Appeal number: FTC/72/2010

COSTS – application for an order for costs in proceedings on appeal from the Tax Chamber of the First-tier Tribunal – rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – further application for an order for costs of the appeal to the Tax Chamber of the First-tier Tribunal pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007 – - appeal proceedings commenced before 1 April 2009 – whether Tribunal should exercise discretion under para. 7, Sch. 3 Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 to allow award of costs under Rule 29, Value Added Tax Tribunals Rules 1986 – yes – applications granted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

SRI INTERNATIONAL **Appellant**

- and -

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

TRIBUNAL: EDWARD SADLER

Sitting in public at 45 Bedford Square, London WC1 on 13 December 2011

David Eward, QC, instructed by Simmons & Simmons, for the Appellant

George Peretz, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. On 22 August 2007 SRI International ("the Appellant") served on the VAT and Duties Tribunal its notice of appeal against the refusal by The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") to refund an amount of VAT pursuant to an application in that regard made by the Appellant under the EC 13th Council Directive of 17 November 1986 (EC 86/560/EEC) and regulation 186 of the Valued Added Tax Regulations 1995 (which implements in the UK the relevant provisions of the EC 13th Directive).

2. The Appellant's appeal was heard on 10 and 11 June 2009 by the Tax Chamber of the First-tier Tribunal (Judge Cornwell-Kelly and Mr M Hossain) ("the FTT"), the successor tribunal to the VAT and Duties Tribunal. On 27 August 2009 the FTT released its decision dismissing the Appellant's appeal. On 19 October 2009 the FTT set aside its decision following representations by the Appellant that certain findings of fact by the FTT in its decision were incorrect, and on 10 March 2010 there was a further hearing before the FTT. On 20 April 2010 the FTT re-released its decision without amendment on 28 April 2010.

3. The Appellant appealed to the Upper Tribunal against the decision of the FTT, and on 10 June 2011 the Upper Tribunal (Sir Stephen Oliver, QC) released its decision allowing the Appellant's appeal on the grounds that the FTT had erred in law. The Upper Tribunal applied section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") to set aside the decision of the FTT and went on to remake that decision under section 12(2)(b)(ii) of the 2007 Act, entitling the Appellant to recover under regulation 186 of the Value Added Tax Regulations 1995 all the VAT for which it had claimed a refund (totalling £262,500).

4. The Appellant now applies to the Upper Tribunal for its costs in these proceedings. It is making two applications: first it is applying for the Upper Tribunal to make an order in its favour in respect of its costs in the proceedings before the Upper Tribunal in relation to its appeal from the decision of the FTT; secondly it is applying for the Upper Tribunal to make an order in its favour in respect of its costs in the original proceedings before the FTT (but only for the period up to the first release by the FTT of its decision – the parties have reached their own agreement as to the costs of the proceedings before the FTT which followed that event and which resulted in the re-release by the FTT of its decision).

5. The Appellant has produced a detailed Statement of Costs setting out the costs it claims for both sets of proceedings. They amount in total to £176,232.93 (including the costs relating to the costs application itself).

Costs in the proceedings before the Upper Tribunal

6. Rule 10(1)(a) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Upper Tribunal Rules") allows the Upper Tribunal to make an order in respect of

costs in proceedings on appeal from the Tax Chamber of the First-tier Tribunal. The Appellant was entirely successful in such proceedings.

7. The Commissioners do not resist, in principle, the Appellant's application for a costs order in relation to the proceedings before the Upper Tribunal – indeed, they would have no basis to do so. In their written submissions to the Upper Tribunal on the Appellant's application they argued that certain aspects of the Appellant's conduct of its case should result in a substantially reduced costs award in relation to their costs in respect of both the proceedings before the Upper Tribunal and those before the FTT. However, at the hearing of the Appellant's application for costs Mr Peretz, who appeared for the Commissioners, withdrew this submission in relation to proceedings before the Upper Tribunal.

8. The Commissioners did, however, persist with submissions as to the quantum of the costs claimed by the Appellant, arguing that such costs are excessive and disproportionate given the amount of tax at stake: in what way, and the extent to which, they are excessive the Commissioners do not specify.

9. The Statement of Costs submitted to the Upper Tribunal by the Appellant, is very detailed, and identifies the sum of £43,448.47 as the Appellant's costs applicable to the proceedings before the Upper Tribunal. Without careful analysis based on detailed submissions by the parties it is not apparent whether the costs claimed in relation to the proceedings before the Upper Tribunal are excessive or disproportionate. It would therefore not be appropriate for me to make a summary order as to costs.

10. I therefore make the following order pursuant to Rule 10 of the Upper Tribunal Rules:

(1) that the Commissioners pay the Appellant's costs on the standard basis in relation to the proceedings in this appeal before the Upper Tribunal; and

(2) the amount of such costs shall be ascertained by assessment pursuant to Rule 10(8)(c) of the Upper Tribunal Rules, if not agreed.

Costs in the proceedings before the First-tier Tribunal

Introduction

11. The position is more complex in the case of the Appellant's claim for its costs in relation to the appeal proceedings before the FTT. The Appellant began its appeal proceedings before 1 April 2009, but its appeal was not heard by the FTT until June 2009. The significance of the date of 1 April 2009 is that on that day the reorganisation of the tribunals relating to tax appeals took effect and from that day proceedings before the Tax Chamber of the First-tier Tribunal are governed by The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the New Rules").

12. However, in the case of proceedings, such as those in the present case, which were begun before the New Rules came into effect, the First-tier Tribunal has the power, exercisable so as to ensure that proceedings are dealt with fairly and justly, to make any direction, and in particular to direct that any provision in procedural rules which applied to the proceedings before 1 April 2009 should apply to the proceedings, rather than the New Rules. In the present case the procedural rules applicable before 1 April 2009 were The Value Added Tax Tribunal Rules 1986 ("the Old Rules").

13. In summary, if the Old Rules are applicable to the proceedings before the FTT in the present case an order awarding the Appellant its costs in such proceedings can be made, whereas if the New Rules are applicable no such order can be made. The Appellant, in applying for its costs, seeks a direction that, in effect, applies the costs regime provided by the Old Rules. The Commissioners argue that this is not a case where the tribunal should exercise its discretion to make such a direction, so that the New Rules should, in the natural course, apply, and no costs award can therefore be made by the tribunal in relation to the proceedings before the FTT.

14. This issue falls to be determined by the Upper Tribunal by reason of provisions in the 2007 Act. As mentioned, in allowing the Appellant's appeal against the decision of the FTT the Upper Tribunal remade that decision under section 12(2)(b)(ii) of the 2007 Act. In such a case section 12(4)(a) of the 2007 Act provides that the Upper Tribunal "may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision". If the First-tier Tribunal were re-making the decision it would have jurisdiction to make an order such as the Appellant now seeks, and therefore the Upper Tribunal has the like jurisdiction in the present case.

The law

15. Section 29 of the 2007 Act gives the First-tier Tribunal a discretionary power to make a costs award for the costs of and incidental to all proceedings in the First-tier Tribunal. However, that power is subject to (in the present case) the New Rules.

16. The costs provisions in the New Rules are in Rule 29, which provides that the First-tier Tribunal may only make an order in respect of costs in the case of wasted costs, or if the First-tier Tribunal considers that a party or a party's representative has acted unreasonably in the course of the proceedings, or if the proceedings have been allocated as a Complex case under the New Rules, and the taxpayer party has not opted out of the costs regime. In the present case we are not concerned with wasted costs or costs for unreasonable behaviour. Further, since the Appellant's appeal proceedings began before 1 April 2009 (as mentioned, they began on 22 August 2007, when the Appellant served its notice of appeal) there can be no question of allocating those proceedings as a Complex case. It follows that the First-tier Tribunal has no power under the New Rules to make an award of costs in the Appellant's favour in relation to the proceedings before the FTT.

17. However, for appeal proceedings which were begun before, and were not completed by, 1 April 2009 there are transitional provisions in paragraph 7 of

Schedule 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ("the Transfer Order"). The Appellant bases its case on the application of these provisions.

18. Paragraph 7(3) of Schedule 3 to the Transfer Order is in these terms, applying to tribunal proceedings commenced before 1 April 2009:

> The tribunal may give any direction to ensure that proceedings are dealt with fairly and justly and, in particular, may –
>
> (a) apply any provision in procedural rules which applied to the proceedings before the commencement date [1 April 2009]; or
>
> (b) disapply any provision of Tribunal Procedure Rules.

It is clear from paragraph 7(4) of Schedule 3 to the Transfer Order that "procedural rules" in sub-paragraph (3)(a) means, in relation to this appeal, the Old Rules.

19. Paragraph 7(7) of Schedule 3 to the Transfer Order provides:

> An order for costs may only be made if, and to the extent that, an order could have been made before the commencement date [1 April 2009] (on the assumption, in the case of costs actually incurred after that date, that they had been incurred before that date).

20. Rule 29 of the Old Rules provides, so far as relevant to the Appellant's case, as follows:

> (1) A tribunal may direct that a party or applicant shall pay to the other party to the appeal or application -
>
> (a) within such period as it may specify such sum as it may determine on account of the costs of such other party of and incidental to and consequent upon the appeal or application; or
>
> (b) the costs of such other party of and incidental to and consequent upon the appeal or application to be assessed by a taxing master of the Supreme Court or a district judge of the High Court of Justice in England and Wales by way of detailed assessment….

21. Therefore, applying these various provisions to the circumstances of the Appellant's appeal and its present application, these are proceedings which began before 1 April 2009 and which are therefore within the ambit of paragraph 7 of Schedule 3 to the Transfer Order and at their commencement were subject to the Old Rules; I have a discretion to give any direction to ensure that the proceedings are dealt with fairly and justly, which includes a direction to award costs; and any direction I may make as to the costs of the appeal must be within the ambit of Rule 29 of the Old Rules on the assumption that all such costs had been incurred whilst the Old Rules were actually in force.

22. One other matter, not of law but of published practice, should be mentioned here as it is relevant to the discretion I am asked to exercise. It was a long-established

practice of the Commissioners, enshrined it what is known as "the Sheldon Statement", that notwithstanding that they could seek costs in proceedings under the Old Rules where they succeeded before the tribunal in having a taxpayer appellant's appeal dismissed, they would not apply for a costs order other than in certain exceptional types of appeal. If the Commissioners were of the view that an appeal was of such an exceptional type, their normal practice was to indicate early in the proceedings (usually in their statement of case) that they would apply for a costs order if successful before the tribunal.

23. In the present case there was no indication at any stage by the Commissioners that they would seek a costs order against the Appellant, and there is nothing in the nature of the Appellant's appeal which suggests that it is of an exceptional nature so as to take it outside the ambit of the Sheldon Statement. Further, although the Commissioners did succeed before the FTT, they did not apply, as they were entitled to do, for costs, invoking paragraph 7 of Schedule 3 to the Transfer Order. It is reasonable, therefore, for the Appellant to assume that had the proceedings before the FTT been completed before 1 April 2009 (and therefore subject to the Old Rules), and had those proceedings then been determined conclusively in favour of the Commissioners, the Commissioners would not have applied for a costs order.

The Appellant's submissions

24. Mr Ewart, appearing for the Appellant, argued that the case which the Appellant had consistently put forward in its dealings with the Commissioners and in its appeal proceedings before the FTT was shown, by the decision of the Upper Tribunal, to be correct. The Appellant would have succeeded before the FTT if the FTT had not made an error of law. He said that the Commissioners had persisted in arguing a case based on the wrong legal test and, moreover, in pursuing that case had insisted that the Appellant had failed to provide sufficient evidence to establish its entitlement to recover the VAT in question. That line of argument had misled the FTT, and also led it to repeat the criticism that the Appellant had failed to provide sufficient evidence, and the Commissioners must accept some responsibility for the errors made by the FTT in reaching its decision.

25. The Commissioners persisted with their confused and wrong case throughout the process of a further hearing before the FTT after the FTT had withdrawn its original decision and that led to the FTT simply re-issuing its decision rather than carrying out a proper review of the case. Only at the stage where the Appellant was applying to the Upper Tribunal for permission to appeal did the Commissioners accept that there was an error of law in the FTT's decision. The decision of the Upper Tribunal not only showed that the Appellant's case had been the right throughout, but also that the Appellant had produced adequate evidence to establish its entitlement to recover the VAT it claimed.

26. In these circumstances, and in particular taking into account the conduct of the Commissioners in pursuing a line of legal argument which was demonstrably wrong, and in doing so repeatedly claiming that the Appellant had failed to produce adequate evidence, it was fair and just that the Appellant should recover its costs of the

proceedings before the FTT, and paragraph 7(3) of Schedule 3 to the Transfer Order enabled the tribunal to make a direction to that effect.

27. Mr Ewart further submitted that the Commissioners could not complain that only at this stage in the proceedings was the Appellant applying to the tribunal for a costs order. The Appellant had made it clear throughout the proceedings that it would, if successful, apply for such an order, and so there was no case that the Commissioners were taken by surprise: as early as May 2008 the Appellant had included in its statement of case an intention to apply for costs, and this was repeated in Mr Ewart's skeleton argument produced before the hearing of the appeal by the FTT. Until the Appellant succeeded, as it had before the Upper Tribunal, it was not in a position to apply for a costs order.

28. The Commissioners argue that the Appellant should have applied at an earlier stage – perhaps even before the hearing in June 2009 – for a direction under paragraph 7(3) of Schedule 3 to the Transfer Order, but there is nothing in the paragraph 7 provisions to suggest that an application should be made other than at the time at which it is relevant to consider the matter, namely, where the direction sought relates to costs, when an application for costs can properly be made. In any event, there was no prejudice to the Commissioners in the tribunal making a paragraph 7(3) direction now rather than pursuant to an earlier application by the Appellant.

29. Mr Ewart pointed out that the Appellant had commenced its proceedings under the Old Rules, and therefore in the expectation that it would be awarded its costs if it succeeded in its appeal. Significant costs of preparing the appeal for the hearing had been incurred before 1 April 2009.

30. Finally, Mr Ewart said that had the Appellant's appeal begun on or after 1 April 2009 it was possible that it would have been allocated as a Complex case, since it was the first case to come before the tribunal dealing with repayment claims under the EC 13th Council Directive. Had that been the case the Appellant would have been within the costs regime provided for in the New Rules. It would be anomalous and unfair if the only circumstance in which the Appellant was denied his costs was that of proceedings which straddled the transition from the Old Rules to the New Rules: the transitional provisions in the Transfer Order are there to deal with such anomalies and unfairness, and should therefore be applied in the Appellant's case.

The Commissioners' submissions

31. Mr Peretz appeared for the Commissioners, as he had in the appeal proceedings before the Upper Tribunal (but not in the proceedings before the FTT). He said that the effect of the New Rules as they relate to costs is that the presumption is that the default position in a case such as the Appellant's, begun before 1 April 2009, is that the New Rules should apply. Only if the Appellant can demonstrate that it is necessary "to ensure that proceedings are dealt with fairly and justly" should a direction under the Transfer Order provisions be made. The Appellant's only case is that it began proceedings before 1 April 2009 and it eventually succeeded in its appeal

– that alone cannot establish that a paragraph 7(3) direction is necessary to ensure that proceedings are dealt with fairly and justly.

32. Mr Peretz referred to two decisions of the Tax Chamber of the First-tier Tribunal dealing with the point, *Hawkeye Communications Ltd v HMRC* [2010] UKFTT 636 (TC) and *Atlantic Electronics Ltd v HMRC* [2011] UKFTT 276 (TC).

33. The *Hawkeye* case identified that when a tribunal considers an application for a direction under paragraph 7(3) of Schedule 3 to the Transfer Order it should conduct a balancing exercise in order to weigh the questions of fairness and justice in all the circumstances of the case, including any prejudice or other consequences for the respective parties of making such an order, or refusing to do so. In that case the tribunal refused a direction to apply the costs regime of the Old Rules even though an application was made before the hearing, on the grounds that the larger part of the work on the case was done after 1 April 2009, and since the application was made in November 2010, the party resisting the application had by that time a reasonable and legitimate expectation that the proceedings would be continued on the basis of the New Rules as to costs.

34. In the Appellant's case it would be contrary to the interests of fairness and justice to grant the paragraph 7(3) direction requested. The Appellant could have applied for the order at any time on or after 1 April 2009, but had waited until the end of the proceedings, so that in a sense it was attempting to pick and choose the costs regime which best suited it once the race had been run, a course of action criticised as unacceptable in the *Atlantic Electronics Ltd* case. Further, it was likely that the larger part of the costs were incurred between 1 April 2009 and the hearing in June 2009.

35. Mr Peretz submitted that it was by no means clear that this case would have been allocated as a Complex case had the proceedings been begun on or after 1 April 2009: it was a two day hearing before the FTT, with one witness, and the amount of tax was not particularly large.

36. The Commissioners rejected any criticism of the conduct of their case before the FTT – just because the matter was eventually decided in the Appellant's favour was not a basis for claiming that the Commissioners had wilfully put forward a bad case. The Commissioners remained of the view that if the Appellant had provided more documentary evidence than it was prepared to offer, the Commissioners might have been in a position to withdraw their opposition to the appeal before it reached the FTT. Therefore, even if a direction were made to apply the Old Rules as to costs, the amount of costs awarded should be substantially reduced.

Decision

37. I am clear that this is a case where I should make a direction under paragraph 7(3) of Schedule 3 to the Transfer Order that the Commissioners should pay the Appellant's costs of the proceedings before the FTT in relation to the first hearing. Applying paragraph 7(7) of Schedule 3 to the Transfer Order, the order for costs

which I make by such a direction must be no more extensive than that which could have been made under Rule 29 of the Old Rules.

38. As Mr Peretz correctly put it, the default position in a case such as that of the Appellant, where proceedings were begun before 1 April 2009 but not completed until after that date, is that the limited costs regime of the New Rules applies. That default position may be displaced where to do so ensures that the proceedings are dealt with fairly and justly: that is provided for in paragraph 7(3) of Schedule 3 to the Transfer Order. It is for the Appellant, the party seeking a direction under paragraph 7(3), to show that in order to ensure that the proceedings are dealt with fairly and justly such a direction is required.

39. The power given to the tribunal under paragraph 7(3) of Schedule 3 to the Transfer Order is very wide. As Mr Ewart pointed out, the tribunal can make any direction whatsoever to ensure that proceedings are dealt with fairly and justly – and not simply to apply the Old Rules. The power is framed in such wide terms to allow flexibility in the uncertain circumstances which might possibly arise in proceedings caught in the transition from one set of procedural rules to another.

40. However, and uniquely in relation to costs, that wide power is curtailed: paragraph 7(7) of Schedule 3 to the Transfer Order provides that an order for costs may only be made in a transitional case if, and to the extent that, an order could have been made in relation to the proceedings in question before 1 April 2009. Thus, in terms of a costs order, a party can be in no better a position than if the proceedings had been completed before that date. In general terms this restriction can be seen as fair and just having regard to the reasonable expectations of the parties as to costs when they embarked upon litigation before the tribunal, and it is also a recognition that different costs regimes applied to appeals before, respectively, the Special Commissioners and the VAT and Duties Tribunal. In the Appellant's case, which relates to VAT, had its appeal proceedings been completed before 1 April 2009 the Old Rules would have applied, and Rule 29 of the Old Rules sets out the basis on which costs may be awarded by the tribunal to the successful party.

41. As I have mentioned, since the Upper Tribunal has re-made the decision of the FTT, the 2007 Act confers on me the powers of the First-tier Tribunal to make a direction under paragraph 7(3) of Schedule 3 to the Transfer Order. If the FTT had reached its decision (as re-made) in August 2009 (when its decision following the first hearing was released), that would have been the point at which the Appellant would have applied to the FTT for it to exercise its powers under paragraph 7(3) to make the costs order it now seeks in relation to the proceedings before the FTT. Therefore, in considering whether to grant the application now made by the Appellant, the proper course is for me to assume that such application was made, and a decision reached on that application, in August 2009 in the light of the decision then released as re-made in the Appellant's favour.

42. The point as to timing is significant. It was not a feature of the Appellant's argument before me, but it was a principal feature of the Commissioners' argument as to why I should not exercise the discretionary power I have: taking his lead from

observations in the *Hawkeye* case, Mr Peretz argued that the longer after 1 April 2009 a party delayed applying for a direction under paragraph 7(3) in relation to costs, the more the balance of fairness and justice tipped away from the applicant.

43. Neither counsel was able, from his own experience, to help me with the point, nor did they have instructions on the point, but my own understanding and experience is that, in the period up to August 2009 (and, indeed, for some months after) it was routine for a taxpayer succeeding in his appeal before the Tax Chamber of the First-tier Tribunal in a VAT or customs or excise duties case to apply for costs; for such application to be unopposed by the Commissioners; and for the tribunal to exercise its powers under paragraph 7(3) of Schedule 3 to the Transfer Order to make a costs order. Since in such cases the parties had commenced the proceedings well before the rule change which took effect on 1 April 2009 (and usually before such a change was even conceived), and therefore in the expectation that if the taxpayer party succeeded, he would be entitled to his costs, the general acceptance was that it was fair and just to make a costs order.

44. Therefore, had the FTT in August 2009 made its decision in the Appellant's favour in the terms of the Upper Tribunal decision, the Appellant would then, in accordance with its expressed intentions, have applied for its costs. It is likely that the Commissioners would then not have opposed that application. Even had they done so it is most likely that the FTT would have accepted that the Appellant had commenced proceedings in August 2007 with an expectation that it would recover its costs if successful under the Old Rules and that a substantial part of the costs of the proceedings had been incurred by 1 April 2009, and that in such circumstances in order to ensure that the proceedings were dealt with fairly and justly, it should exercise its discretion to make the costs order applied for, applying Rule 29 of the Old Rules.

45. That being so, it does not seem to me to be fair to the Appellant that, because it had to wait until June 2011 for the Upper Tribunal to restore the position to what it should have been in August 2009, it should be in a worse position with regard to its costs than in all likelihood it would have been in had the FTT not made an error of law and thereby reached the wrong decision.

46. This brings me to the Commissioners' argument that the Appellant could and should have applied at an earlier stage – even at or before the hearing in June 2009 – for a direction under paragraph 7(3) of Schedule 3 to the Transfer Order. I agree that it could have made such an application, but I do not agree that it tells against the Appellant that it did not do so. I agree with Mr Ewart that in most cases the proper time for a party to apply for a costs order is when the proceedings have been determined in its favour. I also agree with him that, in most cases, the proper time for that party, if it is engaged in proceedings to which paragraph 7 applies, to apply for a direction under paragraph 7(3) so that a costs order can be made, is when it can apply for a costs order. Only at that point, when matters have been resolved, is the tribunal in a position to assess whether such a direction is required, in all the circumstances of the proceedings and their determination, to ensure that those proceedings are dealt with fairly and justly.

47. That is particularly so where, as in the present case, the party has throughout made clear its intention to seek costs if it succeeds – its eventual application at the conclusion of the proceedings for a costs order can come as no surprise to, or ambush of, the losing party.

48. Mr Peretz likened the Appellant to a punter seeking to place a bet on a horse after the race has been run, and claimed some support for that view from remarks in the *Atlantic Electronics* case. I do not accept that analogy in any respect: throughout the proceedings, both before and after 1 April 2009, the Commissioners knew that the Appellant, if successful, would apply for its costs. Once the New Rules were in force both parties knew that, for the Appellant to recover its costs, it would require the benefit of a direction of the tribunal to that effect under paragraph 7(3). Both parties knew that the Appellant would be at risk that its application for such a direction would not succeed. The Commissioners made out no case, nor could they reasonably have done so, that in the period from 1 April 2009 until the hearing in June 2009, they were in some way induced to continue their part in the proceedings by an expectation that the Appellant would not seek its costs (taking the necessary preliminary step of applying for a direction under paragraph 7(3)) if it succeeded, or by an expectation that it would not succeed in obtaining such a direction. Nor could the Commissioners make out any case that their stance with regard to their own costs was in any way influenced by the course the Appellant has followed: they gave no indication in the preliminary stages of the proceedings (when the Old Rules applied) that the case fell outside the ambit of their practice not to seek costs in accordance with the terms of the Sheldon Statement, and consistent with that, when they succeeded before the FTT they did not themselves seek a costs award. If any horse-racing imagery is apt in this case, it is that both riders ran the race with full knowledge of the course and the jumps which had to be negotiated in order to win.

49. In short, if I allow the Appellant's application and exercise my discretion under paragraph 7(3) of Schedule 3 to the Transfer Order so as to award the Appellant its costs, the position of the Commissioners has not thereby been unfairly prejudiced.

50. A further factor which carries some weight is that it is possible (I put it no higher than that) that, had the proceedings been begun on or after 1 April 2009, the case would have been allocated as a Complex case by reason of its subject matter as the first case to come before the tribunal on the EC 13th Council Directive provisions relating to VAT refunds. That there is some complexity in the matter is evidenced by the serious and persistent misunderstanding of the relevant provisions which characterised the Commissioners' case until the matter reached the Upper Tribunal. Had the proceedings been allocated as a Complex case the Appellant would have been entitled to its costs under the New Rules (since, as its conduct shows, it is reasonable to infer that it would not have opted out of the costs regime applicable under the New Rules to Complex cases). In such circumstances it would be unfair if the Appellant were denied its costs under both the Old Rules and the New Rules because its proceedings transition the change in the rules – paragraph 7(3) of Schedule 3 to the Transfer Order is there to deal with any such unfairness.

51. For these various reasons, therefore, I conclude that, in order to ensure that the proceedings in this case are dealt with fairly and justly, I should direct pursuant to paragraph 7(3) of Schedule 3 to the Transfer Order, that an order should be made for the Appellant to recover its costs in the appeal proceedings which resulted in the first decision of the FTT.

52. The Commissioners argued before me that if such an order is made, then it should be substantially reduced, given that the Appellant, in presenting its case, failed to provide all the evidence required to support its claim, and was strongly criticised for such failure by the FTT in its decision.

53. I do not to any extent accept this argument. It is clear beyond any question from the decision of the Upper Tribunal that the FTT had before it all the evidence which it required to reach the correct decision, and that it would have reached that decision on the basis of that evidence had it not erred in its application of the relevant provisions (an error into which it was led by the arguments advanced by the Commissioners). The Upper Tribunal was able to reach the correct decision without requiring the Appellant to adduce any evidence further to that which it had adduced in its case before the FTT. I see no basis for any reduction in the costs to be awarded to the Appellant.

54. As with the Appellant's costs for proceedings before the Upper Tribunal, the Appellant produced to me a lengthy and detailed Statement of Costs in relation to the proceedings before the FTT. For the reasons I have given in relation to costs before the Upper Tribunal, I do not propose to make a summary order as to costs: if they are not agreed then they should be assessed. It makes sense, for the sake of consistency, that the costs for both sets of proceedings should be assessed on the same occasion and by the same process, and since paragraph 7 of Schedule 3 to the Transfer Order does not restrict me to apply Rule 29 of the Old Rules (but merely requires that I can make no more generous a costs order than is permitted by the Old Rules), I propose that any assessment in relation to the FTT costs should be made as provided in the Upper Tribunal Rules.

55. I therefore make the following order pursuant to paragraph 7 of Schedule 3 to the Transfer Order:

> (1) that the Commissioners pay the Appellant's costs on the standard basis of and incidental to and consequent upon the appeal proceedings which resulted in the first decision of the FTT; and
>
> (2) the amount of such costs shall be ascertained by assessment pursuant to Rule 10(8)(c) of the Upper Tribunal Rules, if not agreed.

EDWARD SADLER

JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 03 JANUARY 2012