TC05555

Appeal number: LON/2008/0720

PROCEDURE – application to amend grounds of appeal – whether proposed amendment is amendment to existing claim or new claim - Reed Employment Limited v HMRC [2013] UKUT 109 (TC) and HMRC v Vodafone Group Services Ltd [2016] UKUT 89 (TC) considered – held proposed amendment not new claim - application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

WHEELS COMMON INVESTMENT FUND TRUSTEES LIMITED
THE NATIONAL ASSOCIATION OF PENSION FUNDS
FORD PENSION FUND TRUSTEES LTD
FORD SALARIED PENSION FUND TRUSTEES LTD
FORD PENSION SCHEME FOR SENIOR STAFF TRUSTEE LTD

Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 2 December 2016

Mrs Amanda Brown, solicitor advocate, of KPMG LLP for the Appellants

Mr George Peretz QC, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. The Appellants are, or represent, defined benefit pension funds. In this capacity, the Appellants receive investment management services in relation to securities owned by the pension funds. In September 2007, the supplier of fund management services to the Appellants made a claim under section 80 of the VAT Act 1994 ('VATA') for repayment of VAT charged on investment management services supplied to the Appellants between 1 July 2004 and 30 June 2007. The claim was made on the ground that defined benefit pension schemes in the United Kingdom ought properly, as a matter of EU law, to have been characterised as special investment funds with the result that the services supplied to them would be exempt from VAT under Article 135(1)(g) of Directive 2006/112 (formerly Article 13B(d)(6) of the Sixth Directive which applied for most of the claim period but nothing turns on that) as supplies of "management of special investment funds as defined by Member States". In February 2008, the Respondents ('HMRC') refused the claim and the Appellants appealed to the VAT and Duties Tribunal.

2. In February 2011, there was a hearing in the First-tier Tribunal (Tax Chamber) ('FTT') which decided to stay the proceedings and refer some questions to the Court of Justice of the European Union ('CJEU') for a preliminary ruling. In essence, the issue for the CJEU was whether the pension schemes were special investment funds for the purposes of Article 135(1)(g) of Directive 2006/112. The Appellants' case was that the failure to treat them as special investment funds was inconsistent with the principle of fiscal neutrality because the pension funds were carrying out the same transactions as Authorised Unit Trusts, Investment Trust Companies and Open Ended Investment Companies which were treated as special investment funds by the United Kingdom.

3. On 7 March 2013, the CJEU issued its judgment, see Case C-424/11 reported at [2014] STC 495. The CJEU held that:

> "… an investment fund pooling the assets of a retirement pension scheme is not a 'special investment fund' within the meaning of those provisions, management of which may be exempted from value added tax in the light of the objective of those directives and the principle of fiscal neutrality, where the members of the scheme do not bear the risk arising from the management of the fund and the contributions which the employer pays into the scheme are a means by which he complies with his legal obligations towards his employees."

But for what follows, that might have been the end of this case.

4. The Appellants' appeal returned to the FTT. Both parties agreed to the proceedings being stayed until, on 24 August 2015, the Appellants applied for the appeal be stayed until the determination in the High Court of *United Biscuits (Pension Trustees) Limited v HMRC* HC14A01221 ('*United Biscuits*'). HMRC opposed this application. On 22 January 2016, the application was heard before me. It was clear that the argument being advanced in *United Biscuits* was not the same as the one advanced by the Appellants in their grounds of appeal. United Biscuits had brought certain claims against HMRC in restitution in relation to supplies of investment management to defined benefit pension funds. United Biscuits argues that because similar fund management services would, if supplied by an insurer, have been exempt from VAT under UK law, fiscal neutrality requires that those services should also be exempt when supplied by a non-insurer. Having heard submissions from both parties, I directed, among other things, that the Appellants should submit an application to amend their grounds of appeal to incorporate the argument in United Biscuits and, at that point, they could renew their application for a stay pending the outcome of *United Biscuits*. I directed that, if HMRC objected to either or both applications, there should be a further case management hearing as soon as practicable after 1 April 2016.

5. In an application dated 12 August 2016, the Appellants applied for permission to amend their original grounds of appeal, submitted in 2008, by substituting new grounds of appeal. The new grounds incorporate the legal argument being advanced in the *United Biscuits* case, namely whether the principle of fiscal neutrality requires that similar supplies be treated in the same way, irrespective of whether the supplies are made by an insurer or a non-insurer. This application was the subject of a hearing before me on 2 December 2016. The only issue between the parties at the hearing was whether the Appellants should be permitted to amend their grounds of appeal. It was common ground that this turned on whether the proposed amendment is an amendment to the original claim made in 2007 or a new claim, in which case it would be outside the time limits in section 80(4) and (4ZA) of the VATA. At the conclusion of the hearing, I decided that the Appellants should be permitted to amend their grounds of appeal. This decision sets out my reasons for granting the Appellants' application.

6. The Appellants also applied to stay these proceedings pending the determination of *United Biscuits*. At the hearing, the parties agreed that, if I allowed the application to amend the grounds of appeal, they could agree directions in relation to a stay for approval by the Tribunal.

Case law on amending pleadings

7. The Upper Tribunal has considered whether an appellant should be allowed to amend claims made under section 80 VATA in two cases: *Reed Employment Limited v HMRC* [2013] UKUT 109 (TC) ('*Reed Employment*') and *HMRC v Vodafone Group Services Ltd* [2016] UKUT 89 (TC) ('*Vodafone*'). Both decisions provide helpful guidance and are binding on me.

8. One of the issues in *Reed Employment* was whether a demand made in 2009 could properly be regarded as an amendment to a claim for a much smaller amount made in 2003, in which case it would be in time, rather than a new claim, in which

case it would be out of time. Both claims arose from the fact that Reed Employment claimed that it had accounted for more VAT than was properly due in relation to supplies of staff. The 2009 demand was for a much larger amount than had been claimed in 2003 and related to supplies to a different and larger class of clients. In the Upper Tribunal, Roth J observed at [30] – [31] that there is no statutory definition of 'claim' for the purpose of section 80 of the VATA and it should be given its ordinary meaning which, in this context, is a demand for repayment of overpaid tax. In the absence of a definition to assist in determining whether a subsequent demand for repayment of tax is a new claim or an amendment to an existing one, Roth J said, in [33], that it is very much a question of fact and degree, judged according to the particular circumstances. He approved the test set out in the first sentence of [111] of the FTT's decision in *Reed Employment* which was 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. In [38], Roth J referred to two examples of further demands that he regarded as new claims. The first was where, having made a claim for a particular accounting period in respect of supplies in London, the taxpayer subsequently asked for repayment in respect of supplies made in the same accounting period but in the rest of England. The second was where a taxpayer, who had made a claim for repayment of overpaid VAT in relation to supplies by one part of its business, sought a repayment of VAT in relation to another part of its business. Roth J considered that the second example was a separate claim notwithstanding that it related to the same accounting period and arose out of the same error. Roth J concluded that the 2009 demand was a new claim, covering supplies to a different category of clients to those in the 2003 claim.

9. In *Vodafone*, the taxpayer made a claim under section 80 of the VATA for the repayment of some £4.1m VAT accounted for in periods 01/04 to 01/06. The VAT related to Vodafone's participation in the Nectar card scheme. Vodafone claimed that it had over-declared its liability for output tax and the VAT was repayable. HMRC rejected the claim and Vodafone appealed in 2007. Between 2009 and 2011, Vodafone made other claims for the repayment of over-declared output tax. These over-declarations had nothing to do with the Nectar scheme although some of them occurred in accounting periods which also included Nectar scheme claims. HMRC agreed some of these later claims but refused to pay the other sums claimed, including all of those relating to the periods 01/04 to 01/06, on the grounds that they had been made out of time. Vodafone accepted that, viewed in isolation, the later claims were out of time but argued that it should be permitted to amend the Nectar claim so that it encompassed the later claims instead. HMRC disagreed and submitted that, while it was permissible to amend a claim, it was not permissible to replace one claim with another. The FTT held in favour of Vodafone and HMRC appealed to the Upper Tribunal.

10. The Upper Tribunal (Warren J and Judge Bishopp) began by identifying the elements of a claim under section 80 of the VATA by reference to the terms of the section on its own terms and then in the light of regulation 37 of the VAT Regulations 1995.

11. The Upper Tribunal approved Roth J's description of a claim under section 80 as a demand for repayment of overpaid tax. The Upper Tribunal explained Roth J's approach in *Reed Employment* as follows at [57] – [58]:

> "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.
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> 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."

12. The Upper Tribunal set out their conclusions at [61] – [62]:

> "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.
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> 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 [counsel for HMRC] 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)."

Approach to an application to amend

13. It seems to me that *Reed Employment* and *Vodafone* show that the first step in determining whether an amendment to grounds of appeal relating to a claim for repayment is a new claim, is to identify the fundamental character or elements of the original claim. The fundamental character or elements of a claim are to be found in the facts and circumstances of the claim which can be ascertained from the methodology by which the amount of the claim is calculated and the reason given why the amount accounted for was not output tax due. The relevant elements include the particular supplies or transactions which gave rise to the claimed overpayment of output tax and the specific output tax claimed (but not necessarily the amount). It is then necessary to consider whether the amendment, if allowed, would change the fundamental character or elements of the original claim to such an extent that it is a separate claim.

14. An amendment that does not change the fundamental character or elements of the original claim is not a new claim but an amendment to the original claim. Errors and omissions that do not enlarge the scope of the claim by adding elements not in contemplation when the claim was originally made would not normally constitute a new claim. It appears from both *Reed Employment* and *Vodafone* that changes to the amount claimed or the method of calculation do not, without something more, alter the fundamental character of the claim. An amendment that extends the facts and circumstances beyond those contemplated by the earlier claim is a new claim. For example, an amendment that extends a claim to include supplies to clients not included in the original claim will be a new claim and not an amendment to the original one. In *Reed Employment*, the further demand in that case and the examples given by Roth J of further demands that constituted new claims all involved, if permitted, enlarging an existing claim by including supplies that were outside the scope of the original claim although they arose from the same error. In *Vodafone*, the further demand related to errors and supplies entirely unconnected with those that formed the basis of the original claim and, therefore, a separate claim.

15. Even if I am satisfied that the proposed grounds of appeal are not a new claim but an amendment to the existing claim, I am not obliged to grant the application to amend. Rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') provides that the Tribunal may permit or require a party to amend a document. The use of the word "may" in Rule 5(3) means that it is a matter of judicial discretion whether an amendment should be allowed. The power is a case management power which must be exercised in accordance with the overriding objective in rule 2 of the FTT Rules which is to enable the tribunal to deal with cases fairly and justly. Accordingly, I consider that I must carry out a balancing exercise and decide whether, in all the circumstances, it is fair and just to grant the application.

Summary of submissions

16. Mrs Brown, who appeared for the Appellants, submitted that the proposed amended grounds of appeal do not represent a fundamental change in character of the original claim. The scope of the Appellants' claim has not been altered by the addition of elements which were not in contemplation when the claim was originally made. In effect, all that the amendment does is allow the Appellants to add a new argument, namely the point raised in *United Biscuits*, to their existing case that had

not been considered by the CJEU in the reference. The Appellants submit that it is possible that, had this argument been considered, it could have led to the CJEU reaching a different conclusion. Moreover, irrespective of whether this argument would have influenced the view of the CJEU, it is possible that it could dictate a different result under UK law.

17. The central argument in both the Appellants' appeals and in *United Biscuits* relates to the European law principle of fiscal neutrality. Mrs Brown submitted that the originally pleaded arguments and the substituted grounds both referred to the principle of fiscal neutrality and the only change is that the amended grounds use a different comparator. The original grounds concerned neutrality as between recipients of supplies of investment management services while the amended grounds focus on the suppliers of such services. The fundamental character of the claim remains unchanged: the essence of the Appellants' claim was and remains that the supplies in question were treated as taxable when they ought to have been treated as exempt. The scope of the Appellants' claims will not be extended by the amendment. If the new argument succeeds, the result will be the same as it would have been if the Appellants' original argument had succeeded.

18. HMRC oppose the application on the grounds that the amendment is a new claim for the purposes of section 80 of the VATA because it is of a fundamentally different character to the original claim and arises out of entirely different facts and circumstances. Mr Peretz submitted that the proposed amendment is a new claim because it is based on an entirely different exemption to the original claim (article 135(1)(a) as opposed to article 135(1)(g)). Mr Peretz contended that the Appellants' amended grounds asserted an entirely different infringement of the principle of fiscal neutrality and consequently challenged the validity of domestic legislation in a way that was that was not done in the original claim. Mr Peretz submitted that to allow the amendment and hold that section 80 does not prevent the change to the grounds of appeal would mean that any taxpayer seeking to make a claim based on an alleged infringement of the principle of fiscal neutrality based on a comparison between its supplies and a comparator could, if it lost on appeal, amend its grounds of appeal so as to bring a revised claim using a different comparator.

19. Mr Peretz also submit that permitting the appellants to amend their claim now would be unfair and unjust to HMRC and inconsistent with the overriding objective of the FTT rules. Permitting the amendment now would be unfair to HMRC because, having succeeded in defeating the claim as originally put, it is not fair to require HMRC to argue a new claim on a completely different basis.

Discussion

20. The original claim was made on the basis that domestic legislation was incompatible with article 135(1)(g) of Directive 2006/112 which exempts the management of special investment funds as defined by Member States. The amended grounds of appeal rely on article 135(1)(a) which exempts insurance and reinsurance transactions. The proposed grounds of appeal use supplies made by insurers and supplies made by non-insurers as comparators for the purposes of the argument that domestic legislation breaches the principle of fiscal neutrality. The comparator for the original grounds of appeal was between the Appellants' pension funds and special

investment funds, namely Authorised Unit Trusts, Investment Trust Companies and Open Ended Investment Companies.

21. I consider that *Reed Employment* and *Vodafone*, which concerned changes in claims that were very different to the proposed changes in this case, show that a change in the basis on which a claim is argued is not impermissible. What is ruled out by the Upper Tribunal in those cases is an amendment that goes beyond a change in the argument or even the amount of a claim and seeks to add additional elements, for example adding supplies or extending the period of the claim. That is not the position in this case. The elements of the Appellants' claim, ie the output of tax claimed and supplies to which it relates, are unchanged. Unlike the claimants in *Reed Employment* and *Vodafone*, the Appellants are not seeking to enlarge the original claim by extending it to supplies that were not originally included in it. The supplies in respect of which the Appellants claim a repayment remain the same as does the method of calculating the amount of the repayment. It is clear that if the Appellants are allowed to amend their grounds of appeal then the arguments in support of their claim and, possibly, the evidence necessary to make good those arguments will have changed. I do not see the prohibition of any extension to the facts and circumstances of a claim, referred to in *Reed Employment*, as preventing a change of argument even where that would require further evidence to be adduced in its support. The extension referred to in *Reed Employment* was an extension to the supplies that formed the original claim. As Roth J stated, what is an amendment is a question of fact and degree, judged according to the particular circumstances, and, in the circumstances of this case, I conclude that the new grounds of appeal are an amendment to the grounds for the original claim rather than a separate claim.

22. I must still consider whether, applying the overriding objective and trying to deal with matters fairly and justly, I should allow the Appellants to amend their grounds of appeal. The appeal is still active, notwithstanding that the Appellants accept that the appeal must be dismissed if they cannot amend their grounds. If I refuse the application then I will, in effect, be dismissing the Appellants' appeals without consideration of the new argument. I consider that such a course would not be consistent with the overriding objective in the FTT Rules. I accept that there will be some prejudice to HMRC in having to deal with arguments and a new hearing before the FTT that HMRC might reasonably have thought would not be necessary. However, the appeals were not finally determined by the CJEU but referred back to the FTT and, until the FTT has issued a decision and subject to any further appeal, it remains open to the parties, subject to case management, to put forward new arguments. Although it will result in more time and expense to HMRC, I consider that the balance of fairness and justice is clearly in favour of allowing the Appellants to put forward the new argument in support of their claim.

Decision

23. For the reasons set out above, the Appellants' application to amend their grounds of appeal is allowed.

24. Having granted the Appellants' application, I direct that the parties are to submit agreed draft directions in relation to a stay of the proceedings (or, if agreement proves

not to be possible, separate draft directions) for approval by the Tribunal within seven days of the date of release of this decision.

Right to apply for permission to appeal

25. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this Decision Notice.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 16 DECEMBER 2016