COSTS – Transitional appeal – Appeal by HMRC against direction under Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, Sch 3, para 7 for 1986 applying 2009 Rules to the proceedings – appeal dismissed

FTC/29/2011

2012UKUT45TCC

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN:

THE COMMISSIONERS FOR HER MAJESTY' S REVENUE AND CUSTOMS

Appellants

- and –

ATLANTIC ELECTRONICS LIMITED

Respondent

TRIBUNAL: The Chamber President, the Hon Mr Justice Warren

Hearing date 10 November 2011

Jonathan Swift QC instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants
Abbas Lakha QC and Edmund Vickers instructed by Jeffrey Green Russell for the Respondent

DECISION

The appeal of the Appellants, the Commissioners for Her Majesty's Revenue and Customs, IS DISMISSED

REASONS

Introduction

1. When is it right for the Tax Chamber of the First-tier Tribunal to exercise its discretion to disapply, in transitional cases, the costs provisions of the new rules, the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("**the 2009 Rules**") and apply the previous regime under the old rules, the Value Added Tax Tribunals Rules 1986 ("**the 1986 Rules**")? That is the central question raised in this appeal. The answer affects a number of appeals and is of wider importance to the Appellants ("**HMRC**") than just the present case. I therefore go beyond matters which are strictly necessary in the determination of the present appeal. In order to do so, I have had to enter into a detailed analysis which, I am afraid, has lead to the production of a rather long decision.

2. So far as the present case is concerned, Judge Wallace rejected, in his decision released on 11 February 2011 ("**the Decision**"), an application by HMRC for a direction disapplying the 2009 Rules and effectively granted an application by the Respondent ("**Atlantic**") for a direction that the 2009 Rules should apply. HMRC now appeal against his decision so far as it relates to the direction applying the 2009 Rules.

The facts

3. The history of the proceedings is set out in paragraphs 8 to 14 of the Decision. I can summarise it as follows:

    a. Atlantic's appeals were against decisions by HMRC on 22 May 2007, 28 June 2007 and 28 May 2008 disallowing input tax claimed on the returns for March, April and May 2006. The three appeals were consolidated on 10 July 2008 and HMRC's Statement of Case and List of Documents were served on 8 August 2008. In the Statement of Case HMRC stated that they

would ask for costs if the appeal was dismissed. The appeals were defended on the grounds that Atlantic knew or should have known that its transactions were connected with the fraudulent evasion of VAT relying on the decision of the Court of Justice in *Kittel v Belgium* (Case C-439/04) [2008] STC 1537 and of the Court of Appeal in *Mobilx v HMRC* [2010] STC 1436.

b. On 16 September 2009 HMRC, who had already made one such application, applied for a further extension of time to serve their witness statements. The application included this paragraph:

> "5. In respect of costs the Respondents contend that the costs of this application should be costs in the case or alternatively that they be reserved until the conclusion of the case."

c. A stamp was applied allowing the application unless notice of objection was served in 14 days; there was a written endorsement by a judge, "Costs in the case." A copy was sent to Atlantic's representative with a covering letter which informed Atlantic that it could object to the direction (which included the costs order) within 14 days.

d. On 6 April 2010 the Tribunal consented to an application by the Appellant for a 10 week stay which included, "Costs to be in the cause."

e. On 1 October 2010 Atlantic's solicitors were told on the telephone and in an e-mail that the appeal had been categorised as standard. This was in fact incorrect and was stated without judicial authority. The solicitors did not rely on this and on 21 October applied for a direction that Rule 10 of the 2009 Rules ("**Rule 10**") should not be disapplied. HMRC responded on 28 October 2010 with the notice opposing that application and themselves made an application that the 1986 Rules should be applied. .

The legislation

4. Under Rule 29 of the 1986 Rules ("**Rule 29**"), there was a general costs-shifting power in the following terms:

> "(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 way of detailed assessment …"

5. Under section 29(1) Courts, Tribunals and Enforcement Act 2007 ("the **TCEA**"), the costs of all proceedings in the First-tier Tribunal are in the discretion of the Tribunal. The Tribunal has, under section 29(2), "full power to determine by whom and to what extend the costs are to be paid". However, sections 29(1) and (2) are subject to Tribunal Procedure Rules, in the present case the 2009 Rules.

6. The 2009 Rules preclude the making of a costs order other than in the three circumstances listed in Rule 10(1). It can make a wasted costs order. It can make an order where a party or his representative has acted unreasonably. It can also make an order where the case has been allocated as a Complex case under Rule 23 of the 2009 Rules unless the taxpayer has opted-out of the costs shifting regime. Rule 10 gives the taxpayer the right to opt-out, but he must do so within 28 days of receiving notice of the allocation of the case as a Complex case. This right to opt out is a recognition of the fact that different taxpayers may have different approaches to risk in the context of access to justice. For one taxpayer, a risk of exposure to costs, at the level which might be expected to be incurred in a Complex case, if he loses, is one which he is not prepared to take and would, for him, represent a denial of access to justice. For another taxpayer, an inability to recover such costs if he wins is unacceptable and would, for him, represent an equal denial of access to justice.

7. The right to opt out under Rule 10 has to be exercised, as I have mentioned, within 28 days of the allocation of the case as a Complex case. There are, I think, two

related reasons for that requirement. The first is to achieve certainty for both parties so that they know, at an early stage, which costs regime is to apply and can run their cases accordingly. The second is to prevent the taxpayer from waiting to see how his case progresses. To take the extreme case, if the taxpayer were entitled to wait until a decision had been given, he would obviously elect for a costs shifting regime if he had won and for a no costs shifting regime if he had lost. This would be effectively a one-way costs shifting which it was never the policy of the Tribunal Procedure Committee to produce. In a less extreme case, say half way through an appeal, the same consideration applies although it has less force; but the policy is that the taxpayer should not be able to wait and see how the wind blows but must make his election early on. The need to make an election within 28 days is well-known and causes no difficulties in practice.

8. It can be seen, therefore, that policy-makers have adopted a policy in cases other than Complex cases that there should be no general power to award costs. In those cases, rightly or wrongly, the inability to recover costs is not seen as likely to lead to a denial of access to justice. But in Complex cases, the choice of the taxpayer is to prevail; HMRC, the respondent in all tax appeals and a well-resourced body, is bound by that choice. HMRC themselves accepted this structure for the recovery of costs as a fair and reasonable response to the various and incompatible approaches which had been advocated by different associations of taxpayers' representative during the course of the Tax Modernisation Project and in the costs consultation process leading to the promulgation of the 2009 Rules.

9. In contrast, the 1986 Rules provided for a full costs shifting regime, much as applies in the case of litigation in the courts. There is no suggestion that the general costs shifting regime in the courts should be changed even in relation to litigation against the State. Indeed, that general regime remains embedded even after the major reforms recommended by Lord Justice Jackson in his superb, if I may say so, report "Review of Civil Litigation Costs: Final Report". The Report of the Costs Working Group to the Senior President of Tribunals (December 2011), which I chaired, explains the present system of costs in tax appeals both in the First-tier Tribunal and the Upper Tribunal and makes no recommendation for

change which would have an impact on the issues before me. These different regimes reflect the different ways in which costs can be seen as promoting access to justice. Neither regime can be said to be "right" or "wrong".

10. As part of the reform of tribunals under the TCEA, the VAT and Duties Tribunal ("**the VAT Tribunal**") was abolished and the jurisdictions previously exercised by it were transferred to the First-tier Tribunal, being allocated to the Tax Chamber. The transfer of functions were effected by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 ("**the Transfer Order**").

11. Paragraphs 6 and 7 of Schedule 3 to the Transfer Order provide, so far as relevant, as follows:

> "6. Any current proceedings are to continue on and after the commencement date as proceedings before the tribunal.
>
> 7(1) This paragraph applies to current proceedings that are continued before the tribunal by virtue of paragraph 6.
>
> (2) …
>
> (3) 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
> (b) disapply any provision of the Tribunal Procedure Rules.
>
> (4) …
>
> (5) Any direction or order made or given in proceedings which is in force immediately before [1 April 2009] remains in force on and after that date as if it were a direction or order of the tribunal relating to proceedings before that tribunal.
>
> (6) …
>
> (7) An order for costs may only be made if, and to the extent that, an order could have been made before the commencement date (on the assumption, in the case of costs actually incurred after that date, that they had been incurred before that date)."

12. For the purposes of those paragraphs, Atlantic's appeals are "current proceedings", "the tribunal" is the First-tier Tribunal and the 1986 Rules are "procedural rules which applied to the proceedings before the commencement date", that date being 1 April 2009.

13. Rule 23 of the 2009 Rules makes provision for categorisation of appeals into the four categories, that is to say Default, Basic, Standard and Complex cases. There is a decision of the Tax Chamber to the effect that Rule 23 applies only to appeals made from 1 April 2009 onwards: see *Surestone Ltd v Revenue and Customs Commissioners* [2009] UK FTT 352(TC). Accordingly, current proceedings cannot be allocated as Complex cases under Rule 23, so that there can be no costs-shifting under Rule 10 in current proceedings. Had Rule 23 in fact applied, the present case would, it is common ground, have been allocated as a Complex case but Atlantic would have had a right to opt out of the costs shifting regime. But even then, it seems to me that paragraph 7(3) would still have applied so that Rule 10, including the effect of the opt-out, could have been disapplied.

14. The decision in *Surestone Ltd* might have come as a surprise to some people. Whether it is right or wrong does not matter in the present case because Atlantic's appeals have not in fact been allocated as Complex cases (or, indeed, at all) so that the position, in the absence of an exercise of the power under paragraph 7(3), is that the appeals fall within a no costs shifting regime (under Rule 10 as it applies to a case other than one which has been allocated as a Complex case). And whether the decision in *Surestone Ltd* is right or wrong (something about which I do not need to express a view), what can be said is that a case which falls within the criteria for allocation as a Complex case does so whether or not it is capable of actually being allocated as a Complex case. The idea behind the 2009 Rules is to apply a costs shifting regime (subject to opt out by the taxpayer) to a Complex case not because the case is allocated under Rule 23 as a Complex case (although that is how the 2009 Rules work mechanistically) but because it fulfils the criteria for such allocation. One might therefore see it as a quirk that a complex transitional case is not in fact allocated as Complex under Rule 23. Further, although Rule 10 provides for a costs shifting regime as the default position with a taxpayer opt-out, the policy could equally well have been achieved the other way

round, with a no costs shifting regime as the default position with a taxpayer opt-in. The fact that Rule 10 applies a no costs regime in current proceedings even to a case which would have been categorised as Complex had Rule 23 applied, does not mean that its actual complexity is to be ignored when it comes to exercising the discretion under paragraph 7(3). Indeed, on one view, paragraph 7(3) could itself be used to achieve precisely the same effect as allocating a case as a Complex case. A very different result might be reached in relation to a case which would have been a Default, Basic or Standard case on the one hand and a case which would have been a Complex case on the other hand, notwithstanding that Rule 10 in fact applies to all four types of case in current proceedings in the same way.

15. It follows that any power which the Upper Tribunal has to apply the costs regime of the 1986 Rules to current proceedings such as Atlantic's appeal must derive from the terms of the Transfer Order. In that context, the only relevant provision is paragraph 7(3), there being no provision directed specifically at costs other than paragraph 7(7).

16. Paragraph 7(7) provides a protection for tax-payers and HMRC alike. It precludes a costs order being made where it could not have been made under the previously applicable costs regime. In cases before the VAT Tribunal, costs orders could be made so that paragraph 7(7) would not bite. But in cases before the General or Special Commissioners, there was no general costs-shifting power in the absence of unreasonable conduct. There is accordingly no power to make a costs order in current proceedings transferred into the Tax Chamber from those Commissioners. It can be seen therefore that there is a distinction to be drawn in current proceedings between appeals started in the VAT Tribunal and appeals started before the General or Special Commissioners. In the former case, an order for costs can be made pursuant to paragraph 7(3) if that is needed to ensure that proceedings are dealt with fairly and justly; in the latter case, there is no such power.

Jurisdiction

17. The rubric at the top of the Transfer Order indicates the powers which were exercised by the Lord Chancellor and the Treasury in making it. Section 30(1) TCEA confers the power by order to transfer functions of a relevant existing tribunal to the First-tier Tribunal and the Upper Tribunal and, under section 30(4), such an order

> "may include provision for the purposes of or in consequence of, or for giving full effect to, a transfer under that subsection."

and section 31(9) provides that the Lord Chancellor may

> "in connection with provision made by order under section 30…. make by order such incidental, supplemental, transitional or consequential provision, or provision for savings, as the Lord Chancellor thinks fit…."

18. Quite clearly, those provisions authorised the Lord Chancellor to introduce a power for the tribunal, when it came to consider whether to make an order for costs, to disapply the rules subsequently adopted, that is to say the 2009 Rules. In particular he could have conferred a power wide enough to disapply what became Rule 10 in whole or to a limited extent and power to make a costs order by reference to Rule 29 or otherwise. Such a power could have been conferred in all cases: there is no distinction here to be drawn between cases transferred in from the VAT Tribunal and cases transferred in from the General or Special Commissioners. It is also clear, in my view, that that the Lord Chancellor's authority was wide enough to permit the introduction of a power for the First-tier Tribunal to determine, prospectively, the costs regime which should apply in relation to current proceedings. In particular, the Lord Chancellor, had he so chosen, could have conferred any of the following express powers on the First-tier Tribunal in relation to costs in relation to current proceedings transferred in from the VAT Tribunal:

    a. power to direct that the 1986 Rules should apply to the appeal to the exclusion of any other rules;

b. power to direct that procedural rules subsequently introduced, in the event the 2009 Rules, should apply to the appeal to the exclusion of any other rules;
c. power to direct that those new rules should apply to the appeal but with the statutory power under section 29(1) and (2) being available in all cases, and not only those referred to in Rule 10(1);
d. power to make similar directions but only in relation to part of the proceedings.

19. He did not specifically confer any such power; indeed, apart from paragraph 7(7), there are no transitional provisions at all directed specifically at costs. Instead, paragraph 7(3) confers an apparently unfettered general power to ensure that proceedings are dealt with fairly and justly, which applies to all types of procedural matters. It is not focused on costs; indeed, the draftsman may not have had costs particularly in mind when he drafted it. There is, however, no reason in my view to think that paragraph 7(3) does not apply to costs given the width of the enabling power under section 31(9) TCEA.

20. I make the obvious point, at this stage, that it is the opening words of paragraph 7(3) which provide the power to make directions. Paragraphs (a) and (b) are not free-standing powers but are only examples of the power; they do not purport to lay down boundaries within which any exercise of the power must be kept. This is significant because paragraphs (a) and (b) are not wide enough to permit the tribunal to make a prospective direction that Rule 10 should apply to the exclusion of Rule 29; they provide only for <u>disapplication</u> in the case of Rule 10 and for <u>application</u> in the case of Rule 29.

21. Although, as I have said, no power was conferred expressly referring to costs, paragraph 7(3) is itself, in my judgment, wide enough to permit the tribunal to make a direction the effect of which is to fix the costs regime – costs shifting or no costs shifting – which is to apply and thus, prospectively, to bind the tribunal to that regime when it comes to considering what costs order to make during the course of the appeal following the conclusion of the appeal. And it may exercise that power in relation to the whole or in relation to distinct parts of the

proceedings. Paragraphs (a) and (b) can be relied on in relation to a prospective direction that Rule 29 should apply to the exclusion of the Rule 10. It would be a very odd result indeed if there was not a corresponding power to make a prospective direction to the opposite effect, that Rule 10 should apply to the exclusion of any other provision. I can see no reason at all to construe paragraph 7(3) in that narrow way with such an odd result. I conclude that paragraph 7(3) can be used to make a prospective direction fixing the costs regime which is to apply. I shall refer to such a direction as a "**prospective direction"**.

22. Mr Swift submits that the tribunal cannot fetter itself in that way and that it is always open to it, at the end of an appeal, to make whatever costs order is then appropriate to ensure that the proceedings are dealt with fairly and justly. I disagree with that submission. It may be appropriate at an early stage to make a prospective costs direction in order to achieve that end, in particular by providing certainty for a taxpayer who would, under the 2009 Rules, be able to achieve that certainty. I see no reason to limit the scope of paragraph 7(3) in the way Mr Swift suggests. There would not, in any case, be much point in making an order apparently fixing the costs regime if, at the end of the hearing, the matter of costs fell to be considered afresh on the basis of what was then perceived as most appropriate to achieve fairness and justice. I reject the notion that there would remain a residual power under paragraph 7(3) to make a different costs order in exceptional circumstances even where the tribunal had made a prospective direction. That would lead to considerable uncertainty: it would mean that the tribunal could not provide the certainty which the parties, in particular a taxpayer, might hope to obtain and there would be considerable scope for argument about what would amount to exceptional circumstances. Further, in appeals commenced after 1 April 2009, it is clear that the regime will be fixed one way or the other at an early stage under Rule 10: there is no residual power exercisable at the end of the proceedings to achieve fairness and justice in exceptional cases. That shows that, as a matter of policy, there is no reason to detect a residual power in transitional cases.

23. Since the discretion under paragraph 7(3) is wide, it would, in my judgment, be possible for a judge, as a matter of jurisdiction, to direct that a particular costs

regime should apply to only part of the proceeding, for instance costs incurred before a specified date or costs incurred on a specific issue or in respect of an interim application. Thus, in a case where a large amount of costs had been incurred in current proceedings a significant time before 1 April 2009 but where significant costs had been or were to be incurred after that date, a judge might consider the fairest outcome to be that the tribunal should have power, at the end of the hearing, to throw the earlier costs onto the losing party but that there should be no power to order costs after that date. I see no reason why, as a matter of jurisdiction, he should not be able to make a prospective direction to achieve that result.

24. I might add that the power conferred by paragraph 7(3) is one which can be exercised from time to time. There is no express time limit on its exercise and I do not consider that one is to be implied. Accordingly, if no application is made for a prospective direction or if a direction is applied for but not obtained, the discretion under paragraph 7(3) remains exercisable; in those circumstances, the tribunal could, in theory, make an actual costs order once the appeal has been decided even where the 2009 Rules do not allow it. But, as will be seen, I see the passage of time after 1 April 2009 having the result that the proper exercise of the power is significantly constrained.

The approach to exercise of the discretion

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 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.

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.

27. But even absent any matters of that sort, the tribunal has a wide discretion which is to be exercised in order to ensure that the proceedings are dealt with fairly and justly. Thus, when considering whether or not to make a prospective direction during the course of an appeal, the judge needs to consider whether such a direction would better achieve the aim of ensuring that the proceedings are dealt with fairly and justly than leaving costs to be dealt with under the default regime.

28. I note at this stage that Rule 2 of the 2009 Rules sets out the overriding object of those Rules. It is, according to Rule 2(1), "to enable the Tribunal to deal with cases fairly and justly" with Rules 2(2) to (4) explaining in some respects what this entails. Rule 10, appearing as it does in the same set of Rules, is therefore clearly to be seen as consistent with the overriding objective. In other words, a regime of no costs shifting in Default, Basic and Standard cases is seen as fair and just; and, it is also seen as fair and just that in Complex cases there should be a regime of either costs shifting or no costs shifting, with the taxpayer having the option of deciding (at a very early stage) which should apply. This is the regime which has been adopted, as a matter of policy – one might say as a tribunal philosophy – in relation to tax appeals and that is a policy which is to be seen as promoting the overriding objective.

29. And yet paragraph 7 provides exceptions to that approach. One exception is mandatory: under paragraph 7(7) it is not possible to make a costs order where one could not have been made under the previously applicable regime: this would have been the case in appeals which started with the General or Special Commissioners. Paragraph 7(7) overrides any provision of any rules governing procedure in the Tax Chamber – the 2009 Rules had not been made when the Transfer Order was made – just as a direction under paragraph 7(3) could do so.

One reason for this exception must be that it was perceived as unfair that a taxpayer should be exposed to a risk of an adverse costs order when he had commenced his appeal in a forum where no such order could be made. But this exception applied in both directions: the taxpayer was not given the right to elect into a costs shifting regime even if that was what he would have preferred. So a taxpayer is not able to obtain a costs order even in a case which would have been allocated as a Complex case and where he would have decided to remain in the costs-shifting regime applicable by default in cases started in the Tax Tribunal.

30. Two examples will illustrate that there can be no hard and fast rule about which costs regime is to apply to current proceedings.

31. The **first example**, at one end of the spectrum, is a case where the appeal was commenced in the VAT Tribunal just a day or two before 1 April 2009 and would have been allocated as a Complex case had the 2009 Rules applied. It is to be assumed for the purpose of the example that the vast majority of the work and expense will be done and be incurred after that date. It would be an oddity if there were radically different costs consequences in such a case as compared with an appeal started a day or two after 1 April 2009. In such a case, the policy of the 2009 Rules ought to be the starting point. I consider this further at paragraph 37 below.

32. The alternative approach in this first example is that, since the proceedings started in the VAT Tribunal, its rules should govern the entire proceedings. That is a possible, but in my judgment an incorrect, approach. It fails to reflect the clear policy which can be detected in the 2009 Rules themselves that a taxpayer is to have a choice of costs regime.

33. The **second example** is at the other end of the spectrum. It is a case where the hearing of an appeal has been held by the VAT Tribunal and completed before or very shortly after 1 April 2009 with the decision outstanding at that date. It is to be assumed that the virtually all of the work had been done and virtually all of the costs had been incurred before that date. There would be a different, but equally great, oddity if there were radically different costs consequences in such a case as

compared with an appeal where the decision has been released a day or two before 1 April 2009. Unless there is some policy which drives the tribunal in such a case to apply the new approach to costs to proceedings which were almost entirely conducted in the VAT Tribunal, then that oddity can easily be avoided by an exercise of the paragraph 7(3) power and, in the absence of such policy, it would, I consider, be obviously fair and just (in the absence of some special circumstances) to apply the costs regime previously applicable, that is to say to apply Rule 29. I see no reason at all to think that there was such a policy. In other words, the policy of tax-payer choice is not determinative of the costs regime which should apply although the taxpayer's actual preference is one factor which needs to be taken into account.

34. This leads to a **third example** where the proceedings were commenced in the VAT Tribunal and straddle 1 April 2009 in a substantial way, as in the case of Atlantic's appeal. It is to be assumed for the purposes of this example that substantial work has been carried out and considerable expense incurred over a significant period before that date and that substantial work will be carried out and considerable expense will be incurred over a significant period after 1 April 2009. The issue then is how costs are to be dealt with. A number of questions arise including these: If a party seeks a prospective direction, how should that be resolved? Does it make any difference when the application for such a direction is made? How is the relative amount of work and expense in the first period as compared with the second period to be taken into account, if at all? If neither party makes an application to the tribunal for some sort of prospective direction, how should the tribunal deal with costs at the end of the day?

35. Before turning to questions of that sort, it is to be noted that in most, if not all, of the cases where prospective directions have been considered by the Tax Chamber, including *Hawkeye Communication Ltd v Revenue and Customs Commissioners* [2010] UK FTT 636 (TC) ("***Hawkeye***"), a decision of Judge Berner, and the present case, everyone concerned seems to have been seeking a direction, one way or the other, which applied a single costs regime to the entire proceedings. Nobody appears to have suggested that it would be appropriate to consider whether or not there might be different regimes for different periods (*eg* with Rule

29 applying to costs incurred in respect of the proceeding prior to 1 April 2009 and Rule 10 applying thereafter); nor does it appear that anyone suggested that, if their own favoured regime was not imposed prospectively, the matter should be left to be decided once the result of the appeal was known.

36. Tribunal judges who have made decisions in the past adopting this "all or nothing" approach, can hardly be criticised for doing so in the absence of any submission to the contrary. But, for my part, I hope that, in cases where orders have not yet been made (if there remain any such cases – I do not know whether there are any) or in cases where prospective directions have been made but are successfully appealed so that the question of the exercise of the paragraph 7(3) discretion has to be considered afresh, the parties will give serious consideration to the appropriate outcome if their own favoured regime were to be rejected; and whether or not they do so, the judge ought to consider, when faced with rival applications for prospective directions, whether fairness and justice might better be achieved by making a direction which applies different regimes over different periods, rather than by fixing prospectively a costs shifting regime or a no costs shifting regime for the entire proceedings. If the parties are both adamant that the judge should make a prospective determination one way or other, then no doubt that can be done, although the judge could not be compelled to accede to the parties' wishes. I consider that these alternative approaches should at least be considered by the judge and raised with the parties if the parties do not themselves raise them, if only to be rejected in the light of the parties' clearly expressed wishes.

37. In paragraph 31 above, 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 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 as I have said in paragraph 7 above.

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).

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.

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.

42. But in similar vein, an application by HMRC for a prospective direction applying Rule 29 ought to be rejected. If made during a reasonable period from 1 April 2009, it ought to fail if met by opposition from the taxpayer. The first policy is to give the taxpayer the choice of regime, at least where he makes an application within a reasonable time. In practice, as in the present case, if HMRC make an application which is opposed by the taxpayer, he would surely make his own cross-application for a prospective direction that Rule 10 should apply. If HMRC make their application after the expiry of the reasonable period which the taxpayer has to effect his own election, HMRC ought not, in my view, to be able to displace the default regime any more than they can do so in appeals commenced in the Tax Chamber. It would not be fair and just to allow them to do so. The

same goes for an application by HMRC at the end of the appeal if they are successful for an order for costs against the taxpayer. In this context, the default regime is a no costs regime because that is the way in which Rule 10 works where there has been no allocation of the appeal as a Complex case.

43. I have said all of that in the context of the first example What about the second example? In my view, there is no reason to apply the two polices which I have mentioned, applicable to cases in the Tax Tribunal and governed by the 2009 Rules, to cases which, in practical terms, have nothing at all to do with the Tax Tribunal or the 2009 Rules. It would not, in my judgment, be fair and just to deprive the successful party of the right to costs which he would have recovered had it not been for the implementation of the tribunal reforms. Fairness and justice can be achieved by the exercise of the discretion under paragraph 7(3). In the absence of exceptional circumstances, I would expect the tribunal in the second example to exercise its powers to award costs by applying Rule 29. No question arises, of course, in this example of making an application for a prospective direction. Clearly that would be pointless and would be bound to be met with a response from the tribunal that it was wholly unnecessary and that costs would be dealt with following release of the eagerly anticipated decision.

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.

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.

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.

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.

49. Given the default position under Rule 10, it is, of course, encumbent on the party who wishes to operate in a costs shifting regime to make an application disapplying Rule 10 and applying Rule 29. Unless it is prepared to make a direction for different regimes, the tribunal is really faced with this dilemma. On the one hand, it has before it proceedings part of which were conducted in a costs shifting regime in accordance with the then subsisting policy in respect of cost. On the other hand, it has before it proceedings part of which were and will be conducted in a regime in which, in default of contrary direction, there is no costs-shifting.

50. Ideally, any application to depart from the default regime ought to be done within a reasonable time of 1 April 2009. If an application were made shortly after 1 April 2009, and if the tribunal were to reject the idea of a direction applying different regimes, then it would have to attempt to resolve the tension as best it can. But if the application were delayed for some time, the passage of time will make it more difficult, I consider, to obtain a prospective direction disapplying Rule 10 and applying Rule 29. This is not, in my view, because of any reasonable expectation on the part of the taxpayer that the default regime will apply, but rather because this is what the second policy, the policy of certainty which lies behind the 2009 Rules, requires. If neither party makes an application for a prospective direction, that certainty is to be found in the default regime and the passage of time renders a departure from that regime more difficult to justify.

51. It might be argued that certainty is something of a red-herring in current proceedings because it is always open to either party to obtain certainly by making its own application for a prospective direction. Thus, it is open at any time for a taxpayer to make an application under paragraph 7(3) fixing Rule 10 as the appropriate costs regime, thereby eliminating even the possibility of a cost order in the future; this is precisely what Atlantic eventually did in the present case. Accordingly, it can be argued that delay by HMRC in making its own application

is not of great significance. There is, I consider, something in that point. It means, I think, that less weight should be attached to delay than might otherwise be the case. But this must not be pressed too far. In particular, there is something artificial and contrary to common sense in expecting a taxpayer who wants to rely on the default regime to have to make an application to ensure that that regime cannot be departed from rather than the onus being on HMRC at an early stage to make its own application.

52. Whatever the analysis, it is important not to lose sight of the fact that the tribunal has a discretion under paragraph 7(3) and must do what is fair and just in all the circumstances of the case. Thus, were HMRC to make it clear all along that it would be seeking a costs order at the end of the proceedings if successful, that ought to be taken into account if and when they actually make an application for a prospective order. In those circumstances, some weight is surely to be attached to the ability of the taxpayer himself to make an application for a prospective direction in order to prevent HMRC seeking such an order for costs. This is linked to the question of the expectations of the parties. To the extent that a taxpayer might have an expectation that the default regime will apply, that expectation must surely be tempered by a clearly articulated intention of HMRC to seek to persuade the tribunal at the end of the proceedings to depart from that default regime.

53. As to expectations, I will consider later what Judge Berner said about this in *Hawkeye Communication Ltd v Revenue and Customs Commissioners* [2010] UK FTT 636 (TC) ("***Hawkeye***") and what Judge Wallace said about what he referred to as "legitimate expectations" in the present case. For the moment, I focus on the suggestion that an appellant has a reasonable expectation that Rule 10 will apply unless and until an application is made that Rule 29 should apply. In using the words "reasonable expectation" I intend to make clear that I am not referring to the sort of legitimate expectations which give rise to a public law remedy if breached or to the way in which the concept of legitimate expectation is utilised in EU law.

54. A party to a tax appeal, whether the taxpayer or HMRC, has not only a reasonable expectation that the relevant procedural rules will be applied, but also the right to have them applied in fact. In the case of current proceedings, the relevant rules are to be found in the 2009 Rules read with paragraph 7. Neither a taxpayer nor HMRC are entitled to have the 2009 Rules applied as if paragraph 7 did not exist. But unless a direction is made under paragraph 7, whether a prospective direction or a direction at the time when a costs order comes to be made, then Rule 10 will apply. In that sense, it is perfectly true that a taxpayer has a reasonable expectation that Rule 10 will apply, indeed he has a right to that effect.

55. But that is not to say that there is some justified expectation of the taxpayer (or indeed of HMRC) that the default regime will apply which is, of itself, a factor which should be taken into account in the exercise of the discretion. If it is suggested that the tribunal should exercise its discretion by declining to apply Rule 29 <u>because</u> there is a reasonable expectation that Rule 10 will apply, I do not agree with it. When it comes to exercising the discretion under paragraph 7, whether in making a prospective direction or in making an actual order for costs, the tribunal must, of course, act judicially applying the correct principles whatever they may be. In the case of an application for a prospective order, the passage of time since 1 April 2009 will be a relevant factor, as I will explain, in how that discretion should be exercised. The taxpayer has not only a reasonable expectation, but also a right to insist, that the discretion will be exercised in accordance with those principles; and if it is the case that those principles result in the passage of time making it more difficult for HMRC to obtain a prospective direction that Rule 29 should apply, then the taxpayer can be said to have a reasonable expectation that it will be correspondingly more likely that Rule 10 will apply. The reasonable expectation arises because of the way that the taxpayer is entitled to expect that the discretion will be exercised; it is not the case that the discretion must be exercised in favour of the application of Rule 10 because there is a reasonable expectation that it will be. As with cause and effect, the relationship between the exercise of discretion and the reasonable expectation of a taxpayer goes in only one direction and is important to remember which way the arrow of the relationship, like the arrow of causation, points.

56. Accordingly, a tribunal must be careful to take account of the expectations of a taxpayer only as a reflection of the factors which lead to those expectations and must be careful not to give separate weight to those expectations (unless, of course, there are expectations generated by other matters, such an express representation by HMRC that it would not seek to impose a costs shifting regime).

57. I now come to the decision of Judge Berner in *Hawkeye*. The appeal before me is not, of course, an appeal from that decision. But it was relied on by Judge Wallace in the present case and is relied on by Atlantic. I therefore need to address it in some detail.

58. Judge Berner's reasoning went as follows. He stated in [22] that the circumstances in which the application was made "include the reasonable expectation of the parties" and that "substantial work" was done on the case prior to 1 April 2009. Judge Wallace in similar vein in the present case referred to "legitimate expectations". Then, in [23], Judge Berner stated his view – it was really a finding of fact – that the larger part of the work on the appeal had taken place and would continue to take place after 1 April 2009. Then he said this

> "From that time [1 April 2009], in the absence of any clear indication to the contrary, including an application for the 1986 costs Rules to apply, there was in my view a reasonable and legitimate expectation on the part of the Appellant at least that the 2009 costs rules would apply. The default position is that the 2009 Rules apply to all tribunal proceedings, and although this is subject to the exercise of a discretion by the tribunal to apply the 1986 Rules, unless or until such a direction is made, a party is entitled to conduct the proceedings on that basis……."

59. Then, continuing with [23], after disagreeing with the submission that delay on the part of HMRC in making the application for a direction that the 1986 Rules should apply ought not to weigh in the balance, he noted that

> "In my view, in weighing the issue of fairness and justice, I must consider all the circumstances, including the respective periods where the application of different rules would give rise to different expectations. In doing so, I note that it was not for the Appellant to make any application that the 2009 Rules should apply (though it did in the event apply for clarification of that position)….."

That, if I may say so in passing, is a quite powerful piece of advocacy in favour of different costs regimes applying to different periods

60. Although Judge Berner used the words "a reasonable and legitimate expectation", I do not think that he was intending to refer to the type of legitimate expectation which would give rise to a public law remedy (although if he was doing so, the facts referred to by him do not establish such a legitimate expectation). I think he was using the words in a rather more colloquial or common-sense way to mean that the taxpayer would reasonably assume that the 2009 Rules would apply. The Judge clearly acknowledged, however, that the default position was no more than that, and that there was a discretion to apply the 1986 Rules. I consider that he can be taken as saying no more than that the taxpayer could assume that the default position would apply unless and until HMRC indicated to the contrary, in which case they ought to make an application, and that it would be for HMRC to justify a departure from the default position. This interpretation of what the Judge said is entirely consistent with my own approach to the exercise of the discretion, reflecting the application of the two policies which I have identified.

61. This is borne out by the second passage which I have quoted, where the use of the word "expectation" shows the Judge had well in mind the tension which I have referred to, with an expectation that costs in the pre-1 April 2009 period would be dealt with in a costs shifting regime and the expectation, on the part of the taxpayer, that the costs in the post 1 April 2009 period would be dealt with in a no costs shifting regime (in default of any contrary direction). Those were justifiable expectations in this sense. For the first period, the taxpayer knew he was operating in a costs shifting regime until he found his appeal transferred to the Tax Chamber. Until then (the first of the "respective periods" referred to by the Judge), he had an expectation that a costs shifting regime would apply in relation to the first period. After that, from 1 April 2009, (the second of the "respective periods" referred to by the Judge) the taxpayer knew he was operating in a no costs shifting regime (unless and until his case was allocated as a Complex case at which time he would be able to opt out). In both cases, the taxpayer would know, or ought to know, that the tribunal had a discretion under paragraph 7(3) to depart from the relevant set of rules. It was not inapposite, I consider, to refer to an

"expectation" in relation to the relevant regime in the absence of the exercise of that discretion.

The Decision

62. It is apparent that Judge Wallace, like Judge Berner (see [30] of the decision in *Hawkeye*), saw refusal of HMRC's application to apply Rule 29 and a conclusion that Rule 10 should apply as two sides of the same coin. But as in the case of *Hawkeye*, it does not appear that either side argued for anything other than an "all or nothing" approach or that the tribunal should make no direction at all.

63. After reciting the competing arguments of the parties, Judge Wallace discussed them and reached his decision in [38] to [54] of the Decision under the heading "Conclusions". I should mention and comment on a number of paragraphs of that discussion.

64. In [41] Judge Wallace stated that the power to apply Rule 29

> "is necessary to meet the legitimate expectations of an Appellant who started proceedings before 1 April 2009 in the expectation that if successful he could recover his costs. Denial of such legitimate expectation would have been contrary to Community law….."

And then in [45] he said this:

> "The problem arises when as here one party opposes the application of the 1986 costs rules and above all when that party is an Appellant which can invoke legitimate expectations because of the time that has passed."

65. As to the first of those passages, it is not suggested that HMRC could rely on any legitimate expectation under EU law concerning the recovery of its own costs. However, even if paragraph 7(3) provides a mechanism for giving effect to such a legitimate expectation, I can see no reason for saying that that is the sole or even main purpose of paragraph 7(3) as it applies to costs. It is not at all clear to me, therefore, why Judge Wallace mentioned this aspect. It may be that he actually considered that the <u>only</u> purpose of paragraph 7(3) in relation to costs was to meet the legitimate expectations of an Appellant, but if he did mean to say that, I do not

think he would have been correct. The second example illustrates that the expectations of HMRC are to carry weight too.

66. As to the second of those passages, the Judge links delay and expectations by the words "….an Appellant which can invoke legitimate expectations because of the time that has passed". As I read the Judge, he was saying much the same as Judge Berner. Costs will be dealt with under the default regime unless that regime is disapplied pursuant to the paragraph 7(3) discretion. A taxpayer has a legitimate expectation that that will happen – indeed, I would add that he has a right to that effect. Delay is something which falls to be taken into account and, where delay is present, the legitimate expectation is that the discretion will not be exercised to disapply the default position. This is doing no more than to reflect in the language of reasonable expectation, the way in which the discretion under paragraph 7(3) ought to be approached. I do not read the Judge as detecting some free-standing legitimate expectation, over and above that caused by the delay, to which effect should be given. Indeed, if there was such a legitimate expectation, it is not easy to see why the Judge need have troubled about delay at all because there would have been nothing which would have allowed him to refuse to give effect to it.

67. This is confirmed by that Judge Wallace said, at [49] and [55] of the Decision. At [49], in relation to a submission that delay in making an application for Rule 29 to apply is not relevant he said this:

> "I do not accept that the delay in seeking a direction is not relevant. In my judgment it is clearly not acceptable that parties should wait and see how a case develops before making an application for a direction. I do not suggest that the delay here was for that reason, however it clearly had that effect. "

68. It will be apparent from what I have already said that I agree broadly with the view that delay beyond a reasonable time after 1 April 2009 is relevant to the exercise of the discretion. And I would agree with Judge Wallace to this extent namely that, 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.

69. In [55] Judge Wallace stated what for him, on the facts of the case, was the decisive factor against applying Rule 29. It was the lapse of time since 1 April 2009 until the making of the application by HMRC on 28 October 2010, some 19 months later adding that "there has been nothing in the conduct of the Appellant or otherwise to make it necessary to apply those Rules [the old costs rules] in order to ensure that the proceedings are dealt with fairly and justly". He went on to express full agreement with the reasoning of Judge Berner in *Hawkeye*. It was implicit in what Judge Wallace was saying there that Rule 29 ought not to apply at all; in other words, he was deciding that it would not be appropriate to make a costs order in favour of HMRC at the end of the appeal if it was successful even in relation to the costs incurred in the VAT Tribunal; and that, no doubt, is why he effectively acceded to Atlantic's application to confirm the application of Rule 10.

70. I consider that it was within the range of reasonable decisions open to him for him to have reached the conclusion that the lapse of time in the present case was such that HMRC should not obtain the prospective costs order which they sought in relation to the entire proceeding including the costs in the VAT Tribunal. In particular, he was entitled to reach that conclusion notwithstanding that HMRC had indicated, early in the proceedings, that they would be seeking a costs order if successful. That indication was given before the jurisdiction of the VAT Tribunal had been transferred to the Tax Chamber and before the 2009 Rule were in force. HMRC's indication that it would seek costs under rules, the 1986 Rules, which gave them a right to do so is not to be taken as an indication about how costs would be dealt with under the entirely different regime found in the 2009 Rules. Further, he was entitled, in my view, to reach that conclusion notwithstanding earlier orders on interim applications that costs should be "in the case" or "in the cause". The particular circumstances of those orders cannot be taken as an acceptance by Atlantic that a costs shifting regime was to apply to the entire proceedings.

71. In dismissing HMRC's application, the Judge said this at [56] of the Decision:

> "The application [HMRC's application] is dismissed. The result is that the only costs which can be ordered in this appeal are for wasted costs under Rule 10(1)(a) and costs for unreasonable conduct under Rule 10(1)(b)."

72. Although the Judge did not actually expressly rule on Atlantic's own application, it is implicit in [56] that he acceded to it: the granting of that application would have had precisely the result there expressed. The Judge, it is clear, saw the granting of Atlantic's application as following necessarily from the rejection of HMRC's application. It is true that the refusal of HMRC's application does not, logically, lead by itself to the conclusion expressed in the second sentence of [56]. However, it was implicit in the way that the whole matter was presented to the Judge that if HMRC lost, Atlantic would win. Nobody suggested otherwise; nobody suggested that different costs regimes could be adopted for different periods; and nobody suggested that no prospective direction should be made at all. What the Judge was being asked to do was to choose between the two regimes in respect of the entire proceedings. He was entitled, in my judgment, to reach the conclusion which he did. Had different arguments been addressed to him, and in particular if he had been asked to make a split direction, the outcome may have been very different. It is not necessary to speculate. All that it is necessary for me to say is that the points not having been raised by either party, there is no error or law shown on the part of the Judge.

73. In relation to that aspect of the case, I would only add two things. First, it is difficult to see how it would be possible for a tribunal, at the end of an appeal, to make a costs order in favour of HMRC if they had made, but failed in, an earlier application for a prospective direction applying Rule 29. The very factors which would have led to a rejection of such an application would apply to the exercise of the paragraph 7(3) discretion at the end of the appeal. Indeed, the critical factor, delay, is even more relevant; and the very act of "waiting and seeing" how things turn out is of even more significance.

74. Secondly, even if the possibility of making different directions in relation to different periods had been raised and addressed, it is difficult to see how it would have been possible to apply a costs shifting regime in relation to the costs incurred since 1 April 2009. To have made such a direction in the face of opposition from

Atlantic would fly in the face of the policy of the 2009 Rules. Once the tribunal has acceded to the approach of a split direction, it follows almost inevitably that it should apply that policy in respect of costs incurred in front of the Tax Tribunal. Had this been a matter for me, I would certainly not have exercised my discretion by making the direction sought by HMRC. I would either have made the direction which Judge Wallace made or I would have adopted the split direction approach, in which case the most which HMRC could have achieved would have been a prospective direction applying Rule 29 to the costs incurred prior to 1 April 2009 and I doubt that they would have achieved even that.

Disposition

75. HMRC's appeal is dismissed.

Mr Justice Warren, Chamber President

6 February 2012

Release Date 6 February 2012