input tax. The Appellant is a trader and the Commissioners had denied it its VAT repayment alleging that the Appellant ought to have known that its transactions were connected to a complex MTIC fraud. The Appeal had been commenced before the VAT Tribunal and was originally governed by the Value Added Tax Tribunal Rules 1986 (the Old Rules). Under the Old Rules the unsuccessful party was required to pay the other side's costs. Over the course of lengthy appeal proceedings it was common for the Commissioners' costs to rise at an alarming rate. This had made conducting this sort of litigation increasingly risky for Appellants.

On the 1st April 2009 the VAT Tribunal was abolished, all of its functions were transferred to the First-tier Tax Tribunal and the New Rules came into force. Under the New Rules, in cases such as this, which had been allocated to the Standard category, each party would pay its own costs. The costs regime under the New Rules has the advantage for Appellants that they are better able to understand their potential exposure in fighting this kind of litigation.

Because this case was commenced before, but not concluded by, the 1<sup>st</sup> April 2009, these proceedings are classified as "current proceedings" under the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 "the Transfer Order". In the case of current proceedings the Tribunal has a discretion to disapply any of the New Rules and apply any of the Old Rules under the Transfer Order.

In April 2010 the Appellant and the Commissioners failed to agree which costs regime should apply to the proceedings. The Appellant wanted the costs regime under the New Rules to apply whilst the Commissioners wanted that regime to be disapplied and wanted the costs regime under the Old Rules to be applied. The Tribunal thus had to determine whether or not to exercise its discretion.

Following submissions from counsel for both parties, Judge Berner gave a detailed judgment. He held that the New Rules were the prima facie applicable rules to these proceedings subject to a discretion to disapply them. This discretion is a derogation from the general position and the mere fact that proceedings qualify as "current proceedings" does not justify disapplying the New Rules. Further, the New Rules should only be disapplied if the Tribunal discerns unfairness or injustice.

In determining whether there was any unfairness of injustice caused, Judge Berner analysed the position in the following way.

The Appeal was commenced before the 1<sup>st</sup> April 2009 and so at this time both the parties had a legitimate expectation that, if successful, they would be able to recover their costs. The Respondent's legitimate expectation was thus a matter in favour of exercising the discretion.

However, against this there were the following countervailing considerations:

1. It is important to examine why the New Rules came into force. Although, there is no general principle that disapplying the New Rules would always be a retrograde step, the purpose behind the introduction of the New Rules is significant (Atec Associates Ltd v The Commissioners for HMRC [2010] UKUT 176 (TCC) distinguished). The New Rules on costs came into force to ensure that Appellants were not deterred from accessing the Tribunal.

2. The extent to which the proceedings have been conducted in accordance with the New Rules is relevant. Here, there was meaningful progress in this appeal before the 1<sup>st</sup> April 2009, but considerable steps are still to be taken and the bulk of the costs have been and will be incurred after the 1<sup>st</sup> April 2009.

3. Most importantly, because the New Rules are prima facie applicable to current proceedings, then absent an application from the Respondents to have the costs regime under the New Rules disapplied, the Appellant had a legitimate expectation from the 1<sup>st</sup> April 2009 that it would not be liable for costs in the event that its appeal was unsuccessful. This legitimate expectation lasted until April 2010 when the Appellant became aware that the Respondents would not accept that the costs regime under the New Rules applied to these proceedings. The Appellant's legitimate expectation that the costs regime under the New Rules applied to these proceedings.

Rules applied to the proceedings thus lasted for 12 months (April 2009 until April 2010) in comparison to the Respondent's legitimate expectation that the costs regime under the Old Rules would apply, which only lasted for 7 months (September 2008 until April 2009).

Judge Berner, thus, held that in these circumstances it would not be fair or just to disapply the costs regime under the New Rules. Accordingly, it was directed that the costs regime under New Rules should not be disapplied.

In many other cases, Appellants have simply agreed to disapply the costs regime under the New Rules in favour of the Old Rules. Clearly, the Commissioners favour the Old Rules but Appellants are likely to have a different view.

The court noted during argument that it had become standard practice, perhaps wrongly, for the parties in current proceedings to agree to disapply the costs regime under the New Rules. This case underlines the fact that Appellants need to be aware of how the New Rules affect their appeals and what action they can take.

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