



TC01276

**Appeal numbers: LON/2008/2166 and
LON/2008/2339**

*CASE MANAGEMENT – application for joinder – substantial identity of
evidence in two appeals – application allowed*

FIRST-TIER TRIBUNAL

TAX

FIRST TALK MOBILE LIMITED

Appellant

- and -

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

Respondents

FIRST TALK LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: Mrs B Mosedale (Tribunal Judge)

Sitting in public at 45 Bedford Square, London WC1 on 27 May 2011

Mr S Poynter, Director of and for both Appellants, attending by telephone

**Miss Eyre, counsel, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents, attending in person**

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DECISION

1. First Talk Mobile Limited (“FTML”) lodged an appeal with the Tribunal (LON/2008/2166) against HMRC’s refusal of 12/9/2008 to repay input tax of approximately £1.67 million in relation to various transactions which took place in April and May 2006. FTML lodged a second appeal (LON/2009/425) against HMRC’s refusal of 5 February 2009 to repay input tax of approximately £313,000 in relation to various other transactions which took place in May 2006.
2. First Talk Limited (“FTL”) lodged an appeal with the Tribunal (LON/2008/2339) against HMRC’s refusal of 8/10/2008 to repay input tax of approximately £1.86 million in relation to various transactions which took place in May and June 2006. FTL lodged a second appeal (TC/2010/1703) against HMRC’s refusal to repay input tax of approximately £145,000 in relation to various other transactions which took place in June 2006.
3. On 8 July 2010 HMRC applied for all four appeals to be heard together.
4. By Direction on 6 August 2010 Sir Stephen Oliver consolidated FTML’s two appeals, and also (but separately) consolidated FTL’s two appeals. FTML therefore has a single appeal in this Tribunal under number LON/2008/2166 which is against the two decisions of HMRC mentioned in paragraph 1 above; FTL also has a single appeal in this Tribunal under number LON/2008/2339 against the two decisions of HMRC mentioned in paragraph 2 above. Sir Stephen directed that there should be a hearing to determine whether the consolidated appeals should be heard at the same time.
5. A hearing took place in front of Judge Staker on 22 October 2010. He directed that HMRC serve certain specified material relating to their application for a joint hearing of the appeals on the Appellants, and that the Appellants would then have 3 weeks to reply with their objections to HMRC’s application. He directed that the matter should then be decided on the papers. Despite this direction, the Tribunal service arranged a further hearing to take place on 27 May 2011.
6. In the event, Mr Poynter for the Appellants wrote to the Tribunal on 18 November 2010 saying that he agreed “substantively” with HMRC’s application for joinder of the two appeals. Indeed he said “I agree for both appeals FTML and FTL to be heard concurrently. This will no doubt save Tribunal time, unnecessary duplication and legal costs”.
7. On 24th May 2011 Mr Poynter asked for the hearing due to take place on 27th May to be cancelled. This application was refused on the basis that, even though the issue of joinder of the appeals was resolved, case management directions needed to be issued to progress the appeals towards the hearing.
8. I chaired the hearing on 27 May 2011. It was immediately apparent that Mr Poynter did not appear to understand to what he had agreed in his notice of 18 November 2010. He said to me that all he had agreed was that the appeals should be

heard consecutively: he stated categorically that he did not agree that the appeals of FTL and FTML should be heard at the same time as he considered that this was prejudicial to the companies' shareholders.

5 9. I decided therefore that the first matter the hearing before me would determine was HMRC's application for joinder on the basis that, although the Appellants' representative had appeared to consent to this, he had not in fact done so.

10. HMRC considered the two consolidated appeals should be joined and heard at the same time as:

- there would be no prejudice in joining appeals;
- 10 • there was a substantial overlap of evidence on the allegation of knowledge &/or means of knowledge in both appeals and a joint hearing would save time, avoid repetition and avoid the risk of inconsistent findings on the same facts;
- there was some overlap of evidence on the allegation of connection to fraud: in particular one company (Cell Trading) was a supplier in Deal 19 to FTML and
15 alleged to be a contra trader in 3 deals concerning FTM;
- there was some overlap of evidence in that FTML had made a loan to FTL and HMRC alleged in their statements of case for both appeals that the loan and the terms on which it was made was evidence of knowledge or means of knowledge.

11. The Appellants' objections to the joinder were stated by Mr Poynter to be:

- 20 • HMRC had historically treated the two companies as entirely separate entities;
- FTL traded in CPUs and FTML in mobile phones;
- of the 9 transactions at issue for FTML, HMRC alleged they were all "contra" trades whereas of the 55 transactions at issue for FTL HMRC alleged that all (bar one transaction in mobile phones) were "straight" MTIC chains;
- 25 • the two companies had very different set-ups and the due diligence of each company was quite different to that of the other;
- FTML was a much bigger company and much older;
- the companies had independent rights of appeal;
- although the two companies currently had the same director (ie himself) this might
30 not remain the case by the time the cases come on for hearing;
- the two companies had different shareholders and they did not wish the appeals to be heard together; indeed he said it would be prejudicial to the shareholders of FTL who wanted to distance themselves from FTML;

- he could see no advantage to having the appeals of the two companies heard at the same time and indeed he thought it would create confusion;
- The loan from FTML to FTL was irrelevant as it was now repaid and in any event HMRC had made no allegations in respect of it.

5 12. In answer to questions from me, Mr Poynter said that FTL had 6-7 employees
and FTML had 2-3 different employees. However, Mr Poynter was the sole director
of both companies and both companies had the same financial accountant. Mr
Poynter said that the employees negotiated the transactions at issue in the appeal and
he had no direct input into any particular deal. He also said he did not carry out any
10 of the due diligence although he and the financial accountant were responsible for
both companies' policies on due diligence.

13. Mr Poynter's main concern seemed to be that the shareholders would consider it
prejudicial to them for the appeals to be joined although he did not specify why it
would prejudice them. I did not consider that it would prejudice them: separate
15 hearings would not lead to the exclusion of relevant evidence merely because it
related to the other company. I was satisfied that joining the appeals would not
procedurally prejudice either company. Indeed, it will save them costs by shortening
the overall length of proceedings.

14. That the loan has now been repaid is not relevant to the allegations in respect of
20 the fact that it was made in the first place. Nor is the possibility that Mr Poynter
might not remain the director of either or both companies relevant: it is Mr Poynter's
knowledge or means of knowledge at the time of the deals in question and not who
controls the companies at the time of the hearing. It is HMRC's case that both
companies carried out the same sort of due diligence: Mr Poynter says he disputes
25 this. A joined hearing is the best way of determining the issue.

15. The decision whether to join the hearings rests largely on whether the allegations
and evidence would be substantially the same. It is not relevant that the companies
dealt in different electronic equipment.

16. That the companies are separate legal identities does not give them a right to
30 separate hearings. They have a right to a fair hearing and a joined hearing would be
the best way of achieving that.

17. I found that there was the substantial overlap in allegations and evidence in
relation to the question of knowledge and/or means of knowledge of the two appellant
companies via their sole director, Mr Poynter. The allegations of knowledge and/or
35 means of knowledge were based in part on Mr Poynter's alleged background
knowledge of MTIC. This evidence would be identical in both cases and indeed visits
to Mr Poynter as director of one company were likely to be relevant in considering his
knowledge overall which would be relevant in the appeal of the other company.

18. The allegations of knowledge and means of knowledge were also based on what
40 HMRC alleged to be inadequate due diligence undertaken by both companies.

HMRC alleged that the checks undertaken and not undertaken were virtually identical for both companies. As with background knowledge of MTIC, actions or omissions by Mr Poynter in respect of one company would be (and were alleged to be) relevant to the other company.

5 19. HMRC also plead a number of other factors in each appeal are indicative of
knowledge or means of knowledge and there was overlap between these. For
instance, contrary to what Mr Poynter said, an allegation was made by HMRC in both
statements of case that the loan from one company to the other indicated knowledge
and/or means of knowledge on the part of the companies. The evidence in respect of
10 this would be identical in both companies' appeals.

20. The evidence and submissions in respect of knowledge and/or means of
knowledge are likely to take the larger part of any hearing of the appeals and I agreed
with HMRC that there would be a very substantial saving of time if this evidence only
had to be heard once at a joined hearing.

15 21. But even more significantly, I find it is not in the interests of justice for the
question of the knowledge or means of knowledge of Mr Poynter in April – June
2006, as sole director of two companies undertaking deals at that time, to be tried
more than once. It not only puts both parties to unnecessary expense but risks
conflicting decisions on the same facts by different Tribunals: if the Tribunal hearing
20 the first of the appeals were to decide Mr Poynter had no knowledge and/or means of
knowledge, it would be unfair on Mr Poynter to have to meet exactly the same
allegation based on the same facts in another hearing in relation to the second
company. Similarly if HMRC were successful in establishing knowledge in the first
company's appeal, it would be unfair for them to have to try to prove the same thing
25 based on the same facts again in front of a different tribunal.

22. I considered the small overlap of evidence on the deal chains (in that Cell Trading
was FTML's supplier in one deal and alleged to be in the supply chain for 3 deals
undertaken by FTM) but it did not seem to be me to be particularly material. If the
appeals were joined, there would be a slight saving of time in hearing the evidence in
30 respect of FTML's 55 deals at the same time as FTM's 9 deals, but were it not for the
very substantial overlap of evidence on the knowledge/means of knowledge question,
in my view this would not be a reason for joining appeals if they had no other
connection.

23. For the reasons given above, I allowed HMRC's application and directed that the
35 consolidated appeal of FTM should be joined with and heard at the same time as the
consolidated appeal of FTML.

24. I rejected Mr Poynter's suggestion of consecutive hearings in front of the same
Tribunal. If the hearings were not joined and heard at the same time, it was inevitable
that the two appeals would have to be in front of two different Tribunals as the
40 Tribunal hearing the first appeal would already have heard and formed a view on a
large part of the evidence which would in front of the panel in the second hearing.

25. I announced my decision to join the appeal and went on to issue case management directions. At the end of the hearing Mr Poynter said that he would appeal against my decision joining the appeals and for that reason I have prepared a full decision notice.

5 26. He also asked that pending the appeal of my direction for joinder, the case management directions that I made at the end of the hearing be stayed. I refused this. Whether or not the Appellant companies are given leave to appeal my direction for joinder and (if given leave) whether or not such an appeal is successful makes no difference to the need to progress the appeals of both Appellants towards a hearing.
10 Witness statements need to be served by both parties whether or not the appeals are joined. Mr Poynter's concern that he might have difficulty in deciding which witness statement related to which case is without foundation: HMRC have been directed to make it clear to which appeal (or whether it is to both appeals) each witness statement relates.

15 27. The Tribunal will take a dim view of any delay by either party in serving their witness statements bearing in mind the generous timetable that has been allowed and the length of time these appeals have already been outstanding.

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

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TRIBUNAL JUDGE
RELEASE DATE: 16 June 2011

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