[2018] UKFTT 0604 (TC)

TC6766

Appeal number: LON/2005/464

TYPE OF TAX – application to amend grounds of appeal –* Fleming *claims for repayment of overpaid output tax from 1973 to 1999 – whether one claim or many – whether claims completed by payment and not amendable – whether claims subject to Rule 18.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BALLARDS OF FINCHLEY PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at Taylor House EC1R on 16 July 2018

Tim Brown instructed by Grant Thornton for the Appellant

Paul Marks, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This decision relates to an application by Ballards of Finchley Plc ("Ballards") to amend its Grounds of Appeal.

Background

2. On 6 June 2003 the appellant ("Ballards") wrote to HMRC claiming repayment of VAT overpaid during the period from 1 April 1973 to May 1999 in relation to (a) margins on the sale of demonstrator vehicles and (b) bonuses paid to dealers. Following HMRC's refusal to make repayment on the basis that Ballards' claim was made outside the (then) new time limit, Ballards appealed to the tribunal on 26 April 2005.

3. Since then a considerable amount of water passed under the bridge. On 5 September 2017 Ballards made the application to amend its grounds of appeal which is the subject of this decision.

4. The letter of 26 June 2003 set out for each year from 1973 to 1999 the amount of VAT which Ballards claimed to have been overpaid in relation to margins (using a method of calculation which had been accepted by HMRC) and bonuses.

5. When Ballards' appeal to the tribunal was made it was stayed behind the progress of the *Fleming* cases (*Flemings v HMRC* eventually reported at [2008] UKHL 2) in which the legality of the introduction of a new time limit on making claims was being challenged.

6. After the judgement of the Court of Appeal in 2006 in the *Fleming* cases, HMRC wrote to Ballards on 17 September 2007 agreeing to pay part of the total amount claimed subject to certain confirmations and the receipt of an undertaking to repay if the House of Lords overturned the Court of Appeal.

7. Grant Thornton replied to HMRC on 28 September 2007: giving the confirmations sought and agreeing the amount of repayment in respect of the parts of the total which had been allowed by HMRC. They enclosed the requested undertaking under which HMRC agreed to credit Ballards with £170,289 and Ballards agreed to re-pay if and to the extent that the effect of the final decision in *Fleming* was that it was not fully entitled to the credit.

8. The amount agreed to be repaid comprised:

(i) VAT in respect of margins for the period 1 April 1973 to 4 December 1996; and

(ii) VAT in respect of bonuses for the period 1 April 1973 to 31 December 1992. This period was different from that in (i) because a different argument applied in relation to bonuses after 31 December 1992.

9. The amount paid thus excluded any amount claimed which referred to:

(i) time before 1 April 1973;

(ii) bonuses from 1 January 1993 to 4 December 1996; and

(iii) anything after 4 December 1996 (on the basis that this latter period was subject to the new three-year limitation period in section 80(4) VATA and section 121 FA 2008).

10. On 27 March 2009, after the House of Lords' judgement, HMRC wrote to Ballards confirming their view that *Fleming* applied to claims for overpaid output tax in VAT periods ending before 4 December 1996.

11. From late 2008 the appeal was successively stood over behind the appeals of Scottish Equitable and Leeds City Council in which the legality of the three-year limitation period for post December 1996 claims was being contested. The decision of the Court of Appeal in *Leeds* was given in December 2015 and dismissed the challenge to the legality of that limitation.

12. There was then a further stay. During that stay there was correspondence between the parties in which Grant Thornton asserted that the amounts which had been claimed and repaid in relation to the margin elements were less than they should have been. The argument put was that the original method of calculation was based on tables accepted by HMRC which used changes in the retail prices index to estimate historic costs, but in times of greater inflation factors other than the retail price index had a significant effect on prices. Taking into account these factors, it was claimed that the amount of VAT overpaid was greater than that which had been originally claimed and refunded.

13. Then on 5 September 2017 Ballards made its application to amend its grounds of appeal to assert that the amount claimed and paid in respect of the margin claim was less than it should have been.

HMRC's arguments

14. Mr Marks says:

(1) properly understood Ballards' letter 26 June 2003 consisted of multiple claims: one in respect of margins and one in respect of bonuses for each prescribed accounting period ("VAT period") between 1973 and 1999;

(2) the appeal to the tribunal must be taken as being against each such claim separately;

(3) the claims in respect of margin for the period 1 April 1973 to 4 December 1996 had been settled by the payment made pursuant to the undertaking letter of 28 September 2007. These claims, having been settled, could no longer be subject to the tribunal's jurisdiction and no amendment to the grounds of appeal could revive them;

(4) likewise the bonus claims for the period 1 April 1973 to 31 December 1992 were settled and so were not before the tribunal;

(5) the claims relating to the period after 4 December 1996 had been stayed behind *Leeds. Leeds* had been a lead case. The effect of rule 18 of the tribunal's rules was that unless application was made under rule 18(4) within 28 days of the receipt of notification of the decision in the lead case, that decision was binding on the parties in the stayed cases. No such application under rule 18(4) had been made by Ballards. As a result the appeals against the claims should be regarded as "compromised" with the result that they could not be amended

(6) in any event the proposed amendments to the claims were properly regarded as new claims rather than as amendments to the 2003 claims. As such they were both out of time and outside the ambit of the present appeal before the tribunal;

(7) further, even if the claims have not been settled or compromised and the changes were amendments to them it would not be just and fair to permit the amendments to the statement of case given the time that had passed.

The Applicant's arguments

15. Mr Brown says:

(1) the terms of the undertaking of 28 September 2007 did not contain any agreement by Ballards not to continue to appeal. It could not properly be called a settlement of the claim: it was merely an arrangement for a contingently repayable payment in respect of part of it;

(2) there was nothing to indicate that *Leeds* was a lead case in relation to this particular appeal. This appeal had been stayed behind it but there was no direction which satisfied rule 18 (2) - which both specified *Leeds* as a lead case and stayed this and other appeals;

(3) the change to the method of computation was merely an amendment to an existing claim. The facts and circumstances of the claim: the supplies at issue and the arguments that there had been an overpayment were the same.

Discussion

(1) One claim or many?

16. In *Bratt Autoservices Co Limited v* HMRC [2018] EWCA Civ 1106 the Court of Appeal considered the requirements for a "claim" for overpaid VAT for the purposes of section 80 VATA. Section 80(1) provides that where a person

> has accounted ... for VAT for a [VAT period] and ... has brought into account as output tax ... an amount that was not ... due, the Commissioners shall be liable to credit the person with that amount".

Floyd LJ said

"27 ... a claim under section 80 is not any demand for repayment of overpaid tax, but is a demand for repayment of overpaid output tax for a prescribed accounting period ... thus I would not agree that a claim under section 80 "may relate to one accounting period or many". A taxpayer may, in the same letter, raise a number of different claims, each by reference to an accounting period, but multiple such claims in the same letter are not, in my judgement, correctly referred to as a single claim under section 80."

17. But he accepted ([33]) that there could be cases in which a "claim" was made by reference to a period which encompassed many VAT periods would not necessarily fail to be "claim" for section 80 purposes where it was apparent what the amount for each VAT period would be.

18. Mr Marks did not suggest that the letter of 26 June 2003 failed to be section 80 claims for these purposes. On that basis it seems to me that it must be regarded as comprising a number of section 80 claims, at least one for each of the VAT periods encompassed between 1973 and 1999.

19. That leaves the question as to whether the letter should be treated as conveying separate claims for the margin and bonus element in each period.

20. Floyd LJ's remarks do not address this question. There is some help in the legislation, which calls attention to the amount of a claim. Section 80(2) provides that HMRC shall be liable to credit or repay "an amount under the section on a claim being made for that purpose"; subsection (6) requires a claim to be in writing and to comply with regulations, and regulation 37 of the VAT regulations requires the claim to state "the amount of the claim and the method by which that amount was calculated.

21. It seems to me that whether a document comprises one or more than one claim in relation to a VAT period is a matter of the construction of that document in the light of the requirement that any claim must state its amount.

22. Ballards' letter of 26 June 2003 starts:

"Please accept this letter as a voluntary disclosure on behalf of [Ballards and another company] for £261,810.26 for VAT overpaid in respect of demonstrator vehicles…

This claim follows the ECJ Judgement on respect of Marks and Spencer…

…the present claim concerns the period 1973 to 1999.

The claims are made in respect of VAT overpaid on demonstrator margins, together with VAT overpaid on demonstrator bonuses…"

23. The letter attached schedules setting out the breakdown of the claimed overpaid VAT by company and in respect of margin and bonus, and by year.

24. The writer of the letter uses "claim" and "claims" without apparent discrimination, but it seems to me that although this letter describes the components

of what is claimed it conveys the impression that a single amount is sought by each company and thus that it is intended as a single claim for a single amount for each company in respect of each VAT period comprised in the period to December 1999.

25. I conclude that only one claim was made in relation to each VAT period.

(2) When may a claim be amended?

26. *Wheels Common Investment Fund Trustees Ltd* [2017] UKFTT 830 (TC) related to an application to amend grounds of appeal to incorporate new legal arguments. Judge Sinfield considered the decisions of the Upper Tribunal in *Reed Employment Ltd v HMRC* [2013] UKUT 109 (TC) and *Vodafone Group Services* [2016] UK UT 89 (TC). He concluded: that the following approach should be adopted to an application to amend

> 13. It seems to me that *Reed Employment* and *Vodafone* show that the first step in determining whether an amendment to grounds of appeal relating to a claim for repayment is a new claim, is to identify the fundamental character or elements of the original claim. The fundamental character or elements of a claim are to be found in the facts and circumstances of the claim which can be ascertained from the methodology by which the amount of the claim is calculated and the reason given why the amount accounted for was not output tax due. The relevant elements include the particular supplies or transactions which gave rise to the claimed overpayment of output tax and the specific output tax claimed (but not necessarily the amount). It is then necessary to consider whether the amendment, if allowed, would change the fundamental character or elements of the original claim to such an extent that it is a separate claim.
>
> 14. An amendment that does not change the fundamental character or elements of the original claim is not a new claim but an amendment to the original claim. Errors and omissions that do not enlarge the scope of the claim by adding elements not in contemplation when the claim was originally made would not normally constitute a new claim. It appears from both *Reed Employment* and *Vodafone* *that changes to the amount claimed or the method of calculation* [my underlining] do not, without something more, alter the fundamental character of the claim. An amendment that extends the facts and circumstances beyond those contemplated by the earlier claim is a new claim. For example, an amendment that extends a claim to include supplies to clients not included in the original claim will be a new claim and not an amendment to the original one. In *Reed Employment*, the further demand in that case and the examples given by Roth J of further demands that constituted new claims all involved, if permitted, enlarging an existing claim by including supplies that were outside the scope of the original claim although they arose from the same error. In *Vodafone*, the further demand related to errors and supplies entirely unconnected with those that formed the basis of the original claim and, therefore, a separate claim.

27. I gratefully adopt the same test.

28. It seems to me that the changes which Ballards seek in the calculation of the overpaid VAT do not alter the fundamental characteristics of its claims. The claims arise out of the failure to account properly in relation to margins and bonuses. What has changed are the figures used in the calculation which is made to estimate the cost of the vehicles. I accept that those figures are the result of the application of a method but that method is not fundamental to the nature of the claims: it does not define them; there is no change in the supplies to which the claim relates or the reasons for claiming the VAT on the relevant supplies.

29. As a result I conclude that the changes to the claims sought by Ballards in their correspondence with HMRC prior to the application to amend their grounds of appeal were potentially amendments to their claims for the purposes of section 80. I say "potentially" but I have still to deal with the argument that the claims were settled in 2008 or compromised after *Leeds* and so could not be amended.

(3) Were the claims met, settled or compromised?

30. The tribunal's rules do not contain any express provision which terminates the process of an appeal when an claim is paid or settled - although there are provisions in the tribunal's rules relating to the withdrawal of an appeal and for the making of orders determining the appeal by consent, there is no express termination of an appeal when a claim is paid or settled. Thus it might be said that the satisfaction or settlement of a claim leaves an appeal against its refusal extant, and the tribunal seized of its conduct. On that basis the tribunal would have jurisdiction to determine whether the grounds of appeal may be amended even if the claim as being paid or settled.

31. However in *CCE v University of Liverpool* [2000] VTD16769 a preliminary issue was heard as to whether a letter claiming additional repayment should be treated as making amendments to a claim or as a freestanding claim. Judge Demack said that he regarded a claim as "a demand for something as due" [25], and considered that if a claim had been "completed" it was no longer a claim for section 80 purposes and so could not be amended (with the result that the purported amendment fell to be treated as a new claim in relation to which a fresh appeal would need to be made against any refusal, and which would be subject to any relevant limitation period). He then said ([13].) he would regard the claim as “completed” if:

> (1) it had been met in full by the Commissioners;
>
> (2) it had been met in part or rejected but the time limit for appealing had passed; or
>
> (3) had been met in part or rejected in full, and “the taxpayer has appealed against [that] rejection, his appeal has been determined by the tribunal or court and the time limit prescribed for appealing against that determination has expired or the appeal has been compromised.

32. So far as concerns payment in full that conclusion was accepted without argument in *Reed* where Roth J said [30].

> "There is no statutory definition of "claim" for the purpose 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, and thus the 2009 Claim cannot be regarded as an amendment to the first or second repayment claims.

33. So far as concerns payment in full this approach derives from the acceptance in *Liverpool* that a "claim" is for an amount due or (per Roth J in *ReedI* at [31]) that it is a *"*demand for repayment of overpaid tax" Those definitions of "claim" mean that if the amount claimed is paid, there is no longer a claim. Now, the tribunal's jurisdiction to hear an appeal against a the refusal of a claim is given by section 83(1)(t) VATA which speaks of any "claim to the repayment of any amount under section 80". Thus the jurisdiction of the tribunal vanishes with the disappearance of the claim. As a result, when a claim has been paid in full the tribunal has no jurisdiction to address an application to amend the grounds of appeal since it no longer has any jurisdiction to hear the appeal.

34. In the quoted words in paragraph 31(3) above, Judge Demack speaks of a claim being "compromised". It seems to me that this word must be construed as limited to the situation where there is agreement not to pursue a claim - for only then can it fairly be said that nothing is demanded or said to be due. However, when there is such a compromise it seems to me that the reasons and conclusions in the preceding paragraph apply.

35. Was there completion of the claims by the payments made shortly after 28 Septemebr 2007? (The payments made in respect of the claims for the period 1 April 1973 to 31 December 1992 in respect of to margins and bonuses and for the period 1 January 1993 to 4 December 1996 in relation to margins only)

36. I do not consider that the arrangements comprised in (i) the letter of 17 September 2007 under which £170,289 was paid to Ballards and (ii) Ballards' undertaking to repay that sum if *Fleming* was decided against it, are properly to be construed as the meeting of its claims for those periods because the payment was subject to possible repayment: thus there remained a contention that an amount was or could be due.

37. But after (1) the publication of the decision of the House of Lords in *Fleming* on 23 January 2007, (2) Grant Thornton's letter of 28 September 2007 which agreed the revised payments and (3) HMRC's letter of 27 March 2007 in which it was conceded that *Fleming* applied to periods before for 4 December 1996, it seems to me that the claims for the periods 1 April 1973 to 31 December 1992 had been met in full by HMRC. As a result the claims for those periods may not be amended.

38. The claims for the periods from 31 December 1992 to 4 December 1996 were however not met in full because the element of the claim relating to bonuses had not been paid. There was no evidence of any compromise in relation to these claims. They

remained outstanding and thus the appeals against their refusal remained subject to the jurisdiction of the tribunal.

39. Nor were the claims for the periods after 4 December 1996 completed by payment. Mr Marks, however, argues that they were compromised as a result of the effect of Rule 18 of the tribunal's rules. I now turn to that.

(4) Rule 18 and *Leeds*

40. This is relevant only to the claims for the VAT periods from 4 December 1996 onwards.

41. Rule 18 applies if two or more cases have been started before the tribunal which give rise to common issues of law or fact. It provides that the tribunal may give a direction specifying one or more cases a lead case, and staying the other related cases. Where such a direction is given a decision in the lead case can become binding on the parties to the related cases unless the party makes an application for a direction to the contrary within 28 days.

42. It seems to me that a direction which merely stays a appeal behind another does not bring into effect the mechanism of Rule 18: it is only if there is a direction which both specifies the lead case(s) and stays the related cases that the rule applies.

43. I saw no evidence that *Leeds* had been designated a lead case by a direction which also stayed this appeal. I therefore conclude that Rule 18 does not apply to this appeal. But even if Rule 18 applied the effect would have been that the principles decided in that case would be binding in this appeal. That would mean that Ballards could not argue that the post 1996 time limits were illegitimate. It does not however mean that the appeal has been compromised for there has been no acceptance on the part of Ballards that an amount is not due in respect of the relevant years.

(5) The exercise of discretion.

44. Given that *Leeds* is binding on this tribunal the same substantive result accrues even if it was not a lead case for this appeal. Even if the appeal has not been compromised or settled, Ballards must have no prospect of success in relation to the post 4 December 1996 claims because they were made after the expiry of the time limit.

45. The procedure of the tribunal, including issues as to the amendment of grounds of appeal is a matter of discretion for the tribunal. Such discretion must be exercised in accordance with the overriding objective of dealing justly and fairly. It does not seem to me to be an appropriate exercise of that discretion to allow an amendment to grounds of appeal if the appeal has not prospect of success. As a result I do not give permission to amend the grounds of appeal in relation to claims for periods after 4 December 1996.

46. A similar issue arises in relation to claims for the periods from 31 December 1992 to 4 December 1996 which I address below.

Conclusions - summary

47. The letter of claim dated 26 June 2003 is properly to be treated as a series of claims one (and only one) for each VAT period from 1 January 2073 to 31 May 1999;

48. The claims for the period 4 April 1973 to 31 December 1992 were met in full. The tribunal no longer has jurisdiction to consider appeals in relation to these claims. The application to amend the grounds of appeal in relation to these claims must be refused.

49. The claims in relation to the period after 31 December 1992 to 4 December 1996 were not met. They were not expressly compromised. The tribunal may therefore permit their amendment. The amendments sought by Ballards are permissible amendments. But the tribunal has a discretion as to whether or not to permit the amendments. Grant Thornton's letter of 17 May 2017 sets out the revisions to the claims as a result of the revised method of determining price. It indicates that no revision of the claims is sought in relation to these periods. That was consistent with the evidence of Mr Montgommery that the change in calculation related to distant periods of high inflation. It seems to me therefore that if the tribunal permitted amendment of these claims it would be to no avail. On that basis I do not consider that the discretion should be exercised.

50. The claims in relation to the VAT periods after 4 December 1996 to 31 December 1999 were not met and are still extant. The effect of the decision of the Court of Appeal in *Leeds* was not to "compromise" the appellants' outstanding appeals. They may thus be amended. The changes proposed by Ballards are amendments to those claims. The tribunal may therefore permit the amendment of the grounds of appeal in relation to those claim

51. However as a result of *Leeds* it appears that Ballards has no chance of success in these claims. It would therefore be pointless to permit the amendments and the tribunal should not exercise its discretion to permit them.

Conclusion.

52. I refuse permission to amend the ground of appeal.

Rights of Appeal

53. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 15 October 2018