[2017] UKFTT 0391 (TC)

TC05855

Appeal number: TC/2012/6323

AGGREGATES LEVY *– exemptions and credits - whether activity an exempt process within s 18(2) FA 2001 – whether an industrial process within Reg 13 and sch (Code 018) to the Aggregates Levy (General) Regs 2002– whether part of claim out of time*

FIRST-TIER TRIBUNAL
TAX CHAMBER

AGGREGATE INDUSTRIES UK LIMITED **Appellant**

-and-

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

TRIBUNAL: **Judge Peter Kempster**

Sitting in public at Centre City Tower, Birmingham on 7 & 8 September 2016

Mr Adam Rycroft (KPMG LLP) for the Appellant

Mr James Puzey of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Appellant appeals against two formal decisions by the Respondents ("HMRC") dated 7 March 2012 and 3 June 2015, refusing the Appellant's claims for repayments of Aggregates Levy ("AL") relating to the period 1 April 2006 to 31 March 2011. The parties seek a determination in principle of the dispute, as quantification of exact figures would require further discussions between them; however, it is clear that the amount at issue is a seven figure sum.

The Dispute

Relevant legislation

2. The legislation relating to AL is contained in Finance Act 2001 and is cited here only insofar as relevant to the current appeal.

(1) Section 16 charges AL "on aggregate subjected to commercial exploitation."

(2) Section 17 defines aggregate as "any rock, gravel or sand, together with whatever substances are for the time being incorporated in the rock, gravel or sand or naturally occur mixed with it."

(3) Section 19 provides that aggregate is subjected to exploitation if (inter alia) "it is used for construction purposes".

(4) Section 48 defines use for construction purposes as including "mixing it with anything as part of the process of producing mortar, concrete, … or any similar construction material."

(5) Section 18 excludes "anything … resulting from the application of any exempt process … to any aggregate". One such exempt process (in s 18(2)(c)) is "any process for the production of … cement from limestone or from limestone and anything else".

(6) Section 30 empowers HMRC to make regulations to grant AL credits "in relation to cases where, after a charge to aggregates levy has arisen on any quantity of aggregate … (b) an exempt process is applied to any of that aggregate; [or] (c) any of that aggregate is used in a prescribed industrial or agricultural process …".

(7) The regulations enacted pursuant to s 30 are the Aggregates Levy (General) Regulations 2002 SI 2002/761. Regulation 13(2) grants entitlement to AL credits "in respect of any AL accounted for in respect of that commercial exploitation where the taxable aggregate in question … (b) is used in an exempt process; [or] (c) is used in any of the industrial or agricultural processes listed in the Schedule; …" In reg 13(2)(b) "exempt process" refers (via reg 2) back to s 18(2) (above). For the purposes of reg 13(2)(c) one of the "industrial processes" listed in the schedule to the

Regulations is "Code 018: Manufacture of fillers for coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media."

(8) Regulation 15 requires AL credits to be claimed and incorporates the time limit in s 32(1) FA 2001: "The Commissioners shall not be liable, on any claim for a repayment of aggregates levy, to repay any amount paid to them more than 4 years before the making of the claim."

The Disputed 2012 Decision

3. The Appellant is registered for the purposes of AL. The Appellant quarries aggregates and produces concrete. One of the Appellant's products is crushed limestone rock, and in the relevant period the Appellant accounted for AL on the crushed limestone rock which it used in the production of concrete.

4. In early 2009 the Appellant became aware from discussions with a joint venture partner that HMRC had allowed other concrete producers to claim relief from AL in respect of a proportion of crushed limestone rock used in the production of concrete and concrete products. In March 2009 the Appellant made a claim to HMRC for relief on that basis and HMRC agreed to consider a claim, subject to later quantification. The basis of HMRC's then policy was (quoting from a later HMRC document):

> "In the past a tax credit has been allowed on filler used in the production of concrete where it has been accepted that the filler acts to chemically bind the concrete together. The tax credit has been allowed on the proportion of the filler that was accepted as performing a binding function, so that a tax credit would be allowed on up to 2 per cent of the total filler content where this could be demonstrated."

5. In January 2011 the Appellant obtained an independent expert report which concluded that fine particles of limestone participated in the chemical reactions within most samples of cement pastes supplied by the Appellant for testing, and were not merely inert fillers. In March & June 2011 the Appellant quantified its claim and clarified that it was in respect of "limestone fines (< 125 microns) that are manufactured internally and used in the production of our concrete and concrete based products". (A micron, or 1μ, is 10^{-6} metre, or 1/1000 millimetre.)

6. On 7 March 2012 HMRC rejected the claim, stating:

> "I refer to our previous correspondence relating to your claim for relief from aggregates levy in respect of limestone fines used in the production of concrete and concrete based products.
>
> I am sorry for the delay in replying but can now advise that HMRC is unable to accept your claim for filler used in the manufacture of concrete. To qualify for relief under Industrial Processes Relief Code 018 it is insufficient for the aggregate used to have binding properties.

> It must be used in the manufacture of a binding or modifying media. Concrete clearly is not a binding medium.
>
> …
>
> Following the rules of statutory construction the relieved process [in Code 018] is the manufacture of a binding or modifying media of a similar type to others listed in Code 018 i.e. the manufacture of grouts, mastics etc. Concrete does not fall into that category .
>
> Even if we were to interpret the law re Code 018 that you can claim relief if the limestone dust filler acts as a binder, HMRC has never accepted that limestone dust has any significant binding properties when added in the manufacture of concrete.
>
> … we see no reason to change our view that additional filler added to concrete has little or no binding effect.
>
> … we have concluded that as the filler is not used in a qualifying process, there would be no legal entitlement to relief even if a binding effect could be established."

7. HMRC acknowledge that the reason for this rejection was that HMRC had changed their policy and no longer considered chemical reactivity in concrete was relevant; this was explained in a draft Business Brief that was eventually not published but was made available to industry bodies and advisers:

> "This interpretation of the legislation [ie that stated at [4] above] is no longer accepted. To meet the conditions of Code 018 it is not sufficient for the filler itself to act as a binder. The legislation requires that the filler must be used in the manufacture of a binding medium. Where filler is used in the production of concrete it becomes a constituent of a bulk construction material and is not therefore eligible for relief under Code 018."

8. The rejection of the claim was upheld on formal internal review in May 2012, where the review officer stated:

> "You state that you believe HMRC appears to be confused about whether the added limestone must act as a filler or a binding constituent within the concrete itself in order for it to qualify for the relief from aggregates levy under Code 18. I believe there has been a slight misinterpretation of the information given and I hope to clarify this now.
>
> In order to qualify for the relief, a filler must be added to a product within Code 18 or any other binding or modifying media. HMRC do not dispute that limestone fines are a binding filler, however, HMRC do not classify concrete as a binding or modifying media as is intended by Code 18. This being the case limestone fines, when added to concrete, do not qualify for the relief as they have not been added to a binding or modifying media.

> With regards to your point on the chemical composition and chemical reactivity of cement pastes, I do not believe this is relevant as the claim is in relation to the supply of limestone filler to customers for use in the manufacture of concrete bricks. As the claim relates to concrete products I do not see the relevance of how the limestone fines react within cement is evidence to support your claim.
>
> I understand that you believe that concrete is a binding medium. However, this is not the view of the HMRC policy team."

9. On 14 June 2012 the Appellant appealed to the Tribunal against the rejection of its claim, stating in its detailed grounds of appeal:

> "8. The smallest particles from this process, below 125 microns in diameter, are separated out from other material to comprise the Manufactured Product. The Manufactured Product has the consistency of a fine grain material.
>
> 9. The Manufactured Product acts as filler when added to a cement mixture. It acts as filler as it replaces other ingredients of the cement without detracting from its overall functional performance. It does not detract from the overall functional performance as it reacts with the other ingredients and, in doing so, it improves the bonding process within the cement. It also fills in space that would, otherwise, be taken up with other more environmentally harmful ingredients within the cement mixture.
>
> 10. The Appellant uses the Manufactured Product as filler within the concrete it produces. Concrete is made up of cement, water and aggregates. The primary function of aggregates within concrete is to provide structure and strength. The Manufactured Product, to which the Claim relates, does not fulfil the function of providing structure and strength to the concrete. To the contrary, it fulfils the function as filler within the [cementitious] component of concrete.
>
> …
>
> 14. The Decision is wrong because it fails to recognise the functional characteristics of the Manufactured Product within the binding medium in which it is used.
>
> 15. The functional characteristics are as described in 9 above, i.e. (a) its use does not detract from the overall functional performance as it reacts with other ingredients and in doing so improves the process of bonding in the cement; and (b) it operates as a filler as it fills in space that would, otherwise, be taken up with more environmentally harmful ingredients.
>
> 16. As the Manufactured Product operates as filler within the binding media of cement and concrete it qualifies for credit under Regulation 13(2)(c) of the AL Regulations.

> 17. Alternatively, the Manufactured Product is used in the production of cement from limestone. This follows as the addition of the Manufactured Product, to the extent identified in the Claim, is a recognised process in the production of cement. It is irrelevant for these purposes that the addition of the material is made by the Appellant to the cement in the process of making concrete and not at the prior stage of production of dry cement. As such, the addition of the Manufactured Product, as identified in the Claim, qualifies for exemption under Regulation 13(2)(c) [sic, should be 13(2)(b)] of the AL Regulations."

10. In October 2012 HMRC served their statement of case in reply to the appeal (Tribunal Procedure Rule 25 refers) stating:

> "It is irrelevant whether or not limestone fines have any binding properties as concrete is not a binding medium for the purposes of Code 018 of the Schedule to the Regulations and, therefore, credit for AL is not available pursuant to this item.
>
> In any event, limestone fines have no or no significant binding function in the manufacture of concrete.
>
> By its alternative ground of appeal, the Appellant argues that the limestone fines are used in the production of cement rather than concrete. The Appellant has provided no evidence to support this contention at any stage and, as all of the evidence provided by the Appellant points to the use of the limestone fines in the manufacture of concrete, this ground is not made out. The Commissioners have not previously made any appealable ruling on this contention and reserve the right to respond further in the event that the Appellant should make further submissions or provide evidence in support of its contention."

11. In August 2014 HMRC officers visited one of the Appellant's limestone quarries to observe the activities, and reported:

> "[The Appellant is] currently claiming relief in respect of the use of filler in the manufacture of concrete and cement. We were interested to see the production process to establish if that process could be broken down into distinct components; the manufacture of cement and then the subsequent manufacture of concrete. Our reason was to see whether we could apply the levy exemption for cement production in the process.
>
> Unfortunately, having gone through the process we were unable to identify the manufacture of cement. Cement was being brought into the quarry ready made from other locations and then being used in the manufacture of concrete. The exemption at section 18 of the Finance Act 2001 therefore could not be applied to this process."

The Disputed 2015 Decision

12. In March 2015 the Appellant's advisers (KPMG) wrote to HMRC "to clarify certain issues in relation to the … appeal". It is necessary to quote at length from that letter:

> "*Background*
>
> HMRC previously applied a policy recognising that a proportion of limestone fines used in the production of concrete products qualify for relief from aggregates levy. HMRC's policy relied on their assessment that the terms of relief code 018 applied so as to relieve material which performed a binding function within concrete.
>
> The Appellant quantified its claim on the basis of that policy, identifying the limestone material that it considered performed a binding function within concrete as being material of <125 microns.
>
> HMRC then entered into further discussion with the Appellant concerning the extent to which limestone material can be recognised as performing a binding function within concrete. Both parties produced expert reports addressing whether and to what extent fine grade limestone material can be recognised as performing a binding function.
>
> However, it is clear from the terms of the decision, and subsequently HMRC' s statement of case, that the appeal now proceeds on the basis of very different arguments to those which were initially accepted as applying. In particular, HMRC clearly no longer accept the premise of their policy that relief is applied to materials which perform a binding function.
>
> In this respect it appears there is common ground as the Appellant, similarly, accepts that there is, and never was, any basis in law for the policy as described above. That follows because the terms of code 018 apply so as to relieve the manufacture of (with our emphasis) "*fillers* for coating, sealants, adhesives, paints, grouts, mastics, putties and *other binding or modifying media*." The law therefore clearly applies to the addition of fillers to binding or modifying media rather than material which itself can be demonstrated to perform a binding function. Whilst a filler may be an 'active' filler and so contribute to the binding function of the material that is not a necessary condition and, equally, it is recognised that a filler can be 'inert'; meaning that it is added merely to bulk up or for its mechanical effects within a binding medium.
>
> *Appellant's claim in its grounds of appeal*
>
> Before submitting its notice of appeal the Appellant identified that the policy previously applied by HMRC had no basis in law and that the Appellant's claim could not proceed as a claim for material which performs a binding function.

The claim was therefore reformulated in the terms of the grounds of appeal to make it clear that the Appellant sought to claim, consistent with the terms of the legislation, in respect of limestone material which is used as a filler within cement and/or concrete, and not material which merely performs a binding function.

In addition, the Appellant introduced a further and alternative basis of claim - that such material is exempt on the basis that it is used in the production of cement from limestone.

The Respondents' statement of case

The Respondents, in their statement of case, responded … that fine grade limestone materials do not perform a binding function within cement.

The Respondents essentially reserved their position in respect of the alternative argument on the basis that they had not been provided with any evidence to support the contention that the material is used in a process for the production of cement from limestone.

Clarification in respect of 'filler'

The witness statement served today should provide further clarification in respect of what material the Appellant contends can be recognised as being 'filler'. The Appellant considers that fine grade limestone material can be recognised as being filler within cement on the basis that, when added to concrete, the fine limestone material combines with and behaves as one with the ordinary Portland cement. In this respect we do not consider that the terms 'cement' and 'concrete' are mutually exclusive of each other and the cement and the ingredients commonly added to cement retain a separate and distinct character throughout the process of producing concrete.

As stated above, whilst this limestone material is reactive and performs a binding function that is not critical to its identification as a filler, as fillers can by their nature be ‘reactive’ or ‘inert’ fillers. We do not consider, therefore, that the reactivity or otherwise of the limestone material will be critical to the Tribunal’s analysis.

It has also become clear during the process of taking witness evidence that limestone material below 4mm in size performs a function as a filler within the 'mortar' made up of fine aggregate, cement and water which binds together the coarse aggregate particles. On that basis we are amending the claim to encompass material of 4mm and down.

The binding medium

In its grounds of appeal the Appellant claims that the limestone material is used within the binding medium of cement and/or concrete. The Appellant has considered its case in this respect and now withdraws its claim that concrete is a binding medium. Whilst concrete can be used in

some applications as a binding medium it is more commonly used as a structural component of construction and engineering works.

Evidence of a process of producing cement

Again we hope that the witness evidence served today will clarify the Appellant's position which can be summarised as follows:

The manufacture and addition of fine grade limestone material is a process in the production of cement from limestone.

That process of adding fine grade material is a process in the production of cement whether or not the addition is made to the cement before it is introduced to the concrete mixture or whether it is added during the process of producing concrete.

Quantification

In the event of a successful outcome, the Appellant would seek to quantify its claim on the basis of the limestone material which falls within the same or substantially the same size parameters as the 'binding medium' in which it operates. In the event that the Tribunal were to find that the limestone is a filler within the binding medium of cement then the claim would, in our view, stand as it was originally made, being a claim for material of <125 microns.

If alternatively the Tribunal accepts that limestone material is a filler within the binding medium of mortar then the claim would be for material of 4mm and below. ...

The Appellant does not take any issue with HMRC having previously applied an erroneous policy and so will not object should HMRC wish to amend or supplement their own pleadings."

13. In May 2015 HMRC obtained an independent expert report which stated:

"Concrete is essentially composed of both fine and coarse aggregate (sand and gravel) and cement powder but may include various additional components and additives. Similarly mortar is essentially composed of fine aggregate (sand) and cement powder. On mixing with water the cement undergoes a series of chemical reactions that bind the aggregate and other constituents together resulting in concrete.

AIUK [ie the Appellant] manufacture a range of aggregate products specifically for concrete at quarries around the UK from various rock types including limestone. Concrete is produced using Portland cement (a standardised product classified as CEM I) and other constituents that are imported or purchased in the UK and supplied as ready mix or used by AIUK in precast concrete products.

Limestone fines are a common additional constituent in modern cement and concrete formulations, either provided as part of the cement or

combined with the cement and aggregate at the time of use. When manufactured with the cement, limestone may be added up to the permitted maximum of 5% by mass in Portland cement (CEM I), or in larger amounts up to 35% to form 'Portland limestone cement'. At the point of use, specially prepared limestone fines (specified in BS 7979 as a fine powder of particle size mainly less than 0.045 mm) may also be blended with the cement and concrete aggregate up to 20% by mass of the Portland cement, allowing the usage of cement powder to be reduced accordingly.

A filler or filler aggregate may be added to the cement-aggregate mix to improve the particle size grading of the aggregate and therefore modify the handling and setting properties of the product. The particle size of filler aggregate is stipulated by the relevant standards (BS EN 121620 and BS EN 13139) as being mainly less than 0.125 mm.

The AIUK product for which Aggregates Levy relief is claimed is manufactured by crushing and screening quarried limestone. Although commonly referred to by AIUK as 'limestone fines', it is understood that their claim refers to a product termed '0/4 Dust' in the AIUK quarry classification system. From particle size test data provided by AIUK and CE mark certificates available on the AIUK website, 0/4 Dust is composed of sand (particles 0.063 to 2 mm) with a variable proportion (up to 65%) of fine gravel (particles 2 to 6.3 mm) incorporating 10-20% fine particles (less than 0.063 mm). This material is properly (e.g. using the criteria provided by BS EN 121620) classified as fine aggregate.

It is concluded that the 'limestone fines' product for which Aggregates Levy relief is claimed by AIUK does not correspond to the recognised standard specification of either limestone fines in the meaning of BS 7979 or filler aggregate as defined in BS EN 121620 and BS EN 13139. The use of this material in the manufacture of concrete simply supplements the essential fine aggregate constituent and should not be considered either as a process for the production of cement or as a filler."

14. On 3 June 2015 HMRC wrote to KPMG stating:

"Having taken advice from our Policy team I can now advise you that it is our view that the additional claim, that limestone material below 4mm in size performs a function as a filler within the binding material of "mortar', is a new claim; and cannot be viewed as an extension to the previous claim that material of <125 microns is a filler within the binding material of cement.

In response to your claim that limestone material which is used as a filler within cement and/or concrete qualifies for relief under code 018, or alternatively that such material is exempt on the basis that it is used in the production of cement from limestone, our position is as follows:

1. Relief under industrial Processes Relief Code 018

…

Historically HMRC has allowed relief of up to 2% relief for filler used in the production of concrete provided that the manufacturer could demonstrate evidence of the binding properties of the aggregate used.

However, we have since obtained legal advice that relief in the manufacture of concrete has no legal foundation. Following the rules of statutory construction the relieved process in Code 018 is the manufacture of a binding or modifying media of a similar type to others listed in Code 018 i.e. the manufacture of grouts, mastics etc. It is our view that you have not provided sufficient evidence that the fine limestone material combines with the ordinary Portland cement within concrete and cannot therefore be recognised as being filler within cement. Therefore no relief is due on the fine aggregate material used in the manufacture of concrete.

2. Relief for an exempt process under s18(2)(c)

Under Finance Act 2001 section 18(2)(c), any process for the production of lime or cement from limestone or from limestone and anything else is an exempt process. It is our view that the concrete products in question are produced in a single mixing process which combines cement, aggregate, smaller aggregate fines and water. We do not consider that you have provided evidence that the manufacture and addition of fine grade limestone is a process in the production of cement from limestone. Furthermore we do not agree that the cement you refer to in this context is a separate, identifiable or recognised cement product.

Therefore I must reject the claim for a repayment of the Aggregates Levy paid in respect of limestone material below 4 mm in size used in the manufacture of ready-mix concrete products in its entirety.

Quantification

In respect of the claim made on 15th April 2015 for limestone material of <125 microns, this is considered to be an amendment to the claim originally submitted on 17th March 2009 and later quantified in the letter of 29th March 2011. …

In respect of the claim made on 1st March 2015 for limestone material of 4mm and below, covering the period from 1st April 2006 to 31st March 2011 and later updated by letter of 15th April 2015 to cover the periods to 31st December 2014, this claim is a new claim and is rejected in its entirety for the reasons given above. A claim for a repayment of overpaid levy is made under section 31 of FA 2001 and must be made in such a form and manner as required by the Commissioners. The form required is set out in SI 2002/761 regulation 19 which states that a claim must be made in writing and must state the amount of the claim and the method of calculating the amount. As set out in the supplementary requirements of s. 32, such a claim must be made to the Commissioners

within 4 years of the date when the original levy was paid. The claim for aggregate of 4mm and below does not meet the requirements of regulation 19. Additionally the part of the claim covering the periods 1st April 2006 to 31st December 2010 is considered to be out of time under FA 2001 s.32(1) and as such the Commissioners have no liability to repay the amounts claimed. I therefore refuse all the amounts claimed."

15. That letter also stated that the Appellant had a right of appeal against the decision, and on 2 July 2015 the Appellant made a further appeal to the Tribunal, stating in its detailed grounds of appeal:

"8. The smallest particles from the process, below 4mm in diameter, are separated out from the other material to comprise the Manufactured Product.

9. Some of the Manufactured Product acts as filler when added to a cement mixture. It acts as filler as, to the extent it relates to 125 microns and down, it replaces other ingredients of the cement without detracting from its overall functional performance. It does not detract from the overall functional performance as it reacts with the other ingredients and in doing so improves the bonding process within the cement. It also fills in space that would, otherwise, be taken up with other more environmentally harmful ingredients within the cement mixture.

10. The Appellant uses the Manufactured Product, to the extent it relates to 4mm and down, to perform the function of a filler within the mortar - made up of fine aggregate, cement and water - which binds together the coarse aggregate particles.

…

Reasons the Decision is wrong

14. The Contested Decision is wrong because it fails to recognise the functional characteristics of the Manufactured Product within the binding medium in which it is used.

15. The functional characteristics are as described in 9 above. i.e. (a) its use does not detract from the overall functional performance as it reacts with other ingredients and. in doing so, improves the process of bonding within the cement; and (b) it operates as a filler as it fills in space that would, otherwise. be taken up with more environmentally harmful ingredients.

16. As the Manufactured Product operates as a filler within the binding media of cement and mortar it qualifies for credit under Regulation 13(2)(c) of the AL Regulations.

17. Alternatively. the Manufactured Product is used in the production of cement from limestone, This follows as the addition of the Manufactured Product, to the extent identified in the Amended Claim. is a recognised process in the production of cement. It is irrelevant for

> these purposes that the addition of the material is made by the Appellant to the cement in the process of making concrete and not at the prior stage of production of dry cement. As such, the addition of the Manufactured Product, as identified in the Amended Claim. qualifies for exemption under Regulation 13(2)(c) [sic, should be 13(2)(b)] of the AL Regulations.
>
> *Grounds of appeal for the Out of Time Rejection*
>
> 18. The Appellant contends that the Amended Claim is, in its entirety, an amendment to the Original Claim and all accounting periods remain within time for recovery."

16. In September 2015 HMRC served a consolidated statement of case (ie covering both appeals) contending:

> "(f) The limestone material produced by the Appellant does not comply with the stipulated particle sizes required by the relevant standards (SS EN 12620 in respect of concrete and SS EN 13139 in respect of mortar) and cannot properly be considered to be a filler aggregate in the production of either cement or mortar. Therefore, it is does not qualify for credit pursuant to regulation 13(2)(c) of the Regulations.
>
> (g) Further, the limestone material is not used by the Appellant in the production of cement but rather, as it is added to the concrete mix at the same time as the cement, is used in the production of concrete. Therefore, it does not qualify for credit pursuant to regulation 13(2)(b) of the Regulations.
>
> (h) Section 32(1) of the Act provides that the Respondents shall not be liable, on any claim for repayment of AL, to repay any amount paid to them more than 4 years before the making of the claim.
>
> (i) The Appellant's claim dated 10 March 2015 was not an amendment of its claim dated 17 March 2009 but, as it related to particles of up to 4mm rather than the original 125 microns, constituted a new claim in respect of a different category of material. It was, therefore, out of time in respect of amounts of AL paid before 10 March 2011."

Witness evidence

17. I took oral evidence from two witnesses:

> (1) For the Appellant, Mr Geoffrey Richardson, technical manager for the concrete division of the Appellant.
>
> (2) For HMRC, Mr Robert Barnes of GeoloGIS Limited, who authored the expert report commissioned by HMRC referred to at [13] above.

18. The Appellant produced as physical exhibits samples of a selection of typical limestone aggregate products.

Mr Richardson's evidence

19. Mr Richardson confirmed and adopted a witness statement dated 12 March 2015. He has over 40 years' experience as a construction materials engineer and technical manager on construction materials, including cements, concretes and mortars. He had been involved in the disputed claim from the outset in 2009.

The Appellant's operation

20. At its quarries the Appellant extracts limestone by drilling and explosives. The blast rock is transported from the working face of the quarry to a processing plant which is normally sited elsewhere on the quarry site. The raw limestone material is loaded into a primary crushing machine, which reduces the size of the blast rock and produces a coarse material. Some of that material is then subjected to secondary crushing which produces particles with a range of sizes. The particles are conveyed to a mechanical screen or sieve where they are separated into different products with different particle size ranges. The materials may be sold at this stage or subjected to further processing through tertiary crushing. This involves hammer mills or fine cone crushers. The particles at this size will be smaller than 40 mm and normally have a range of sizes between 4 mm and 40 mm. The output is sieved again into different sizes. The Appellant would usually grade to 3 different sizes for concrete: 0-4 mm, 4-10 mm and 10-20 mm. The product within the range of 0-4 mm is termed "fine aggregate".

21. Concrete is produced by mixing cement, coarse aggregate, fine aggregate, water and, occasionally, other additives. The fine aggregate could be naturally occurring fine aggregate or crushed rock fine aggregate. Fine aggregate is also commonly referred to as sand. The Appellant monitored its production of fine aggregates, and test laboratory results were produced. At its concrete production sites cements and other fine powders were stored in vertical conical silos, and aggregates were stored in hoppers. To make concrete, the cements, aggregates and other dry ingredients were weighed and fed into a mixer, where water and admixtures were added. The mixer then mechanically combined the ingredients.

22. The Appellant made available to its customers over 300 recognised concrete types. To produce these the Appellant had around half a million concrete recipes – the large number necessitated by the wide variation in raw products, and the many different ways of achieving the same result in terms of strength, durability and workability of the concrete. For example, if a customer specified BS 197 Portland Limestone Cement (see [27] below) then the Appellant would explain that it did not stock or manufacture that product; however, it could achieve the same result by using 0-4 mm aggregate but the result could not be called Portland Limestone Cement because the Appellant was not testing to the required standard. The Appellant produced cement as a mix or a combination but did not manufacture cement. The Appellant acquired ordinary Portland cement from the cement division of its group and then, as a member of the concrete division of its group added materials to produce an inmix combination.

Industry standard designations of Aggregates

23. There is a number of different designations of aggregate used within the concrete industry.

(1) *Fine aggregate* - this is aggregate of less than 4mm in diameter: British Standard for Aggregates for Concrete BS 12620.

(2) *Filler aggregate* - this is aggregate most of which passes a 63μ sieve: *ibid.*

(3) *Fines* - this is the particle size fraction of an aggregate which passes a 63μ sieve: *ibid.*

(4) *Limestone fines* - this is a fine powder obtained from the processing of limestone 90% of which by mass must be below 45μ in diameter: British Standard for Specification for Limestone Fines for use with Portland Cement BS 7979.

24. Where a supplier purports to supply a product conforming to British Standards then they can be held accountable both through the terms of their contract with the customer and through UK Trading Standards. Whilst the British Standards are not statutory obligations, they are almost invariably adopted in the construction industry and so represent ordinary commercial practice for the sale of construction materials.

The production of Cement

25. Cement is finely ground inorganic material which, when mixed with water, forms a paste which sets and hardens by means of hydration reactions and processes and which, after hardening, retains its strength and stability even under water.

26. Portland cement clinker is manufactured from limestone, clay and iron ore. The raw materials are analysed, combined and ground in a mill. The resulting material is then passed into a pre-heater to warm it and then into a furnace where the material is partially melted to form the compounds that occur in cement. After heating, the material is rapidly cooled or "quenched" in cold air. The resulting clinker is taken to a ball mill and ground down to a fine powder. Sulphate, in the form of calcium sulphate, is added during the grinding phase to control the setting process of the cement.

27. Cement is categorised by the British Standard for Specification of Cements BS 197 and each category and subcategory is given a notation. The notation for a Portland limestone cements falls within four categories of "CEMIII".

28. Limestone fines are not the only material that can be added to ordinary Portland cement and recognised as forming part of the cement. The additions each have different properties and can be added in different proportions. Limestone fines are widely recognised to be reactive and so to perform a binding function within cement though not to the same degree as other additions. Limestone fines also perform

another function in that they provide nucleation sites on which cement hydration products can form.

29. Cement manufacturers have a ready source of limestone as it is required in the production of ordinary Portland cement. The raw limestone addition in Portland limestone cement is typically introduced before the clinker is ground, meaning that the limestone is ground to the same or similar particle size as the clinker material. Portland limestone cement can be produced by adding limestone either before the grinding stage or limestone fines can be blended with the cement after grinding is completed. BS 197 recognises that a cement can be produced by adding limestone fines to cement clinker which is then referred to as a "Portland limestone cement".

30. In Mr Richardson's opinion, when the Appellant adds limestone fines to its concrete it is undertaking a process which is recognised as a process for the production of cement.

Fillers and cement

31. "Filler" is material used to pack out voids in other materials, such as concrete. Different sizes of packing give various benefits. Voidage in aggregates must be filled, usually by cement. The use of fillers reduces the amount of cement required. This reduces the environmental impact of the concrete. It can also reduce the amount of water required, so reducing the permeability and increasing the durability of the concrete. Use of limestone fines as fillers increases the workability of the concrete. The suitability of the fines can be affected by clays and other contaminants, which may react adversely with admixtures. It is also important to monitor the moisture content of the materials, as this may affect their flow characteristics.

32. Fine limestone material is recognised as being part of cement within industry standards because it performs a function as a filler. Within certain tolerances, it does not materially affect the functional performance of cement. The introduction of too much limestone fines would affect the strength of the cement. The limestone fines must have a size which is the same or similar to the cement itself. Industry standards require that 100% of cement must pass through a 125 μ sieve. The use of fine grade limestone material in combination with cement has both economic and environmental advantages. The production of clinker and ordinary Portland cement involves very high carbon costs. The production of fine grade limestone material involves much lower carbon costs (as it is mainly a mechanical process) and thus the addition of the material to cement has environmental benefits.

33. In Mr Richardson's opinion, the process adopted by the Appellant of adding limestone fines into the concrete mixture was in substance the same as the use of composite cement or the use of a Portland limestone cement. In each mixture the limestone fines perform exactly the same function as a reactive component within the cement.

Mortar

34. A mortar is a mixture of cement, water and sand with the possible addition of lime. Sand for these purposes is the same as fine aggregate being mineral particles of less than 4mm in size. Sand is added to mortar as a filler, in the sense that the material bulks up the mortar and changes its mechanical properties making it easier to work. The sand, water and cement within a concrete mixture is no different in structural terms to masonry mortars, as both perform the same function of holding larger particles together. The mortar in cement has a quite distinct and separate visual appearance; if the concrete is polished then it is easy to identify with the naked eye the mortar as distinct from the coarse aggregate which it holds in place.

35. When the Appellant adds fine aggregate into its concrete mixtures then it combines with the cement to create a mortar which then binds together the hard aggregate. The fine aggregate in this way performs exactly the same function as a filler within a masonry mortar as it bulks up the mortar making it easier to work.

The claim

36. In the claim submitted in March 2009 and March 2011 Mr Richardson identified the relevant material as being fines < 125μ because his opinion was that material this size performed a binding function within concrete through its interaction with cement, and also that this size designation broadly corresponded with filler aggregate - BS 12620 requires >85% of filler aggregate to be <125μ.

37. When HMRC issued their decision in March 2012 they revealed that they had changed their policy so that the test was not whether the aggregates had binding properties, but instead whether the material was used in the manufacture of a binding or modifying medium.

38. In 2014 more information was provided by HMRC in the form of a draft Business Brief and at a site visit. This resulted in the letter from HMRC quoted at [11] above. In March 2015 KPMG wrote to clarify or otherwise amend the basis of the claim – see the letter quoted at [12] above.

Questions

39. In response to questions from Mr Puzey, Mr Richardson clarified and confirmed:

> (1) The samples provided of "0-4 material" would have a mix of size particles in it; some <45μ, some <63μ, some <125μ, and some larger.
>
> (2) The samples identified as "0-4 Dust" were limestone dust and are the subject of the claim. The samples identified as "0-4 Sand" were from various quarries and are not within the claim.
>
> (3) The samples themselves did not comply with the relevant British Standards, but they contained material which was of the permitted/required specifications.

(4) The standards prescribed minimum cement content, and provided for some limestone fines to count towards the cement content of the product.

Mr Barnes's evidence

40. Mr Barnes confirmed that he was the author of the GeoloGIS report dated 29 May 2015 and a supplemental letter dated 3 September 2016; he confirmed and adopted both documents. He is a geologist with 35 years' experience.

Cement

41. Some form of cement is fundamental to all concrete and mortar. By far the most commonly used cement for this purpose is "ordinary Portland cement". It is manufactured from limestone and clay or mudstone that are crushed and heated together at very high temperature to produce a product called clinker. The clinker is then ground to a very fine powder (mainly less than 0.06 mm particle size). A small quantity of calcium sulphate (usually gypsum or anhydrite) is added to cement during its manufacture to control setting. Other constituents may be added during grinding to create a wide range of more specialised cement products along with additives that improve the manufacture or the properties of the cement. Cement must be used with some form of aggregate. When mixed with water to create a paste, the cement undergoes complex chemical changes in a process called hydration that cause it to set and bind together the solid aggregate particles.

42. BS 197 recognises 27 common cements and 12 more specialised products. Two classes of cement are:

(1) Portland cement (classified as type CEM I) is 95-100% clinker, containing less than 5% by mass additional "minor" constituents including limestone.

(2) *Portland Limestone cement* (one of a number of Portland composite cements classified as type CEM III) comprising Portland cement with 6-35% by mass of limestone. Portland Limestone cement is separated into four types depending on the proportion (6-20% and 21-35%) and the total organic carbon content (< 0.2% and < 0.5%) of the limestone.

43. Limestone is commonly added to Portland cement during manufacture, when it is interground with the clinker to produce a very fine particle size. Because this method of production leads to reduced levels of CO_2 emissions and reduced energy consumption when compared with the production of the same quantity of Portland cement without added limestone these are sometimes referred to as "low carbon" cements. Alternatively, specially prepared limestone fines corresponding to the specifications of BS 7979 may be blended at the time of use with the cement-aggregate mix at the batching plant or mixer (when it may be referred to as a "combination").

44. BS 197 recognises that a cement can be produced by adding limestone to cement clinker which is then referred to as a “Portland limestone cement". This addition is carried out as part of the cement manufacturing process, limestone being included with the cement clinker at the factory grinding stage and the materials interground to create limestone particles that are the same size as or smaller than those of the cement clinker. The product is then supplied packaged as Portland limestone cement. The standards for the production of concrete (BS 206 and BS 8500) also allow that certain additions, when combined in the concrete mixer, count fully toward the Portland cement content. Filler aggregate conforming to BS 12620 and limestone fines conforming to BS 7979 are recognised by the standards as being generally suitable for this purpose. In Mr Barnes’s opinion, in this case no identifiable cement product is produced; the addition of specially prepared material to the concrete mix adds fines or supplements fines already present and thereby lessens the requirement for Portland cement on a pro rata basis.

Concrete

45. Concrete is fundamentally composed of a mixture of sand (fine aggregate), gravel (coarse aggregate) and cement. Various other components or additives may be used to control properties of the concrete mix or the finished product. When water is added the mixture can be handled for a period of time but then sets to form a durable rock-like material.

46. The precise nature and proportions of the cement and aggregates may vary to some extent depending on availability and on the required properties of the mix and finished product. The cement powder is used in sufficient quantity to bind the aggregate grains together. Aggregate provides bulk and strength to the product; the sand and gravel sized components are both essential to facilitate particle packing and to minimise void space.

47. For use in concrete, British Standards (BS 8500) states that provided the additions are within prescribed limits, addition of limestone fines conforming to BS 7979 can be taken fully into account in the concrete composition in respect of the cement content and the water/cement ratio. The proportion of limestone fines is limited to less than 20% of the combination.

Mortar

48. Mortar is composed fundamentally of sand (fine aggregate) and cement. When mixed with water the mortar sets to form a durable material that is used to join bricks, blocks or stone in construction or as a coating referred to as render for walls or screed for floors.

49. Naturally occurring sand is often used to make mortar but fine aggregate manufactured by crushing and screening quarried rock may also be appropriate. As with concrete, cement powder is used in sufficient quantity to bind the aggregate grains together. Various additives may be used to control properties of the mix or the finished product. The British Standard on Aggregates for Mortar BS 13139 lists the

sizes of aggregates for mortar, and prescribes different limits for fines content depending on the aggregate size and the proposed end use of the mortar.

50. The requirement for a maximum fines content often derives from natural fine aggregate where fines may be particles such as clay that would be deleterious to the mortar in too large proportion. Limestone fines (90% less than 45μ as defined by BS 7979) may also be used in combination with Portland cement in mortar.

Test results

51. Mr Barnes had examined certain test results for product samples from the Appellant's Holme Park Quarry. He had attempted to identify the product on which the Appellant was claiming exemption from or credit for AL. The products most relevant to the description "fine aggregate" in BS 12620 appeared to be "0/4 Dust" and "0/4 Sand". His conclusions were:

> (1) The 0/4 Dust material does not comply with the standard particle size requirements for either filler aggregate (BS 12620 specifies 100% <2mm and >70% <63μ) or, where produced from limestone, limestone fines as specified in BS 7979 (90% by mass is < 45μ) for use in combination with Portland cement.
>
> (2) BS 7979 imposes other specifications including that the composition of the material must be not less than 75% calcium carbonate and that the moisture content shall not be greater than 0.5% by mass. The latter condition was rarely met in the test results; the compositional criteria will not be met if the limestone includes dolomite as opposed to being calcium carbonate or if the product includes a significant proportion of other minerals including clay or shale.
>
> (3) Limestone 0/4 Dust is not a unique or distinctive source of fines in concrete manufactured by the Appellant. 0/4 Dust is produced from a range of rocks types and 0/4 Sand and all-in aggregates produced more widely commonly have the same fines classification. The Appellant's commercial documentation did not state in what quantities or with which other aggregates the 0/4 Dust is used in the Appellant's concrete mixes. It is likely that 0/4 Dust is the only fine aggregate present in the mix, when its role is fine aggregate, not filler. If some other fine aggregate is present (e.g. 0/4 Sand or an all-in aggregate) and 0/4 Dust is added up to the permitted 20% of the Portland cement as a "filler", the proportion of additional fines will be relatively minor.
>
> (4) 0/4 Sand cannot be regarded as filler aggregate or limestone fines for the same reasons as given for 0/4 Dust. They constitute the sand or fine aggregate fraction that is fundamental to the concrete aggregate mix.
>
> (5) In relation to mortar, used alone with cement these products would constitute the fundamental sand or fine aggregate component of the mortar. None are produced from limestone hence none include nor can be

considered as limestone fines. They cannot be regarded as filler aggregate (e.g. for admixture with washed sand to improve the fines content) as they do not meet the BS 13139 specification for filler aggregate.

52. Limestone fines (BS 7979) and filler aggregate (BS 12620), are very clearly defined as being mainly fines of less than 45µ or 63µ particle size respectively. The 0/4 Dust product does not conform to either, being instead largely composed of sand (63µ to 2 mm) and gravel (larger than 2 mm) sized particles, and correctly classified under BS 12620 as fine aggregate.

53. In Mr Barnes's opinion:

(1) The addition of the 0/4 Dust product to concrete is not a process for the production of cement; it simply comprises (if used alone) or otherwise adds to the fine aggregate that is an essential component in the manufacture of concrete.

(2) 0/4 Dust does not conform to BS 12620 and cannot therefore be considered to be a filler in this context.

(3) In relation to mortar, in BS 13139 the definition of filler aggregate for mortar is the same as that in BS 12620. No Dust or equivalent product is manufactured by the Appellant in this category. The mortar aggregate products are all classified as 0/2 Sand, many of which are washed to remove fines. They are a fundamental constituent of the mortar. No filler is therefore identified for use in mortar.

Questions

54. In response to questions from Mr Rycroft and Mr Puzey, Mr Barnes clarified and confirmed:

(1) Cement and limestone fines are not substitutable in performing the same function. The addition of limestone fines permitted use of less cement. Blending limestone fines into cement produced a combination that may produce an equivalent end product of concrete. The fines in the final mix would come from both the cement and the fine aggregate.

(2) The quarry samples did contain material that constituted "fines".

(3) BS 17979 permitted up to 20% limestone fines into ordinary Portland cement for the manufacture of concrete. That was the industry standard for the amount of limestone fines that would not be deleterious to the concrete.

(4) He was aware of the term "combination concrete" but not "combination cement".

Appellant's case

55. Mr Rycroft for the Appellant submitted as follows.

56. The Appellant's appeal related to limestone material <4 mm and was on three grounds:

> (1) The material was used in the production of cement from limestone – thus it qualifies under Reg 13(2)(b).
>
> (2) The part of the material <125µ acts as a filler when added to a cement mixture – thus it qualifies under Reg 13(2)(c) and schedule Code 018.
>
> (3) The material acts as a filler within a mortar mixture – thus it qualifies under Reg 13(2)(c) and schedule Code 018.

The timing of the appeal

57. It was important to recognise that the initial claim by the Appellant in 2009 was based on a policy endorsed by HMRC at that time but subsequently abandoned by HMRC. In reading Code 018 HMRC had applied the wrong test; HMRC had concentrated on whether limestone dust performed a binding function within cement and/or concrete. Both parties were then acting on a mistaken understanding of the relevant considerations. The original claim had had to be amended and clarified because of HMRC's belated notification of their change of policy; it was not a new claim, as HMRC suggest. A fresh notice of appeal had been filed in July 2015 as a practical matter of good order, in order to ensure there was no time limit bar in relation to challenging HMRC's revised position.

58. In *Reed Employment Limited v HMRC* [2011] SFTD 720 the Tribunal stated:

> "**[106]** … Whilst it is accepted that if an original claim has ceased to have currency then no purported amendment can revive that claim and become part of it, the converse does not hold true. Where an original claim is uncompleted, it is not the case that every subsequent claim expressed to be an amendment is such. That depends on the nature of both the original claim, and the later purported amendment.
>
> …
>
> **[110]** There is no definition of 'claim' in the VATA, nor any provision for amendment of a claim. The starting point, therefore, we think is that any assertion of a right to repayment must be regarded as an individual, discrete claim, separate from any other, unless it is shown to be in essence as one with an earlier claim.
>
> **[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.
>
> **[112]** The line in each individual case will be for the tribunal, on the particular facts of the case before it, to draw. What is necessary is for the tribunal to determine the subject matter of each claim. This cannot, in our view, be cast too wide, as that would permit claims that are clearly discrete on any analysis potentially to be drawn in. Thus, it would not be right, in our view, to regard a later claim as an amendment to an earlier one simply because it relates to the same period, is a claim under the same statutory provision, or relies upon the same legal argument or the same error on the part of the taxpayer. It follows also that no combination of these factors would result in a later claim being treated as part of an earlier one."

59. Throughout the Appellant had relied on the same two exemptions/reliefs and the same claim had been in contemplation. There had been an acceptable amendment of the detail of the claim in the light of HMRC's shifting position.

First ground - the production of cement from limestone

60. The exempt process was, "any process for the production of … cement from limestone or from limestone and anything else." The Appellant accepted that it was not a *manufacturer* of cement but that was not the relevant test, which was "any process for the *production* of cement".

61. In *R (ex parte British Aggregates Associates & others) v HM Treasury* [2002] EWHC Admin 926 Moses J examined the relevant legislation and stated (at [109]):

> "These essential aims are to be achieved by the definition adopted in the statute of aggregate and by the exemption for non-aggregate. However, the definitions and exemptions are created not so much by reference to the nature of the substance but rather by reference to their use. For example, clay or shale and coal and lignite are not generally used as aggregate and are exempt. Certain processes are also exempt by reason of their use such as agricultural and industrial processes."

62. The aiming of the reliefs at "non-aggregate" purposes was confirmed in the terms of the European Commission's decision C(2013) 4901 on the UK AL (at (13)):

> "Materials that are suitable for use as aggregates can also be used to manufacture other products. In that sense, the industry distinguishes

> between aggregate uses of sand, gravel and crushed rock materials and non-aggregate uses of sand, gravel and crushed rock materials. Non-aggregate uses of rock, sand and gravel are, for instance, the production of cement, glass, and other industrial or agricultural uses."

63. Thus exemptions should be afforded to non-aggregate uses, and the use of limestone dust in the production of cement should qualify.

64. The report commissioned by HMRC from Capita Symonds in December 2011 was clear that cement could be produced either at a factory or at the mixing/batching plant:

> "2.3 Within the British Standard BS 197, limestone fines are therefore permitted to be incorporated within the cement itself, either as a 'Minor Additional Constituent' (MAC), in the case of most types of Portland Cement (CEM I specifications, which allow for a maximum of 5% MACs); or as a Secondary Main Constituent (SMC) or 'filler' in the case of 'Portland Composite Cement' (including CEM IIA specifications, which allow for 6 to 20% filler; and CEM IIB specifications, which allow 21 to 35% filler).
>
> …
>
> 4.2 As noted earlier, limestone fines and certain other inorganic materials can be added to cement clinker, either as a Minor Additional Constituent (MAC) or as a Secondary Main Constituent (SMC). SMCs (often referred to as fillers) may be added, either at the factory (to create a CEM 11 specification composite cement) or at the mixer/batching plant, to create a combination cement. By virtue of their fine particle size, MACs aid the control of cement workability, water retention and strength development, and help to inhibit 'bleeding'."

65. HMRC were wrong to contend that the limestone had to be added at the manufacturing stage rather than at the mixing stage; a baker could choose to use manufactured self-raising flour or instead to use plain flour and add baking powder at the mixing stage – the function and end result was the same with either method.

66. The BS standards were useful background describing the processes but it was accepted that the Appellant's products did not meet the exacting requirements of the standards. The relevant tax statutory provisions did not require adherence to the BS standards; "cement" would still be cement even if it did not meet strict terms of the BS Cement standard. The BS Cement standard showed there was a range of recognised cement products with varying permitted constituents. Adding the limestone fines was part of the production of cement. There was no reaction until water was added. Whether material was added as a separated product or instead as part of a composite material, it was still the production of cement.

Second ground - material <125μ is a filler in the cement mix

67. Code 018 was the industrial process, "Manufacture of fillers for coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media.". It was accepted that the *ejusdem generis* principle applied in interpreting this provision, and the Appellant's contention was entirely consistent with the specified categories. It was accepted that concrete is not a "binding or modifying media"; however, cement was such a medium.

68. The material was a filler because it was an extender – it allowed less cement to be required. The filler was manufactured by the Appellant by the processes of crushing and screening. There was no difference in substance in adding the fines which included the <125μ material, compared to separating such material from the fines and adding the separated material. The Appellant's claim had been quantified to identify (a) the part of the material comprising <125μ material, and (b) to set a limit of 20% as recognised by the British Standards.

Third ground - material is a filler in mortar

69. Similarly to the second ground, the material is manufactured by the Appellant for the binding medium of mortar. Again, the BSI definitions of mortar were not part of the tax code; there was still a mortar present in the concrete mix binding together the coarse aggregate assemblage. The case was even clearer here, as the material in the mortar did not only fill the gaps in the mortar but also bulked up the mortar to provide the necessary mechanical properties.

Respondents' case

70. Mr Puzey for HMRC submitted as follows.

The second claim is out-of-time

71. The claim was originally brought on the basis that part of the limestone fines <125μ performed a binding function in the concrete. When HMRC corrected their policy because of a misunderstanding of the law, the Appellant continued its claim but on a differently stated case. In 2015 it then brought a new claim for different material (>125μ but <4 mm aggregate) on yet another basis.

72. The second claim was a new claim. It related to different material (0-4mm limestone); it advanced a different justification (filler in mortar, not in cement); and the appeal against HMRC's rejection was notified to the Tribunal on a separate notice of appeal. All of this was new in March 2015; it could not have been in the Appellant's contemplation when it made its first claim in relation to <125μ limestone being a filler in cement. Thus it was not an amendment of the first claim – see *Reed Employment Ltd* – and was out-of-time for any period of claim prior to 10 March 2011 (that date being four years prior to the date of the new claim).

The first ground

73. The Appellant produces concrete. The Appellant rightly accepts that it does not manufacture cement; that would require inter-grinding of materials and calcining by heat treatment. Concrete requires cement, aggregate and water. HMRC's site visit revealed what was happening: ordinary Portland cement is bought in from another group division and stored in a silo; fine and coarse aggregates are stored in other silos; these are then mixed (perhaps with other additions) according to a carefully weighed recipe together with water. The wet concrete mix is then used for blocks or as ready-mixed concrete. Mr Richardson agreed with that description of the operation. The Appellant sought to make an artificial analysis, saying that mixing the ordinary Portland cement with the limestone aggregate produced a different kind of cement. Mr Barnes did not recognise the term "combination cement". The addition of aggregates allowed the use of less cement (which had environmental benefits); it did not produce a new kind of cement. The limestone is not part of the cement; it replaces the cement. The product was really just a mix of ordinary Portland cement plus limestone aggregate, with water.

74. The Appellant was producing concrete to BS standards but accepted that it was not producing cement or mortar to BS standards. The Appellant kept pointing to the detailed specifications in the standards but, as Mr Barnes found on testing, the limestone samples were of 0-4 mm material. There was no correlation with the conditions in the standards relating to permitted percentages of stated particle sizes; the Appellant could not demonstrate that the limestone material qualified as "fines" or "filler aggregate".

The second and third grounds

75. Both witnesses agreed that the limestone material was a filler in the concrete, and that it was a key ingredient in the composition of the concrete; it filled the voidage in the concrete and did this in place of additional cement, and enhanced the workability and strength of the concrete. The Appellant sought to argue that the limestone was a filler in the *cement* – that was simply incorrect. Similarly, the argument that the limestone was a filler in "mortar" was incorrect.

Consideration and Conclusions

Summary of dispute

76. I would summarise the dispute as follows.

77. The Appellant contends:

> (1) Limestone fines <125μ are a filler within cement. When added to concrete the fines act as a filler as they improve the bonding process within the cement, replace other more environmentally harmful ingredients, and do not detract from the overall functional performance. Thus the fines are entitled to credit under Code 018: "Manufacture of fillers for … binding … media."

(2) Limestone fines <4mm are a filler within mortar. When added to concrete the fines act as a filler within the mortar, made up of fine aggregate, cement and water, which binds together coarse aggregate particles to make the concrete. Similarly, the fines are entitled to credit under Code 018. This contention was made as an amendment to the 2011 claim, not as a new claim in 2015.

(3) Alternatively, the limestone fines are used in the production of cement from limestone. This is done in the process of mixing concrete, rather than at the earlier stage of manufacture of ordinary Portland cement, but is a recognised process in the production of cement. Thus the fines are exempt by s 18(2)(c): "any process for the production of … cement from limestone …"

78. HMRC contend:

(1) The claim in relation to limestone fines >125μ but <4mm was a new claim, made outside the four year deadline in reg 15.

(2) The limestone fines do not comply with the stipulated particle sizes required by the relevant industry standards for cement or mortar, and thus cannot constitute filler aggregate in either.

(3) The limestone fines are not used in the production of cement; they are used in the production of concrete by being added to the concrete mix at the same time as the cement.

79. I shall deal first with the out-of-time point; then the "production of cement from limestone" argument; and lastly the "manufacture of fillers for binding media" argument.

The out-of-time point

80. I have quoted (at [3 to 16] above) extensively from the correspondence between the parties because I consider that it is admirably well drafted by both parties and encapsulates the background to and conduct of the dispute between the parties.

81. I agree with the Tribunal in *Reed Employment* (at [106]) that "it is not the case that every subsequent claim expressed to be an amendment is such. That depends on the nature of both the original claim, and the later purported amendment." Also (at [112]): "The line in each individual case will be for the tribunal, on the particular facts of the case before it, to draw. What is necessary is for the tribunal to determine the subject matter of each claim. This cannot, in our view, be cast too wide, as that would permit claims that are clearly discrete on any analysis potentially to be drawn in."

82. The original claim in 2011 was in respect of "limestone fines (< 125 microns) that are manufactured internally and used in the production of our concrete and concrete based products". That claim was rejected by HMRC in March 2012 and the decision upheld by formal internal review in May 2012. That decision was appealed to the

Tribunal in June 2012 and the grounds of appeal state: "The smallest particles from this process, below 125 microns in diameter, are separated out from other material to comprise the Manufactured Product." I should comment that that was factually inaccurate – it is now clear and accepted that the <125µ particles are not "separated out from other material" but instead are included in the <4mm limestone fines that are mixed into the concrete. In any event, it is clear that the subject matter of the claim is the <125µ particles, defined as the Manufactured Product.

83. In March 2015 KPMG wrote to HMRC "to clarify certain issues in relation to the … appeal" and stated: "It has also become clear during the process of taking witness evidence that limestone material below 4mm in size performs a function as a filler within the 'mortar' made up of fine aggregate, cement and water which binds together the coarse aggregate particles. On that basis we are amending the claim to encompass material of 4mm and down." HMRC (in June 2015) rejected that as a new claim and out-of-time, and the Appellant filed a fresh notice of appeal in July 2015 stating in the grounds of appeal:

> "8. The smallest particles from the process, below 4mm in diameter, are separated out from the other material to comprise the Manufactured Product.
>
> 9. Some of the Manufactured Product acts as filler when added to a cement mixture. It acts as filler as, to the extent it relates to 125 microns and down, it replaces other ingredients of the cement without detracting from its overall functional performance. It does not detract from the overall functional performance as it reacts with the other ingredients and in doing so improves the bonding process within the cement. It also fills in space that would, otherwise, be taken up with other more environmentally harmful ingredients within the cement mixture.
>
> 10. The Appellant uses the Manufactured Product, to the extent it relates to 4mm and down, to perform the function of a filler within the mortar - made up of fine aggregate, cement and water - which binds together the coarse aggregate particles."

84. That statement (which is entirely consistent with the approach adopted by the Appellant in this hearing) adopts a definition of Manufactured Product which is different from the 2012 notice of appeal.

85. I have some sympathy with the Appellant's point that it was only in March 2012 that the Appellant was aware of HMRC's revised stance (which abandoned the relevance of chemical reactivity of limestone in concrete) and so the Appellant was in a position to frame its claim in the light of HMRC's revised stance. However, the claim for material >125µ but <4mm was not made until March 2015 (ie three years later) and was prompted because it had "become clear during the process of taking witness evidence that limestone material below 4mm in size performs a function as a filler within the 'mortar'". It may be unfortunate for the Appellant that the possibility of relief for the material >125µ but <4mm did not become apparent until collation of witness evidence in early 2015, but it is clear to me that that possibility was not in the contemplation of the Appellant until early 2015. Furthermore, the basis of the

claimed relief is that the material >125µ but <4mm is a filler in the mortar, rather than a filler in the cement (which was the basis for the 2011 claim for the <125µ material).

86. I agree with the Tribunal in *Reed Employment* (at [111]) that, "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." In the present case I consider that the subject matter is different (for example, the two different definitions of Manufactured Product in the appeal notices) and the facts and circumstances of the purported function of the material >125µ but <4mm (as being a filler in mortar) fall outside the contemplation of the 2011 claim.

87. For those reasons I find that the claim in relation to the material >125µ but <4mm is out-of-time for any period of claim prior to 10 March 2011. In case this dispute goes further, I have below considered the arguments for the material >125µ but <4mm regardless of the claim being out-of-time.

The "production of cement from limestone" argument

88. The provision in s 18(2)(c) for the relevant exempt process is "any process for the production of … cement from limestone or from limestone and anything else".

89. The parties are agreed that it is not sufficient for the limestone fines to be used in the production of *concrete*; the limestone fines must be used in the production of *cement*.

90. What is cement? What constitutes "the production of cement from limestone"? None of this is defined in FA 2001 or the AL Regulations. Some guidance can be obtained from the British Standards to which I was referred. The Appellant contends that "cement" in s 18(2)(c) should not be read as meaning only a product which satisfies the strict specifications in BS 197. However, it cannot be that any product self-described by a trader as cement would fall within the statutory relief. Mr Richardson in his witness statement stated, "British Standards … operate to provide fixed standards to which suppliers can operate. Whilst the British Standards are not statutory obligations, they are almost invariably adopted in the construction industry and so represent ordinary commercial practice for the sale of construction materials." The Appellant adopted a rather varied position on the relevance of the British Standards. On the one hand the Appellant highlighted the particle size provisions in the Standards (in particular the importance of the 125µ and 4mm limits in BS 12620) and the 20% limit on limestone fines in BS 17979. On the other hand, the Appellant accepts that the limestone fines it manufactures do not meet the strict requirements of the Standards but says that does not matter.

91. Having carefully considered the evidence and submissions I have concluded that "cement" in s 18(2)(c) should be construed as meaning cement as understood and accepted by the construction industry, and that the Standards provide the generally adopted framework for determining whether a given product is cement. Accordingly,

the requirements of the Standards (eg formula composition, particle size, moisture content etc) are determinative of whether the product is cement.

92. In relation to "production of cement from limestone", I have concluded that the process covered by s 18(2)(c) is what in the hearing was described as the manufacture of cement – namely, the combining of permitted materials; calcining and quenching the mix; and grinding to a fine powder meeting the requirements of BS 197. Once the cement has been produced in this manner then the addition of further substances to it (such as extra limestone material) does not constitute "the production of cement" – the cement was produced at the manufacturing stage and the subsequent process is adding the pre-produced cement to other material.

93. The only evidence to the contrary is the brief statement in the Capita report quoted at [64] above. I have carefully considered that statement but I am mindful that it is made incidentally in a report that was addressing a point that has now become irrelevant: the disputed chemical reactivity of limestone in concrete. Further, that Mr Barnes's evidence was that he was unaware of the term "combination cement". Accordingly, I have preferred the other evidence in reaching the conclusion in [92] above.

94. Turning from those conclusions on "cement" and "production of cement" to what the Appellant does, I conclude that the test in s 18(2)(c) is not satisfied. The Appellant takes cement produced by other persons and then adds its manufactured limestone fines (and other materials) to the cement to produce concrete. The Appellant is not producing cement; it is producing concrete from cement that has been produced earlier by other persons. Further, as the Appellant accepts, the Appellant's addition of the limestone fines to the pre-produced cement results in a product that does not meet the requirements of BS 197, even though the original cement did meet BS 197 specification.

95. In relation to the comments of Moses J in *British Aggregates Associates* and of the European Commission in C(2013) 4901, ss 19 & 48 are explicit that subjecting aggregate to exploitation includes using it for construction purposes, which in turn includes "mixing it with anything as part of the process of producing mortar, concrete, … or any similar construction material." That is exactly what the Appellant does.

96. Accordingly, the activities of the Appellant do not constitute an exempt process within s 18(2)(c).

The "manufacture of fillers for binding media" argument

97. The provision in Code 018 for the relevant industrial process is "Manufacture of fillers for coating, sealants, adhesives, paints, grouts, mastics, putties and other binding or modifying media."

98. I consider that the Appellant's work in quarrying, crushing and screening the limestone constitutes "manufacture" for the purposes of Code 018.

99. The parties are agreed that concrete is not a binding medium for the purposes of Code 018, and thus it is not good enough to show that the material is used as filler in *concrete*. The Appellant contends that there are two identifiable binding media: cement and mortar, both of which are present in the concrete.

100. In relation to the claim in respect of cement, for the same reasons as set out at [91] above, I consider that matters should be construed by reference to the relevant Standards. The material added does not meet the specifications of the permitted additions in BS 1260. That was Mr Barnes's conclusion from the test samples and, I understand, is not contested by the Appellant.

101. In relation to the claim in respect of mortar, I consider this fails on three grounds (independent of my conclusion on the out-of-time point at [87] above).

(1) First, I conclude that there is not a mortar that is a binding medium within the concrete. Again, for the same reasons as set out at [91] above, I consider that the meaning of "mortar" should be construed by reference to the relevant Standards and BS 13139 refers to "different types of mortars (masonry, floorings, internal and external cladding, repair mortars, etc)." I consider the Standard envisages a mortar that is as defined by the OED: "A pastelike material … which is applied to form the joints between stones or bricks and which, when set, bonds them together". There is no such material here; rather, there is concrete which has a combination of ingredients in it.

(2) Secondly, even if there was such a mortar, the material added does not meet the specifications of the permitted additions in BS 13139. That was Mr Barnes's conclusion from the test samples and, I understand, is not contested by the Appellant.

(3) Thirdly, even if there was such a mortar, the material added to it is fine aggregate and is not a "filler". As Mr Barnes put it: the aggregate is a fundamental constituent of the mortar, not a filler.

102. Accordingly, the activities of the Appellant do not constitute an industrial process within Code 018.

Conclusions

103. As stated above:

(1) The claim in relation to the material >125μ but <4mm is out-of-time for any period of claim prior to 10 March 2011.

(2) The activities of the Appellant do not constitute an exempt process within s 18(2)(c).

(3) The activities of the Appellant do not constitute an industrial process within Code 018.

Decision

104. Although the parties requested a decision in principle, my above determination of the issues in dispute means that the appeal fails on all grounds and thus I should dispose of the proceedings by dismissing the appeal.

105. The appeal is DISMISSED.

106. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 12 MAY 2017