TC06002

Appeal number:TC/2014/01804

PROCEDURE – costs – complex case – whether appellant opted out of liability for costs within 28 days of receiving notice of allocation as a complex case – date notice received – what amounts to receiving notice - written request to opt out of liability made in time

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALBON ENGINEERING AND MANUFACTURING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at the Royal Courts of Justice, Strand, London WC2A 2LL on 16 June 2017

David Southern QC instructed by Arram Berlyn Gardner LLP Chartered Accountants for the Appellant

Richard Vallat and Emma Pearce of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

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DECISION

Background

1. The present appeal has been categorised as a complex case pursuant to *Tribunal Rule 23(2) Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009*. On 27 March 2017 the Tribunal directed that there be a case management hearing to determine whether the Appellant's written request to the Tribunal dated 15 March 2017 pursuant to Tribunal Rule 10(1)(c)(ii) to exclude the proceedings from potential liability for costs was made in time. If not, whether the time for making a written request should be extended. This is my decision in relation to those issues.

2. Rule 23 provides that on receipt of a notice of appeal the Tribunal must give a direction allocating the case to one of four categories. The direction is generally given by email or letter and in the present case an email was sent to the Respondents on 21 May 2014 informing them that the appeal had been assigned to proceed under the complex category. Where a case is categorised as a complex case the Tribunal will have a general jurisdiction to make appropriate costs directions in relation to the appeal. Provision for this "costs-shifting regime" is made in Rule 10(1)(c)(i). However, Rule 10(1)(c)(ii) provides that a taxpayer (but not the respondent) can exclude the proceedings from potential liability for costs where the taxpayer sends or delivers to the Tribunal a written request to that effect. The written request must be sent or delivered within 28 days of receiving notice that the case has been allocated as a complex case.

3. Rule 10(1) provides as follows:

> " (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)--
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; . . .
>
> (c) if--
>
> > (i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and
> >
> > (ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of **receiving notice** that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph; "
>
> (emphasis added)

4. The appeal itself is listed for hearing on 9 October 2017 for 4 days. I am not concerned with the underlying merits of the appeal, or with the issues which will be determined when the appeal is heard. There is no question that the appeal is properly categorised as a complex appeal and significant sums of tax are in dispute.

5. Put briefly, the Appellant contends that it did not receive any direction of the Tribunal allocating the appeal as a complex case. In the circumstances set out below it contends that it is therefore still in time to make a written request to exclude liability for costs and that it has done so. To the extent that it is not in time to make such a request the Appellant seeks an extension of time in which to do so.

6. The Respondents contend that I should proceed on the basis that the Appellant did receive notice that the appeal had been categorised as a complex case in May 2014, or later in 2014. They submit that the Appellant's written request for the proceedings to be excluded from potential liability to costs is therefore out of time and that I should not extend the time limit. The Respondents rely in their submissions on the effect of section 7 Interpretation Act 1978 ("IA 1978") which provides as follows:

> " Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

7. The Respondents contend that the Tribunal sent a letter dated 21 May 2014 to the Appellant's representative, Arram Berlyn Gardner ("ABG") categorising the appeal as complex. There is therefore a presumption that it was delivered in the ordinary course of post and the Appellant has not established that it was not so delivered. In the alternative, if that letter was not received then the Appellant received notice later in 2014.

The Issues and the Circumstances in which they Arise

8. The appeal was notified to the Tribunal in a notice of appeal dated 2 April 2014. By January 2017 the appeal was ready to be listed and the parties were also seeking to agree a statement of facts. On 3 February 2017 the Respondents wrote to Mr Victor Dauppe of ABG in relation to certain outstanding matters. They invited the Appellant to withdraw its appeal and stated that they would be seeking their costs if the case proceeded to a hearing. On 23 February 2017 Mr Dauppe wrote to the Tribunal with a copy to the Respondents. At this stage he had been told by the Tribunal that a letter designating the appeal as complex had been sent out dated 21 May 2014. He stated in his letter to the Tribunal as follows:

> "On a prompt from HMRC's Solicitors Office in their letter of 3 February 2017 and by Tax Counsel, Mr David Southern QC on 6 February … I examined the Firm's files for a letter from you designating this Appeal "Complex", receipt of which would start a

period of time in which an Application for exclusion from the Costs regime could be validly made wish was and is the wish of my client (sic).

No such letter from you could be located and it is my view that it was never received. "

9. Mr Dauppe's letter to the Tribunal enclosed an application by the Appellant dated 22 February 2017 to extend the time to request exclusion from liability for costs. That application was considered by Judge Berner who questioned whether there was any need to extend time if the Tribunal's letter categorising the appeal as complex had not been received. A case management hearing was therefore listed.

10. The Appellant's application to extend time recorded the following as fact:

" As stated in the letter [Mr Dauppe's letter dated 23 February 2017]:

(i) The Tribunal Office sent a letter to ABG dated 21 May 2014 stating that the appeal had been classified as a Complex case.

(ii) That letter was never received by ABG …"

11. It is apparent from the Appellant's application that the Appellant was not challenging the fact that the categorisation letter had been sent out by the Tribunal, but was asserting simply that it had not been received by ABG.

12. For the purposes of the present hearing Mr Dauppe made a witness statement which was served on the Respondents on or about 7 April 2014. Mr Dauppe is a Chartered Accountant and the tax partner in ABG. He has conduct of the present appeal on behalf of the Appellant. His evidence briefly described ABG's system for incoming mail. He also stated that he had thoroughly examined ABG's files and could not find any letter dated 21 May 2014 on those files.

13. Mr Vallat on behalf of the Respondents cross-examined Mr Dauppe. In submissions it was the Respondents' case that the Tribunal had sent the letter dated 21 May 2014 to ABG. Section 7 IA 1978 therefore deemed the letter to be received by ABG in the ordinary course of post and the Appellant had not proved the contrary.

14. Mr Southern QC on behalf of the Appellant submitted that the Respondents had not established that the Tribunal had properly addressed, pre-paid and posted the categorisation letter to ABG. He therefore submitted that section 7 IA 1978 was not engaged. The only question therefore was whether the categorisation letter was received by ABG. There was no burden on the Appellant to establish that it was not received.

15. The Appellant's submission questioning whether the categorisation letter had been sent was raised in Mr Southern's skeleton argument only a few days before the hearing. It was raised in circumstances where the Appellant had previously accepted that the letter had been sent by the Tribunal to ABG. Applying the overriding objective, I do not consider that it would be fair and just on the Respondents to expect them to adduce detailed evidence as to the addressing, pre-payment and posting by the

Tribunal of the categorisation letter to ABG. If the Appellant was seriously questioning those matters then the Respondent would no doubt have sought more detailed evidence to address them. In the event, the Respondent had obtained a letter from the Tribunal dated 26 May 2017 to the effect that "it may be inferred [from the file] that the letter dated 21 May 2014 was sent by post". That would not in itself ordinarily be sufficient evidence to engage section 7 IA 1978 but in circumstances where the Appellant had indicated that the only issue was one of receipt I am prepared to accept that section 7 IA 1978 is engaged.

16. Against that background I can summarise the issues to be resolved as follows:

(1) Did the Appellant receive notice in 2014 that the appeal had been categorised as a complex case either:

(a) through receipt of the categorisation letter by ABG, or

(b) otherwise.

(2) If so, should time be extended for the Appellant to opt out of the costs-shifting regime?

17. Mr Vallat accepted that if notice was not received by the Appellant in 2014 then the Appellant was entitled to opt out of the costs regime as it has sought to do in 2017. The Respondents contend either that the Appellant received the categorisation letter, or that it received notice of categorisation as a complex case by other means in 2014. In particular they rely on:

(1) receipt by ABG on or about 25 July 2014 of the Respondents' Statement of Case which contained an application for costs, and

(2) receipt by ABG on or about 8 August 2014 of an email from the Tribunal attaching a document entitled "*Complex Directions.doc*".

18. The Respondents contend that these documents were sufficient to put the Appellant on notice that the appeal had been categorised as a complex case.

19. If I am not satisfied that the Appellant received notice of allocation as a complex case in 2014, then the question arises whether I should exercise discretion to extend time for the Appellant to opt out of the costs-shifting regime.

Findings of Fact

20. The first issue is whether the categorisation letter was received by ABG. For the reasons given above I accept that section 7 IA 1978 is engaged, namely that the Tribunal properly addressed, pre-paid and posted the categorisation letter. I must therefore consider whether the Appellant has proved that it was not delivered to ABG.

21. The Appellant lodged its notice of appeal with the Tribunal on 2 April 2014. On 21 May 2014 the appeal was notified to the Respondents by an email which also informed the Respondents that the appeal had been "assigned to proceed under the complex category". The Tribunal also prepared a letter dated 21 May 2014 to ABG acknowledging receipt of the notice of appeal and informing them that the appeal had

been assigned to proceed under the complex category. The letter also indicated that the Respondents had 60 days to serve a Statement of Case and that the Appellant could opt out of the costs regime within 28 days of the date of the letter. Strictly it ought to have said within 28 days of the Appellant receiving notice that the appeal was categorised as complex.

22. On 25 July 2014 the Respondents served their Statement of Case. The last paragraph of the Statement of Case under the heading "conclusion" stated:

> "For these reasons, the appeal should therefore be dismissed (with costs)."

23. On 8 August 2014 the Tribunal wrote to both the Respondents and ABG inviting them to agree case management directions. The letter stated that it was enclosing a copy of draft directions the Tribunal might make. The letter was sent to the Respondents as an attachment to an email dated 8 August 2014. The draft directions were also attached to the email as a file named "*Complex Directions.doc*". ABG received the letter and it was on their file, but Mr Dauppe could not say whether it came by post or by email. ABG replied to it by letter and fax dated 18 September 2014. I indicated to the parties at the hearing that I would check the Tribunal file to see how it was sent. The file shows and I find that the letter was emailed to Mr Dauppe at ABG as an attachment to an email dated 8 August 2014 timed at 13.06. Also attached were the draft directions with the same file name identified above. As a result ABG must be taken to have known that the draft directions were in a document called "*Complex Directions*". The draft directions themselves gave no indication on their face that the appeal had been categorised as a complex case.

24. Mr Dauppe is an experienced tax practitioner, although he has very limited experience of conducting appeals before the Tribunal. In 2014 he was not aware of the Tribunal Rules in relation to costs, although he was prepared to accept that he ought to have made himself aware. Mr Dauppe said in evidence that he expected the Tribunal Service to tell him everything he needed to know with a "flow of instructions to help him through the procedure". He described this appeal as "a voyage of exploration". I have to say that it is unacceptable for a professional tax adviser to adopt such an approach. The Tribunal seeks to assist parties by explaining the procedure, in particular for the benefit of appellants appearing in person and inexperienced representatives. However, a professional tax adviser representing a client before the Tribunal must not use that as an excuse for not familiarising himself with the Tribunal Rules, including the rules as to costs.

25. Mr Dauppe's evidence was that when he received the Respondents' letter dated 3 February 2017 he looked at ABG's file for the appeal and could not find any letter from the Tribunal categorising the appeal as a complex case. He then telephoned the Tribunal on 21 February 2017 and was told that a letter designating the appeal as complex had been sent out on 21 May 2014. He asked for a copy of that letter, which was subsequently provided.

26. Mr Dauppe said that since 21 February 2017 he had re-examined all his firm's files dealing with the appeal and was not able to find any copy of the categorisation

letter. He described his firm's systems. Files were maintained electronically in 2014. Incoming post was received in the post room where it was opened unless it related to a personal matter. The contents were then given to the member of the firm responsible for the matter to which it related. That person would action the letter, scan it and electronically file the letter. Hard copy letters might sometimes be placed in a special projects temporary paper file. There were no gaps in ABG's electronic file for the Appellant and the record of correspondence did not indicate any omissions.

27. On 3 February 2017 Mr Dauppe received the Respondents' letter inviting the Appellant to withdraw its appeal and indicating that the Respondents would be seeking their costs of the appeal should it proceed to a hearing. I am satisfied that it was this letter which first prompted Mr Dauppe to consider the question of costs.

28. I was referred to various authorities illustrating the operation of section 7 IA 1978. All those cases are decided by reference to their own facts and the context in which the issues arose. As such I did not derive much assistance from them and there is no need for me to reference them in this decision. I do however mention two cases. Firstly, *R v Secretary of State for Home Department Ex parte Yeboah [1987] WLR 1586 at p1593C* where Sir Nicolas Browne-Wilkinson V-C stated:

> " The principle in *Rossi's case [1956] 1QB 682*, as I understand it, is that where the principal Act makes the date of receipt of a notice crucial either for the purpose of enabling the person to whom it is addressed to take some action or for the purpose of, for example, fixing the date of valuation, section 7 of the Interpretation Act 1978 cannot operate to deem that the notice has been received when it has not in fact been received."

29. Secondly, in *Calladine-Smith v Saveorder Ltd [2011] EWHC 2501 (Ch)* Morgan J stated as follows:

> " [26] …if the addressee of the letter proves on the balance of probability that the letter was not served upon him then that matter has been proved and the section should be applied accordingly. Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including issues as to the credibility of witnesses. That is the ordinary way in which a court goes about making findings of fact."

30. Mr Vallat submitted that the evidence of non-receipt was inadequate. In particular there was no evidence from Mr Dauppe that he had checked whether his firm's system for incoming post was operating efficiently in May 2014. I accept that Mr Dauppe's evidence as to the reliability of his firm's systems might have been more comprehensive. However, Mr Dauppe was a credible witness and on balance I am satisfied that ABG and therefore the Appellant did not receive the Tribunal's letter dated 21 May 2014.

Decision

31. As mentioned above, Tribunal Rule 23(1)(b) requires the Tribunal on receipt of an appeal to give a direction allocating the case to a category. Tribunal Rule 6(4) then provides as follows:

> " 6(4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction."

32. Mr Dauppe's evidence was that he assumed that the appeal had never been categorised. Mr Vallat contended that this was an unreasonable assumption. I agree. For the reasons given above Mr Dauppe should have been aware that the Tribunal must categorise an appeal on receipt, and notify the parties of that categorisation. If Mr Dauppe had read the Tribunal Rules he would have been aware that he had not received any categorisation letter and ought to have made enquiries of the Tribunal.

33. The purpose of the costs-shifting regime for complex cases in the Tribunal Rules was considered by the Upper Tribunal in *Atlantic Electronics Ltd v Commissioners for HM Revenue & Customs [2012] UKUT 45 (TCC)* where Warren J described it as follows:

> " 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."

34. Mr Southern submitted that it is necessary for an Appellant to receive written notice from the Tribunal that a case has been allocated as a complex case. Time would not start running merely because the Appellant should reasonably have known that the case had been allocated as a complex case. Imputed or constructive knowledge was insufficient. In a case of non-receipt, time would not start running. The purpose of the rule was legal certainty and anything falling short of actual written notice from the Tribunal would defeat that purpose. Mr Southern also submitted that even if the Appellant had been reliably informed that the appeal had been allocated as a complex case that would be insufficient. Legal certainty requires receipt of the written notice.

35. I do not accept Mr Southern's submissions. In construing the Tribunal Rules to identify what amounts to sufficient notice for the purposes of Rule 10(1)(c)(ii) it is necessary to take into account the policy behind the costs-shifting provisions as described by Warren J. Tribunal Rule 2(3)(b) also provides that in interpreting the Rules the Tribunal must seek to give effect to the overriding objective of dealing with cases fairly and justly. On that basis a taxpayer should be treated as having received notice of allocation for these purposes where it would be fair and just for him to be treated as having received such notice. Such an approach is consistent with the decision of the Upper Tribunal in *Hills v Commissioners for HM Revenue & Customs [2016] UKUT 266 (TCC)*. In that case the Upper Tribunal held in rather unusual circumstances that a written request to opt out of the costs-shifting regime did not take effect where the interests of justice would not be served by treating it as a written request for the purposes of Rule 10(1)(c)(ii).

36. A similar issue was recently considered in this Tribunal in *Clipper Group Holdings Ltd v Commissioners for HM Revenue & Customs [2016] UKFTT 712 (TC)* where the letter categorising the appeal as complex was not received by the Appellant and only came into its possession when it was included in a large bundle handed to the Appellant's counsel during the course of an application hearing. In that case Tribunal Judge Beare held that the Appellant had not received notice of the allocation for the purposes of Rule 10(1)(c)(ii). He stated at [41] as follows:

> " 41. So I would summarise my view by saying that, on a fair and just interpretation of the language used in rule 10(1)(c)(ii) of the Tribunal Rules, notice can be said to be received for the purposes of rule 10(1)(c)(ii) of the Tribunal Rules only if the recipient either is actually aware that it has received the notice or ought to be aware that it has received the notice given the circumstances in which the notice was received."

37. Construing the Rules purposively it seems to me that knowledge derived from something other than a written direction given by the Tribunal pursuant to Rules 23(1)(b) and 6(4) can amount to notice in appropriate circumstances. Rule 10(1)(c)(ii) refers to "receiving notice" and not receiving "the" notice. Whether oral notice or what Mr Southern described as imputed notice or constructive notice is sufficient for these purposes will depend on all the circumstances of the case.

38. I will not seek to set out in this decision any general principle as to what might be sufficient to constitute "notice" for these purposes. Each case will no doubt turn on its own facts. I am satisfied that where the categorisation letter is not received, receipt of the Statement of Case with a concluding request for the appeal to be dismissed with costs does not constitute sufficient notice for the purposes of 10(1)(c)(ii). In particular the Statement of Case did not originate from the Tribunal and it did not particularise on what basis the Respondents would be seeking their costs. Costs might have been sought on the basis that the appeal was a complex case, or on the basis that the Appellant had acted unreasonably in bringing the appeal because there was no real prospect of success.

39. I am also satisfied that receipt of suggested draft directions from the Tribunal in electronic form in a document with a file name "Complex Directions.doc" does not constitute sufficient notice, either by itself or together with the Statement of Case.

40. Mr Vallat submitted that the reference to costs in the Statement of Case and the receipt of draft directions from the Tribunal in a document named "Complex Directions.doc" ought to have put Mr Dauppe on notice in the sense that he ought to have checked the position as to categorisation and costs when he received those documents . For the reasons already given above I am satisfied that Mr Dauppe ought to have been aware that the Tribunal would allocate a case to a category and he ought to have been aware of the rules as to costs. I accept therefore that in 2014 Mr Dauppe ought to have queried with the Tribunal the category to which the appeal had been allocated. Those failings however are not sufficient in my view to constitute notice that the appeal had been categorised as a complex case. It is one thing to say that there was sufficient information in the hands of a party to know that the appeal had been categorised as complex. It is another to say that with further enquiries a party would have discovered that the appeal had been categorised as complex. In my view the failure of Mr Dauppe to make himself familiar with the Tribunal Rules or to make enquiry of the Tribunal is more appropriately a matter to be taken into account in relation to any application for costs which might be made under Rule 10(1)(b) based on unreasonable conduct. That would be a matter to be addressed at the conclusion of the appeal and I express no view as to whether Rule 10(1)(b) would be engaged.

41. I am satisfied that the Appellant first became aware that the appeal had been categorised as a complex case when Mr Dauppe contacted the Tribunal on 21 February 2017 and was told that the appeal had been allocated as a complex case in 2014. On the present facts the earliest date on which the Appellant might be said to have received notice of the categorisation is 21 February 2017. The Appellant then delivered a written request to the Tribunal opting out of the costs regime on 15 March 2017. The written request was sent to the Tribunal within 28 days of 21 February 2017 and was therefore effective to exclude potential liability for costs.

42. In the light of my findings this is not a case where the Tribunal needs to exercise discretion to extend the time for opting out of the costs-shifting regime. I shall simply say that if, contrary to my findings, the Appellant did receive notice of allocation in 2014 then I would not have been minded to extend the time for opting out. I agree with Mr Southern that the applicable principles are those in *Data Select Ltd v Commissioners for HM Revenue & Customs [2012] UKUT 187 (TCC).* Applying those principles, in the light of the purpose of the Rule described in *Atlantic Electronics Ltd* I would not have extended time. Put briefly, the purpose of the 28 day time limit is clearly to promote certainty and fairness. There would have been no good reason for the delay. The Respondents have conducted the proceedings to date on the basis that costs-shifting applied. Those factors would have outweighed the prejudice to the Appellant of an unwanted potential liability for costs.

Conclusion

43. For the reasons given above I am satisfied that the Appellant has delivered a written request to the Tribunal within the 28 day time limit in Tribunal Rule 10(1)(c)(ii) and it is excluded from potential liability for costs under Rule 10(1)(c)(i).

44. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 13 JULY 2017