[2019] UKUT 0017 (TCC)

Appeal numbers: UT/2018/0119
UT/2018/0120

INCOME TAX – claims for repayment of tax paid by German real estate investment funds under the Non-Resident Landlord scheme – whether original claim for all income tax or only a proportion – if not, whether claim could be amended under TMA s114 – application to amend claim under Rule 5(3)(c) of FTT Rules – whether FTT could direct repayment of a greater sum than was claimed under TMA s50 or Schedule 1A – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) GLL BVK INTERNATIONALER IMMOBILIEN SPEZIALFONDS
(2) iii-BVK EUROPA IMMOBILIEN SPEZIALFONDS **Appellants**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 4 December 2018

Nicola Shaw QC for the Appellants

Ravi Mehta and Celia Rooney, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the decision on the appeal by GLL BVK Internationaler Immobilien Spezialfonds ("GLL") and iii-BVK Europa Immobilien Spezialfonds ("iii-BVK") (together "the Appellants") against the decision of the First-tier Tribunal ("FTT") released on 21 May 2018 and reported at [2018] UKFTT 384 (TC) ("the Decision").

Background

2. The Appellants are German real estate investment funds. Since their precise characteristics may be relevant in the ongoing FTT proceedings, and since we had no evidence as to those characteristics, we will simply recite the Appellants' contentions as to relevant characteristics without making any findings. As a matter of German law, it is said that the Appellants have no separate legal personality and they are therefore managed by separate management companies. At all material times, both Appellants held interests in UK real estate (the legal title to which was vested in their respective management companies) and rent on those properties was paid under deduction of income tax under the Non-Resident Landlord ("NRL") scheme. Each of the Appellants was said to be fiscally transparent.

3. One of the fifteen ultimate owners of the Appellants was a German pension fund, Bayerische Architektenversorgung ("Bayerische"). Bayerische held approximately 14% of iii-BVK and 17% of GLL, through its 100% holding in BARCHV-Masterfund ("Masterfund"), another German fund which was said to be fiscally transparent. The other ultimate owners of the Appellants were also German pension funds who also held interests in the Appellants through separate "masterfunds" that were also said to be fiscally transparent.

4. On 28 February 2014 the Appellants wrote to HMRC claiming repayments of income tax paid under the NRL scheme for the four years ending 5 April 2010 through to 2013.[1]

5. HMRC understood the letter of 28 February 2014 to relate only to tax attributable to the proportionate interest of Bayerische in the Appellants (which we will refer to throughout this decision as "Bayerische's share" of that income tax), and not to tax attributable to the interests of the other German entities which ultimately owned the Appellants. They refused the claim on the basis that Bayerische was not registered as UK tax law required under the Finance Act 2004.

6. On 4 August 2017 the Appellants appealed to the FTT against HMRC's refusal, on the grounds that it was a breach of the EU principles of equal treatment and the free movement of capital.

[1] In fact, two materially identical letters were sent. However, neither party suggested that anything material turns on this fact and for the purposes of this decision, we will refer only to the letter of 28 February 2014.

7. The position of the Appellants was that the claim made on 28 February 2014 was, contrary to HMRC's view, for repayment of all income tax referred to in that letter, not just Bayerische's share of that income tax.

8. On 2 February 2018 the Appellants made the following alternative applications to the FTT:

> (1) to amend their grounds of appeal "so as to particularise the quantum of their claims for repayment of tax" on the basis that the claims as originally made were for a repayment of the tax relating to the other beneficial owners, as well as for that relating to Bayerische ("the First Application"), or
>
> (2) for a ruling that section 114 of the Taxes Management Act 1970 ("TMA") permitted the Appellants to amend their claims so as to encompass the other beneficial owners ("the Second Application"), or
>
> (3) for the Tribunal to direct under Rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") that the claim be amended in that way ("the Third Application"), or
>
> (4) for a ruling that section 50 and/or paragraph 9(5) of Schedule 1A of TMA gave the FTT power to direct HMRC to repay all the tax referred to in the letter of 28 February 2014 and not just Bayerische's share ("the Fourth Application").

9. The Second and Fourth Applications had been presented by the Appellants as "applications for rulings". The FTT, noting that it had no jurisdiction to give "rulings", treated those applications as applications for the relevant issues to be dealt with as preliminary issues under Rule 5(3)(e) of the FTT Rules.

10. The FTT refused all four Applications. With permission of the FTT, the Appellants now appeal against the four decisions to refuse the applications.

11. As with the Decision, this appeal is not concerned with the substantive issues which are under appeal.

First Application

12. The issue raised by the First Application is whether the claim submitted to HMRC on 28 February 2014 ("the Claim Letter") was, as HMRC contend, a claim for repayment just of Bayerische's share of the income tax, or, as the Appellants contend, for all income tax referred to in the Claim Letter. If the latter interpretation is correct, then the Appellants apply, under Rule 5(3)(c) of the FTT Rules, to amend their grounds of appeal to give particulars of the full amount of income tax claimed.

Relevant legislation

13. The claims were made under Schedule 1AB of TMA. Paragraph 1 of that Schedule is headed "Claim for relief for overpaid tax" and reads:

> "(1) This paragraph applies where:

(a) a person has paid an amount by way of income tax or capital gains tax but the person believes that the tax was not due…

(2) The person may make a claim to the Commissioners for repayment or discharge of the amount.

(3) …

(4) Paragraphs 3 to 7 (and sections 42 to 43C and Schedule 1A) make further provision about making and giving effect to claims under this Schedule."

14. Paragraph 3 of Schedule 1AB of TMA states:

"(1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.

(2) In relation to a claim made in reliance on paragraph 1(1)(a), the relevant tax year is:

(a) …

(b) …the tax year in respect of which the payment was made."

15. Section 42 of TMA, referred to in paragraph 1(4) of Schedule 1AB, is headed "Procedure for making claims etc" and reads:

"(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.

(1A) Subject to subjection (3) below, a claim for relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.

…

(9) Where a claim has been made (whether by being included in a return under section 8, 8A, 4 or 12AA of this Act or otherwise) and the claimant subsequently discovers that an error or mistake has been made in the claim, the claimant may make a supplementary claim within the time allowed for making the original claim.

…

(11) Schedule 1A to this Act shall apply as respects any claim or election which

(a) is made otherwise than by being included in a return under section 8, 8A, 12ZB or 12AA of this Act."

16. Schedule 1A, referred to in s 42(11) of TMA above, provides at paragraph 2(3) that "a claim shall be made in such form as the Board may determine". However, the parties agreed that HMRC do not prescribe any particular form for a claim.

17. TMA Schedule 1A paragraph 3(1)(b) allows a claimant to amend a claim "at any time before the end of the period of twelve months beginning with the day on which the claim is made".

The Claim Letter

18. The FTT summarised the relevant passages of the Claim Letter, and its finding in relation to "the Fifth Agreement" said to be attached to the Claim Letter, as follows:

"17. On 28 February 2014, BNP Paribas sent the Claim Letter to HMRC. It was headed:

"GLL BVK Internationaler Immobilien Spezialfonds

iii-BVK Europa Immobilien Spezialfonds

Claim for overpayment relief – tax years ended 5 April 2010, 2011, 2012 and 2013"

18. The first paragraph read:

"We hereby give notice of a claim under Schedule 1AB TMA 1970, for relief from the overpayment of income tax suffered by each of the entities named above under the Non Resident Landlord scheme in the tax years ended 5 April 2010, 2011, 2012 and 2013. In total, £1,719,337 of income tax was suffered under the scheme and paid to HMRC by iii-BVK Europa Immobilien Spezialfond and £4,653,798 was suffered by GLL BVK Internationaler Immobilien Spezialfonds. A further breakdown of these amounts can be found in Appendix 1."

19. The Claim Letter went on to say that it contained the following:

- background of the current holding structure of iii-BVK and GLL;
- the grounds for the claim which includes the technical analysis that the holding structure between the ultimate investor and the UK real estate assets held by iii-BVK and GLL is transparent for UK tax purposes;
- the characteristics of the ultimate investor that shows it is comparable to a UK pension fund; and
- the application of EU law which sets out that entities should be treated equally regardless of residence."

20. The first page ends with the words "no claim or appeal in relation to the overpayment of income tax has previously been made by the above named entities or any of their members".

21. Under the first heading, being "Background", the Claim Letter says that Bayerische is a German pension fund, and describes its membership and the restrictions under which it operates. It then continues:

"Bayerische currently invests in UK real estate indirectly through its 100% holding in a German fund, BARCHV-Masterfund ('Masterfund'), which in turn has a c.14% holding in iii-BVK and a c. 17% holding in GLL (the exact percentages held by Masterfund in each year can be found in Appendix 1). The remaining units in iii-BVK and GLL are held by 15 other similar masterfund and pension scheme vehicles. As such this claim is only in respect of the proportion of profits in iii-BVK and GLL that are attributable to Masterfund (see Appendix 1)."

22. Appendix 1 was divided into tax overpaid by iii-BVK and tax overpaid by GLL:

Tax overpaid by iii-BVK		
Tax year	Total tax paid by Fund	Masterfund's allocation of tax paid
5 April 2010	£557,001	£81,211 (14.58%)
5 April 2011	£348,215	£50,770 (14.58%)

5 April 2012	£345,468	£44, 364 (12.92%)
5 April 2013	£468,653	£61,019 (13.02%)
Total	£1,719,337	£237,634
Tax overpaid by GLL		
5 April 2010	£1,688,959	£276,989 (16.4%)
5 April 2011	£1,300,290	£213,248 (16.4%)
5 April 2012	£980,514	£160,804 (16.4%)
5 April 2013	£684,035	£116,149 (16.98%)
Total	£4,653,798	£767,190

23. Under the heading "Grounds for claim" the Claim Letter reads:

"On the basis that Bayerische is a German Pension Fund that is equivalent to a qualifying UK pension fund, we consider that EU law that sets out the equal treatment of entities regardless of residence should be applied to Bayerische. Consequently we believe that Bayerische should be taxed in the same manner as a UK pension fund, with any investment income received being exempt from UK tax.

Notwithstanding any arrangements entered into for tax management purposes we consider that the Funds and Masterfund are tax transparent entities for UK income tax purposes and therefore the relevant allocation of profits (as detailed in Appendix 1) arising for the UK real estate assets held directly by the Funds should be taxed in the hands of Bayerische and therefore the tax suffered by the Fund [sic] on this amount of profit should be repaid."

24. There are then several subheadings, all falling under the same main heading "Grounds for claim". These subheadings are italicised below:

(1) *Transparency of iii-BVK and GLL*, which explains the structure, as summarised at §14-16 above;

(2) *Transparency of Masterfund*. This says that Masterfund is tax transparent and that "Bayerische as the sole investor in Masterfund and therefore one of the beneficial owners of the assets in the Funds, should be assessable to income tax on the profits derived from the assets in the Funds rather than a Masterfund".

(3) *Tax treatment of the Funds and Masterfund according to German Law*. This section concludes by saying "any income arising in Masterfund is attributed to Bayerische and taxed at the level of the Bayerische whether or not such income is actually distributed".

(4) *General characterisation of Bayerische*. This explains how Bayerische is set up and concludes "we consider that Bayerische is [in] a comparable position to a UK pension fund…".

(5) *Tax treatment of Bayerische in the UK*. This ends by saying "as we regard Bayerische to be in a comparable situation to a UK pension fund…therefore Bayerische should be exempt from suffering UK tax on its investment income". It also cross refers to Bayerische's Articles of Association, which are attached as Appendix 6 to the Claim Letter. A discussion of EU law was included, together with an explanation as to why Bayerische should be treated in the same way as a UK pension fund.

(6) *Tax treatment of Bayerische in Germany*, which explains that Bayerische has obtained a German tax exemption certificate.

(7) *Summary of claim*, which says:

"…Bayerische is ultimately entitled to its share of the profits arising from the UK real estate assets held by the Funds and should therefore be treated as the taxpayer. However under EU law Bayerische should be treated in the same manner as an equivalent UK entity…"

(8) *Declaration* which states that the contents of the Claim Letter are "correctly stated" to the best of the knowledge and belief of the signatories representing iii-BVK and GLL and asks HMRC to copy all correspondence to Ms Oakes at KPMG in London.

25. The Claim Letter is signed (although the signatures are indecipherable); the text underneath states that it has been signed by BNP on behalf of iii-BVK and by PATRIZIA on behalf of GLL.

26. Attached to the Claim Letter are a number of documents. The Tribunal was taken only to the Fifth Agreement between iii-BVK and a list of Master Funds who are defined as "the investors" in iii-BVK. The Fifth Agreement is neither signed nor dated, but the opening paragraph states that:

"the investors approve the alteration of the 'general and special fund rules'…the fifth agreement herewith agreed takes effect at the same time and replaces the prior version…as well as the side-letter dated 16 February 2012."

27. From the date there stated, I find as a fact that the Fifth Agreement was drawn up after 16 February 2012. I further find that the Fifth Agreement was drawn up after the end of the relevant period. That this is correct is confirmed by the inclusion on the list of investors of a Masterfund (BÄV) which did not invest in the Funds until after the relevant period, see the further findings at §40 and §43(2).

28. On 11 March 2014, a further Claim Letter was sent to HMRC, this time from PATRIZIA. It appears to be a mirror image of the Claim Letter dated 28 February 2014, albeit without the Appendices and attachments. Both parties confirmed that this was the position, and as a result I have not separately considered that Claim Letter."

The Appellants' submissions

19. Ms Shaw made the following submissions on behalf of the Appellants:

(1) The proper construction of the Claim Letter is a question of law. The correct approach is to have regard "to the words used, to the provisions of the agreement as a whole, to the surrounding circumstances in so far as they are known to both parties, and to commercial common sense": see *Secret Hotels2 v HMRC* [2014] UKSC 16, at [34]. The intention of the writer is not relevant to that process.

(2) The *contra preferentem* rule, by which an ambiguity in a contract is resolved against the party which inserted the relevant clause, is not applicable since the Claim Letter is not a contract.

(3) The opening paragraph of the Claim Letter plainly states that it is a claim for repayment of overpaid tax in the amounts £1,719,337 and £4,653,798.

(4) That opening paragraph is sufficient without more to satisfy the prescribed content for a claim under Schedule 1AB of TMA, according to section 42.

(5) The remainder of the Claim Letter simply provided the background and context to the claims, which it did by reference to the circumstances of Bayerische, but did not limit their quantum.

(6) As a matter of "commercial common sense", there was no reason to limit the claims to the tax attributable to Bayerische. The reference to "15 other similar masterfund and pension scheme vehicles" meant that the other investors were all similarly constituted and thus comparable to Masterfund and Bayerische.

(7) The reference to the remaining investors is consistent only with the Claim Letter making claims for all of the income tax paid, because the existence and nature of the other investors is completely immaterial if the only amounts claimed were those attributable to Bayerische.

(8) The Fifth Agreement which was appended to the Claim Letter listed all of the masterfunds which had invested in iii-BVK. A similar agreement in respect of GLL was also appended to the Claim Letter. The finding of the FTT that the Fifth Agreement was "dated after the relevant period" was incorrect.

20. For HMRC, Mr Mehta and Ms Rooney supported the FTT's construction of the Claim Letter and the reasons it gave.

The FTT decision

21. We set out in full the FTT's reasoning and decision on the First Application, which begins at paragraph 61 of the Decision:

> "*Discussion of the First Application*
>
> 61. I agree with HMRC, for the reasons given by Mr Mehta and for the following further reasons.
>
> 62. The only fair and reasonable reading of the Claim Letter is that it related only to Bayerische. This is evident from the paragraph relied on by Mr Mehta and cited at §55. It is also clear from the subparagraphs under the heading "grounds for claim", summarised at §24. The first two subparagraphs set out the general background, but the remainder relate explicitly and only to Bayerische and to the BARCHV-Masterfund, in which Bayerische is the only investor. The final paragraph of the "grounds for claim" says (emphases added) "Bayerische is ultimately entitled to its share of the profits arising from the UK real estate assets held by the Funds…Bayerische should be treated in the same manner as an equivalent UK entity".
>
> 63. As for the other investors, they are not even named in the Claim Letter. Miss Shaw submitted that they were set out as parties to the Fifth Agreement, but that was dated after the relevant period, and includes BÄV, which could not have made a claim because it did not invest during the relevant period.

64. Moreover, the Claim Letter does not say that the position of the other investors was "the same" as Bayerische's position, but rather that (again, emphasis added) that "the remaining units in iii-BVK and GLL are held by 15 other similar masterfund and pension scheme vehicles".

65. Miss Shaw placed particular reliance on the opening paragraph of the Claim Letter, which refers to the total tax paid by the Funds. However, that was the necessary starting point for the claim made in relation to Bayerische, because the self-assessments filed by the Funds identified only the total tax deducted, not the amounts attributable to the underlying investors. In other words, before tax could be repaid to Bayerische, the Funds had first to show that it had been paid to HMRC. The opening paragraph provided that necessary context. It did not set out the quantum of the claim.

66. Miss Shaw is of course correct that the Claim Letter cannot be interpreted by reference to the subsequent correspondence. However, having arrived at my view as to the meaning of the Claim Letter, I agree with HMRC that until 2017, more than three years after the Claim Letter had been submitted, both parties held exactly the same view as to the nature and scope of the claim.

67. In particular, in the appeal letter of 14 December 2016, KPMG explicitly set out the quantum of the claim as being the amounts related to Bayerische; when it set out the reasons for the appeal, it also referred only to Bayerische. Miss Shaw sought to explain the wording of the appeal letter by saying that KPMG did not submit the Claim Letter and "only became involved when the closure notices were issued". I do not accept this. The Review Letters refer to letters dated 6 August 2013 and 27 February 2014, both of which predate the Claim Letter, and describe them as having been received from "your representative in this matter, KPMG". The Claim Letter ends by requiring that all correspondence be copied to KPMG, see §24(8). I therefore find as a further fact that KPMG was acting for the Applicants both before and after the Claim Letter was submitted.

68. Given that KPMG was the Applicants' representative at the time of the Claim Letter, it is simply not credible that the claim was always for a total of £6,373,135. On 14 December 2016 KPMG instead confirmed that total was only £1,004,824. It is also not credible that KPMG would have referred only to Bayerische when explaining the basis of the appeal. The only reasonable inference from the appeal letter of 14 December 2016 is that KPMG understood the claim to relate only to Bayerische, and did not extend to the other investors, and I find this to be a fact. It was not until the following year that KPMG and the Applicants decided to argue that the Claim Letter had always been for the higher amount.

69. Miss Shaw also refers to the fact that the Grounds of Appeal do not refer to "Bayerische", but instead to "the Bayerisches", defined as "German occupational pension funds…who invest via Masterfunds. However, using that terminology in the Grounds does not change the position, because:

> (1) the Grounds are not to be read in isolation, but in conjunction with correspondence which included the Claim Letter, and that Letter is explicitly only referable to Bayerische; and
>
> (2) I have already found, in agreement with Miss Shaw's own submissions, that subsequent communications between the parties cannot be used to interpret the meaning of the Claim Letter. It is equally the case that the Grounds of Appeal cannot be used for that purpose.
>
> *Decision on the First Application*
>
> 70. For the reasons set out above, the First Application is dismissed."

Discussion of the First Application

22. The First Application was, in form, an application by the Appellants to amend their grounds of appeal before the FTT. The whole basis of the First Application was the Appellants' argument that, properly construed, the Claim Letter was a claim for repayment of all income tax that the Appellants had suffered under the NRL, and not just Bayerische's share. Therefore, to enable it to decide the First Application, the FTT necessarily had to determine the meaning and effect of the Claim Letter, which was a matter of law. It follows that, in determining the First Application the FTT was not simply making a discretionary "case management" decision of the kind with which the Upper Tribunal should be slow to interfere. Rather, if the FTT erred in its construction of the Claim Letter, it would similarly have erred in deciding whether to grant the Appellants permission to amend their grounds of appeal and the Upper Tribunal should consider how the First Application should have been determined on the basis of a correct construction of the Claim Letter.

23. The parties were broadly agreed as to how the question of construction should be approached, although they differed on points of detail such as whether the *contra preferentem* rule (under which, in certain situations, ambiguities in documents can be construed against the person drafting the document) was of any relevance. In *HMRC v Bristol and West plc* [2016] EWCA Civ 397, in the analogous situation where a "closure notice" issued by HMRC fell to be construed, the Court of Appeal applied an approach drawn from the law of contract and determined that the question was how the notice would be understood by a reasonable person in the position of its intended recipient. More specifically, the Court of Appeal explained its approach by reference to the speech of Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Limited* [1997] AC 749 at page 767G (a case which concerned a contractual notice served by a landlord under a lease) as follows:

> "The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene."

24. Applying the approach set out at [23], the Claim Letter was sent to HMRC and so should be construed as having the meaning that, in the light of all relevant circumstances, a reasonable HMRC officer would give it. We entirely agree with the FTT's conclusion that a reasonable HMRC officer would interpret the Claim Letter as

a claim for repayment of only Bayerische's share of the income tax. More specifically, given the breakdown of the figures set out in Appendix 1 of the Claim Letter, a reasonable HMRC officer would interpret the Claim Letter as setting out a claim by iii-BVK for repayment of £237,634 of income tax and a claim by GLL for repayment of £767,190 of income tax.

25. Since we substantially agree with the FTT's reasoning we see little point in setting out our own detailed analysis of the Claim Letter since that would achieve little more than replicating, in large part, the FTT's analysis that we have quoted at [21] above. Rather, we will focus our analysis on addressing the various challenges that the Appellants made to the FTT's reasoning.

26. Ms Shaw is correct to observe that the opening paragraph of the Claim Letter refers only to the "headline" figures of £1,719,337 and £4,653,798 of income tax that iii-BVK and GLL respectively were said to have suffered by deduction. HMRC do not dispute that the only formal requirement for a claim under Schedule 1AB of TMA is that the amount of the claim be quantified when made (see s42 of TMA). However, the mere fact that a total amount of income tax is specified in the first paragraph of the letter does not, when the Claim Letter is read as a whole, compel the conclusion that the Appellants were claiming repayment of that total sum. The paragraph of the Claim Letter on which Ms Shaw relies states only that the total amounts of income tax were suffered. It does not assert that all of that income tax is repayable. Having read the letter as a whole, a reasonable HMRC officer would have noted that, despite the reference to total amounts of income tax in the opening paragraph, (i) the Appellants stated expressly that the claim for repayment "is only in respect of the proportion of profits … that are attributable to Masterfund" (and they quantified those sums in Appendix 1) and (ii) when the Appellants formulated their claim for repayment in the section headed "Grounds for claim", they stated that, because the Appellants are "tax transparent", the "relevant allocation of profits as set out in Appendix 1 [which set out the "allocation" of profits and tax to Masterfund] should be taxed in the hands of Bayerische and therefore the tax suffered by the Fund *on this amount of the profits* should be repaid." (emphasis added) Moreover, a reasonable officer would have noted that the basis of the claim for repayment was that Bayerische specifically was in a comparable position to a UK pension fund and, beyond a general statement that other investors in the Appellants were "similar pension scheme vehicles" no specific information (such as that supplied in respect of Bayerische) was given on those other investors. Those factors would more than dispel any suggestion that the opening paragraph of the letter was intended to constitute a claim for the entirety of the income tax that the Appellants had suffered.

27. Ms Shaw rightly acknowledged that the following section of the Claim Letter posed difficulties for the Appellants' case:

> "Bayerische currently invests in UK real estate directly through its 100% holding in [Masterfund] which in turn has a c. 14% holding in iii-BVK and a c. 17% holding in GLL BVK (the exact percentages held by Masterfund in each year can be found in Appendix 1). The remaining units in iii-BVK and GLL BVK are held by 15 other similar masterfund and pension scheme vehicles. As such, this claim is only in respect of

> the proportion of profits of iii-BVK and GLL BVK that are attributable to Masterfund (see Appendix 1)."

However, she sought to address those difficulties by submitting that this section should be read as saying that, because all of the ultimate pension fund investors were "similar", the aggregate claim would be substantiated by reference to the position of Bayerische alone and HMRC should assume that the same analysis applied to all the other pension fund investors. Put another way, she submitted that, because HMRC had been told that all the pension fund investors were "similar" and because information was given in support of the proposition that Bayerische was comparable to a UK pension fund, it "did not need to be said" that the other pension fund investors were comparable, thereby counteracting any impression that only part of the income tax suffered was being reclaimed.

28. We do not accept that submission. We agree with Mr Mehta and Ms Rooney that it amounts to a rewriting of the relevant paragraph which does not state that information is being given only on a "sample" pension fund but rather states expressly that the claim for repayment is only in respect of a proportion of the total income tax suffered. Nor do we accept Ms Shaw's submission that the interpretation of the paragraph that both we and the FTT favour deprives the words "as such" of any meaning. The words "as such" might initially appear slightly incongruous since the statement that the claim is only for part of the income tax suffered does not follow logically from the immediately preceding sentence stating that the pension fund investors are all similar. However, the final sentence does proceed logically from a combination of the two previous sentences and it is reasonable to read the entire paragraph as stating that Bayerische is just one of 15 similar pension fund investors and the claim is made only in respect of Bayerische's share of the income tax that the Appellants suffered.

29. Ms Shaw submitted that it was contrary to "commercial common sense" for the Claim Letter to limit the claim to a proportion of the income tax that the Appellants suffered given the assurance that the other pension fund investors were "similar" to Bayerische. We do not accept that submission. As the FTT observed, the statement was only that the other investors were "similar". No assurance was given that they were in all material respects identical and it is therefore possible to envisage realistic scenarios in which the Appellants might not be able to justify a claim for repayment of all the income tax that they had suffered because of small differences between the positions of the ultimate pension fund investors. But even putting that point to one side, a reasonable HMRC officer receiving the Claim Letter would not consider it was incumbent on him or her to consider whether it made sense for the Appellants to claim repayment of part only of the income tax they said they had suffered. Rather, the officer would have concluded that it was for the Appellants to make whatever claim they wished to make and, read as a whole, the Claim Letter was plainly requesting repayment only of the income tax particularised in Appendix 1 to that letter. It was not HMRC's responsibility to consider why that decision had been made.

30. At [63] of the Decision, the FTT concluded that one of the reasons why the Claim Letter should not be read as a claim for repayment of income tax attributable to the profit shares of investors other than Bayerische was that none of those investors were even named in the Claim Letter. However, one of the annexes to the Claim Letter was

the "Fifth Agreement" that did set out a list of investors. The FTT evidently thought that the Fifth Agreement was signed only after the end of the period relevant to the claim. However, the copy of the Fifth Agreement with which we were provided does bear a date (albeit in small print) of 21 November 2012 and so fell before the end of the 2012-13 tax year which was the last tax year dealt with in the Claim Letter. HMRC did not formally concede that the FTT made an error in its findings as to the date of signature of the Fifth Agreement. We will, without deciding the point, consider the position if the FTT was mistaken in saying that the Fifth Agreement was signed after 5 April 2013.

31. Even if the FTT did make a mistake as to the date of the Fifth Agreement, that does not vitiate its reasoning. At most, the Fifth Agreement demonstrates that the Appellants provided HMRC with the names of investors as at 21 November 2012. That is very different from providing a list of all ultimate investors throughout the four tax years covered by the Claim Letter. More fundamentally, a reasonable HMRC officer would not have understood from the fact that the Appellants supplied a copy of the Fifth Agreement (or a list of investors' names) that they wished to reclaim all the income tax that they had suffered under the NRL scheme when the text of the Claim Letter, read as a whole, made it clear that they were not doing so.

32. Finally, in her skeleton argument, Ms Shaw suggested that the FTT had impermissibly based its conclusion on the construction of the Claim Letter on correspondence between the parties after that letter. We do not accept that submission. At [66] and [69] of the Decision, the FTT states quite clearly that subsequent correspondence is not an aid to the construction of the Claim Letter. Read in context, therefore, the references to subsequent correspondence at [67] to [69] of the Decision are making the simple point that the correct construction of the Claim Letter as determined by the FTT appeared to be consistent with the positions of both parties as set out in correspondence until 2017.

33. In short, we consider that the FTT construed the Claim Letter correctly for the reasons it gave (with the possible exception of the reliance on the date of the Fifth Agreement). Since we have reached that conclusion by reference to the ordinary meaning of the words used in the Claim Letter, it is unnecessary for us to consider whether, as Mr Mehta and Ms Rooney argued, the "*contra preferentem*" rule of construction applies in this context or what result an application of that rule would produce.

34. It follows that the FTT was correct to refuse the First Application since it could not permit the Appellants to amend their grounds of appeal so as to deal with a claim for repayment of all income tax that had never been made.

Second Application

35. The Second Application invited the FTT to conclude that, by virtue of s114 of TMA, the Appellants are entitled to treat the Claim Letter as a claim for repayment of all income tax that they suffered under the NRL scheme and not just Bayerische's share.

Relevant Legislation

36. Section 114 provides, so far as relevant, as follows:

> "**114 Want of form or errors not to invalidate assessments, etc**
>
> (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

The FTT's decision on the Second Application

37. The FTT refused the Second Application at [87] to [91] for four reasons:

> (1) Section 114 is not capable of applying to claims sent by taxpayers to HMRC.
>
> (2) Section 114 is concerned with situations where there is a want of form or a mistake in a document. The Claim Letter did not suffer from a want of form. Nor did it contain any mistake as, on its face, it amounted only to a claim for a proportion of the income tax that the Appellants had suffered.
>
> (3) In any event, applying *R (on the application of Archer) v HMRC* [2017] EWCA Civ 1962 and *HMRC v Donaldson* [2016] EWCA Civ 761, s114 cannot apply where a reasonable recipient of the document would have been "confused or misled" by receipt of the original (unamended) document. An objective reading of the Claim Letter indicated that the Appellants were requesting repayment of only a proportion of the income tax that the Appellants had suffered and therefore HMRC would have been "confused or misled" by the Claim Letter as submitted.
>
> (4) As decided in *Pipe v HMRC* [2008] EWHC 646 (Ch) and *Donaldson* mistakes or omissions that are "fundamental" or "gross" cannot be remedied under s114 of TMA. The defects in the Claim Letter which the Appellants sought to correct were both fundamental and gross.

38. In her written and oral submissions, Ms Shaw took issue with all aspects of the FTT's reasoning. Mr Mehta and Ms Rooney submitted that the FTT had reached the correct conclusion on s114 for the reasons it gave.

Discussion of the Second Application

39. We will not decide whether, as a matter of principle, s114 of TMA applies only to documents and other proceedings emanating from HMRC or whether it can also apply to documents that taxpayers send to HMRC. Tax law provides for HMRC and taxpayers to send a wide variety of documents, assessments and claims to each other and, in those circumstances, a general pronouncement as to the scope of s114 could turn out to be unfair or inadequate in particular cases.

40. We accept Ms Shaw's submission, that is supported by paragraph 34 of Lewison LJ's judgment in *Archer*, that "other proceedings" for the purpose of s114 include "every document required to be used in assessing, charging, collecting and levying tax" for the purposes of s113(3) of TMA. However, that definition does not apply to the Claim Letter. By the time of that letter, the process of assessing, charging, collecting and levying tax was complete and indeed the Claim Letter sought to establish that that process had resulted in the Appellants paying the wrong amount of tax. No doubt Ms Shaw is correct to say that the process of determining how much tax is due can be an iterative process. But Parliament has not specified that any document relevant to a taxpayer's final tax liability falls within s113(3). Rather, Parliament has singled out documents *required* to be used in assessing, charging, collecting and levying tax. That process ended well before the Claim Letter was written and, moreover, there was no "requirement" to submit the Claim Letter at all.

41. However, in case we are wrong in our conclusion at [40], we have gone on to consider the position if the Claim Letter was a document falling within Lewison LJ's formulation.

42. The first relevant question is whether the Claim Letter contained a "mistake, defect or omission" since there was no suggestion that it suffered from a want of form. Ms Shaw submitted that the FTT had misinterpreted this requirement at [91] of the Decision by deciding that evidence of the subjective intention of the author of the letter was required before a "mistake" or "omission" in the letter could be identified whereas, as the Court of Appeal made clear in *Archer*, s114 is concerned with an objective reading of the Claim Letter. We do not, however, consider that the FTT made any such error. The FTT's conclusion at [91] was that the function of the Claim Letter was to set out a claim for repayment of tax. Having already concluded that, viewed objectively, the letter claimed only repayment of a proportion of the income tax the Appellants had paid, there could be no "mistake", in an objective sense, in the letter since the letter claimed repayment of the precise amount of tax that, viewed objectively, it intended to claim.

43. Ms Shaw argued that a reasonable recipient of the Claim Letter would not have been "confused or misled" by it with the result that the impediment to the application of s114 identified in *Donaldson* and *Archer* is not present. We reject that submission. Our conclusion on the First Application is that a reasonable HMRC officer with relevant knowledge of the background would have read the Claim Letter as a claim only for a proportion of the income tax the Appellants had paid. If s114 permitted the Claim Letter to take effect as a claim for repayment of a much larger sum of income tax, the hypothetical officer would most certainly have been confused or misled.

44. In a similar vein, we reject Ms Shaw's argument that any "mistake" or "omission" in the Claim Letter was not gross or fundamental. As Ms Shaw identified, s42 of TMA 1970 required only that the Claim Letter quantify the amount of tax being reclaimed. The amendments sought under s114 go right to the heart of this core requirement as they would permit the Appellants to claim a much larger sum than was claimed in the original Claim Letter. While we agree with Ms Shaw that, of themselves, the relative

quanta of the unamended and amended claims are not determinative, on any view, that would amount to a "fundamental" amendment to the Claim Letter.

45. The FTT, therefore, made no error of law in refusing the Second Application.

The Third Application

The FTT's decision and the Appellants' grounds of challenge

46. By their Third Application, the Appellants invited the FTT to exercise its case management powers in Rule 5(3)(c) of the FTT Rules to permit the Appellants to amend their claim for repayment so that it embraced all income tax mentioned in the Claim Letter, and not just Bayerische's share. Rule 5(3) provides, so far as relevant, as follows:

> **5 Case management powers**
>
> (1) Subject to the provisions of the [Tribunals, Courts and Enforcement Act 2007] and any other enactment, the Tribunal may regulate its own procedure.
>
> …
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction--
>
> ….
>
> (c) permit or require a party to amend a document;

47. The FTT considered the distinction between the amendment of an existing claim and the making of a new claim that the Upper Tribunal explored, in a VAT context, in *Reed Employment v HMRC* [2013] STC 1286 and *HMRC v Vodafone* [2016] STC 1064. Having considered that distinction, the FTT concluded that the Appellants were seeking to make a new claim, and not merely to amend an existing claim and that it would refuse the Third Application for that reason.

48. The FTT stated that, even if it had considered that the Appellants were merely seeking to amend an existing claim, it would have refused to exercise its discretion in their favour. It reasoned that, for over three years since the Claim Letter had been submitted, both parties had apparently been proceeding on the basis that the claim was only for the repayment of the proportion of income tax that was attributable to Bayerische's share. Since no evidence had been given as to why the Appellants had been so late in making their application or as to why the Claim Letter was originally drafted in the way it was, the FTT was not satisfied that there was a good reason to exercise its discretion in the way the Appellants requested.

49. Ms Shaw broadly submitted that the FTT had interpreted and/or applied the authorities wrongly and that, contrary to its view, the Appellants were seeking only to amend an existing claim, not to make a new claim. She also submitted, in her skeleton argument, that the Appellants were not aware of any need to amend their claims until, following correspondence with HMRC in 2017, they realised that HMRC thought the

Claim Letter involved a claim for repayment of part only of the income tax that they had incurred. As soon as they realised there was a problem, they acted promptly to make their claim. In those circumstances, given that HMRC would suffer no material prejudice if the Appellants were allowed to seek repayment of all the income tax identified in the Claim Letter, whereas the Appellants would suffer prejudice if they were denied the ability to reclaim substantial amounts of unlawfully levied tax, she argued that the FTT should have exercised its discretion in the Appellants' favour.

Discussion of the Third Application

50. For the reasons set out below, we consider that the Third Application was and remains fundamentally misconceived. The basis on which we have reached that conclusion was not identified or considered by either the parties or the FTT. Ordinarily in such a case, before releasing this decision, we would have invited the parties to make further written submissions on this issue. However, at the hearing, the parties informed us that there was some urgency in this matter: there are to be further proceedings before the FTT (as the Decision dealt only with preliminary and case management issues) and the parties may wish to ask the FTT to refer one or more issues to the Court of Justice of the European Union. Since we have come to the view for the reasons set out below that, whatever the relevance or otherwise of *Vodafone* and *Reed Employment*, the FTT was entitled to exercise its case management discretion in the way it did and so to refuse the Third Application, we considered that requesting further written submissions could only add to delay without altering the overall result. For that reason, we have decided not to request such further submissions.

51. In *Reed Employment* the taxpayer company submitted a claim for repayment of VAT under s80 of the Value Added Tax Act 1994 ("VATA 1994"). The taxpayer then altered its claim (to use a neutral term). If that alteration took effect simply as an amendment to the existing claim, HMRC would have no defence of "unjust enrichment" available to them. However, with effect for claims made after 26 May 2005, HMRC had a statutory defence of "unjust enrichment". Therefore, the question arose whether the taxpayer's alteration of its claim was simply an amendment of an existing claim (which was not subject to a defence of "unjust enrichment") or the making of a new claim (which was subject to that defence).

52. *Vodafone* raised a similar issue. In January 2007, the taxpayer made a claim for repayment under s80 of VATA 1994 which HMRC disputed. Between 2009 and 2011, the taxpayer made further claims for repayment of output tax under s80. The taxpayer argued that these further claims were amendments to its existing claim. HMRC argued that they were completely new claims that were made outside applicable statutory time limits.

53. The Third Application is misconceived for the following reasons.

54. Neither *Reed Employment* nor *Vodafone* are authority for the proposition that the FTT Rules confer any discretion on the FTT to permit claims already made by a taxpayer to HMRC to be altered. Moreover, given the architecture of the statutory provisions governing repayments of income tax, the powers given to the FTT to

determine disputes on such claims and the fact that the FTT (and Upper Tribunal) are "creatures of statute" without any inherent jurisdiction, there is plainly no room for the discretion which the Appellants argue should be exercised in their favour.

55. As we explain in detail in our analysis of the Fourth Application, the scope and subject matter of the Appellants' appeals are identified by HMRC's closure notices. In the circumstances of this appeal, HMRC's closure notices responded to specific claims that the Appellants had made. The FTT is given no express power to permit the Appellants to "amend" the Claim Letter. The only relevant power to amend claims is given to taxpayers in paragraph 3(1)(b) of Schedule 1A of TMA (which contains a 12-month time-limit for amending a claim). No power for the FTT to amend claims can be inferred since it would result in the FTT adjudicating on a different claim from that the Appellants *actually* made and, moreover, a claim on which HMRC have expressed no view in their closure notices.

56. The basis of the Third Application is that the FTT has jurisdiction to amend the Claim Letter under Rule 5(3)(c). That misunderstands both the scope and purpose of the FTT Rules. As we have explained, *Reed Employment* and *Vodafone* concerned the question of whether a claim made by the taxpayer was an amendment to an existing claim or a new claim. That issue came before the FTT in each case as part of the normal process by which taxpayers may appeal certain HMRC decisions. Neither case concerned (or even referred to) the exercise by the FTT of its powers under Rule 5(3)(c) or any other FTT Rule. Given the definition of "document" in Rule 1(3) of the FTT Rules ("anything in which information is recorded in any form") the Claim Letter is clearly a document. However, at the risk of stating the obvious, the FTT does not have the power to amend every document. Rule 5(3)(c) exists and must be interpreted in the context of the Rules as a whole and taking into account the limited powers of the FTT under the 2007 Act and other legislation. The FTT Rules are, as their title makes clear, rules governing the procedure to be adopted by the tribunal in proceedings before it. It is to be used in relation to documents generated by the parties to the relevant proceedings before the FTT for the purpose of those proceedings. In practice, it is used to permit amendments to documents such as a statement of case (see, for example, *Alpha International Accommodation Ltd v HMRC* [2017] UKFTT 778 (TC)) or a notice of appeal (see, for example, *Buckingham Bingo Ltd v HMRC* [2018] UKFTT 257 (TC)).

57. The argument that Rule 5(3)(c) confers on the FTT a general discretionary power to amend claims, returns, elections or other documents submitted by a taxpayer to HMRC (perhaps many years ago), and presumably by HMRC to the taxpayer, is without merit. Our conclusion on the First Application is that the Appellants did not make a claim for repayment of all the income tax that they mentioned in the Claim Letter; they claimed repayment of part only. Given the reasoning above, we do not consider that Rule 5(3)(c) of the FTT Rules gave the FTT any power to permit the Appellants to amend that claim.

58. Even if we are wrong in that conclusion, the FTT was plainly correct to characterise the Third Application as involving the making of a completely new claim, and not merely an amendment to the existing claim. As we have concluded in our determination of the First Application, the Claim Letter involved a claim only for Bayerische's share

of the income tax that the Appellants had suffered that was underpinned by an argument that Bayerische was comparable to a UK pension fund. By their Third Application, the Appellants are not only seeking to increase the amount of income tax reclaimed, they are also underpinning that claim with an assertion that 15 German pension funds are all comparable to UK pension funds. Ms Shaw submitted that this did not matter since the amended claims that the Appellants sought to bring all arose "out of the same subject matter" as the original claim and so constituted a mere amendment of the claim applying the Upper Tribunal's decision in *Reed Employment*. We do not accept that submission. At [33] of its decision in *Reed Employment*, the Upper Tribunal endorsed the test that the FTT had applied namely whether "… 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". The Appellants' revised claim makes the characteristics of 15 German pension funds relevant and, beyond a general assurance that those pension funds are "similar" to Bayerische, the original claim gave little, if any, information on the characteristics of those pension funds.

59. Finally, even if the FTT did have a discretion to permit an amendment to the claim, it was not bound to exercise its discretion in the Appellants' favour. Both parties were rightly agreed that the Upper Tribunal should be slow to interfere with the appropriate exercise by the FTT of a discretion. The position was summarised succinctly by Sales J, as he then was, in *HMRC v Ingenious Games LLP and others* [2014] UKUT 0062 (TCC), at [56]:

> "The proper approach for the Upper Tribunal on an appeal regarding a case management decision of the FTT is familiar and is common ground. The Upper Tribunal should not interfere with case management decisions of the FTT when it has applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the Upper Tribunal is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the FTT."

60. Ms Shaw submitted that the FTT approached the exercise of discretion wrongly in failing to have regard to the overriding objective in the FTT Rules and the "balance of convenience" (which favoured giving the Appellants permission to pursue a claim for income tax overpaid). However, on closer inspection, that amounts simply to an assertion that the FTT should have exercised any discretion differently. We do not consider that the FTT's decision went outside the "generous ambit" of any discretion it had. In particular, since the Appellants were asking the FTT to permit them to make an amendment that would result in the claim being quite different from that which, on an objective reading, was contained in the original Claim Letter, the FTT was entitled to expect some evidence as to *why* the Claim Letter had been drafted as it was since that could clearly be relevant to the exercise of discretion. The Decision records, at [103], Ms Shaw's submission that, at the time of the Claim Letter, the Applicants were only in a position to provide information about Bayerische, and not on other investors. If the Appellants wanted to rely on this as a justification for the FTT exercising a discretion in their favour they should have provided witness evidence and, if that evidence was controversial, tendered their witness for cross-examination.

61. Moreover, the Claim Letter was submitted on 28 February 2014 and the Appellants only made their applications to the FTT on 2 February 2018. The parties clearly have very different perspectives on whether the Appellants were guilty of any delay. However, plainly *some* explanation was called for and the FTT was entitled to conclude that, without witness evidence from the Appellants on why (at least apparently) it took several years for them to suggest that the Claim Letter was not merely a claim for repayment of Bayerische's share of the income tax suffered, it was not satisfied of the absence of delay and so would not exercise its discretion in the Appellants' favour.

62. For all those reasons, the FTT made no error of law in determining the Third Application.

The Fourth Application

Background and relevant legislation

63. During the hearing, we were shown the detail of how HMRC set about enquiring into the Appellants' request for repayment of income tax. On 2 June 2014, having received the Claim Letter, HMRC sent four letters to the Appellants and their advisers (one for each of the tax years covered by the claim). Those letters relating to the tax years ended 5 April 2010, 2011 and 2012 were expressed as involving a check to the Appellants' *claim*, with the check being made under paragraph 5 of Schedule 1A of TMA. That relating to the tax year ended on 5 April 2013 was expressed to be a check made under s9A of TMA 1970 in relation to the Appellants' *income tax return* for 2012-13 that had been submitted on 31 January 2014, and stated that HMRC would be checking only the Appellants' "claim to exemption from UK income tax".

64. On 14 November 2016, when HMRC completed their enquiries, they sent the Appellants and their advisers four further letters, each relating to a different tax year. The letters relating to the tax years ended 5 April 2010, 2011 and 2012 were expressed to set out the conclusions of HMRC's checks under paragraph 7 of Schedule 1A of TMA. The letter relating to the tax year ended 5 April 2013 was expressed to be a closure notice issued under s28A(1) and s28A(2) of TMA.

65. Each of HMRC's letters of 14 November 2016 contained materially identical wording in the section headed "My decision" as follows:

> "Whilst it is acknowledged that your stated view that UK domestic law is (on the requirement for a pension scheme to register in order to receive tax relief on its investment income discriminatory and therefore) in breach of EU law, for the reasons set out in its letter of 12 November 2015, HMRC does not agree with your interpretation.
>
> The consequence is that the refund claimed for the year ending [specified year] of £[amount of Bayerische's share]… is not due."

66. As noted at [30] to [35] of the Decision, the Appellants appealed to HMRC against the closure notices, and on 6 July 2017 HMRC upheld their decisions on statutory review. The Appellants then appealed to the FTT.

67. In their skeleton argument on behalf of HMRC Mr Mehta and Ms Rooney formally accepted that HMRC had followed the wrong procedure in relation to the tax year ended 5 April 2013: they should have opened and closed their enquiries under paragraphs 5 and 7 respectively of Schedule 1A of TMA rather than under s9A and s28A respectively of TMA. As a result, it was explained that HMRC had written to the Appellants offering to repay the income tax that the Appellants had claimed for that tax year (limited to Bayerische's share of that income tax as set out in the Claim Letter). There was no suggestion that this was a "without prejudice" offer of settlement and we have taken it as an acceptance by HMRC that, to the extent of Bayerische's share, the income tax repayment the Appellants claimed for the year ended 5 April 2013 is due, presumably because HMRC failed to open an appropriate enquiry into the claim (under paragraph 5 of Schedule 1A of TMA) within the relevant time limits.

68. By their Fourth Application, the Appellants sought a decision on a preliminary issue to the effect that, when the FTT considered the substantive appeals in due course, it could, in reliance on s50(6) or s50(7A) of TMA and/or paragraph 9(3) of Schedule 1A of TMA, decide that the Appellants are entitled to a greater amount of income tax repayment than Bayerische's share of the income tax suffered set out in the Claim Letter.

69. Paragraph 9(3) of Schedule 1A of TMA provides as follows:

> "(3) In the case of an appeal against an amendment made by a closure notice under paragraph 7(2) above, if an appeal is notified to the tribunal under section 49D, 49G or 49H, the tribunal may vary the amendment appealed against whether or not the variation is to the advantage of the appellant."

70. Section 50(6) and s50(7A) of TMA are to similar effect and provide relevantly as follows:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good…
>
> (7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good."

71. The definition of "appeal" for the purposes of the above provisions is contained in s48 of TMA. It provides that, unless the context otherwise requires:

" "appeal" means any appeal under the Tax Acts."

The FTT's decision and the Appellants' challenge to it

72. The concession referred to at [67] was not made to the FTT and it seems likely that the FTT was not even aware that HMRC had followed a different procedure in relation to the 2013 tax year from that they followed for other years.

73. The FTT concluded, at [129] of the Decision, that s50(6) of TMA was not applicable as, since HMRC had amended the Appellants' claims for repayment and not their self-assessments, there was no appeal against either a self-assessment or a closure notice amending a self-assessment notified to the FTT and so the introductory words of s50(6) were not met. In addition, at [131] of the Decision, the FTT concluded that s50(7A) was not engaged since the Appellants had received closure notices under paragraph 7 of Schedule 1A of TMA and not under s28A of TMA.

74. The FTT concluded that paragraph 9(3) of Schedule did give the FTT power to "vary the amendment appealed against" whether that amendment is to the advantage of the Appellants or not. However, the FTT decided at [137] and [138] that the scope and subject matter of the Appellants' appeals was limited by HMRC's closure notices which were themselves limited to refusing the Appellants' claims for Bayerische's share of the income tax that they had paid. Therefore, the FTT concluded that paragraph 9(3) of Schedule 1A did not open the door to a "general roving enquiry" so as to permit the FTT to allow the Appellants a claim for repayment of income tax that they had never made.

75. The Appellants argued that, on any view, s50(6) and s50(7A) of TMA were relevant to the tax year ended on 5 April 2013 because HMRC had issued closure notices under s28A of TMA for that year. More generally, they argued, relying on *Vowles v HMRC* [2017] UKFTT 704 (TC) and *HMRC v Walker* [2016] UKUT 32 (TCC) that the effect of HMRC's closure notices, for all years, was to put in play, for the purposes of s50(6) and s50(7A), the whole question of whether the Appellants were overcharged by their self-assessments in those years. Moreover, they argued, relying on *Rouf v HMRC* [2009] STC 1307 and *Glaxo Group v IRC* [1996] STC 191 that, if the FTT is satisfied that the Appellants were so overcharged, the FTT is both entitled and obliged to adjust their self-assessments accordingly. The Appellants made similar submissions in relation to the FTT's powers under paragraph 9(3) of Schedule 1A.

76. HMRC argued that that the FTT had reached the correct conclusion on the Fourth Application in relation to tax years ended 5 April 2010, 2011 and 2012 for the reasons it gave in the Decision. They submitted that, since HMRC had now agreed to repay the Appellants the amount of income tax claimed for the 2013 tax year, the Appellants' appeal against refusal of that claim was academic, with the result that the Upper Tribunal did not need to make any determination of the scope of s50(6) or s50(7A) in relation to the claim for that tax year.

Discussion of the Fourth Application

77. To determine the Fourth Application, it is necessary to address two logically distinct but related issues. The first issue involves determining what issues are properly before the Tribunal as a consequence of the Appellants' appeals. The second issue involves determining what powers the Tribunal has when disposing of those issues.

78. Starting with the first issue, the Appellants' appeals for the years ended 5 April 2010, 2011 and 2012 are, by virtue of paragraph 9(1)(a) of Schedule 1A of TMA, against "any conclusion stated or amendment made" by the closure notices that HMRC issued for those years under paragraph 7(2) of Schedule 1A. To the extent that there remains any HMRC decision susceptible to appeal for the year ended 5 April 2013, the Appellants' appeal is, by virtue of s31(1)(b) of TMA, against the "conclusion stated or amendment made by a closure notice" under s28A or s28B of TMA.

79. In relation to the question of what "conclusions" were reached in the Closure Notices (which, as explained below, determines the scope and subject matter of the appeals), Ms Shaw argued at the hearing that on a proper construction the Notices did not in fact reach a conclusion as to the claim for repayment. Rather, the conclusion set out in each letter was that HMRC rejected the Appellants' EU law argument, and it was simply a consequence of that conclusion that the claim was not due. Ingenious as that argument may be, we have no hesitation in rejecting it. Construed in context, the conclusion set out in each Closure Notice was that the Appellant's (limited) claim was rejected. The reference to rejection of the EU law argument is simply the reason for that conclusion.

80. In *Fidex Ltd v HMRC* [2016] EWCA Civ 385, Kitchin LJ summarised the effect of HMRC closure notices in defining and limiting the scope of an appeal in the following terms:

> "45.In my judgment the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court [*in Tower MCashback LLP v Revenue and Customs Commissioner*s [2011] UKSC 19]. So far as material to this appeal, they may be summarised in the following propositions:
>
> i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> iii) The closure notice must be read in context in order properly to understand its meaning.
>
> iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

81. Point (iv) above represents a summary of a principle endorsed by the Supreme Court in *Tower MCashback LLP*. It is worth noting that, in the relevant parts of its decision,

the Supreme Court endorsed, as "entirely correct", the passage of the judgment of Henderson J (as he then was) at first instance in which he said:

> "Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the Commissioners on their own initiative.
>
> That is not to say, however, that an appeal against a closure notice opens the door to a general roving inquiry into the relevant tax return. The scope and subject matter of the appeal will be defined by the conclusions stated in the closure notice and by the amendments (if any) made to the return."

82. Given the central importance of the relevant closure notices, it is appropriate to consider the tax years ended 5 April 2010, 2011 and 2012 separately from the tax year ended 5 April 2013 in view of the different statutory machinery that HMRC used to conduct their checks in those years.

The tax years ended 5 April 2010, 2011 and 2012

83. For these tax years, HMRC issued closure notices under paragraph 7(2) of Schedule 1A. We accept Ms Shaw's submission that this does not mean that the FTT's powers on an appeal can only be found in paragraph 9(3) of Schedule 1A. Section 50(6) is also of potential relevance since that section applies to any "appeal" notified to the Tribunal. An appeal under paragraph 9 of Schedule 1A is an "appeal" for these purposes given the definition in s48 of TMA. Section 50(7A), however, is not applicable since, as the FTT identified, that applies only where HMRC have issued a closure notice under s28A of TMA. It follows that both paragraph 9(3) of Schedule 1A and s50(6) are of *potential* application. However, for reasons set out below, we consider that the FTT was correct to conclude that on the facts those provisions did not entitle the FTT to decide that the Appellants would be entitled to a greater income tax repayment than was claimed in the Claim Letter.

84. HMRC's closure notices must be read in context as responses to the claims for repayment that the Appellants had made. As we have determined in connection with the First Application, the Appellants were reclaiming only Bayerische's share of the income tax that they had paid. HMRC's conclusion was that the claims should be refused because they did not agree with the interpretation of European law that the Appellants were putting forward. In those circumstances, the "scope and subject matter" of the Appellants' appeals to the FTT were limited to the question whether Bayerische's share of the income tax that the Appellants had claimed was due or not.

85. Ms Shaw's argument was essentially that once an appeal is notified to the Tribunal the effect of s50(6), s50(7A) and paragraph 9(3) of Schedule 1A of TMA is inevitably to open a "two-way street" allowing both HMRC and the taxpayer to argue for alterations to all aspects of the tax return for that year. We do not agree. That construction effectively elides the two issues set out at [77] and would produce precisely the "general roving enquiry" which both Henderson J and the Supreme Court said was impermissible.

86. Ms Shaw referred us to the decision of the FTT in *Vowles v HMRC* and, in particular, the FTT's conclusion at [170] of that decision that "[b]y amending [the taxpayer's] self assessment, HMRC put the entire self-assessment within the jurisdiction of the Tribunal" for the purposes of s50(6) of TMA. We do not need to decide whether the FTT's decision in *Vowles* was correct. However, it was clearly made in very different circumstances from this appeal. In *Vowles*, HMRC initiated a general enquiry into all aspects of the taxpayer's tax returns for several years and, given the importance of context to which Kitchin LJ referred in *Fidex*, we can certainly understand why the FTT in *Vowles* considered that the closure notice that HMRC served put the entire self-assessment in issue. By contrast, for the 2010, 2011 and 2012 tax years in this case, HMRC issued closure notices that responded only to the Appellants' specific, and limited, claim for repayment. Whether it applied its powers under s50(6) or paragraph 9(3) of Schedule 1A, in our judgment the FTT was correct to conclude that for these tax years, given the nature of the closure notices HMRC had issued, the FTT was limited to considering the claims for repayment that the Appellants had actually made, and HMRC's conclusions that those claims should be rejected. In the circumstances of this appeal, the FTT would not be entitled to award the Appellants an income tax repayment that they did not claim.

The tax year ended 5 April 2013

87. For the tax year ended 5 April 2013, HMRC opened an enquiry under s9A of TMA 1970 into the Appellants' income tax returns for that tax year. In legal form, that was a different type of enquiry from that permitted by Schedule 1A of TMA 1970 as it gave HMRC the power to look at the entirety of the Appellants' income tax returns and not merely the claim for repayment that the Appellants had made. However, that distinction is more apparent than real since, as noted at [63], HMRC themselves limited the scope of their enquiries to the claims the Appellants had made. Therefore, bearing in mind the importance of context, when HMRC issued their closure notice under s28A of TMA 1970, they were necessarily closing the enquiry that they had opened which was limited to the claims for repayment that the Appellants had made. Understood in that context, the conclusions set out in the closure notice (and so the scope and subject matter of the Appellants' appeals to the FTT) were limited to a rejection of the claims that the Appellants had made.

88. For the 2013 tax year, the FTT's powers are those set out in s50(6) and s50(7A) of TMA. Paragraph 9(3) of Schedule 1A is inapplicable since HMRC's closure notices were issued under s28A of TMA and not under paragraph 7(2) of Schedule 1A.

89. However, for reasons that are essentially the same as those we give in the section above, under s50(6) and s50(7A) of TMA, the FTT has jurisdiction to decide only on the claims that the Appellants had made (for repayment of Bayerische's share of the income tax suffered in the 2013 tax year). It is not entitled to determine that other claims for repayment that the Appellants could have made, but did not make, should be allowed.

90. If we had concluded otherwise, we would have had to decide whether, and if so to what extent, it is relevant that HMRC now accept that the income tax repayment that

the Appellants claimed for 2013 (limited to Bayerische's share) is due. On one view, since HMRC have withdrawn the decision under appeal, the FTT would no longer have any jurisdiction to consider that appeal (and so no jurisdiction to exercise its powers under s50(6) or s50(7A) of TMA). On another view, since the appeal has been duly notified to the FTT, those powers would remain exercisable. However, given our conclusion set out above, we do not need to determine this issue and we will not do so.

Disposition

91. For the reasons set out above, the Appellants' appeals are dismissed.

JUDGE JONATHAN RICHARDS **JUDGE THOMAS SCOTT**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 23 January 2019