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UT (Tax & Chancery) Case Number: UT/2022/000155

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
London EC4A 1NL

Heard on: 17 October 2024
Judgment date: 07 January 2025

PROCEDURE - COSTS - construction of Rule 11(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requiring parties to send or deliver notice to the Tribunal of the appointment of non-legal representatives – application to costs shifting jurisdiction under Rule 10(1)(c) for cases allocated to the complex category - appeal dismissed

Before

JUDGE RUPERT JONES
JUDGE PHYLLIS RAMSHAW

Between

BRIDGECOM INTERNATIONAL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Assistant Professor Emil Zarkov, of St. Ioan Rilsky Chudotworec Limited, Chartered Accountants.

For the Respondents: Mr Sam Way, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

1. This appeal concerns the construction of Rule 11 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") on the appointment of representatives. The appeal is against a costs decision (which followed a summary decision released on 11 August 2020) of the First-tier Tribunal ("FTT" or "the Tribunal") TC/2016/01517 dated 29 April 2021 ("the Decision"). At the conclusion of the Decision, the FTT ordered that Bridgecom International Limited ("the Appellant") should pay the costs of His Majesty's Revenue and Customs ("HMRC" or "the Respondents") in respect of the Appellant's appeal which had been struck out on 15 May 2019. The order was made pursuant to Rule 10(1)(c).

2. The appeal is made on the basis that the FTT erred in law in making the costs order against the Appellant. In short, the Appellant argues that at the time that notice was given by the FTT to the representative of the allocation of the Appellant's appeal to the Complex category, the appointment of the representative had not been validly notified to the FTT so, as a consequence, the FTT could not serve the notice on the representative. Thus, the FTT costs shifting jurisdiction under Rule 10(1)(c) did not apply.

3. The Appellant submits that Rule 11(2) requires a party to proceedings before the FTT, when appointing a non-legal representative, personally to send or deliver to the FTT the written notice of the representative's name and address. It argues that in this case the notice was sent by the Appellant's representative rather than by the Appellant, the party, such that the notice appointing the representative was defective or invalid. Therefore, when the Tribunal notified the Appellant's representative, rather than the Appellant as party and taxpayer, that the case had been allocated to the complex category and that it had 28 days to opt out of the costs shifting regime (make a request to be excluded from potential liability to costs pursuant to Rule 10(1)(c)(ii)), the Tribunal had failed to give the required notice. Therefore, there was no jurisdiction for HMRC to apply for their costs nor power for the FTT to award them.

4. The Appellant accepts that this was not an argument that was made in the proceedings before the FTT, and the issue is not addressed in the Decision, but nonetheless the FTT granted it permission to appeal on this ground on 6 April 2022.

5. In short, HMRC submit that the appeal should be dismissed for a number of alternative reasons: (i) that even though the Appellant did not itself send to the FTT the notice that its non-legal representative was appointed to act, nonetheless the Appellant caused written notice of the appointment of its representative to be sent or delivered to the Tribunal and this was sufficient to comply with Rule 11(2); or (ii) Rule 11(2) should be interpreted purposively so as to require only that a party is required to give notice in writing of the appointment of a non-legal representative and their name and address rather than requiring the party to send or deliver such notice; or (iii) Rule 7 would and should permit the FTT to have waived any breach of the procedural rules or requirement on the facts of this case; and (iv) the FTT retains a jurisdiction to award costs by virtue of Rule 10(1)(c) even where no notice has been received by the parties or representatives of the allocation of a case to the complex category such that the Appellant's failure to request to opt out of the costs regime 28 days after the allocation decision was received enabled the Tribunal to award costs against it.

6. We are grateful to the representative of the Appellant, Assistant Professor Zarkov, and counsel for HMRC, Mr Way, for the quality of their written and oral submissions which we address below.

7. For the reasons set out below, we agree with (i), (ii) and (iii) of HMRC's submissions in the alternative and dismiss the Appellant's appeal. There was no material error of law in the FTT's Decision.

Background and FTT Decision

8. References in square brackets [] are to paragraphs within the Decision.

9. The FTT at [6] began by identifying the nature of HMRC's application for costs:

> 6.As set out above, [HMRC's] application [for costs] is made under rule 10(1)(c) of the Rules on the basis that the proceedings have been allocated as a complex case under rule 23 of the Rules (allocation of cases to categories) and the appellant did not send or deliver 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 rule. This case was allocated as complex on 27 July 2016 and the appellant did not make a written request for the proceedings to be excluded from this provision. HMRC made a request for the costs to be summarily assessed.
> …

10. At [8] the FTT identified the issue which was in dispute before it at that time: whether the Appellant had been duly notified of the categorisation of the appeal and its effects. It expressed its conclusion that the Appellant had been duly notified of the allocation and categorisation of its appeal and the effect on its liability for costs by virtue of the application of the Rules:

> *Was the appellant duly notified of the categorisation of the appeal and its effects?*
> 8. As set out in its representations submitted to the tribunal dated 22 July 2019, the appellant argues that it was not validly duly notified by the tribunal that the case was allocated to the complex category and that it was not properly informed of the position under rule 10(1)(c). However, in my view, as explained below, it clear that this is not the case according to the procedure under the Rules and the documents in the tribunal's file for these appeal proceedings.

11. The FTT then set out its findings in relation to the relevant background facts at [9]:

> 9. In outline, the relevant facts are as follows:
> (1) The appellant submitted a notice of appeal to the tribunal dated 11 March 2016 in which Accura Accountants Limited is listed as its representative. <u>At the same time the appellant submitted to the tribunal a form authorising that firm to act on its behalf in these proceedings signed on its behalf by Mr B Stoykov.</u> In the notice of appeal, the contact at Accura Accountants Limited was stated to be Melvyn Langley and the address of that firm was given as Langley, House, Park Road, London N2 8EY and the email address was given as msl@aabrs.com. The notice of appeal was signed by Mr Langley.
> (2) The tribunal sent notification that the case had been allocated to the complex category to Mr Melvyn Langley at Accura Accountants Limited on 21 July 2016 by post and email to the postal and email addresses set out in (1) above.
> In the letter the tribunal stated:
> "The Tribunal has now re-assigned the above appeal to proceed under the complex category.
> In an appeal which has been categorised as "complex" the Tribunal has a general power to award costs and is likely to award costs against the unsuccessful party. If you wish to opt out of this costs regime, you must apply to the Tribunal within 28 days from the date of this letter."
> (3) With the letter of 21 July 2016 the tribunal enclosed directions issued by the tribunal which included a direction re-assigning the case as complex. These directions had been provided by HMRC to the tribunal in draft on 5 July 2016 for the tribunal's consideration and were approved by the tribunal. No response was received from the appellant or its representative to this letter.

(4) The tribunal received notification by email of a change in the appellant's representatives on 11 August 2016. The enclosed form signed by Mr Stoykov authorising the new representative to act on behalf of the appellant was dated 27 June 2016 but the change in representative was not notified to the tribunal until 11 August 2016.

[emphasis Added]

12. It is to be noted that the FTT found at [9(1)] that the Appellant, rather than the Appellant's then representative, Accura Accountants Limited ("Accura), had 'submitted' to the Tribunal the form authorising the representative to act. The form was a standard template issued by the Tribunal and, when completed, becomes authority for the representative, Accura, to act on its behalf in proceedings. It contains the Appellant's name, with a statement that it authorises its representative to act. It then includes the name and address of the representative. It also includes the name of the signatory, Mr Stoykov, on behalf of the Appellant and his signature together with the date. The form concludes with a caveat 'Please note that this form is not required if your representative is a legal representative (normally a firm of solicitors)'.

13. The Appellant's ground of appeal and evidence provided in the agreed bundle requires us to consider the FTT's finding at [9(1)] in more detail. We do not have before us the complete bundle of documents that was before the FTT. However, the FTT finding appears to be based specifically on an email dated 11 March 2016 in which Accura was listed as representative and an authorisation form. We do have that email and the attached form before us. The notice of appeal and form of authority on behalf of the Appellant for the representative to act were sent to the Tribunal by email on 11 March 2016 by Robert Blech, director of Accura, and copied to Mr Langley, also of Accura. The covering email from Mr Blech states: 'Following from your earlier e-mail, I enclose a revised Notice of Appeal for the above. Also find attached 1)…2) Copy of signed authorisation form for us to act on Appellant's behalf…'

14. The issue of law in this appeal is the significance of the finding that the Appellant itself 'submitted' the form authorising the representative to act when it was the representative who sent the form to the Tribunal by email. The precise nature of this finding was not significant at the time because no point was taken in argument before the FTT as to whether the original representative, Accura, had 'sent' to the tribunal the form of authority that the firm was acting rather than the Appellant sending or delivering the document. The focus at that stage was upon whether the Appellant itself had been duly notified of the complex categorisation of its appeal (see [8] and [12] of the Decision), particularly in light of the subsequent change of the Appellant's representative which was notified to the Tribunal on 11 August 2016 (see [12] below).

15. It is also to be noted that Melvyn Langley of Accura had signed the Appellant's notice of appeal to the FTT dated 11 March 2016 checking the box as the legal representative of the Appellant. That was not the correct procedure to follow as neither Mr Langley nor Accura, as a firm of accountants, were legal representatives. Therefore, the Appellant itself (through one of its directors or officers) should have signed the notice of appeal. The FTT's notice of appeal form specifically instructs parties and representatives as follows (in text contained below the respective boxes for the signature of either the party or their legal representative):

"* 'legal representative' is defined in Rule 11(7) of this Tribunal's rules which may be found on our website

If you are the representative of the appellant but not a legal representative, we will only communicate with you if the appellant signs this form, or if the appellant provides us with written notice of your name and address."

16. The Tribunal determined that the Appellant had been validly notified of the allocation of its appeal to the complex category, so that the costs regime in complex cases applied (which provide for general costs shifting between parties). The FTT found at [12]:

> 12. I note that, when the tribunal sent the notification [of allocation to the complex category] to Accura Accountants Limited on 26 July 2016:
> (1) Under rule 11(4), the tribunal, as a person who received due notice of the appointment of Accura Accountants Limited as the representative of the appellant, was required to provide the representative with that notification (and did not need to provide it to the appellant as the represented party) and to assume that Accura Accountants Limited was and remained authorised as the appellant's representative until it received written notification that this was not the case. The tribunal did not receive notification of a change in the appellant's representative until 11 August 2016, around two weeks after it had sent this notification to Accura Accountants Limited.
> (2) Under rule 13(5) rules the tribunal was entitled to assume that the postal and email address provided by Accura Accountants Limited, as the appellant's representative, was and remained the address to which documents such as the notification should be sent or delivered until receiving written notification to the contrary. The tribunal did not receive notification of a change in the relevant addresses until it was notified of the change in the appellant's representative on 11 August 2016.
> (3) Accordingly, in compliance with rules 11 and 13, in making the notification, the tribunal duly informed, Accura Accountants Limited, as the party it had been duly notified was the appellant's representative in these proceedings, by pre-paid post and email of the categorisation of the appeal as complex and that action was required by the appellant if it wished to opt out of the regime for costs in complex cases.

17. The FTT concluded that the Tribunal had duly notified the Appellant, through its original representative, of the allocation of its case to the complex category for the purposes of the requirements under the Rules.

18. At [13]-[16] of the Decision the FTT also found that the Tribunal had given the Appellant sufficient notice, as a non legally represented party, of what it had to do in order to opt out of the costs shifting regime. The FTT found that in its notice of allocation dated 26 July 2016 the Tribunal had effectively notified the Appellant of the effect of the allocation direction on the applicability of the regime for costs in complex cases and that the Appellant could opt out of that regime.

19. It was not in dispute that neither the Appellant nor either of its representatives (Accura or the subsequent representatives whose appointment was notified on 11 August 2016) at any stage gave notice to the FTT within 28 days of receiving the allocation notification or at all thereafter that it wished to be excluded from potential liability to costs for the purposes of Rule 10(1)(c)(ii). In the absence of notifying any request to opt out of the costs shifting regime, the FTT therefore decided that it had jurisdiction and power to order the Appellant to pay HMRC's costs of and incidental to the proceedings in the FTT.

20. Thereafter, at [17]-[19] of the Decision the FTT granted HMRC's application and ordered the Appellant to pay HMRC's costs of the FTT proceedings, to be agreed or summarily assessed, having exercised its discretion to make the costs order against the Appellant.

21. The Appellant originally sought permission to appeal on two grounds of appeal for which the FTT granted permission on 6 April 2022.

22. The first ground is the one we consider below having heard full argument. The second ground was that the FTT conducted the proceedings in breach of the proper procedures because: i) "Mr Langley had marked himself a legal representative of the Appellant which was obviously not the case"; ii) "at the time the appeal had been made, the representative (as a tax advisor) had requested a review of HMRC's decision which precluded his right of appeal to the tribunal until after the review had been completed".

23. The second ground of appeal has not been pursued by the Appellant so we consider it no further.

The Law

24. The relevant parts of the Rules are as follows.

FTT Rules

25. Rule 2 contains the overriding objective which the FTT must give effect to when interpreting and applying the Rules by virtue of Rule 2(3):

> *Overriding objective and parties' obligation to co-operate with the tribunal*
>
> 2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> …

26. Rule 7(1)-(2) provides a mechanism by which a Tribunal may waive or remedy breaches of its Rules, practice directions or directions if it considers it just to do so:

> *Failure to comply with rules etc.*
> 7.—(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—
> (a) waiving the requirement;

(b) requiring the failure to be remedied;
(c) exercising its power under rule 8 (striking out a party's case);
(d) restricting a party's participation in proceedings; or
(e) exercising its power under paragraph (3).
…

27. Rule 10 provides for the Tribunal's costs jurisdiction to be limited to certain qualifying gateways. One of these, Rule (1)(c), provides for the costs regime to apply to proceedings allocated to the complex category:

10.—(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
…
(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.

28. Most importantly, Rule 11 provides for the appointment of representatives for parties and 11(2) distinguishes the notification obligations for the appointment of legal and other types of representatives:

Representatives
11.—(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.
(2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.
(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.
(4) A person who receives due notice of the appointment of a representative—
(a) 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; and
(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.
(5) At a hearing a party may be accompanied by another person who, with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.
(6) Paragraphs (2) to (4) do not apply to a person (other than an appointed representative) who accompanies a party in accordance with paragraph (5).
(7) In this rule "legal representative" means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act, an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland.

[emphasis added]

29. Rule 20(1) and (2) also require that a person (appellant or representative) must state the appellant's representative's name and address in a notice of appeal and send or deliver that to the Tribunal:

Starting appeal proceedings

20.—(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.
(2) The notice of appeal must include—
(a) the name and address of the appellant;
(b) the name and address of the appellant's representative (if any);
(c) an address where documents for the appellant may be sent or delivered;
(d) details of the decision appealed against;
(e) the result the appellant is seeking; and
(f) the grounds for making the appeal.
…

30. Rule 13 provides for the sending and delivery of documents to parties and to the Tribunal:

13.—(1) Any document to be provided to the Tribunal under these Rules, a practice direction or a direction must be—
(a) sent by pre-paid post or document exchange, or delivered by hand, to the address specified for the proceedings; or
(b) sent or delivered by such other method as the Tribunal may permit or direct.
(2) Subject to paragraph (3), if a party or representative provides a fax number, email address or other details for the electronic transmission of documents to them, that party or representative must accept delivery of documents by that method.
(3) If a party informs the Tribunal and all other parties that a particular form of communication (other than pre-paid post or delivery by hand) should not be used to provide documents to that party, that form of communication must not be so used.
(4) If the Tribunal or a party sends a document to a party or the Tribunal by email or any other electronic means of communication, the recipient may request that the sender provide a hard copy of the document to the recipient. The recipient must make such a request as soon as reasonably practicable after receiving the document electronically.
(5) The Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary.

31. Rule 23 governs the allocation of cases to categories including the complex category at 23(2)(d):

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

(a) rule 10(1)(c) (costs in Complex cases) applies to the case; and
(b) rule 28 (transfer of Complex cases to the Upper Tribunal) applies to the case.

Aquarius Decision considering Rule 11(2)

32. At the hearing, Mr Way, on behalf of HMRC, quite properly drew our attention to a decision of Judge Jonathan Richards (now Mr Justice Richards) when sitting in the FTT in: *The Aquarius Film Company LLP & Ors v Revenue and Customs* [2016] UKFTT 702 (TC) ("*Aquarius*"). Although this decision is not binding upon us, it is a decision of an experienced salaried tax judge who is now a member of the senior judiciary.

33. The background facts to the case are rather different to the present case and are at set out at [4] to [16]. The case involved a number of appeals brought in 2011, 2013 and 2015. In relation to the 2013 appeals it is important to note that the non-legal representative, Aquarius Consultants, of the appellant in that case had also ticked a box on the notice of appeal to describe itself as a legal representative when it was not (see [5] and [6]). However, in contrast to this appeal, there was no signed letter or form of authority or any form of written correspondence from the appellant itself authorising Aquarius Consultants to act as its representative in the appeal.

34. Thereafter notice of the allocation to the complex category was given to the appellant itself rather than the representative and the appellant had failed to opt out of the costs shifting regime (see [8] and [9]). Some years later after the relevant appeals, in 2016, new representatives sought to opt out of the cost-shifting regime in respect of all the appeals (see [16]).

35. At [22]-[25] of the FTT's decision Judge Richards stated:

> 22. It follows from the Tribunal Rules that while a legal representative may notify the Tribunal of its own appointment, a party appointing a non-legal representative[1] must notify the Tribunal of that appointment. I was not shown any evidence that, at or around the time Aquarius Consultants sent the 2013 Appeals to the Tribunal, Aquarius sent written notification of the appointment of Aquarius Consultants as a non-legal representative. It follows that I have concluded that, by 3 December 2013, Aquarius Consultants had not been validly appointed as Aquarius's representative under Rule 11 of the Tribunal Rules and, accordingly, there was no question of the Tribunal being obliged to send correspondence to Aquarius Consultants under Rule 11(4).
>
> 23. Ms Nathan argued that even if Aquarius Consultants had been validly appointed as a representative, the Tribunal's letter of 3 December 2013 was still validly served on Aquarius since it had been sent to Aquarius at the address that Aquarius gave on its Notice of Appeal and it was not suggested that Aquarius had not received it. Therefore, Ms Nathan argued that, when Aquarius received the letter of 3 December 2013 it "receiv[ed] notice that the case had been allocated as a Complex case" for the purposes of the Tribunal Rules and the deadline for opting out expired 28 days later.
>
> 24. I do not need to determine whether Ms Nathan's argument is correct given the findings that I have made at [22]. I will say, however, that I regard the point as debatable. Rule 11(4) of the Tribunal Rules is in mandatory terms: it requires "a person" who receives due notice of a representative's appointment to send documents to that representative. It is not absolutely clear whether the Tribunal is a "person" who is required to comply with this rule and there are other parts of the Tribunal Rules that make it absolutely clear when rules that the Tribunal must itself follow are set out (see for example Rule 13). However, it would be odd indeed if Rule 11(4) was envisaging that parties had to communicate with representatives whereas the Tribunal was entitled to communicate only with the parties themselves and I doubt that such a practice would contribute to the efficient conduct of

litigation. Therefore, I consider it likely that Rule 11(4) does apply to the Tribunal and, if Aquarius Consultants had been validly appointed as a representative, the question would be what consequence should follow if the Tribunal did not comply with that rule. The effect of Ms Nathan's argument would be that no consequence at all should flow from a failure to send a highly important document to a representative (who might be presumed to be in a good position to realise the importance of that document). Having said that, Mr Smith accepted that Aquarius had received the Tribunal's letters of 3 December 2013 and it would be odd if the Tribunal Rules had the effect that documents that plainly were received were to be treated as if they were not received. If I had to express a conclusion on this issue (which I do not) I would probably have concluded that, even if Aquarius Consultants had been duly appointed as a representative, the letters of 3 December 2013 were still validly served on Aquarius. However, in such a circumstance, the Tribunal would need to take into account the fact that the letters were not sent to Aquarius's representative in deciding whether to exercise the discretion to extend time referred to below.

25. Finally, I note that even if the letters of 3 December 2013 were not properly served on Aquarius, on 3 May 2016 the Tribunal sent Mr Smith, Aquarius's duly appointed representative, a copy of letters that confirmed the 2013 Appeals were categorised as "complex". Therefore, on any view, the time limit set out in Rule 10(1)(c)(ii) expired 28 days after Mr Smith received those letters. Mr Smith only sent his letter purporting to opt-out of the costs-shifting regime on 9 June 2016 therefore, even on Aquarius's arguments, that opt-out would still be out of time…

Submissions of the parties

The Appellant

36. We have summarised the essential argument made on behalf of the Appellant at the outset of this decision. Professor Zarkov submitted that the Appellant did not have a valid representative appointed at the relevant time in July 2016 upon whom the notice that the appeal had been allocated as a complex case could be served by the FTT. This is because the representative had sent to the FTT the notice of acting by email on 11 March 2016 and not the Appellant in breach of Rule 11(2). He contended that the Tribunal was not entitled to treat the representative as duly authorised or appointed so as to receive notification of the allocation decision and no notice of the allocation decision was given to the Appellant as taxpayer. Therefore, he argued that, applying Rules 11(2) and 10(1)(c), the Appellant had not received notification of the allocation of the appeal to the complex category nor the requirement to request any opt out of the costs shifting regime within 28 days of receiving notice such that time had not begun to run. The result was that HMRC was not entitled to apply for costs and the FTT erred as it had no power to order the Appellant to pay HMRC's costs of the proceedings pursuant to Rule 10(1)(c) as it purported to do.

37. He submitted that if a representative is not a legal one, the party itself and not the representative must send or deliver to the Tribunal the notice of the representative's name and address as required by the natural reading of Rule 11(2). This is not a formal issue but protects a specific purpose: the Rules require separate methods of notification because of the level of trust and control that could be exercised by the Tribunal in respect of a non-legal representative as opposed to a legal representative.

38. A legal representative is a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act. A legal representative can be trusted to make and provide to a court or tribunal reliable representations, such as that they are properly instructed by their client, and they are accountable by virtue of the professional rules and regulation to which they are subject. That is not necessarily the case with any other person who states that they represent the taxpayer because of the different level of responsibility and accountability for a non-legal representative. There is no guarantee that a non-legal representative will act professionally or

ethically, when there is no requirement that they be a professional or regulated person, and there is no easy traceable route for the Tribunal to establish and verify that the taxpayer has actually given authorisation for the representative to act which may then be asserted by a representative especially if, as in this case, the taxpayer has not signed the notice of appeal. Rule 11(2) therefore gives the Tribunal some confidence that the party itself has given the representative authority to act because the party must send the notice of the representative's name and address to the Tribunal.

39. Professor Zarkov also raised an argument that Melvyn Langley of Accura had misleadingly marked the box in the notice of appeal stating that 'I am the legal representative* of the Appellant" by virtue of his signature although the asterisk mark (*) next to the word "representative*' refers clearly to Rule 11(7) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. He contended that as Accura was not a legal representative for the purposes of the Legal Services Act 2007, the notice of appeal did not provide any authority for it to act.

40. He went further and even contended that there may have been a deliberate or fraudulent misrepresentation by Accura in the form of authority provided to the Tribunal in which the Appellant's signatory's name and signature were included. He relied on the fact that the copy of the form of authority was hardly visible or legible and it is not clear that it was in fact signed by a company director of the Appellant, as opposed to the representative itself, and thus not clear that the representative had indeed been authorised to act. This is reinforced by the fact that the email attaching the form was sent to the Tribunal by the representative who was not a legal one and not by the Appellant itself.

HMRC

41. Mr Way, for HMRC, made the four alternative submissions opposing the appeal which we have summarised in (i)-(iv) at paragraph 5 of this decision and which we consider below.

Discussion and Analysis

The Rule

42. This appeal turns on the construction of Rule 11(2) which provides:

> (2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party to the proceedings written notice of the representative's name and address.

43. The general approach to interpreting statutory provisions is to some extent contentious in this appeal. The outcome sought by the appellant requires a literal construction of Rule 11(2), although Professor Zarkov did refer to the purpose behind the distinction between the notification requirements. There are many cases setting out the modern approach to interpretation. We must identify the meaning borne by the words in the particular context and have regard to the purpose of the provision seeking to construe it, as far as is possible, in a way which best gives effect to that purpose. These principles have recently been confirmed by the Supreme Court in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("PACCAR"). In the judgment of Lord Sales (with whom Lord Reed, Lord Leggatt and Lord Stephens agreed, Lady Rose dissenting):

> 40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme*, at p 396, "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

41. As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16; [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment." …

44. A court should not interpret a statute by a plain construction if it produces an absurd result. It is open to a court to adopt another possible interpretation (even if that is more strained) to avoid an absurd result. This is not without limits as explained by Lord Sales in *PACCAR*:

> 43. The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore), citing a passage in Bennion on Statutory Interpretation, 6th ed (2013), p 1753. See now Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), section 7 13.1(1): "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature". As the authors of Bennion, Bailey and Norbury say, the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief". The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), "[t]he strength of the presumption … depends on the degree to which a particular construction produces an unreasonable result". I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity…

45. In construing the requirements of Rule 11(2) we begin by considering the purpose behind it.

i) The purpose of Rule 11(2)

46. The purpose of Rule 11(2) is agreed by the parties. It seeks to distinguish between the notification requirements of the appointment of legal representatives who are to act for parties in tribunal proceedings as opposed to other non-legal representatives. It also worth noting that Rule 11(2) only concerns the notification requirements regarding the appointment of a representative and not the validity of the appointment itself.

47. When a party instructs a representative other than a legal representative ie. a non-legal representative, in this case an accountant, 11(2) requires that the Tribunal be given notice from the party that it has instructed the representative to act by the means of the party sending notice of the representative's name and address.

48. There is a strong public interest which Rule 11(2) seeks to promote.

49. Legal representatives, as defined under the Legal Services Act 2007, are bound by all manner of laws, regulations, rules and codes of conduct or ethics. For example, lawyers are subject to regulation by regulators such as the Solicitors Regulation Authority (for solicitors) or the Bar Standards Board (for barristers). They are required to carry professional indemnity insurance. The Tribunal can be reasonably confident that where a legal representative states to the Tribunal that they are acting or have been authorised to act – for example when the legal representative signs a notice of appeal on behalf of an appellant – they have been duly appointed and authorised to do so. Therefore, the Tribunal can have a degree of confidence that a legal representative is acting on the instructions and authority of a party. The Tribunal is not under a duty to investigate the assertion made in the signing of a notice of appeal that a person is indeed a legal representative and that they are in fact instructed by the taxpayer but should this turn out not to be the case, then a party should be able to seek redress against the representative through mechanisms provided by law.

50. The same level of regulation, rules and conduct rules do not necessarily apply to non-legal representatives. Some non-legal representatives, such as accountants, may be bound by professional rules, regulations and ethical or conduct codes which are enforceable through regulators, courts or tribunals. Nonetheless, some other representatives, whether professionals, tax advisors or simply ordinary members of the public, may not be so regulated. In the absence of the same level of protection, Rule 11(2) requires that the party gives notice to the Tribunal that it has duly authorised the non-legal representative to act on its behalf in the proceedings.

51. In our view the purpose of the Rule in drawing a distinction between the notification requirements as between legal and non legal representatives is intended to be achieved through some form of independent evidence from the party itself that it had authorised the representative to act. This will give both the Tribunal and the other parties the confidence that the representative is instructed to advise and represent the party in the proceedings fundamentally altering the conduct of the proceedings in that the Tribunal will only communicate with the representative thereafter.

52. The context of the Rule is also important when considering the purpose. There are generally benefits of having a representative to act in proceedings on an appellant's behalf particularly where, as in tax cases, there are often technical and complex legal and procedural issues arising. One of the benefits is that the representative will undertake to file documents on an appellant's behalf. The Rule should not be interpreted so as to frustrate the wider purpose of ensuring that an appellant can be effectively represented.

53. We note that the Tribunal's own guidance contained in its notice of appeal is consistent with this. A non-legal representative is instructed "…we will only communicate with you if the appellant signs this form, or if the appellant provides us with written notice of your name and address." A party is required to sign the notice of appeal in person where they are unrepresented or represented by a non-legal representative. The party is thereafter instructed to send in notice of the representative's name and address before the Tribunal with communicate with them.

54. The Tribunal administrative staff cannot be expected in ordinary circumstances to conduct investigations into what is asserted in a notice of appeal by a party or its legal or non-legal representative or the identity of the sender. For the Tribunal to be under an obligation to investigate the authority of any representative, there must "a situation in which there may be some concern as to whether a representative has sufficient current instructions or authority". In such a situation, it is a matter for the Tribunal how to manage that concern, which should not be lightly overturned on appeal (see *London United Busways Limited v Dankali* [2023] EAT 123 at paras 55-56). Any disputes of fact can, if necessary, later be resolved by the hearing of evidence by the Tribunal.

i) Construing the Rule

55. On a literal reading of Rule 11(2), although the words 'itself' or 'by its own hand' are not contained in the Rule, it is correct to say that the 'party' must refer to the party **itself** which is required to send or deliver to the Tribunal the notice of the non-legal representative's name and address.

56. In this case the Appellant did not sign the notice of appeal but nothing turns on this and despite the original representative incorrectly asserting it was a legal representative, the Appellant subsequently signed a standard template form of authority which is used for non-legal representatives. The issue in this appeal is the consequence of the fact that the form of authority was sent or delivered to the Tribunal by the representative as an attachment to its email and not personally sent by the Appellant itself.

57. Rule 11(2) requires that 'if a party appoints a representative, that party …must send or deliver to the Tribunal … written notice of the representative's name and address.' We accept that it is not only to be read in a literal sense. To do so may cause absurdity or become unworkable in some situations as discussed below. As quoted in *PACCAR*, it is noted in Bennion, Bailey and Norbury that absurdity is given a wide meaning by courts using it to include virtually any result which is impossible, unworkable or impracticable etc.

58. For example, the Rule literally only requires that the name and address of the representative be provided to the tribunal and not any written confirmation from either the representative or the party that the representative has been instructed or authorised to act.

59. Rule 11(2), read literally, seeks to require that the party itself or by its own hand send or deliver the notice to the Tribunal but this would not be possible to verify in all cases because of the variety of methods by which documents may be sent or delivered pursuant to Rule 13. While the sender of an email may be identifiable and attributable to a party, the same may not be said of mail delivered by post or by use of a public fax machine. On a literal reading the party may send the name and address of the representative by post but it may be impossible, unworkable and impracticable for the Tribunal, or any other party, to verify that the post was actually sent or delivered by the party rather than the representative or some other person. On a such a literal understanding of the rule, the public policy in requiring confirmation that a non-legal representative has been authorised by a party is not protected and such a construction may lead to absurd results. We consider that such a construction is not necessary to give effect to the purpose of the provision. What is required to give effect to the purpose is for the provision to be read so as to require that there is independent evidence from the party that a non-legal representative has been instructed. Often a party's signature confirming a particular statement will satisfy such evidential requirements.

60. In practice this may not cause so much of a difficulty because the notice of appeal itself requires a party to sign when it does not have a legal representative and state the name and address of its non-legal representative. The requirement contained in the notice of appeal for the party to sign exceeds the requirements in Rule 20 which only requires that a person (the appellant or representative) state the appellant's name and address and that of its representative and send or deliver the notice of appeal to the Tribunal. Further, this case demonstrates that the practice required by the notice of appeal that the party sign when not represented by a legal representative is not always followed and the authorisation form is routinely sent to the Tribunal by the non-legal representative. We do not suggest that because a practice has developed the Rules should be interpreted so as to give effect to that practice.

61. We are satisfied that Rule 11(2) should be interpreted more broadly as being satisfied where the party causes or authorises written notice of the representative's name and address to be sent or delivered to the Tribunal on its behalf. The Rule should therefore be read as requiring that if a party appoints a non-legal representative, that party must send or deliver to the Tribunal or cause or authorise to be sent or delivered written notice of the representative's name and address. This can be effected by the party signing a notice of appeal and stating the name and address of its non-legal representative therein and causing/authorising the notice of Appeal to be served on the Tribunal or separately by causing a signed form of authority stating the name and address of the representative to be sent to the Tribunal. In our view this statutory construction gives effect to the purpose of the provision. Further, the approach to interpretation the Rules should accord with the overriding objective by virtue of Rule 2(3). This includes avoiding unnecessary formality and seeking flexibility.

62. Therefore, we do not consider that there was any error of law in the FTT's acceptance that the Appellant's representative was properly authorised to act on its behalf in this appeal at the time that the notification of the allocation decision and complex categorisation was sent to it. Thus, there was no error in it deciding it had the power to make the costs order. We agree with Mr Way's primary submission that Rule 11(2) can be interpreted more broadly and on the broader interpretation, its requirements were complied with on the fact of this case.

63. As set out above the FTT at [9(1)] of the decision made a finding of fact that the Appellant 'submitted' the form of authority. In light of our decision on the construction of 11(2) this finding is not material. It is accepted by the parties, and having considered the documents we concur, that the Appellant itself did not send or deliver to the FTT the form of authority which had been completed and signed by an officer of the Appellant and which confirmed that its then representative, Accura, had been authorised to act on its behalf. The form of authority was sent to the Tribunal in an email from Accura on 11 March 2016 rather than in any email from the Appellant itself. We proceed on this factual basis.

64. Applying our interpretation of Rule 11(2) to the factual basis contained in the undisputed primary documents before us we consider that the FTT was correct to consider that the Appellant's representative was properly authorised to act at the time that the notification of the allocation decision and complex categorisation was sent to it. The requirement of Rule 11(2) is satisfied in this case because the Appellant caused or authorised the signed form of authority to be sent to the Tribunal by its representative. The documents evidence that the Appellant authorised Accura to act in proceedings and intended and caused this to be notified to the Tribunal.

65. The Appellant's officer, Mr Stoykov, duly signed and dated the Tribunal's standard template form confirming it had authorised its then representative, Accura, to act on its behalf in the proceedings. The form of authority stated the name and address of the representative, contained the Appellant's name and signatory on its behalf together with his signature. The form contained the statement: 'I authorise my representative to act on my behalf in this appeal.' In the absence of or any evidence to the contrary, and consistent with the finding by the FTT at [9(1)], the completed form of authority is evidence that the Appellant instructed and caused/authorised the representative to send or deliver the form to the Tribunal. Thereby the Appellant caused written notice of its representative's name and address to be sent to the Tribunal.

66. We should briefly deal with Professor Zarkov's attempt to argue that the notice of appeal or original form of authority from Accura contained fraudulent misrepresentations: either in fraudulently asserting Accura was a legal representative; or in Accura filling out the form and fraudulently asserting it was instructed; or in fraudulently asserting that the Appellant itself or its purported

signatory had actually signed the form of authority. We did not permit the representative to pursue this argument during the hearing for the following reasons: the Appellant had no permission to argue this as a ground of appeal; it was not argued before the FTT; it was a question of evidence and indeed there was no evidence presented but merely the late assertion and speculation of the representative; it was directly contradicted by the findings of the FTT; and there had been no application by the Appellant to admit any fresh evidence on appeal.

67. The Appellant did not have permission to argue in this appeal that Accura did not in fact have the Appellant's authority to commence proceedings on its behalf. If the Appellant had had permission to make such assertions, it would have been incumbent on it "to provide a full account of exchanges and communications" with that representative (see *Katib v HMRC* [2019] UKUT 0189 (TCC) at para 49). Without doing so, the Upper Tribunal should not entertain any argument that the Appellant had not in fact authorised Accura Accountants Limited to act on its behalf as a representative.

68. In any event, we are satisfied that Accura was properly appointed as the Appellant's representative. The FTT was entitled to take both of the following as authorisation that Accura was appointed as the Appellant's representative: the form of authority was proper notification of the appointment of a representative; and the FTT was entitled to accept the notification contained in the Notice of Appeal.

69. It appears from Mr Blech's covering email of 11 March 2016 that the FTT sought clarification and sent the form of authority to Accura, but the FTT would in any event have been entitled to accept the statement on the Notice of Appeal that Accura was the Appellant's legal representatives. Rule 11(2) permits a legal representative to provide notice themselves that they are the Appellant's representative. In this case, the Notice of Appeal was signed by Accura, stating itself to have submitted the appeal as the Appellant's legal representative. There was nothing on the face of that document, or in any other correspondence which accompanied it, including the form of authority, which could have given rise to any concern as to the status of that representative. No enquiry was required; the FTT would have been entitled to take that statement at face value and conduct the appeal accordingly, albeit it appears that it sought clarification and confirmation of the type of representative that it was and that it had the Appellant's authorisation to act.

70. We finally address the decision in *Aquarius*. Professor Zarkov relied on [22] in particular:

> 22. It follows from the Tribunal Rules that while a legal representative may notify the Tribunal of its own appointment, a party appointing a non-legal representative[1] must notify the Tribunal of that appointment. I was not shown any evidence that, at or around the time Aquarius Consultants sent the 2013 Appeals to the Tribunal, Aquarius sent written notification of the appointment of Aquarius Consultants as a non-legal representative…

The first sentence speaks of Rule 11(2) requiring a party appointing a non-legal representative to 'notify' the Tribunal of the appointment whereas the second sentence follows the literal wording of the Rule when it speaks of Aquarius not providing evidence it had 'sent' written notification of the appointment of the representative. The point is that, while we are grateful to Mr Way for bringing it to our attention, the decision does not assist us in this case as the facts are significantly different. In that case there was no letter or form of authority signed by the appellant Aquarius in respect of the representative, Aquarius Consultants. Just as importantly, Judge Richards heard no argument as to the meaning or construction of Rule 11(2) and gave no specific guidance in the decision.

71. We therefore dismiss the Appellant's appeal as there was no error of law in the Decision that the Tribunal was properly notified that the representative was duly appointed by the Appellant pursuant

to Rule 11(2) and therefore authorised to receive notification of the allocation decision made by the FTT for the purposes of Rules 11(4) and 10(1)(c). The result is that the FTT had power to make an order for costs against the Appellant in the absence of it making any request to be excluded from potential liability to costs within 28 days. Nonetheless we go on to consider HMRC's arguments in the alternative in the event that we are wrong in the above construction of Rule 11(2).

72. Pausing at this point we consider briefly Rule 11(3), although this point was not argued, Rule 11(3) might even cure any perceived non-compliance with Rule 11(2). Rule 11(3) provides that, 'Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.' Therefore, in circumstances where the party has signed a notice that the representative has authority to act on its behalf then the representative may send or deliver that notice for the purposes of Rule 11(2).

73. However, we accept that too broad an application of Rule 11(3) to Rule 11(2) may present difficulty in practice because it might absent the need for the Tribunal to be provided with some form of written notice emanating from the party that it has instructed the representative. Too wide an application could also lead to uncertainty. There is a real danger that a non-legal representative might simply provide notice of its name and address to the Tribunal asserting that it is acting for a party without some independent evidence from the party itself that it had authorised the representative to act. That would go against the purpose behind Rule 11(2) and would not comply with the Tribunal's practice.

ii) An alternative purposive interpretation of the Rule

74. In the alternative, we accept HMRC's secondary submission that, Rule 11(2) should be given a purposive interpretation consistent with the purpose of the Rule which we have explained above. HMRC argues that Rule 11(2) should be interpreted purposively so as to require only that a party is required to give notice in writing of the appointment of a non-legal representative and their name and address rather than requiring the party to send or deliver such notice, it is sufficient for the **content** of the notification to have come from the party. This construction of Rule 11(2) would simply require that if a party appoints a non-legal representative the notification requirement in Rule 11(2) is satisfied even if in fact it is sent to the Tribunal by the non-legal representative. What is required to satisfy the Rule, recognising the distinction drawn, is that a legal representative need not provide any proof of their authority from the party whereas a non legal representative must provide proof of their authority from the party itself. So where, as in this case, a party signs a notice of authority appointing a non-legal representative, it is the party themselves who provides the written notice required by Rule 11(2) even if that notification is in fact sent to the Tribunal by another person.

75. That is something the Appellant has complied with on the facts of this case. The Appellant has given or notified to the Tribunal the representative's name and address contained in the signed form of authority, howsoever it was sent or delivered. The form constitutes written notice to the Tribunal of the appointment of its representative.

76. In the event that we are also wrong in this interpretation of Rule 11(2), we consider HMRC's further arguments.

iii) Any non-compliance with Rule 11(2) should be waived or remedied by Rule 7

77. Further, we accept Mr Way's third alternative argument that even if Rule 11(2) did not permit the representative to send the form of authority to the Tribunal, such that there was a breach of the Rules,

the FTT would and should have waived such a breach of the procedural rules pursuant to Rule 7(1) and (2).

78. On the facts of this case, any breach of Rule 11(2) should be waived because it would be just and fair to do so, in accordance with the overriding objective, in circumstances where: a) the point of fact and law was not argued before the FTT or at any earlier stage. At the time that the FTT came to determine whether to make an award of costs, the validity of the notice assigning the proceedings to the complex category was not in issue, whether or not that notice had been validly served on the Appellant; and b) any breach is not relied upon to suggest that any other act undertaken by Accura in relation to the appeal, such as the bringing of the appeal itself, was invalid or that the notice of appeal itself was defective. The alleged breach is only relied upon to argue that the allocation notice could not be properly served upon the representative so that the costs jurisdiction does not arise. The Appellant seeks to rely on the benefit of the alleged irregularity without accepting the other potential consequences ie. that there was never any valid appeal before the FTT because the representative was not authorised to act when it completed and filed the notice of appeal.

79. We do not therefore need to rule upon Mr Way's further argument that the Appellant was estopped from arguing such a point (on the principles set out in *Tinkler v HMRC* [2021] UKSC 39; [2022] AC 886 at paras 45 to 49). He submits that the Appellant's argument relates to the manner in which the appeal was instituted. However, notwithstanding that alleged error, the Appellant continued to pursue its appeal up to the point at which it was struck out. By doing so, Mr Way contends that the Appellant implicitly accepted that its appeal had been validly instituted and induced all parties, including both HMRC and the FTT, to proceed on the basis of that assumption. He therefore submits that it is inequitable for the Appellant to now seek to resile from that position so that it may take a technical point as to the FTT's jurisdiction to make an award of costs.

80. On the facts of this case we are therefore satisfied that if there were any procedural error it should be waived and would not invalidate: i) the form of authorisation notifying the Tribunal that the representative was appointed and acting for the Appellant in proceedings; or ii) the notification to the representative on behalf of the Appellant that the case had been allocated to the complex category which stated that the Appellant would have 28 days in which to request to opt out of the costs shifting regime; or iii) the order for costs made by the FTT.

81. There is a further fundamental error in the ground of the appeal: that any non-compliance with the procedural requirements relating to the service of the notice that the case had been allocated to the complex category such that the consequences of that allocation do not follow thus rendering the costs order a nullity.

82. Per Rule 7(1) of the FTT Rules, an error in complying with a requirement in the Rules "does not of itself render void the proceedings or any step taken in the proceedings". Even if, as the Appellant argues, there was an error in the person to whom the notice of allocation to the complex category was sent, that does not render that allocation void, thereby depriving the FTT of jurisdiction to make an award of costs pursuant to Rule 10(1)(c).

83. If the Appellant considered that there was some defect in the appointment of its representative at the start of its appeal, and that this had caused some prejudice to the Appellant, the Appellant's remedy was to apply to the Tribunal for such directions as it considered necessary to enable the Appellant to take those procedural steps that it wished to take at that time. If the Appellant wished to opt out of costs pursuant to Rule 10(1)(c)(ii), then such an application could have included a request for an extension of time to provide the required notification.

84. Having failed to do so, it was not open to the Appellant to argue, only when the FTT were considering whether to award costs, that the FTT was deprived of jurisdiction to make an award of costs on the basis of a procedural error.

85. There was thus no material error in the FTT's finding that the Appellant was properly notified, through its representative, of the decision that its appeal had been allocated to the complex category and that it would have 28 days in which to request to be excluded from the potential liability to costs. Again, there was no error of law in the FTT deciding it had power to make a costs order and exercising its discretion to do so.

iv) *Rule 10(1)(c) does not require that the Appellant has been given notice of allocation*

86. Mr Way submitted in writing that even if the Appellant was not given notice of the allocation as a complex case, the Tribunal still had the power to make an award of costs under Rule 10(1)(c).

87. He argued that on its proper construction, Rule 10(1)(c) provides only two conditions for the FTT to have the power to make an award of costs. Those may be paraphrased as follows: i) under Rule 10(1)(c)(i), the case has been allocated as a Complex case, and ii) under Rule 10(1)(c)(ii), the taxpayer "has not" given notice requesting to be excluded from potential liability to costs within 28 days.

88. Mr Way did not press this argument orally and he was right not to do so. We are satisfied that either the taxpayer or the duly appointed representative thereof must be given notice of the allocation to the complex category by the Tribunal in order for the costs regime under Rule 10(1)(c) to arise. Rule 23 requires the FTT to give notice of its allocation decisions by virtue of the fact that Rule 23(1) requires it to 'give a direction' as to its allocation decision. The giving of a direction in respect of a complex category allocation must require the giving notice of that direction to the taxpayer or their representatives. Rule 10(1)(c) ii) requires notice of the allocation decision to have been received by the taxpayer (or by virtue of Rule 11(4), its representative). We do not accept that the power to award costs in respect of the condition in 10(1)(c)(ii) arises where the taxpayer has not requested that the case be excluded from liability to costs in circumstances where no notification of the allocation decision is given. It is the receipt of the notice of allocation that triggers the 28-day period to request to be excluded from costs. In our view the 28-day period would not start to run unless the Tribunal notified the allocation as a complex case and therefore the power to award costs would not arise. It would be an unjust and absurd interpretation to construe Rules 23(1) and 10(1)(c) as permitting the Tribunal to make complex category allocation decisions without notifying the parties thereof, given the potential consequences that follow. Rule 6(4) also provides that unless the Tribunal considers there is good reason not to do so, the Tribunal must send written notice of any direction to every party. Although the subrule refers to directions of the Tribunal's own motion rather than where the Tribunal must make a direction, as in rule 23, it is supportive of a requirement in the interests of fairness that notification must be given.

89. It is also good practice and in the public interest that when it gives notice, the Tribunal also explains to all parties what the effect of allocation decision is upon costs by virtue of Rule 10(1)(c) and the ability for the taxpayer to make a request within 28 days to be excluded from potential liability to costs. On the facts of this case the FTT did notify the Appellant's representative of the allocation and the effects on costs and the 28-day period.

The consequences of the appointment of the representative for the FTT's costs order

90. We have found that there was no error of law in the FTT deciding that notice had been validly given as of 11 March 2016 that the Appellant's representative had been appointed and authorised such that it was on the record on 21 July 2016 and 26 July 2016 at the time the Tribunal made the

complex case allocation and gave notice of this to the representative. There is no challenge to the Tribunal's findings that the effect of Rule 13(5) is that the representative continued to act on behalf of the Appellant at the time that notice was given and only ceased on 11 August 2016 when notice was given of the new representative acting. Therefore, the representative was the proper person to receive notice of the allocation decision at the time the Tribunal gave notice of it by virtue of Rule 11(4)(b).

91. Although the Appellant had no permission to argue this as a ground of appeal, during oral submissions Professor Zarkov raised a further argument to the effect that notice of the allocation decision can only be given to the taxpayer by virtue of Rule 10(1)(c) and not to its representative, even if validly appointed and notified to the Tribunal. Therefore, he submitted that no effective notice was or has been given to the Appellant of the allocation decision, the time for the Appellant to opt out of the costs shifting regime has not yet started running and therefore the Tribunal erred in law when ordering costs when it had no power to do so.

92. We agree with the decision at [24] in *Aquarius* that when Rule 11(4) states that it applies to 'a person', that person includes and applies to the Tribunal. Therefore, the Tribunal on receiving due notice of the appointment of the representative—

(a) 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; and

(b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.

93. Per Rule 11(4)(b), a representative is deemed to remain authorised until written notification to the contrary is provided by the representative or the party. Such notification was not provided until 11 August 2016. On 26 July 2016 when notification was sent to Accura that the case had been allocated to the complex category, Accura remained, and the Tribunal was entitled to assume that it remained, the Appellant's representative. Thus, the Tribunal was entitled to serve on the representative rather than the Appellant the notice of the allocation decision and costs implications on 26 July 2016 pursuant to Rule 11(4)(a).

94. Professor Zarkov raised a final point in argument that Rule 10 is the only one of the Rules which speaks of a 'taxpayer' rather than a 'party' so that the representative cannot be substituted for the party under Rule 11(4)(a). Thus Rule 10(1)(c) requires notice of the allocation decision to be served directly upon the Appellant as the taxpayer rather than through its representative. However, in post hearing correspondence Professor Zarkov decided not to pursue the point any further.

95. Nonetheless, while we do not need to address this argument, we consider it important to do so. We do not accept it. Rule 10(8) defines a taxpayer as a party in the following terms:

> (8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings.

96. Thus, the requirement to serve the notice of allocation on the taxpayer translates to a requirement to serve on a party and where the party is represented, upon their representative, by virtue of the combined effect of Rules 11(4), 10(1)(c) and 10(8). The Appellant received notice of the allocation decision, that its appeal had been categorised as complex, and the costs implication thereof when the allocation decision was sent to its representative on 26 July 2016. The Appellant and its

representative failed to make a request to opt out of the costs shifting regime within 28 days after the notice was received or at all thereafter.

Disposition

97. We have rejected the grounds of appeal pursued by the Appellant and found there to be no material error of law in the FTT's Decision. The appeal must be dismissed and the FTT's costs order is confirmed.

Postscript

98. We hope that this decision emphasises the need for a realistic and pragmatic approach to the FTT's procedural Rules. The approach to interpretation and application of the Rules should accord with the overriding objective by virtue of Rule 2(3). This includes avoiding unnecessary formality, seeking flexibility and dealing with the case in a proportionate way. While all cases are important to the parties, the FTT (Tax Chamber) hears a huge variety of appeals ranging from simple cases with low sums at stake and unrepresented parties to the most complex litigation where billions of pounds of revenue may be in issue. We adopt all that is said in binding authorities about the parties' approach to compliance with the Rules and the requirements of procedural fairness, but emphasise that this should not give rise to opportunistic or technical arguments being raised which bear no relationship to the merits or justice of a case.

JUDGE RUPERT JONES
JUDGE PHYLLIS RAMSHAW

RELEASE DATE: 8th January 2025