FTC/45/2010
[2010] UKUT 373 (TCC)

PROCEDURE – allocation to categories – Complex case – appeal from categorisation from decision of First-tier Tribunal categorising case as Standard – decision re-made by Upper Tribunal categorising case as Complex – Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CAPITAL AIR SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: Mr Justice Warren, President
Sir Stephen Oliver

Sitting in public at the Royal Courts of Justice, Strand. London WC2A 2LL on 1 October 2010

Mario Angiolini, counsel, instructed by Norton Rose, for the Appellant

James Rivett, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal against the decision of Judge Avery Jones CBE "(**the Judge**"), in the Tax Chamber of the First-tier Tribunal, to categorise the case as a Complex case. The case concerns the liability to register the Appellant for VAT in respect of its purchasing and chartering of a helicopter. The Appellant was represented by Mr Mario Angiolini, and the Respondent ("**HMRC**") by Mr James Rivett.

2. The appeal is the first occasion on which allocation of cases to categories has arisen for consideration in this Tribunal. It raises questions about the correct application of rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**the Rules**") which provides as follows:

> "23.—(1) When the Tribunal receives a notice of appeal, application notice or notice of reference, the Tribunal must give a direction allocating the case to one of the categories set out in paragraph (2).
>
> (2) The categories referred to in paragraph (1) are—
>
>> (a) Default Paper cases, which will usually be disposed of without a hearing;
>>
>> (b) Basic cases, which will usually be disposed of after a hearing, with minimal exchange of documents before the hearing;
>>
>> (c) Standard cases, which will usually be subject to more detailed case management and be disposed of after a hearing; and
>>
>> (d) Complex cases, in respect of which see paragraphs (4) and (5) below.
>
> (3) The Tribunal may give a further direction re-allocating a case to a different category at any time, either on the application of a party or on its own initiative.
>
> (4) The Tribunal may allocate a case as a Complex case under paragraph (1) or (3) only if the Tribunal considers that the case—
>
>> (a) will require lengthy or complex evidence or a lengthy hearing;
>>
>> (b) involves a complex or important principle or issue; or
>>
>> (c) involves a large financial sum.
>
> (5) If a case is allocated as a Complex case—
>
>> (a) rule 10(1)(c) (costs in Complex cases) applies to the case; and
>>
>> (b) rule 28 (transfer of Complex cases to the Upper Tribunal) applies to the case."

3. In the present case, the Judge considered that the case did not fall within any of the sub-paragraphs of rule 23(4). It inevitably followed that he could not allocate the case as a Complex case. Before we turn to the grounds of appeal, we wish to make some observations and to state some general propositions about the structure and working of rule 23.

The general approach to categorisation

4. Categorisation (or allocation, to use the word found in rule 23 itself) is a key element in the new tax appeal system. The system has to cope with straightforward single-issue appeals on compliance matters at one end of the spectrum and multi-issue appeals involving huge amounts of tax at the other. The categorisation rules seek to ensure that the appeal obtains an appropriate degree of case management and that it is heard by a judge and member whose experience and competence match the demands of the case. Hence rule 23(1) contains a mandatory direction to allocate every case to a category.

5. Rule 23(2) then lists the four available categories in an ascending order of difficulty (to use what we hope is a neutral word in the context of the present dispute). The words used to identify the categories – Default Paper, Basic, Standard and Complex – are of themselves an indicator of the sort of case which is properly to be allocated to each category. The draftsman has not, for instance, called them Categories A, B, C and D.

6. He has nonetheless gone on to describe certain characteristics of the first three categories. Thus, we are told how the first two categories "will usually" be disposed of and that third category "will usually be subject to" more detailed case management. The use of the words "will usually" demonstrates that there is an element of flexibility about categorisation. It cannot be said, for instance, that it is part of the definition of a Default Paper case that it must be one which is to be disposed of without a hearing or of a Basic case that it must be one which is to be disposed of only after a hearing. The words following each category give, of course, a strong flavour of the sort of case which is seen as falling within each of the first three categories. But they do not define the category, still less do they give any indication of the sorts of case where the Tribunal might properly categorise a case other than "usually".

7. In relation to the first three categories, it can thus be seen that the Rule tells us how cases within each category will usually be dealt with or managed. In contrast, cases which can be allocated to the Complex category are restricted by reference to the criteria set out in rule 23(4). It is clear that a case which is complex within the ordinary meaning of the word might not fall within any of those criteria. For instance, a case might almost, but not quite, meet all of the criteria taken separately but could properly be regarded as complex within the ordinary meaning of that word when the case is viewed in the round. It could not, however, be allocated as a Complex case even though it might ordinarily be seen as a case of some complexity.

8. As to the ordinary meaning of the adjective "complex", different definitions can be found in different dictionaries. One common meaning is "complicated" or "complicated in structure". We consider that "complicated" is a suitable synonym where that word appears in rule 23(4)(a) and (b). Another meaning of the adjective can be found. For instance, in the Shorter Oxford English Dictionary, "complex" is

given this meaning (among others): "Comprehending various parts connected together; composite, compound". That definition also gives some, albeit a small, indication of the meaning of the word "complex" in rule 23(4) and is a pointer to the sort of case which could be allocated as Complex subject always to passing through the rule 23(4) gateway. But a case might be complex in that sense – comprehending various parts *etc* – without in any way being particularly difficult or complicated of resolution; care must be taken when placing any weight on this aspect in deciding whether a case can qualify as Complex.

9. We cannot, however, dismiss the possibility of a case which is not complex within the ordinary meaning of that word and yet is one which satisfies one or more of the criteria in rule 23(4). Thus a case might involve no lengthy or complex evidence and may be capable of being dealt with in a short hearing; it might involve no complex or important principle or issue. It might, however, involve what is, on any view, a large financial sum. But the case would not by reason of its high value alone be seen as "complex" within the ordinary meaning of that word.

10. The question then is whether the case can, or should, be allocated as a Complex case. The argument here is that a case which satisfies any of the criteria is at least capable of being allocated as a Complex case; on this approach, the criteria are not simply gateways through which a case must pass before it can be allocated as Complex, but are part of the defining architecture by which the class of Complex cases can be identified. We consider this aspect further at paragraph 29 below.

11. Rule 23 contains no detailed exposition of any of the criteria found in rule 23(4). Nor do any other provisions of the Rules do so. It is left for determination outside the Rules how the following issues are to be decided:

(1) what amounts to lengthy or complex evidence or a lengthy hearing;

(2) what is a complex or important principle or issue;

(3) what is a large financial sum.

12. The determination of those issues gives rise in turn to two separate questions:

(1) By what criteria are they to be assessed?

(2) Whose assessment is to be determinative?

13. We do not consider that any of those issues can be determined in abstract. As to the first of those issues, it does not help in assessing whether a hearing of, say, 3 days is lengthy to establish that it is short in the context of a patent action concerning complex electronics or long in the context of a County Court possession action. Again, what may be complex (in the sense of difficult) for expert tax judges sitting in the Tax Chamber – for instance to understand some aspect of building construction in the context of capital allowances – may be entirely simple for an expert judge in the Technology and Construction Court.

14. As to the second of those issues, what is complex or important must be assessed in the context in which the question arises, namely taxation and tax appeals. It may not

be straightforward to establish precisely what principles or issues are actually involved in a particular case or whether, once identified, they can be described as important, (giving rise to the question Important to whom?).

15. As to the third of those issues, what is, or is not, a large financial sum must be assessed by reference to the sort of cases undertaken in the Tax Chamber. What may be large in the context of a social security claim may be small in the context of tax disputes generally.

16. Although we consider it to be clear that the third issue must be approached in that way, it is less clear whether it is appropriate to refine that approach by considering different types of work undertaken by the Tax Tribunal. It might, for instance, be said that what is a lengthy hearing for a VAT case is not to be seen as a lengthy hearing in a transfer pricing case; and it might be said that what can be seen as a large financial sum in a personal income tax case might nonetheless properly be regarded as small in the context of dispute concerning petroleum revenue tax. We do not consider that it is appropriate to adopt this refinement. It will lead to complexity and opaqueness in the allocation of cases resulting in an inappropriate use of the resources of the Tribunal (both judicial and financial) with a risk of unnecessary and disproportionate satellite litigation.

17. A further question is whether it is appropriate to take account of the circumstance of the parties in assessing whether a large financial sum is involved. For instance, a given amount of VAT may be very large indeed when viewed through the eyes of a small trader with a turnover of a few hundred thousand pounds, but may be seen as almost trivial when viewed through the eyes of an international corporation with a turnover of hundreds of millions of pounds. We do not consider that, as a general rule, the circumstances of the parties should be taken into account in this way. We say that this should be the general rule because there may be special factors which take a particular case out of the ambit of this general rule. We do not consider it helpful in this decision to attempt to give examples of what might be sufficient to amount to an exception.

18. To obtain a proper understanding of the operation of rule 23 it is necessary to say something about the consequences of a case being allocated as a Complex case. There are two significant consequences which are apparent from the Rule itself.

19. The first consequence is that the Tribunal has a general power to make costs orders in the case under section 29 Tribunals, Courts and Enforcement Act 2007. It does not, we wish to make clear, follow that the Tribunal must, at the end of the case, make a costs award in favour of the successful party. Such an order does, we appreciate, normally follow in proceedings in court. But that is because the Civil Procedure Rules (reflecting the practice before their adoption) provides expressly at Part 44.3(2) that, where the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. There is, however, no similar rule in the Tax Chamber Rules. And it can be seen from other jurisdictions that a general costs-shifting power does not always result in the winner obtaining costs. To take an example, the Competition Appeals Tribunal has a developing jurisprudence in this area where, in certain types of case, a successful party does not obtain an order for costs.

20. It would be wrong, however, for a judge of the Tax Chamber to assess whether a case should be allocated as Complex by reference to his or her own subjective view about whether the case is one where there should be power to award costs. That would be to put the cart before the horse. The Rules have been drafted on the footing that certain sorts of case – namely cases which are appropriate for allocation as Complex – are to have applied to them a certain costs regime. It is not the function of the Tribunal judge to pre-judge, as it were, whether a case which is, objectively, appropriate for allocation as Complex should nonetheless be taken out of the costs regime which the Tribunal Rules Committee has thought it right to adopt. The costs regime which applies to Complex cases applies <u>because</u> the case is Complex; the decision to categorise a case as Complex is not to be made simply because a judge thinks that a cost-shifting regime should be available.

21. The second consequence is that the case is one which can, with the consent of the parties and of the Presidents of the Tax Chamber and the Tax and Chancery Chamber, be transferred to the latter Chamber. We wish to emphasise the obvious point that not every case allocated as Complex is suitable for transfer to the Upper Tribunal. For instance, a very long Missing Trader Intra-Community case taking many weeks to hear may be inappropriate for transfer (even if it is very complex in nature) for the very reason that its length makes it inappropriate to be heard by the Upper Tribunal having regard to its judicial, estate and financial resources. It would not, therefore, be right to say that before a case could be allocated as a Complex case it must be one which is suitable for transfer to the Upper Tribunal.

22. Notwithstanding the observations in the preceding two paragraphs in relation to costs and transfer, it would not be right to dismiss altogether the consequences of allocation as irrelevant to the meaning of rule 23. The availability of a costs-shifting regime in all cases allocated as Complex and the availability of a transfer to the Upper Tribunal in some cases allocated as Complex (and only in cases so allocated) each inform the interpretation of what is to be seen as appropriate for allocation as Complex. A judge of the Tribunal is entitled to view the case in the round in deciding how to allocate although whether this is part of the exercise of deciding what is capable of being allocated as Complex or is done in the context of the exercise of a discretion to decline to allocate a qualifying case is not clear. For instance, the judge might conclude that the case is the sort of case for which the Upper Tribunal would be an appropriate forum in the light of its legal complexity, recognising at the same time that it might not actually be appropriate to transfer it to the Upper Tribunal for instance because of the length of the hearing required. Or the judge might consider that a case raises a very important issue (bringing the case within rule 23(4)(b)) but conclude that the point is a short one and that not much money is involved (so that the case is not within rule 23(4)(a) or (c)). In deciding whether or not to allocate the case as Complex, we consider that the judge would be entitled to take account of the costs implications of allocating as Complex and to ask himself whether it is really the sort of case where a costs-shifting regime should be available.

23. What we have said so far addresses the criteria by which a Complex case is to be identified. The next question is who is to assess whether a case should be allocated as Complex. The answer to that is, we consider, clear: it is the Tribunal. Rule 23(4) permits <u>the Tribunal</u> to allocate a case as Complex only if <u>the Tribunal</u> consider that the case satisfies one or more of the three criteria. It is for the Tribunal to decide, for

instance, whether or not a lengthy hearing will be required. This, we consider, does not require the Tribunal only to be satisfied that a hearing of a particular length will be required – to take an extreme and, we accept, highly unlikely example where one party estimates 1 day and another estimates 2 weeks – it also requires the Tribunal to be satisfied that whatever the correct estimate is held to be, it is "lengthy". Again, it is for the Tribunal to decide what amounts to a large financial sum.

24. We accept, of course, that there are limits outside which the Tribunal cannot stray. It would be perverse to say that a hearing of ½ day could ever be lengthy or that a 3 month case was not lengthy. It would be perverse to say a case involving tax of £1,000 involved a large financial sum or that a case involving tax of £100 million did not do so. But in many cases there will a judgment to be made where different judges of the Tax Chamber might reasonably take different views. It cannot be said that there is a single "right" answer that can be objectively ascertained as a matter of law. The Rules assign the task of making that judgment to the Tribunal by providing that a case can be allocated as Complex only if the Tribunal considers one or more of the criteria to be met. We do not consider that there is a single objective and correct answer to how long is "lengthy" or how large is a "large financial sum".

25. In any case, it is clear beyond argument, we think, that the assessment of what is "complex" evidence or a "complex" issue within rules 23(4)(a) and (b) is a matter of judgment. The task of making that judgment is assigned to the Tribunal whose decision, if made applying the correct principles, can be overturned on an appeal to the Upper Tribunal only if it can be said that no reasonable tribunal could have reached that decision. The fact that assessment of those factors involves judgment suggests strongly, in our view, that assessment of other factors is also a matter of judgment.

26. We consider that the general approach to rule 23 which we have explained also reflects common-sense. In accordance with that approach, the Tribunal is able to take account of its own knowledge and experience of its work and of the length and conduct of hearings generally. The Tribunal may have more knowledge about these matters than the Upper Tribunal or the Court of Appeal. If the question of whether one or more of the criteria has been met is a matter of law with only one correct outcome, the scope for satellite litigation is huge. It will always be possible to argue, for instance, about how much evidence will be required and whether it is properly to be seen as complex or not. This cannot be what the framers of the Rule envisaged.

27. We would add this. If the assessment of what is a lengthy hearing or a large financial sum is capable of determination so that there is only one "correct" answer, that answer must be the same in other cases as the answer in the present case. Why, then, did the Tribunal Procedure Committee itself not state the period and the amount expressly in the Rules? The answer, surely, is because it is a matter for the judgment of the Tribunal.

28. It is suggested by HMRC that rule 23(4) gives the Tribunal a discretion whether or not to allocate to the Complex category even if the Tribunal does consider that one or more of the criteria are satisfied. Reliance is, of course, placed particularly on the use of the word "may" in contrast with the use of the word "must" in rule 24(1). It can also be observed that a Complex case can be seen as a sub-set of Standard cases in

that every case which is Complex is also one which will be "subject to more detailed case management and be disposed of after a hearing".

29. The existence and scope of such a discretion is linked with what satisfies the criteria for allocation as Complex in the first place. Take the following example. A case may be very straightforward, involving no complexity and no lengthy hearing. It may, nonetheless, involve a large amount of tax. It may well not be appropriate to allocate such a case as Complex. But whether this is because the case does not fall within the criteria for allocation (on the basis that a case must be complex in the ordinary sense of the word before it can be categorised as Complex), or whether it is because the Tribunal has a discretion not to allocate it as Complex, is not clear. If fulfilment of any of the criteria set out in rule 23(4) is sufficient to qualify the case as Complex, then it can only be by exercise of a discretion that the case could be allocated other than as Complex. In contrast, if a case has to be "complex" as that word is ordinarily understood before it can be allocated as Complex, then the case in this example is not capable of allocation as Complex and no question of the exercise of a discretion arises. We do not consider that it is necessary to resolve this issue in order to determine the present appeal; and we do not consider it appropriate to form a view in order to give more general guidance.

30. However, we do say this: if the Tribunal does have a discretion to allocate other than as Complex a case which is capable of being allocated as Complex, it must be a discretion of limited scope. The general rule should, we consider, be that a case capable of being allocated as Complex ought to be so allocated. Any discretion to allocate other than in accordance with that general rule should be exercisable only in the light of special factors.

The appeal in the present case

31. The present case is an appeal against HMRC's refusal to register the Appellant (referred to in the Statement of Case as "Capital Air Services Limited in its capacity as bare trustee of a helicopter owned by Granard Aviation LLP") for VAT purposes. Granard Aviation LLP ("the LLP") is described as the beneficial owner in a Trust Deed to which the Appellant and the LLP are parties. The basis for HMRC's refusal is that the Appellant, as trustee of the helicopter, has not been carrying on a business in the VAT sense of that word. During 2008, according to the Statement of Case, the helicopter was used by the LLP on a number of occasions and by third party charterers on other oaccions.

32. The amount of input tax potentially recoverable, assuming that the Appellant is properly registrable, is some £550,000. The evidence as to the actual operation of the helicopter relates to 2008 and 2009. For 2008 the relevant output tax was tax at 17.5 per cent on charter fees (net of VAT) of some £120,000. For 2009 and 2010 the output tax is said by the Appellant to be tax on some £150,000 and £210,000 of charter fees (net of VAT) respectively. Those figures produce a recoverable amount of VAT, so far, on £480,000 (net) of charter fees.

33. The Appellant now estimates that the hearing of the appeal could take 4 days. At the time of the hearing before the Tribunal, the estimate was 2-3 days which remains HMRC's current estimate.

The Decision and the appeal

34. Following a hearing on 6 April 2010 of an application by the Appellant for the case to be categorised as Complex, the Judge declined to categorise it as such. The core of his decision is to be found in paragraphs 5 and 6 which we now set out:

> “5.The context of rule 23 is that cases must be categorised into one of default paper, basic, standard, or complex. It can be categorised as complex only if it satisfies one of the criteria listed in rule 23(4), all of which have a flavour of being something exceptional. The “only if” suggests that a restrictive interpretation should be applied. As stated in rule 23(5) categorisation as complex means that costs can be awarded in the same way as normal civil litigation, and with the consent of both parties and both Chamber Presidents the appeal might start in the Upper Tribunal. These give a clear impression of the type of case falling within the complex category. It must be sufficiently out of the ordinary to merit costs, when no costs apply to the majority of cases, thus harmonising the previous costs regimes for indirect and direct tax appeals in favour of the direct tax rule of extremely limited costs; and it must be of sufficient weight to start in the Upper Tribunal unlike the majority of appeals. It must be the type of case that one could approach the Presidents of both the Tax Chamber of the First-tier and the Tax and Chancery Chamber of the Upper Tribunal making a case that it ought to be treated exceptionally and start in the Upper Tribunal and be heard by a more limited category of judges, perhaps including a High Court Judge. All these show that it needs to fall well outside the ordinary run of cases.
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> 6. In the application of the rule to this appeal I agree with Mr Rivett. I regard this case as being in the top half of standard cases in its complexity, whether of fact or law, the amount of tax involved, and the likely length of the hearing, but nothing out of the ordinary to merit its being categorised as complex. I accept that the facts are slightly complex but not so as to involve “lengthy or complex evidence.” There is nothing unusual in the law involving both domestic and European authorities, even if *Halifax* is raised that is no longer new ground. A two or even three day case is not a “lengthy hearing.” The amount of money involved in not out of line with many other cases in the First-tier Tribunal. It is not a case that I would consider approaching the President of the Tax and Chancery Chamber of the Upper Tribunal on the basis that this appeal was out of the ordinary and merited starting in the Upper Tribunal (although this is not requested by the Appellant, but it is a test of whether the case is complex).”

35. Mr Mario Angiolini who appears for the Appellant criticises the decision on a number of grounds. There is not, he says, a necessary implication to be drawn from the words “only if” in rule 23(4) that a restrictive interpretation should be given to the words of the three conditions. We agree with that conclusion and see no reason for such an interpretation. The tests are, as we have already observed, designed to cover a wide range of circumstances. They are to be applied in their ordinary meanings without stretching or restricting their meanings.

36. In making that submission, Mr Angiolini reads what the Judge said as actually adopting a restrictive interpretation. What he said must, of course, be read in context. It was proceeded by the observation that each of the criteria set out in rule 23(4) has

"a flavour of being something exceptional". The rule itself, it will be remembered, uses the words "Standard" and "Complex" as the labels for two of the categories to which a case may be allocated. If one asks what it is that takes a case out of the Standard category and into the Complex category, all aspects of the case must be addressed and, in accordance with what we have said generally about the interpretation of rule 23, the case must be viewed in the round. The criteria found in rule 23(4) represent a gateway through which a case must pass before being allocated as a Complex case. Those criteria describe attributes of the case which, as compared with a Standard case, are to be seen as long or complex or of high financial value. If by use of the word "exceptional" the Judge meant no more than that the features of the case must take it out of the ordinary – ordinary in the sense of being appropriate for allocation as Standard – he cannot be criticised. However, if he meant that the case has to be exceptional by the standards of the work of the Tax Chamber as a whole, we think that that would be wrong. It is perfectly possible for a significant number of cases in the Tax Tribunal to be allocated as Complex cases; the number may be such that it would not be right to describe each and every one of them as exceptional. Further, it would not be right to restrict the number of cases allocated as Complex, as a matter of principle, to such a number as would justify the description of each of them as exceptional.

37. It is not clear, reading the relevant sentence by itself, in which of those two senses the Judge was using the word "exceptional". However, in the next sentence the Judge makes the statement of which Mr Angiolini is critical. It is clear, we think, that the Judge was referring to rule 23(4) in suggesting that a restrictive interpretation was to be adopted. That would suggest that he was using the word "exceptional" in the second of the senses we have just considered.

38. What the Judge said in the second and third sentences of paragraph 5 of his decision leads us to conclude that it is more likely than not that he applied the wrong approach in considering whether any of the criteria in rule 23(4) were satisfied. At the very least, there is a real doubt that he applied the correct approach. Accordingly, unless it can be demonstrated from the decision as a whole that the wrong approach could have made no difference to the outcome, the Judge's decision to allocate the case as a Standard case should be set aside and the matter should be determined afresh. For our part, we are unable to conclude that the adoption of the wrong approach could have had no impact on his actual decision. Accordingly, we would allow the appeal on this ground alone.

39. However, that is not the only criticism of the decision. The manner in which the Judge addressed the impact of costs was, as we see it, also flawed. In the first place, he identified the costs regime applicable once a case is allocated as Complex by saying that "costs can be awarded in the same way as normal civil litigation" by which we understand him to mean the general run of cases in the High Court or the County Court. We have already explained that the regime under the Civil Procedure Rules differs from that in the Tax Chamber and the Upper Tribunal in that the former expressly provides for the normal rule to be that costs follow the event. That is not the case in the latter.

40. In the second place, and in accordance with Mr Angiolini's submissions, we do not consider that it is right to say, as the Judge did, that the case must be "sufficiently out of the ordinary to merit costs, when no costs apply to the majority of cases".

Whether a case enters the costs regime (under rule 10(1)(c)) is, as we have already explained, a consequence of categorisation and, whilst the availability of a costs-shifting regime informs the meaning of rule 23 and the allocation exercise, it is wrong to elevate the importance of that factor in the way in which the Judge did. In passing, we add that we do not consider that the Judge was entirely accurate in his comparison of the costs regime in the Tax Tribunal which applies in cases other than Complex cases with the previous regime in direct tax cases. The new regime is certainly closer to the old direct tax regime than the old indirect tax regime, but there are material differences.

41. Next, Mr Angiolini asks whether it is right to say, as the Judge said, that to rank as Complex, the case must be of sufficient weight to start in the Upper Tribunal, unlike the majority of appeals. We think not. For a case to be capable of transfer to the Upper Tribunal it has to qualify as Complex in the first place but before it can actually be transferred it has to be accepted as suitable for transfer by the Presidents of the Tax Chamber and the Tax and Chancery Chamber. One reason why the Presidents might think that a case, although allocated as Complex, is not suitable for transfer is that it is not regarded as being of sufficient weight but, rather, is a case which would most appropriately be dealt with by the Tax Chamber. We do not, as we have made clear, suggest that the possibility of transfer of a Complex case to the Upper Tribunal is to be wholly ignored as a factor in determining what is meant by Complex in the first place. But we read the Judge as going further than that by elevating this factor to a level of importance which is not justified. Thus when the Judge concluded that the test of whether a case is complex is whether or not it merits such an approach to the President, he has, we think, misdirected himself as to the proper meaning and effect of the criteria set out in rule 23(4).

42. Those errors in respect of the issues of costs and transfer to the Upper Tribunal are significant. Even taken by themselves, they would, we consider, be sufficient to show that the Judge has adopted a wrong approach and his decision cannot stand.

Conclusion on the appeal

43. Accordingly, we conclude that the Judge's decision was based on material errors in relation to (i) the need to show that the case is "exceptional" and that a restrictive interpretation must be applied to the criteria set out in rule 23(4), (ii) the way in which account was taken of costs and (iii) the way in which account was taken of the possibility of transfer of the case to the Upper Tribunal.

The consequences of allowing the appeal

44. In the light of our decision, we have a choice about how to deal with the case. We can send the matter back to the Tax Tribunal for a further hearing with directions for its reconsideration. Alternatively, we may re-make the decision making such findings of fact as we think appropriate.

45. At this point, we record that we have before us evidence which was not before the Judge and which gives a fuller picture of what the Appellant says is the complexity of the case. It may be that the Judge would have made a different decision if he had had this material. It might be said that, rather than appeal, the Appellant should have asked the Judge to revisit his original allocation decision pursuant to rule 23(3) in the

light of this additional material. For our part, we do not think that would have been a realistic course of action given the Appellant's case that the Judge had applied the wrong approach and might be expected to repeat his errors on a review. On an appeal, we have power to remake the decision under section 12(2) TCEA; in so doing, we may make any decision which the Tax Chamber could make if it were remaking the decision itself and we may make further findings of fact: see section 12(4). We are entitled to take account of the additional material if we decide to re-make the decision ourselves. That is the course we propose to take.

Categorisation by this Tribunal

46. For this purpose we start by addressing the rule 23(4)(b) test "that the case involves a complex or important principle or issue". While we are not satisfied that the case involves a principle which is "complex" or" important", we are satisfied for the reasons that follow that it does involve an issue which is "complex".

47. The additional material which we have mentioned is relevant to the categorisation issue. It includes two substantial witness statements, both made on 3 June 2010, one by Mr Michael Hampton (who, according to his Witness Statement regards himself "as owner/trustee of the helicopter") with one exhibit and the other by Mr Timothy Dennis with thirteen exhibits.

48. Several of the exhibits are agreements or deeds. Some were prepared by Norton Rose LLP, the law firm that, we were told, advised on the legal structure with particular reference to the tax implications and practicalities of operating the helicopter. These documents define the network of relationships involved in the arrangements. They deal with the legal and equitable interests of the parties in the helicopter itself and with those parties' interests in the fees and profits arising from its operation. They govern the management and control over the use and exploitation of the helicopter. Although at the hearing the Judge saw some of the documents subsequently exhibited, he did not see them all; indeed, some post-date the hearing.

49. In slightly more detail, they cover the relationship between the Appellant as owner/trustee of the helicopter, the Appellant in its "individual" capacity and Mr Hampton. Then there are rights and obligations covered by the so-called "Fractional Sharing Flight Service Agreement" between the Appellant "solely as owner/trustee", the Appellant "in its individual capacity" and the LLP. This, according to its recital, sets out the terms on which the LLP is entitled to charter the helicopter from the Appellant as owner/trustee, the terms on which the Appellant, as owner/trustee, shall "via" the Appellant be entitled to charter the helicopter to any third party and the terms on which payments are to be made between the parties. We note in this connection that the Appellant as owner/trustee is obliged to make payments to the Appellant "in its individual capacity" and that the LLP is required to make payments into a helicopter operating account in the name of the Appellant as owner/trustee and that the LLP is required to meet any shortfall in the helicopter operating account.

50. Next, there is the Trust Deed to which the Appellant ("but not in its individual capacity") and the LLP are parties. This recites (a) the LLP's desire that the helicopter be conveyed to the Appellant and (b) that the Deed creates a trust by which the Appellant is to hold the "Trust Estate", namely the helicopter, for the LLP. This is the document in which the Appellant, in its capacity as owner/trustee, agrees to "register

the Trust for VAT purposes" and at the same time to act "solely as trustee hereunder and not in any individual capacity". Then there is a Deed of Mortgage by which the Appellant as owner/trustee obtains security over the helicopter as security for its obligations under the Trust Deed.

51. There is a letter agreement between a Mr David Gorton by which Mr Gorton provides some £4 million as capital contribution to the LLP to enable the LLP to finance the purchase of the helicopter. There is a Novation Agreement by which the Appellant obtains the right to buy the helicopter from a company called Granard Ltd. Finally there is a deed by which a different individual agrees to hold her entire interest in the LLP for the benefit of Mr Gorton.

52. The above summary is necessarily disjointed and makes no attempt to draw any conclusions. But it gives the flavour of the legal framework against which the First-tier Tribunal will have to decide whether the Appellant's activities as bare trustee have amounted to a business or to "economic activities". And it highlights some of the topics that will need explanations.

53. One of the issues before the Tribunal can therefore be described in this way. It is whether the Appellant as owner/trustee has been chartering out the helicopter in the course of a business or as an economic activity. This has to be determined following a full analysis of the fiduciary and contractual relationships embodied in the documents that were created for the purposes of the arrangements. Those documents, as briefly summarised above, produce a "complex" whole (in the second sense mentioned in paragraph 8 above). Further, the entity seeking registration is holding the equipment as trustee and acting as trustee for at least one beneficiary and leasing it to that beneficiary and to itself as a non-trustee; the exercise for the Tribunal involves complications that cause the issue, in our view, to be so complex (in the first sense mentioned in paragraph 8 above) as to warrant the case being classed as Complex.

54. In this connection we mention that we know of no previous VAT decisions which provide any real guidance. HMRC say that there are no novel points of law. They say that *Halifax* arguments or something akin to them have been flagged but may not yet feature and should, accordingly not be taken account of in relation to the present allocation exercise. If more complex points are raised, an application can be made to re-categorise the case. In any case, they suggest that the decision of the Tax Chamber in *Berwick* (VAT Decision 17686, Release Date 31 May 2020) provides an answer to such novel points as might arise. In the particular circumstances of the present case, we are not persuaded that *Berwick* resolves the issues.

55. The case raises issues which, in our view are properly to be seen as complex in every sense of that word. The Tribunal will most likely have to conduct an intensive examination of every aspect of the complex whole (including the accounting arrangements and the direct tax positions of the various parties involved). For the reasons given above and in the light of all the evidence before us, including information that was not available to the Judge, we conclude that the appeal involves a complex issue and as such falls within rule 23(4)(b).

Conclusion on categorisation

56. Accordingly, we re-make the decision, directing that the case be categorised as Complex.

Other matters

57. Strictly we do not have to address the application of the tests in rule 23(4)(a) and (c). Although the facts of the case give rise, in our view, to complex issues for the purposes of rule 23(4)(b) for the reasons we have given, we do not consider that the evidence is, of itself, "lengthy or complex" for the purposes of rule 23(4)(a). Even if a case is capable of being capable of allocation as Complex by virtue only of involving a "lengthy hearing", we see a four day hearing as being very much on the borderline and note that a large number of cases that could not possibly be described as complex in accordance with the ordinary meaning of that word (such as "mark-up" appeals) last more than that. In any event, we are not satisfied that a four day estimate is accurate and think, on what we know at present, that it ought to be capable of disposal within 3 days.

58. Does the case involve "a large financial sum" within rule 23(4)(c)? In one sense, the appeal does not involve a financial sum at all. The appeal is against a refusal to register the Appellant and not against a financial determination of any sort. The financial consequences of that are uncertain. Input tax of about £550,000 has been incurred. As at the end of 2010, fees are estimated to be about £480,000, making the recoverable tax a sum equal to VAT on that amount. There is no certainty that full relief would ever be obtained for the full £550,000 of input tax to which the Appellant will lay claim if it wins the appeal. There is no certainty that the present arrangements will continue for long enough. If it is permissible to take into account possible future outputs in determining whether this appeal involves a large financial sum (even assuming that £550,000 is a large financial sum), it would follow that nearly every case of an appeal from a refusal to register would involve a large financial sum because, potentially, large inputs and outputs might be involved in the future. We do not propose to express a view on the correct answer to this question, nor to give guidance about precisely where the dividing line between what is and is not a large financial sum is to be drawn.

Conclusion: final disposition

59. The Appellant's appeal is allowed. We allocate this case as a Complex case.

MR JUSTICE WARREN

PRESIDENT

SIR STPEHEN OLIVER

UPPER TRIBUNAL JUDGE

Release date: 12 October 2010 (as amended on 10 November 2010 to correct typographical errors)