

## Analysis

# Lead cases in the tax tribunal: the rule 18 procedure

## Speed read

Where separate appeals relate to similar issues, rule 18 of the Tribunal Procedure Rules allows the tribunal to designate an appeal as a lead case, with other appeals that raise common or related issues of fact or law being stayed behind that lead case. While this avoids the need to have separate hearings and the risk of conflicting decisions on the same points, taxpayers should make sure they have sufficient information on the lead case and are comfortable to be bound by it before applying for or agreeing to a rule 18 direction.



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The high volume of cases before the First-tier Tribunal (FTT) and HMRC's approach to assessing taxpayers mean that, quite often, there are several live appeals that raise the same or similar issues. In such cases, it is in both the parties' and the FTT's interest to avoid having separate hearings, as this will save time and costs and avoid the risk of conflicting decisions being issued by different judges on similar points.

There are three options for dealing with such cases:

- the appeals may be joined or consolidated under rule 5(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules, SI 2009/273;
- some appeals may be stayed pending the outcome of one case under rules 5(3)(b) and (j); or
- an appeal may be formally designated as a lead case and related cases may be stayed under rule 18.

The FTT's case management powers under rule 5 are well-known and relatively straightforward. However, it is worth exploring rule 18 in more detail, especially as the FTT has provided helpful guidance on its application in recent years.

### The basics of rule 18

Rule 18 applies where the following three conditions are all met:

- two or more cases are before the FTT;
- the FTT has not issued a decision disposing of the proceedings in those cases; and
- the cases concern common or related issues of fact or law.

When these conditions are met, the FTT may issue a direction under rule 18(2) designating one or more of the appeals as a lead case or lead cases, and staying the other appeals behind the lead case. It is clear from the wording of rule 18(2) that the FTT may issue a direction on the parties' application or of its own volition, although it would be unusual for the FTT to do so without being prompted and without reference to the parties. The direction will generally include a description of the common or related issues agreed by the parties; where the parties cannot reach agreement, the FTT will normally list a hearing to consider the issues.

The purpose of rule 18 was succinctly summarised by Judge Mosedale in *288 Group Ltd and others v HMRC* [2013] UKFTT 659 (TC) (at para 39):

'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.'

Rule 18 directions are generally made early on in the proceedings, before or soon after an appeal is allocated to a category. For the follower cases, no case management directions will be issued and HMRC will not be required to submit a statement of case until the outcome of the lead case.

Under rule 18(3), once the FTT has issued a decision in the lead case, it must send a copy of that decision to each party in the follower cases. Any such decision will be binding unless the parties apply for a direction under rule 18(4) that the decision does not apply to that case. If no such application is made, the FTT will issue directions providing for the disposal of or next steps in the follower cases. In practical terms, this means that the default position is that if the lead case appeal is allowed, the follower cases' appeals will be allowed, and vice versa (but see 'Unbinding the followers' below).

Parties to follower cases do not have a right of appeal against the decision in the lead case. However, if they are unsuccessful in light of the outcome of the lead case, they have the option to appeal against any decision the FTT makes to dismiss their own appeal, and the Upper Tribunal will then consider whether the FTT made any errors of law in reaching its decision.

If the parties in the lead case have been granted permission to appeal to the Upper Tribunal, the FTT may stay the related cases until the Upper Tribunal has issued its decision in the lead case. This was confirmed by the FTT in *HMRC v ABL (Holding) Ltd and another* [2017] UKFTT 220 (TC), where Judge Richards held 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' pending the outcome of the Upper Tribunal appeal. However, any such direction will depend on the nature of the case and the common or related issues that are being appealed to the Upper Tribunal.

If the lead case is withdrawn or disposed of without determination of the common issues, the FTT may designate one of the follower cases as a lead case. It may also amend or set aside any direction affecting the followers.

### Lead cases in the High Court

Rule 18 has similarities to an equivalent procedure under the Civil Procedure Rules (CPR). The court may issue a group litigation order (GLO) under CPR 19.22 where multiple claims have been issued that raise common or related issues of fact or law. Any judgment on a GLO issue will be binding in relation to all other claims on the group register, unless the court orders otherwise. GLOs are useful tools that, like rule 18, avoid multiple sets of proceedings being pursued in the same court and avoid the risk of inconsistent decisions being issued in each case.

Unlike the GLO procedure, rule 18 is far less prescriptive and does not make provision for cost-sharing or appeals. This reflects the FTT's relative informality compared to the higher courts, but the flexibility provided by rule 18 is at the expense of the certainty inherent in the more formal CPR provisions. From the perspective of the lead case taxpayer, the absence of a costs sharing mechanism can be particularly frustrating. Unless cost sharing can be agreed on a contractual basis with the follower cases (which is challenging but not impossible), the lead case will in effect determine the common or related issues at its own expense.

GLOs are publicised to enable claims within their scope to join the litigation. Similarly, rule 18 lead cases are publicised on a web page on the FTT website (see [bit.ly/leadcases](http://bit.ly/leadcases)) that sets out details of existing lead cases. However, it is unclear if this is still being updated, as the last update was made in May 2020.

**'A direction under rule 18(4) [to unbind a follower from a lead case] 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'**

### Rule 18 or rule 5?

Taxpayers should carefully consider whether the lead case procedure under rule 18 is appropriate in their case, or whether it would be better to apply for a simple stay under rule 5 pending the outcome of another case, without the decision in that case becoming binding. The disadvantage of a rule 5 direction is that the parties do not have certainty with regards to the outcome of the case, which may have to be progressed and heard separately following the decision in the case they are stayed behind. However, while a rule 18 direction provides the advantage of certainty, the lead case decision will be binding on the followers and the onus will be on the taxpayer to prove that their case can be distinguished.

In the recent case of *Putney Power Ltd and others v HMRC* [2023] UKFTT 292 (TC), the FTT considered a rule 5 application by HMRC and a rule 18 application by the taxpayers. The substantive dispute related to whether shares issued by the taxpayers qualified under the enterprise investment scheme, and the parties were agreed that three appeals should be stayed behind two lead cases, but disagreed as to whether such a stay should be under rule 5 or rule 18. Judge Scott referred to the judgment in *Kingston Maurward College v HMRC* [2017] UKFTT 502 (TC), in which Judge Citron emphasised (at para 26) that '[a] clear definition of the common or related issues is important

to the efficient operation of rule 18 ... On the other hand, the presence of additional issues to the common or related ones, in the lead case or a related case or both, should not be a barrier to the operation of rule 18, as the decision in the lead case is binding only in relation to the common or related issues.' While Judge Scott accepted that there were similarities between the appellants' cases, the differences in the factual matrices were not simply nuanced and the parties could not agree upon common or related issues that would be determinative in all appeals. As a result, Judge Scott considered a rule 18 direction to be inappropriate and instead directed a stay under rule 5.

More generally, the FTT will be reluctant to order a stay, whether under rule 5 or rule 18, if the taxpayer objects. Every taxpayer has a right to have their appeal heard, and it would be unusual for the FTT to impose a significant delay on them without their agreement unless there are very good reasons for doing so.

### Unbinding the followers

If a taxpayer disagrees with the decision in the lead case, their options will depend on the scope of the lead case directions. In broad terms, however, two options are likely:

- they can either apply for a direction under rule 18(4) that the decision in the lead case does not apply to them; or
- they can seek to distinguish their case on the facts.

An application under rule 18(4) must be made within 28 days after the date that the FTT sent a copy of the decision in the lead case to a party in a follower case. Such applications are not granted lightly, as they have the potential to undermine the rule 18 procedure.

In *General Healthcare Group Ltd v HMRC* [2014] UKFTT 353 (TC), the FTT dismissed an application for a direction to unbind a follower from an unsuccessful lead case in the FTT concerning the VAT treatment of supplies of medical appliances. Judge Berner held that '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.' Judge Berner also emphasised the importance of clarity in recording the common or related issues, as failure to ensure such clarity will inevitably lead to rule 18(4) applications.

Although the taxpayer's application under rule 18(4) was dismissed, the FTT noted that the lead case direction was only in relation to common or related issues of law, not fact. As such, the FTT directed that a hearing be listed to determine the outcome of the appeal in light of the decision in the lead case.

The more recent case of *Muller Dairy (UK) Ltd v HMRC* [2023] UKFTT 654 (TC) further illustrates the options that are available to taxpayers who disagree with a ruling in a lead appeal. In that case, the FTT considered an application by the taxpayer under rule 18(4) in the context of an appeal that was stayed under rule 18 behind another case, in which the FTT held that an arrangement called a growth securities ownership plan did not work. The taxpayer applied for a direction that it was not bound by the decision on the common legal issues in the lead case, as its own arrangements had real commercial objectives and could be distinguished from those in the lead case. The FTT refused the application, holding that the starting point for a rule 18(4) application is 'to preserve the integrity of the lead case process.' However, as in *General Healthcare Group*, the FTT issued directions for a hearing to determine the outcome of the case, which will give the taxpayer an opportunity to establish that its own appeal should be allowed on the facts.

### Practical tips

When considering whether to apply for a rule 18 direction or dealing with such an application by HMRC, taxpayers and advisers should bear the following in mind:

- **Knowledge of lead case:** Before applying for or agreeing to a direction under rule 18, taxpayers should ensure they have sufficient knowledge of the facts and legal issues in the lead case (or the proposed lead case) to enable them to make an informed decision. If the taxpayer in the lead case is unrelated, it can be difficult to obtain such information, as neither the FTT nor HMRC tend to provide details of other cases before they have been heard. In the absence of such details, taxpayers may wish to consider a stay under rule 5 to ensure they are not bound by a case that they have insufficient knowledge of.

### Taxpayers should exercise caution in agreeing to an application by HMRC to have their case stayed under rule 18, as HMRC may choose – deliberately or otherwise – a lead case where the facts are more favourable to them

- **Agreeing to HMRC's application:** Taxpayers should exercise caution in agreeing to an application by HMRC to have their case stayed under rule 18, as HMRC may choose – deliberately or otherwise – a lead case where the facts are more favourable to them. If a taxpayer is uncertain or, as mentioned above, does not have the necessary information to make an informed decision, it may object to the use of the rule 18 procedure and apply for a general stay pending the final outcome of the lead case under rule 5.
- **Consider the scope of the common or related issues carefully.** If a rule 18 direction has not yet been made by the FTT, the taxpayer should pay close attention to the proposed scope of the common or related facts and issues and make representations to the FTT if necessary. Are the issues in your case really the same, or are there subtle differences in the facts or in your legal arguments compared to those in the other cases?
- **Withdrawal of lead case:** If the lead case is withdrawn or otherwise disposed of, it is possible for one of the followers to become the lead case. If this happens, the FTT will notify the parties in the follower cases, who should request details of the new lead case and consider whether they are comfortable with their appeals being stayed behind it. Taxpayers in the follower cases should consider whether they would be willing to be the lead case and apply to the FTT accordingly.
- **What if you are the lead case?** Taxpayers in lead cases should progress their appeals as usual, although they may wish to liaise with the appellants in follower cases (if they know who those appellants are and if they are willing to share information) to identify any other potential lead cases, or to share details of HMRC's approach to their respective cases. Care should be taken to maintain legal privilege in any such dialogue. ■

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