



TC05441

Appeal number: TC/2012/03394

EXCISE DUTY - costs – application for an award of costs in relation to a case allocated as “complex” – Appellant entitled to opt out of the costs regime within 28 days of receiving the notice of allocation – whether the receipt of notice by the Appellant’s counsel as part of a bundle prepared for an application in the course of the appeal constituted notice for this purpose - no – application for costs denied

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLIPPER GROUP HOLDINGS LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE TONY BEARE

**Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL
on 10 October 2016**

Ms Valentina Sloane for the Appellant

**Mr Jonathan Hall QC, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This appeal arises out of an application by the Respondents for the costs incurred by the Respondents in preparing for an appeal made by the Appellant in relation to excise duty which was later withdrawn.

2. The question which I have been asked to decide arises out of rule 10(1)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Tribunal Rules”). That provision specifies that this Tribunal may make an order in respect of costs if:-

“(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer...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”.

3. I have been asked to determine whether a notice given by the Appellant’s representative, 4 Eyes Ltd, dated 10 November 2015 and purporting to opt out of the costs regime in relation to the Appellant’s appeal, was sent within 28 days of the Appellant’s receiving notice that its appeal had been allocated as a complex case.

The facts

4. There is no dispute between the parties as to the relevant facts. These may be summarised as follows:-

(1) The Appellant appealed against an assessment to excise duty in the sum of £5,166,601 on 23 February 2012;

(2) On 6 March 2012, the Tribunal sent a letter to both parties (the “Notice Letter”) notifying them that the appeal had been categorised as a complex case and that, as such, the Tribunal had a general power to award costs against the unsuccessful party unless the Appellant elected to opt out of the costs regime within 28 days of receiving the Notice Letter;

(3) The Notice Letter was not received by the Appellant;

(4) On 26 September 2014, before the hearing of the Appellant’s appeal had been listed, the Appellant made an application to amend its grounds of appeal pursuant to rule 5(3)(d) of the Tribunal Rules and for specific disclosure pursuant to rule 5(3)(d) of the Tribunal Rules;

(5) The Appellant was represented at that hearing by Ms Valentina Sloane, its counsel. Also present at the hearing was Mr Cedric Andrew of 4 Eyes Ltd, the appointed representative of the Appellant in connection with the appeal;

(6) Prior to the hearing on 26 September 2014, Mr Andrew e-mailed a draft bundle index to the Respondents on 9 September 2014 and subsequently served

on the Tribunal and the Respondents the Appellant's bundle of documents in accordance with that index on 17 September 2014;

(7) On 18 September 2014, Mr Sandeep Ghelani of the Respondents sent an e-mail to Mr Andrew which contained the following paragraph:-

5 "Moreover, it appears to us that the draft Index you have produced omits several important documents, namely:

1. Decision Letter
2. All documentation (pleadings, communications and letters between HMRC Officers and you client) in which HMRC's position has been stated.
3. Clipper's original Statement of Case and Listed Documents.
4. Annex to HMRC's initial Statement of Case.
5. All Witness Statements served on behalf of Clipper on 28 May 2013 with exhibits & Appendices and the first witness statement of Robert McWilliam and exhibits.
6. The Schedule accompanying the disclosure made by HMRC comprised in 5 Lever arch files.
7. All Directions and Notices given by the Tribunal

20 We suggest that for the bundle, you could separate, into distinct sections as is normal in hearing bundles, the pleadings, witness statements, tribunal correspondence and interparty correspondence. Please could you amend the Index accordingly, and send me a soft copy of the Index in order that we may make any necessary suggestions?";

25 (8) Mr Andrew replied to Mr Ghelani by e-mail on 22 September 2014. After noting that he had served the Appellant's bundle of documents on the Tribunal and the Respondents on 17 September 2014 because Mr Andrew had not had a response by then to his e-mail of 9 September 2014, the e-mail went on to say the following:-

30 "In respect of the further documents you refer to below, we do not agree that the documents are necessary for the hearing. However, please feel free to put in a supplementary bundle to the Tribunal of any documents you consider necessary.";

35 (9) The Respondents duly did put in a supplementary bundle, accompanied by an Index. The Index referred at tab 11 to "Correspondence from 6 March 2012 to present" and a copy of the Notice Letter was contained in the bundle at page 185. The bundle as a whole contained approximately 250 pages;

(10) The bundle was handed to Ms Sloane at the hearing and was retained by her following the hearing. However, the Notice Letter was not relevant to the subject matter of the hearing and it was accordingly not referred to at the hearing;

40 (11) This meant that neither Ms Sloane, nor Mr Andrew nor anyone at the Appellant was aware of the Notice Letter at that stage;

5 (12) The Respondents did not draw the attention of Ms Sloane to the inclusion of a copy of the Notice Letter within the bundle for the simple reason that the Respondents had no reason to believe that the Notice Letter had not been received by the Appellant in March 2012 when the Notice Letter was sent and the contents of the letter – i.e. the category to which the Appellant’s case had been allocated – were not relevant to the hearing;

(13) On 30 October 2015, Mr Andrew sent an e-mail to the Respondents offering to withdraw the Appellant’s appeal on certain conditions;

10 (14) In response to that e-mail, Mr Farhad Shahidi of the Respondents wrote to Mr Andrew on 6 November 2015 and pointed out that, as the Appellant’s case had been categorised as “complex”, the Tribunal had a general power to award costs and would be likely to award costs against the Appellant. He added that, “in the event that your client does decide to withdraw its appeal, HMRC is minded to apply to the Tribunal for request an award of HMRC’s legal costs of the appeal to date.”;

15 (15) The receipt of this letter of 6 November 2015 was the first time that anyone involved in the appeal on behalf of the Appellant – Ms Sloane, 4 Eyes Ltd and the Appellant – became aware of the existence and contents of the Notice Letter;

20 (16) Upon receiving a copy of the Notice Letter from the Respondents, Mr Andrew sent to the Tribunal a letter dated 10 November 2015. In it, Mr Andrew stated that 4 Eyes Ltd had no record of ever receiving the Notice Letter and that it had recently been provided with a copy of the Notice Letter by the Respondents. He went on:-

25 “Had 4 Eyes Ltd received the Tribunal’s letter of 6 March 2012, we would have elected to opt out of the costs scheme, and Clipper will be contesting any costs application by HMRC.”

5. Both parties are proceeding on the basis that this letter dated 10 November 2015 from Mr Andrew on behalf of the Appellant to the Tribunal amounts to a written request that the proceedings be excluded from potential liability for costs or expenses under rule 10(1)(c) of the Tribunal Rules. I am content to proceed on that basis because that was clearly the intention of Mr Andrew in writing the letter although I would note that, technically, the letter was not so much a request to opt out of the costs regime as a statement that the Appellant would have elected to opt out of the costs regime had it received the Notice Letter when the Notice Letter was originally sent in March 2012.

6. So, proceeding on the basis that the letter from 4 Eyes Ltd dated 10 November 2015 amounted to a request to opt out of the costs regime, the sole question for me to determine is whether that letter was sent within 28 days of the Appellant’s receiving notice that its case had been allocated as a complex case.

Preliminary point

7. There is an argument that the reference in rule 10(1)(c)(ii) to the receipt of notice by the taxpayer should be confined to circumstances where the notice has been received by the taxpayer from the Tribunal itself, following the allocation of the taxpayer's case to a particular category under rule 23 of the Tribunal Rules. This is because:

(a) rule 23 of the Tribunal Rules requires the Tribunal to give a direction allocating each case to one of the categories set out in rule 23(2) of the Tribunal Rules and it expressly points out that, if a case is allocated as a complex case, rule 10(1)(c) of the Tribunal Rules applies to the case; and

(b) rule 6(4) of the Tribunal Rules states that, 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".

These two rules, taken together, could be taken to suggest that the notice referred to in rule 10(1)(c)(ii) is confined to the written notice which is required to be given by rule 6(4) of the Tribunal Rules of the allocation required by rule 23 of the Tribunal Rules and therefore that only a notice received directly from the Tribunal (and not from any other source) can suffice for this purpose. Of course, if rule 10(1)(c)(ii) were required to be construed in this way, then, on the facts in this case, the 28 day time limit in rule 10(1)(c)(ii) would still not have started running because the Appellant has even now not received the Notice Letter from the Tribunal itself. What it has received is a copy of the Notice Letter and it has received that copy from the Respondents. However, construing rule 10(1)(c)(ii) in that way would produce the absurd result that, even in circumstances where a taxpayer has received a copy of the relevant allocation letter from the Respondents, it would still be able to allege that the time limit had not yet started to run. I would add that neither party has contended that this is the right interpretation of rule 10(1)(c)(ii). So I proceed on the basis that rule 10(1)(c)(ii) should not be construed in such a limited way and therefore that a copy of a letter of allocation received from a source other than the Tribunal can suffice as notice.

8. On that basis, there are in this case only two conceivable dates on which the Appellant could be said to have received notice of the allocation of its appeal as a complex case – 26 September 2014, when a bundle of documents containing a copy of the Notice Letter was handed to Ms Sloane, the Appellant's counsel, at the hearing of the application on that date or 6 November 2015, when the Respondents drew the attention of Mr Andrew to the existence of that letter.

9. If the earlier date is the date on which the Appellant received the relevant notice, then Mr Andrew's letter dated 10 November 2015 electing to opt out of the costs regime was outside the 28 day time limit whereas, if the later date is the date on which the Appellant received the relevant notice, then Mr Andrew's letter dated 10 November 2015 was within the time limit and the Respondents' application for costs must fail.

The parties' contentions

10. Mr Hall, on behalf of the Respondents, alleged that the Appellant should be taken to have received notice on 26 November 2014 when the bundle containing a copy of the Notice Letter was handed to the Appellant's counsel. He contended that
5 "received" means "received", that the copy of the Notice Letter was clearly received when the bundle was handed to the Appellant's counsel and that, in answering this question, it is irrelevant that neither the Appellant's counsel nor 4 Eyes Ltd nor the Appellant itself were aware of the existence within the bundle of the copy of the letter in question.

10 11. In response to the allegation by the Appellant that receipt by its counsel does not amount to receipt by the Appellant, Mr Hall pointed out that, on the authority of the decision in *Penman v Parker* [1986] WLR 882 ("*Penman*"), the Appellant's counsel had implied authority to accept the bundle on behalf of the Appellant and therefore that receipt by the Appellant's counsel should be equated to receipt by the
15 Appellant itself.

12. Mr Hall added that, in any event, Mr Andrew of 4 Eyes Ltd, the appointed representative of the Appellant, was present at the hearing on 26 September 2014 and therefore should be regarded as having received the bundle along with the Appellant's counsel. If the Appellant's counsel chose not to show the bundle to Mr Andrew, that
20 is a matter between the two of them but Mr Andrew should be regarded as having received the bundle as well and, as 4 Eyes Ltd is the appointed representative of the Appellant, Mr Andrew's receipt of the letter equated to the receipt of the letter by the Appellant.

13. Mr Hall pointed out that this is not a case where the existence of the Notice Letter was well-hidden. For example, the Respondents' pre-hearing e-mail to Mr Andrew drew Mr Andrew's attention to the fact that the Appellant's bundle omitted several important documents including "All Directions and Notices given by the Tribunal"; and the index to the bundle which was handed to the Appellant's counsel at the hearing referred at tab 11 to "Correspondence from 6 March 2012 to present".

30 14. So, in summary, Mr Hall's contention is that:-

- (a) receipt of the bundle by Ms Sloane in the presence of Mr Andrew amounted to receipt of the bundle by the Appellant;
- (b) the word "received" in rule 10(1)(c)(ii) of the Tribunal Rules means
35 "received" and therefore that a taxpayer can be said to have received notice for the purposes of the rule simply by receiving a copy of the allocation letter regardless of whether the existence of that letter is flagged to the taxpayer or how conspicuous the letter may be when it is handed over; and
- (c) in any event, the circumstances leading up to the appeal and the
40 reference to 6 March 2012 in the index to the bundle mean that the Appellant was on notice that the Notice Letter existed and should

therefore have discovered the copy of the Notice Letter within the bundle at or shortly after the hearing on 26 September 2014.

15. In relation to the contention at sub-paragraph 14(b) above, Mr Hall proposed at the hearing, in response to my question, that a taxpayer could be taken to have
5 received notice even if the notice was contained in a bundle of a million pages and its existence was not flagged when the bundle was handed over.

16. Finally, Mr Hall pointed out that, as the Respondents were unaware of the fact that the Appellant had not received the Notice Letter, the Respondents' failure to draw the attention of the Appellant's counsel to the existence of the Notice Letter when the
10 bundle was handed over was entirely understandable.

17. For the Appellant, Ms Sloane argued that the bundle containing the copy of the Notice Letter had been prepared solely for the purpose of the hearing on 26 September 2014 and that it was received by her on that date solely on that basis. She did not hold herself out as accepting the bundle on any other basis and had no
15 authority, express or implied, to receive the bundle on any other basis.

18. Ms Sloane pointed out that, unlike 4 Eyes Ltd, she was not the appointed representative of the Appellant for the purposes of rule 11 of the Tribunal Rules. That rule expressly provides that anything permitted or required to be done by a party under the Tribunal Rules except for signing a witness statement may be done by the
20 appointed representative and that a person who receives due notice of the appointment must provide to the representative any document which is required to be provided to the represented party and need not provide that document to the represented party.

19. Ms Sloane relied on a passage in the *Penman* case to the following effect:-

25 "As a generality, it seems to me, counsel does not have an all-embracing, general authority to accept service of documents. In the majority of cases if documents are not to be served upon the party personally then the agent who should receive service is the solicitor."

She went on to say that the decision in the *Penman* case should be regarded as based on the particular facts of that case to the effect that a counsel in the magistrates' court
30 had authority to accept documents relevant to the matter in issue.

20. Ms Sloane pointed instead to a decision of the Upper Tribunal in *Romasave (Property Services) Ltd v Revenue and Customs Commissioners* [2015] UKUT254 (TCC) ("*Romasave*"), in which the Upper Tribunal held that the receipt by the taxpayer's solicitors and accountants of assessments to VAT did not amount to receipt
35 by the taxpayer of notification of those assessments for the purposes of section 73 of the Value Added Tax Act 1994 (the "VATA").

21. Finally in support of her proposition that the handing over of the bundle containing a copy of the Notice Letter did not amount to a handing over of the copy of the Notice Letter to the Appellant, Ms Sloane pointed out that the bundle was handed

to her and her alone and that the presence at the hearing of Mr Andrew was irrelevant. The bundle was handed to her and remained with her following the hearing.

22. Ms Sloane went on to say that, even if her receipt of the bundle should be equated to receipt of a copy of the Notice Letter by the Appellant, that did not suffice to constitute notice for the purposes of rule 10(1)(c)(ii) of the Tribunal Rules because the mere fact that a document is handed over does not, in and of itself, amount to the receipt of notice of the contents of that document. Instead, it is necessary to examine the purpose for which the document is handed over. So, she contended, the handing over of a document as part of a bundle prepared for the specific purpose of the application which was the subject of the hearing on 26 September 2014 and at which the allocation of the case as complex was completely irrelevant did not amount to the giving of notice of the matter set out in that document if the inclusion of the document within the bundle was not expressly drawn to her attention.

23. Finally, Ms Sloane pointed out that, if the Appellant had received the Notice Letter when that letter was originally sent, it would have elected out of the costs regime within the 28 day time limit. Witness statements to that effect had not been challenged by the Respondents. So this was not a case where the Appellant was acting in bad faith by purporting to elect out of the costs regime at a time when it knew that it was going to have to withdraw its appeal. Instead, the Appellant was simply doing what it would have done at the time when the Notice Letter was originally sent.

24. Ms Sloane relied on various cases where the legislation provided that the receipt of a notice or document was a necessary pre-condition to a subsequent consequence and the courts held that a failure to receive the specified notice or document meant that the subsequent consequence should not have arisen – for example, *R v. County of London Quarter Sessions Appeal Committee ex parte Rossi* [1956] 1 QB 682, *Calladine-Smith v Saveorder Ltd* [2012] L.&T.R. 3, *HMRC v AG Villodre SRL* [2016] UK UT 166 (TCC) and *England and Wales Cricket Board Limited v Revenue and Customs Commissioners* [2016] UK FTT 248(TC) (the “Notice Cases”). She said that the facts in this case were similar to those in the Notice Cases in that the receipt of notice was a necessary pre-condition to the start of the time limit and that therefore a failure to receive the notice meant that the time limit could not be seen as having started.

Discussion

25. I have listened to the arguments of both parties and reflected on those arguments after the hearing and it seems to me that the question that has been put to me gives rise to two distinct issues.

26. The first is whether the receipt of a copy of the Notice Letter by Ms Sloane at a hearing at which the Appellant’s duly appointed representative was present amounted to the receipt by the Appellant of a copy of the Notice Letter and the second is whether, assuming that it did, the receipt of a copy of the Notice Letter within the bundle that was handed to Ms Sloane at the hearing, in the circumstances in which

that occurred, amounted to the receipt of notice by the Appellant for the purposes of rule 10(1)(c)(ii) of the Tribunal Rules.

27. In relation to the first question, I am inclined to agree with the contentions of Mr Hall on behalf of the Respondents because I believe that the facts in this case are
5 closer to the facts in the *Penman* case than to the facts in the *Romasave* case.

28. In the *Penman* case, the defendant was represented by counsel on a charge of driving a motor vehicle while unfit to drive through drink. The case was adjourned and, after the defendant and his solicitor had left the magistrates' court, a police officer purported to serve on counsel a certificate signed by a medical practitioner to
10 the effect that he had taken a specimen of blood from the defendant and also the analyst's certificate showing the proportion of alcohol found in the specimen of blood. After that hearing, further informations were preferred against the defendant, including a charge that he had driven after consuming so much alcohol that the proportion thereof in his blood exceeded the prescribed limit. At the hearing in
15 relation to that later information, the justices dismissed the later information on the basis that the relevant evidence had not been properly served on the defendant when it was handed to the defendant's counsel at the end of the earlier hearing. This was overturned on appeal. The appeal court held that, even though the information which was the subject of the appeal had been laid only after the purported service of the
20 evidence at the end of the earlier hearing, counsel still had authority to receive service of the evidence because the later information arose out of the same incident as the information in which counsel was representing the defendant at the time of receiving service. The reasoning of the court was that, although counsel does not have an all-embracing, general authority to accept service of documents on behalf of his or her
25 client, there are circumstances where counsel should be taken to have such authority. The court made it clear that the link between the information which was the subject of the hearing at which counsel was representing the defendant and the information to which the evidence related was sufficiently close that counsel should be taken to have had authority to have received the evidence on behalf of the defendant.

30 29. In the *Romasave* case, this Tribunal had refused permission to appeal out of time in relation to various VAT assessments made under section 73(2) of the VATA. On a subsequent appeal to the Upper Tribunal, the question addressed was whether the delivery of the assessments to the taxpayer's solicitors and accountants amounted to notification to the taxpayer. The Upper Tribunal, reversing the decision of this
35 Tribunal on those questions, held that neither the solicitors nor the accountants had authority to receive the assessments on behalf of the taxpayer and that therefore their receipt of the assessments did not amount to notification to the taxpayer for this purpose. The Upper Tribunal held that the mere fact that a person appoints solicitors or accountants to act for him in relation to a particular matter or matters does not
40 mean that the solicitors or accountants have authority to act on behalf of the person more generally. Accordingly, in that case, the mere fact that the solicitors and accountants were acting for the taxpayer in relation to other tax matters did not mean that they had authority to accept the assessments on behalf the taxpayer. In the case of the solicitors, the solicitors were authorised to act for the taxpayer in relation to a
45 demand for immediate payment in connection with the taxpayer's VAT affairs but

“[that] could be understood only in terms of notices of assessment having already been given to [the taxpayer] (which would have been the justification for the payment demands), and not the authorisation of [the solicitors] to receive any such notification on [the taxpayer’s] behalf”. In the case of the accountants, the fact that the accountants received copies of the assessments and thereafter corresponded substantively with HMRC in relation to the assessments did not mean that the accountants had authority to receive notification of the assessments. As The Upper Tribunal noted, “[the] mere receipt of copies of the assessments, followed by the carrying out of work in relation to them, cannot suffice to support such a finding.”

30. I consider that the facts in the present case are closer to those in the *Penman* case than those in the *Romasave* case. In this case, Ms Sloane was acting in the course of conducting the Appellant’s appeal when she received the bundle of documents containing a copy of the Notice Letter at the hearing on 26 September 2014. The Notice Letter was one of the documents pertaining to the conduct of that appeal. It was not, as was the case in the *Romasave* case, a document (like an assessment) which led to, and effectively pre-dated, the appeal.

31. The fact that the document was handed to Ms Sloane as part of a bundle prepared in connection with an application that was not the substantive hearing of the appeal is neither here nor there, in the same way that counsel in the *Penman* case received the relevant document at a time when he was dealing with the matter generally in issue but not at a time when the document was immediately relevant. I therefore conclude that Ms Sloane did have implied authority to receive the copy of the Notice Letter on behalf of the Appellant when she received the bundle containing the Notice Letter at the hearing on 26 September 2014.

32. If that conclusion is incorrect, then I also agree with Mr Hall that the presence at the hearing of Mr Andrew on behalf of 4 Eyes Ltd is significant because 4 Eyes Ltd were the Appellant’s appointed representatives for the purposes of rule 11 of the Tribunal Rules and Ms Sloane should be regarded as having accepted the bundle on behalf of Mr Andrew. Therefore her receipt of the bundle in his presence amounted to his receipt of the bundle and the fact that she chose not to hand the bundle to him does not affect the answer.

33. It follows from the above that, if, at the hearing on 26 September 2014, the Respondents had handed a copy of the Notice Letter to Ms Sloane in the presence of Mr Andrew and drawn the attention of Ms Sloane and Mr Andrew to the inclusion of the copy of the Notice Letter within the bundle, I would have had no doubt in concluding that the Appellant would thereby have received notice of the allocation in question on that date.

34. However, although it was through no fault of the Respondents, that is not what actually happened at the hearing on 26 September 2014. Instead, a copy of the Notice Letter was simply handed over as part of a large bundle and at a time when the contents of the Notice Letter were irrelevant to the proceedings at hand. So I am compelled to weigh up Mr Hall’s contention that “received” means “received”, no matter what the intention underlying the handing over of a document or whether the

attention of the recipient is drawn to the existence or contents of the document, against Ms Sloane's contention that those matters are fundamental to the question of whether or not notice has been received.

5 35. I am a little surprised that this issue has not been the subject of a previous decision but neither party has referred me to any authority which deals with the issue. So I have approached this question without the benefit of judicial guidance. In doing so, I have borne two points in mind.

10 36. The first is that rule 2 of the Tribunal Rules provides that the overriding objective of the Tribunal Rules "is to enable the Tribunal to deal with cases fairly and justly". Rule 2(3) of the Tribunal Rules then goes on to say that the Tribunal must seek to give effect to this overriding objective when it exercises any power under the Tribunal Rules or "interprets any rule or practice direction". So, in construing rule 10(1)(c)(ii) of the Tribunal Rules, I am required to give effect to the overriding objective and ask myself whether it would be fair and just to treat the Appellant as
15 having received notice in these circumstances.

20 37. The second is to observe that there is a clear policy underlying rule 10(1)(c)(ii), which is that, in fairness to the taxpayer, the taxpayer should be given an opportunity to opt out of the costs regime in circumstances where a case is a complex case and could therefore give rise to substantial costs but that, in fairness to HMRC, the taxpayer must exercise that election at the start of the process and therefore at a time when it does not know the outcome (or the likely outcome) of its appeal. So, applying that policy in this case, it would obviously be unfair on the Appellant to be deprived of its right to opt out of the costs regime simply because the Appellant was unaware of its right to do so at the relevant time but it would equally be unfair on the
25 Respondents if the Appellant, having failed to make its election in time, then sought to opt out of the costs regime at a time when it had become apparent that the Appellant was going to lose its appeal.

30 38. Taking these matters into account and weighing up the merits of each party's position, I have concluded that, although this case is finely balanced, the Appellant should not be regarded as having received notice of the hearing on 26 September 2014 when the bundle containing a copy of the Notice Letter was handed to Ms Sloane as counsel for the Appellant in the presence of Mr Andrew.

35 39. I would say at the outset that I cannot accept Mr Hall's contention that "received" means "received" in all cases and no matter what the circumstances. To my mind, applying a fair and just interpretation as is required by the Tribunal Rules, it is implicit in the very phrase "receiving notice" that either the recipient must actually have become aware of the matter in question or the recipient must be in a position in which it can reasonably be said that the recipient should have become aware of the matter in question by reason of the circumstances in which the document referring to
40 the matter in question was handed over. For example, I would not accept the proposition that simply handing over a document as one page in a bundle comprising one million pages, without any reference to the existence of that document within the bundle and in circumstances where the document has no immediate relevance to the

matter to which the bundle relates can comprise notice for the purposes of rule 10(1)(c)(ii) of the Tribunal Rules.

40. On the other hand, applying a fair and just interpretation as is required by the Tribunal Rules, I would also reject the proposition that, in order to have received
5 notice for the purposes of rule 10(1)(c)(ii) of the Tribunal Rules, the taxpayer needs actually to be aware of the existence or contents of the document in question. In my view, it would be sufficient if the taxpayer should have known of the existence and contents of the document in question from all the circumstances surrounding its receipt of the document. In that event, I do not think that it is acceptable for a
10 taxpayer to succeed in arguing that it has not received notice because it did not actually look for or read the document when it should have done so.

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
15 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.

42. Taking these principles into account, and recognising that there are valid arguments in both directions, I have concluded that the balance of the arguments is with the Appellant in this case.

20 43. It is true that, there were some indications in the circumstances surrounding the hearing on 26 September 2014 that could have led the Appellant to conclude on or shortly after 26 September 2014 that its appeal had been allocated as a complex case and that therefore it had an option to elect out of the costs regime for a limited period of time from that date.

25 44. First, there is the fact that, pursuant to rule 23 of the Tribunal Rules, the Tribunal was required to make a direction allocating the Appellant's case to a particular category and, by rule 6(4) of the Tribunal Rules, the Tribunal was required to notify the parties of that allocation. So the Appellant and its representative, 4 Eyes Ltd, should have been expecting to receive a letter in or around March 2012
30 informing the Appellant of the category to which its case had been allocated. Instead, the Appellant simply proceeded on the assumption that its case had been allocated as a standard case without any basis for that assumption. At the hearing, Ms Sloane suggested that this was because both the Appellant and 4 Eyes Ltd were inexperienced in litigation and were not expecting to receive such a notice.

35 45. Secondly, there is the fact that both the exchange of e-mails which preceded the hearing on 26 September 2014 and tab 11 to the index of the bundle that was handed by the Respondents to Ms Sloane at that hearing could be said to have put the Appellant on notice that it might be missing letters from the Tribunal, including the Notice Letter.

40 46. However, I do not think that either of these features is sufficient for the Respondents to prevail. As regards the first point, although inexperience in litigation

is no excuse for a failure to understand the procedural rules, it is, in my view, a bit too much of a leap to say that, because the Appellant and its representative should have been expecting to receive an allocation letter from the Tribunal in March 2012, it should have been expecting to see such a letter in the bundle which it received in
5 September 2014. The fact is that the hearing on 26 September 2014 related to an entirely different aspect of the Appellant's appeal and the allocation of its case to a particular category was simply irrelevant at that stage. So I don't think that the failure by the Appellant and its representative to note that it did not receive the Notice Letter in March 2012 means that the Appellant should have been on notice that the bundle
10 handed over to Ms Sloane on 26 September 2014 might have contained a copy of the Notice Letter.

47. As for the second point, I think that the pointers to the fact that the bundle handed over on 26 September 2014 might have contained a copy of the Notice Letter are more apparent with the benefit of hindsight than in reality. The e-mail from the
15 Respondents before the hearing set out a long list of missing documents and did so in the context of matters that were relevant to the hearing. In his reply to that e-mail, Mr Andrew pointed out that he did not think that those documents were relevant to the hearing and, at least in the case of the copy of the Notice Letter, he was quite right. And there is no reason why the reference, at tab 11 in the index to the bundle, to
20 "Correspondence from 6 March 2012" should have alerted the Appellant to the existence of the copy of the Notice Letter simply because that date was the date of the Notice Letter if, as it transpired, the Notice Letter was irrelevant to the application in question.

48. So my conclusion is that the fact that the Appellant and its advisers were not
25 actually aware of the inclusion of the copy of the Notice Letter when the bundle was handed over and had no reason to be aware that the bundle contained a copy of the Notice Letter means that it did not receive notice of the allocation of its appeal as a complex case when it received the bundle.

49. I must therefore deny the Respondents' application for costs on the grounds that
30 I have no power to award the costs.

50. I should add that, in reaching this conclusion, I have not found that any of the Notice Cases cited to me by Ms Sloane sheds any light on the question which I am required to address. In each of those cases, there was a failure to receive the relevant notice or communication (in the same way that the Appellant in this case failed to
35 receive the Notice Letter in March 2012). The Notice Cases do not address the question which is in issue here of whether the actual receipt of a document in circumstances where the recipient is unaware that it has received the document can be said to amount to the receipt of notice.

51. I do feel considerable sympathy with the Respondents in relation to this
40 conclusion because the Respondents have at all times behaved properly and had no reason to believe that the Appellant was unaware of the contents of the Notice Letter until that became apparent in the exchange which took place in November 2015. So the Respondents were proceeding in contesting the appeal in the belief in good faith

that the Appellant had chosen not to opt out of the costs allocation regime and I can readily understand why it is hard for them to accept that the Appellant should be entitled to do so at a time when it had become apparent that the Appellant would lose its appeal.

5 52. 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 Rules. 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
10 (Tax Chamber)” which accompanies and forms part of this decision notice.

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TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016