



TC05130

Appeal number: TC/2009/13684

PROCEDURE – Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – Application by related case appellant for a direction that it should not be bound by lead case decision – Application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**TADMARTON HEATH GOLF CLUB
COMPANY LIMITED**

Applicant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN BROOKS

**Sitting in chambers at the Royal Courts of Justice, Strand, London WC2 on 27
May 2016**

As both parties consented and the Tribunal considered that it was able to determine the matter without a hearing and having considered the written representations of Mr Malcolm Jones for and on behalf of the Appellant and an email from HM Revenue and Customs of 25 May 2016 stating it was “neutral” on the application, the application was determined on 27 May 2016 on the papers without a hearing pursuant to Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

DECISION

1. On 7 December 2015 the Tribunal released its decision in *The Berkshire Golf Club and Others v HMRC* [2015] UKFTT 627 (TC) (the “Decision”). It held, *inter alia*, that although there would be an element of unjust enrichment for the appellants (non-profit making members’ golf clubs) if the whole of their claim for repayment of VAT, which had been incorrectly imposed on green fees was met, 90% of their claims should nevertheless be repaid. There has been no appeal against this element of the Decision. *The Berkshire Golf Club* was a “lead case” under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Procedure Rules”) which raised common issues of fact and law with over 1,200 “related” appeals, including that of Tadmarton Heath Golf Club Company Limited (the “Club”).

2. Rule 18 of the Procedure Rules provides:

Lead cases

18.—(1) This rule applies if—

- (a) two or more cases have been started before the Tribunal;
- (b) in each such case the Tribunal has not made a decision disposing of the proceedings; and
- (c) the cases give rise to common or related issues of fact or law.

(2) The Tribunal may give a direction—

- (a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and
- (b) staying (or, in Scotland, sisting) the other cases falling under paragraph (1) (“the related cases”).

(3) When the Tribunal makes a decision in respect of the common or related issues—

- (a) the Tribunal must send a copy of that decision to each party in each of the related cases; and
- (b) subject to paragraph (4), that decision shall be binding on each of those parties.

(4) Within 28 days after the date that the Tribunal sent a copy of the decision to a party under paragraph (3)(a), that party may apply in writing for a direction that the decision does not apply to, and is not binding on the parties to, that case.

(5) The Tribunal must give directions in respect of cases which are stayed or sisted under paragraph (2)(b), providing for the disposal of or further steps in those cases.

(6) ...

3. Copies of the Decision (ie the lead case decision) were sent to related case appellants by the Tribunal on 8 December 2015.

4. On 5 January 2016 Mr Malcom Jones wrote to the Tribunal on behalf of the Club requesting a direction that the Decision is not binding on the Club. In that letter he referred to a letter he sent HM Revenue and Customs (“HMRC”) on 14 August 2014 in which he questioned whether a repayment of VAT that had been incorrectly imposed would amount to “enrichment” or “unjust enrichment” on a non-profit making organisation such as the Club stating that in his opinion it would not. He wrote:

If I am held up by Dick Turpin: “Your money or your life”, and he is apprehended and I get my money back, am I being enriched? Hardly – I am just back where I started.

5. In his letter of 5 January 2016 Mr Jones emphasised that the Club is non-profit making and partially exempt from VAT which he considers to be:

... crucial elements which in the five days of the hearing [of the lead cases] had no mention.

His letter continues:

I feel I can add no more to the effect of non-profit-making than I have set out in my letter [of 14 August 2014], but on the method of partial exemption I would add the following.

From reading the HMRC case prior to the hearing, and subsequently the report of the hearing, it seems to me that both experts agree that the payment of VAT is akin to payment of a dog licence. Indeed the HMRC expert went so far as to imply that repayment should reflect whether the dog was a mongrel, or pedigree. VAT is rather more complicated.

Please see the enclosed copy of an annual partial exemption reconciliation. If a visitor paying a £36 green fee on 1 June 2013 had been asked how much VAT he has paid the obvious answer is £6. This is the basic misconception. £6 is the amount for which the club is accountable. The £6 would be a part of the gross figure in Box 1. What should not be ignored, however, is the exempt input tax the club cannot reclaim shown in the bottom left-hand corner. This reflects the exemption of golf subscriptions. Henceforth it will be enlarged to account for the exemption of green fees.

To return to the pie-chart depictions in my letter, not only does the payment of the VAT leave a void in the income circle, but the expenditure circle is also enlarged by the entry of the “sticking” input tax. These are both financial burdens borne by the club.

For these reasons I request that a direction be given that the decision does not apply to, and is not binding on, Tadmarton Heath Golf Club Co Limited.

6. However, it is clear from [1] of the Decision that it related to non-profit making members’ organisations and from the common issues of fact and law that the lead case clubs were partially exempt from VAT. As the relevant parts of [13] of the Decision states:

In a direction of the Tribunal (Judge Brooks) dated 16 May 2015 the appeals of The Berkshire, the Wilmslow and The Glen were specified as “lead cases” and the appeals of the other golf clubs stayed as “related appeals” in accordance with rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber Rules) 2009 as giving rise to the following common issues of fact and law:

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) Which categories of course maintenance costs are properly treated as residual in each of the following circumstances:
 - (a) The club provides advertising services from locations on the golf course but has no corporate day income;
 - (b) The club has neither corporate day income nor course advertising income; and
 - (c) The club has taxable income from the hire of other golfing equipment, including but not limited to golf buggies, trolleys or clubs.
- (6) Whether the link between course maintenance costs and taxable tee advertising, corporate day or rental income is sufficiently direct and immediate to give rise to at least partial input tax recovery and whether this depends on the category of cost incurred and is the Tribunal able to identify, on the evidence before it, which categories do give rise to a sufficiently direct and immediate link.

7. Although, as Mr Jones correctly identified in his letter of 5 January 2016, neither issue was specifically addressed in the Decision this was because it was accepted by both the lead case clubs and HMRC that the case concerned non-profit making partially exempt bodies. As such, it was not necessary to explore these issues either in submissions at the hearing or in the Decision itself.

8. Also, with regard to unjust enrichment, as stated at [23] of the Decision:

“In order to establish whether a repayment would constitute unjust enrichment it is appropriate for the court to take account of damage suffered by the trader as a consequence of the imposition of the unlawful charge (*Just* at [26]; *Comateb* at [29] and [30]; *Michailidis* at [34] and [35]; *Weber’s Wine World* at [98] and [99]; and *Lady & Kid* at [21]).”

9. It is clear from the Decision that it was:

“14. ... common ground between the experts that the three lead case golf clubs have suffered an economic loss through the incorrect imposition of VAT on green fees. This comprises first the VAT that could not or was not passed on to the green fee visitors by the Clubs but absorbed by them and secondly the lost profits (net of costs) on

rounds of golf that would have been played if VAT had not been payable and the resulting higher price had not deterred some green fee golfers from playing. This definition of economic loss was agreed by both experts.

15. Therefore the issue before us is not whether the Clubs have suffered an economic loss, but the extent of that loss. HMRC contend that the Wilmslow and The Glen have suffered an economic loss of about 53%-54% of the VAT paid and that The Berkshire has suffered an economic loss of about 35% of the VAT paid whereas the Clubs argue that, because of the minimal marginal costs they would incur from the number of additional rounds of green fee golf that would be played, the economic loss is, at the very least, 95% of the VAT paid in all three cases.

10. As the concerns raised by Mr Jones in respect of unjust enrichment, non-profit making bodies and partial exemption were taken into account in the Decision, having regard to all the circumstances, I do not consider a direction in the terms sought by the Club to be appropriate. Therefore, for the above reasons, the application is dismissed and the Decision in relation to the common issues of fact and law shall be binding on and apply to the Club and its appeal determined accordingly.

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

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 31 MAY 2016