Hawkeye Communications Limited v The Commissioners for HMRC

Tribunal Appel Ref: LON/2008/1475

On 10 December 2010 Judge Berner handed down an important ruling on the question of what costs regime should apply to transitional appeals. This is a case in which HMRC have withheld a VAT repayment claim by the trader alleging that the trader knew or ought to have known that its transactions connected back to a fraudulent tax loss.

HMRC had sought a ruling applying Rule 29 of the Value Added Tax Tribunals Rules 1986 ("the old Rules") thus in the process disapplying Rule 10 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 ("the new rules").

Any appeal that commences after 1 April 2009 will automatically be governed by the new rules. However for appeals, such as this, which commenced prior to that date the Tribunal is empowered to determine which rules shall apply to ensure that proceedings are disposed of fairly and justly. This power is conferred by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ("the TTF order").

In summary were the old Rules to apply the losing party would have been liable to pay the costs of the successful party. Indeed HMRC had indicated in the Statement of Case that it was their intention to seek costs if the appeal was refused. Under the new rules the circumstances in which costs can be awarded are much more tightly circumscribed and are confined to cases allocated to the Complex Category or where the Tribunal determines that wasted costs should be awarded or where a

finding has been made that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings (rule 10(1)(a) and (b)).

In this case the Appellant had been informed by the Tribunal's officers that the appeal had been allocated to the Standard Category. However Judge Berner indicated that this was an error and that in fact categorisation of cases pursuant to rule 23 of the new rules only applied to appeals that have commenced after 1 April 2009. Judge Berner provided a recital of the appeal's history before the Tribunal and referred to a directions hearing before Judge Hellier on 19 July 2010. At that hearing a question arose as to the applicable costs regime and a direction was made allowing for application for further directions on the point.

HMRC, through Mr Biggs, made five submissions in support of their application: i. the appeal had commenced when both parties were at risk with regard to costs; ii. the majority of work in the appeal had occurred before 1 April 2009; iii. had the case commenced after 1 April 2009 it would have been categorised as Complex allowing the parties to respond accordingly; iv. if the appeal is refused there is good reason to hold the Appellant to account in costs; and v. the Appellant had not turned its mind to the question of costs until July or August 2010.

The Tribunal rejected the suggestion that the majority of work in the appeal had been completed prior to 1 April 2009 and recited Mr Lakha Q.C.'s argument for the Appellant that the new rules were drafted in accordance with the overriding objective namely that cases be disposed of fairly and justly (rule 2 of the new rules) and that one purpose of the introduction of the new costs regime was to reassure putative appellants

as to their potential liability in costs thus ensuring that meritorious appeals are not abandoned because of financial uncertainty.

Judge Berner acknowledged that the Tribunal was called upon to perform a balancing exercise which had to take account of the legitimate expectations of the parties. He concluded that the majority of the work in the appeal would be conducted after 1 April 2009 and that from that date, in the absence of any application by HMRC to apply the old rules, the Appellant would have held a legitimate expectation that the appeal would be governed by the new rules. In reaching this conclusion the Tribunal dismissed a claim by HMRC that the timing of an application had no bearing on its determination.

The Tribunal rejected the notion that any consequences flowed from the contention that the case would have been allocated to the Complex Category had the appeal commended after 1 April 2009. This is because under the new rules the appellant can request an opt-out from costs liability even when a case is categorised as Complex. The Tribunal also rejected the suggestion that MTIC cases as a rule were more deserving of costs awards instead determining that every case had to be judged on its merits.

The Tribunal acknowledged an argument advanced by HMRC that potentially the old rules could apply to the pre-1 April 2009 work on the case and the new rules to all work since. However it concluded that on balance the Appellant would suffer greater prejudice and more wrong would be done to its legitimate expectation if the old rules were applied. It referred to the fact that HMRC had provided no explanation for its failure to seek disapplication of the new rules at an earlier stage. For the

same reason Judge Berner felt that it would not be fair on the Appellant to impose a split costs regime under both the old and the new rules.

The Tribunal did bear in mind that refusing to exercise its discretion to apply the new rules meant that HMRC would not be at risk of costs should the appeal succeed.

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For the respondent: Stuart Biggs

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