TC03488

Appeal number: TC/2010/07574

PROCEDURE – rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 – binding effect of lead case in respect of common or related issues – lead case appeal dismissed but no appeal to Upper Tribunal – related case appellant arguing (a) lead case decision wrong in law, and (b) related case distinguishable on facts – application under rule 18(4)that lead case decision should not be binding

FIRST-TIER TRIBUNAL
TAX CHAMBER

GENERAL HEALTHCARE GROUP LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 14 April 2014

Sam Grodzinski QC, instructed by Deloitte LLP, for the Appellant

Matthew Donmall, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appeal of General Healthcare Group Limited ("GHG") is a related case under a lead case direction made by the Tribunal on 5 July 2011 following a hearing on 30 June 2011, which specified the appeal of Nuffield Health as the lead case under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules").

2. The Tribunal (Judge Brooks and Mr Adams FCA) released its decision in the lead case appeal on 8 May 2013 (*Nuffield Health v Revenue and Customs Commissioners* [2013] UKFTT 291 (TC)). It dismissed the appeal. Under rule 18(3)(b) of the FTT Rules, that lead case decision was, subject to one caveat, binding on the parties to this appeal. The caveat is that contained in rule 18(4), which gives a party to a related case the right to apply for a direction that the lead case decision does not apply to, and is not binding on the parties to, that case.

3. GHG made such an application under rule 18(4). At the hearing, having heard the arguments of the parties, I dismissed the application. Instead, I made directions for a subsequent hearing to enable the Tribunal to give directions for the disposal of this appeal in accordance with rule 18(5). At that subsequent hearing, although bound by the decision of the Tribunal on the common or related issues of law determined by the Tribunal in *Nuffield*, the parties may address the question whether GHG's case is distinguishable on its facts, and GHG may raise the further issue, as set out in its notice of appeal but which did not form part of the common or related issues under the lead case direction, namely whether HMRC may not, having regard to the EU principle of equivalence, reject GHG's claim.

4. I gave brief reasons for my decision at the hearing, which I now explain a little more fully in this written decision.

GHG's appeal

5. GHG's appeal concerns the proper VAT treatment for the supply by GHG of medical/surgical appliances, and the services necessarily involved in the fitting of those appliances. In short, the issue is whether GHG is entitled to recover input tax it has incurred in relation to such supplies on the basis that they were zero-rated for VAT purposes. GHG contends that such supplies are zero-rated so that input tax is recoverable. HMRC contend that such supplies are exempt.

The lead case direction

6. Prior to the lead case direction being made, there had been discussion between those representing Nuffield Health and those representing GHG. I had the benefit of a witness statement of Mr Gerry Kerr, the Group VAT manager at BMI Healthcare (the subsidiary of GHG through which the group trades), and I was shown copies of telephone attendance notes recording conversations between Deloitte LLP, for GHG, and KPMG for Nuffield Health. There was no dispute on this evidence.

7. What the notes show is that Deloitte were concerned, on behalf of GHG, to obtain an assurance that *Nuffield* (and another proposed lead case that is not material) would determine the issues in the GHG appeal. A concern was expressed that the proposed lead cases would not achieve this. GHG sought information from KPMG as to similarities and differences in the facts of the two cases. The key point expressed by Deloitte was to determine through an exchange of information that the lead case (or cases) would cover the full spectrum of the facts.

8. Relevant assurances not having been obtained, GHG instructed counsel (Andrew Hitchmough, now QC) to appear on its behalf at the hearing of the lead case application on 30 June 2011. Mr Hitchmough prepared a skeleton argument for that hearing in which he said that GHG supported in principle the identification and appointment of a lead case or lead cases. However, he made clear that, without assurance that the facts, issues and arguments to be addressed by the Tribunal in *Nuffield* fairly and accurately reflected the facts, issues and arguments raised in its own appeal, GHG believed it could suffer real prejudice if the Tribunal were to make the lead case direction sought.

9. In the event, GHG's objection was not pursued at the hearing, and it was unnecessary for the Tribunal to make a ruling on it. Prior to the start of the hearing, Mr Hitchmough had a discussion with Ms Amanda Brown of KPMG which reassured him that GHG's concerns would be addressed in the final hearing of Nuffield's appeal. On that basis GHG consented to be a related case under the rule 18 direction specifying *Nuffield* as the lead case.

10. For reasons I will explain, the form of the lead case direction in this case is important. It specified *Nuffield* as the lead case, and scheduled the related cases, including this appeal, which were stayed in accordance with rule 18(2). It set out the common or related issues giving rise to the lead case direction as follows:

> "This Direction applies to the appeals made by Nuffield Health (appeal reference TC/2010/4122) and the other Appellants listed in the Appendix to this Direction ("the Related Cases") being appeals giving rise to common or related issues of law:
>
> (1) whether or not the provision of pharmaceutical supplies and/or the supply and surgical fitting of prostheses, such as artificial hip joints or pacemakers, to patients were at the relevant times part of a single exempt supply or zero rated for the purposes of Value Added Tax Act 1994; and
>
> (2) accordingly, whether or not the Appellants can recover the attributable input tax on such expenditure incurred in the course of private "in-patient" treatment prior to 1997,
>
> being issues of law arising from appeals brought against the Respondents on the basis of the majority decision of the Court of Appeal in Customs and Excise Commissioners v Wellington Private Hospital Ltd [1997] STC 445 following the House of Lords' decision in Fleming v Revenue and Customs Commissioners [2008] STC 324."

11. As I noted earlier, the tribunal dismissed the appeal of Nuffield Health. There has been no appeal by the lead case appellant. That, says GHG, leaves it in an invidious position, given that, firstly, it considers the Tribunal's decision in *Nuffield* to be wrong, secondly its appeal has been stayed under rule 18 but, thirdly, the appellant in *Nuffield* is taking its appeal no further, and finally, and in any event, there are several factual issues that were not addressed in any detail in *Nuffield* in respect of which, it is said, GHG's case is different.

The law

12. Rule 18 provides as follows:

> **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) If the lead case or cases are withdrawn or disposed of before the Tribunal makes a decision in respect of the common or related issues, the Tribunal must give directions as to—
>
> (a) whether another case or other cases are to be heard as a lead case or lead cases; and
>
> (b) whether any direction affecting the related cases should be set aside or amended.

Discussion

13. As noted by Judge Mosedale in *288 Group Limited and others v Revenue and Customs Commissioners* [2013] UKFTT 659 (TC), at [6], rule 18 goes further than merely staying one case pending a determination in another case. It provides for the decision in one First-tier Tribunal case to be binding on another such case, something that does not generally apply, as the First-tier Tribunal is not a court of record. I would not, however, go quite as far as Judge Mosedale in describing rule 18 as creating binding precedent, something that, of course, a superior court of record is able to do. Rule 18 does not give any decision of the First-tier Tribunal the quality of binding precedent; it merely operates to determine the cases designated as related cases in accordance with the determination in the lead case of the common or related issues.

14. As Mr Grodzinski (who appeared for HMRC in *288 Group*) pointed out, Judge Mosedale drew attention, at [8], to the fact that rule 18 is not without its difficulties. Those difficulties, as Judge Mosedale observed, stem primarily from the fact that the designation of cases as lead cases and related cases does not survive an appeal; there is no equivalent of rule 18 in the Upper Tribunal. This is also different from the position under Group Litigation Orders according to the Civil Procedure Rules ("CPR"), where a GLO survives on appeal.

15. Having recognised that rule 18 has its limitations, Judge Mosedale went on to consider the practical implications of a number of different possible outcomes of a lead case. One of those was the position that has arisen in this case, namely that the lead appeal had been lost by the lead appellant in the First-tier Tribunal and not appealed. Judge Mosedale took the view, at [10] and [11], that it would defeat the purpose of rule 18 if the related cases had to apply under rule 18(4) not to be bound by the lead case decision and then undergo a second hearing on the same issue, as that would put the related cases in no better (or perhaps no different) position than cases with ordinary stays. Instead, on the basis that the First-tier Tribunal would direct, under rule 18(5), that the related appeal would be dismissed, that direction could form the subject of an appeal by the related case appellant.

16. In this case, Mr Grodzinski argues that the proper course is not to proceed by way of appeal to the Upper Tribunal, but for GHG to be unbound from *Nuffield* under rule 18(4). He submits that, if GHG's appeal were simply dismissed by this Tribunal under rule 18(5), GHG would then have to appeal that decision to the Upper Tribunal. But, he says, the Upper Tribunal would be left in the anomalous and artificial position of having to decide the appeal on the basis of the findings of fact made in *Nuffield*, and not on the basis of findings of fact concerning GHG. He submits therefore that GHG's appeal should be unbound from *Nuffield* under rule 18(4), in order that the First-tier Tribunal should be able to both make substantive findings of fact in relation to GHG's case, and determine the matter on the basis of GHG's arguments on the law.

17. It cannot be right that a related case appellant should be unbound from the decision in the lead case as a matter of course if the lead case appellant does not appeal, and the appellant in a related case wishes to challenge the decision in the lead

case. Mr Grodzinski did not put his case that high. He submitted that the test that should be applied by the Tribunal is that the Tribunal should accede to an application under rule 18(4) by a party to a related case in those circumstances, unless the Tribunal can be absolutely confident that the result will always be the same on the facts as asserted by the related case appellant; in other words that, however far the case should progress, there is no realistic possibility that the result would be different.

18. I do not accept that this is an appropriate test. In my judgment, a direction under rule 18(4) should be made only in circumstances where the binding effect on a party would create an injustice that cannot be avoided by any other procedural means which preserves the integrity of the lead case process. On making a lead case direction the Tribunal must be satisfied that the cases give rise to common or related issues of fact and law. This case itself is a good example, in fact, of the care that should be taken before an appeal is designated as a related case under a rule 18 direction. A lead case direction is not one that is made lightly, nor should it routinely be capable of being cast aside.

19. It is, as Judge Mosedale found in *288 Group*, at [29], only the decision in the lead case "in respect of the common or related issues" that is binding under rule 18(3). With that in mind, it is incumbent on the Tribunal, and on the parties, to ensure that the common or related issues, of law or fact or both, are properly recorded in the lead case direction. Clarity is paramount, because of the binding effect of the lead case decision in those respects. Failure properly to identify the common or related issues will inevitably lead to applications under rule 18(4) to be unbound.

20. I set out earlier the common or related issues identified in the lead case direction applicable to this case. Those common or related issues were confined to issues of law. There were no identified common or related issues of fact. As such, the direction, in my view, was to the same effect as a direction to determine a preliminary issue of law in an individual case. Questions of fact, to the extent relevant once that preliminary issue of law had been determined, would fall to be determined later.

21. On that basis, it is only the determination of the Tribunal in *Nuffield* on the common or related issues of law that is binding. To the extent that GHG wishes to challenge that determination, in my view the only appropriate means of such challenge is to apply for permission to appeal to the Upper Tribunal. Such an application would be in respect of the disposition of GHG's own appeal, in respect of which a direction by the Tribunal is required by rule 18(5). On an appeal to the Upper Tribunal on that basis, there would, in my view, be no impediment to the Upper Tribunal determining that appeal having regard to factual assertions, if different from the lead case, put forward by GHG, making necessary findings of fact, or if appropriate remitting the case to the First-tier Tribunal for further findings and application of the law as found by the Upper Tribunal.

22. I do not accept that s 12 of the Tribunals, Courts and Enforcement Act 2007 would constrain the Upper Tribunal in this respect. Mr Grodzinski pointed to the power of the Upper Tribunal to remit or remake the decision under s 12(2) and to make findings of fact under s 12(4), both of which, he argued, required the Upper

Tribunal to have set aside the decision of the First-tier Tribunal as having involved an error of law. I see no difficulty with s 12. The point is that the Upper Tribunal would not be considering an appeal of the lead case decision; it would be the GHG decision (albeit bound by the *Nuffield* decision on the issues of law) that would be before it. It is perfectly possible for the Upper Tribunal to come to the view, if it was the case, that the law had been correctly stated in the lead case, but that the application of that law in certain factual circumstances, including those asserted by GHG, should lead to a different result from that found in the lead case. That would be an error of law in the GHG decision, which could then either be re-made by the Upper Tribunal, or remitted as necessary to the First-tier Tribunal.

23. There is no provision in rule 18 for a party to a related case to appeal the decision in the lead case. There must first be a determination by the Tribunal of the related case. In most cases, particularly in those cases where the common or related issues cover both the law and the facts of the relevant appeals, the required determination of the related case under rule 18(5) may simply follow from the result of the lead case. But that will not always be so. Particularly where the common or related issues comprise issues of law only, questions of the application of the law as determined by the lead case to the particular facts of a related case may arise, and may result in different conclusions being reached from those arrived at in the lead case.

24. That, indeed, is an aspect of GHG's application. As well as arguing that the Tribunal in *Nuffield* made an error of law, it is also argued that, even if the law was correctly stated in *Nuffield*, this case may be distinguished from *Nuffield* on its facts, such that the result in this case should be different even if no error of law can be found in *Nuffield.*

25. That, in my view, is significant, for the following reasons. The lead case direction was in relation only to common or related issues of law. It is the decision in respect of those issues alone that is binding on GHG under rule 18(3), if GHG is not unbound under rule 18(4). No directions have been given for the disposal or further steps in this case under rule 18(5). In those circumstances, the expedient course, in my view, is for the Tribunal first to determine, in the light of the binding decision as to the law (which, as I have described, is in these circumstances akin to the determination of the law as a preliminary issue), whether, on the particular facts which the Tribunal will find in this case, GHG's appeal should be allowed or dismissed. Any rights to appeal will thereafter flow from that decision. That, in my view, will be the just way of dealing with the issues that remain between the parties in this case. No injustice will be created by retaining GHG's case within the rule 18 procedure, and not acceding to the application that GHG should be unbound from the decision in *Nuffield* on the common or related issues of law.

26. Subject to one further point, which was raised by Mr Grodzinski in further support of GHG's application under rule 18(4), that is the course I propose to adopt. Directions will be given for a hearing to determine the appropriate resolution of GHG's case under rule 18(5), which will include the exchange of evidence relevant to the case put by GHG that its appeal should be allowed, on its own facts,

notwithstanding the binding effect of the determination in *Nuffield* on the common or related issues of law as directed by the Tribunal under rule 18.

27. The further point is the submission by Mr Grodzinski that GHG cannot in any event be considered to be bound by the decision of the Tribunal in *Nuffield*. That submission is based on the undoubted principle that the doctrine of *stare decisis*, or binding precedent, does not apply where the precedent, although otherwise binding as a matter of domestic law, conflicts with EU law. Mr Grodzinski referred me, by way of example, to what the Court of Justice said in *DG grup EOOD v Direktor na Agentsia 'Mitnitsi'* (Case C-138/10) [2011] All ER (D) 99, at para 47:

> "… it should be recalled that European law precludes a national court which is called upon to decide a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of that higher court, if it takes the view, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law (Case C-173/09 *Elchinov* [2010] ECR I-0000, paragraph 32)."

28. In the case referred to by the CJEU, *Elchinov v Natsionalna zdravnoosiguritelna kasa* (C-173/09) [2011] All ER (EC) 767, the Court also considered the position where a lower court is in the position of being inhibited by binding authority from giving full effect to provisions of EU law. In such a case, the CJEU stated that the rule of national law must be disregarded. The Court said (at para 31):

> "In addition, it is appropriate to point out that, in accordance with settled case law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, that is to say, in the present case, the national procedural rule set out in para 24 of this judgment, and it is not necessary for the court to request or await the prior setting aside of that national provision by legislative or other constitutional means (see, to that effect, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629 (para 24) and *Filipiak v Dyrektor Izby Skarbowej w Poznaniu* Case C-314/08 [2010] All ER (EC) 168 (para 81))."

29. Mr Grodzinski submitted that, whatever might be the position where there has been an otherwise binding decision of a higher court, the position is even clearer in a case such as this, where the only decision said to be binding is one of another First-tier Tribunal, whose decisions ordinarily set no precedent.

30. Beguiling though Mr Grodzinski's arguments are, I do not accept them. The crucial point, in my view, is that the binding effect of the decision on the common or related issues in the lead case is not in the nature of a binding precedent, but merely a determination of those issues in the related case. The lead case procedure under rule 18 is no more than a procedural means whereby the First-tier Tribunal determines the relevant issues in the appeals both in the lead case and in the related cases. There is

no question of there being one First-tier Tribunal whose decision is said to bind another; the Tribunal is a single body, whose decision on those issues in the lead case is, subject to any application under rule 18(4), binding on the parties to the related case. Thus, in the same way that it would not be open to a party to re-open proceedings before the First-tier Tribunal on a preliminary issue of law decided by the Tribunal in those proceedings or to re-open the relevant issue in the lead case itself on the ground that the tribunal was wrong as a matter of EU law, it is equally not open to a party to argue in the First-tier Tribunal that the decision in the lead case does not bind the parties to the related case because it is inconsistent with EU law. The proper forum for an argument of that nature is the Upper Tribunal on appeal on a question of law from the relevant decision of the First-tier Tribunal.

Decision

31. For these reasons, I dismiss GHG's application under rule 18(4). I have directed that there should be a hearing for the purpose of the Tribunal giving directions under rule 18(5) providing for the disposal of this appeal having regard to this decision.

Application for permission to appeal

32. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 16 April 2014