VALUE ADDED TAX — claim for repayment of overpaid output tax — VATA s 80 — VAT Regs reg 37 — whether claim can be amended by complete substitution of reasons — no — claim must remain substantially unchanged — appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal ref: UT/2014/0078

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

VODAFONE GROUP SERVICES LIMITED **Respondent**

Tribunal: Mr Justice Warren
Judge Colin Bishopp

Sitting in public in London on 10 December 2015

Mr Raymond Hill, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellants

Mr Andrew Hitchmough QC and Ms Laura Poots, counsel, instructed by Simmons & Simmons LLP for the respondent

DECISION

Introduction

1. The factual background to this appeal is simple and uncontroversial. On 30 January 2007 the present respondents, Vodafone Group Services Limited ("Vodafone"), wrote to the present appellants, HMRC, to make a voluntary disclosure. Vodafone's letter requested a repayment of £4,173,388.61 representing the amount by which, the letter said, it had over-declared its liability for output tax in its VAT returns for the periods 01/04 to 01/06. The letter went on to relate the over-declaration to Vodafone's participation in the Nectar card scheme, and to its view that it should have taken into account in calculating its output tax liabilities the cost to it of the Nectar points awarded to its customers. HMRC do not agree that there was any over-declaration of output tax for this reason and they rejected the claim by letter of 30 July 2007. The claim ("the Nectar claim") remains outstanding, and is the subject of an appeal, submitted to the VAT and Duties Tribunal on 28 August 2007 and now before the First-tier Tribunal ("the F-tT").

2. Between 2009 and 2011 Vodafone made several more voluntary disclosures, some of which included claims for the repayment of further output tax which it had over-declared in accounting periods including those covered by the Nectar claim. Those over-declarations have nothing to do with the Nectar scheme, but are attributable to other accounting errors, for example in respect of the use by Vodafone's customers of their mobile phones outside the European Union. HMRC agree that the output tax included in these declarations was over-paid, and they have repaid some of it, or have offset it against an assessment for output tax for which Vodafone should have accounted in respect of certain sales of phone cards for use in Ireland. That assessment has no direct relevance to the issue before us, though we shall need to refer to it again later.

3. HMRC have refused to pay the remainder of the sums claimed in the 2009, 2010 and 2011 voluntary disclosures, including all of those relating to the periods 01/04 to 01/06 ("the later claims"), because they were made after the expiry of the time limit, until 31 March 2009 three and thereafter four years, within which such claims must be made. In consequence, they say, the later claims must fail, regardless of their merits. Vodafone accepts that, had the later claims been free-standing, that would be so; but, it says, it is permissible to amend the Nectar claim—which, as HMRC accept, was made in time—so that it encompasses the later claims instead. Vodafone has not abandoned the Nectar claim, but it is willing to forego it and accept instead the same amount of money but upon the different grounds supporting the later claims. The amount attributable to the later claims for the periods 01/04 to 01/06 exceeds the value of the Nectar claim, but Vodafone does not contend that it should recover more than the amount of that claim.

4. HMRC dispute Vodafone's argument, and say that while it is permissible to amend a claim, it is not permissible to do as Vodafone wish to do, which amounts to replacing one claim with another.

5. In order to resolve the difference between the parties it was agreed that the F-tT should determine, within the appeal against HMRC's rejection of the Nectar claim, a preliminary issue which, slightly re-phrased, was as follows:

> "In circumstances where a VAT-registered taxpayer has submitted a claim for a sum of money in a VAT period, in accordance with the time limits set out in s 80 of the Value Added Tax Act 1994 ('VATA'), can the taxpayer 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 s 80 of VATA but while the claim remains unresolved?"

6. The preliminary issue duly came before the F-tT (Judge Mosedale) who, in a decision released on 21 July 2014, determined it in Vodafone's favour. HMRC appeal to this tribunal with permission granted by Judge Mosedale.

7. The relevant legislation is to be found, as the formulation of the preliminary issue indicates, in s 80 of VATA which, as the parties agree, contains an exhaustive code for the making of claims for the recovery of over-paid output tax. So far as relevant, and as it was in force at the time the Nectar claim was made, it was as follows:

> "(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) … above …
>
> if the claim is made more than 3 years after the relevant date …
>
> (4ZA) the relevant date is—
>
> (a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection …
>
> (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.
>
> (7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

8. There have been subsequent amendments to that section but, save for the extension of the time limit from three years to four, none is relevant here.

9. The regulations to which sub-s (6) refers are the Value Added Tax Regulations 1995 (SI 1995/2518), reg 37 of which provides:

> "A 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."

The F-tT's decision

10. At [12] Judge Mosedale summarised Vodafone's principal argument, as it had been put to her, as follows:

> "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."

11. At [14] she summarised HMRC's response to that argument:

> "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 [later claims] were out of time, and do not arise out of the same subject matter as the [Nectar] 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."

12. Various comments made by the judge show that she considered that although neither s 80 nor reg 37 expressly refers to reasons it is implicit that some must be supplied. She summarised her conclusions on that point at [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."

13. She then developed that point with these further observations:

> "[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 … 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] … As I have said, s 80 does not expressly require reasons. Even though the assumption underlying s 80 must be the 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."

14. The judge then embarked on an examination of the relevant case law, with which we shall deal below, before arriving at her conclusion at [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."

15. She accordingly accepted that it was permissible for Vodafone to rely upon completely different grounds for its claim, provided only that it confined itself to the amount of the original, Nectar, claim.

HMRC's arguments

16. For HMRC, Mr Raymond Hill argued that Judge Mosedale was right to conclude that reg 37 imposes not only the explicit requirement that the method of calculation be provided but also the implicit requirement that reasons for the claim be given. That part of her decision was consistent with what was said about reg 37 by this tribunal in *Revenue and Customs Commissioners v General Motors (UK) Ltd* [2015] UKUT 0605 (TCC) at [81]:

> "… it is a provision of an essentially administrative nature, designed to ensure that, when a section 80 claim is first made, it has sufficient particularity for HMRC to engage with it and decide whether or not to accept it."

17. What Judge Mosedale did not do, however, was go on to find that the reasons were an integral part of the claim. HMRC do not contend that the reasons cannot be changed at all, but do argue that an amended claim remains the claim which was originally made only if it is supported by what is materially the same calculation and reasons. In other words, the underlying facts must be essentially the same.

18. What Vodafone was aiming to do was advance completely new claims, and not an amended version of the original claim. It was proposing simply to abandon the Nectar claim and advance in its place new claims which, as it accepted itself, were out of time. Moreover, it is not only the reasons which have changed but also the method of calculation. A comparison of the original calculation accompanying the Nectar claim and the calculations supporting the later claims shows that they are completely different.

19. It is well established in the jurisprudence of the Court of Justice of the European Union ("the CJEU"), Mr Hill continued, that there is nothing offensive about the imposition of time limits for the making of repayment claims. The imposition of the time limit is consistent with legal certainty. The judge's conclusion in this case, however, was not consistent with that principle because it allowed a taxpayer in Vodafone's position with an in-time but doubtful claim to replace it by an out-of-time even if otherwise well-founded claim. 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.

20. A similar point was addressed by this tribunal in *Reed Employment Ltd v Revenue and Customs Commissioners* [2013] UKUT 109 (TCC), [2013] STC 1286. There, too, the question was whether a claim represented an amendment to an existing claim or was a new claim. The F-tT in that case ([2011] UKFTT 200 (TC)) concluded, at [111], that it could be regarded as an amendment "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." On the appeal to this tribunal, Roth J expressly agreed with that conclusion. He also said, at [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."

21. At [38] he gave an example of what he would regard as a new claim:

> "[Counsel for the taxpayer] gave the example of a claim for a particular accounting period in respect of supplies in London, where the taxpayer subsequently wrote to ask for repayment in respect of supplies made for the same accounting period in the rest of England. However, in my judgment, unless there was some express reservation in the initial claim … the later request would clearly constitute a separate claim."

22. The relevant facts of *Reed Employment* are that the taxpayer made a claim in 2003 for the recovery of VAT for which it had accounted in respect of supplies made to certain of its customers ("the irrecoverable sector"). In 2009 it made a further claim, on substantially the same grounds, but in respect of supplies made to a different group of its customers ("the recoverable sector"). The underlying issue was whether or not HMRC were entitled to rely on the unjust enrichment defence for which s 80(3) of VATA (not relevant here) provides. In order to determine whether that defence was available it was necessary to decide whether the further claim was, as the taxpayer maintained, an amendment to its existing claim or was a new claim. The F-tT and, on appeal, Roth J decided that it was a new claim. At [52] Roth J put his conclusions in this way:

> " … the 2009 demand covering the much larger recoverable sector and thus seeking a further sum of close to £64m, cannot be viewed as an amendment to the … repayment claim made in 2003 for the irrecoverable sector in an

> amount now calculated at just under £4m. It was a new claim, covering supplies to a different category of clients (*ie* those not wholly or partially exempt from VAT) who had been consciously excluded from the 2003 claim."

23. Judge Mosedale came to the conclusion that the decision in *Reed Employment* could be distinguished. She observed, at [58], that Roth J had said that a "claim" was simply "a demand for repayment of overpaid tax" and added that "Nowhere did Roth J or the FTT say that the original claim must contain reasons and/or was defined by its reasons." Then, despite what she had said at [43] (quoted at para 13 above) she added, at [59],

> "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."

24. Mr Hill accepted that *Reed Employment* related to a demand for an additional sum rather than, as here, a change of reasons for claiming the same amount but argued that Judge Mosedale's distinction was a false one. What was clear, he said, was that *Reed Employment* established that the claim as amended had to arise out of the same subject matter as the original claim, and could not be extended to facts or circumstances not within the contemplation of the original claim. That was the case whether the basis for the amendment was a change of reasons or a change of amount. Indeed, Judge Mosedale's approach was illogical; if it is permissible to change the reasons it is difficult to see why it should not also be permissible to change the amount, yet at [103] Judge Mosedale had excluded that possibility.

25. It was also illogical to treat as an amendment the abandonment of one claim and its replacement by another for no better reason than that they happened to be for the same amount—particularly when they were for the same amount only because the taxpayer had decided to limit the replacement claim. It would be absurd, Mr Hill said, to treat two claims as the same solely because they happen to be for the same amount when they differ in every other respect.

26. Judge Mosedale had relied on what she regarded as the analogous case of *BUPA Purchasing (No 2) v Customs and Excise Commissioners* [2008] STC 101, a decision of the Court of Appeal. That case related to an assessment rather than a s 80 claim. The question before the court was whether it was permissible for HMRC to amend an in-time assessment, after expiry of the time limit, by adjusting the amounts of input tax and output tax taken into account and, in consequence, the overall amount due. After the original assessment was made HMRC recognised that further input tax credit was due, but also that additional output tax should have been assessed. Arden LJ, with whom Auld and May LJJ agreed, recorded HMRC's concession—as she described it—that an assessment must be supported by reasons and that an amended assessment must be derived from the same transactions as the original assessment. She went on to conclude that in a case in which the assessment was adjusted so as to allow greater credit for input tax it could also be adjusted so as to assess a greater amount of output tax. The only limitations were that the net amount of tax due from the taxpayer could not be increased and that, as HMRC had (in her view correctly) conceded, the adjustments must arise from the same transactions as the original assessment.

27. Judge Mosedale's perception of that case appeared at [89]:

> "… *BUPA* is looking at the mirror image to this case. Here, the question is the meaning of '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 [*sic*] 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?"

28. That analysis, Mr Hill said, was not correct because *BUPA Purchasing* is not the mirror image of a case such as this. What was in issue in that case was the meaning of the phrase "assessment of the amount of VAT due" as it is used in s 73(1) of VATA. The conclusion was that it meant the net amount owed by the taxpayer and not the amounts of input tax and output tax which led to that net amount. Arden LJ made that clear at [41] with her observation that "the critical figure for the purpose of the assessment remains the bottom line figure – the amount of VAT due". As Arden LJ herself recognised at [46], s 73 does not impose any obligation on HMRC to provide reasons – if there is such an obligation it is to be derived from HMRC's public law duties. That position is to be contrasted, Mr Hill said, with the express requirement of reg 37 that the method of calculation be provided, and the implicit requirement of reasons.

29. The differences between the requirements which must be met in respect of an assessment and those relating to a repayment claim are justified by sound policy reasons. A taxpayer should retain all the records of his business so as to allow him to calculate a claim and provide supporting reasons. By contrast, HMRC may not have access to those records and will often be unable to provide full reasons and a precise calculation. That is why s 73 requires only that HMRC assess to the best of their judgment. That the requirements imposed on a taxpayer and the taxing authority may legitimately differ has been recognised by the CJEU in *Ecotrade SpA v Agencia delle Entrate – Ufficio di Genove 3* (Joined Cases C-95/07 and C-96/07) [2008] STC 2626, in which it observed, at [51], that "the position of the tax authority cannot be compared with that of a taxable person."

30. Arden LJ said more about the tax authority's position in *BUPA Purchasing* at [58]:

> "VATA thus requires the Commissioners to make an assessment only to the best of their judgment … In setting the standard at best judgment, Parliament has … recognised that there is no absolute certainty about the amount of the VAT due or its components in an assessment under s 73(1). It has also expressly recognised that as other facts become known or as the matter develops further assessments may be needed … It is true that there is no express power for the Commissioners to amend the input and output tax 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 overclaimed input tax or underdeclared output tax (as the case may be), must in my judgment follow from and be implicit in the best judgment requirement. Those powers are reasonably necessary for carrying out the assessment process. Otherwise, the Commissioners could find that even though they raised an assessment to the best of their judgment at an appropriate time that assessment cannot be amended to reflect facts and matters becoming known later in the particular circumstances of this type of case in circumstances where it would be proper and reasonable for them to make those changes."

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. That difference was recognised by this tribunal in *Lothian NHS Health Board v Revenue and Customs Commissioners* [2015] UKUT 264 (TCC), [2015] STC 2221, in which it also pointed out that the burden of establishing an overpayment, and its amount, rested on the taxpayer. The fact that it is the taxpayer who should have the necessary information also explains why, in the case of a challenge to an assessment, it is the taxpayer who bears the burden: see *Tynewydd Labour Working Men's Club and Institute Ltd v Customs and Excise Commissioners* [1979] STC 570. It follows therefore that it is not possible to treat a repayment claim as the mirror image of an assessment.

32. Even so, it is apparent from what Arden LJ said in *BUPA Purchasing*, particularly at [68], that HMRC are confined when amending an assessment to the same series of transactions, and cannot simply replace one set of reasons with another. If that limitation applies to the amendment of an assessment, it must be of equal application to the amendment of a repayment claim. The logical consequence of Judge Mosedale's approach, however, is that HMRC are held to a considerably stricter standard when amending an assessment than is applied to a taxpayer seeking to amend a repayment claim.

33. At [104] Judge Mosedale had added that a statutory interpretation other than that at which she had arrived

> "would mean that, despite the making of a claim within s 80 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."

34. That observation, said Mr Hill, reveals a misunderstanding of the purpose of the time limit. It is quite clear, even on Vodafone's own case, that had it not had an outstanding, unresolved claim the later claims would have been out of time and HMRC would be quite right to refuse to meet them. The fact that the same result will follow if this appeal is allowed does not represent a windfall for HMRC; it is simply the effect of the time limit.

Vodafone's submissions

35. Mr Andrew Hitchmough QC, leading Ms Laura Poots, accepted that a repayment claim must be supported by reasons but, he said, there was no basis for the importation of a restriction on subsequent amendment of those reasons. The F-tT was correct to conclude that as long as a claim remains unresolved it is open to the claimant to advance any sustainable basis for the claim, provided only that the amount claimed does not increase.

36. The starting point was the legislation itself. Section 80 refers to a claim for "an amount". If a valid claim is made HMRC are liable to credit the person with "that amount". Regulation 37, too, refers to "the amount" of the claim. It is, therefore, the amount of the claim which identifies it and is its essential characteristic. In the absence of any statutory limitation on the amendment of reasons which, it should be remembered, are an implicit rather than express requirement, none should be implied. If, despite the repeated references to an "amount", it is permissible to increase the amount of a claim, as the decision in

Reed Employment shows, provided only that the additional amount arises out of the same subject matter, it must be equally permissible to amend the reasons. It was recognised both in *Reed Employment* and in *General Motors* that the method of calculation of a claim might be amended, and that the documentation relied upon might be substituted. It would be appropriate to adopt that course in the case of a claim based, when first made, on an extrapolation of current sales data to earlier years in the belief that historic sales data were not available. If, thereafter, information came to light more accurately quantifying historic sales, it would be very strange if the taxpayer were not able to recalculate his claim and rely on the recently discovered information.

37. It follows that the requirements, both express and implied, of the legislation are not inflexible. The F-tT was right to find that the elevation of an implicit need for reasons to a bar on amendment of those reasons was not warranted by the statutory wording, and would moreover lead to an illogical result: on HMRC's case, the express requirements are flexible but the implied requirements are rigid. That was what Judge Mosedale had said, correctly, at [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."

38. HMRC were wrong to argue that there is no parallel between assessments and repayment claims. The focus of both is to identify the amount of tax over- or under-paid; the reasons are at best subsidiary. This point was illustrated by the decision of the F-tT in *Masterlease Ltd v HMRC* [2010] UKFTT 339 (TC), [2010] SFTD 1243. In that case Masterlease, which sold cars on hire purchase, accounted for VAT in full when the vehicle was delivered to the customer. It was common ground that if it repossessed the car it was entitled to adjust the amount of VAT paid by it on the original sale, because it would no longer receive the entirety of the agreed price, and the question was whether the adjustment should be made in accordance with reg 38 of the VAT Regulations, as Masterlease proposed, or by way of a s 80 claim, as HMRC contended. Masterlease had also failed to account for output tax on its disposals of the repossessed cars. If it was correct that reg 38 was in point, HMRC would be unable to assess for the output tax for which Masterlease had failed to account as they would be out of time to do so. If, instead, Masterlease was compelled to make a s 80 claim, HMRC would be able to offset the under-declared output tax against the amount of the claim.

39. The tribunal decided that HMRC were right, and based their conclusion in part on the submission made by counsel for HMRC, and recorded at [14], that "The correct amount due did not depend on the reason why it was not due." HMRC's position now is inconsistent with what they argued in that case. The F-tT accepted the argument, observing at [18] that the amount of a claim "is not tied to the reason why it was not output tax due". The result of that analysis was that HMRC were liable to repay only the net amount of overpaid VAT in each accounting period, measured in relation to the period as a whole and not by

reference to any particular supply. Judge Mosedale was right to reach the same conclusion in the instant case.

40. The same point can be illustrated by examining what HMRC did following the making of the assessment relating to Vodafone's sales of phone cards for use in Ireland, to which we have referred above. After Vodafone had appealed, and before the appeal was resolved, it made what would otherwise have been an out-of-time claim for repayment of output tax which it had over-declared, in the same periods but for entirely unconnected reasons. HMRC agreed to reduce the assessment in order to reflect those overpayments. They did so because the purpose of an assessment is to recover the correct amount of tax due for a particular accounting period. Similarly, if a taxpayer makes a claim which has not yet been resolved, it would be open to HMRC to offset against it tax underpaid for the same period, again for unconnected reasons. Mr Hitchmough accepted that there was no exact comparison between those situations and the present, but argued that they demonstrated that the proper focus is on the amount of tax over- or under-paid, and not the reasons why the tax been over- or under-paid. Thus allowing a claimant taxpayer to amend his reasons is consistent with a focus on the correct amount of tax.

41. In *BUPA Purchasing* HMRC had made an assessment whose purpose was to recover input tax which, at that time, HMRC considered not to be deductible. After expiry of the relevant time limit they accepted that the input tax was, after all, deductible but that BUPA Purchasing had failed to account for output tax which was due for the same periods. It was, as Judge Mosedale said, "an in-time assessment but for the wrong reasons." The essence of the taxpayer's argument was that the reasons given for making an assessment form part of the assessment itself and are fixed; it was not open to HMRC to assess the same amount but for different reasons. HMRC, however, submitted that although they were obliged to give reasons for an assessment the reasons did not form part of the assessment itself and could be amended unless there was some public law objection. It was HMRC's arguments which were accepted.

42. While it is true that there are differences between assessments and repayment claims, for example that HMRC are required to assess only by the exercise of best judgment whereas a taxpayer is required to be more precise, it is nevertheless conspicuous that the statutory language used in the relevant provisions is similar. Both refer to "the amount of VAT due". Neither imposes a requirement that reasons must be given, but it is accepted by HMRC as well as Vodafone that in both cases there is an implicit requirement of reasons. Although they may not be exact mirror images, they have mirror purposes: to recover underpaid VAT, or to recover overpaid VAT. The statutory provisions should therefore be interpreted consistently. That was exactly what Judge Mosedale had said at [89] (see para 27 above).

43. HMRC, however, are attempting to differentiate assessments and claims by importing restrictions on amendments of claims while resisting their imposition on assessments. There is no warrant for doing so; once the basis of an assessment or a claim has been identified, what follows is purely administrative. Moreover, HMRC's argument does not reflect what Arden LJ actually said in *BUPA Purchasing*. The same point was addressed by Judge Mosedale at [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."

44. HMRC had conceded, as Arden LJ recorded, that they would not seek to alter the basis for an assessment by relating it to different transactions, but the basis for the concession is unexplained. The purpose of the legislation is to ensure that the correct amount of tax is accounted for, period by period, and *Masterlease* is a good example of the manner in which that purpose is put into practice.

45. HMRC's analysis of *Reed Employment*, too, was incorrect because it is elided the two questions considered by this tribunal, namely the meaning of "claim"; and whether a further demand for an additional amount represented the amendment of an existing claim. The elision is not permissible because one cannot answer the second question until the first has been addressed. The definition of a "claim" given by Roth J was "a demand for repayment of overpaid tax". He did not qualify that definition by any reference to reasons or even the underlying facts. His answer to the second question was that an increase in the claim could be regarded as an amendment only if it arose out of the same subject matter as the original claim, but that is not a consideration in this case because Vodafone has made only a single claim, for the repayment of overpaid output tax of about £4.1 million.

46. HMRC's argument that allowing a change of the reasons supporting the claim would undermine legal certainty is misconceived. A change of reasons does not have that effect; HMRC knew from the outset that they were faced with a claim for about £4.1 million, and that remains their position. They have greater certainty than they had in *Reed Employment*, where they were faced with the possibility of an increase in the claim even if, in the event, that did not happen. Arden LJ addressed this point in *BUPA Purchasing*, albeit the roles were reversed in that case. She put her conclusions in this way:

> "[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."

Discussion

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. To take a very simple example, suppose he makes two supplies, supply A for a consideration giving rise to VAT of £X and supply B for a consideration giving rise to VAT of £Y. He then accounts for VAT of £(X+Y). He has brought into account £X as output tax in relation to supply A and £Y as output tax in relation to supply B. If it transpires that the £X was not output tax due, that is because it was not output tax due in relation to supply A.

48. Now suppose that the taxpayer considers that supply A did not give rise to output tax at all. If he is correct, HMRC are liable to credit him with £X. But that is not a sum of £X in abstract; it is a credit against the VAT for which he has accounted in respect of supply A. If it turns out that he is wrong in his contention that supply A did not give rise to output tax, then he has not incorrectly accounted for the £X output tax in respect of that supply.

49. Continuing with the hypothesis that supply A did give rise to output tax of £X, suppose next that in fact supply B did not give rise to output tax so that the taxpayer has accounted for £Y as output tax in respect of supply B which was not output tax B. HMRC are then liable to credit him with £Y in respect of the output tax for which he has accounted in relation to supply B. If Y is greater than X, then it can be said that HMRC are liable to credit him with at least £X. Their liability, however, is to credit him with the amount for which he has accounted which was not output tax due. The £X due in relation to supply A is not, to state the obvious, output tax which has been accounted for in relation to supply B. HMRC has no liability in relation to the £X properly accounted for in relation to supply A; rather, its liability under s 80(1) is to credit the taxpayer with £Y in relation to supply B.

50. That liability is not, however, absolute. HMRC are only liable to credit or repay an amount under s 80 on "a claim being made for the purpose" as provided by s 80(2). The "purpose" there referred to is the purpose of asserting HMRC's liability under s 80(1). It is only by reference to the claim that HMRC (and, on appeal, the tribunal) is able to assess whether the claim is a good one or not.

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. In the example, the taxpayer might make a claim for £X but that claim would need to relate to the transactions in relation to which the taxpayer

contends output tax was not in fact due. It is not possible, in our view, for the taxpayer to rely on that claim as including a claim in relation to the £Y (albeit that the claim might be restricted in value to the equivalent of £X) which was accounted for as output tax in relation to entirely different transactions.

52. It follows from the discussion above that, in the present case, the later claims are not subsumed within the Nectar claim and that HMRC's appeal must therefore be allowed.

53. Thus far, we have considered s 80 by itself without reference to the regulations. If we are wrong in reaching the conclusion which we have by reference to s 80 alone, then it becomes necessary to consider the interaction of that section with regulation 37. We now turn to that.

54. It is apparent from s 80(1) and (2) that the taxpayer's claim must be a demand for a particular amount, namely the amount of output tax which was not due. However, the process of identification of a claim does not end there. Subsection (6) imports the mandatory requirements which are set out in reg 37. Although we agree that the regulation is primarily procedural rather than substantive, when it is read together with sub-ss (1), (2) and (6) it is apparent not only that the requirements of writing, of the statement of the amount of the claim and of the method of calculation are obligatory, since without them there is no claim within the statutory meaning, but that they are also the elements which, together, identify the claim.

55. It follows that we do not accept Mr Hitchmough's argument that a claim is defined by its amount alone. The argument is not consistent with the statutory words: reg 37 requires the claimant to state both the amount of the claim and the method by which that amount was calculated. We do not see any basis on which it could reasonably be concluded that the first is fixed and immovable whereas the second can be changed at will, as Mr Hitchmough's argument implies. The draftsman has imposed two distinct even if interdependent requirements and there is nothing in the words used to suggest that one is more important than the other, or has a different character from the other.

56. We agree with Judge Mosedale that s 80 and reg 37 carry with them an implicit requirement that a claimant should provide reasons sufficient to enable HMRC to understand why the claim has been made. We agree too with Mr Hitchmough that it would be strange if the implicit requirement of reasons were to be rigid while the mandatory requirements of reg 37 were flexible. The requirement to identify the methodology by which the amount of the claim is ascertained will, expressly or by necessary implication, identify the elements of the output tax brought into account which are said not to be output tax due. At least, we have been unable to conceive of a case where that requirement would not do so. In that sense, the reasons for the claim will be provided by the claim. But that is not the important point, which is that the requirement relating to methodology forms part of the identification of the claim, defining what the claim actually is.

57. The essence of the conclusion of Roth J in *Reed Employment* was that a claim could be amended, even if the amendment consisted of a change in the amount claimed or the method of calculation, as long as the fundamental character of the claim was unchanged: in other words, the amended claim had to arise out of essentially the same facts or circumstances as the original claim. The examples

Roth J gave in that case, at [33], were of the correction of an arithmetical mistake or the addition of an element of claim which the taxpayer had plainly intended to include but which, by mistake, he had omitted. Those examples are consistent with our own conclusion that it is the amount and the method of calculation which define the claim; amendments of that kind do not alter its fundamental character. Nothing Roth J said limited the permissible amendments to those which did not increase the amount of the claim, and we respectfully agree with him on that point; once it is accepted that amendment is possible, there is no logical reason for a restriction of that kind. Indeed, one of the examples he gave might result in an increase in the overall amount of the claim, and the second almost inevitably would do so.

58. By contrast, the example of an impermissible amendment he gave at [38] was of the addition of a further claim arising out of similar but not the same circumstances. The reason why the taxpayer was unsuccessful in that case was not because of an amendment of the calculation, nor because the amendment, if allowed, would increase the value of the claim, but because it was attempting to add what was in reality a separate claim. Again, we agree with Roth J's reasoning and with his conclusion.

59. We agree with Mr Hitchmough that an assessment and a s 80 claim are mirror images of each other in the sense that their purposes are similar – an argument which, we think correctly, identifies a lesser degree of similarity than did Judge Mosedale. It does not, however, follow that the mechanics of the two processes, and in particular the requirements which must be met, must be as near as may be identical. The CJEU recognised in *Ecotrade* that there could legitimately be asymmetry between the positions of the taxpayer and the taxing authority. In that case the contrast which fell to be considered was between the length of the applicable time limits, which required the taxpayer to make his claim within two years while allowing the taxing authority four years to make an assessment. The court held that the disparity was permissible, provided only that the principles of equivalence and effectiveness were respected. Although we accept that words and phrases common to assessments and claims should, where possible, be given similar meanings we do not accept the implicit proposition that the tribunal should strive to interpret the provisions, unless it is impossible to do so, in a manner which leads to equality of treatment. The comparison with assessments is, therefore, of only limited assistance.

60. Arden LJ dealt with the asymmetry between the positions of the taxpayer and the tax authority, in a context more closely aligned to this, in *BUPA Purchasing*, and at the same time explained some of the policy reasons for the latitude allowed to HMRC: see the passage from her judgment quoted at para 30 above. There is an obvious difference between the position of HMRC who, in many cases, will not have access to the full facts, and that of the taxpayer who has, or should have, access to his own records. In the taxpayer's case, the need for latitude is correspondingly reduced although, as Roth J indicated, it is not eliminated. Nevertheless, it does not seem to us to be offensive to require a taxpayer making a repayment claim to provide the basis of the calculation of his claim and to be bound by what he has put forward, subject to amendment at least to allow for the correction of mistakes and accidental omissions.

61. In our judgment the correct view is essentially that reached by Roth J in *Reed Employment*. A claim must satisfy the mandatory requirements of writing, amount and method of calculation. The latter two identify its character – how much is claimed, and how that amount was determined. Errors and omissions may be corrected provided the correction does not enlarge the scope of the claim by adding elements not in contemplation when the claim was originally made.

62. In *Reed Employment* the taxpayer attempted to enlarge its claim by adding to it a further element arising from similar facts but in respect of supplies which were not within the contemplation of its original claim. For the reasons we have given we agree with Roth J that it was not permissible to effect such an amendment. Vodafone wishes to go even further, by changing the entire basis of its claim. It is, as Mr Hill says, attempting to abandon one claim and pursue another. In our judgment that is not a permissible course; it amounts to an attempt to circumvent the time limit imposed by s 80(4). We accept that the result of that conclusion is that HMRC will not be required to meet an otherwise meritorious claim, but as Mr Hill correctly said, that is the ordinary consequence of the operation of a time limit and not a peculiar feature of this case.

63. Accordingly, even if we are wrong in our conclusion based on s 80(1) and (2) alone without reference to regulation 37, we consider that subsection (6) and reg 37 preclude Vodafone from relying on the Nectar claim as subsuming any part of the later claims.

Disposition

64. HMRC's appeal is allowed. The F-tT's decision is set aside and the matter is remitted to the F-tT for it to continue to determine the validity of the Nectar claim.

Mr Justice Warren

Judge Colin Bishopp

Upper Tribunal Judges

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