



TC05961

Appeal number: TC/2015/07140

Value added tax – case management - application to stay behind rule 18 lead case – no precise match between issues arising in appeal and common and related issues identified in lead case - application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KINGSTON MAURWARD COLLEGE (the “College”) Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS (“HMRC”)**

TRIBUNAL: JUDGE ZACHARY CITRON

Sitting in public at the Royal Courts of Justice, London on 10 January 2017

Mr Peter Mantle, Counsel, for HMRC

Mr Nigel Tyler of VAT Angles Consultancy Ltd for the College

1. This was an application by HMRC to have this appeal stayed as a related case behind the lead case of *Colchester Institute Corporation v HMRC* (TC/2014/04502) under rule 18 of the Tribunal Procedures (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “rules”). It was heard on the afternoon of 10 January 2017. My decision refusing the application, including a summary of the findings of fact and reasons for the decision, was released on 30 January 2017. HMRC applied to the tribunal for full written findings and reasons by email of 23 February 2017; these now follow.

2. The appeal has been stayed until 14 days after the determination of any appeal to the Upper Tribunal in relation to this decision, or the expiration of time to bring such an appeal, whichever is the later.

The application

3. By notice dated 30 September 2016, HMRC applied for a direction by the tribunal pursuant to rules 5(2) and 5(3) that this appeal be joined as a rule 18 follower to the lead case of *Colchester*.

4. The College opposed the application by notice to the tribunal dated the same day.

Background to the application

5. At the hearing I had a hearing bundle containing documents relating to the appeal and correspondence between the College and HMRC leading up to the appeal. It also contained documents relating to *Colchester*; and skeleton arguments.

6. The College is a further education college which also carries on certain commercial activities related to farming (for example, it operates a farm, a dairy, an equestrian centre and a blacksmith shop). It derives income from a combination of government grants, fees paid by students, and revenues from its commercial activities.

7. By notice of appeal dated 11 December 2015, the College appealed against decisions of HMRC to deny input tax recovery claims for periods between 2010 and 2015. The grounds of appeal set out there were that under the College’s partial exemption special method, all VAT incurred by it is reclaimable; and that the College does not have any non-business activities because its education and training courses are supported by both grant funding and commercial activity.

8. The *Colchester* lead case directions, issued by Judge Peter Kempster on 18 October 2016, set out three common or related issues of law (the “Common/Related Issues”) to which *Colchester* and the 17 related cases specified in the directions gave rise.

9. Common/Related Issue 1 was the VAT treatment of the provision of further education and/or vocational training by further education colleges in circumstances where:

- (a) such education and/or vocational training is provided free of charge to students; and
- (b) the further education college is wholly funded by grants provided to it by government in order to perform the activity in (a); and

(c) the further education college also educates and trains students and/or trainees alongside those at (a) above who pay fees for the education and/or tuition, or on whose behalf fees are paid or are payable to the further education college.

10. The VAT treatment considered in Common/Related Issue 1 was whether such provision is not an “economic activity” and is outside the scope of VAT, and is not a “supply of services for consideration” and is not a “supply”.

11. Common/Related Issue 2 was an issue of law which does not arise in this appeal.

12. Common/Related Issue 3 was whether, in the circumstances specified for Common/Related Issue 1 (see paragraph [9] above), a further education college has any entitlement to credit for input tax by reason of carrying on the activities described in paragraph [9] above.

The law

13. Under rule 5, subject to the provisions of the Tribunals, Courts and Enforcement Act 2007, the tribunal may regulate its own procedure. In particular, the tribunal may by direction consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise).

14. Rule 18 provides as follows:

(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 ... 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 ... under paragraph 2(b), providing for the disposal of or further steps in those cases.

(6) If the lead case or lead 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.

HMRC's arguments

15. Mr Mantle submitted that the activities of the College in issue in this appeal are within the description in Common/Related Issue 1; and, as the College is appealing against decisions of HMRC to refuse claims by the College to deduct VAT as 'input tax' (on the basis that HMRC considers that the College carries out "non-business" provision of education), Common/Related Issue 3 also arises in this appeal.

16. Mr Mantle submitted that the presence of a partial exemption special method in this case is incidental to the main issues and of no significance to the outcome of this application. The only matter of potential significance, he submitted, was the impact of the College's commercial farming activities, which he said was an additional issue in this appeal.

17. Mr Mantle accepted that if the *Colchester* appeal fails on Common/Related Issue 1, the College's appeal might still succeed on account of its commercial farming activities. On the other hand, if the *Colchester* appeal succeeds on Common/Related Issue 1, Mr Mantle said it was all but inevitable that the College would not have to raise the issue of the impact of its commercial farming activities to succeed in its appeal; and so the tribunal would not have to consider that issue. In this sense, Mr Mantle submitted that Common/Related Issue 1 was "logically prior".

18. Mr Mantle said that the College's response did not identify any prejudice that will be caused to it by having to await the decision in *Colchester*. It seems that the most that could be said is that there is some chance of delay, if it proves necessary to pursue the issue of the impact of the College's commercial farming activities after the decision in *Colchester*.

19. Mr Mantle submitted that when a lead case has been specified under rule 18, there is a high imperative to manage other cases so that the common and related issues are decided in the lead appeal. Here, he submitted, the existence of what he called a "further issue" – the impact of the College's commercial farming activities - does not justify the College being able to proceed with this appeal independently of the *Colchester* lead case. The inevitable consequence of a rule 18 lead case, he said, is that other appeals will proceed more slowly; but that is a necessary consequence of efficient case management, avoiding duplication of effort and cost and inefficient use of tribunal time and resources. It also avoids inconsistent decision at first instance.

20. As a postscript, Mr Mantle submitted that if the tribunal were not minded to exercise its discretion to stay this appeal pending the decision in *Colchester*, some form of coordinated case management of the appeals would be appropriate.

The College's arguments

21. Mr Tyler emphasised the factual differences between this appeal and *Colchester* – for example, *Colchester* relates to deemed output tax, whereas this appeal in respect of the application of a partial exemption special method.

22. The important difference between this appeal and *Colchester*, in Mr Tyler's submission, is the interaction in this appeal with the College's commercial farming activities, which does not exist in *Colchester*. As such, the College is not (in the words describing Common/Related Issue 1 at paragraph [9(b)] above) "wholly funded by grants provided to it by government in order to perform the activity [in paragraph [9(a)] above]".

23. Thus, according to Mr Tyler, on the facts of this appeal none of the three Common/Related Issues apply to this appeal. He submitted that the issues in this appeal are so distant from those set out in the *Colchester* lead case directions as to make rule 18 inappropriate in this matter. It is entirely possible, he submitted, that, even if the *Colchester* appeal was unsuccessful, that that would not necessarily lead to the same result in this case. Hence, this application could lead to a result that was contrary to justice.

Discussion

24. The question before me was whether this appeal gives rise to any of the common or related issues identified in *Colchester* and, if so, if it is appropriate to exercise the tribunal's discretion to stay this appeal behind *Colchester*. I am required to interpret the rules to give effect to the overriding objective of dealing with cases fairly and justly.

25. The tribunal's power to specify lead cases under rule 18 is a case management tool for rationalising the tribunal's consideration of common or related issues of fact or law across more than one appeal. The tribunal (Judge Mosedale) observed in *288 Group Limited & Others v HMRC* [2013] UKFTT 659 (TC) at [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."

26. Rule 18 operates by making the tribunal's decision in the lead case in respect of the common or related issues binding on the related cases. A clear definition of the common or related issues is important to the efficient operation of rule 18; without this, the case management efficiency of the rule 18 mechanism is reduced or reversed as related cases apply to the tribunal for a direction under rule 18(4) that they be unbound from the lead case. 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.

27. Striking the right balance between the delay to resolution of the case, and the efficiency of the tribunal's consideration of common or related issues, will be a feature of any rule 18(2) direction by the tribunal.

28. This was an application to add this appeal as a further "related case" to an existing "lead case" in which the common or related issues have already been spelled out – namely, the three Common/Related Issues. It is common ground that this appeal does not give rise to one of these Common/Related Issues. As for the other two, they are defined by reference to a factual circumstance that does not apply to this appeal – namely, that the further education college in question is "wholly funded by grants provided to it by government in order to perform the activity in [paragraph 9(a)]". Here, the College is funded in part from its commercial farming activities.

29. There is thus not a precise "match" between the Common/Related Issues, and the issues to which this appeal gives rise. HMRC argued that it is nevertheless appropriate to add this appeal to the *Colchester* lead case, one of their arguments being that a decision in the taxpayers' favour for wholly grant-funded further education colleges (*Colchester*) would be relevant (*a fortiori*) for further education colleges with mixed funding sources (this appeal). (This was Mr Mantle's point that the *Colchester* appeal was "logically prior".) The College argued that the "mismatch" between the issues in this appeal and the Common/Related Issues makes it inappropriate that this appeal be joined to the *Colchester* lead case, as the VAT issues for a college with mixed funding sources are essentially different from those for colleges which are wholly funded by government grants. The College illustrated this by pointing out that a decision in HMRC's favour in the *Colchester* lead case would not necessarily have any relevance for this appeal.

30. In essence there is disagreement here as to the issues of law to which this appeal gives rise. The College says that the fact it carries on commercial farming activities is fundamental to its legal case. HMRC say that the legal issues at stake in *Colchester* could be decisive to this appeal, too. I do not accept Mr Mantle's submission that this disagreement is akin to those cases where *additional* issues to the (agreed) common or related issues of fact or law have been identified. Here, it is a case of lack of agreement as to whether there are common or related legal issues at all.

31. A complete resolution of this argument between the parties about what legal issues the appeal gives rise to, would require little short of a full hearing of the underlying appeal. This would clearly not be appropriate in the context of an application to apply a case management mechanism designed to make the tribunal's proceedings more efficient.

32. In these circumstances, and seeking to give effect to the overriding objective in my interpretation and application of rule 18, I balanced the disadvantage of allowing this application (the likelihood of delay to the resolution of the appeal) against the advantage of doing so (the possibility that Common/Related Issues 1 and 3 may prove materially relevant to the resolution of this appeal); I also placed weight on the fact that the *Colchester* lead case directions drew a clear line at wholly grant funded further education colleges and had done so out of a correct desire to define the common or related issues as clearly as possible. There is an element of fitting a square peg (a college with commercial farming activities) into a round hole (a wholly grant funded college) in seeking to add this appeal to the *Colchester* lead case, which in my

view tipped the balance of fairness and justice in favour of avoiding delay and allowing this appeal to progress independently.

33. Mr Mantle proposed that if I refused this application, the tribunal should direct “joint case management” for this appeal and *Colchester* (for example, by having them heard by the same panel in close proximity). Like the rule 18 application just considered, this would carry advantages to the extent that the cases gave rise to common or related issues, but at the cost of delay and administrative inconvenience. As the advantages are (for the reasons given above) uncertain but the disadvantages certain, I again find the balance of fairness and justice falls on the side of allowing this appeal to progress independently of *Colchester*.

Conclusion

34. The application is refused.

35. 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.

**ZACHARY CITRON
TRIBUNAL JUDGE**

RELEASE DATE: 30 MAY 2017