



TC05710

Appeal number: TC/2014/05809
TC/2014/05810
TC/2015/02692

PROCEDURE – Direction under Rule 18 of FtT Rules – approach when lead appellants appeal to Upper Tribunal – whether to stay related appeals pending decision of Upper Tribunal - yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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

Applicants

- and -

**ABL (HOLDING) LIMITED
TANIAS PROPERTIES LIMITED**

Respondents

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice on 10 February 2017

Malcolm Gammie QC and Laura Poots, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Applicants

Michael Sherry, instructed by Charterhouse (Accountants) LLP and Haines Watts, for the Respondents

DECISION

1. This is a decision on HMRC's application to vary directions that the First-tier Tax Tribunal (the "FtT") made following disposal of "lead cases" under Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FtT Rules") consequent on the lead appellants being given permission to appeal to the Upper Tribunal. There was no dispute as to the factual background which was as set out at [2] to [5] below.

2. In directions made on 25 August 2015 (the "Rule 18 Direction"), the FtT specified four appeals as lead cases under Rule 18 of the FtT Rules and designated a number of other cases as related cases (which were stayed pending resolution of the lead cases). The lead cases and related cases arose out of similar tax planning arrangements involving the transfer of loan notes to employees and directors in a manner that was said not to give rise to any PAYE or national insurance ("NIC") liability. The Rule 18 Direction specified a number of related questions of fact and law which, to the extent determined in the lead appeals, would be binding on the related appellants. The first such common or related issue (the "First Issue") was:

Is the Employer liable to income tax and Class 1 NICs as a result of the subscription for the Loan Notes and/or the transfer of the Loan Notes to the Employee, or do section 425(2), Part 7 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and Schedule 3 of the Social Security (Contributions) Regulations (SI/2001/1004) apply to prevent such a liability arising?

3. Over time, new appeals were notified to the FtT arising out of similar planning and those new appeals were separately designated as "related cases". As of 10 February 2017, some 133 appeals had been designated as "related cases".

4. Two of the lead appellants withdrew their appeals, but the two remaining lead appeals were heard in June 2016. On 12 July 2016, the FtT released a decision in *Cyclops Electronics Limited and Graceland Fixing Limited v HMRC* [2016] STFD 842 ("*Cyclops*") dismissing the appeals of the lead appellants and subsequently sent copies of that decision to all related appellants as required by Rule 18(3) of the FtT Rules.

5. The lead appellants requested permission to appeal against the decision and the FtT gave permission. After granting permission to appeal, the FtT made directions on 12 September 2016 (the "Stay Directions") which had the following effect:

- (1) The related cases were stayed until 60 days after disposal of the lead appellants' appeals to the Upper Tribunal.
- (2) The deadline for related appellants to apply to be "unbound" pursuant to Rule 18(4) of the FtT Rules was extended to the date on which the stay expires.

6. On 20 October 2016, HMRC asked the FtT to reconsider the Stay Directions. HMRC's application potentially affected all of the related appellants. Rather than

seeking submissions from all of the related appellants, the FtT determined that two related appellants (agreed to be representative of the others) would be the respondents to HMRC's application.

Relevant provisions of the FtT Rules

5 7. Rule 18 of the FtT Rules provides as follows:

18 Lead cases

(1) This rule applies if--

- (a) two or more cases have been started before the Tribunal;
- 10 (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
- 15 (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--

- 20 (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.

30 The parties' respective submissions

8. Mr Gammie argued that the Rule 18 Direction meant that the decision on the common or related issues was binding on the related appellants (subject to any successful claim to be unbound pursuant to Rule 18(4)). He submitted that the FtT's decision on the First Issue was sufficient to enable it to make a determination under Rule 18(5) dismissing all the related appeals. If any related appellant wishes to argue that its appeal should not be dismissed, that appellant should make an application in short order either to be unbound (pursuant to Rule 18(4)) or for additional directions (pursuant to Rule 18(5)). Crucially, in his submission, these steps should be required before the Upper Tribunal determines the lead appellants' appeals. The Stay Directions should not, in Mr Gammie's submission, permit the related appellants to

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take no action until the Upper Tribunal determined the appeal. That would put them in the same position they would have been in if their appeals had simply been stayed (under Rule 5 of the FtT Rules) behind those lead appeals and would give insufficient weight to the binding nature of the FtT's decision on the First Issue.

5 9. Therefore, Mr Gammie argued that appropriate directions would be as follows:

(1) The stay made by the Stay Directions should be lifted.

(2) The related appellants should have 28 days (or such longer period as the FtT thinks appropriate) to submit an application to be unbound pursuant to Rule 18(4). HMRC and the relevant related appellant would then discuss any application and the FtT would ultimately, if necessary, make a decision on it.

(3) Any related appellant who considers that, even allowing for the binding effect of the First Issue, there are distinguishing features of that appellant's case, or additional considerations that the FtT should take into account, should write to the FtT within the same time period as set out at [(2)] above. The FtT could then take those matters into account when making directions under Rule 18(5).

(4) Where a related appellant makes no such application of the kind set out at [(2)] or [(3)], the FtT should make a direction under Rule 18(5) dismissing the related appellant's appeal.

(5) Any related appellant who is dissatisfied with the determination of its appeal under Rule 18(5) should apply to the FtT for permission to appeal. HMRC would have no objection if the FtT chose to extend the deadline for applying for permission to appeal until after the Upper Tribunal's decision is available. Alternatively, to the extent that the FtT gives permission to appeal, HMRC would have no objection if any related appellant applied (to the Upper Tribunal) for its appeal to be stayed pending the determination of the Cyclops appeal.

10. Mr Gammie pointed out that the effect of the Stay Directions is that HMRC are not able to take steps to collect any tax due from the related appellants as all of those appellants have had their obligation to pay the tax in dispute postponed under s55 of the Taxes Management Act 1970 ("TMA 1970"). He submitted that this was unsatisfactory in circumstances where they had participated in what he termed a "marketed avoidance scheme" which the FtT determined had failed particularly given they had already had the use of the money for a number of years. Under his proposed directions, HMRC would be able to take enforcement action against any related appellant whose appeal was dismissed following a determination under Rule 18(5) as s56 of TMA 1970 provides that, even where an appeal is made to the Upper Tribunal, the tax at issue would be due and payable.

11. Mr Sherry disagreed with Mr Gammie's objection to the Stay Directions, and his alternative proposals, for the following reasons:

(1) He considered that the Stay Directions produced a result that was in all material respects identical to one advocated by the FtT in *288 Group Limited v Revenue & Customs Commissioners* [2014] STFD 592. By contrast, the effect

of Mr Gammie’s alternative proposal was the same as that of which the FtT disapproved in that decision and would add to costs and result in duplication of litigation – the very results that Rule 18 was seeking to avoid.

5 (2) He submitted that HMRC’s complaint that they could not collect tax due on the basis of the FtT’s decision was not a reason for making a case management decision that would run contrary to the purpose of Rule 18. Moreover, if HMRC were not content with tax payable by the related appellants being postponed, they could always apply under s55(4) of TMA 1970 for the amount postponed to be varied on the grounds of the “change in circumstances”
10 occasioned by the FtT’s determination in *Cyclops*.

(3) He acknowledged that, in *General Healthcare Group Limited v Revenue & Customs Commissioners* [2014] STFD 1026, the FtT had made directions under Rule 18(5) disposing of related appeals. However, that was in a situation where the lead appellants did not wish to take their appeals to the Upper
15 Tribunal. Therefore, it was only by making directions under Rule 18(5) in that case that the related appellants could have matters considered by the Upper Tribunal. In this case the lead appellants are appealing to the Upper Tribunal.

Discussion

12. The FtT has, as Mr Gammie submits, determined the First Issue in HMRC’s
20 favour. I believe it is instructive to explain precisely how the FtT has determined that issue:

(1) It determined that, as a matter of law, the relevant loan notes would not be “restricted securities” to which s425(2) of ITEPA (and analogous provisions relating to NIC) applied, in circumstances where there was no business or
25 commercial purpose for the inclusion of a forfeiture provision in those loan notes. It rejected the appellants’ arguments that a wider examination of the commerciality of the arrangements was required.

(2) It concluded that, having regard to the facts of the specific appeals being considered, the forfeiture provision had no business or commercial purpose.
30 Even if a wider examination of commerciality was relevant, on the facts of those appeals there was insufficient commerciality. Therefore, applying (1) and (2), the FtT concluded that the loan notes were not within the scope of s425(2) of ITEPA (and related NIC provisions), thereby determining the second part of the First Issue.

(3) It concluded that, as a matter of law, there was a payment of earnings for income tax and NIC purposes when cash was placed unreservedly at the disposal of the relevant employees.
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(4) It concluded that, on the facts of the appeals being considered, the principal amount of the loan notes was placed unreservedly at the disposal of
40 the relevant employees when the loan notes were transferred to them. Therefore,

there was a receipt of earnings equal to the principal amount of the loan notes at that point.¹

13. The decision on the First Issue is, therefore, a determination of mixed questions of fact and law. If the FtT made an error of law in its approach to the First Issue, it might have reached the wrong conclusion on that issue. Nevertheless, the FtT's conclusion on the First Issue is, as matters stand, binding in the related appeals and Mr Gammie's suggested approach is one possible way of dealing with the related cases. However, it is not the only possible approach. Mr Gammie accepted that the FtT has a discretion as a matter of case management to adopt a different approach that takes into account the possibility that the Upper Tribunal will determine that it made an error of law. I agree with that: there is no reason why directions that the FtT gives under Rule 18(5) cannot include directions for the related appeals to be stayed. In exercising my case management discretion, I must take all relevant factors into account, including the fact that the FtT Rules provide for the decision on the First Issue to be binding in the related appeals, the detailed provisions of Rule 18 and the overriding objective set out in Rule 2 of the FtT Rules.

14. Mr Gammie's suggested approach clearly gives full effect to the binding nature of the FtT's determination of the First Issue. However, it has its drawbacks. A related appellant would have to decide, based on the FtT's decision in *Cyclops*, what, if any, factors to ask the FtT to take into account when making a determination under Rule 18(5). Given the nature of the FtT's decision on the First Issue referred to at [12], it is unlikely that a particular appellant's assertion that the loan notes were part of an overall arrangement with a commercial rationale will carry much weight (since the FtT's conclusion on the First Issue was driven in large part by its conclusion that it is only the commercial rationale of the forfeiture provision that is relevant). Yet, if the FtT's conclusion on this issue was wrong in law, it may be that overall commerciality is in fact relevant. More generally, if related appellants are required now to explain what specific factors should be taken into account under Rule 18(5), there is a risk that they will do so based on a misunderstanding of the legal parameters and will not mention matters which the Upper Tribunal, when correcting any error of law, determines to be relevant. A similar point arises in relation to any applications for unbinding under Rule 18(4). I respectfully agree with statements that Judge Berner made in *General Healthcare* to the effect that applications to be unbound under Rule 18(4) should be granted only where preserving the binding effect of a FtT decision would create injustice that could not be avoided by other procedural means. However, the FtT risks proceeding on a mistaken basis if it considers the question of injustice by reference only to its own decision in *Cyclops* if the Upper Tribunal determines that decision contains an error of law.

15. Mr Gammie acknowledged the issues referred to at [14], but argued that they could be addressed by the Upper Tribunal, on appeal, finding additional facts using its powers under s12(4) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA

¹ Strictly, the First Issue asks only whether there was a receipt of earnings when the loan notes were transferred. It does not expressly enquire as to the amount of any such receipt. However, neither party argued that this was significant.

2007”). I accept that this power exists. However, it must be questioned whether if the Upper Tribunal considered there was an error of law in the *Cyclops* decision, it would feel able to make necessary factual findings in a potentially large number of appeals. There must be at the very least a strong possibility that the Upper Tribunal would
5 remit the appeals back to the FtT and, if it did so, the result would be additional delay and expense which, applying the overriding objective, are to be avoided where practicable.

16. The Stay Directions, by contrast, avoid most of the problems referred to at [14] and [15]. However, since they will not result in a disposal of the related appeals under
10 Rule 18(5) until after the Upper Tribunal’s decision is released, they defer the point at which the binding nature of the FtT’s decision on the First Issue is given full effect. That results in prejudice to HMRC, the successful litigant as matters stand, who have to wait until they are in a position to collect tax from the related appellants.

17. Therefore, neither the Stay Directions, nor Mr Gammie’s proposal, is perfect.
15 Having weighed up the various considerations, my overall conclusion is that the Stay Directions should remain in place for the following reasons:

(1) The FtT’s overriding objective is to deal with cases fairly and justly. The Stay Directions ensure that the related appeals are disposed of with the full benefit of the Upper Tribunal’s decision on appeal. By contrast, Mr Gammie’s
20 approach runs the risk that those appeals are disposed of based on an imperfect understanding of the law. Any resulting mistake could be corrected (at least for those related appellants who seek permission to appeal against the disposal of their case under Rule 18(5)). However, the procedure for correcting any mistake could result in additional costs and complexity which would not arise under the
25 Stay Directions.

(2) While the Stay Directions defer the point at which the binding nature of the FtT’s decision on the First Issue has tangible effects, they still acknowledge the binding effect of that decision. Even with the Stay Directions in place, once the Upper Tribunal’s decision in the *Cyclops* appeal is known, there is nothing
30 to prevent the FtT following Mr Gammie’s suggested approach for disposing of related appeals. I do not, therefore, accept Mr Gammie’s submissions that the effect of the Stay Directions is to relegate the Rule 18 Directions to the status merely of an informal stay under Rule 5(3) of the FtT Rules. Moreover, the only reason why the FtT is not giving immediate effect to the binding nature of its
35 decision on the First Issue is because it is reasonably arguable that the FtT made an error of law in its decision so that it is right that the matter should proceed to the Upper Tribunal.

(3) Mr Gammie is correct to say that, until there is a “determination of the appeal” for the purposes of s55(3) of TMA 1970, any postponement of tax
40 granted under s55 remains in place. However, HMRC are entitled to interest on any tax that is determined to have been underpaid. Moreover, as Mr Sherry notes, HMRC are entitled to apply under s55(4)(a) of TMA 1970 for a direction that the postponement of tax should cease owing to a change in circumstances (although, of course, HMRC would need to satisfy the FtT on this issue).

Therefore, there is scope for any prejudice that HMRC suffer in being kept out of their money to be mitigated. By contrast, if the FtT adopted Mr Gammie’s proposal and the appeal of a related appellant was wrongly disposed of based on a flawed appreciation of the law, that related appellant would need to appeal to the Upper Tribunal for the mistake to be corrected, would incur costs in doing so and may incur further costs if the matter were then remitted back to the FtT.

(4) I am reassured to note that Judge Mosedale, in paragraphs [12] and [13], of her decision in *288 Group Limited* was endorsing an approach similar to the one I am suggesting. While I differ slightly from her assumption that related appellants dissatisfied with the decision in the lead appeal should apply under Rule 18(4) to be unbound, it is clear that she was suggesting that, where the lead appellant in a Rule 18 situation appeals, the FtT should await the decision of the Upper Tribunal. I do not consider that Judge Berner was saying anything different in *General Healthcare*. While he did emphasise the binding nature of the FtT’s decision on common or related issues under Rule 18, he did so in the context of a decision confirming that related appellants dissatisfied with that decision should not apply to be unbound under Rule 18(4) but should, instead, seek permission to appeal against the determination of their appeal under Rule 18(5). Moreover, he was dealing with a situation where a lead appellant chose not to appeal a decision of the FtT. I do not consider that Judge Berner was saying that the FtT should invariably make directions under Rule 18(5) without the benefit of the Upper Tribunal’s decision if the lead appellant does appeal.

(5) Finally, although neither party referred to this authority, I am reinforced in my conclusion by the approach taken in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 which suggests that I should consider whether the Upper Tribunal’s decision will be of “material assistance” in resolving the related appeals and whether it is expedient to stay proceedings. I consider both limbs of this test to be satisfied.

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

**JONATHAN RICHARDS
TRIBUNAL JUDGE**

RELEASE DATE: 13 MARCH 2017