# TC03020

**Appeal number: LON/2007/00962**

***COSTS — appellant unsuccessful before First-tier Tribunal — permission to appeal to Upper Tribunal obtained — appeal lodged but later withdrawn — whether appellant should pay respondents' costs of First-tier Tribunal appeal — appeal begun before VAT and Duties Tribunal — no order in respect of costs or application of rules made on transfer to Tax Chamber — appeal not categorised — whether "old" rules should apply — yes***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**MYNT LIMITED** **Appellant**

**- and –**

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

**TRIBUNAL: JUDGE COLIN BISHOPP**

**Sitting in public in London on 7 October 2013**

**The appellant was not represented**

**Ms Catherine Addy, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the respondents**

## DECISION

1. The appellant, Mynt Limited ("Mynt") appealed against a decision of the respondents, HMRC, refusing credit for input tax incurred by Mynt in the purchase of mobile phones it sold to overseas customers. HMRC's reason for the refusal was that they considered Mynt knew or ought to have known that its transactions were connected with fraud: it was what is commonly known as an MTIC appeal.

2. The appeal was brought in May 2007, when the jurisdiction in such appeals lay with the VAT and Duties Tribunal. It was not determined, however, until March 2011, by which time the VAT and Duties Tribunal had been abolished and its jurisdiction transferred to this Chamber of the First-tier Tribunal. The appeal was dismissed; the tribunal agreed with HMRC that Mynt, by its director, knew or should have known of a connection to fraud.

3. Mynt then obtained permission to appeal to the Upper Tribunal but, for reasons which are immaterial for present purposes, withdrew that appeal. The decision of this tribunal is, therefore, final.

4. In July 2011, while Mynt's application for permission to appeal was in progress, HMRC made an application for a direction that Mynt pay their costs of the appeal before the VAT and Duties Tribunal and this tribunal. The decision released in March was silent on that subject. Once Mynt had secured permission to appeal the application was held in abeyance while the onward appeal to the Upper Tribunal was pursued but, now that the appeal has been withdrawn, HMRC seek to have their application determined. It came before me for that purpose on 7 October 2013. Mynt was not represented but its director had written to the tribunal indicating that he would not attend and asking the tribunal to take account of his argument that there is no jurisdiction to make the direction HMRC seek: I will return to that argument in due course. I concluded that it was in the interests of justice to hear the application in the absence of any representative of Mynt, and I did so. HMRC were represented by Ms Catherine Addy of counsel.

5. The VAT and Duties Tribunal had a full "costs shifting" power—that is, it could direct that one party pay the costs of the other if it was appropriate to do so. There was no restriction on the exercise of the power, save for the ordinary constraints of judicial discretion. The relevant rule at the time was rule 29 of the Value Added Tax Tribunals Rule 1986 (SI 1986/590) ("the 1986 Rules"), which was in these terms:

> "(1) A tribunal may direct that a party or applicant shall pay to the other party to the appeal or application—
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> (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
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> (b) the costs of such other party of and incidental to and consequent upon the appeal or application to be assessed … by way of detailed assessment …."

6. It was customary for the VAT and Duties Tribunal to award costs to successful appellants and, with occasional exceptions, HMRC did not resist such directions. As a matter of policy and practice HMRC refrained from seeking costs directions in many cases when they were successful, but there were certain classes of case, of which MTIC appeals were one, in which they normally sought a direction for the payment of their costs if they won.

7. When the jurisdiction was transferred to this Chamber, however, the rules relating to costs directions changed. The starting point is now s 29(1) and (2) of the Tribunals, Courts and Enforcement Act 2007, which provide that costs are to be in the discretion of the tribunal and that the tribunal has "full power to determine by whom and to what extent the costs are to be paid". Pausing there, s 29 broadly replicates rule 29. However, s 29(3) provides that "Subsections (1) and (2) have effect subject to Tribunal Procedure Rules." In this Chamber the relevant rules are the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("the 2009 Rules"), and in particular rule 10(1) which, so far as material to this case, provides that:

> "(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
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> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
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> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;
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> (c) if—
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> (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
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> (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; …."

8. Thus, ordinarily, each party to an appeal bears its own costs, whatever the outcome. The tribunal may make a costs direction only in limited circumstances: it may make a wasted costs order in accordance with s 29(4) of the 2007 Act (which does not arise in this case); it may make a direction where one party has behaved unreasonably (a possibility to which I shall return at a later stage); or it may do so when an appeal has been allocated in accordance with rule 23 of the 2009 Rules to the Complex category, and the taxpayer has not "opted out" of the costs-shifting regime.

9. No direction was made when this appeal was transferred from the VAT and Duties Tribunal to this Chamber that it should be allocated to any category and, since there was no provision in the 1986 Rules for the categorisation of cases, there was no transitional measure which might have led to the same result. Nor did either party apply for a direction that the 1986 Rules, and in particular rule 29, should be applied to the appeal in place of rule 10. Such a direction might have

been made in accordance with para 7(3) of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) ("the 2009 Order"), which applies to "current proceedings", meaning appeals pending before the VAT and Duties Tribunal (among others) immediately before the transfer of its jurisdiction on 1 April 2009 but not concluded before that date, of which this appeal was one. It reads as follows:

> "The tribunal may give any direction to ensure that proceedings are dealt with fairly and justly and, in particular, may—
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> (a) apply any provision in procedural rules which applied to the proceedings before the commencement date; or
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> (b) disapply any provision of Tribunal Procedure Rules."

10. In addition the parties did not, at least overtly, change their manner of conducting the appeal following the transfer in order to reflect the fact that new rules had come into effect. On 18 November 2008—before the transfer to this Chamber, but when they would have been well aware that it was imminent—the parties agreed directions, endorsed by the VAT and Duties Tribunal on 20 November, providing for the conduct of the appeal to its eventual hearing which, as the directions contemplated, would take place after 1 April 2009. Those directions included two provisions in respect of costs: that HMRC were to provide the document bundles for the hearing, and arrange for transcription, on Mynt's then representatives' undertaking to pay half the cost of their doing so; and that "costs be in the case"—that is they should be paid by the loser to the winner. Further directions were made in May 2009, shortly after the transfer, varying the earlier directions in some respects but repeating, without change, the provisions relating to costs. Yet more directions were made in June and July 2009, effecting further amendments to the earlier directions. The provisions in respect of bundles and transcription were not set out again, but both sets of directions included a provision that costs be in the case (or cause, which has the same meaning). Throughout that time Mynt was represented by chartered accountants and counsel. HMRC's skeleton argument for the hearing of the appeal, served on or about 27 April 2010, stated that they would apply for a costs direction if successful, necessarily on the basis that rule 29 was to apply to the proceedings. I was not shown a copy of Mynt's skeleton argument and deduce there may not have been one, as it was represented at the hearing by its director rather than by a lawyer or accountant; the accountants who had previously represented it had by then ceased to do so. Thus I do not know whether Mynt had adopted a formal position in respect of costs at that stage, and in the absence of any evidence or submission to the contrary assume that it had not. The hearing began on 4 May and concluded, after a number of interludes, on 7 October 2010. As I have said, the decision is silent about costs and I deduce that the matter was not addressed at the hearing despite what was said in HMRC's skeleton argument.

11. HMRC's case now is that, against a background of both parties having proceeded on the footing that costs would follow the event, and when it can therefore be fairly assumed that, had it been successful, Mynt would have sought a direction for costs in its favour, it would be wrong to allow it, now it has lost the appeal, to resist a direction for costs on the technical ground that no direction

formally applying rule 29 of the 1986 Rules has been made. Alternatively, it behaved unreasonably in pursuing the appeal when it, or more particularly its director, knew or should have known it had no merit, in the light of seriously adverse comments made about the director's truthfulness and knowledge when he gave evidence in criminal proceedings relating to other participants in MTIC trading, when the director declined to give evidence at the hearing of the appeal, and when the First-tier Tribunal in this case decided he had actual knowledge of the connection between Mynt's transactions and fraud.

12. Mynt's argument, as I have said, is that I do not have the jurisdiction to make the direction HMRC seek: it says that rule 10 of the 2009 Rules applies to any case proceeding before this tribunal and, since the appeal was not allocated to the Complex category, a costs direction may not be made. It refers, in support, to the decision of Judge Kempster in this tribunal in *Hillcraft Trading Limited and Express Computers UK Limited v Revenue and Customs Commissioners* [2013] UKFTT 002 (TC), a case which I shall examine in more detail later. Mynt's fundamental proposition, that there is no jurisdiction to make the direction sought, however, does not correctly reflect either the legislative provisions or, as will become apparent, what Judge Kempster said. As I have already explained, para 7(3) of the 2009 Order does allow me, if it is fair and just to do so, to apply rule 29 of the 1986 Rules to the appeal. It is not a necessary condition of the application of that provision that a direction be made at any particular time, and it may be made now if I am persuaded that it is the appropriate course; that was also the view of the President of the Tax and Chancery Chamber of the Upper Tribunal, Warren J, in *Atlantic Electronics v Revenue and Customs Commissioners* [2012] UKUT 45 (TCC), [2012] STC 931 at [24].

13. The first question I must answer therefore is whether it is fair and just to apply rule 29 of the 1986 Rules to the appeal, either throughout or for part of the period for which it proceeded. The second, if the answer to the first is no, or yes but only in respect of part, is whether HMRC have made out their case that pursuit, or continued pursuit, of the appeal amounts to unreasonable conduct in the sense meant by rule 10(1)(b) of the 2009 Rules.

14. How this tribunal should approach an application for costs in cases of this kind—that is, where no direction has been made in advance that rule 29 of the 1986 Rules should apply, but both parties have proceeded without apparently giving the fact that the rules relating to costs had changed any thought—was considered by Warren J in *Atlantic Electronics*. That case, too, was an MTIC appeal begun before the VAT and Duties Tribunal, transferred to this Chamber on 1 April 2009, in which orders for costs in cause had been made in respect of interlocutory proceedings although no direction had been made in accordance with para 7(3) of the 2009 Order. As here, neither party appears to have given the effects of the change of rule in respect of costs any thought at or about the time the transfer took place; at least, there is no evidence of correspondence between them on the subject. HMRC had made it clear in their statement of case (served before the transfer) that they intended to seek a direction in their favour if successful; the report is silent about whether there was a corresponding intimation in the notice of appeal. There was some administrative confusion about the categorisation, or purported categorisation, of the appeal in accordance with rule

23 of the 2009 Rules but nothing turns on that as the appeal (as in this case) was not in fact allocated to any category. In October 2010—thus some 18 months after the transfer to this Chamber—the appellant applied for a direction that rule 10 should not be disapplied. HMRC opposed the application, and made an application of their own for a direction that costs-shifting in accordance with rule 29 of the 1986 Rules should apply. The First-tier Tribunal rejected that application and, inferentially, allowed the appellant's application.

15. Warren J dismissed HMRC's appeal against that determination, essentially on the ground that it was one well within the bounds of a reasonable exercise of judicial discretion, although he made it clear at [74] that, had he been exercising a first-instance jurisdiction, he too would not have made the direction sought by HMRC but might have considered making different directions for the periods before and after the transfer. In doing so he examined, in some detail, the policy and rationale behind the changes made in the costs regime by the 2007 Act and the 2009 Rules, making the, in my view important, observation at [54] that no party to an appeal now before this Chamber but formerly before the VAT and Duties Tribunal could seek to rely on the 2009 Rules without regard to the existence of para 7(3) of the 2009 Order. At [20] he observed that the wording of para 7(3) is such as to permit the tribunal to make a direction disapplying any or all of the 2009 Rules and applying any or all of the 1986 Rules, but not one applying the 2009 Rules and disapplying the 1986 Rules. In other words, there must be a positive decision to apply the 1986 Rules and it follows that, absent a direction pursuant to para 7(3) or agreement to the same effect between the parties endorsed by the tribunal, the 2009 Rules apply automatically to current proceedings, and do so despite the fact that for what may have been a lengthy period they were governed by the 1986 Rules and particularly rule 29.

16. As I have said, Warren J suggested that in appropriate circumstances the tribunal might make different provision for the periods before and after 1 April 2009, a course which might address that last point. Ms Addy accepted, without much enthusiasm, that I could adopt that course here; her argument was that the bulk of the costs had already been incurred before 1 April 2009, even though the hearing took place later, and that such a division would be artificial. I will return to this issue later.

17. There is an important difference between *Atlantic Electronics* and this case in that, there, the parties were each seeking a prospective order at a time when the eventual outcome of the appeal could not be predicted, whereas here the application was made only after the appeal had been concluded. Thus although the analysis of the change in the rules undertaken by Warren J represents useful guidance, it does not directly provide an answer to the problem which faces me. The essential question in this case is not what should be the position in the future, but how should the costs rules be applied, after the event and when the outcome is already known, to parties who did not previously address themselves to the matter by seeking or agreeing a prospective direction.

18. That was nearly, but not quite, the position in *Hillcraft Trading*. That was also an MTIC appeal, started in the VAT and Duties Tribunal and transferred to this Chamber on 1 April 2009. As in this case and in *Atlantic Electronics*,

directions had been made both before and after the transfer providing for "costs in case", and as in this appeal neither party had applied for a prospective direction in respect of the applicable costs regime. Shortly before the hearing began HMRC notified the taxpayers' representatives that they would be seeking to have rule 29 of the 1986 Rules applied, a course to which the representatives, even if a little ambiguously, seem to have assented. Nevertheless, it is apparent that no formal direction or agreement to that effect was made.

19. After the hearing had been concluded, but before the decision of the tribunal was released, the taxpayers sought a direction that rule 29 of the 1986 Rules, rather than rule 10 of the 2009 Rules, should apply to the appeal in order that they could recover their costs if they were successful. The hearing of the application was deferred until the decision in *Atlantic Electronics* had been published and in the meantime the *Hillcraft Trading* tribunal's decision, in the taxpayers' favour, was released. HMRC opposed the making of the direction—taking, in effect, the reverse position from that they advance now. Judge Kempster refused the taxpayers' application.

20. In doing so he relied heavily on various comments made by Warren J in *Atlantic Electronics*. Despite the differences between that case and this the essential question, there as here, was how one is to reconcile, in a case which has straddled the transfer from the VAT and Duties Tribunal to this Chamber, the fact that before 1 April 2009 the parties could assume that there was likely to be a costs-shifting direction, while from that date on, unless the appeal was categorised as Complex or there was a direction in accordance with para 7(3), they must assume that each side would be required to bear its own costs.

21. Warren J addressed this question at [25] and [26] of his decision in *Atlantic Electronics*:

> "[25] There has been some debate before me about what has been referred to as the default position, namely that the 2009 Rules should apply with the result that a no costs shifting regime applies. That is said to be the default position because the 2009 Rules apply unless they are disapplied. Linked with this is the suggestion that a taxpayer in current proceedings had a 'legitimate expectation' both before and after 1 April 2009 that costs would be dealt with in accordance with Rule 10. I place those words in quotation marks because the phrase is used in the Decision [of the First-tier Tribunal] but not in the sense in which it is understood in public law cases nor in the sense of the EU law principle of legitimate expectations.
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> [26] It is important to treat with some care both what is said to be the default position and what rules the parties to an appeal might reasonably have expected would apply to an appeal. No doubt one party might, by their actions or inactions and by what they say or do not say, lead the other party to believe that the first party would seek to apply one set of rules rather than the other, giving rise to some sort of reasonable expectation on the part of the second party that he could rely on the first party's representation. Matters of that sort can certainly be taken into account by the tribunal when it comes to exercising its discretion in relation to costs."

22. He then went on to consider the differences between cases started a few days before 1 April 2009 (what he called "the first example"), cases started long

before that date but concluded shortly after ("the second example"), and cases in which costs had been incurred before and after that date in roughly equal proportions ("the third example"), in order to demonstrate that it would be absurd and unfair to apply the 2009 Rules in all of those situations. Then he said this:

> "[37] … I have expressed the view that it would be odd in the first example if there were radically different results depending on whether the appeal was started just before or just after 1 April 2009. It is important here to identify what does, and what does not, fall within the policy of the 2009 Rules. One policy is to give the taxpayer in a Complex case a choice as to the applicable costs regime, a choice which a taxpayer must make at an early stage of the proceedings. If he does not elect to opt out, the appeal falls, by default, within a costs shifting regime. The tribunal is not, it is to be noted, left with a power, at the end of the proceedings, to decide whether to apply a costs shifting regime or not. So, it seems to me, there is a second policy which is to provide certainty about the applicable costs regime at an early stage of the proceedings. There is, of course, a reason for this second policy apart from merely putting the parties into a position so that they know where they are. If a taxpayer was able to exercise his right of election at a late stage, or even [wait] until the result of the appeal was known, he would be able to elect for the regime which he knew was the more favourable to him; this would amount, effectively, to one-way costs shifting which was obviously never intended….
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> [38] The first of those two policies has been given effect to in the 2009 Rules as a matter of drafting by linking the taxpayer's right of election to the actual allocation of the appeal as a Complex case. The second policy has been given effect to by providing costs shifting as the default regime. Those policies would have been given equal effect if the default position had been a no costs shifting regime with the right for the taxpayer to opt into a costs shifting regime. I rather doubt, therefore, that it can be said that the default regime under the 2009 Rules reflects a policy which goes beyond giving the taxpayer a choice and providing for certainty. But if there is a policy which goes beyond that, it must surely be that cases which are in their nature complex should attract a costs shifting regime. The 2009 Rules themselves are formulated in the context of cases which commence in the Tax Tribunal where all cases will fall within one of the four categories and will be allocated accordingly. As I have said, the fact that current proceedings cannot be allocated at all, if *Surestone Ltd* is correct, does not mean that those proceedings are not complex but only that they cannot be allocated as a Complex case. It is, therefore, the nature of the case as complex, rather than its categorisation as a Complex case, which is relevant to the exercise of the paragraph 7(3) discretion either to displace or to fix in place the default regime in current proceedings under Rule 10 (*ie* no costs shifting)."

23. The case referred to in [38] is *Surestone Ltd v Revenue and Customs Commissioners* [2009] UKFTT 352 (TC), in which my predecessor as President of this Chamber said that

> "Rule 23 [of the 2009 Rules] and the allocation of appeals and 'application notices' has no application to 'current proceedings'; it applies only to appeals or appeal notices (*eg* to extend time for appealing) that have been made from 1 April 2009 onwards. There is no power in paragraph 7(3) of

> Schedule 3 to the [2009] Order to make rule 23 apply in order to enable an allocation of an appeal to the complex category."

24. Warren J was evidently doubtful about that proposition. It was, however, also the conclusion reached in this tribunal by Judge Berner in *Hawkeye Communications Ltd v Revenue and Customs Commissioners* [2010] UKFTT 636 (TC), [2011] SFTD 250, a decision which, in other respects, Warren J heartily approved in *Atlantic Electronics.*

25. His statement in [38] that "cases which are in their nature complex should attract a costs shifting regime" suggests that Warren J was of the opinion that in cases begun shortly before 1 April 2009 which, had they been begun after 1 April 2009, would have been categorised as Complex, a tribunal faced with an application for the exercise of the para 7(3) discretion by applying rule 29 of the 1986 Rules should ordinarily agree to do so, unless the taxpayer made it clear, reasonably promptly after transfer, that he wished the appeal to be excluded from a costs-shifting regime. A direction pursuant to para 7(3) would be necessary because, if *Surestone Ltd* is correct and it was not possible for such an appeal to be allocated to the Complex category, or if, as in *Atlantic Electronics* and in this case, the appeal was not so allocated as a matter of fact, the costs shifting regime of rule 10 could not be applied to it: as Warren J pointed out, the costs-shifting regime of rule 10 of the 2009 Rules, and with it the right of the taxpayer to opt out, is conferred by rule 10 only in respect of cases which have been allocated to the Complex category; there is no provision by which it can be applied to appeals which cannot be or have not been so allocated.

26. The taxpayer would not be prejudiced by exposure to a costs-shifting regime against his will:

> "[39] Consider, then, an application (whether to fix a costs shifting regime or a no costs shifting regime) made by the taxpayer in the first example within a reasonable time after 1 April 2009. The two policies of the 2009 Rules which I have identified would be properly reflected by the making of the direction sought by the taxpayer. Save in the most exceptional circumstances (which it is not easy to envisage), I would expect the tribunal to make a prospective direction reflecting the taxpayer's choice."

27. In such circumstances the taxpayer would be left in, broadly, the same position as if he had brought his appeal after 1 April 2009. He would have the choice between costs-shifting or no costs-shifting, and the tribunal would, save in exceptional circumstances, respect his choice just as, in proceedings brought after 1 April 2009 and allocated to the Complex category, it is the taxpayer, and the taxpayer alone, who is able to dictate the costs regime which is to apply. Warren J then considered different situations:

> "[40] Suppose, however, that the taxpayer does not make an application within a reasonable time and thereby fails to make an election within a reasonable time. What, then, is the position if either party thereafter seeks a prospective determination or, if no application is made, what is the position at the end of the appeal? The question, in essence, is whether the policy of the 2009 Rules is best reflected by (i) applying the actual default position under Rule 10 as applied to current proceedings or (ii) applying the default

position applicable to a Complex case, on the footing that the case is one which is complex in nature or (iii) adopting some other position.

[41] In my view, the tribunal in the first example ought, in the absence of exceptional circumstances, to reflect the two policies which I have identified. Once a reasonable time has passed, there is no longer a policy imperative to give the taxpayer a choice; on the contrary, the second policy, to achieve certainty, suggests strongly that he should no longer have a choice. If he is to have no choice, it is in my judgment the default regime under Rule 10 which should apply. He could not, seeing the wind blowing strongly in his favour, after the passage of time, successfully seek a prospective costs order applying Rule 29 or seek an order for costs when he actually wins his appeal."

28. I am bound to say, with respect, that I find those observations a little confusing. The proposition which I derive from [38] and [39], as I have said, is that in current proceedings brought shortly before 1 April 2009 which, had they been brought after that date, would have been categorised as Complex the tribunal should at least lean towards applying rule 29, with the taxpayer afforded a means of opting out as a substitute for the rule 10 route. But if [41] is right, the taxpayer who took no steps to opt out is nevertheless to be treated as if he had done so.

29. Those remarks were, however made in the context of Warren J's first example; this appeal is akin to his third example, the appeal which straddles the transfer in roughly equal proportions. Before reaching what he said in respect of the third example I should record briefly Warren J's conclusion, at [43], about the second example, the appeal brought long before 1 April 2009 but concluded only thereafter, which was that, absent special circumstances, fairness demands application of the 1986 Rules. I doubt if that proposition would, on the whole, be controversial, but it seems to me to have a significance to which I shall return.

30. Of the third example Warren J said:

"[44] When one comes to the third example, one question facing the tribunal dealing with an application for a prospective direction will be whether to make one at all. There are good arguments for doing so, although it will always be a matter of discretion. In particular, both the 1986 Rules and the 2009 Rules satisfy the second policy which I have identified, that of providing certainty. The 1986 Rules provide certainty in that it is known that a costs shifting regime will apply; the 2009 Rules provide certainty in that the costs regime will be identified at an early stage depending on whether the taxpayer elects to opt out of costs shifting. If either party seeks to depart from the default regime, they ought, for reasons I will explain, to make an application at an early stage for a prospective direction.

[45] Another question facing the tribunal will be whether to make a prospective direction applying different costs regimes in respect of different periods. The first and second examples display the tension between the policy of the 2009 Rules applicable in a 'new' case and the fairness and justice of maintaining the old regime in what is essentially an 'old' case. It is, quite simply, impossible to resolve that tension by appeals to policy in the third example which straddles 1 April 2009."

31. I am, of course, not dealing with an application for a prospective direction, but one made when the outcome was already known. Nevertheless, there are some

considerations which apply equally in either case, and Warren J dealt with them in this way:

> "[46] It is, however, a tension which it is possible to avoid by the adoption of different costs regimes for the periods before and after 1 April 2009. In relation to the earlier period, Rule 29 can be applied; in relation to the later period, Rule 10 can be applied. At least that could be a starting point from which to arrive at a direction best designed to achieve fairness and justice in the context of the proceedings as a whole.
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> [47] But if a single regime is to be imposed, a major factor in the exercise of discretion will surely be the relative amount of time and money spent on the proceedings before and after that date. The actual length of time during which the proceedings continued before and after that date may be a factor, I accept, but it should carry very little weight compared with the actual work done in the two periods, although ordinarily, it might be expected that the relative length of the two periods would reflect, broadly, the relative amount of work undertaken and expense incurred.
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> [48] Having identified all the relevant factors, the question for the tribunal is how the interests of fairness and justice will best be served. It is an easy question to ask, but almost intractable difficulties are met in answering it. For instance, focusing only on work done and expense incurred, does the appropriate costs regime depend simply on whether more than half the time and effort and expense falls one side of that date or the other? Or is there some other test? It cannot, I suggest, be right to say that the matter is one for the discretion of the tribunal without laying down some principles by which that discretion is to be exercised. Nor can it be right simply to leave matters to the whim of the judge. It would certainly be quite inappropriate for a judge to adopt one approach or the other because of his own perception that costs shifting represents a 'better' or 'worse' policy than the other or because he considers that tribunals should behave more like courts or *vice versa*. That would be arbitrary and unacceptable. Of course, as is the case with nearly all discretions, there will be a range within which the discretion under paragraph 7(3) can properly be exercised but there have to be boundaries. And if there are to be boundaries, there need to be principles by which they are to be ascertained."

32. Before I come to the application of those observations to the instant case I think it appropriate to undertake an examination of the approach of Judge Berner in *Hawkeye Communications* and of Judge Kempster's conclusions in *Hillcraft Trading*.

33. In *Hawkeye Communications* Judge Berner was faced with an application by HMRC for a prospective direction that rule 29 should be applied to the entire appeal. The appeal was begun in June 2008 and proceeded without any apparent regard to the change in the rules about costs until July 2010, when the topic was raised, evidently informally, at a pre-trial review. The judge directed that the parties should make an appropriate application should they wish to do so, and HMRC duly did. It is clear that the taxpayer opposed the application, on the basis that it was entitled, from 1 April 2009, to assume that the new regime would apply, and that it was not exposed to a costs risk, and that rule 29 of the 1986 Rules should be applied only in exceptional circumstances. Judge Berner refused the application, making the points that the conduct of the parties following

transfer was relevant, that the greater part of the work would be, or have been, undertaken after 1 April 2009, that from that date the taxpayer had a reasonable expectation that the 2009 Rules would apply, and that, had it been possible to categorise the appeal as Complex, the taxpayer would have had the right to opt out of a costs-shifting regime.

34. He took the view that the tribunal was required to undertake a balancing exercise, weighing fairness and justice, and taking account of the reasonable expectations of each party and of the prejudice they might suffer. Given, particularly, the taxpayer's reasonable expectation that the 2009 rules would apply and the absence of any application by HMRC for rule 29 to be applied for more than a year after the transfer, the balance fell on the side of applying the 2009 Rules. As that conclusion, too, was reached in the context of an application for a prospective direction, the considerations which led to it are not identical to those I must examine.

35. The appeal in *Hillcraft Trading* was brought in May 2008, and heard in May and June 2010. There were interlocutory directions, before and after transfer, providing for "costs in the case". As I have said, HMRC indicated shortly before the hearing that they would be seeking a direction that rule 29 should apply to the proceedings, to which the taxpayer, even if ambiguously, seems to have agreed. In the event it was the taxpayers which succeeded. There is no indication in his decision that Judge Kempster doubted whether he had the jurisdiction to make the direction sought; rather he examined the merits and decided that they did not warrant the making of the direction.

36. He plainly took it as a significant factor that, despite HMRC's intimation of their intention, neither party made a request for a direction applying rule 29 until some time after the hearing had concluded, albeit before the decision was released. He regarded the fact that interlocutory directions for "costs in case" had been made as inconsequential, echoing Warren J's observation in *Atlantic Electronics*, at [70], that "those orders cannot be taken as an acceptance by [the taxpayer] that a costs-shifting regime was to apply to the entire proceedings". Judge Kempster considered that the taxpayer's delay in seeking a direction that rule 29 should apply was a material factor, upon the basis that, as Warren J put it at [68] in *Atlantic Electronics*, "after a reasonable time has expired, parties who wait and see how a case develops before making an application should not ordinarily expect their application to succeed."

37. It seems to me that it was this last factor, coupled with Warren J's comment in *Atlantic Electronics* at [44], set out above, that an application in respect of rule 29 should be made promptly, which Judge Kempster found compelling. I agree that delay is an important factor, and that in a case in which it is evident that the party seeking to recover costs has concealed his hand until it is clear, or at least reasonably predictable, what the outcome of the appeal will be an opportunistic application should fail. But the difficulty facing a judge in a case of this kind is that the party in question has often not so much concealed his hand as failed to direct his mind to the matter. For that reason I agree with Judge Berner that the conduct of both parties is a relevant factor when determining what is the fair course, but am of the view that one cannot take delay as a ground for refusing an

application without considering other relevant circumstances, particularly those aspects of a litigant's conduct which throw light on the reasons for the delay.

38. As I have explained, an appellant bringing an MTIC appeal before 1 April 2009 would have been aware that he was within a costs-shifting regime. Such an appellant, if alert, would realise that the position in which he found himself had changed on 1 April 2009, and that he was presented with three possible courses of action. First, knowing that his case could not be allocated as Complex and thus brought within the costs-shifting regime of the 2009 Rules but wishing to retain that regime, he could agree with HMRC, or make his own application for a direction, that rule 29 should govern the appeal. Second, he could agree with HMRC or if that failed seek certainty by direction of the tribunal that rule 10 should apply to it, thereby bringing himself out of a costs-shifting regime since his appeal could not be allocated to the Complex category. In either of those cases different provision for the periods respectively before and after transfer could be made or agreed if appropriate, but I do not need to consider those possibilities further at this stage. Third, he could wait until it became clearer which would be the most advantageous course.

39. The position in which HMRC found themselves was similar, but not identical. They too could have sought a direction applying either rule 29 or rule 10 to the appeal although, for the reasons I have already explored, it is likely that the tribunal would have favoured the taxpayer's preference in any case which had been proceeding for a relatively short time. Nevertheless, even if the outcome of the application was not to their liking, HMRC could at least have achieved certainty.

40. Applications of that kind would lead to the making of prospective costs directions. Here, the position is that neither party made an application until after the appeal was concluded and the costs had been incurred. It does not seem to me that, in deciding upon the course to be adopted now, I should start from the assumption that either Mynt or HMRC made a deliberate decision to wait until the outcome of the appeal was known, nor does it seem to me that I should consider only HMRC's conduct. Either party could have made an application to achieve certainty, but neither did. If HMRC were culpable for that omission, so too was Mynt, though not necessarily to the same extent.

41. As I have explained, the 2009 Rules apply to proceedings started before 1 April 2009 but concluded thereafter, throughout, unless a direction applying the 1986 Rules, or any provision of them, has been made. HMRC were aware (and if they were not, should have been aware) that they could have achieved certainty by making an early application for a direction to that effect. I am not persuaded that the standard to be applied to Mynt, in the period immediately following the transfer, was much lower since it was represented at that time by chartered accountants who were or should have been equally familiar with the tribunal's procedures, and by counsel. Mynt might well have assumed that the coming into effect of the 2009 Rules meant that it was no longer within a costs-shifting regime, and that if it was content so to be, no further action was required. I would not regard that as a serious failing, notwithstanding Warren J's observation that no litigant could blithely assume that the 2009 Rules would apply without regard to

the existence of para 7(3). There was some uncertainty at the time about whether current proceedings could be categorised following transfer (the decision in *Surestone Ltd* was released only in December 2009), and the tribunal's approach to the application of para 7(3) was still largely untested. What I do not know is whether Mynt or its representatives made a positive decision one way or the other, chose to bide their time, or simply did not address their minds to the subject.

42. HMRC had made their intention to seek costs, if successful, clear in their statement of case, served before transfer of the appeal. That fact does not, in itself, help them in the light of the rule changes: if it was no longer within the power of the tribunal to award costs their earlier intention became irrelevant. However, while I agree that the making of directions for "costs in cause" cannot be determinative, nor represent, taken alone, an acceptance by the taxpayer that a costs-shifting regime was to apply throughout, I attach rather more significance to such directions made after transfer than others have perhaps done. Suppose Mynt, or its representatives, had made the decision that Mynt should take advantage of the removal of the appeal from the costs-shifting regime which the change of rules brought with it. On what basis, then, could they properly have agreed to such directions? The tribunal would be unable to give effect to them. In my judgment, the fact that such directions were agreed is inconsistent with a decision to be governed by the 2009 Rules alone, but is consistent either with a decision to remain (whether by application of rule 29 or by the allocation of the appeal, had that been possible, to the Complex category) in a costs-shifting regime, or with a failure to recognise and act upon the fact that the rules had changed. And if Mynt or its representatives had decided to bide their time, it should have been apparent to them that they could no longer do so.

43. It cannot be said that HMRC were entirely blameless. They too would be unsure, until late 2009, of the tribunal's view about whether it was possible to allocate current proceedings to one or other of the categories for which the 2009 Rules provide, and they suffered the same uncertainty as other litigants about the criteria by which para 7(3) would be applied, at least in respect of costs. As I have said, they could have sought a direction by which the applicable costs regime was determined, but did not do so. But they had at least made their position clear, and were consistent in their approach: they indicated in the statement of case that they would seek costs, agreed to directions for costs in cause after 1 April 2009 and repeated their position that they would seek costs in their skeleton argument. Their doing so is, in my view, indicative of a commitment to a costs-shifting regime, win or lose, and to be contrasted with the taxpayers' "wait and see" approach in *Hillcraft Trading.*

44. In my judgment, if Mynt pursued its appeal hoping to recover its costs if successful it is manifestly unfair that it should be protected from having to pay HMRC's costs if unsuccessful; that would represent the one-way costs shifting criticised by Warren J. A "wait and see" approach, too, is no more open to the paying than to the receiving party. In what follows, however, I assume in Mynt's favour that for at least some of the period after 1 April 2009 and before the hearing it had not decided to remain within a costs-shifting regime or to bide its time, but that it and its representatives had not properly thought about the matter.

45. Unless it made the positive decision to take advantage of the fact that the appeal was taken out of a costs-shifting regime on 1 April 2009 but nevertheless agreed to directions for costs in the cause Mynt can be forgiven for not having reacted immediately to the change in the rules, by seeking an appropriate direction or in some other way; as I have said, it was not at that time clear what, if anything, an appellant in Mynt's position needed to do. But there came a time, no later than when HMRC served their skeleton argument, when it must have become obvious to Mynt's director, who by then was its representative, that the issue of costs needed to be addressed. I have no evidence that the director stated to the tribunal or to HMRC, before or during the hearing, that Mynt thought it was, or wanted to be, in the position that no costs-shifting direction might be made. The director's written submission does not advance any argument to that or similar effect. In other words, its position must be taken to be either that it was content to be in a costs-shifting environment, or that it was still biding its time.

46. The conclusion to be drawn therefore is that Mynt was hoping to recover its costs if successful, and either willing to submit to a costs direction if unsuccessful or, more probably in view of what it has in fact done, aiming to preserve an argument which might enable it to resist such a direction. It follows, in my judgment, that it is fair and just to exercise the para 7(3) power and direct that rule 29 of the 1986 Rules shall apply to the appeal throughout. I am fortified in that conclusion by the observation of Warren J in *Atlantic Electronics*, at [38], that complex cases (as this was) should ordinarily be in a costs-shifting regime, an observation which, despite the reservations I have expressed at para 28 above, seems to me to be right. I direct therefore that save to the extent that any direction made in the course of the appeal may have provided otherwise, Mynt is to pay HMRC's costs of and incidental to the appeal, to be the subject of detailed assessment on the standard basis by a costs judge of the Senior Courts should they not be agreed.

47. In the light of that conclusion it is unnecessary for me to deal with the subsidiary issues, but it is nevertheless appropriate I say a little about them.

48. The director's written submission says nothing about HMRC's argument that the continuing pursuit of the appeal amounted to unreasonable conduct. I have, therefore, examined the material available to me supporting, or said to support, HMRC's case that what Mynt did amounts to unreasonable conduct in the sense contemplated by rule 10(1)(b). I accept that severe criticism of Mynt's director was made in the criminal proceedings to which I have referred, as HMRC contended, and that the director's failure to give evidence at the hearing of this appeal might be regarded as an indication that the appeal was pursued even though the director knew it had no merit. But one cannot lose sight of the fact that the burden of showing a connection between a trader's transactions and fraud, and of showing that it knew or ought to have known of that connection, rests on HMRC. A trader is, ordinarily, entitled to see whether or not HMRC can discharge that burden. There may come a time when compelling HMRC to do so might be regarded as unreasonable, but I do not think HMRC have surmounted the hurdle of showing that that was the case here. Unreasonable conduct, in my view, has to consist of a good deal more than making the opposing party prove its case. In addition, I observe that the tribunal found no more than that Mynt knew

or ought to have known of the connection to fraud; it did not need to and, contrary to what Ms Addy said, did not, go so far as to say that Mynt, in the person of its director, had actual knowledge of the connection.

49. There is no reason, in the light of my conclusion, to make different provision for the periods before and after 1 April 2009. Mynt's director's submission does not address this possibility. It might, I think, be an appropriate course when an application is made for a prospective order or when for some other reason different considerations apply to those periods. But I do not detect any such reason in this case: in particular, there is nothing before me to suggest that, had it been Mynt which was applying for a direction in its favour, it would have sought to limit such a direction to the period before transfer. If I am right in my conclusion that Mynt was either content to be in a costs-shifting regime or was biding its time in respect of the period after transfer, there is plainly no basis on which it would be appropriate to make different directions in respect of the periods before and after transfer.

50. It seems to me that there is also a further consideration. In his first example, that is when relatively little has been done before transfer, Warren J indicated his view that it would ordinarily be right to respect the taxpayer's choice if that was to opt out. In his second example, the appeal nearly at a conclusion when it was transferred, he considered it would be usual to preserve costs-shifting throughout. Plainly the balance must shift from one direction to the other as one passes along the scale, and eventually it tips from favouring the taxpayer's choice to a (rebuttable) presumption that the taxpayer should not lightly be allowed to opt out of the costs-shifting regime to which he has hitherto been subject when, perhaps, it is already becoming clear to him that he is at significant risk of losing. Though I am not convinced by Ms Addy's argument that substantially the greater part of the work in this case was completed before the transfer, it is plain that a good deal of it was. Had I not concluded as I have, I would have directed that Mynt pay HMRC's costs for the period before transfer.

51. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply, pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for permission to appeal against it on a point of law to the Upper Tribunal. 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.

**COLIN BISHOPP**

**CHAMBER PRESIDENT**

**RELEASE DATE: 30 October 2013**