TC08060

VALUE ADDED TAX – claim for repayment of overpaid VAT – section 80 (4) VATA – whether claim outside 4 year time limit or amendment of existing claim – Reed Employment Ltd v HMRC [2013] UKUT 109 (TCC) considered

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07916 & 07917

BETWEEN

LEICESTER CITY COUNCIL **Appellant**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN

The hearing took place on 9 February 2021. The form of the hearing was a video hearing on the Tribunal's video platform. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. Therefore, the hearing was held in public.

Leslie Allen, Mishcon de Reya, for the Appellant

Laura Castle, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns HMRC's decisions on 10 September 2018 and 11 September 2018 by which HMRC refused to repay certain amounts contained in the Appellant's claims made to HMRC on 25 April 2018 and 26 April 2018 (collectively "the April 2018 claims"). The Appellant ("the Council") appeals against those decisions and it is common ground that these are appealable matters under section 83(1)(t) of the Value Added Tax Act 1994 ("VATA").

2. In short, the Council contends that the April 2018 claims constituted amendments to existing claims that had already been made within the four year time limit prescribed by section 80(4) VATA. HMRC, on the other hand, argue that those claims constituted new claims made outside the four year time limit.

THE EVIDENCE

3. I was supplied with an electronic bundle of documents comprising 422 pages. That bundle contained a witness statement of Mr Ian Harris, a Principal Accountant with the Council, who was responsible for the Council's VAT affairs at all material times.

4. In the course of the hearing, Ms Castle (appearing for HMRC) indicated that she wished to cross-examine Mr Harris. The Council's skeleton argument had clearly proceeded on the basis that Mr Harris' evidence would be unchallenged. Mr Allen (appearing for the Council) informed me that HMRC had previously indicated that they did not intend to cross-examine Mr Harris. After the hearing, Mr Allen produced email correspondence (particularly an email dated 28 May 2020 from HMRC) which supported his understanding.

5. Nonetheless, although unprepared, Mr Harris indicated that he was willing to answer questions and I permitted Ms Castle to cross-examine him. In the event, I do not think that cross-examination advanced matters appreciably. Mr Harris was in my view an honest and credible witness. HMRC did not seek to give witness evidence of its own.

6. I do not think it is satisfactory, however, that a witness should be taken by surprise in this manner. If HMRC had intended to cross-examine Mr Harris then this should have been made clear in advance of the hearing. That, in the circumstances of this case, I permitted the cross-examination to proceed should not be taken as a general permission to cross-examine a witness without warning in this way.

BACKGROUND

7. It may be helpful at the outset if I briefly outline the circumstances leading to this appeal. There have been many repayment claims made by the Council and it is easy to experience some difficulty in seeing the "wood for the trees" without some sort of overview. I also refer to paragraphs 49 to 51 below, where I attempt to summarise the position in relation to the April 2018 claims (which are referred to below as "Claim 7" and "Claim 8").

8. I should also make it clear at this stage that when I refer to a "claim" I do so merely for convenience without in any way prejudging the issue that I have to decide, viz whether the claim is an amendment to an existing claim or a new claim.

9. As I shall explain in more detail, the Council (along with a number of other similar councils) came to the view that it may have overpaid VAT in respect of the provision of sports facilities.

10. The Council submitted what is known as a "Fleming claim"[1] to HMRC on 25 March 2009 in respect of over-declared output tax on sports and leisure facilities from 1973 to 1996. Further claims in respect of later periods were submitted and, as time went by, further repayment claims covering later periods were submitted within the four year time limit prescribed by section 80(4).

11. Ultimately, following the decision of the CJEU in *Ealing London BC v Revenue and Customs Commissioners* Case C-633/15 [2017] STC 1598 (July 2017) (the "*Ealing* case"), HMRC accepted the Council's position that the supply by a council of sports facilities was exempt from VAT under what is now Article 132(1)(m) of the Principal VAT Directive.

12. The result of the *Ealing* case was that many of the repayment claims made by the Council, which had initially been rejected on the basis that there was no underlying liability, were accepted and were paid by HMRC in May 2019.

13. However, in March 2017 the Council claimed a further repayment of output tax in respect of its income from golf courses. In April 2018 the Council put in further claims, amending the March 2017 claim, in respect of its golf course income. In addition, the Council also claimed a repayment of output tax in respect of its income from sports activities on its parks ("sport on parks"). These final two claims are the April 2018 claims.

14. HMRC have rejected the Council's April 2018 claims in respect of its golf course income and from sport on parks. HMRC say that these are new claims, brought outside the four year limit imposed by section 80(4), and are not amendments to existing claims. The Council maintains that the April 2018 claims were simply amendments to earlier claims. It is these the April 2018 claims with which this appeal is concerned.

15. It is, however, necessary to look at the interrelationship between the April 2018 claims and the earlier claims in order to address the issues raised in this appeal, bearing in mind that many of the earlier claims were accepted as valid by HMRC and have been satisfied by repayment in May 2019.

THE FACTS

16. I set out below the facts in this appeal which were not in dispute. It is perhaps regrettable that the parties did not see fit to produce an agreed statement of facts.

17. The Council became aware in approximately 2008/2009 that the supply of sports facilities by councils may not be liable to VAT. This was on the basis of three possible arguments:

(1) the provision by a local authority of sports facilities was not an economic activity, applying *EC v Finland* C-246/08; and/or

(2) if it was an economic activity, the provision by a local authority of sports facilities was subject to a special legal regime and that no significant distortion of competition would be caused by "non-Vatable" treatment, applying Article 13(1) of the Principal VAT Directive; and/or

[1] "Fleming claims" are claims for over-declared VAT, potentially going back as far as the inception of VAT in 1973. They followed the House of Lords judgments in January 2008 in the cases of *Fleming t/a Bodycraft v HMRC and Conde Nast v HMRC* [2008] STC 324 which concerned the way that the three year time limit on making claims had been introduced. The "Fleming window" allowed taxpayers to submit claims for over-declared VAT without time-limit for periods prior to November 1996, provided the claim was submitted by 31 March 2009.

(3) if it was an economic activity and was not subject to a special legal regime, the provision by a local authority of sports facilities was exempt from VAT under what is now Article 132(1)(m) of the Principal VAT Directive.

18. As I have also indicated, the result of the *Ealing* case in 2017 was that HMRC largely accepted the Council's position on issue (3) above. The two other grounds, I was informed, remain subject to ongoing litigation led by Chelmsford City Council (TC/2011/07816), which appeal serves as the "lead case" for England and Wales for what is referred to as the "Local Authority Sporting Services Appeals Group." Whilst the Council maintains an appeal under the "Local Authority Sporting Services Appeals Group", I was informed that that appeal has no direct relevance to the present appeal.

19. On 25 March 2009, the Council wrote to HMRC in respect of output tax claimed to have been over-declared on sports and leisure facilities from 1973 to November 1996 (**"Claim One"**) in the amount of £3,310,919.[2] Claims in respect of periods 04/73 to 12/89 were rejected by HMRC on 10 September 2012 and the Council's appeal in respect of those periods are, as I understand it, stayed behind an appeal being brought *Chelmsford City Council* appeal mentioned above. Claims in respect of VAT periods 01/90 to 11/96 were paid by HMRC on 31 May 2019 following the decision in *Ealing* case in 2017.

20. The letter of 25 March 2009 claimed over-declared VAT on "sports and leisure facilities" and referred to section 19 of the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act") which empowered a local authority, as the letter stated, to provide "recreational" facilities e.g. leisure centres, including the express power to levy charges for the use thereof (section 19(2)). I have set out in full the relevant provisions of section 19 later in this decision but note that it included the power to provide:

> "outdoor facilities consisting of pitches for team games, athletics grounds, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding…."

21. The amounts claimed were broken down by year rather than by VAT periods. I shall return to this point later, but for the moment I would merely observe that in my experience this was not uncommon in relation to "Fleming claims" (which often went back many years in respect of which no or minimal records existed). No objection to this was taken by HMRC when the claim was partly paid in May 2019.

22. Mr Harris wrote to HMRC on behalf of the Council on 29 August 2009 giving further details of the special regime which, the Council argued, applied to the provision of sports and leisure facilities. Mr Harris referred again to section 19 of the 1976 Act. He also referred to:

> "Section 76 of the Public Health Act 1907 (as amended), which empowers a local authority to set aside part of a park or similar open space for the purpose of sports, games or recreational use, e.g. football and cricket pitches, tennis courts, bowling greens, etc., including the power to exclude other members of the public therefrom whilst the activity in question is underway. This legislation further authorised the provision by a local authority of equipment and apparatus for sports, games and recreational use and entitles the local authority to levy charges for the use thereof."

[2] In a revised skeleton argument served at 13:18 p.m. on the day before the hearing, HMRC drew attention to the fact that Claim One also included a repayment claim in respect of "cultural shows". This revised skeleton argument was not delivered to me until after the hearing had commenced. In any event, I understand that nothing turns on this point and that this has no bearing on the current appeal.

23. In addition, Mr Harris referred to the powers conferred on local authorities in Section 164 of the Public Health Act 1875 and Section 507A and B of the Education Act 1996 in relation to the obligation of a local authority to ensure that adequate facilities for recreational, social and physical training for children under the age of 13 were made available.

24. On 23 December 2009, the Council wrote to HMRC, amending Claim One by providing an alternative argument to support it. This was the argument that was eventually upheld by the CJEU in the *Ealing* case (the argument in paragraph 16(3) above).

25. Claim One was rejected by HMRC (in a letter dated 18 February 2010) on the basis that the Council was not acting under a special legal regime. The Council replied to this letter on 12 March 2010 and requested a review. The Council's letter repeated the statutory provisions under which the Council provided sports and leisure facilities in an effort to persuade HMRC that those facilities were provided under a special legal regime.

26. The Council wrote to the reviewing officer on 27 May 2010 putting forward the additional argument mentioned in paragraph 16(1) above, viz that the Council's provision of sports and leisure facilities was not an economic activity.

27. On 23 July 2010, the Council wrote to HMRC with a claim in respect of over-declared output tax on the provision of "sports services" in the periods from 07/06 to 03/09 ("**Claim Two**") in the amount of £1,477,649. In that letter Mr Harris stated that he was still working on the period since April 2009 and the period between December 1996 and June 2006. The letter stated:

> "The claim has been calculated on the basis of data collected as part of the Council's annual partial exemption calculation, which requires a VAT breakdown of income streams at Council sports and leisure centres, and pro-rated where appropriate."

28. Again, the claim was not broken down into VAT periods but, in an Annex, referred to the periods July 2006 to March 2007, 2007 to 2008, April to November 2008 and December 2008 to March 2009. The Annex referred to "Sports and leisure facilities".

29. Claim Two was rejected by HMRC on 10 August 2010 on the grounds that HMRC did not accept that the Council was acting under a special legal regime. HMRC's letter referred to the Council's supplies of "sporting and leisure services." Mr Harris replied to HMRC's letter on 17 November 2011, reiterating the Council's position and referring to the statutory provisions (referred to above) under which the Council provided sports and leisure facilities.

30. Claim Two was made, as I understood it, within the four year period prescribed by section 80(4) VATA. There was, again, no suggestion that Claim Two was invalid because it was not broken down into separate VAT periods. Indeed, Claim Two was paid by HMRC on 31 May 2019.

31. On 10 September 2012, HMRC rejected Claims One and Two for periods 04/73 to 11/96 and 07/06 to 03/09 on the basis that there was no special legal regime under which the Council supplied the sporting and leisure services, that there was not a sufficient link between the supply of the sport and leisure services and the payment for them and noting that HMRC may additionally wish to consider whether there was a distortion of competition.

32. On 17 March 2014, the Council wrote to HMRC with a claim in respect of over-declared output tax on sports and leisure facilities from 04/09 to 03/13 ("**Claim Three**") in the amount of £1,975,606. HMRC rejected Claim Three on 27 March 2014 because HMRC considered that:

(1) VAT periods 04/10 to 03/13 were in time but were not repaid at that time due to the dispute in respect of the liability.

(2) VAT periods 04/09 to 03/10 were out of time.

33. The Council has now accepted that VAT periods 04/09 to 03/10, included in Claim Three, were out of time. Claim 3 in relation to the periods 04/10 to 03/13 was paid by HMRC on 31 May 2019.

34. On 28 March 2017, following the release of the Advocate General's opinion in the *Ealing* case, the Council wrote to HMRC in respect of output tax over-declared on income its two municipal golf courses in the amount of £250,272 covering the VAT periods 04/13 to 03/16 inclusive (**"Claim Four"**). In this case, the claim was itemised by VAT periods.

35. On 29 March 2017, the Council wrote to the HMRC in respect of output tax over-declared on its provision of sports and leisure facilities in the amount of £1,668,356 covering the VAT periods 04/13 to 03/16 inclusive (**"Claim Five").** The claim was also itemised by VAT periods.

36. On 9 May 2017, Claims Four and Five were rejected by HMRC. The two claims related to the same VAT periods but to different income streams and were both made in time. The claims were rejected on the basis that HMRC, having considered the Advocate General's opinion and subsequent CJEU ruling in *Ealing*, concluded that the supplies in question were standard rated for VAT purposes. Claim Five was, however, ultimately accepted by HMRC and paid on 18 December 2018.

37. On 17 April 2018, the Council wrote to HMRC with a claim in respect of over-declared output tax involving its provision of sports and leisure facilities in the amount of £848,838 covering the VAT periods 04/16 to 11/17 inclusive (**"Claim Six"**). The letter from Mr Harris read as follows:

> "I refer to previous correspondence on the above and the Council's ongoing claim seeking a refund of VAT which it asserts was overdeclared on its provision of sports and leisure services. This letter is by way of amendment to the aforementioned claim in order to bring it up to date for periods 04-16 to 11-17 in respect of 'mainstream' sports and leisure facilities (the claim's ongoing amendment in respect of golf courses and sport on parks will follow separately shortly together with further amendments in respect of sports facilities at neighbourhood and community centres and schools-based community sports facilities)."

38. HMRC accepted that Claim Six was in-time and the claim was paid on 18 December 2018.

39. On 25 April 2018, the Council wrote to the HMRC regarding output tax over-declared on the its golf course income in the amount of £835,036 covering the VAT periods 04/06 to 11/17 inclusive (**"Claim Seven"**). Claim Seven amended Claim Four. HMRC treated the period for 04/14 to 11/17 as a valid in-time claim, (see below). In the letter of 25 April 2018 Mr Harris stated:

> "I believe this letter is an acceptable amendment to the Council's extant claim, applying the criteria established in *Reed Employment Ltd* ([2011] UKFTT200(TC) (and not disturbed on appeal), this being a clearly contemplated further element of the extant claim, as indeed upheld by the Tribunal in *Longcliffe Golf Club* (unpublished but see appeal reference TC-2014-03325).

> Accordingly, annexed hereto are details of VAT overdeclared by the Council on golf courses income between Period 04-06 and 11-17, when the Council ceased declaring VAT on such income following the Judgment in *London Borough of Ealing* (C-633/15).
>
> You will note that this overlaps the Periods covered by my letter of 28 March 2017, i.e. 04-13 to 03-16, in respect of which this letter should be regarded as a revised calculation of the VAT overdeclared in those periods. This follows a rigorous review of the amounts referred to in my letter of 28 March 2017, which has revealed that these erroneously included 'VAT' on income already correctly treated as exempt from VAT. I must apologise for this error."

40. It will be noted that the reduction in some of the amounts claimed in the letter of 28 March 2017, related to periods outside the four year limit prescribed by section 80(4). Nonetheless, HMRC accepted this reduction.

41. On 26 April 2018, the Council wrote to HMRC regarding output tax which was over-declared on its "sport on parks" income in the amount of £139,500 covering the VAT periods 04/06 to 11/17 inclusive (**"Claim Eight"**). The Council had not previously claimed specifically for its sport on parks income. HMRC treated the periods 04/14 to 11/17 as a valid in-time claim (see below).

42. As already noted, Claims Seven and Eight are the April 2018 claims which are the subject of the present appeal.

43. On 30 April 2018 Mr Harris wrote to HMRC as follows:

> "I refer to previous correspondence on the above and the Council's claim seeking a refund of VAT which it asserts was overdeclared on its provision of sports and leisure services; I also refer to the Judgment of the Court of Justice of the European Union in *London Borough of Ealing* (C-633/15).
>
> Having also now perused the criteria established in *Reed Employment Ltd* ([2011] UKFTT200(TC) and not disturbed on appeal (and as, indeed, upheld by the Tribunal in *Longcliffe Golf Club* - unpublished but see appeal reference TC-2014-03325), I believe the previous correspondence referred to is, in fact, a single claim for the recovery of VAT overdeclared by the Council on income arising from its sports and leisure provision.
>
> This clearly includes not just 'mainstream' sports and leisure centres but also golf courses, sport on parks, sports facilities at neighbourhood and community centres, and schools based community sports facilities, it obviously being contemplated by the Council in submitting the claim that it should encompass all sports and leisure services provision, something also in accordance with your requirement for consistency referred to in VAT Information Sheet 08/17.
>
> This is, therefore, the basis of the amendments to the claim recently submitted, notably my letters of 17 April, 25 April and 26 April, which together bring the claim comprehensively up to date (albeit a few small elements may still be further adduced)."

44. On 10 September 2018, HMRC wrote to the Council with their decision in relation to Claim Seven on 25 April 2018 relating to its golf course income. The Council had only previously claimed specifically for its golf course income for VAT periods 04/13 to 03/16 inclusive in Claim Four. HMRC's decision was as follows:

(1) The Council was out of time to claim for the earlier VAT periods, 04/06 to 03/13.

(2) HMRC accepted an arithmetical adjustment had been made to Claim Four in relation to VAT periods 04/13 to 03/16 inclusive.

(3) HMRC accepted that a valid in-time claim was made for the later VAT periods only, 04/16 to 11/17.

45. On 11 September 2018, HMRC wrote to the Council with their decision in relation to Claim Eight on 26 April 2018 regarding its sports on parks income for 04/06 to 04/17. HMRC accepted that VAT periods 04/14 to 04/17 in Claim Eight were valid and in-time. HMRC did not accept 04/06 to 03/14 were valid because they considered that they were out of time under section 80(4) VATA.

46. On 29 November 2018, the Council appealed HMRC's decisions in respect of Claims Seven and Eight to this Tribunal.

47. I asked Mr Harris why the Council had not claimed for the repayment of over-declared VAT in respect of golf course and sport on parks earlier, i.e. before Claims Seven and Eight. He told me that he had put in a claim on 25 March 2009 (Claim One) and had "sat on it" pending the decision in the *Ealing case*. When the CJEU's decision in that case had released, it prompted him to review the claims made (which included updating claims made within the four year time limit, as well as the original "Fleming claim"). At that stage, he realised that golf course and sport on parks income had been mistakenly omitted from the original claims. It had always been the Council's intention to claim repayment of over-paid VAT in respect of all of its sports activities. Although that may have been Mr Harris' intention, it is clear that Claims Two, Three and Five did not include golf course in come and sport on parks income.

48. Mr Harris' evidence was that, at the time, he did not believe that Claim One was limited to the periods 04/73 to 11/96 but was capable of amendment to cover other subsequent periods. Mr Harris also said that it was not his intention to limit the claims to "mainstream" sports and leisure facilities, thereby excluding golf courses and sport on parks.

49. Drawing these threads together, it is Claims Seven and Eight that are currently under appeal.

50. Claim Seven covered golf course income in respect of VAT periods 04/06 to 11/17 inclusive. HMRC, on 19 December 2018, accepted and paid Claim 7 in respect of periods 04/13 to 03/16 and 04/16 to 11/17. The Council has accepted that the periods 04/06 to 06/06 cannot be seen as amendments to an existing claim for those periods and consequently has withdrawn its claim for these periods. Similarly, according to Mr Harris' evidence, the Council withdrew its claims made in relation to Claim Three in respect of the periods 04/09-03/10 following the decision of the Court of Appeal in *Leeds City Council v HMRC* [2015] EWCA 1293. Therefore, in relation to Claim Seven, the periods in dispute are 07/06 to 03/09 and 04/10 to 03/13 in respect of golf course income. All these periods, when Claim Seven was made, were the subject of outstanding claims made in respect of the provision of sports and leisure services or simply sports services i.e. Claims Two and Three.

51. Claim Eight covered income from sport on parks for VAT periods 04/06 to 04/17. HMRC have accepted that periods 04/14 to 04/17 were valid and in-time and these were paid on 19 December 2018. However, HMRC do not accept that periods 04/06 to 03/14 were valid claims because, in HMRC's view, they are out of time under section 80(4) VATA. As noted in paragraph 50 above, the Council accepts that there was no existing claim in relation to

periods 04/06 to 06/06. Furthermore, as explained in that paragraph, the claim in relation to 04/09 to 03/10 was withdrawn. Therefore, the periods in dispute (which concern sport on parks) in relation to Claim Eight are 07/06 to 03/09 and 04/10 to 03/14. All these periods, when Claim Eight was made, were the subject of outstanding claims in respect of the provision of sports and leisure services or simply sports services i.e. Claims Two, Three and Five.

THE STATUTORY PROVISIONS

52. Section 80(4) VATA relevantly provides:

> "80 Credit for, or repayment of, overstated or overpaid VAT
>
> (1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> …
>
> (4) The Commissioners shall not be liable on a claim under this section—
>
> (a) to credit an amount to a person under subsection (1) or (1A) above, or
>
> (b) to repay an amount to a person under subsection (1B) above,
>
> if the claim is made more than 4 years after the relevant date.
>
> (4ZA) The relevant date is—
>
> (a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period
>
> mentioned in that subsection, unless paragraph (b) below applies…."

53. Regulation 37 of the Value Added Tax Regulations 1995 provided:

> "37 Claims for credit for, or repayment of, overstated or overpaid VAT
>
> Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

54. The Council's claims for over-payment of VAT referred to section 19 of the Local Government (Miscellaneous Provisions) Act 1976 which provided:

> "19 Recreational facilities
>
> (1) A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and, without prejudice to the generality of the powers conferred by the preceding provisions of this subsection, those powers include in particular powers to provide—

(a) indoor facilities consisting of sports centres, swimming pools, skating rinks, tennis, squash and badminton courts, bowling centres, dance studios and riding schools;

(b) outdoor facilities consisting of pitches for team games, athletics grounds, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding ;

(c) facilities for boating and water ski-ing on inland and coastal waters and for fishing in such waters;

(d) premises for the use of clubs or societies having athletic, social or recreational objects ;

(e) staff, including instructors, in connection with any such facilities or premises as are mentioned in the preceding paragraphs and in connection with any other recreational facilities provided by the authority ;

(f) such facilities in connection with any other recreational facilities as the authority considers it appropriate to provide including, without prejudice to the generality of the preceding provisions of this paragraph, facilities by way of parking spaces and places at which food, drink and tobacco may be bought from the authority or another person;

and it is hereby declared that the powers conferred by this subsection to provide facilities include powers to provide buildings, equipment, supplies and assistance of any kind.

(2) A local authority may make any facilities provided by it in pursuance of the preceding subsection available for use by such persons as the authority thinks fit either without charge or on payment of such charges as the authority thinks fit."

THE AUTHORITIES

55. The question whether a subsequent claim constitutes a new claim or an amendment to an existing claim has come before this Tribunal and the Upper Tribunal on a number of occasions. Although decisions of this Tribunal, unlike those of the Upper Tribunal, are not binding upon me, I consider that they contain useful guidance. I have cited most of the relevant authorities in some detail because the question whether a claim is an amendment to an existing claim or constitutes a new claim is, as Roth J indicated in *Reed Employment*, a question of fact and degree. It is therefore important to understand the facts in each of those cases in order to understand the background against which those judgments were delivered.

56. The leading authority, which was relied on by both parties, is *Reed Employment Ltd v HMRC* (Roth J) [2013] STC 1286 ("*Reed Employment*"). The taxpayer, Reed, made a claim in 2003 to recover output tax for the period 1 April 1973 to 31 December 1990 (the 2003 claim) on the supplies of temporary workers to the "irrecoverable sector" i.e. to clients who were fully or partially exempt or who were not registered for VAT and who could not recover their own input tax in full. HMRC refused that claim and Reed appealed. In March 2009, Reed claimed the repayment of two further amounts of overpaid output tax in respect of supplies made to clients in the "recoverable sector". Reed claimed that the first of those demands (the 2009 Demand) which related to the period 1 April 1973 to 31 December 1990 was an amendment to the 2003 claim and that therefore HMRC could not raise a defence of unjust enrichment. HMRC, however, argued that the 2009 Demand was a new claim made outside the applicable time limit and that therefore HMRC had a statutory defence of 'unjust enrichment'.

57. The FTT ([2011] UKFTT 200 (TC) (Judge Berner and Dr Small)) considered whether the 2009 Demand was to be treated as a new claim or an amendment to an existing claim. The FTT held, dismissing Reed's appeal, that this was a new claim and not an amendment to the 2003 claim. Reed appealed to the Upper Tribunal which upheld the decision of the FTT but in somewhat narrower terms. 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.
>
> [34] It follows that I reject the submission of [Counsel for Reed] that the crucial issue for determining this question is the relationship between Reed and HMRC and thus whether the later application relates to the same accounting period or periods; and that if the later application arises out of the same underlying error (i.e. here accounting for the whole of the sum received by Reed rather than just its commission) and the only difference is one of quantum the latter cannot be a new claim. I consider that there is no warrant for such a prescriptive requirement given the statutory language to which I have referred.
>
> [35] I should add that the fact that the 2009 demand is drafted in the form of an amendment to the third repayment claim cannot serve to constitute it as such an amendment if in substance it is not."

58. After indicating that authorities in relation to the Limitation Act were of no assistance, Roth J continued:

> "[38] [Counsel for Reed] 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."

59. *HMRC v Vodafone Group Services Ltd* [2016] UKUT 89 (TCC), [2016] STC 1064 (Warren J and Judge Bishopp)(" *Vodafone*"). In January 2007, the taxpayer made a claim for the repayment of £4.1m of over-declared output tax in its VAT returns for the periods 01/04 to 01/06, as a result of its participation in the Nectar card scheme ('the Nectar claim'). HMRC did not accept that there was an over-declaration and rejected the claim. The Nectar claim remained outstanding and was the subject of an appeal to (what was then) the VAT and Duties Tribunal in August 2007 and subsequently before the Upper Tribunal. Between 2009 and 2011, the taxpayer made other claims for the repayment of further output tax which it had over-declared in accounting periods including those covered by the Nectar claim. These over-declarations had nothing to do with the Nectar scheme and were attributable to other accounting errors, for example in respect of the use by Vodafone's customers of their mobile phones outside the European Union. HMRC agreed that the output tax included in those declarations was overpaid. However, HMRC rejected the remainder of the claims, including all of those relating to the periods 01/04 to 01/06 ('the later claims'), on the grounds that they had been made out of time. HMRC argued that while it was permissible to amend a claim, it was not permissible to do as the taxpayer wished to do, which amounted to replacing one claim with another. The Upper Tribunal allowed HMRC's appeal and held that the later claims were not amendments to the Nectar claim:

> "[56] We agree with Judge Mosedale [the FTT judge] that s 80 and reg 37 carry with them an implicit requirement that a claimant should provide reasons sufficient to enable HMRC to understand why the claim has been made. We agree too with Mr Hitchmough that it would be strange if the implicit requirement of reasons were to be rigid while the mandatory requirements of reg 37 were flexible. The requirement to identify the methodology by which the amount of the claim is ascertained will, expressly or by necessary implication, identify the elements of the output tax brought into account which are said not to be output tax due. At least, we have been unable to conceive of a case where that requirement would not do so. In that sense, the reasons for the claim will be provided by the claim. But that is not the important point, which is that the requirement relating to methodology forms part of the identification of the claim, defining what the claim actually is.
>
> [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."

60. In *Grand Entertainments Company v HMRC* [2016] UKUT 209 (TCC)("*Grand Entertainments*"). Between 1973 and 1996, GEC offered a number of games to its customers, which it accounted to HMRC for output tax upon participation fees GEC received from those customers. In March 2009 GEC made an original claim for overpaid VAT in respect of bingo and gambling machines – the claim related to periods between 1 November 1980 and 4 December 1996. The original claim specified that it was made in respect of income from "Mechanised Cash Bingo" ("MCB"), "Amusements With Prizes" ("AWP") and Jackpot Machines ("JM"). In November 2009 (and outside the period specified by section 80(4)), GEC purported to amend its claim to include "Main Stage Bingo" ("MSB"). The MSB claim also sought to recover VAT for periods *earlier* than that to which the original claim related. Snowden J dismissed GEC's appeal and held that the MSB claim constituted a new claim and not an amendment to the original claim. Snowden J held that it was clear that the original claim had not included, and had not contemplated, a repayment claim in respect of MSB or a claim in respect of any supplies during periods prior to 1 November 1980. The subsequent decision to make a claim for MSB had been the product of analysis in the light of Revenue Briefings, following a decision of the High Court. Viewed objectively, the original claim indicated no intention on the part of GEC to make a claim for periods prior to 1 November 1980. Snowden J said:

> "33. Although it is difficult to imagine a subsequent claim being regarded as an amendment to an earlier one unless they related to the same supplies, the converse is not necessarily the case. Even if a taxpayer only ever supplies one type of service throughout the course of his business, it does not mean that two claims for repayment made at different times and covering supplies made in different accounting periods must necessarily be regarded as one claim and an amendment to it. As Roth J. made clear in paragraph 31 in *Reed*, there is no reason why the two claims could not be regarded as self-standing. Moreover, a conclusion that a later claim could always be regarded as an amendment to an extant earlier claim in respect of the same or similar supplies would significantly undermine the effectiveness and purpose of the limitation period in section 80 VATA, because it would not encourage accuracy and finality in the submission of claims.
>
> …

35. … I note that in *Reed*, Roth J. endorsed the point made by the FTT in the first sentence of paragraph 111 of its judgment, that the test of whether a subsequent claim should be regarded as an amendment of an original claim 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.

36. Put in those simple terms, it is clear that the Original Claim did not include and did not contemplate a repayment claim in respect of MSB, or a claim in respect of any supplies during periods prior to 1 November 1980.

37. As to a claim for MSB, the wording of the Original Claim could not have been clearer in referring only to MCB, AWP and JM. On any objective reading, the Original Claim did not include a claim in respect of MSB. Moreover, although I think that it is an objective test, it is apparent from the explanation that Mr. Deeming gave as to the advice he received before making that Original Claim and the subsequent advice he later received ("I was advised that I could also claim for MSB") that no-one thought that the Original Claim did include a claim for MSB. The subsequent decision to make a claim for MSB was the product of analysis by the Appellant's advisers in light of the Revenue Briefings following the decision of the High Court in Rank in June 2009.

38. It is also clear that when Roth J. referred in *Reed* to the correction of mistakes by amendment, "whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included", he was referring to the correction of accidental errors or omissions. The concept of mistake in this context cannot include a conscious decision by a taxpayer not to include certain items in a demand. That is so even if, with the benefit of hindsight as to law or fact, it is subsequently appreciated by the taxpayer that it would have been preferable to have included further supplies and his earlier decision not to do so turned out not to be to his best advantage.

39. That conclusion is illustrated by the actual decision reached in *Reed* to which I have referred in paragraph 24 above. It is also illustrated by the examples given by Roth J. of mistakes that could be corrected by amendment. The concept of amendment of an earlier claim would plainly cover, for example, a demand for repayment for a number of supplies where one of the numerical amounts was, by clerical error, misstated; or where the total amount reclaimed was wrongly added up. Likewise, if the claim stated that the taxpayer was applying for a repayment in respect of VAT on supplies made in accounting periods 1-4, but by carelessness the amount in respect of supplies made in 4th period was omitted from the computation. But as Roth J. pointed out, the concept of amendment of an earlier claim would not cover a further demand made by reference to supplies made in a different geographical area, or in a different type of business than the one specified in the first claim in circumstances where, viewed objectively, there had been a conscious decision to limit the supplies which were the subject of the first claim.

…

42. As regards the claims in respect of supplies prior to 1 November 1980, the simple fact, as identified by the FTT, was that the Original Claim was expressly made by reference to the period 1 November 1980 to 4 December 1996 and made no mention of any other accounting periods.

> 43. If, as I think it is, the key question is whether the Original Claim, viewed objectively, indicated any intention on the part of the Appellant to make a claim for periods prior to 1 November 1980, the clear answer is "no". And for the reasons set out in paragraphs 31-32 above, even though, for VAT purposes, the nature of the supplies included in the January 2010 Claim were the same as those included in the Original Claim, it does not follow that the subsequent claim in respect of different accounting periods must be regarded as being part of, or an amendment to, the earlier claim."

61. Next, *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):

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

62. In *Bratt Autoservices Company Ltd v HMRC* [2018] STC 1404 the taxpayer wrote to HMRC, in March 2009, enclosing a copy of its accounts of the year ended 31 December 1989. It explained that its solicitors had calculated a value of £1,293,750 of the overpayment of VAT for that year. The letter then explained that it was believed that a claim could be calculated on a similar basis for each of the years for which audited accounts were available, extrapolating the claim backwards over the period of trading. HMRC rejected the purported claim on the grounds that it did not meet the statutory requirements. The Court of Appeal,

dismissing the taxpayer's appeal, held that the combined effect of Section 80(1) VATA 1994 and Regulation 37 of the VAT Regulations 1995 was to require a valid claim to be broken down into individual prescribed accounting periods. Floyd LJ (with whom McFarlane and Sales LJJ agreed) said:

> "[27] I agree with Roth J [in *Reed Employment*] that the formal requirements of a claim are those contained in reg 37. However, as I have explained, reg 37 and s 80 have to be read together so as to give 'claim' and 'amount' a consistent meaning throughout. A claim under s 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 which is not output tax due. Thus I would not agree that a claim under s 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 judgment, correctly referred to as a single claim under s 80. That distinction did not matter for the purposes of *Reed*, but is of importance in the present appeal. In any event, Roth J did not go so far as to suggest that a claim could be made, as here, without reference to any accounting period at all.
>
> [28] I do not think that there is much to be derived from the fact that there are wide powers of amendment available to those who make a claim, as Roth J recognised in Reed. The first question must be to determine the requirements imposed by the statute and the regulation. It does not follow from the existence of a power to amend the amount, or its method of calculation, that the claim is not required to state an amount (in the defined sense) and a method of calculation at the outset."

63. HMRC also relied on a decision of this Tribunal in *Longcliffe Golf Club v HMRC* [2018] UKFTT 383 (TC) (Judge Rupert Jones). That case involved the VAT treatment of "green fees" to a golf club by non-members. Following a CJEU decision, it was determined that the "green fees" were exempt from VAT. The taxpayer put in what was, evidently, a Fleming claim for repayment of over-paid VAT. Subsequently, the taxpayer put in a further claim (the second claim) in respect of some of the same and some different accounting periods from the original claim. Some of the periods in the second claim were treated as amendments to the original claim. However, some of the claims in respect of different accounting periods were treated by HMRC as new claims which fell outside the four year period in section 80(4) VATA. The FTT, dismissing the appeal, said at [60]:

> "In summary, the Tribunal finds that a request for repayment arising from new VAT periods, different supplies … and different sums claimed to be overpaid must necessarily concern different subject matter in comparison with the original claim. Unspecified and future VAT periods fell outside the contemplation of the taxpayer when making the original claim in April 2009, and that is sufficient to find that the original claim included requests for repayment relating to the additional periods."

DISCUSSION

64. Essentially, Mr Allen submitted that Claims Seven and Eight were amendments to earlier claims related to the provision of sports and leisure facilities. Clearly, golf courses and sport on parks constituted the provision of sporting facilities and therefore, on that basis, Claims Seven and Eight constituted amendments to existing claims. It was only in May 2019 that HMRC settled the majority of the Council's claims and, until then, those pre-existing claims could be amended.

65. Ms Castle, however, argued that the methodology of the original claims did not include income from golf courses and sport on parks. Claims Seven and Eight were, therefore, new claims rather than amendments to existing claims.

66. It was common ground that the income derived by the Council from golf courses and sport on parks was not liable to VAT. Therefore, had a timely claim for repayment of VAT been made, HMRC would have been obliged to refund the VAT which the Council had over-declared. Indeed, had the income from golf courses and sport on parks been included in Claims Two, Three and Five as appropriate HMRC, no doubt, would have eventually paid those claims in May 2019.

67. It is also clear that when Claims Seven and Eight were submitted, Claims Two, Three and Five were existing "live" claims covering the relevant VAT periods. On the basis of the above authorities, alleged amended claims for periods outside those in which there were existing "live" claims must be regarded as new claims.

68. It was evident from Mr Harris' evidence that, when Claims Two, Three and Five were made, it had been his intention to claim in respect of income from all its sports and activities. It was only when reviewing the decision of the CJEU *Ealing case* that he realised that income from golf courses and sport on parks had been mistakenly omitted from the Council's earlier claims. But the subjective intention of Mr Harris does not determine the issue. In my view, the question of what was in the contemplation of the parties when Claims Two, Three and Five were made is an objective one looking at all the relevant facts and circumstances (see *Grand Entertainments* at [37], [39] and [43]). That question requires a careful scrutiny of those claims to see whether, when Claims Two, Three and Five were made it was objectively within the contemplation of the parties, that further claims in respect of golf courses and sport on parks were within the scope of what had been claimed. In other words, were Claims Two, Three and Five, when they referred to "sporting services" or "sports and leisure services", fairly to be taken to be omnibus claims for all types of sports and leisure services (so that other sports could be added) or were they were claims for the sports and leisure services in respect of which those claims were actually made, according to the calculations which underlay those claims?

69. The question of what was in the contemplation of the parties at the relevant time, as I have said, requires an examination of the original claims (i.e. Claims Two, Three and Five) and, in particular, the methodology of the claim which, as the Upper Tribunal held in *Vodafone* at [56], will usually define the claim that has been made.

70. I recognise that the correspondence referred, *inter alia*, to section 19 of the 1976 Act which mentioned "golf courses". However, that reference and similar statutory references were made in the context of seeking to persuade HMRC that the Council provided sports and leisure services under a "special legal regime" i.e. they were seeking to explain the legislative framework under which the Council supplied its sports and leisure services. They were not, in my view, references which were intended to indicate either that the Council did supply all the services mentioned in section 19 or that the claims being made included or anticipated income in respect of all those services.

71. In my view, the present appeal is somewhat different from the facts of the authorities cited above, because in this case the earlier claims were made in broad terms but did not include the actual supplies comprised in the later claims. Nonetheless, I think they do provide important guidance.

72. In *Reed Employment* the original claim related to supplies to the "irrecoverable" sector. The new claim (the 2009 demand) related to supplies to the "recoverable" sector. The new claim covered supplies to a different category of clients who had been consciously excluded from the original claim. On this basis, the new claim was held to be a separate claim and not an amendment to an existing claim, even though the supplies dealt with in the new claim, it appears, fell within the same general exemption as those in the original claim.

73. Pausing on *Reed Employment* for a moment, I do not think it is correct to regard that case as an authority for the proposition that, in all circumstances, a subsequent claim cannot be an amendment to an existing claim where the recipient of a supply is a different person from the recipient of the supply in the original claim. That would make little sense, in the present case, where the supplies were made to unidentified members of the public. The point in *Reed Employment* was that the original claim was specific in claiming an over-payment in respect of supplies to the "irrecoverable" sector. The purported amendment was, therefore, an extension of the facts which underlay the original claim because the original claim had specifically identified a particular class of recipients. It was on that basis that the subsequent claim was seen as a new claim rather than an amendment to an existing claim. In the present case, all or most of the supplies were made to members of the public and any overlap in identity between recipients of the Council's services in respect of golf courses, for example, and those in respect of other supplies of sporting and leisure services would, no doubt, be fortuitous. The important question in the present case is not the identity of the recipients but the nature or elements of the services in the original claims and the alleged amending claims.

74. Next, in *Grand Entertainments*, the purported amending claim added a new category of gambling service (viz MSB) to a prior claim which was specifically made in respect of different types of gambling services and different periods. The Upper Tribunal, therefore, had no difficulty in concluding that the purported amending claim was in fact a new and separate claim. That was so even though MSB was a gambling service entitled to the same exemption from VAT as the gambling services included in the original claim.

75. Finally, in *Vodafone*, the taxpayer added subsequent claims for over-declared tax which had nothing to do with the original claim (the Nectar claim). Again, the Upper Tribunal was easily able to conclude that the subsequent claims were new claims and not amendments to an existing claim. In the language of *Reed Employment*, the later claim arose out of a different subject matter from the original claim: there was, therefore, an extension to facts and circumstances that fell outside the contemplation of the earlier claim.

76. As I have said, in *Vodafone* the Upper Tribunal emphasised the methodology of the earlier claim, reasoning that the methodology of the claim would identify or define the extent of that claim.

77. It is true that, in the present appeal, the overall characterisation of the supplies ("sports and leisure services") was wide enough to include both the underlying supplies in the earlier claims (Claims Two, Three and Five) and subsequent claims (Claims Seven and Eight) but the actual supply of services involving golf courses and sport on parks was different from the actual supplies in the earlier claims. As the Upper Tribunal said in Vodafone at [51]:

> "The taxpayer's claim under section 80(2) is likewise not, we consider, simply for a sum of money, but is for a sum or money *related to particular transactions in respect of which output tax has been accounted for*……"
>
> (*emphasis added*)

78. Therefore, an analysis of the methodology of the earlier claims (e.g. of the supplies made in respect of the amounts claimed) must inevitably identify a material difference in the original supplies (Claims Two, Three and Five) from Claims Seven and Eight. Although Claims Two, Three and Five did not itemise the individual sports and leisure activities that underpinned those claims, it is clear from the evidence that those claims did not include supplies in relation to golf courses and sport on parks. Therefore, in my judgment, Claims Seven and Eight constitute an extension of the facts upon which Claims Two, Three and Five were based – claims in respect of golf courses and sport on parks were not in contemplation when Claims Two, Three and Five were made and were not in fact included in those claims. Therefore, Claims Seven and Eight were separate claims and not amendments to the existing Claims Two, Three and Five - they were further claims "arising out of similar but not the same circumstances", as the Upper Tribunal put it in *Vodafone* at [58].

79. HMRC complained that Claims One, Two and Three had not been broken down into prescribed accounting periods. Although the validity of those claims was not the subject matter of the current appeal, HMRC submitted that the Council should not benefit from any lack of clarity in those earlier claims in determining if there had been an extension of facts and circumstances from those claims.

80. In my view, the "ship has sailed" in relation to that issue and that it is too late for HMRC to raise it at this time (a point made for the first time in their skeleton argument). That point was not raised by HMRC when those claims (Claims One, Two and Three) were paid in May 2019 and it is too late to raise it now – effectively HMRC have already accepted those claims as valid. Claims Seven and Eight were in any event broken down into VAT periods. Be that as it may, in the light of my conclusion that Claims Seven and Eight involved an extension of the facts and therefore constituted new claims, I think it is unnecessary to dwell further upon this point.

81. For the reasons given above, I dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

82. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 18 MARCH 2021