TC03735

Appeal number: TC/2010/01995

VAT – claims for overpaid VAT – whether claims in question were amendments of an earlier claim (and therefore not out of time) or new claims (and therefore time-barred) – Reed Employment Limited v HMRC (No 3) considered – held the claims were new claims – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRAND ENTERTAINMENTS COMPANY (a firm) **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MRS SONIA GABLE

Sitting in public in Priory Court, Birmingham on 12 May 2014

Phil Luty of Dains LLP Chartered Accountants, for the Appellant

Martin Priest, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is concerned with the question of whether two particular communications on behalf of the Appellant to HMRC, in which it claimed repayment of various amounts of supposedly overpaid VAT, amounted to new "claims" in their own right, or were merely amendments to a previous claim.

2. The question is relevant because if the communications amounted to new claims then they were made outside the statutory time limit and the parties agree they should therefore be denied by reason of their lateness. If they amounted to amendments or variations of the original claim, then the parties agree they should be regarded as having been made within the statutory time limit and should therefore be settled (subject only to any issues of computation).

The facts

3. We received a bundle of agreed documents in evidence and we also heard oral evidence from Mr Tim Deeming. Mr Deeming had been a partner in the Appellant firm from 1975 until its business had been incorporated into a successor company in November 2009. We find the following facts.

4. By letter dated 19 March 2009 from its advisers Dains LLP ("the Original Claim"), the Appellant made a claim to HMRC for repayment of overpaid VAT. The letter read as follows:

> "Dear Sirs,
>
> **The Grand Entertainments Co**
> **VAT registration number [***]**
> **Fleming claim**
>
> We are writing to make a voluntary disclosure on behalf of the above named company reclaiming over declared output VAT under section 80 of the VAT Act 1994 in respect of Mechanised Cash Bingo, AWP *[explained at the hearing as meaning "amusement machines with prizes"]* and Jackpot machines as detailed in sections 14, 31 and 34 of the Gaming Act 1968. This disclosure is further to the judgment of the VAT and Duties Tribunal in the two cases of HMRC v Rank Group plc (V20777 and V20688).
>
> The claim is being made following the judgement in the Fleming case outlined in HMRC's Business Brief 07/08.
>
> We calculate that £158,459.21 of output VAT has been overpaid over the period covering 1 November 1980 to 4 December 1996 in respect of this income. Please find enclosed a copy of the amendments required to the VAT returns covered by this period. We would also like to claim

> Statutory Interest under section 78 of the VAT Act 1994, where applicable to out claim.
>
> If you have any questions on the enclosures please do not hesitate to contact me.
>
> Yours faithfully"

5. In due course, on 20 October 2009 HMRC authorised payment of that part of the Original Claim that related to Mechanised Cash Bingo. In the meantime, however, they had formally rejected the other two constituent parts of the Original Claim and this rejection was confirmed, following a review, by letter dated 1 September 2009.

6. The Appellant appealed to the Tribunal against this refusal on 16 September 2009.

7. By letter dated 9 November 2009 from Dains LLP to HMRC, the Appellant submitted what was expressed as "an amendment" to the Original Claim. This claim ("the November 2009 Claim") was in respect of the same period as the Original Claim, and was for overpaid VAT on Main Stage Bingo. It was for a total of £92,167.58.

8. HMRC rejected the November 2009 Claim as being out of time, on the basis that it was a new claim and not an amendment to the Original Claim. This rejection was upheld, following a review, by letter dated 26 January 2010.

9. By letter dated 12 January 2010, the Appellant submitted a claim ("the January 2010 Claim") which was expressed as "a further amendment" to the Original Claim. The January 2010 Claim covered a different period (from 1 April 1973 to 31 October 1980), and was for overpaid output VAT on Main Stage Bingo, Mechanised Cash Bingo, Amusements with Prizes and Jackpot Machines. It was for a total of £40,963.23.

10. The January 2010 Claim was submitted because the Appellant had discovered its records for the relevant period during the course of renovation work at its premises. Those records had not been available at the time of the Original Claim and it now sought to extend the time period covered by the Original Claim and the November 2009 Claim.

11. In due course, HMRC formally rejected the January 2010 Claim as being a "new" claim (rather than an amendment to an existing claim) and therefore out of time.

12. By Notice of Appeal to the Tribunal dated 19 February 2010 the Appellant appealed against HMRC's decisions to reject the November 2009 Claim and the January 2010 Claim. That appeal was stayed for a lengthy period to await the outcome of the *Rank* litigation, and subsequently to await the outcome of the appeal

to the Upper Tribunal in *Reed Employment Limited v HMRC*, but had now been released for hearing.

The law

13. The terms of the detailed legislation are not relevant to the dispute between the parties and we therefore do not need to set it out here.

14. It is common ground between the parties that if the November 2009 Claim and the January 2010 Claim are properly regarded as new claims, then they are out of time and the appeal should be dismissed. If on the other hand they are properly regarded as amendments to the Original Claim, then they are not out of time and the appeals in relation to them ought (subject to matters of quantum) to be allowed.

Submissions of the parties

Submissions for the Appellant

15. Mr Luty argued that as the Original Claim had not been settled in full by the time the November 2009 and January 2010 Claims were submitted, it was still an "open" claim, susceptible of amendment. At the time of submission of the Original Claim, he said the Appellant had taken the "prudent" view, based on the then state of the *Rank* litigation, not to include in it any element of Main Stage Bingo; it was only on 20 August 2009, when HMRC issued Brief 55/09, that it became clear they were contemplating the possibility that Main Stage Bingo might also be subject to exemption pursuant to the *Rank* litigation, and only on 8 December 2009, when they issued Brief 75/09, that they finally accepted this was the case.

16. He submitted that, as could be seen from the *Rank* litigation (and as first publicly accepted by HMRC on 8 December 2009), Main Stage Bingo and Mechanised Cash Bingo were effectively the same thing, at least from the fiscal point of view. Therefore the addition of Main Stage Bingo to the Appellant's claim in the November 2009 Claim ought quite properly to be seen as a simple amendment to the Original Claim which remained, in substance after the amendment, the same claim.

17. So far as the January 2010 Claim was concerned, he argued a similar approach should apply. There was nothing qualitatively new about the content of this claim, it merely extended the period covered by the existing claims as a result of the new records becoming available.

Submissions for HMRC

18. Mr Priest argued that, whatever label was attached to the November 2009 Claim and the January 2010 Claim, they were in fact completely new claims. The November 2009 Claim related to a completely different income stream of the Appellant from the Original Claim and the January 2010 Claim related to a completely different period from the Original Claim and the November 2009 Claim.

The law

19. The parties referred us to *CCE v University of Liverpool* [2000] VTD 16769 and *Reed Employment Limited v HMRC (No 3)* [2013] UKUT 0109 (TCC).

20. In *University of Liverpool*, the VAT Tribunal considered the distinction between "outstanding" and "completed" claims, and found that the claim at issue in that case was a new claim because the previous claims to which it was claimed to be an amendment were all "completed" (in the sense that, broadly, they had either been paid in full or any appeal rights had been exhausted). Mr Luty argued that since the Original Claim was "outstanding" in the *Liverpool University* sense at the time of submission of the November 2009 and January 2010 Claims, those claims could and should be seen as amendments to it.

21. In *Reed*, Roth J in the Upper Tribunal considered what "constitutes a distinct claim". As he said (at [30]):

> "There is no statutory definition of "claim" for the purposes of s. 80 that would provide a basis for distinguishing an amendment to an existing claim from a new claim. Nor is there any authority on this question, save for two VAT Tribunal decisions holding that once a claim has been paid, any further demand cannot constitute an amendment to that claim. This was accepted by Reed in this case…."

22. He went on to consider the issue in more detail, as follows:

> "32. The FTT approached the question of whether a further demand is an amendment to an existing claim by adopting the test of whether it was shown to be "in essence as one with an earlier claim": para 110. In my judgment, there is nothing wrong with this test, but I am not sure it advances the matter significantly, and I do not think it is appropriate to add a gloss to the statutory wording. The FTT proceeded to hold as follows:
>
> > "111. That test, in our view, will be satisfied only if the later claim arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim. Without deciding matters outside of this appeal, we consider, for example, that this would generally include cases where a particular computation was not made at the time of the original claim, but the subject matter of the claim was sufficiently identified for such a calculation made subsequently to be related back to the original claim. Simple calculation errors would similarly be included. It should also cover, we think, cases where particular items within the category of the subject matter of the original claim are unknown or not fully identified

> at the time of the original claim, and would but for that fact have been included in the original claim, but only subsequently come to light."
>
> 33. If subsequent to the submission of a claim, the taxpayer sends in the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included, then I consider that would clearly not be a new claim but an amendment. Further, if the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim. Thus I consider that what is an amendment is very much a question of fact and degree, judged by the particular circumstances. I therefore respectfully agree with the test set out by the FTT in the first sentence of para 111. However, of the examples given in that paragraph, I would not wish to approve in the abstract the final example: that would be for consideration on the particular facts of the case should it arise.
>
> …..
>
> 35. I should add that the fact that the 2009 Demand is drafted in the form of an amendment to the third repayment claim cannot serve to constitute it as such an amendment if in substance it is not.
>
> ….
>
> 38. Mr Peacock gave the example of a claim for a particular accounting period in respect of supplies in London, where the taxpayer subsequently wrote to ask for repayment in respect of supplies made for the same accounting period in the rest of England. However, in my judgment, unless there was some express reservation in the initial claim of the kind that I have indicated, the later request would clearly constitute a separate claim. So also if Reed initially sought to claim reimbursement of allegedly overpaid VAT only for its placement services in the healthcare sector, and subsequently made a demand for repayment as regards another part of its business, notwithstanding that this was for the same accounting period and arising out of the same error."

Discussion and decision

23. Applying normal English usage, as illuminated by the comments of Roth J in *Reed*, we have no doubt in reaching the conclusion that the November 2009 Claim

and the January 2010 Claim were both new claims and not amendments to the Original Claim.

24. As was made clear by Roth J at [35] in *Reed*, the fact that the later Claims were expressed to be amendments to the Original Claim is irrelevant to their true nature.

25. The Original Claim was quite clearly on its face not intended to apply to Main Stage Bingo and it was also on its face quite clearly limited to the period from 1 November 1980 to 4 December 1996. On any interpretation, by clearly stating the categories of the supplies and the time period to which it related, it implicitly excluded any claim in respect of other categories of supplies and other periods of time. To seek to add such supplies and periods of time at a later stage can only sensibly be regarded as making entirely new claims (albeit claims that were, by their subject matter, closely linked to the Original Claim).

26. We are not here concerned with "the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included"; the November 2009 Claim and the January 2010 Claim sought to do neither; instead they sought to extend the Original Claim to cover matters which, with hindsight, it would have been preferable for it to have included. Nor had the Original Claim been submitted on an explicitly provisional basis, with the later claims merely providing the promised missing material; they covered entirely different matters.

27. In short, we have no hesitation in finding that the November 2009 Claim and the January 2010 Claim should both be regarded as standalone claims and accordingly the appeal must be dismissed.

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

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 19 June 2014