TC03041

Appeal numbers: TC/2013/3240, TC/2013/1067, TC/2012/7303, TC/2013/1547, TC/2013/3720 & TC/2013/3721

PROCEDURE - whether Rule 18 direction for appeals to be related cases appropriate - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

288 GROUP LIMITED

ADVANCED DIRECT MAIL

GLOBAL MAILING LIMITED

HAYLOFT PLANTS LIMTED

HYUNDAI MOTOR UK LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 5 November 2013

Mr G Tack, solicitor, of DLA Piper UK LLP for the Appellant

Mr S Grodzinski QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The five appellants apply for a Rule 18 Direction. HMRC opposes the application. HMRC opposes the application for two reasons: one ground relates to the issues in the particular cases; the other objection is related to the appropriateness of rule 18 directions in general.

2. Zipvit TC/2010/6234 has been designated as a lead case under rule 18. A number of other cases have been designated as related cases to it under rule 18. The appellants apply to be additional related cases. The common or related issue in so far as the existing rule 18 directions are concerned is:

> "whether a taxable person, who has received supplies of services from Royal Mail which were at the material time treated by Royal Mail as exempt under the Value Added Tax Act 1994, but which were properly chargeable to VAT under the Sixth VAT Directive or Principal VAT Directive, is entitled to an input tax credit in respect of those supplies."

3. The appellants consider that the same common or related issues of fact/law arise in their cases and seek a direction designating their appeals as related to Zipvit on the basis of the same common or related issue.

Appropriateness of rule 18 directions in principle

4. The ability for the Tribunal to make Rule 18 directions was introduced with the 2009 Tribunal rules. It has no forerunners in the rules which applied to the VAT and Duties Tribunal or Special or General Commissioners. Nor does Rule 18 closely resemble the CPR rules on group litigation.

5. The Tribunal has power to stay cases behind other cases and it regularly does so. It has done so in these cases: all 6 appeals are already stayed behind *Zipvit*. HMRC say that there are about 140 cases stayed behind the lead case, only a few of which have been directed to be related cases.

6. Rule 18 directions do more than merely stay one case behind another. The difference, as Mr Grodzinski puts it, is that a rule 18 direction makes the FTT decision in the lead case binding on the related cases in the FTT. To this extent the FTT decision in the lead case creates binding precedent when, as the FTT is not a court of record, its decisions normally do not have this effect.

7. The advantage of a rule 18 direction to the appellants is that if Zipvit is successful, they will not need to re-litigate the issue with HMRC. HMRC will be bound to apply the Zipvit decision in their favour. This is not the position with normal FTT decisions as they do not create precedent.

8. But the application of rule 18 is not without its difficulties. Most of these difficulties stem from the fact that a designation of cases as lead cases and related cases does not survive on an appeal: the Upper Tribunal has no mirror to rule 18. In

this rule 18 in effect diverges from the CPR where a group litigation order survives on appeal.

9. Does Rule 18 offer practical advantages over a simple stay? If the situation is that the lead appeal is won by the lead appellant and HMRC does not appeal, no problem should arise. The related cases would expect their appeals to be allowed automatically under rule 18(5). Indeed, it is the perceived benefit to the related cases of this provision over the position of appeals merely stayed behind a lead case which the appellants seek by applying for a rule 18 direction.

10. But what if the lead appeal is lost by the lead appellant in the FTT and not appealed? There is no automatic right for the related cases to appeal yet it would defeat the purpose of rule 18 if they had to apply under rule 18(4) not to be bound by the lead decision and then undergo a second FTT hearing on the same issue. This puts them in no better position than cases with ordinary stays.

11. In practice, as the FTT must issue directions on related cases following the disposal of the lead case (see Rule 18(5)), in such an eventuality the FTT is likely to issue a direction dismissing the related appeals. This direction can then be appealed. The Upper Tribunal on appeal would then consider the merits of the decision in the lead case because the Upper Tribunal, unlike the FTT, would not be bound by the precedent created by the FTT decision.

12. But what if the lead appeal is lost by the lead appellant in the FTT and appealed by the lead appellant? Oddly perhaps, rule 18 does not anticipate this situation which raises the spectre of the related cases being bound by the FTT decision while the lead appellant may successfully overturn the FTT decision in a higher court. This is because rule 18(3)(b) provides that the FTT decision remains binding on the related cases unless a direction is sought to unbind them under rule 18(4).

13. In such a case, as long as the related appellants make the application for unbinding, the current practice of the Tribunal is to stay the application pending the final resolution of the appeal in the lead case. An alternative approach would be to refuse to unbind the related cases and simply dispose of them, against the various appellants, under rule 18(5), thus creating a decision would could be appealed to the Upper Tribunal as per § 11. I am not aware of this approach being adopted and it has the disadvantage that it would mean all the related cases would have to appeal rather than waiting the outcome of the lead case appeal. This would increase costs and seem to defeat the object of the rule 18 procedure.

14. And what if the lead case is won by the lead appellant and HMRC appeals? A similar problem arises: HMRC will need to make an application to unbind the related cases and it is likely that such applications would be stayed pending the outcome of the appeal on the lead case. Again there is the possibility of the Tribunal instead allowing all the related appeals thus creating individual decisions which HMRC would be able to appeal aswell.

15. In other words, where there is a Rule 18 direction, this can generate a great deal of work as applications may well need to be made and considered on all the related cases once the lead case is decided. Nevertheless, any case stayed by a simple stay direction would also need to be revisited after the issue of the lead case decision; while no applications for unbinding under rule 18 need be made, the parties would have to decide whether to abide by the decision in the lead case or progress the stayed case to a hearing on its own merits. And, unlike rule 18 cases (see §10-11), with cases simply stayed it would be difficult to avoid re-litigating the issue in the FTT if the lead case did not appeal and the related cases were not prepared to abide by the outcome.

16. In conclusion, Rule 18 does offer an advantage to appellants and HMRC where there is a real chance that the appellants and HMRC might chose to abide by the FTT decision. While it might increase the value of Rule 18 directions if the rules of the Upper Tribunal recognised rule 18 directions made at FTT level, a rule 18 direction may also assist in a case where an appellant in a related appeal wishes to appeal but the lead appellant does not (see §11).

17. In this case if HMRC lose at first instance in the lead appeal, because of the amount of money estimated to be involved in the 140-odd similar cases (approximately £1billion), Mr Grodzinski told me he was instructed to say that HMRC would be bound to request permission to appeal.

18. But it seems to me that even if I accept that an appeal is inevitable if HMRC lose, so that the benefit to the appellant of a rule 18 direction mentioned in §9 could never be available to them, nevertheless they would still have the benefit that if HMRC win and Zipvit choses to accept that, the related appellants could appeal as per § 11.

19. <u>payment pending higher appeal:</u> HMRC raise another objection to Rule 18 and this is based on the provisions of S 85A and B of VATA 94. S85A(2) requires HMRC to repay VAT to a taxpayer who wins at first instance. S 85B(1) requires HMRC to make this repayment despite any appeal. This can only be avoided if HMRC can show that it is necessary for the protection of revenue to withhold payment.

20. HMRC's concern is that the effect of Rule 18 is that they might be obliged to pay the claims on all related cases if the lead appellant was successful even if HMRC then appealed the FTT decision. This would not be a risk if the cases were simply stayed pending the final outcome of the lead appeal. HMRC say they would make applications to disapply s 85B(1) in order to protect revenue but such applications would not necessarily be successful.

21. Anyway, as mentioned above, the FTT is bound to take steps to dispose of the related cases once the lead appeal is determined: rule 18(5). However, if (as indicated in § 14) HMRC applied for the related cases not to be bound by the FTT decision on the lead case, which logically they must do in order to protect their position if they are appealing, the 'further steps' taken by the Tribunal might be to

stay the unbinding application rather than dispose of the case. It would only be necessary to issue a decision disposing of the case (as per § 11) where the lead case was not on appeal. Nevertheless, the appellant might oppose such a stay and oppose the unbinding and request a decision disposing of the related case favourably so that they can benefit from S85B(1) while HMRC's appeals are pending.

22. Mr Tack did not suggest that this is the reason his clients sought a rule 18 order. And I am not in a position to prejudge the outcome of such hypothetical applications so I conclude that it is a possibility that in the scenario outlined by HMRC the effect of a Rule 18 order is that they might have to pay out on related cases pending an appeal to a higher court when they would not have to do so had only a simple stay been ordered in the FTT

23. But I do not consider that S 85B amounts to a reason to refuse a Rule 18 direction. It is a matter that can be fully aired should the situation in § 21 arise, and the Tribunal needs to decide what are the appropriate directions to be made under Rule 18(4) and (5) following the FTT decision in the lead appeal.

24. In conclusion, I do not consider there can be any objection to a Rule 18 direction on the basis of its general operation, and it potentially offers an advantage to the five appellants as outlined in §11 although it is unlikely to offer the advantage the five appellants seek as HMRC have indicated they will appeal if they lose. But I go on to consider whether a rule 18 direction is appropriate in these particular six appeals.

Specific objections

25. Both parties accept that the six appeals raise additional issues to those raised in Zipvit. Three of the cases are defended in part on the basis that some or all of the claim was lodged out of time. This is not an issue in Zipvit. For all six appeals some of the claim relates to supplies made after January 2011. Similarly this is not an issue in Zipvit. HMRC also indicated that they do not accept that factually the contracts with the 5 appellants are the same as in Zipvit: the appellant's case is that none of the contracts included written or oral terms which dealt with VAT.

26. In addition, the grounds of appeal in the case of Global Mailing Ltd are rather different to those in Zipvit: the appellant applies for leave to amend its grounds of appeal which were drafted by its former advisers and (its seems in both parties' view) are inadequate.

27. <u>What does the lead appeal decide?</u> HMRC's first objection to making a rule 18 direction in cases where additional issues will arise is that (they say) there is a risk that the effect of Rule 18 is that the outcome of the lead case is binding on the related cases irrespective the other issues arising. They appear to suggest that if the Tribunal designated, say, Hayloft Plants Ltd as a related case and Zipvit won the lead appeal, this would necessarily mean that Hayloft Plants would succeed in their appeal even in so far as it was refused by HMRC on the grounds that it was made out of time.

28. I do not accept this. Rule 18 provides:

> (3) when the Tribunal makes a decision in respect of the common or related issues-
>
> …
>
> (b)…that decision shall be binding on each of those parties [ie the related parties]."

29. In other words it is the decision on the common or related issues that is binding on the related parties: it is not the outcome of the lead appeal which is binding (even though in many cases it would amount to the same thing). Take for instance, a lead appeal with an out of time issue and a main issue which was designated as the common or related issue with another case. If the lead appellant wins on the main issue of law but loses on the out of time issue, the related case, which did not raise the out of time point, would not be dismissed just because the lead appeal was dismissed. On the contrary, it would succeed.

30. I reject this as a ground to refuse a Rule 18 direction.

31. More pertinently HMRC object to Rule 18 directions being made where the related case raises additional issues because such a direction cannot dispense with the need for litigation between HMRC and the related party.

32. Out of time issue: Mr Tack's view is that this is a discrete issue affecting some of the would-be related cases. If Zipvit succeeded, whether in the FTT or in a higher court, it would be necessary to resolve the out-of-time issue, but it would be advantageous if on the main issue the decision in Zipvit was binding on the Tribunal considering the out-of-time issue.

33. The change in law issue: after January 2011 UK law was changed in order to implement the *TNT* decision. As I understand it at present, the appellants' case is that nevertheless Royal Mail still treated, and was treated by HMRC, as making exempt supplies where under *TNT* they should have been treated as making taxable supplies.

34. I accept HMRC's statement that TNT is currently challenging the domestic law introduced on 1 February 2011 in the Administrative Court on the grounds that it does not comply with EU law and that it was expected that the Court will refer the matter to the CJEU.

35. Mr Tack's view is that, therefore, in respect of supplies after January 2011, either the supply was exempt under UK law but standard rated under EU law and the claim is exactly the same as in Zipvit or the supply was standard rated under both UK and EU law (although treated by Royal Mail as exempt) and some of the issues of law involved in Zipvit fall away. Obviously the issue of whether the contracts were inclusive or exclusive of VAT would remain. It would raise no additional issues.

36. HMRC's view, on the contrary, is that it would require the Tribunal in addition to rule on the issue of whether UK law post January 2011 was compliant with EU law.

37. contracts issue: Mr Tack's position is that if the Tribunal were to insist that related cases had identical facts to those in the lead case before a Rule 18 direction was made, then no Rule 18 directions could ever be made. As I understand it while he accepts the factual position of each appellant is different, he considers that in all cases there were no written terms which related to VAT. As I understand it, it is therefore his case that in the substantive appeals he would argue the same in all the cases which is that the contracts were silent on VAT and therefore VAT inclusive.

38. HMRC do not agree that the contracts were VAT inclusive and complain that they do not have the evidence to decide whether the contracts were silent on VAT.

39. Conclusions: I cannot agree with HMRC that where a would-be related case raises any issue not raised in the lead case it would necessarily be inappropriate to make a rule 18 direction. The purpose of rule 18 is, it seems to me, to avoid unnecessary litigation, and that must include shortening the length of hearings. It must also include decreasing the risk of multiple tribunals deciding the same issues, and particularly to avoid the risk of FTT tribunals in different hearings coming to different conclusions on the same issue. Therefore, the mere fact additional issues would arise on the would-be related case if the lead case succeeded, such as quantum or whether an appeal was lodged late, does not seem to be a good reason to refuse a rule 18 direction.

40. So far as the question of the post-January 2011 claims is concerned, I do not see why a rule 18 direction would necessarily be inappropriate. Assuming that Zipvit ultimately succeeds, either the Tribunal will likely have to take a view on the 2011 domestic law compliance with EU law or there will be a decision of a higher court or even of the CJEU on that issue which will bind the Tribunal. Nevertheless the hearing will be shortened because the Tribunal would be bound by the Zipvit decision on the other questions of law.

41. The difficulties which are likely to arise are where the parties dispute whether the facts in the related cases are sufficiently similar such that the decision on law in the lead case actually applies and binds the related case. Nevertheless, it seems to me that even this is a fairly weak objection in that Tribunals and courts regularly have to decide whether a case is distinguishable on the facts in order to decide whether the decision on the law by a superior court is binding.

42. In this case HMRC have accepted that the cases do raise the same issues as in Zipvit and should be stayed behind Zipvit. They do not seek to resile on that. Unless and until they do it must be their position that the cases do raise the same issues. If they consider that the facts are so different that Zipvit might not resolve these cases then they should not have consented to the stay.

43. Therefore, I see nothing in the particular position of these 6 appeals or 5 appellants which suggest that a Rule 18 direction would not be appropriate and as a Rule 18 direction can be advantageous even in a case where an appeal if HMRC lose is inevitable, I will allow the application for a Direction by the appellants (with the

exception of the application of Global Mailing Limited) that their above appeals shall be related cases to Zipvit under Rule 18 and on the basis of the issue as set out in §2.

44. So far as Global Mailing Limited is concerned I give it leave within two weeks to make an application to amend its grounds of appeal. If it does so, HMRC have leave to object to the new grounds of appeal within two weeks of receiving the application. If the application for new grounds of appeal is made and successful, and (as indicated by Mr Tack) Global's grounds of appeal becomes identical to the grounds of the other 4 appellants in this application, I will make an order that Global Mailing Limited's appeal shall be a related case to Zipvit as well.

45. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 13 November 2013