[2018] UKFTT 384 (TC)

TC06551

Appeal number: TC/2017/06212
TC/2017/06214

INCOME TAX – claim for tax repayment – whether claim made in relation to a single pension scheme or extended to 13 other investors – application to amend grounds of appeal to "reflect full extent of claims" – if refused, application to perfect the claim under TMA s 114 – application to amend claim – application for ruling that TMA s 50 and/or Sch 1A requires or allows Tribunal to direct HMRC to repay the tax relating to the other investors – applications refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

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

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery Avenue, London on 27 April 2018

Miss Nicola Shaw QC, instructed by KPMG LLP, for the Applicants

Mr Ravi Mehta and Ms Celia Rooney, both of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On February 28 2014, three German real estate investment funds claimed repayments of income tax paid under the Non-Resident Landlord ("NRL") scheme for the four years ending 5 April 2010 through to 2013 ("the relevant period").

2. The three funds were GLL BVK Internationaler Immobilien Spezialfonds ("GLL"), BAV-TMW-Globaler Immobilien Spezialfonds ("BAV") and iii-BVK Europa Immobilien Spezialfonds ("iii-BVK"), together "the Funds".

3. Each of the Funds is transparent, and beneficially owned by other entities. One of the beneficial owners is Bayerische Architektenversorgung ("Bayerische"), a German pension fund for Bavarian architects. HMRC's understanding was that the claims for repayment of the income tax paid under the NRL scheme related to Bayerische's share of the Funds' property income.

4. HMRC refused the claim on the basis that a pension fund could only receive tax relief on its investment income if it had registered under Finance Act 2004, Part 4, Chapter 2, and Bayerische had not registered.

5. On 4 August 2017, the Funds notified their appeals to the Tribunal, on the grounds that HMRC's refusal to refund the tax was a breach of the EU principles of equal treatment and the free movement of capital. The Tribunal joined the three appeals and allocated them to the complex category.

6. On 2 February 2018, two of the Funds, GLL and iii-BVK ("the Applicants") made the following applications to the Tribunal:

(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 in the alternative

(2) a ruling that Taxes Management Act 1970 ("TMA") s 114 permits the Applicants to amend their claims so as to encompass the other beneficial owners ("the Second Application"); or in the alternative

(3) for the Tribunal to direct under Rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") that the claim be amended in that way ("the Third Application"); and/or in the alternative

(4) for a ruling that TMA s 50(6) to (7A) and/or Sch 1A para 9(5) give the Tribunal the power to direct HMRC to repay all the tax deducted from the rental income of all beneficial owners, and not only from Bayerische's income ("the Fourth Application").

7. If one or more of the Applications had succeeded, GLL's claim would have been for a repayment of £4,653,798, rather than for a repayment of the £767,190 suffered by Bayerische. Similarly, iii-BVK's claim would be for £1,719,337 rather

than the £237,634 suffered by Bayerische. In total, the Applicants' claims would be for £6,373,135 instead of for £1,004,824.

8. The Applications were refused, because I agreed with HMRC that:

(1) the claims were originally made for the repayment of tax deducted from income relating to Bayerische; no claim was made for the repayment of tax deducted from the rental income beneficially owned by the other investors;

(2) the claims could not be amended in reliance on TMA s 114;

(3) Rule 5(3)(c) of the Tribunal Rules cannot be used to enlarge the scope of a claim; and in any event, it would not be fair and just to do so in this case; and

(4) TMA s 50(6) only applies where an assessment is under appeal, and the Applicants have not appealed their self-assessment; instead they made repayment claims and appealed the closure notices issued following those claims. The relevant provision is instead Sch 1A, para 9(3). For the reasons given in the main body of this decision, that provision does not permit the Tribunal to direct that HMRC refund the tax borne by the other investors.

9. The Second and Fourth Applications were phrased as applications for "rulings". The Tribunal does not have the jurisdiction to grant "declarations" or "rulings", but does have the power to deal with "any issue in the proceedings as a preliminary matter". I have therefore treated the Second and Fourth Applications as applications for those issues to be dealt with as preliminary matters under Rule 5(3)(e) of the Tribunal Rules.

10. This decision relates only to the Applications and is not concerned with the substantive issues which are under appeal. Any legislation in this decision is cited only so far as relevant to the issues before the Tribunal.

The evidence

11. The Applicants provided a Bundle for the hearing, which included:

(1) the letter to HMRC dated 28 February 2014 ("the Claim Letter");

(2) HMRC's enquiry notices into the claims, and their closure notices refusing the claims;

(3) correspondence between HMRC and KPMG LLP ("KPMG"), agent for the Funds; and

(4) the Grounds of Appeal dated 4 August 2017, and HMRC's Statement of Case dated 7 November 2017.

12. The Bundle did not include copies of the SA700, the NRL form completed by the Funds. The parties agreed that the Tribunal should access copies of that form via the internet after the hearing. There was no dispute about what was required to be disclosed on the SA700.

13. On the basis of the evidence summarised above, the Tribunal finds the facts set out below.

The facts

14. The Funds are open-ended real estate special investment funds that are tax resident in Germany. They do not have a legal personality, so the assets are held by two capital investment companies acting as nominees, being BNP Paribas Real Estate Investment Management Germany GmBH ("BNP") and PATRIZIA GewerbeInvest Kapitalanlagegesellshaft mbH ("PATRIZIA"), together "the Management Companies".

15. The Management Companies hold the legal title to the investors' assets and manage them in a fiduciary capacity; they are remunerated by arm's length management fees and are not connected with the Funds for tax purposes. Investors purchase units in the Funds, and the Management Companies use that money to invest in assets on behalf of the beneficial owners.

16. The Management Companies invest in UK properties, and are registered under the NRL scheme. The scheme requires them to provide details of their UK property investment income, expenses and profits by completing form SA700, headed "Tax return for a non-resident company liable to income tax"; that information is then used to produce the related self-assessment computations. The computations produce an income tax figure for each Fund. That figure is not analysed as between the beneficial owners of the underlying investments, or between the Masterfunds, so HMRC do not know, from the self-assessment returns completed by the Funds, what percentage of the total income tax is related to which investor.

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 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.

29. On 2 June 2014, Mr Shingler of HMRC opened enquiries into the claims made by the Funds. On 14 November 2016, he wrote to the Funds with copies to KPMG, refusing the claims. In relation to the claim for the tax year 2009-10 he said that HMRC did not agree with the analysis set out in the Claim Letter and "the consequence is that the refund claimed for year ended 5 April 2010 of £276,989 is not due". Using similar wording, he closed the enquiries into each of the other year, for both iii-BVK and GLL. Each closure notice explicitly sets out the quantum of the claim as being the amount attributed to Bayerische in Appendix 1 to the Claim Letter.

30. On 14 December 2016, Mrs Amanda Brown of KPMG appealed the closure notices on behalf of GLL for all four years. She said:

> "We are writing to appeal against the conclusions of the Closure Notices refusing GLL's claims for overpayment of income tax for the relevant periods totalling £767,190 being:
>
> - £276,989 for the year ended 5 April 2010
> - £213,248 for the year ended 5 April 2011
> - £160,804 for the year ended 5 April 2012

- £116,149 for the year ended 5 April 2013."

31. This was followed by a summary of the reasons for GLL's appeal, which included:

> (1) The investors in the Masterfunds should in principle be treated as the entities assessable to income tax on the rental income in the UK. Bayerische is the sole investor in BARCHV Masterfund ('Masterfund') which is one of the investors in GLL and as such it is this entity which should be treated as potentially liable to income tax on the profits derived from the assets in GLL rather than GLL itself.
>
> (2) Looking through GLL and Masterfund to attribute profits for income tax purposes to Bayerische is consistent with the taxation of the income of the entities under German tax law.
>
> (3) The operation of Bayerische as a German pension fund is clearly comparable to that of a UK pension fund.
>
> (4) Bayerische has suffered a difference in treatment.
>
> (5) Bayerische is treated less favourably that a UK registered pension fund. Bayerische should also be exempt from paying income tax on its investments in the UK.
>
> (6) It is irrelevant that Bayerische could potentially have elected to register with HMRC in the same way as a UK established pension fund. Bayerische would have been treated differently from a UK entity even had it successfully registered with HMRC.

32. On the same date, Ms Brown wrote a similar letter in relation to iii-BVK, again making explicit reference to the amounts of the income attributable to Bayerische, followed by the same arguments.

33. On 6 July 2017, Mr David Linneker, HMRC's Review Officer, issued his statutory reviews, upholding Mr Shingler's decisions ("the Review Letters"). The Review Letters were sent to the Applicants, with copies to KPMG. They referred to the quantum of the claim as being the amounts relating to Bayerische. When setting out the materials covered as part of the statutory reviews, Mr Linneker said:

> "I have read all the correspondence relating to this matter between your representative in this matter, KPMG, and HMRC, in particular the arguments put forward by KPMG in letters dated 6/8/2013, 27/2/2014, 5/10/2014 and 7/4/2017…"

34. I pause here to note that none of the correspondence referred to by Mr Linneker was in the Bundle. However, neither party sought to argue that any earlier correspondence between HMRC and KPMG put the position (so far as the issues before this Tribunal are concerned) any differently from the Claim Letter.

35. On 4 August 2017, the Funds notified their appeals to the Tribunal. Their Grounds of Appeal say that "the Appellant's ultimate investors are German

occupational pension funds ('Bayerisches') who invest via Masterfunds" and that each Appellant had made a claim for repayment on the basis that "as the income is taxable in the hands of the Bayerisches and as the Bayerisches are objectively comparable to UK pension funds, the income should be exempt from UK tax…" The Grounds of Appeal throughout refer to "the Bayerisches" and not to "Bayerische". The following paragraph is also included:

> "The background to and basis of the claim is set out at length in the correspondence between the parties (appended to the Notice of Appeal). These grounds of appeal should therefore, be read in conjunction with that correspondence and in particular with the letters of 6 August 2013, 27 February 2014, 28 February 2014 and 7 April 2017."

36. As already noted, the letters dated 6 August 2013, 27 February 2014 and 7 April 2017 were not in the Bundle. That dated 28 February 2014 was the Claim Letter.

37. On 7 November 2017, HMRC filed and served their Statement of Case. This said at paragraph 3 that the Appellants were:

> "seeking to challenge (and obtain repayment of) income tax accounted for under self-assessment of :
>
> - for GLL, in the sum of £767,190 for the years ending on 5 April 2010-2013;…
>
> - for iii-BVK, in the sum of £237,634 for the years ending on 5 April 2010-2013"

38. The Tribunal's directions required the parties to exchange their lists of documents within 42 days after the Statement of Case had been filed and served. On 14 December 2017, Mr Richard Doran of KPMG wrote to HMRC, referring to the requirement to exchange document lists, and saying (emphasis in original):

> "we are writing to request written confirmation from the Respondent's representatives that they agree with the Appellants' understanding for the full value existing claims which are under appeal…to recap, the Appellants' original claim letter…indicates that the Appellants seek to recover the tax paid on the income attributable to <u>all</u> the investing pension funds. However, at the time these claims were submitted to both GLL and iii-BVK, BARCHV was the only pension fund for which a particularised calculation could be made illustrating the attributable portion of the total tax suffered.
>
> Given that the claim relates to all of the 14 pension funds that invested in the Appellants, through their respective Masterfonds (of which there are 16 in total) during the tax years which are under appeal…the Appellants intend to include the relevant documentation for each of these funds (see the enclosed table for details of the names of each of the pension funds, their respective Masterfonds and the dates of investment.

> …As set out the Appellants' claim letter dated 28 February 2014, GLL claims repayment of £4,653,798 and iii-BVK claims repayment of £1,719, 337…
>
> …the analysis in the Claim Letter under the heading 'summary of claim' is equally applicable to the remaining pension funds (and their respective Masterfonds) which were known to be in a position similar to BARCHV. it follows that it is also clear from this section that the claims are for the full amounts of tax suffered, albeit not fully particularised…"

39. Attached to Mr Doran's letter was a list of the other investors in GLL and iii-BVK (excluding Bayerische) in the years 2008-09 through to 2012-13 ("the List"). These show that, with one exception, each invested via a single Masterfund. The exception was Bayerische Versorgungsverband Zusatzversorgungskasse der Bayerische Gemeinden ("ZKDBG") which invested via three separate Masterfunds. One of these invested for the entire four year period; the other two invested from 30 June 2012 to 5 April 2013.

40. There are fourteen names on the List, but the fourteenth is Bayerische Ärzteversorgung (BÄV). Under the heading "period of Spezialfond investment", the table says "N/A", and a footnote adds that BÄV "had the ability to invest in GLL from 2012 onwards". As already noted, the "Background" section of the Claim Letter says that "The remaining units in III-BVK and GLL are held by 15 other similar masterfund and pension scheme vehicles". This is the same as the List – 13 other investors, with ZKDBG investing via three Masterfunds.

41. Of the 12 names on the List (excluding Bayerische and ZKDBG), most were invested in GLL and iii-BVK throughout the relevant period, but some were invested for only part of that period:

(1) Versorgunganstalt der deutschen Bezirksschornsteinfeger ("VDBS") was invested in iii-BVK for the relevant period, but in GLL from 6 April 2009 to 1 December 2012;

(2) three investors, Versorgungswerk der Ingenieurkammer Niedersachsen ("NingV"), Pensionskasse des Schornsteinfegerhandwerks ("PKS"), and Sächsische-Thüringischen Apothekeversorgung ("STAPV") were invested in GLL from 30 June 2012 to 5 April 2013, and in iii-BVK from 21 March 2012 to 5 April 2013; and

(3) Versorgungswerks der Steuerberater/innen und Wirtshaftsprüfer/innen im Saarland ("VSWL") was invested in GLL from 31 December 2012 to 5 April 2013, and in iii-BVK from 16 October 2012 to 5 April 2013.

42. Many of the investors on the List are prefixed by the word "Bayerische", so it is reasonable to infer that they relate to Bavaria. Some are prefixed with the names of other provinces, including Niedersachsen (PKS), Saarland (VSWL), and Saxony (STAPV), or appear to relate to all of Germany, such as the Versorgungsanstalt der deutschen Kulturorchester and the Versorgungsanstalt der deutschen Bühnen.

43. From the above facts, I make the following further findings of fact:

(1) there were 13 other investors (apart from Bayerische) in the relevant period;

(2) although BÄV "had the ability to invest in GLL from 2012 onwards" it did not do so in the relevant period;

(3) five of the beneficial owners were invested for only part of the relevant period;

(4) one (ZKDBG) was invested via three Masterfunds, and two of these were invested for only part of the relevant period;

(5) some of the underlying investors are not based in Bavaria; and

(6) none of the facts here set out was included in the Claim letter, and they could not be inferred from the Claim Letter.

44. On 19 December 2017, HMRC replied to Mr Doran, saying that they did not agree that the claims had ever been for £4,653,798 and £1,719,337; and that the claims could not now be amended because the Applicants were out of time. Having not had a response, HMRC wrote again on 8 January 2018. On 2 February 2018 the Applicants made the Applications.

The First Application

45. By the First Application, the Applicants applied to amend their grounds of appeal "so as to particularise the quantum of their claims for repayment of tax" on the basis that the claim as originally made was for the repayment of the tax relating to the income of all the beneficial owners, and not only the tax relating to Bayerische.

Relevant legislation

46. The claims were made under TMA Sch 1AB. 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."

47. TMA Sch 1AB, para 3 says:

> "(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."

48. TMA s 42, referred to in Sch 1AB para 1(4), 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."

49. Schedule 1A, referred to at TMA s 42(11) above, provides at para 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.

50. TMA Sch 1A, para 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".

Submissions on behalf of the Applicants

51. Miss Shaw submitted that the Claim Letter should be interpreted in the same way as a contract. She relied on *Secret Hotels2 v HMRC* [2014] UKSC 16 ("*SH2*") at [32] where Lord Neuberger, with whom the other members of the Supreme Court agreed, said:

> "When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense…"

52. She made the following submissions:

(1) The Claim Letter was signed by the Applicants, and its opening paragraph says that "In total, £1,719,337 of income tax was…paid to HMRC by iii-

BVK…and £4,653,798 was suffered by GLL…". Had the Claim Letter ended at that point, it would be absolutely clear that the claim was for those amounts.

(2) If the Claim was only for the tax relating to Bayerische, it would have been "irrelevant" to include the full amounts of tax paid by the Funds.

(3) There is no statutory requirement to provide the information set out in the "background" and "grounds" parts of the Claim Letter, and those parts do not "limit or otherwise define the extent of the claims". The reason why these parts referred only to Bayerische was because, at the time of the Claim Letter, the Applicants were only in a position to provide information about Bayerische and not about the other investors.

(4) Appendix 1 set out the full amount of the tax paid by the Funds each year, so the claim had clearly been quantified, as required by TMA s 42(1A).

(5) The Claim Letter says that, apart from Bayerische, "the remaining units in iii-BVK and GLL are held by 15 other similar masterfund and pension scheme vehicles". The Claim Letter therefore provides general information about the other investors.

(6) There is more information in the Fifth Agreement, including the identity of those investors; all are masterfunds for German pension schemes in the same position as Bayerische.

(7) The proper construction of the Claim Letter cannot depend on what was said in the closure notices, so it is irrelevant that the closure notices refer only to the amounts claimed by Bayerische.

(8) Similarly, correspondence between KPMG and HMRC after the submission of the Claim Letter cannot determine the scope of the claim. In her Reply, Miss Shaw said that there was no reference to the position of the other investors in the appeal letter of December 2016 because: KPMG did not submit the Claim Letter, and "only became involved when the closure notices were issued" and possibly "didn't seek to clarify the position quickly enough".

(9) She drew attention to the fact that the Grounds of Appeal refer to "the Bayerisches", defined as "German occupational pension funds…who invest via Masterfunds", and that throughout those Grounds the references are to "the Bayerisches" and not to "Bayerische". The Grounds had therefore been drafted so as to include all the underlying investors, and not merely Bayerische. However, she accepted that the Grounds did not particularise the proportion of income tax attributable to each of the underlying investors.

53. Miss Shaw described as "unhappily worded" the sentence in the Claim Letter which reads "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)". However, she submitted that the words "as such" meant that the sentence related to, and must be read in conjunction with what had gone before, namely that the other investors are similar to Bayerische. The context was, she said, that all the investors were in the same position. There was "no compelling or rational reason" why the Applicants

should have limited the claim to a proportion of the tax, when the position is the same for the other investors.

Submissions on behalf of HMRC

54. Mr Mehta began by referring to the time limits. It was not in dispute that the Applicants were out of time to make a fresh claim for the other investors in relation to the relevant period, because of the four year time limit for making claims at Sch 1AB, para 3, and out of time to amend the original claim, see TMA s 42(9) and Sch 1A, para 3(1)(b). He said that the Tribunal should not permit the "aggressive re-writing" of the Claim Letter so as to circumvent those statutory time limits.

55. He went on to say that the Applicants' submissions were, in any event, contrary to the express words of the Claim Letter, which said (his emphasis):

> "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)"

56. The Claim Letter therefore explicitly related only to Bayerische, because it clearly differentiated between (a) the other investors, and (b) "Masterfund", which had been defined earlier in the same passage as the vehicle through which Bayerische held its investments in GLL and iii-BVK. Appendix 1 (cross-referenced at the end of that sentence) set out Bayerische's share of the total tax paid by GLL and iii-BVK, expressing that share as a percentage. The claim had been quantified, as required by TMA s 42, and the amount of that quantification was the percentage of the total tax which was attributable to Bayerische.

57. Mr Mehta said that, had the claim been intended to cover the other investors, the Claim Letter would have stated this was the position, and it would have been necessary to explain why they also met the requirements for the tax to be refunded – as the Claim Letter had done for Bayerische. The whole basis of the claim is that Bayerische should be treated in the same way as a UK pension fund. Yet there is no evidence attached to the Claim Letter showing that any of the other investors are similar to UK pension funds, and there is no quantification of the amount of tax which relates to each of these other investors, either in money or as a percentage share of the tax. There was instead only the very general statement that the other investors were "similar" masterfund and pension vehicles. Supporting documentation was provided only in January 2018.

58. It was, Mr Mehta said, not credible that Bayerische was included in the Claim Letter only as some sort of exemplar, pending the collection of information about the other investors. He pointed out that the Applicants had provided no witness evidence as to this purported rationale; they were relying on submissions only.

59. Moreover, nearly four years had passed between the Claim Letter dated 28 February 2014, and Mr Doran's letter of 14 December 2017. During that time both HMRC (in the closure notices) and KPMG (in the appeal against the closure notices) explicitly referred to the amounts claimed by Bayerische, and made no reference to

the total tax paid by the Applicants. At no point did the Applicants or KPMG say that there was any misunderstanding as to the scope of the claim, or refer to any reservation of rights in relation to the other investors. Mr Mehta submitted that the reality was that until the end of last year, both parties had had a common understanding as to the amount and scope of the claim, namely that expressly set out in the Claim Letter. The reason why the Applicants had made the claim only for Bayerische was not a matter on which any evidence had been provided, and HMRC were not able to speculate on the reasons.

60. He asked the Tribunal to reject Miss Shaw's submission that the opening paragraph of the Claim Letter should be read as setting the amount and scope of the claim. Instead, the letter had to be read as a whole. Miss Shaw had drawn parallels with contractual interpretation, and referred to *SH2*. He did not disagree, but said that both the "words used" and "the provisions of the agreement as whole" made it clear that the claim related only to Bayerische.

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.

The Second Application

71. The Second Application was for a ruling that TMA s 114 permits the claim to be amended to encompass the other beneficial owners as well as Bayerische. The Application is made in the alternative, and so falls to be considered because the Tribunal dismissed the First Application.

Jurisdiction

72. HMRC did not challenge the Tribunal's jurisdiction to hear and determine the Second Application. Although the Tribunal does not have an inherent jurisdiction to grant declarations or rulings, it does have the power under Rule 5(3)(e) to deal with "any issue in the proceedings as a preliminary matter".

73. I have therefore treated the Second Application as an application for the Tribunal to determine, as a preliminary matter, whether TMA s 114 permits the Applicants to amend their claims so that they encompass the other beneficial owners.

74. In *Wrottesley v HMRC* [2016] STC 1123 at [28] ("*Wrottesley*"), the Upper Tribunal gave guidance as to how the Tribunal should exercise its discretion to decide issues at a preliminary hearing. Having considered that guidance, I decided that it was in the interests of justice to decide the Second Application, because:

(1) the issue is linked to the other three Applications before this Tribunal, and in particular to the First Application;

(2) if the issue is not resolved as part of this hearing, it is likely to be resurrected at the substantive hearing;

(3) the relevant background would then have to be revisited as part of that substantive hearing, which would increase the time and costs for the parties and for the Tribunal;

(4) the issue can be divorced from the points to be decided at the substantive hearing; and

(5) there is no risk that deciding the issue will hinder the Tribunal in its determination of the substantive issue.

Relevant legislation

75. TMA s 113 is headed "Form of returns and other documents" and begins:

> (1) Any returns under the Taxes Acts shall be in such form as the Board prescribe...
>
> …
>
> (3) Every assessment, determination of a penalty, duplicate, warrant, notice of assessment, of determination or of demand, or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty shall be in accordance with the forms prescribed from time to time in that behalf by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual. "

76. TMA s 114 is headed "Want of form or errors not to invalidate assessments, etc" and reads:

"(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.

(2) An assessment or determination shall not be impeached or affected:

(a) by reason of a mistake therein as to

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination."

Case law cited both parties

77. Both parties cited, directly or indirectly, the same four judgments, namely *McGuinness v HMRC* [2013] UKFTT 088 (TC) (*McGuinness*); *Pipe v HMRC* [2008] STC 1911 ("*Pipe*"), *HMRC v Donaldson* [2016] STC 2511 ("*Donaldson*") and *R (oao Archer) v HMRC* [2018] STC 38 ("*Archer*") . HMRC referred also to two other cases, which are noted in the submissions part of this decision.

78. In *McGuinness,* an earlier decision of mine, HMRC had made a mistake when they inserted Mrs McGuinness's name on the notice to file a self-assessment return. One of the issues in the case was whether TMA s 114(1) could be relied on to remedy that mistake. The answer to that question depended on whether a notice to file a tax return was an "other proceeding" within the meaning of that section.

79. In order to decide the issue, I considered the dictionary definition of the meaning of "proceeding"; the *eiusdem generis* principle, and the rule of statutory construction that an Act is to be read as a whole. I then concluded at [53] that when the draftsman referred to "assessment or determination, warrant or other proceeding", the reference to "other proceeding" was a reference back to TMA s 113(3), and was shorthand for the items in that subsection which were not an assessment, determination or warrant, as emphasised below:

"assessment, determination of a penalty, duplicate[1], warrant, notice of assessment, of determination or of demand, or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty..

[1] TMA s 112(1) refers to "any assessment to tax, or any duplicate of assessment to tax" and the word "duplicate" here refers back to that subsection.

80. In *Archer* Lewison LJ, giving the only judgment with which Asplin and Longmore LJJ both agreed, said at [34] that the analysis in *McGuinness* was "generally accepted" to be the correct view. I return to *Archer* below.

81. In *Pipe* the taxpayer had been notified by letter that, if she did not submit her tax return within 14 days of the date of receipt of that letter, HMRC would issue penalties of £60 a day from 8 September 2004. Mrs Pipe did not comply, and on 29 September 2004 HMRC issued the penalty notice, wrongly referring to the period of the penalty as being 15 to 28 April 2004. Henderson J said that the document containing the mistake only notified the penalties, and the taxpayer's appeal was against the assessment which preceded the notification, but that TMA s 114 would in any event have cured the defect. He referred to s 114(2)(b), which refers to the document not being affected "by reason of any variance between the notice and the assessment or determination", and continued at [51]:

> "The force of the words 'any variance' is that no variance of any description between the notice and the determination is to invalidate the determination. I accept that there may come a stage where the error or discrepancy in question is so fundamental in character that it could not properly be described as a 'variance' at all; but in my judgment a mistake about dates of the type made in the present case gives rise to a 'variance' within the ordinary and natural meaning of that word."

82. The issue in *Donaldson* was whether the daily penalty notices issued to Mr Donaldson were valid. Under Finance Act 2009, Sch 55, para 4(1)(c), one of the requirements for a valid notice was that HMRC must "state in the notice the period in respect of which the penalty is assessed". Dyson MR, giving the only judgment with which Kitchen and Hamblen LJJ both agreed, found at [28] that although HMRC had failed to meet that requirement, the failure was remedied by s 114(1). He said that the section was "expressed in wide terms", although he agreed with Henderson J in *Pipe* that "a mistake may be too fundamental or gross to fall within the scope of the subsection", and went on to say at [29]:

> "Although the period was not stated, it could be worked out without difficulty…Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice."

83. In *Archer,* HMRC had failed to state, in a closure notice, the amount of tax due from the taxpayer. Lewison LJ first set out the above passage from *Donaldson,* and then said at [36]:

> "Although this passage is worded in terms that might suggest that the question was whether Mr Donaldson himself was misled, the test under s 114 must be an objective one: see *Pipe v HMRC* at [51]. However, in applying an objective test the reader of the closure notice must, I think, be

> taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC's conclusions were…"

84. He went on to say at [39] that:

> "applying the test in *Donaldson*, Mr Archer's liability could have been easily worked out, and he can have been in no doubt what he owed HMRC. He had in addition been informed by the APNs what HMRC asserted was his liability. He could not have been confused or misled. KPMG themselves had said in support of their application to the FTT that there was no amount of tax for 2001/2 which remained uncertain. HMRC's omission to amend his return to accord with their conclusions was, in my judgment, a matter of form rather than substance on the particular facts of this case. I would hold, therefore, that the closure notices were validated by s 114."

Submissions on behalf of the Applicants

85. Miss Shaw submitted that the Applicants should be permitted to amend their Grounds of Appeal so as to particularise their claims for repayment of the total tax paid in the years in issue, because TMA s 114 entitles them to treat the claims as being for the total amount of tax paid, and not only for the amounts relating to Bayerische. She said that:

(1) a claim for repayment of overpaid tax is an "other proceeding" because it is "a document required to be used in assessing, charging, collecting and levying tax" within the meaning of TMA s 113(3); it is therefore also within TMA s 114;

(2) that section provided "a substantive right available to both HMRC and the taxpayer, allowing documents within its scope to be unaffected by a mistake, defect or omission"; in this context she referred to *Donaldson*, where Dyson MR had said that TMA s 114 was "expressed in wide terms;

(3) the Claim Letter did not include the necessary details of the other investors, and that failure was both an omission and a mistake;

(4) although Dyson MR had confirmed that some defects were "too fundamental or gross" to be remedied by s 114, that was not the case here, because:

(a) the additional amounts had already been included in the opening paragraph of the Claim Letter;

(b) had the Claim Letter stopped after the opening words, the claim would have been valid and effective and there would have been no omission and no mistake; the defect arose from the wording of subsequent paragraphs;

(c) the facts, circumstances and grounds which would be relied on to support the repayment of the additional amounts were, in all material senses, identical to those already provided in support of Bayerische's claim; and

(d) for those reasons, HMRC were not misled by the Claim Letter.

Submissions on behalf of HMRC

86. Mr Mehta submitted that:

(1) although TMA s 114 was "expressed in wide terms", that did not extend to allowing taxpayers to amend claims.

(2) The meaning of "other proceedings" as set out in *McGuinness* and confirmed in *Archer,* refers to documents used for "assessing, charging, collecting and levying tax or determining a penalty". The making of claim does not come within any of those categories;

(3) section 114 allows errors of form to be corrected; the Applicants were instead seeking to increase the amount of the claim from around £1m to over £6m; and

(4) there was no genuine "mistake" here. The Claim Letter was explicit and related only to Bayerische; both HMRC and KPMG had understood this to be the position for over three years after it had been submitted.

Discussion and *decision on the Second Application*

87. I refuse the Second Application for four reasons.

88. First, I agree with HMRC that s 114 does not apply to claims sent by the taxpayer to HMRC. That is clear from the wording of the provision, which refers to documents "used in assessing, charging, collecting and levying tax or determining a penalty". These are types of documents issued by HMRC to gather taxes; they are not documents sent by a taxpayer to HMRC when claiming a refund of overpaid tax. All that Dyson MR said in *Donaldson* was that the section was "expressed in wide terms", which falls far short of supporting Miss Shaw's submission that the section provides "a substantive right available to both HMRC and the taxpayer".

89. Second, the words of TMA s 114 provide that it can only be relied on to correct an error "if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding". In other words, it is not possible to rely on the section to remedy an error if, objectively speaking, the recipient would be misled by the original document. In both *Donaldson* and *Archer* the Court of Appeal found that the taxpayers were not "misled or confused" by HMRC's mistakes. Although Miss Shaw submitted that HMRC "were not misled" by the Claim Letter, because the opening paragraph sets out the amounts of tax paid by the Applicants, that is clearly wrong. On an objective reading of the Claim Letter, the reasonable person would understand it to relate only to Bayerische, and would have been misled by the wording if, in fact, the claim did relate to all the investors.

90. Third, the Applicants are seeking to increase the claim from around £1m to over £6m. This is clearly "too fundamental or gross to fall within the scope of the subsection". Moreover, as is clear from the findings of fact at §§39-43, it was not

possible to deduce from the Claim Letter (including the attachments) the following key points:

(1) which Masterfunds were investing in the Applicants;

(2) for which periods; or

(3) what percentage of the total tax deducted related to each Masterfund, or to each beneficial owner.

91. Fourth, TMA s 114 can only be relied on where there is a want of form or an error. The Applicants rightly do not submit that this is purely a matter of form, but say there was an error in the Claim Letter. However, I agree with Mr Mehta that it contained no "mistake, defect or omission" within the meaning of that section. The Applicants made explicit and detailed claims relating only to Bayerische; they signed a Declaration that the claims were "correctly stated" to the best of their knowledge and belief, and it was only later that they decided to seek to expand the claims to include other investors. That is not the sort of "mistake" which TMA s 114 is designed to remedy.

The Third Application

92. The Third Application was for the Tribunal to direct under Rule 5(3)(c) of the Tribunal Rules that the claim be amended to encompass also the other beneficial owners.

The Rules and the legislation

93. Rule 2(1) sets out the overriding objective of the Rules, which is "to enable the Tribunal to deal with cases fairly and justly".

94. Rule 5 is headed "Case Management Powers" and begins:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (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;…"

95. The time limit provisions have already been set out earlier in this decision, but are repeated here for ease of reference. TMA s 42(9) provides that:

> "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.

96. TMA Sch 1A, para 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", and Sch 1AB, para 3(1) provides that "a claim under this Schedule may not be made more than 4 years after the end of the relevant tax year".

The case law

97. Both parties referred to *Reed Employment v HMRC* [2013] STC 1286 ("*Reed Employment*") and *HMRC v Vodafone* [2016] STC 1064 ("*Vodafone"*).

98. In *Reed Employment,* the company had previously claimed a refund of VAT on supplies of temporary workers. Six years later, it sought to amend that claim. The issue was whether it was, instead, making a new claim. At the Upper Tribunal, Roth J said:

> "[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.
>
> …
>
> [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."

99. In *Vodafone* the issue was also whether the company was making a new claim, or amending an existing claim. The Upper Tribunal (Warren J and Judge Bishop) held that an overpayment claim is not just for a sum of money, but for a sum of money which (in the case of VAT) arises in relation to particular supplies, see [47] and [51]. The UT continued:

> "[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 para [33], were of the correction of an arithmetical mistake or the addition of an element of claim which the taxpayer had plainly intended to include but which, by mistake, he had omitted. Those examples are consistent with our own conclusion that it is the amount and the method of calculation which define the claim; amendments of that kind do not alter its fundamental character. Nothing Roth J said limited the permissible amendments to those which did not increase the amount of the claim, and we respectfully agree with him on that point; once it is accepted that amendment is possible, there is no logical reason for a restriction of that kind. Indeed, one of the examples he gave might result in an increase in the overall amount of the claim, and the second almost inevitably would do so.
>
> [58] By contrast, the example of an impermissible amendment he gave at para [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."

100. From those cases, the following principles can be elicited:

(1) the correction of a mistake, whether an arithmetical error or through the omission of something that was clearly intended to be included, is not a new claim but an amendment;

(2) so too is the provision of further details, where the original claim states that the claimant is not yet able to calculate the full figures and gather all the documentation, but is in the course of doing so and will provide such further details as soon as possible;

(3) a change in the method of calculation or the amount are both permissible when making an amendment, and there is no prohibition on amendments which increase the quantum of the claim;

(4) however, the fundamental nature of the claim must not change – in other words, the amended claim has to arise out of essentially the same facts or circumstances as the original claim; and

(5) where the circumstances of the purported amendment arise out of similar but not the same circumstances, it is not an amendment but a new claim.

Submissions on behalf of the parties

101. Miss Shaw submitted that the Tribunal should exercise its discretion under Rule 5(3)(c) and direct that the amendment be allowed, for the following reasons:

(1) the Applicants intended to include in the claim the income tax for all the investors and not only for Bayerische;

(2) the amendment arises out of the same subject matter as the original claim;

(3) in *Reed Employment* Roth J implicitly accepted that an amendment could be made 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", and that was the position here;

(4) the full amount of the tax was known and fully identified at the time of the Claim Letter, so this is not a case 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

(5) the income tax was paid from the same investment income on the same investment properties as already set out in the Claim Letter, and so clearly arises from the same facts and circumstances as the original claim.

102. Mr Mehta submitted that this was not an amendment, but a new claim. The Applicants were, he said, seeking to enlarge a claim made in relation to Bayerische, so that it includes income tax relating to other investors. When the Claim Letter was submitted, there was no "express reservation" to the effect that the claims were to be further particularised; instead the claims were explicitly limited to Bayerische.

103. He also submitted that it would not be fair and just for the Tribunal to exercise its discretion to admit the amendment, because:

(1) there had been a long delay between the date of the Claim Letter and this application to amend; both parties had operated for over three years on the basis that the claims related only to Bayerische;

(2) HMRC had conducted the enquiries into the claims, issued the closure notices, and drafted their Statement of Case on the basis of that common understanding;

(3) there was no good reason for the delay. The Applicants had provided no evidence to support Miss Shaw's submission that "the reason why these parts referred only to Bayerische was because, at the time of the Claims Letter, the Applicants were only in a position to provide information about Bayerische and not about the other investors"; and

(4) the application was instead a "deliberate attempt" to circumvent the statutory time limits, both for amending claims and for making new claims.

Discussion of the Third Application

104. I first considered and applied the principles in *Reed Employment* and *Vodafone.*

(1) this Application does not require only the correction of an arithmetical error, or a change in the method of calculation;

(2) although Miss Shaw submitted that the Applicants intended to include the income tax for all the investors, no evidence has been put forward to support that submission and it is contrary to the express words of the Claim Letter. I therefore find that this Application does not require the insertion of "something that was clearly intended to be included";

(3) this is not a case where the original claims said that the Funds were "not yet able to calculate the full figures and gather all the documentation as required…, but is in the course of doing so and will provide such further details as soon as possible". Instead, the Claim Letter made only a passing reference to the other investors, saying only that "the remaining units in iii-BVK and GLL are held by 15 other similar masterfund and pension scheme vehicles". It is not until almost four years later, in December 2017, that Mr Doran of KPMG notified HMRC that "the Appellants intend to include the relevant documentation for each of these funds".

(4) neither is the Application asking only for a change in the amount of the claims. If the amendment were allowed, the fundamental nature of the claim would have changed, because any repayment would arise not only out of the facts and circumstances of Bayerische, but out of the facts and circumstances of the other investors; and

(5) it may be the case that (although this had not been shown to be the position as a matter of fact, but was instead merely asserted) the circumstances of the other investors is similar to those of Bayerische. However, for an

amendment to be allowed, the circumstances must be the same, not merely similar.

105. The Applicants' position is instead similar to the examples considered by Roth J at [38] of *Reed Employment,* and endorsed in *Vodafone* at [58], namely where there was "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" or the claim was for staff in the healthcare sector, and subsequently asked for repayment in relation to "another part of its business". Both of these were categorised as a new claim, despite being "for the same accounting period and arising out of the same error".

106. Even had I agreed with the Applicants that this was an amendment and not a new claim, I would have refused to exercise my discretion to grant the amendment, for the reasons given by Mr Mehta.

Decision on the Third Application

107. For the reasons set out above, I refuse the Third Application.

The Fourth Application

108. The Fourth Application is only relevant if the Applicants succeed before the Tribunal at the substantive hearing. As originally made, the Fourth Application was for a ruling that TMA s 50(6) gives the Tribunal the power to direct that HMRC repay the tax deducted from the income of all beneficial owners, and not only from Bayerische.

109. However, paragraphs 36 to 43 of Miss Shaw's skeleton argument are headed "ss 50(6)-(7A) and paragraph 9(5) of Schedule 1A TMA 1970". A footnote to that heading reads "The Appellants' Application refers only to s 50(6)…to the extent necessary, the Appellants hereby apply to amend their Application so as to include reference to those other provisions".

110. Mr Mehta did not seek to challenge that late application to amend the Fourth Application, or the unorthodox manner in which permission was sought to make the amendment. I have therefore proceeded on the basis that the Fourth Application is on that wider basis.

Jurisdiction

111. I treated the Fourth Application as an application to determine a preliminary matter. Having considered the Upper Tribunal's guidance in *Wrottesley*, I decided that it was in the interests of justice to do so, for essentially the same reasons as in relation to the Second Application, namely that:

(1) the issue is linked to the other three Applications before this Tribunal;

(2) if not resolved as part of this hearing, it is likely to be resurrected at the substantive hearing;

(3) the relevant background would have to be revisited as part of that substantive hearing, which would increase the time and costs for the parties and for the Tribunal;

(4) the issue can be divorced from the points to be decided at the substantive hearing; and

(5) there is no risk that deciding the issue will hinder the Tribunal in its determination of the substantive issue.

Legislation

112. TMA s 50 is headed "Procedure". The first five subsections were removed by F(No2)A 1975, so the section begins with subsection 6:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b) … 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.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is undercharged to tax by a self-assessment
>
> (b) …or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.
>
> (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."

113. TMA Sch 1A, para 7 is headed "Completion of enquiry into claim" and reads:

> "(1) An enquiry under paragraph 5 above is completed when an officer of the Board by notice (a 'closure notice') informs the claimant that he has completed his enquiries and states his conclusions.
>
> (2) In the case of a claim for discharge or repayment of tax, the closure notice must either
>
> (a) state that in the officer's opinion no amendment of the claim is required, or
>
> (b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess…

(3) In the case of a claim that is not a claim for discharge or repayment of tax, the closure notice must either

(a) allow the claim, or

(b) disallow the claim, wholly or to such extent as appears to the officer appropriate."

114. TMA Sch 1A, para 9, is headed "Appeals against such amendments" and reads:

(1) An appeal may be brought against

(a) any conclusion stated or amendment made by a closure notice under paragraph 7(2) above, or

(b) any decision contained in a closure notice under paragraph 7(3) above….

(2) …

(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.

(4) …

(5) If, on an appeal notified to the tribunal, the tribunal decides that a claim which was the subject of a decision contained in a closure notice under paragraph 7(3) above should have been allowed or disallowed to an extent different from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears appropriate, but otherwise the decision in the notice shall stand good."

The Applicants' approach to the relevant provisions

115. The cited provisions relate both to assessments (TMA s 50(6) and (7)) and to claims (TMA s 50(7A) and Sch 1A, para 9(5)). As indicated by Miss Shaw's amendment to the Fourth Application, there was some uncertainty as to which were relevant. However, in the main body of her skeleton argument Miss Shaw said that the Applicants could, at the hearing of their appeals, "adduce evidence to show that their claims for repayment of tax should be increased…and that consequently their self-assessments for the years in issue are excessive".

116. From this I find that the Applicants are seeking to rely on both the legislation relating to self-assessments and on that relating to claims. I first considered the provisions relating to self-assessments, and then those relating to claims.

The provisions relating to self-assessment

Miss Shaw's submissions

117. The Applicants filed self-assessments by completing forms SA 700. Miss Shaw submitted that, because those self-assessments incorrectly included the income relating to all the investors as being taxable, the Tribunal had the power under TMA s

50(6)(a) to decide that the Applicants had been "overcharged" by those self-assessments, and the Tribunal must direct that the assessments be "reduced accordingly".

118. She referred to *Tower MCashback v HMRC* [2008] EWHC 2387 (Ch) ("*Tower*") where Henderson J said at [115]:

> "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest."

119. When *Tower* reached the Supreme Court, under reference [2011] UKSC 19, Lord Walker expressly approved those words at [15] of the judgment.

120. Miss Shaw submitted that if the Tribunal did not take into account the tax wrongly paid by the Applicants under their self-assessments, they would not have paid "the correct amount of tax". In reliance on *Tower,* she said it was the Tribunal's duty to use its power under TMA s 50(6) to correct the Applicants' self-assessments.

121. She also relied on *Vowles v HMRC* [2017] UKFTT 704 (TC) (Judge Mosedale and Mr Sims), where the appellant had appealed against amendments to her self-assessment returns, and against discovery assessments. That tribunal found that Mrs Vowles had been overcharged to tax, and concluded:

> "[162] …s 50(6)(a) must be given a broad interpretation as the policy is that a taxpayer should only pay the correct amount of tax
>
> [163] What is that broad interpretation? It seems right that if HMRC put the correctness of one aspect of a tax return in issue, they must accept that the taxpayer can counter by proving (if he can) that another aspect of the same tax return was unduly favourable to HMRC, even if the taxpayer would be out of time to make a stand-alone correction under s 9ZA. That must be especially the case here, where the dividends and benefit in kind were an issue in the appeal in any event, at least in respect of 2010 and 2011."

122. Miss Shaw submitted that Applicants are therefore able to put forward, as part of their appeals, other aspects of their self-assessment returns, despite being "out of time to make a stand-alone correction". Furthermore, the taxability of the Applicants' rental income was "an issue in the appeal in any event", because that was the very matter which had been appealed.

123. Miss Shaw also referred to *HMRC v Walker* [2016] UKUT 32 (TCC) ("*Walker*") and *Auckland v PAVH* [1992] STC 712 ("*Auckland*"). However, I agreed with Mr Mehta that they do not assist the Applicants, but instead provide support for HMRC's position, and they are therefore set out below.

Mr Mehta's submissions

124. Mr Mehta relied on the opening words of s 50(6), which begins "on an appeal notified to the Tribunal". He said that there was no appeal before the Tribunal against

the Applicants' self-assessments; their appeals were instead against amendments made following the closure of HMRC's enquiries into the Claim Letter. It followed, he said, that TMA s 50(6) had no application.

125. He relied on *Walker,* where, having considered the principle established by Henderson J, the Upper Tribunal (Warren J and Judge Sinfield) went on to say at [33] (Mr Mehta's emphasis):

> "Given the general principle to which Henderson J referred, we consider that section 50(6) and (7) should be construed, insofar as their language sensibly allows, so as enable the FTT to amend a self-assessment return to give effect to the decision which they have made in relation to an appeal which is properly before them. In the present case, it was within the appellate jurisdiction of the FTT to make the decisions of fact which it did since those findings were made in an appeal 'against... any conclusion stated or amendment made by a closure notice under section 28A'. It would, as we see it, be a surprising result if the FTT were then unable to give effect to its findings by amending the return."

126. Similarly, in *Auckland*, where HMRC had appealed against a decision of the General Commissioners, who had offset overpayments in earlier years (which were not under appeal) against assessments of underpayments in later years (which were under appeal). Hoffman J overturned the General Commissioners' decision, saying (again, Mr Mehta's emphasis):

> "[Counsel for the appellant said] that [s 50(6) TMA] meant that the [general] commissioners could reduce the assessment before them if they were satisfied that the taxpayer company had been overcharged on some other occasion, in this case the 1979 and 1980 assessments. But that is not how I read the section. It says that if the appellant is overcharged by any assessment the assessment shall be reduced accordingly. In my judgment, the only assessment that can be reduced is the assessment in respect of which the commissioners think that the taxpayer has been overcharged. As I have said, it was no longer open to the commissioners to reduce the 1979 or 1980 assessments. In any event, there was no appeal against those assessments before them. They were not entitled on account of their views about those assessments to reduce the assessment against which the appeal had actually been brought. The result is that in my judgment the commissioners thereby erred in law and the appeal must be allowed."

127. Mr Mehta said that *Vowles* did not assist the Appellants. He drew attention to [170] of that judgment, where the tribunal said:

> "It might be said that the only issue before the Tribunal for 2008 and 2009 is the validity of the amendments which HMRC made to the appellant's self assessments for those years, and therefore, while the Tribunal could reduce those amendments to nil, it cannot go further and reduce the self assessments. But we think that is to give s 50(6) an unduly narrow reading: it refers to whether 'the appellant is overcharged by a self-assessment'. For each of 2008 and 2009 only one

> assessment is in issue, which is the appellant's self assessment as subsequently amended by HMRC. By amending that self assessment, HMRC put the entire self-assessment within the jurisdiction of the Tribunal."

128. Thus, in Mr Mehta's submission, the Tribunal does not have the power to reduce the Applicants' self-assessment returns when it makes its decision on the appeal against the closure notices, because the self-assessment returns are not under appeal. The only matters under appeal are HMRC's amendments following the closure of their enquiries into the claims.

Decision on the provisions relating to self-assessment

129. I agree with Mr Mehta, for the reasons he gives. The Tribunal is a statutory body, and its appellate jurisdiction depends on a person first making an appeal. Not only is there no appeal before the Tribunal against the Applicants' self-assessments, it is not possible to appeal a self-assessment; it is only possible to appeal against closure notices which amend those self-assessments. The closure notices do not amend the Applicants' self-assessments, they amend their claims, and it is to those that I now turn.

The provisions relating to claims

130. In her skeleton argument, Miss Shaw cited this edited version of TMA s 50(7A) (my emphasis):

> "If, on an appeal notified to the tribunal, the tribunal decides that a claim…which was the subject of a decision contained in a closure notice…should have been allowed…to an extent different from that specified in the notice, the claim…shall be allowed…accordingly to the extent…appropriate…"

131. The words which have been omitted from TMA s 50(7A) by the underlined ellipsis are, however, important. The full phrase reads "contained in a closure notice under section 28A of this Act". TMA s 28A is headed "completion of enquiry into personal or trustee return or NRCGT return", and begins by stating that it "applies in relation to an enquiry under section 9A(1) or 12ZM of this Act.

132. The Applicants have not received closure notices following an enquiry under TMA s 28A; their closure notices were instead issued under TMA Sch 1A para 7. Miss Shaw did not cite any provision by which a closure notice issued under that provision could be deemed to have been issued under TMA s 28A, and I am not aware of any.

133. Miss Shaw also relied on Sch 1A para 9(5). However, that subparagraph refers to amendments "contained in a closure notice under paragraph 7(3) above". Closure notices under para 7(3) relate to claims which are "not a claim for discharge or repayment of tax". The Applicants did claim a repayment of tax. Thus, para 9(5) is also inapplicable.

134. Although not referred to by Miss Shaw, from my reading of the statute, the relevant provision appears to be Sch 1A para 9(3), which refers back to para 7(2). The latter applies where the disallowed claim was for the "repayment of tax". I therefore find that the Tribunal has the power under para 9(3) to "vary the amendment appealed against whether or not the variation is to the advantage of the appellant".

135. It is clear that, if the tribunal at the substantive hearing finds that the Applicants are correct in their submissions, that tribunal will allow the appeals and HMRC's amendments will be varied in reliance on TMA Sch 1A para 9(3) so as to reinstate the full amount of the claims.

136. However, Miss Shaw submits that the Tribunal has a duty, not only to reverse the amendment and reinstate the claimed tax repayments, but to increase those repayments by including the tax paid by the other investors. Only that course of action would, in her submission, ensure that the Applicants pay "the correct amount of tax".

137. Mr Mehta asked the Tribunal to reject that submission. He said that in *Tower* Lord Walker had endorsed not only Henderson J's formulation of the "correct amount of tax" principle, but also his statement that an appeal against a closure notice does not open the door "to a general roving inquiry into the relevant tax return". Instead "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".

138. Mr Mehta said that "the scope and subject matter" of these appeals was the claims made by the Applicants to repay tax of £1,004,824 suffered by Bayerische over a four year period. The Tribunal could not vary HMRC's amendments so as to expand the claim to encompass other facts and circumstances, and to increase the amount payable, over and above the tax actually claimed by the Applicants on the basis of the facts and circumstances set out in the original claim.

139. Again, I agree with Mr Mehta. The Tribunal's power, given by Sch 1A para 9(3), is to "vary the amendment appealed against". That does not extend to varying the claim itself. The Applicants are out of time to amend the claim or to make a new claim.

Decision on the Fourth Application

140. For the reasons set out above, I refused the Fourth Application.

Other

141. These appeals were allocated to the complex track. Rule 10(4) allows HMRC to make an application for costs "at any point in the proceedings" but no later than 28 days after the Tribunal issues its final decision following the substantive hearing. It is therefore a matter for HMRC whether they wish to seek the costs of defending these Applications by making an application to the Tribunal at this point.

142. The Tribunal thanks Miss Shaw, Mr Mehta and Miss Rooney for their helpful submissions.

Decision and appeal rights

143. This document contains full findings of fact and reasons for the decision. If the Applicants are dissatisfied with this decision, they have 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2018

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 18 June 2018.