[2018] UKFTT 383 (TC)

TC06549

Appeal number: TC/2014/03325

VAT – repayment – four year time limit for claim under section 80(4) VATA 1994 – new claim or amendment to an existing claim – stay of appeal pending decision in Bridport and West Dorset Golf Club – Reed Employment - whether claim arises out of same subject matter without extension to facts and circumstances outside the contemplation of the earlier claim – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONGCLIFFE GOLF CLUB **Appellant**

- and -

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Nottingham Justice Centre on 6 December 2017

Noel Tyler, VAT consultant, representative for the Appellant

Gareth Hilton, Presenting Officer of HM Revenue and Customs for the Respondents

DECISION

Introduction

1. This is a revised decision of the Tribunal following a review conducted pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). The Tribunal released a summary decision allowing the appeal on 9 January 2018 and, following a request from HMRC on 15 January 2018, released its full decision allowing the appeal on 7 February 2018. HMRC sought permission to appeal the full decision and provided grounds of appeal dated 29 March 2018.

2. The Tribunal considered in accordance with Rule 40(1) of the Tribunal Rules whether to review the original decision released on 7 February 2018 pursuant to the application for permission to appeal by HMRC dated 29 March 2018.

3. On 16 April 2018 the Tribunal decided to undertake a review for the purposes of Rule 41(1) because it was satisfied that there was an error of law in the decision. Pursuant to Rule 41(3) it notified both parties that they had an opportunity to make representations before the Tribunal took any action such as amending the original decision. The Tribunal issued directions giving the Appellant 28 days to file any representations in relation to the review and in reply to the grounds set out in HMRC's permission to appeal application. Thereafter the HMRC were given 28 days to file any representations in reply.

4. In compliance with those directions the Appellant provided further written representations dated 23 April 2018 and HMRC provided written submissions in reply dated 22 May 2018.

5. In light of those additional submissions this is the Tribunal's revised decision. It amends and replaces its earlier decision of 7 February 2018 pursuant to the Tribunal's power to review its earlier decision. This revised decision is notification of the outcome of the review pursuant to Rule 41(2).

6. It should be stated at the outset that the Tribunal has considerable sympathy with the Appellant's position. The Appellant had very good reason to believe it had won its appeal as of 7 February 2018. Further, the reasons relied upon by the Tribunal in now dismissing the appeal are based upon arguments which were not raised by HMRC at the hearing of the appeal but only in the subsequent application for permission to appeal. The Tribunal pointed out HMRC's failure to raise many of these arguments at the hearing in its notification to the parties that it was conducting a review. The Appellant relied on HMRC's failure in part in its latest submissions.

7. Nonetheless, while it is unattractive that HMRC did not argue its case fully at the hearing of the appeal, or at least in a way that was capable of persuading the Tribunal, they are entitled to raise arguments of law in making their permission to appeal application. No new issues of fact have been raised and the Tribunal is empowered to conduct a review where it is satisfied that it has erred in law.

8. While the Appellant may feel understandably aggrieved, it has been given an opportunity to reply to HMRC's submissions of law and, as set out below, the Tribunal

has permitted the Appellant to raise a further legal argument it did not raise at the hearing of the appeal. This argument is considered and rejected below.

The Appeal

9. The Appellant appeals against a review decision of HMRC dated 30 May 2014 confirming their original decision of 27 February 2014 refusing a claim for repayment of VAT said to have been overpaid between 1 January 2009 and 30 September 2009.

The Facts

10. The facts are not in dispute and were agreed between the parties and evidenced by documents provided to the Tribunal.

11. The Appellant is a not for profit member's club operating as a golf club and registered for the purpose of VAT under number 114 5162 07 with an effective date of registration of 1 April 1973.

12. By letters dated 31 March 2009 in respect of accounting periods 07/73 to 12/89, and 8 April 2009 in respect of accounting periods 06/06 to 12/08, the Appellant wrote to HMRC seeking the repayment of VAT said to have been overpaid in respect of fees charged to non-members visiting the club to play golf.

13. These fees, which are commonly known as 'green fees', were said by the Appellant to be required to be treated as exempt from VAT.

14. By a letter dated 13 July 2009 HMRC rejected the Appellant's claims on the basis the supplies in question fell outside the exemption provided for by Item 3 of Group 10 of Schedule 9 to the Value Added Tax Act 1994 (VATA) as the exemption was limited to supplies made to members or eligible bodes where the membership was granted for a period of three months or more.

15. The Appellant appealed under reference TC/2009/15760 and this appeal was stayed behind that of *Bridport and West Dorset Golf Club*. Following the judgment of the Court of Justice of the European Union in *Bridport* released on 19 December 2013, HMRC then accepted that the supplies in question were exempt from VAT but the appeal remained stayed pending HMRC's investigation into a defence of unjust enrichment.

16. By a letter dated 11 November 2013, the Appellant sought the payment of an additional amount of VAT in the sum of £77,164 said to have been overpaid in the accounting periods 12/07 to 09/13.

17. By a letter dated 11 December 2013, this claim was reduced to the sum of £48,687 to take account of disallowed input tax recovery.

18. For the periods 03/09, 06/09 and 09/09 HMRC rejected the claim of 11 December 2013 by letter dated 27 February 2014.

19. HMRC accepted, in relation to the periods 12/07 to 12/08, that the claim represented an adjustment to the Appellant's claim made in 2009. However, they treated the claim in respect of all subsequent periods as a new claim.

20. As the claim for the periods 03/09, 06/09 and 09/09 was made more than four years after their end, HMRC considered that the claim for these periods fell outside the time limit provided by Section 80(4) of the Value Added Tax Act 1994 ("VATA"). The amount claimed in respect of these periods, and subject to appeal, is £9,070.

21. Following subsequent correspondence, HMRC confirmed their rejection of the Appellant's claim in their review decision letter dated 30 May 2014. It is this decision which is subject to the appeal.

22. The Appellant appeals by way of a notice of appeal dated 11 June 2014 on the grounds summarised as follows: the Appellant's claim dated 11 December 2013 in respect of the disputed periods was not a new claim but an amendment or adjustment to the existing claim made by the Appellant in 2009.

23. In late 2016 a single repayment of the Appellant's entire claim, minus 10% for unjust enrichment was made by HMRC covering all VAT quarters with the exception of the periods 03/09 to 09/09 which are the subject of this appeal. A few days later, a separate payment was made by HMRC in respect of interest. As a result of these repayments, the appeal under reference TC/2009/15760 was withdrawn.

24. The Appellant's claim of November / December 2013 (whether an amendment to the 2009 claim or new claim) was made at a time when the 2009 claim was still open and had not been completed by HMRC making the repayments it subsequently did.

The Law

25. Section 80(4) of the Value Added Tax Act 1994 ("VATA") provides that HMRC are not liable to meet a claim made more than four years after the end of the prescribed accounting period to which it relates.

26. Judge Berner sitting in the First-tier Tribunal in *Reed Employment Limited v HMRC* [2011] UKFTT 200 (TC), set out the background at paragraph 98-103 of his decision as to whether a claim is a new claim or an amendment of an existing claim. At paragraphs 110-112 of his decision the Judge gave guidance as to the test:

98 – For the Commissioners it was submitted that the VATA did not recognise amended claims. Every claim was subject to the three-year cap and would not be circumvented by labelling it an amendment to an earlier claim; every claim was a new claim. Claims might be adjusted if, for example, they contained arithmetical errors, but that was an entirely separate matter. It was submitted that where an earlier claim had been accepted and paid, any later claim could not be regarded as an amendment'.

99 – The Tribunal (Mr David Demack – chairman) distinguished between claims made under S80 VATA which were outstanding, and those which had been completed. He held that the original claims were all completed claims, such that there was nothing to amend; consequently that later claim could not be an amendment but was itself a new original claim.

……

103 – What we do find is that the Tribunal does have a relevant jurisdiction in this matter, namely to determine for the purposes of S83(1) (t) simply whether there is, as a matter of fact and law, one claim or two, and when the claim or claims must be regarded as having been made.

……..

"**110** There is no definition of 'claim' in VATA, nor any provision for amendment of a claim. The starting point, therefore, we think is that any insertion 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. Without deciding matters outside of this appeal, we consider, for example, 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 made subsequently 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.

112 The line in each individual case will be for the tribunal, on the particular facts before the case before it, to draw. What is necessary is for the tribunal to determine the subject matter of each claim. This cannot, in our view, be cast too wide, as that would permit claims that are clearly discrete on any analysis potentially to be drawn in. Thus, it would not be right, in our view, to regard a later claim as an amendment to an earlier one simply because it relates to the same period, is a claim under the same statutory provision, or relies upon the same legal argument or the same error on the part of the taxpayer. It follows also that no combination of these factors would result in a later claim being treated as part of an earlier one."

[Emphasis Added]

27. The test was narrowed by Roth J in the Upper Tribunal decision [2013] UKUT 109 (TCC) at paragraphs [32]-[33]:

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. The FTT proceeded to hold as follows: "111. ……..."

33. 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. Further, if the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim. Thus I consider that what is an amendment is very much a question of fact and degree, judged by the particular circumstances. I therefore respectfully agree with the test set out by the FTT in the first sentence of para 111. However, of the examples given in that paragraph, I would not wish to approve in the abstract the final example: that would be for consideration on the particular facts of the case should it arise.

[Emphasis Added]

HMRC's submissions at the hearing

28. At the hearing of the appeal in December 2017 HMRC submitted that by seeking to extend its claim to additional accounting periods in 2013, the Appellant was seeking

to amend its claim by extending it to facts and circumstances outside the contemplation of its original claim. Therefore, they submitted that each subsequent accounting period was the subject of a new and separate claim.

29. HMRC relied further on paragraph 112 of the First Tier Decision in *Reed Employment:*

Thus, it would not be right, in our view, to regard a later claim as an amendment to an earlier one simply because it relates to the same period, is a claim under the same statutory provision, or relies upon the same legal argument or the same error on the part of the taxpayer. It follows also that no combination of these factors would result in a later claim being treated as part of an earlier one.

30. HMRC submitted that the fact that the ongoing litigation behind which the Appellant's appeal was stayed lasted a long time was not uncommon. The Appellant would have expected it would need to claim for subsequent periods during this time. It would be incumbent on a reasonable taxpayer to protect its position regardless of the outcome of the litigation.

31. HMRC submitted that because the Appellant's claim was made on 11 November 2013, as revised in December 2013, it was made out of time so far as the new claims relating to accounting periods 03/09, 06/09 & 09/09.

32. HMRC considered that the instant appeal involved similar facts to the case of *Nairn Golf Club v Revenue & Customs Commissioners* [2015] UKFTT 185 (TC), in which Judge Scott stated at paragraph 34:

"*We can find no basis on which the 2014 claim could be found to be an amendment or extension of the 2009 claim. As in Hadley, it is introducing wholly new accounting periods*."

33. HMRC submitted that the arguments put forward in *Nairn* supported their position in that the 2013 claim could only be seen to be a new claim. If the claim is not an amendment to the existing claim, it could only be a new claim and would therefore be subject to the four-year capping provided for by Section 80 of VATA. Section 80 is absolute; HMRC are not afforded any discretion with regards to its application. If the claim is made outside of the statutory limits imposed by Section 80 the claim must be rejected. They submitted that that was what had happened for the periods 03/09 to 09/09.

34. The periods after 09/09 claimed for in 2013 were allowed by HMRC as they were within the four-year period and were dealt with accordingly.

35. HMRC submitted that in light of the body of case law that existed in answer to the question of whether a supplementary claim is an amendment to an existing claim or a new claim in itself, the supplementary claim submitted by the Appellant should properly be considered in law to be a new claim and therefore capped by the provisions of Section 80 of the Value Added Tax Act 1994.

36. HMRC maintained that the claim made in November 2013 was, at least in part, a new claim made outside of the time limits and correctly capped in line with Section 80. HMRC asked that the Tribunal dismiss the appeal.

Submissions on behalf of the Appellant at the appeal

37. Mr Tyler made submissions on behalf of the Appellant at the hearing both orally and in writing. He pointed out that the 2009 claims were submitted by its previous accountant, Godkin & Co, who did not provide copies to the Appellant so that the taxpayer would not later have been aware of the precise periods in respect of which it had already submitted claims. At the hearing the Tribunal indicated its view that it would have been reasonable to request this information if the Appellant had not been made aware of it by its former accountant. Likewise, the original 2009 claim forms were signed by the secretary of the Appellant so it should have kept a copy of them and been aware of the precise periods in respect of which it had made claims at the time.

38. Nonetheless, Mr Tyler submitted that the reasonableness of the Appellant's approach is not the test which the Tribunal must apply but that set out in the first sentence of paragraph 111 of the First Tier Tribunal decision in *Reed Employment*. As Mr Justice Roth stated at paragraph 33 of the Upper Tier Tribunal decision, this is a matter of fact and degree judged by the particular circumstances of the case. Mr Tyler submitted that the fact that a taxpayer seeks to amend a claim to include subsequent accounting periods cannot be determinative of it being a new claim.

39. Mr Tyler on behalf of the Appellant submitted that the November 2013 claim for the three disputed 2009 VAT periods was an amendment of the existing April 2009 claim and thus was not made out of time. The Appellant had not received any payment on the existing claim as of November 2013 when the amended claim was submitted to HMRC.

40. He submitted that the Appellant's November 2013 claim in respect of the 2009 periods was in respect of the 'same subject matter as the original claim' and was also 'without extension to facts and circumstances that fall outside the contemplation of the earlier claim'. Thus, it was an amendment of the 2009 claim and not a fresh claim.

41. Mr Tyler made submissions in relation to the first issue - that the later 2013 claim arose out of the original subject matter as the original 2009 claim. He submitted that the grounds of the Appellant's claims in April 2009 and November 2013 were exactly the same and the issues were exactly the same, only the time period different was period. The subject matter of the claims in March and April 2009, just as in November 2013, was the same in every VAT quarter.

42. The subject matter was whether the income generated from the Appellant's guest fees minus the effect on residual input tax was recoverable for that quarter. The grounds of claim and issue for determination was therefore the same for each VAT period from the beginning of the claims in March 2009 for the earlier periods up to November 2013 in respect of the later periods.

43. Mr Tyler relied on HMRC's published guidance in their on-line VAT manual states that: 'It is important to note that a claim is defined by the issue upon which it is based'.

44. The issue for the Appellant was whether output tax overdeclared on guest fees should be adjusted for overclaimed residual input tax. The subject matter of the claim was not defined merely by the VAT quarters to which it related.

45. Mr Tyler made submission in respect of the second issue in the appeal - whether a claim in respect of later VAT accounting periods 'extended to facts and circumstances that fall outside the contemplation of the earlier claim'.

46. He submitted that the facts and circumstances did not fall outside the contemplation of the earlier claim. He submitted that the Tribunal should approach this on the basis what objectively would reasonably have been within the contemplation of the original claim. He submitted that the 2013 claim covered facts and circumstances which were objectively within the contemplation of the Appellant in its 2009 claim.

47. Mr Tyler submitted that what was contemplated by the Appellant in 2009 when the original claims were submitted was that there would be a need for protective claims for VAT periods to be submitted while the ongoing litigation *Bridport and West Dorset Golf Club* would reach a conclusion in the appellate courts (as it did in 2013).

48. He submitted that it was clear from the Appellant's claim in April 2009 for the periods from 06/06 through to 12/08 that it was marked as a 'protective' claim. It was not anticipated that the Appellant's claim would immediately be settled by HMRC and that would be the end of the matter. In 2009, when the protective claim was made, it was evident from the paperwork, as submitted by Mr Tyler, that the Appellant considered or planned that determination of the matters would take time and it would need to apply to ongoing or future VAT accounting periods until the litigation was finally resolved.

49. While it might have been reasonable for the Appellant to make a claim to HMRC for every VAT accounting period as it occurred during the period 2009 to 2013 pending the resolution of the litigation behind which its appeal was stayed, that does not mean it did not contemplate the same issue occurring for every period. The 2013 claim did not extend to facts and circumstances outside the contemplation of the earlier claim in 2009.

50. He submitted that the Appellant taxpayer had another choice in 2009. It could complete its VAT returns based on a belief as to the law as it hoped it might eventuate rather than the law as it was. This would not have been reasonable. Instead, as the Appellant reasonably did, it continued to rely upon on the then current state of the law aware that the disagreement would be resolved by the appellate courts which. This might then require a further need to claim for subsequent periods.

51. Mr Tyler relied upon an Oxford English Dictionary definition of 'contemplation': 'The state of being considered or planned'. He submitted that as such, the '*contemplation'* of the Appellant in 2009 was to be aware that the *Bridport* litigation was ongoing, with the realisation that there would be additional periods to be included at some time in the future. The failure to make contemporaneous further claims in 2009 for the additional periods does not mean the 2013 claim extended to facts and circumstances outside the contemplation of the earlier claim.

52. Mr Tyler argued that at the time of the Appellant's original claims in March and April 2009, the judgment of the CJEU in *Canterbury Hockey Club*, which prompted the issue, had been released by the CJEU on 16 October 2008, its impact was being considered, and a number of golf clubs had, or were making, claims with regards to the same issue, just as the Appellant did.

53. He argued that the basis of HMRC's letter of 18 July 2009 to the Appellant, provided within the bundle, although seemingly only dealing with the *Fleming* claim is, it is suggested, an indication that HMRC were mounting a concerted defence against all such claims.

54. Mr Tyler submitted that it was reasonably apparent to any advisor as it would be to the Appellant by April 2009 that the matter would proceed to Tribunal and possibly much further – even if at that stage any reference to the CJEU was less than clear. In the circumstances, the Tribunal should be satisfied that it was contemplated by the Appellant as of 2009 that the parties were in for the long haul, and that accordingly the claim for additional periods as were later made would have been within the contemplation of the earlier claim.

55. As has been demonstrated by the number of appeals that have resulted in dealing with similar such *Bridport and West Dorset Golf Club* claims. The Appellant's original could never reasonably have been considered to have been a stand-alone claim. It was always clear that HMRC would contest, matters robustly. As such the Tribunal should be satisfied that it was always contemplated by the Appellant that additional VAT quarters would need in the future to be added to the claim.

56. Mr Tyler argued that this conclusion should be limited to the particular facts of this case where the Appellant's contemplation would have been based on the ongoing litigation, the stay of its appeal pending the conclusion of the litigation, the further periods accruing during this time and the nature of its protective claim.

57. As such, the net output tax overclaimed for the VAT quarters in question arose out of the same subject matter and extended to facts and circumstances within the contemplation of the original 2009 claim. Mr Tyler therefore submitted that the 2013 claim constituted an amendment to the earlier 2009 claim and is not statute-barred.

Discussion and Decision

58. In dismissing the appeal the Tribunal relies on the following arguments of HMRC and is satisfied that it previously erred in law in allowing the appeal.

59. The Tribunal is satisfied that in accordance with the Tribunal decisions in *Reed Employment*, the Appellant's November / December 2013 claim in respect of periods 03/09, 06/09 & 09/09 must be regarded as an individual, discrete claim, separate from any other, and has not been shown to be in essence as one with the earlier claim of April 2009. The Appellant's claim of November 2013 was therefore made outside of the four-year time limit for making claims in respect of the 03/09 to 09/09 periods provided by section 80(4) VATA. The later claim did not arise out of the same subject matter as the original claim in April 2009. Further, it extended to facts and circumstances that fell outside the contemplation of the earlier claim.

60. In summary, the Tribunal finds that a request for repayment arising from new VAT periods, different supplies and different supplies and different sums claimed to be overpaid must necessarily concern different subject matter in comparison with the original claim. Unspecified and future VAT periods fell outside the contemplation of the taxpayer when making the original claim in April 2009, and that is sufficient to find that the original claim included requests for repayment relating to the additional periods.

61. Further, the Tribunal accepts it may not apply an overly broad and subjective test but must apply an objective test of what was contemplated consistent with the statutory requirements of binding authority. The fact that the Appellant did not file further repayment claims between 2009 and 2013 because it was apparent that it would take considerable time for the legal issues between the parties to be resolved is an immaterial consideration.

Same subject matter as the original claim?

62. In *HMRC v Vodafone groups Services Ltd* [2016] UKUT 89 (TCC), the Upper Tribunal considered a case where a taxpayer sought to amend an earlier claim relating to the same periods and for the same amount, but so as to rely on an entirely different reasoning for the claim. Mr Justice Warren noted on the question of the definition of a claim:

47.In our view it is necessary to begin by identifying what are the elements of a claim. It is, as Roth J said in Reed Employment at [31] "a demand for repayment of overpaid tax". This is a succinct description of what s 80(1) and (2) provide. As we see it, the focus of s 80(1) is on an amount of output tax which has been brought into account but which was not due, and thus the focus is also on the supplies relevant to that amount. Where a taxpayer has brought into account an amount which was not due as output tax, HMRC are liable to credit him with that amount, that is to say the amount of output tax. When a taxpayer brings into account an amount of output tax, he clearly does so in relation to particular identified supplies……..

……

51. In our view, the claim is not simply for a sum of money in abstract. Rather, it is for the amount which the taxpayer asserts has been brought into account as output tax that was not output tax due. HMRC's liability is not simply for a sum of money; rather, it is for a sum of money equal to the amount of output tax accounted for which was not output tax due. The taxpayer's claim under section 80(2) is likewise not, we consider, simply for a sum of money, but is for a sum or money related to particular transactions in respect of which output tax has been accounted for.……

63. The Appellant's original claim in 2009 and the 2013 request were demands for different sums due, arising from different supplies. The April 2009 claim was not made in respect of the VAT periods 03/09, 06/09 and 09/09 but earlier periods up to 12/08. Only the 2013 claim was in respect of the three 09 periods. Therefore, the 2009 and 2013 were not claims arising from the same transactions. The fact that they arose from the same type of supplies, and the legal justification for the requests was the same is not sufficient for them to relate to the same subject matter. Different supplies, at different times, which would have been entitled to the same VAT treatment if some of the requests were not time barred, have been made by the Appellant.

Without extension to facts and circumstances that fell outside the contemplation of the original claim?

64. Furthermore, the later VAT periods in 09 which were not referred to at all in the original claim of April 2009 were also outside the objective contemplation of that earlier claim. It would not assist the Appellant even if its subjective intention at the time was to include additional VAT quarters in future. The test as to what can properly be found to be inside the contemplation of an earlier claim is objective assessment is required as stated by the CJEU in *BLP Group plc v Commissioners of Customs and*

Excise [1995] ECR I-1001 and *Grand Entertainments Company (A Firm) v HMRC* [2016] UKUT 209 (TCC) – see below.

65. The Tribunal has considered the question of what is apparent on the face of the written material on behalf of the Appellant purporting to make a claim. However, it would not go so far as accepting HMRC's argument that the Tribunal is circumscribed in only assessing the written document purporting to make the claim.

66. In the Tribunal's view it can draw reasonable inferences from all the written material supplied by the Appellant to HMRC before making a claim up to and including the document itself making the repayment claim when making an objective assessment of what was within the contemplation of the original claim. There is nothing in *Reed Employment* that supports HMRC's very strict approach that only the document making the claim should be examined. However, the Tribunal does accept that the letter from the Appellant in April 2009 making the claim is the most important document to consider when assessing what was within the contemplation of the original claim.

67. There is no statutory definition of a claim for the purposes of section 80 VATA. However, the Value Added tax Regulations 1995/2518, Regulation 37 provides:

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

68. The Upper Tribunal has considered the meaning of a claim for section 80 VATA in its decisions and has held that the terms are to be construed strictly in accordance with the regulatory requirement and in accordance with he need to preserve legal certainty. In *Vodafone*, Mr Justice Warren stressed that time limits exist so as to create legal certainty:

19. …….. The F-tT's justification of that approach was derived from its conclusion that any amendment was permissible provided the amount claimed was not increased. But if that was the correct approach, there would be no need for reg 37 to require a claimant taxpayer to provide a method of calculation based on supporting documents, or for any implicit requirement of reasons. It was those requirements which led to legal certainty, namely that HMRC could know the nature and scale of the claim with which they were faced. The illogicality of the F-tT's approach was demonstrated by the fact that Vodafone itself accepts that if it had not had an outstanding claim it could not have made the later claims. It was only because of the accident that the Nectar claim had not been resolved that it had even an arguable case that it was able to make the later claims.

69. As to the requirements for the making of a claim Warren J found:

31.The position of a taxpayer is different: his claim for repayment must be for a specific sum which he is in position to establish has been overpaid. The taxpayer ought to be in a position to do so because he has, or should have, the relevant information and evidence.

70. There is no space in this analysis for the making of the Appellant's claim in April 2009 to be in relation to future periods such as 06/09 and 09/09. No specific sum has been overpaid where a taxpayer simply intends to continue trading in a similar manner to its earlier operation, such that future claims are likely to arise. Nor is it even possible to provide an amount or methodology of calculation in relation to a future period, requirements to comply with Regulation 37.

71. In relation to VAT period 03/09 which had ended by the time of the April 2009 claim, there has been no compliance with Regulation 37; no sum was claimed in respect of that period, nor any method of calculation set out in the original claim. There is no written request at all in 2009 which can reasonably be construed to be made in relation to this period. If there was no original claim was made, there cannot even be an amendment.

72. These requirements cannot be circumvented by finding that some unspecified other claim is in the taxpayer's contemplation at the time of making a claim.

73. Further, what was in the contemplation of the claim must be objectively ascertainable. On the facts of this case, the Appellant made no reference at all to any claims for the periods 03/09, 06/09 and 09/09 and there was no compliance with Regulation 37 with regard to these periods.

74. Further, the Tribunal should not take into account whether the Appellant subjectively intended in future to amend the original claim to add new VAT periods. This is not sufficient to bring claims for those periods inside the contemplation of the original claim within the meaning of *Reed Employment*. On the facts of this case, this would obviate the strict requirements of Regulation 37 such as to bring into consideration claims which were not apparent in the written request for repayment or on the other documents filed with HMRC prior to that date.

75. Mr Justice Roth at paragraph 33 of the Upper Tribunal decision in *Reed Employment* stated he would not agree with the final example at paragraph 111 of the First Tier Tribunal's decision as it would turn on the facts of the particular case. Roth J did not endorse a new gloss on the statutory wording such that matters in the subjective contemplation of the taxpayer could be captured in an original claim, even though they were not expressly included.

76. Warren J commented in *HMRC v Bratt Auto Contracts Ltd, Bratt Auto Services Ltd* [2016] UKUT 90 (TCC) on Roth J's findings:

37. …….. There is no room within reg 37 for a claim to be made, without the specification of an amount or the method of calculation, but upon the basis that they will be provided later. We agree with Judge Berner that Roth J did not decide the contrary in Reed Employment, but was instead focusing on the character of an amendment rather than on the validity or otherwise of the original claim. To have said what he did in the context of the validity of the original claim would have been inconsistent with the decision of the Court of Appeal in BSOC……..

39. …….. We therefore agree with Judge Berner that they must fail since they did not satisfy the statutory requirements: as before, mere intimation of a claim with details to follow is not enough. ……..

77. The Court of Appeal upheld this decision in their judgment of 18 May 2018, *Bratt Autoservices Company Ltd v HM Revenue and Customs* EWCA Civ 1106 where Floyd LJ stated at paragraph 28: 'I do not think that there is much to be derived from the fact that there are wide powers of amendment available to those who make a claim, as Roth J recognised in *Reed*. The first question must be to determine the requirements imposed by the statute and the regulation. It does not follow from the existence of a power to amend the amount, or its method of calculation, that the claim is not required to state an amount (in the defined sense) and a method of calculation at the outset'.

78. Contemplation in this context can only mean what was apparently intended to be claimed for at the time when the original claim was made, applying an objective construction to its wording It cannot be intended to incorporate an exception to the strict requirements of Regulation 37, such that requests for repayment which are not apparent from an objective reading of the original claim (potentially read alongside earlier documents filed by the Appellant) may nevertheless be held to have been part of that claim. It is likely that permissible later amendments to an existing claim are confined to a narrow range of circumstances such as where there are mistakes or calculation errors.

79. In *Grand Entertainments Company (A Firm) v HMRC* [2016] UKUT 209 (TCC), Mr Justice Snowden was explicit that the test to be applied to construing what was within the contemplation of the original claim must be objective and derived from the wording of the written request. Further the very issue which arises in this appeal also arose on the facts of *Grand Entertainments* – whether a claim which was silent as to certain accounting period could nevertheless be amended so as to include those accounting periods at a later date, or whether the purported amendment was a new claim. Snowden J stated at paragraphs 42 and 43 of the judgment:

42. As regards the claims in respect of supplies prior to 1 November 1980, the simple fact, as identified by the FTT, was that the Original Claim was expressly made by reference to the period 1 November 1980 to 4 December 1996 and made no mention of any other accounting periods.

43. If, as I think it is, the key question is whether the Original Claim, viewed objectively, indicated any intention on the part of the Appellant to make a claim for periods prior to 1 November 1980, the clear answer is "no". And for the reasons set out in paragraphs 31-32 above, even though, for VAT purposes, the nature of the supplies included in the January 2010 Claim were the same as those included in the Original Claim, it does not follow that the subsequent claim in respect of different accounting periods must be regarded as being part of, or an amendment to, the earlier claim.

80. Applying the same analysis to the facts of this case there is no part of the original claim made in April 2009 which, objectively construed, could constitute a claim for repayment in relation to periods 03/09, 06/09 and 09/09. There was no objective feature of the original claim which could be construed as indicating that the three VAT periods were intended to be claimed for at that time. No claim for those periods was made in 2009 or within four years thereafter in compliance with section 80(4) of VATA.

81. The Tribunal cannot take into account any other matter, such as evidence of subjective intention of the taxpayer to make future amendments to include those periods.

82. Further, the fact that the Appellant may have been influenced, in not making further in time claims, because of the then state of the law is not relevant. The ongoing nature of the dispute as to the exemption in question at the time is immaterial to deciding what was in contemplation of the original claim. The Court of Appeal in *Leeds City Council v HMRC* [2015] EWCA Civ 12903 has held that ignorance of the law or knowledge that HMRC will refuse a claim because of its current policy is not a basis for non-application of a limitation period:

"[43]…..Thus the fact that HMRC advanced a view of the law which is now conceded to be wrong does not preclude reliance on the limitation period. If a taxpayer is

dissatisfied with HMRC's view of the law, the proper course is to appeal to the appropriate tribunal…." (per Lewison LJ with whom the other LJJ agreed).

Fresh argument of the Appellant

83. Finally, it should be noted that in its latest submissions the Appellant raises a fresh argument as to why its appeal should succeed. The Appellant argues that even if the claim for the periods for VAT periods 03/09, 06/09 and 09/09 did constitute a new and separate claim from that previously made on behalf of the Appellant – and this is not accepted on behalf of the Appellant – it does not necessarily follow that the statutory time limits in domestic legislation under Section 80(4) of the Value Added Tax Act 1994 must apply to it.

84. The Appellant submits that the claim(s) made by the Appellant, as well as in excess of 1,000 other golf clubs, sat behind that of *Bridport & West Dorset Golf Club Ltd C-495/12*. This was a case where the Golf Club, successfully as it turned out, argued that domestic legislation did not properly reflect the provisions of Article 132(1)(m) of the Principle VAT Directive ("PVD"), and requested the direct application of that Article.

85. Accordingly, the Appellant submits that each of the other claimant golf clubs also sought the direct application of Article 132(1)(m). The judgment of the CJEU in *Bridport* was released on 19 December 2013 and, in accordance with it, domestic legislation was amended, with effect from 1 January 2015, by the *Value Added Tax (Sport) Order 2014/3185*.

86. Accordingly, the Appellant submits that its claim made on 11 November 2013, if indeed it constitutes a separate claim from the previous one, must have been made seeking the direct application of the Directive, since it pre-dates both the release of the decision in *Bridport* and the subsequent amendment to domestic legislation.

87. Therefore, the Appellant submits, in cases such as *Bridport*, where a taxpayer relies on the direct effect of the PVD, since domestic legislation does not properly reflect it, and cannot be interpreted under *Marleasing* to do so, there is a raft of case law that provides that when seeking the direct effect of any part of the PVD, the taxpayer is applying directly the entirety of the PVD. This would include what was in the directive and what was not.

88. The Appellant argues that one provision that does not appear in the Directive is any provision for the capping of claims. Therefore, the Appellant argues that the claim, if indeed it is a fresh one, was made under the direct application of the PVD and its predecessors, as those directives do not have any '*capping provisions'* in them, then the claim can neither be capped by the claimant nor by HMRC.

89. The Tribunal does not accept this argue of the Appellant and accepts the submissions of HMRC in reply as follows.

90. Article 131 of the Principal VAT Directive states:

"The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions **and in accordance with conditions which the Member States shall lay down** for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse." (Emphasis added)

91. In other words, Member States have jurisdiction to lay down the conditions to be applied, including procedural matters such as time limits, when issues under Chapters 2 to 9 are litigated. The exemption relied upon by the Appellant is in Chapter 2, Article 132(1)(m). This is a complete answer to the Appellant's new argument: the Community provisions have prescribed that domestic procedure applies to claims arising under the exemption in question.

92. The CJEU has long held that matters of procedure, including time limits, are domestic issues and Member States may prescribe the procedure as they see fit (subject to limits such as those required by the principles of effectiveness and equivalence):

"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, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)…

35 As regards the latter principle, the court has held that in the interests of legal certainty, which protects both the taxpayer and the administration, it is compatible with Community law to lay down reasonable time limits for bringing proceedings: *Aprile* , paragraph 19, and the case law cited therein. Such time limits are not liable to render virtually impossible or excessively difficult the exercise of the rights conferred by Community law. In that context, a national limitation period of three years which runs from the date of the contested payment appears to be reasonable: see, in particular, *Aprile* , paragraph 19, and *Dilexport* , paragraph 26.

36 Moreover, it is clear from *Aprile* [2000] 1 WLR 126, 149 , para 28, and *Dilexport* [1999] ECR I-579, 616 , paras 41 and 42, that national legislation curtailing the period within which recovery may be sought of sums charged in breach of Community law is, subject to certain conditions, compatible with Community law. First, it must not be intended specifically to limit the consequences of a judgment of the court to the effect that national legislation concerning a specific tax is incompatible with Community law. Secondly, the time set for its application must be sufficient to ensure that the right to repayment is effective. In that connection, the court has held that legislation which is not in fact retrospective in scope complies with that condition." (*Marks & Spencer Plc v CCE* [2003] 2 WLR 665, CJEU)

93. Consequently, reliance on the Directive itself does not mean that domestic time limits are no longer applicable. The CJEU has consistently held that they are, provided they comply with Community law.

Conclusion

94. The appeal is dismissed. The Appellant's claim in respect of VAT periods 03/09, 06/09 and 09/09 was a fresh claim made in November 2013 outside the four-year time period permitted by section 80(4) of VATA. It was not a claim that arose out of the same subject matter as the earlier claim of April 2009 and it extended to the facts and circumstances which fell outside the contemplation of the earlier claim.

95. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 21 JUNE 2018