TC03822

Appeal number: LON/2007/01523

VAT – claim for repayment of over paid tax – appellant sought to justify claim on a different basis to the basis on which claim originally made – whether that was the making of a new claim out of time* –Reed Employment considered - *appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VODAFONE GROUP SERVICES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 20 and 21 May 2014

A Hitchmough QC and Miss L Poots, Counsel, instructed by Simmons & Simmons for the Appellant

Mr R Hill, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is a preliminary hearing to determine the following issue:

> "In circumstances where the Appellant has submitted a claim for a sum of money in a VAT period, in accordance with the time limits set out in section 80 of the Value Added Tax Act 1994 (the "Act"), (the "Claim"); can the Appellant maintain the quantum of the Claim, but vary the methodology by which the Claim is calculated (for example by substituting a different reason for claiming an identical or lower amount) after the expiry of the time limits set out in section 80 of the Act but while the Claim remains unresolved?"

Facts

Statement of Agreed Facts

2. The facts material to the determination of this Preliminary Issue were agreed by the parties in a Statement of Agreed Facts dated 7 May 2013. The agreed facts in summary are:

3. The appellant was at all material times VAT registered. It makes (as is common knowledge) supplies of telecommunications services. It had an agreement with Loyalty Management (UK) Limited which allowed it to participate in the Nectar loyalty scheme.

4. The appellant submitted a claim to HMRC on 30 January 2007 for repayment of the sum of £4,173,388.61 on the basis it had over-declared output tax in its VAT returns for the periods 01/04 to 01/06 as a result of its participation in the Nectar loyalty scheme. The basis of the appellant's claim was that it should have reduced its output tax liability on its sales to reflect its costs of awarding Nectar points to its customers. HMRC rejected the claim on 30 July 2007. On 28 August 2007 the appellant appealed to the VAT Tribunal.

5. Although the question of whether the appellant in law did overpay any output tax as a result of its participation in the loyalty scheme ("the Nectar Issue") remains an unresolved issue between the parties, it is common ground for the purposes of this Preliminary Hearing that the appellant has in any event overpaid VAT in the periods 01/04-01/06 for other reasons, unconnected with its participation in the Nectar scheme, and in an amount far greater than that claimed in its voluntary disclosure of 30 January 2007.

6. The precise reasons why the parties are agreed that the appellant overpaid VAT in the period in issue are not relevant to the resolution of the preliminary issue. In very brief summary, which does not reflect the complexity of the issues, there were agreed to be five separate overpayments of output tax of varying amounts:

(1) non-EU line rental;

(2) non-EU SMS second leg;

(3) free minutes credited to customers;

(4) non-activated pre-paid top-ups;

(5) free top-ups.

7. These overpayments were made in the periods covered by its original voluntary disclosure on 30 January 2007 and in later periods as well. The appellant made various voluntary disclosures in 2009-2011 to recover the various overpayments. So far as these later voluntary disclosures related to periods 01/04 to 01/06, which were the periods covered by the original 2007 Nectar issue voluntary disclosure, they were rejected by HMRC as being out of time and that appellant did not challenge that.

8. While it was not a part of the agreed statement of facts, another factual matter which did not appear to be in dispute between the parties, and indeed which was evidenced by letters, was that the appellant was assessed at some point in time for (alleged) failure to account for VAT due on the sale of phonecards in Ireland in the accounting periods 10/03-04/04. That assessment has been appealed and is in dispute. But in the meantime, HMRC have reduced the assessments for the accounting periods which overlapped with the later voluntary disclosures made in 2009-2011 to reflect the fact that the appellant overpaid output tax in those periods in respect of the five matters outlined at §6 above, even though HMRC rejected the voluntary disclosures for repayment as out of time. The amount by which the assessments were reduced (about £1.1 million) was considerably less than the amount overpaid by the appellant overall (as largely the accounting periods do not overlap). So despite this offset, the amount overpaid by the appellant in the periods in issue in this appeal still exceeds the amount of the disputed 2007 voluntary disclosure of about £4.1million.

The appellant's position

9. The appellant's position is that it made an in-time voluntary disclosure for about £4.1million. HMRC accept that Vodafone overpaid VAT in excess of that amount in the periods to which the claim relates. Therefore, HMRC should, says the appellant, repay to the appellant the amount of its 2007 voluntary disclosure, and that once repayment is made it would be the end of the matter. It could no longer pursue the Nectar issue and HMRC would not be liable to repay the full amount overpaid in those accounting periods. The appellant's case is simply that it made an in-time claim for £4.1million, HMRC accepts the appellant overpaid more than that amount in the relevant period, so the appellant considers itself entitled to the £4.1million. It is irrelevant, according to the appellant, that the basis on which it made the 2007 voluntary disclosure is not the basis on which HMRC accept that the appellant has actually overpaid output tax.

The Law

10. At all material times, section 80 of the Act provided (so far as is relevant):

"(1) Where a person—

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.

…

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

…

(4) The Commissioners shall not be liable on a claim under this section—

(a) to credit an amount to a person under subsection (1) or (1A) above...

if the claim is made more than 3 years after the relevant date.

…

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases."

11. In accordance with section 80(6), the Value Added Tax Regulations 1995 (SI 1995/2518) (the "VAT Regulations") prescribe the form and manner of a claim:

"**37 Claims for credit for, or repayment of, overstated or overpaid VAT**

Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

Appellant's case

12. The Appellant's position is that a "claim", for the purposes of section 80 of the Act, is made and identified by reference to the money sum alleged to have been overpaid in a particular period. A "claim" is not restricted to the reasons advanced for originally having made the claim. Accordingly, while a claim remains unresolved, it is open to the claimant to put forward any sustainable basis for that claim. Once the fact of an overpayment (for whatever reason) has been agreed and/or proved, the claim must be paid.

13. Appellant relies on the following matters:

(a) The wording of the legislation;

(b) Authority;

(c) The Principle of Equivalence.

14. HMRC's position is that the reasons for the alleged overpayment are fundamental to the identification of a claim, so that the substitution of new reasoning involves the making of a new claim. The claims based on the five matters identified at §6 were out of time, and do not arise out of the same subject matter as the original 2007 claim, and so cannot be sustained. HMRC say that any amendment to an existing claim for repayment must arise out of the same subject matter as the original claim, without extension to facts or circumstances that fall outside of the contemplation of the earlier claim.

15. HMRC say that the effect of the appellant's case (if right) is that a taxpayer could put forward a claim within the 4 year limitation period for repayment claims contained in section 80(4) VATA. If it later found out that it had another potential claim for a repayment, based on different factual circumstances, which would be out of time if brought as a fresh claim – and it judged that the new claim had a better chance of success on the merits than the old one – it would be entitled to substitute the new claim for the old one (provided that it stayed within the amount claimed under the old claim). So far as I understand it, the appellant agrees that this is the effect of the position it adopts in this appeal. Indeed, that is exactly what the appellant seeks to do.

Interpretation of the legislation

16. The appellant accepts that a correct interpretation of the law is that HMRC has no liability to repay overpaid VAT unless the appellant makes a valid claim (s 80(2)). It accepts that the provisions of Regulation 37 are mandatory (s 80(6)). I was referred to the case of *Nathaniel & Co* [2010] UKFTT 472 (TC) where the FTT rejected an appeal against a refusal to repay a voluntary disclosure on the grounds that it did not meet the requirements of Regulation 37 (§11 above) as, in particular, it did not contain the 'method' by which the voluntary disclosure was calculated:

> "[63] …We agree … that the requirements of Regulation 37 are mandatory. On this basis, even if it is accepted that the amount of £32,048.11 was a statement of the amount claimed, the letter itself contains no indication of the method used to calculate that amount.
>
> [64] Our conclusions in the above paragraph are enough to determine this appeal. However, since the third question was argued by both parties we think it appropriate to express our conclusion on this point as well.
>
> [65] …we consider that, when Regulation 37 provides that the claim must state the method by which the amount claimed was calculated, the test should be an objective one, viz did the claim contain sufficient information as to the method used to derive the amount claimed as to enable a reasonably competent VAT officer to understand the way in which the amount claimed had been calculated...."

17. Neither party criticised the conclusion of, or obiter dicta in, this FTT decision.

18. The requirements of Regulation 37 were also considered in the case of *Graham Laing* [2012] UKFTT 862 (TC) where the appeal was allowed. The FTT found that even thought the information was not sufficiently detailed to enable to finalise its decision on the voluntary disclosure, the letter making the claim did satisfy Regulation 37 as it did quantify the claim and state the method by which it was calculated. See §14.

19. Vodafone's point is that it did make a claim which satisfied Regulation 37. It quantified the claim and stated the method by which it was calculated. Therefore, says the appellant, under a straightforward reading of s 80, HMRC must repay overpaid tax in the period to which the claim relates at least up to the amount of the claim. The appellant overpaid VAT; the appellant made a claim which met the requirements of Regulation 37.

20. HMRC's case, says the appellant, requires the Tribunal to read into s 80 a restriction that is not there on the face of it. That restriction is that the overpayment must be for the reason stated in the claim. If HMRC succeed, it will mean that HMRC escape liability to repay overpaid tax despite a valid in-time claim being made for an amount that was in law overpaid.

21. I agree with the appellant that HMRC's position does require the Tribunal to imply into s 80 a restriction that is not literally there. Nevertheless, the Tribunal must give a purposive interpretation to the legislation. So the question is really whether Parliament intended such a restriction: is such a restriction impliedly in the legislation?

22. The first comment on this is that there is nothing in s 80 which requires the appellant to state the reasons by which it overpaid VAT. On its face, s 80 only contains three restrictions on the form of a claim. The first is that a claim must relate to 'an amount' (s 80(1) & (2)); the second that it is made in the form dictated by secondary legislation (s 80(6)); the third is that it must be made in time: s 80(4).

23. Does s 80 impose any (other) requirements on the 'claim' or is it all left to secondary legislation by s 80(6)? I seek to answer this by looking at what s 80 does require.

The amount of the claim

24. Section 80 contains many references to an 'amount' of VAT. HMRC are liable to credit to a taxpayer the 'amount' of overpaid VAT (see s 80(1)). However, S 80(2) reads:

> "[HMRC] shall only be liable to credit or repay an amount under this section on a claim <u>being made for the purpose</u>." (my emphasis)

25. So s 80 requires the claim to be made 'for the purpose' and the 'purpose' appears to be, referring back to the first part of s 80(2), the credit or repayment of an amount. Does this mean, irrespective of Regulation 37, that s 80 requires the claim to

be for an stated amount? I think that it does, but that does not import any requirement that the reason for the claim must be stated.

26. Legal certainty is achieved by requiring a claim to be for a particular stated amount. Even so, it is clear that the amount of a claim can later be increased in particular circumstances: *Reed Employment Ltd* [2013] UKUT 109 (TCC). I consider this in detail below (see §61).

Claim must be in correct form

27. There is nothing in s 80 itself which expressly requires the claim to state the reason for the overpayment. But s 80(6) does require a claim to be in the form prescribed by secondary legislation.

28. HMRC consider that a 'claim' must include a statement of the reason why the taxpayer considers VAT was overpaid. For this they rely on regulation 37. Regulation 37 refers to "the method by which that amount was calculated".

29. The appellants suggest that the reference to "the method" serves a limited purpose only which is to enable HMRC to verify that the amount claimed has been correctly calculated and has indeed been overpaid. There is no requirement to state the reason for the overpayment even though the reason might be possible to ascertain from the method of calculation. Even if the reason for the (alleged) overpayment cannot be inferred, the method of calculation will inform HMRC in respect of which particular supplies the appellant considers it has overpaid VAT.

30. If the method of calculation does not make clear the reason for the claimed overpayment, then it will not assist HMRC in deciding whether the repayment is due. I consider that the assumption underlying Regulation 37 is that HMRC will know the reason the overpayment is claimed to be made. There is not much point in requiring a method of calculation if the underlying reasoning is not known: HMRC could not make a repayment unless satisfied it was due which requires it to know both the reasoning and the precise calculation.

31. But while the drafters of Reg 37 must have assumed that reasons would be provided, how can the provisions of secondary legislation influence the interpretation of primary legislation? And even if Reg 37 does influence the interpretation of S 80, does that mean the reasons cannot later be changed?

The claim must be made in time

32. HMRC suggest that, irrespective of Regulation 37's requirement for a method to be stated, I should imply into s 80 a requirement that the claim must be made for the reason that the tax was actually overpaid. Their reasoning is founded in the four year cap.

33. While EU law requires overpaid VAT to be repaid by the tax authorities, the legislature is entitled in the interests of legal certainty to subject claims to limits, and

in particular to time limits. HMRC referred me to the well-known decision of the CJEU in *Marks and Spencer II* C-62/00 [2002] ECR I-6325 at paragraph 35. As is also well-known, s 80 does impose a time limit and indeed it is because of that time limit that the appellant is out of time to lodge new claims for overpayments in the periods at issue in this appeal, so that even if it is successful in this preliminary issue, to the extent its overpayments exceeded the amount claimed in its 2007 voluntary disclosure, it will be unable to claim repayment.

34. HMRC's case is that unless I require a claim to state the reason for the overpayment, I will in effect be permitting the appellant to circumvent the four year time limit on claims. Parliament must have intended such an interpretation, say HMRC, as Parliament clearly intended the four year time limit to be absolute: there is no provision for the time limit to be extended by either HMRC or the tribunal. I was referred to the comment by Judge Sadler in *Beds Beds Beds London Ltd* [2012] UKFTT 353 (TC):

> "[18]….The terms of section 80 VATA 1994 are clear and explicit, and they alone determine whether or not a repayment can be made, as section 80(7) VATA 1994 makes clear. No discretion is given by the statute to the Commissioners to vary this rule to allow them to repay overpaid VAT if a claim is made after the four year period, however deserving a taxpayer's case may be. Unlike certain other instances in the VAT legislation where a taxpayer has failed to comply with a time limit, in the case of a claim for overpaid VAT under section 80 VATA 1994 there is no provision which allows the Tribunal to step in to decide that there is a reasonable excuse for the taxpayer's failure to take action so that the time limit can be set aside.
>
> "[19] The four year limitation period, in such absolute terms, is enacted to provide legal certainty: there has to be a cut off or finality beyond which a claim, whatever the circumstances, cannot be acted upon or enforced in law….."

35. In HMRC's view, if I accepted the appellant's case, it would be open to any appellant at any time to substitute <u>any</u> new repayment claim for any existing claim, provided that the new claim was for the same or a lower amount. That would be, says HMRC, wholly contrary to the intention of Parliament as it would allow claims which would otherwise be time-barred to be made simply because the taxpayer happened to have an existing claim for the same or a higher amount on foot. It would also be, says HMRC, wholly contrary to legal certainty, since the Commissioners would not know with finality at the end of the time period for making claims that there were no more claims in relation to a particular error for that period, since more claims could yet be made by converting existing claims based on different factual grounds. Since the Commissioners are entitled to reject a claim for uncertainty which does not contain sufficient information, they cannot logically be required to accept the substitution of a new claim arising from different subject matter to an existing claim.

36. The factual scenario in this case seems rare in that I am unaware of this point arising before in this Tribunal. The factual scenario is that an appellant made a genuine (but perhaps erroneous) in-time claim that it overpaid VAT of a particular amount in particular periods but, before that claim is resolved one way or the other,

later discovered that it had clearly overpaid VAT in those periods in respect of different supplies and for different reasons to the original claim

37. At first glance, allowing the appellant's claim as valid, would not appear to offend against legal certainty. The appellant claimed in time that £4.1million was overpaid. More than £4.1million was actually overpaid. HMRC must repay: they knew within the four years that the taxpayer claimed to have overpaid up to £4.1 million even if they did not at that point in time know why. I reject HMRC's argument at §35 that a change in reasons offends against legal certainty because, at the point that the four year cap expires, HMRC have the certainty of knowing that the putative taxpayer is claiming a stated sum in overpaid tax, and that it is out of time to claim more.

38. What HMRC really seem to be saying is that the appellant's interpretation allows spurious speculative 'protective' claims for repayment to be made for every period covering the entire amount paid to HMRC just before the 4 year cap expires. These 'claims' would then sit in abeyance just in case one day the taxpayer discovers it really did overpay VAT in those periods. It would then activate its in-time claim, thus neatly avoiding the 4 year time limit on claims. This cannot have been intended by Parliament and I agree.

39. But would the effect of finding in the appellant's favour in this preliminary issue be that such a circumvention of the cap was possible? It follows that the spurious protective claim is necessarily unfounded so far as anyone knew at the time it is made and HMRC ought to reject it. That rejection, and any 'review' of that rejection required by the taxpayer, will be final unless appealed within strict time limits. If the appellant still pursues the matter by lodging the appeal (in order to keep the claim 'open' pending possible discovery of a real overpayment) then the claim is likely to be struck out as it would not have a reasonable prospect of success and that would leave the appellant at risk of costs for unreasonable behaviour.

40. Nevertheless, from the moment such an unfounded claim is made and unless and until its claim is struck out or otherwise finally resolved, the logic of the appellant's position is that such a speculative 'protective' claim will be valid if, before it is struck out or otherwise terminated, the appellant is able to show it actually did overpay some or all of the VAT accounted for in that period. This would permit circumvention of the four year cap and clearly be contrary to Parliament's intentions.

Conclusions

41. There is no express requirement in s 80 for a claim for 'an amount' to state the reason for the overpayment. Nevertheless, it is obvious that unless a claim stated the reason for the overpayment, HMRC would be unable to verify whether it was justified, and therefore unable to make any repayment. A failure to state the reason would lead to a claim being rejected out of hand and for this reason I presume claims are always supported by reasons in practice and there was no need perceived for s 80 to expressly require reasons to be stated.

42. But that does not answer the question of whether a reason is *essential* to the claim's validity and, irrespective of that answer, whether a new reason can be added later to support an earlier claim.

43. I agree that it is inherent in s 80 that a claim ought to be accompanied by reasons. A taxpayer submitting a claim without reasons cannot reasonably expect it to be paid: and indeed I accept HMRC's point that being able to submit a claim without reasons would permit for a limited period of time at least a taxpayer to circumvent the four year cap, as outlined at §§38-40 above, which is clearly contrary to the purpose of s 80. A claim made without reasons, or made simply to circumvent the four year cap, cannot be a claim for repayment of 'an amount' of overpaid tax at all.

44. But does that mean the reasons cannot be added to later? S 80 does not expressly require reasons, so to elevate the need for reasons outlined in the above paragraph to become a bar on later amending reasons goes beyond what a purposive interpretation of s 80 requires.

45. HMRC's concerns with a spurious global claim lodged simply to preserve a right of recovery beyond four years at a time when no overpayment has been identified are dealt with by a purposive interpretation that the claim must be supported by a reason and have as its purpose the repayment of an amount of overpaid VAT rather than the purpose of circumventing the four year cap. It is not obvious to me why their concerns outlined at §35 above are contrary to the purpose of s 80. As I have said, s 80 does not expressly require reasons. Even though the assumption underlying s 80 must be that reasons for a claim would be provided, it is not a necessary implication that reasons could not later be amended or changed. If an in-time claim for overpayment has not been finally resolved there is no threat to legal certainty if the appellant is allowed to justify the claim by the addition of further reasons, because the appellant is unable to alter the amount claimed. Therefore, as a question of statutory interpretation, I think a purposive interpretation means that the reasons given for the 'amount' being claimed can later be amended.

46. I move on to consider the appellant's second limb which is case law.

Authorities

Matter already decided by binding authority?

47. HMRC's case is that the issue which arises in this hearing has already been decided by the Upper Tribunal in the case of *Reed Employment* and that I must therefore give a ruling against the appellant. The appellant does not agree that the Upper Tribunal has determined the matter against it.

48. The case of *Reed Employment Ltd* [2013] UKUT 109 (TCC) considered the question of an increase in quantum of a claim. Like this case, the *Reed* case involved a claim under section 80 of the Act. However, unlike this case, Reed argued that it could subsequently increase the quantum of its claim from close to £4m to almost £68m, by way of an amendment to the original claim.

49. The facts were that Reed considered it had overpaid VAT on the supply of temporary workers (on the basis it had accounted for VAT on the price rather than just the commission). In 2003 it reclaimed VAT (of about £4million) on supplies it made to its clients in the exempt sector in 1973-1990. In 2009 it reclaimed VAT (of about £64 million) on supplies it made to its clients in the taxable sector in 1973-1990. Both these claims were made in time. Nevertheless, it was significant whether the 2009 claim was a new claim or an amendment to the 2003 claim because, if it was a new claim, HMRC would be able to raise the defence of unjust enrichment. But it could not use that defence against a claim made in 2003.

50. Whether the 2009 claim was an amendment to the 2003 claim was described as Issue (2) in the FTT. Its conclusion was:

> "There is no definition of 'claim' in VATA….we think …any assertion of a right to repayment must be regarded as an individual, discrete claim, separate from any other unless it is shown to be in essence as one with an earlier claim.
>
> [111] That test, in our view, will be satisfied only if the later claim arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim….we consider…that this would generally include cases where a particular computation was not made at the time of the original claim, but the subject matter of the claim was sufficiently identified for such a calculation to be related back to the original claim. Simple calculation errors would similarly be included. It should also cover, we think, cases where particular items within the category of the subject matter of the original claim are unknown or not fully identified at the time of the original claim, and would but for that fact have been included in the original claim, but only subsequently come to light."

51. The FTT went on to hold that the 2009 claim was a new claim and not an amendment of the 2003 claim because, although the overpayment was made in respect of the same type of supply and arose out of the same error, it related to supplies in a different sector (the taxable sector) to the supplies which were the subject of the first claim (the exempt sector): §113.

52. The Upper Tribunal upheld the FTT's decision on appeal. The Upper Tribunal approved the first sentence of §111 of the FTT decision (with some reservations over the last sentence of §111 which are irrelevant here). At §33 it said:

> "If subsequent to the submission of a claim, the taxpayer sends in the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included, then I consider that would clearly not be a new claim but an amendment…..I …respectfully agree with the test set out by the FTT in the first sentence of paragraph 111"

53. HMRC considered the Upper Tribunal decision in *Reed* (as it is binding) was a complete answer to the appellant's claim. Relying on the Upper Tribunal's adoption

of §111 of the FTT decision, HMRC say that the original claim can only be amended if the amendment arises out of the same subject matter as the original.

54. The appellant, on the other hand, considered *Reed* irrelevant. It answered a different question, says Mr Hitchmough. The precondition to all that the Upper Tribunal said at §33 and the FTT at §111 was that the new or amended claim was for an amount in addition to the amount of the original claim. Vodafone, on the other hand, is not seeking to claim any amount in addition to the amount of its original claim.

55. HMRC accept that the question here is different to the question at issue in *Reed* but say that the Upper Tribunal determined what "a claim" was and that ruling binds the FTT in any other case where the issue is the meaning of 'a claim.'

56. What the Upper Tribunal said was:

> "30. There is no statutory definition of "claim" for the purpose of s. 80 that would provide a basis for distinguishing an amendment to an existing claim from a new claim. …..
>
> 31. In those circumstances, I consider that "claim" should here be given its ordinary meaning. In this context, it means a demand for repayment of overpaid tax. It may relate to one accounting period or many, to one particular supply or many, and to a part of the taxpayer's business or the whole of its business. There is no reason, in my view, why any of these cannot constitute a self-standing claim.
>
> 32. The FTT approached the question of whether a further demand is an amendment to an existing claim by adopting the test of whether it was shown to be "in essence as one with an earlier claim": para 110. In my judgment, there is nothing wrong with this test, but I am not sure it advances the matter significantly, and I do not think it is appropriate to add a gloss to the statutory wording….." (my emphasis)

57. In other words, the Upper Tribunal addressed, first, the meaning of claim in order, second, to decide whether a further demand for an additional amount was an amendment of an existing claim. So in so far as the Upper Tribunal ruled on the meaning of 'claim' it must be applied in this appeal, even thought the issue in *Reed* was not the same one as in this appeal.

58. Roth J said, in [31] that a 'claim' was simply 'a demand for repayment of overpaid tax'. What he said at [33] was clearly in the context of what was an *amendment* to a claim. Nowhere did Roth J or the FTT say that the original claim must contain reasons and/or was defined by its reasons. All they said was that an increase to the amount of a claim had to be linked by its reasons to the original claim.

59. Therefore, I have to agree with the appellant. *Reed* is not authority on the question at issue in this appeal. The ruling in *Reed*, so far as relevant to this appeal, was that a 'claim' is a demand for repayment of overpaid tax. There was no ruling that a claim must contain or is defined by the reasons for it.

60. The matter at issue in this hearing has therefore not been decided by a higher court and I can only consider principles applied in other cases where similar issues were determined. The two cases to which I was referred was *Masterlease* and *BUPA.*

61. So far as *Reed Employment* was concerned, it decided that, in very limited circumstances, the *amount* of a claim could be increased out of time as that would amount merely to an amendment of a claim even though s 80 and Regulation 37 required the taxpayer to state the quantum of the claim very precisely in order for there to be a valid claim. S 80 and reg 37 do not require the justification for the claim to be stated at all: it would therefore be surprising to read into s 80 a requirement that the justification could not be changed, when the Upper Tribunal has stated that in limited circumstances the amount of the claim can be increased.

62. On the other hand, the FTT and UT in *Reed Employment* presupposed that the taxpayer had provided the justification for the original claim. Unless it had done so, it would not be possible to determine if the later increase in quantum of the claim arose out of the 'same subject matter'.

63. The answer could be that if the taxpayer had not justified its original claim, it could not expect HMRC to pay it and it would be unable to justify an increase in quantum under *Reed Employment* as it could not prove that it arose out of the same subject matter. But the answer I have given at §§41-43 is that, because HMRC could not pay a claim it did not believe to be justified, it is inherent in s 80 that a claim must be reasoned. But there is nothing in *Reed Employment* which prevents the reasons later being amended.

64. *Reed* allows the *amount* of a claim to be amended upwards where arising out of exactly the same reasons as the original claim. There is nothing in the decision which suggests that the *reasons* for a claim could not be amended where exactly the same *amount* is claimed as was originally claimed. Indeed, one way of looking at *Reed* is that it indirectly supports the appellant's position because it permits the *amount* to be revised where the *reasons* are exactly the same, suggesting the *reasons* can be revised where the *amount* remains exactly the same.

65. I move on to consider the other cases to which I was referred to see if relevant principles can be discerned.

Authority on the interpretation of s 80 – Masterlease Ltd [2010] UKFTT 339 (TC).

66. The appellant considers the *Masterlease* case is persuasive (although, as FTT, not binding) authority that the reasons a claim was made is irrelevant to s 80; that Parliament in s 80 was only concerned that VAT was actually overpaid rather than with the reasons for it. The appellant says that the arguments it puts in this case are the same arguments as those advanced by HMRC, and accepted by the FTT in, *Masterlease Ltd.*

67. In that case, Masterlease sold cars on hire purchase. It accounted for VAT in full when the vehicle was handed over to the customer. When a car was repossessed it

was common ground that Masterlease was entitled (under Regulation 38) to adjust the amount of VAT paid by it on the original sale on the basis that it would no longer receive the entirety of the agreed purchase price. Masterlease did not make the adjustment at the time but made a claim under s 80 later for overpaid output tax.

68. HMRC's defence was that Masterlease had (allegedly) failed to account for VAT on the subsequent sale of the repossessed cars to the extent they were no longer in the 'same 'condition'. They claimed Masterlease's *net* position was that only a fraction of the amount of VAT claimed to be overpaid was actually overpaid when its failure to pay this output tax was taken into account.

69. The second issue in the case about the extent to which Masterlease had failed to account for VAT on the sale of the repossessed cars is irrelevant. However, the decision of the Tribunal was in principle that any VAT overpaid in a VAT accounting period had to be offset against any VAT underpaid in the same period to arrive at the 'net' amount that HMRC was liable to repay under s 80, even though HMRC was out of time to assess the underpayments.

70. The appellant relies on the FTT's interpretation of s 80. At §14 the FTT recorded the submissions of Counsel for HMRC as follows:

> "14… [Counsel for HMRC] said that the [underdeclaration on the sales of repossessed cars] had to be considered as well as the adjustment for decrease in the VAT on the [hire purchase] supplies so as to arrive at the "amount that was not output tax due" within section 80(1)…. The correct amount due did not depend on the reason why it was due or was not due."

71. And then at §18 the FTT accepted HMRC's submissions on this point.

> "[18] 'That amount' clearly refers to the whole or any part of the total output tax entered on Box 1 of the VAT return. It is not tied to the reason why it was not output tax due."

72. I agree with HMRC that what the FTT here decided was that under s 80(1) HMRC was only liable to repay overpaid output tax in any particular period. While the appellant could validly show it had overpaid VAT on particular supplies (or more accurately, failed to make a Regulation 38 claim in the right period on particular supplies) nevertheless HMRC and the Tribunal had to consider the taxpayer's overall position in that VAT accounting period, and as it found that the appellant had underpaid VAT on other supplies in the same period, HMRC was only liable to repay the net amount.

73. So the case was about what s 80 required HMRC to repay when it said HMRC must credit the taxpayer with 'that amount'. Clearly 'that amount' was the 'amount that was not output tax due'. The Tribunal decided that that was measured in relation to the period as a whole and not in respect of any particular supply.

74. The decision was clearly that 'that amount' did not import any reference to the *reason* it was unpaid, or perhaps more accurately, it did not import any reference to any particular supply or type of supply made the appellant. It looked at the global position for that VAT return period: had VAT been overpaid?

75. I accept HMRC's point that *Masterlease* was a decision which turned on the meaning of s 80(1); it had nothing to say on the meaning of s 80(4) and in particular what meaning should be attributed to "a claim being made for the purpose". It is not therefore directly relevant to this appeal. On the contrary, in *Masterlease,* the in-time claim stated the correct reason for the overpayment (which was the appellant's failure to make a Regulation 38 adjustment in the right period). The question which arises in this appeal (can the appellant change the reason?) simply did not arise in that one.

76. Can any analogies be drawn from the case?

77. The case did decide that, although the appellant made a valid claim for overpayment, and had overpaid VAT in the sum claimed, nevertheless HMRC were entitled to bring into account the taxpayer's global VAT position in that period and rely on the fact that the taxpayer had under-accounted for VAT on a different supply. HMRC could do this even though it was out of time to assess.

78. The *Masterlease* case, therefore, shows the importance that Parliament was found to attach in s 80 to the *right* amount of VAT being paid or repaid, irrespective of time limits. This is because *Masterlease* in effect allowed HMRC to circumvent a time limit in order to ensure that VAT was not repaid to the taxpayer when it was not owing to the taxpayer.

79. The distinction with this appeal, however, is that HMRC were only able to circumvent the time limit on assessments in a *defence* to a claim for repayment. I note here that HMRC accept that taxpayers can also in effect circumvent the time limit on s 80 claims as a *defence* to assessments, and HMRC have allowed Vodafone to do that in this case (see §8). The appellant's case here, in contrast to HMRC's case in *Masterlease*, is that taxpayers should be permitted to circumvent the four year cap in its primary claim, and not as any defence to an assessment. It would be equivalent to upholding an assessment for the right period but the wrong reason.

80. The ratio in *Masterlease* cannot apply in this case; and for the reason just stated I consider no analogy can be drawn either. The correct analogy would be with whether HMRC can alter the reasons for an assessment without affecting the validity of the assessment. And in this context the appellant seeks to rely on an analogy with *BUPA Purchasing (no 2)* [2008] STC 101.

BUPA

81. This case was about the limits of HMRC's powers to assess. It was therefore concerned with s 73 VATA rather than s 80. A very simplified summary of the factual position is that in 1995-96 the appellant implemented a VAT avoidance scheme, known as an exit scheme. The appellant had completed its VAT returns on the basis that it was effective. HMRC considered the scheme ineffective and issued

in-time assessments against the appellant on the basis that the appellant had recovered more input tax than to which it was entitled.

82. A similar scheme had been implemented by other taxpayers, including Thorn Materials Supply Ltd. That appellant appealed the assessments and the matter ultimately came before the House of Lords in 1998, reported at *Thorn Materials Supply Ltd* [1998] STC 725. The Lords' analysis of the legal effect of the exit scheme meant that BUPA Purchasing had not in law over-reclaimed input tax, but it had failed to account for output tax for which in law it should have accounted. HMRC did not issue a fresh assessment on BUPA Purchasing for the underpaid output tax. It was out of time to do so. The question was whether the original assessment was valid, as HMRC sought to defend it on the basis the taxpayer had underpaid output tax, although the assessment (and its calculation) was on the basis the taxpayer had overclaimed input tax.

83. In other words, referring back to §80, this was a case of an in-time assessment but for the wrong reasons: was it enforceable?

84. The *BUPA* case was factually a re-run of an earlier case, *Ridgeon's Bulk Ltd* [1994] STC 427. In that case HMRC assessed the appellant on the basis that (claimed HMRC) they had reclaimed input tax to which they were not entitled. The appellant appealed and the High Court upheld the appeal: input tax had not been over-reclaimed and the appeal therefore had to be allowed even though in the same accounting period it was clear that the appellant had under-accounted for output tax to an amount greater than the amount of the assessment, and even though the failure to account for output tax arose out of the same transaction (a supply of building works) on which the taxpayer had reclaimed the disputed input tax.

85. The Court of Appeal in *BUPA Purchasing (no 2)* overruled *Ridgeon's Bulk*. It decided that the assessment could be upheld, even though it was based on an excessive input tax recovery by the appellant rather than the appellant's actual underpayment of output tax. Arden LJ, giving the judgment of the Court, said:

> [38] S 73(1) states that an assessment under that section is of 'the amount of VAT due'. Accordingly, unless the assessment determines the net amount of VAT due it cannot be an assessment for the purpose of s 73(1)….[41] …the critical figure for the purpose of the assessment remains the bottom line figure – the amount of VAT due. The figures for input tax and output tax are of course legally significant….but they are not the figures that make the act of the Commissioners an assessment for the purposes of s 73(1)….
>
> [41] It is common ground that as a matter of public law the Commissioners must provide the basis on which they make an assessment. In other words, they must supplement the assessment with notification of the reasons. But this duty is grounded in public law, and not in the statute….
>
> [48] In the circumstances, I conclude that the reasons for an assessment do not form part of an assessment under s 73(1) to which statutory consequences as to alteration apply."

86. It seems to me that the objections HMRC put forward to allowing an appellant after expiry of the time limit to make a claim, to change the reasons for its in-time claim under s 80 would apply with equal force to assessments. The fundamental objection it seems to me is that it to some extent allows circumvention of the time limit. Lady Justice Arden's view on this argument in so far as assessments were concerned was as follows:

> "[59] I do not find ultimately persuasive the submission that the Commissioners' interpretation removes protection for the taxpayer given by the provisions for time bars in ss 73(6) and 77(1). I accept that time limits are an important driver of good governance in tax matters. They are imposed by Parliament on the Commissioners, and by their very nature in any context they often give uncovenanted (but important) benefits to a party.
>
> [60] Nonetheless, the purpose of time bars is primarily to protect the taxpayer from being faced with a stale claim for the first time after the limitation period had expired. In the situation contemplated in this case, the taxpayer will have been duly warned of his liability by the original assessment. The Commissioners will have already made an assessment to the best of their judgment. In those circumstances, I can see no reason why Parliament should have wished to confer the benefit of a time bar defence on the taxpayer in this case. The contrary conclusion could give the taxpayer a considerable windfall."

87. The appellant's case here is that the same considerations apply. There is a risk of HMRC obtaining a windfall: if HMRC succeed in this preliminary issue and if the appellant ultimately fails in its claim based on the Nectar scheme, HMRC will have retained tax which was overpaid and for which the appellant made an in-time claim.

88. Referring back to the scenario postulated in §38 of speculative 'protective' claims being made routinely by taxpayers, it must be said that that seems much less of a risk for assessments. Certainly I am not aware that HMRC, despite the judgment in *BUPA*, making such assessments; doing so would probably breach their public law duty, the requirement for assessments to be best judgment, and would certainly breach the concession reported at §29 of *BUPA*.

89. I agree with the appellant that *BUPA* is looking at the mirror image to this case. Here, the question is the meaning of a 'claim' and in *BUPA* the question was the meaning of an 'assessment'. In both cases the question was whether the claim or assessment was valid when the reason for it altered after the expiry for the time limit to bring a new claim or make a new assessment. The Court of Appeal has held that the underlying reasons for an assessment may change. Why should the position for s 80 claims for repayment be different?

90. Relevance of best judgment? HMRC's argument was that section 73 did not require the assessment to include the method by which the amount was calculated. It was enough for the assessment to show the net amount due. At paragraph 27 of her judgment, Arden LJ recorded that:

> "[27] The essence of the argument… for the Commissioners, is that assessment is an assessment of the amount due by way of VAT. There are no further separate assessments of input tax or output tax. The Commissioners will have to give reasons for an assessment under section 73(1) but those reasons are not part of the statutory assessment. Those reasons can be amended, unless there is some objection under public law to the Commissioners amending the reasons".

91. Arden LJ agreed that s 73 did not require reasons. But I do not agree that it is implicit in her judgment that because Regulation 37 (unlike s 73) requires a method of calculation that there is implicit in s 80 a requirement that the reasons for a claim cannot be altered.

92. HMRC is only required to make assessments to best judgment. The taxpayer has the facts and figures about its own business; HMRC does not. HMRC can assess their best estimate. The taxpayer, on the other hand, must be precise when making a claim. Its claim must be for an amount supported by a calculation: Regulation 37. Therefore, says HMRC, Parliament contemplated that HMRC could alter the assessment. Arden LJ said in *BUPA:*

> "[58] In setting the standard at best judgment, Parliament has as I see it recognized that there is no absolute certainty about the amount of the VAT due or its components in an assessment under s 73(1) … It is true that there is no express power for the Commissioners to amend the input and output elements of the computation where no alteration is made to the overall amount of VAT due. However, such a power, and likewise a power to take into account by deduction offsets of over claimed input tax or under declared output tax (as the case may be) must in my judgment follow from and be implicit in the best judgment requirement"

93. The same reasoning cannot be applied to claims which are precise and not to best judgment, no doubt because the taxpayer ought to have access to its own records and know what it has overpaid. HMRC can normally only estimate what a taxpayer has underpaid. But that does not mean that the rest of Lady Justice Arden's reasoning is inapplicable to claims by taxpayers.

94. Nor do I agree with HMRC that that fact an assessment must be to 'best judgment' whereas a claim by a taxpayer must be precise affects whether the reasoning on which they are based can be changed. As I have said, the explanation for why an assessment must be to best judgment whereas a claim must be precise merely reflects that a taxpayer ought to have the facts and figures which relates to its business. Where these are not provided to HMRC, HMRC can do no more than estimate. But even where HMRC only makes an estimate it must have a *reason* for considering tax to be underpaid. 'Best judgment' relates to quantum and not to the underlying reason for the (alleged) underpayment. I do not consider that this is a ground on which the reasoning in *BUPA* can be distinguished from the reasoning which ought to apply in a case of a claim by a taxpayer.

95. <u>Overpayment must arise out of same series of transactions?</u> HMRC also point out that Arden LJ took as the premise to her consideration the fact that the amendment

HMRC made to the assessment was to assess output tax 'in respect of the same transactions as formed the basis of the assessment' for over-reclaimed input tax. Would she have reached the same conclusion had the changed reasons for the assessment been on the basis of underpayment of output tax on other, entirely unrelated, supplies?

96. HMRC's position is her decision was predicated on the basis the assessment (on whatever basis it was raised) related to the same transactions and her decision would not have been the same if that were not the case. But I do not agree. Nowhere does she qualify her decision to say that it was only where that premise occurred that such an assessment for altered reasons could be upheld : it seems to me that in §34 she was only setting out the factual position of the actual case before her.

97. Further, at [66]-[68] she discusses whether it is essential that the 'revised' assessment related to underpaid tax in the same VAT accounting period as the original assessment. She said at §68 that that did not matter because 'the tax in question relates to the same series of transactions as are included in the original assessment'. In other words it was only because the same series of transactions was concerned that HMRC were able to maintain the original assessment for input tax arising in one VAT accounting period as a good assessment for output tax for *another period*. This implies that the reasons for the assessment could be changed even where different transactions are concerned but *only* in the same VAT accounting period.

98. In any event, HMRC had conceded at §29 that as a matter of public law they would not seek to substitute reasons for an assessment arising out of wholly different circumstances:

> "[29] The Commissioners made some important concessions. They accept that there may be cases where it would be unreasonable in the public law sense for them to maintain an assessment…..They also accept that it would be unreasonable to exercise the power to alter the basis for an existing assessment where, for example, the altered assessment is an entirely new replacement assessment not arising from the same set of circumstances or transactions that led to the making of the original assessment. In other words, the Commissioners accept that an assessment must be supported by reasons and that an amended assessment must derive from the same transactions as the original assessment."

The judge reports HMRC's concession without commenting on whether she agreed that it was right as a matter of public law. The fact the concession was made does explain why she does not specifically deal with the position of the validity under VATA of an amended assessment which does not derive from the same transactions. It was unnecessary as HMRC had said they would not make such an amendment. But that does not mean that such an amended assessment would be outside the terms of s 73 and the considerations in §97 above suggest the judge did not think it would be.

99. Part of Arden LJ's reasoning was to focus on the word 'amount': see §§36-41:

> "[41]…the critical figure for the purpose of the assessment remains the bottom line figure – the amount of VAT due…."

100. It is on this analysis that in part the judge draws her conclusion that the underlying cause of the an amount of VAT being due (and in that case in particular whether it was an underpayment of output tax or over-reclaim of input tax) was not significant to the validity of the assessment and could therefore be changed. The question was whether VAT was due: not why it was due.

101. I agree with the appellant that this reasoning should be applied by analogy to s 80 where similarly the focus of the legislation is on an amount of VAT – but overpaid rather than underpaid.

102. While on one side it might be said that permitting reasons to be amended allows a circumvention of the 4 year cap, that circumvention is no more than what happens when an out-of-time claim reduces an in-time assessment, or an underpayment which is too late to be assessed nevertheless can be offset against an in-time claim: HMRC should not be able to assess, or the taxpayer claim, more than is actually due. The other side of this it seems to me that HMRC can change the basis of an in-time assessment, or the taxpayer the basis of an in-time claim where tax really was underpaid or overpaid, as the case may be, but not for the reason which prompted the in-time assessment or claim to be made in the first place. As *BUPA* shows that this is the correct position on assessments, it seems to me that the mirror is true for claims.

Conclusions

103. While purposive interpretation of s 80 means that a specious claim, made without reasons, but to circumvent the four year cap, is not a claim within s 80, and therefore all claims should have some basis, I have found nothing in s 80 that would prevent a later amendment to the reasons underlying that claim. As a claim with amended reasons could only apply to the amount originally said to be overpaid, the four year cap is unaffected: only the amount for which a claim was notified within the time limit need be paid.

104. Any other interpretation would mean that, despite the making of an claim within s80 which met the formal requirements of s 80 and Reg 37 *and* that VAT had been overpaid in that same period for which the claim was made, HMRC would escape liability to repay and receive a windfall. Much of Arden LJ's reasoning on the mirror position with assessments seems applicable here.

105. While public law may limit HMRC's ability to substitute new reasoning to support an existing assessment, that cannot affect the interpretation of s 80. So far as *Reed* is concerned, the Upper Tribunal's decision was that despite the explicit requirement that a claim be for 'an amount' that nevertheless the claim could be revised upwards if the enlarged claim arose strictly arising out of the same reasons for which the claim was originally lodged; so it seems to me that because there is no explicit requirement for a claim to be reasoned, even though for the explanation given at §§41-43 some reason should be given, I find that the reasons can be amended to support the amount originally claimed.

106. Any other interpretation would result in a windfall on HMRC in that, where a formally correct in time claim was made and tax really was overpaid, HMRC would not have a liability to repay it.

107. Of course, if HMRC rejected the original claim (and that rejection was not subject to a live appeal), an attempt to amend the reasons for the claim after the time limit for lodging a new claim would be unsuccessful as the original claim would already have failed.

108. And while I find the appellant may amend its reasons, and the Upper Tribunal has ruled in certain limited circumstances the appellant could amend the amount claimed, it is not possible to do both at the same time.

109. Therefore I determine the preliminary issue in favour of the appellant and the effect of that is that the appeal succeeds as it was agreed that the appellant had overpaid VAT in an amount in excess of the amount of its claim. Its claim to repayment is therefore upheld.

110. Having decided the appeal in principle in favour of the appellant I do not need to go on to consider the third reason on which it based its claim. Nevertheless, I set it out in brief in case this appeal goes further.

The Principle of Equivalence

111. The principle of equivalence applies in the UK's enforcement of taxpayer's legal right to repayment of overpaid taxes. The CJEU said in *Marks & Spencer* [2002] STC 1036 at [34]:

> "It should be recalled at the outset that in the absence of Community rules on the repayment of national charges wrongly levied it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)…."

112. The appellant's position is that the principle of equivalence requires the identification of a comparable domestic action, and that the closest domestic analogy to a claim under section 80 is an assessment raised by HMRC under section 73. They can be seen (as I have treated them above) as opposite sides of the same coin. From *BUPA* it is clear that in VAT law, ignoring public law or any concessions by HMRC, the reasons for assessing are irrelevant to the identification and validity of an assessment raised by HMRC under that provision.

113. While HMRC accepts that the principle of equivalence applies, HMRC do not agree that a claim for repayment under s 80 should be seen as equivalent to an assessment under s 73. And they say that, practically, HMRC are constrained by public law

considerations in that they cannot raise an assessment on one basis and maintain it on another (unless it arises out of the same circumstances).

Are claims similar to assessments?

114. The principle of equivalence applies only where:

> "the actions concerned are similar as regards their purpose, cause of action and essential characteristics." (§57 in *Preston and others* C-78/98)

115. HMRC's view is that the CJEU has already held that claims made by taxable persons are *not* similar to assessments by taxing authorities and for this they rely on the decision in *Ecotrade SpA* C-95/07 & C-96/07 [2008] ECR I-3457 at §§49-52.

116. In that case, a company acquired services from traders elsewhere in the EU. It should have made a 'reverse charge' on itself in its VAT books, treating itself as both customer and supplier and making two self-cancelling entries. It did not. In net terms it neither overpaid nor underpaid VAT. But Italian law gave the tax authorities a longer period to assess underpayments than to the taxpayer to claim overpayments: when the error was discovered the taxpayer was too late to make the positive entry in its books to claim the input tax on the reverse charge but the tax authority was in time to assess the failure to make the negative 'output tax' charge.

117. The taxpayer, not surprisingly bearing in mind that its error had not led to a loss to the state, appealed and the case reached the CJEU. The CJEU records at §47 that the principle of equivalence was not argued before it. It seems therefore that it did not consider it.

118. It did consider the Principle of Effectiveness at §§48-53. It is clear from those paragraphs that the CJEU did not consider that the principle of effectiveness (that the exercise of EU law rights must not be made virtually impossible or excessively difficult) was infringed by the differing time limits on assessments and claims. The reason for this view was that tax authorities and taxpayers are not in analogous positions so far as time limits are concerned:

> "[50] In that regard, it should be pointed out that the tax authority does not have the information necessary to determine the amount of the tax chargeable and the deductions to be made until it receives the taxable person's tax return. ….
>
> [51] Thus the position of the tax authority cannot be compared with that of a taxable person….."

119. I find therefore that *Ecotrade* does not answer the question of whether the principle of *equivalence* would permit a comparison to be made between whether reasons for an assessment can be changed and whether reasons for a voluntary disclosure can be changed. In *Ecotrade,* the CJEU did not consider the principle of equivalence and in any event decided that there was a distinction between the taxpayer and tax authorities on time limits such that the principle of equality did not permit a comparison between the two.

120. I do not agree with HMRC that the reasoning in *Ecotrade* on the principle of equality and time limits can be read across to the principle of equivalence and whether assessments and claims must be reasoned to be validly made. Clearly, the tax authority is in a different position on both timing and measuring quantum to the taxpayer as the taxpayer ought to have its records and the tax authority does not. I have already referred to this at §§92-93. But I see not reason why the tax authority is in any different position than the taxpayer over whether it is required to state its reasons to justify an assessment than a taxpayer to state its reasons to justify a claim.

121. But can the principle of equivalence apply when the comparison is between a right of the tax authority and the right of the taxpayer? Clearly that is no bar to the application of the principle of *equality* as the CJEU implicitly decided that comparisons could be made between tax authorities and tax payers in *Ecotrade* but only when in comparable circumstances.

122. I think the principle of equivalence, and certainly equality, can in the appropriate circumstances apply to compare the position under national law between a taxpayer asserting a *San Giorgio* right and tax authorities issuing an assessment.

123. But even assuming that my conclusion on the applicability of the principle of equivalence is right, I do not consider that it assists the appellant. The CJEU does not restrict itself to considering the strict legal position but will consider administrative practice too (eg, in a different context, *Danfoss A/S* (C-371/07) [2009] STC 701 at §42). As a matter of public law and/or a matter of administrative practice, and as recorded by Lady Justice Arden in *BUPA* at §29 and recorded at paragraph 98 above, HMRC would not fundamentally alter the reasons for an assessment, such that the underlying payment arose out of an entirely different factual matter, at the point when they are out of time to raise a new assessment.

124. In this case the appellant's agreed underpayments arose from entirely different facts and circumstances to the claimed underpayment which originally led to the making of the in time claim. If the appellant is unable to substitute new reasons, it would not be being treated any differently from HMRC in making an assessment, as, as a matter of public law, HMRC cannot justify an assessment by reference to facts and circumstances which do not relate to the facts and circumstances originally relied on when the assessment was first made.

125. The appellant's case is that as a matter of strict law HMRC could substitute entirely new grounds for an assessment and that Lady Justice Arden made no comment whether HMRC's concession in *BUPA* that they would not do so was correct as a matter of public law. But it seems to me that as a matter of public law HMRC would be in difficulties in resiling on a concession made in open court and reported by a judge of the Court of Appeal. Nor is there any suggestion that HMRC have failed to apply this concession. The appellant's case on the Principle of Equivalence therefore fails.

126. Mr Hitchmough also relies on a comparison with the right of set-off against assessments as an analogous right of action for the principle of equivalence. I have discussed this above at §§79-80 and concluded that an analogy cannot properly be made

between a defence to an assessment and a primary cause of action. So on this the appellant also can not make out a case relying on the Principle of Equivalence.

Legal certainty

127. HMRC's case appears to be that, relying on EU principles to permit the taxpayer to substitute new reasons for the claim for overpayment, would offend against another EU principle, that of legal certainty and that therefore such other principles cannot be relied upon. Strictly I don't need to consider this because I have come to the conclusion that the principles of equivalence and equality do not help the appellant.

128. I note that in any event the Court of Appeal in *Birmingham Hippodrome* [2014] EWCA Civ 684 (released after the hearing) noted that the CJEU had ruled (in *Fallimento Olimpiclub Srl* C-2/08) that the principle of legal certainty was not absolute but could be overridden by the principle of effectiveness: §46-49.

129. I agree with the appellant for the reasons stated at §45 that merely adding additional reasons to justify a claim that a particular amount of tax was overpaid does not per se offend against the principle of legal certainty. Time limits apply to the making of the claim and the statement of the amount of the claim. Complete legal certainty can't be achieved until any dispute about the repayment is resolved. The ability to add reasons later does not it seems to me necessarily delay this resolution although it might complicate it.

130. My reservation is the possibility postulated by HMRC of a taxpayer submitting a succession of spurious claims just before the expiry of the four year cap on each VAT return period and covering the entire amount of the VAT accounted for in that return period (or more) as a precaution to circumvent the four year cap just in case it is later discovered that an amount really had been overpaid (or under-reclaimed). This would offend against EU principles of legal certainty and (as a matter of construction) cannot have been the intended interpretation of s 80 VATA. But my conclusion on this is as before (§43): such a claim is not a claim within s 80. Therefore, I do not consider that the principle of legal certainty prevents the appellant relying on the principle of equivalence. But that is irrelevant as I consider the appellant (for the reasons given above) can not rely on the principle of equivalence.

131. But that is also irrelevant, as I find the appellant's case succeeds on the basis of UK law.

132. 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: 21 July 2014