[2015] UKUT 0416 (TCC)
TCC JR/08/14

Application for judicial review – self-assessment in annual return – claim to relief under Chapter 6 of Part 4 of Income Tax Act 2007 (dealing with share loss relief) – whether such a claim governed by section 42(11A) of, and Schedule 1B, to Taxes Management Act 1970 – whether any enquiry into claim should be under section 9A or under Schedule 1A of Taxes Management Act 2007- whether claim given effect within paragraph 4 of Schedule 1A to Taxes Management Act 1970 – whether judicial review appropriate procedure

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Between :

THE QUEEN (ON THE APPLICATION OF JAMES IRONMONGER DERRY)
Claimant

- AND -

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Defendants**

TRIBUNAL: MR JUSTICE MORGAN

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 30 and 31 March and 1 April 2015

Ms Hui Ling McCarthy (instructed by **UHY Hacker Young LLP,** accountants) for the **Claimant**
Mr Scott Redpath (instructed by **General Counsel and Solicitor for HM Revenue and Customs**) for the **Defendants**

DECISION

RELEASE DATE: 28 July 2015

Tribunal Judge: Mr Justice Morgan:

Introduction

1. This is a claim by a taxpayer, Mr Derry, for judicial review of a demand for tax made on him by Her Majesty's Revenue and Customs ("HMRC"). The claim was issued in the Administrative Court of the Queen's Bench Division where Mr Derry was given permission to seek judicial review and the claim was then transferred to the Upper Tribunal (Tax and Chancery Chamber).

2. Ms McCarthy appeared on behalf of Mr Derry and Mr Redpath appeared on behalf of HMRC.

The facts in outline

3. In the tax year 2009-2010, Mr Derry had an income of £519,625 or thereabouts, which was liable to tax.

4. Mr Derry says that on 22 March 2010, he purchased 500,000 shares at a cost of £500,000 in a company called Media Pro Four Limited, which he says was a qualifying company for the purposes of section 131 of the Income Tax Act 2007 ("ITA"). Mr Derry says that on 4 November 2010, he sold those shares for £85,500 resulting in a capital loss to him of £414,500. That loss was in the tax year 2010-2011.

5. Mr Derry says that he is entitled to claim relief for his capital loss and, in particular, he is entitled to claim such relief against his taxable income in the tax year 2009-2010. He says that he is entitled so to claim pursuant to Chapter 6 of Part 4 of ITA. If he is able so to claim, the relief would result in his income tax for 2009-2010 being reduced by 40% of £414,500, i.e. by £165,800.

6. On 24 January 2011, Mr Derry's accountants submitted his 2009-2010 tax return on line. HMRC says that Mr Derry made a self-assessment of total tax of £95,546.36. Mr Derry says that he made a self-assessment which showed a tax refund due to him of £70,253.64. I will describe the contents of this tax return in more detail when I discuss the issue which arises from it.

7. HMRC wished to investigate the facts as to the alleged capital loss with a view to contending that Mr Derry is not able to establish the claimed capital loss on the ground that the main purpose, or one of the main purposes, of the relevant arrangements was to secure a tax advantage: see section 16A of the Taxation of Chargeable Gains Act 1992. In addition, HMRC contend that, even if Mr Derry had an allowable capital loss in the tax year 2010-2011, he cannot claim relief for that loss against his income in the tax year 2009-2010 so as to reduce

the tax payable for that tax year. HMRC rely on section 42 of, and Schedule 1B to, the Taxes Management Act 1970, as amended, ("TMA").

8. On 18 October 2011, HMRC made a payment to Mr Derry of £70,497.90.

9. On 4 January 2012, HMRC opened (or purported to open) an enquiry into a claim in Mr Derry's tax return for 2009-2010 pursuant to Schedule 1A to TMA. Mr Derry says that this enquiry was of no effect; he says that the only enquiry which could have been opened into the 2009-2010 return was an enquiry under section 9A of TMA but no enquiry under that section was ever opened and it is now too late for HMRC to do so.

10. On 21 February 2014, HMRC made a demand on Mr Derry for tax allegedly due in the sum of £166,044.26 together with a further sum for interest.

11. On 6 June 2014, HMRC made a further demand on Mr Derry replacing the earlier demand of 21 February 2014. The further demand was for tax allegedly due of £95,546.36 together with a further sum for interest.

The issues

12. The following points have been argued in this case:

    (1) does Schedule 1B apply to Mr Derry's claim to relief under Chapter 6 of Part 4 of ITA?

    (2) what was the effect of Mr Derry's tax return for 2009-2010?

    (3) have HMRC validly opened an enquiry into that tax return pursuant to Schedule 1A to TMA?

    (4) disregarding the payment to Mr Derry of £70,497.70, what sum was HMRC entitled to demand in respect of tax?

    (5) what are the consequences of the payment to Mr Derry of £70,497.70?

    (6) what should the Upper Tribunal do?

The relevant provisions of ITA

13. Section 4 of ITA provides that income tax is charged for a year only if an Act so provides, a year for which income tax is charged is called a "tax year" and every assessment to income tax must be made for a tax year.

14. Sections 23, 24, and 25 of ITA are in Chapter 3 of Part 2 of ITA. Chapter 3 is headed "Calculation of Income Tax Liability". At the relevant time, Section 23 provided:

> "**23 The calculation of income tax liability**
>
> To find the liability of a person ("the taxpayer") to income tax for a tax year, take the following steps.

Step 1

Identify the amounts of income on which the taxpayer is charged to income tax for the tax year.

The sum of those amounts is "total income".

Each of those amounts is a "component" of total income.

Step 2

Deduct from the components the amount of any relief under a provision listed in relation to the taxpayer in section 24 to which the taxpayer is entitled for the tax year.

See section 25 for further provision about the deduction of those reliefs.

The sum of the amounts of the components left after this step is "net income".

Step 3

Deduct from the amounts of the components left after Step 2 any allowances to which the taxpayer is entitled for the tax year under Chapter 2 of Part 3 of this Act or section 257 or 265 of ICTA (individuals: personal allowance and blind person's allowance).

See section 25 for further provision about the deduction of those allowances.

Step 4

Calculate tax at each applicable rate on the amounts of the components left after Step 3.

See Chapter 2 of this Part for the rates at which income tax is charged and the income charged at particular rates.

If the taxpayer is a trustee, see also Chapters 3 to 6 and 10 of Part 9 (special rules about settlements and trustees) for further provision about the income charged at particular rates.

Step 5

Add together the amounts of tax calculated at Step 4.

Step 6

> Deduct from the amount of tax calculated at Step 5 any tax reductions to which the taxpayer is entitled for the tax year under a provision listed in relation to the taxpayer in section 26.
>
> See sections 27 to 29 for further provision about the deduction of those tax reductions.
>
> *Step 7*
>
> Add to the amount of tax left after Step 6 any amounts of tax for which the taxpayer is liable for the tax year under any provision listed in relation to the taxpayer in section 30.
>
> The result is the taxpayer's liability to income tax for the tax year."

15. Section 24(1)(a) of ITA, which only applied if the taxpayer was an individual, provided that the provisions referred to at Step 1 of section 23 included Chapter 6 of Part 4 of ITA (share loss relief). Section 24(1)(a) also included section 72 (dealing with trade loss relief in Chapter 2 of Part 4). Section 24(1)(b), which applied to all taxpayers, included other provisions in Part 4 of ITA, in particular, sections 64, 83 and 89 (dealing with trade loss relief in Chapter 2 of Part 4), sections 118, 120 and 125 (dealing with property loss relief in Chapter 4 of Part 4), section 128 (dealing with employment loss relief in Chapter 5 of Part 4) and section 152 (dealing with loss relief against miscellaneous income in Chapter 7 of Part 4).

16. Section 25 of ITA contained supplementary provisions in relation to Steps 2 and 3 in section 23. Section 25(2) provided that at Steps 2 and 3, reliefs and allowances were to be deducted in the way which would result in the greatest reduction in the taxpayer's liability to income tax. By section 25(3), section 25(2) was subject to any other provision of the Income Tax Acts under which reliefs or allowances deductible at Step 2 of 3 were not permitted to be deducted from particular components of income or were required to be deducted from particular components of income or in a different order. Although the "Income Tax Acts" would include TMA (see Schedule 1 to the Interpretation Act 1978), HMRC did not argue that section 25(3) had any significance in the present case.

17. Part 4 of ITA is headed "Loss Relief". Part 4 contains 7 Chapters. Section 59 of ITA provides in relation to Part 4:

> "**59 Overview of Part**
>
> (1) This Part provides for income tax relief for—
>
> (a) losses in a trade, profession or vocation (and certain post-cessation payments and events) (see Chapters 2 and 3),

(b) losses in a UK property business or overseas property business (and, in the case of a UK property business, certain post-cessation payments and events) (see Chapter 4),

(c) losses in an employment or office (see Chapter 5),

(d) losses on a disposal of certain shares (see Chapter 6), and

(e) losses in certain miscellaneous transactions (see Chapter 7).

(2) This Part needs to be read with Chapter 3 of Part 2 (calculation of income tax liability).

(3) … ”

18. The Chapter relied on by Mr Derry is Chapter 6 of Part 4, which includes sections 131 – 133, which provide:

“**131 Share loss relief**

(1) An individual is eligible for relief under this Chapter (“share loss relief”) if—

(a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year (“the year of the loss”), and

(b) the shares are qualifying shares.

This is subject to subsections (3) and (4) and section 136(2).

(2) – (4).

132 Entitlement to claim

(1) An individual who is eligible for share loss relief may make a claim for the loss to be deducted in calculating the individual's net income—

(a) for the year of the loss,

(b) for the previous tax year, or

(c) for both tax years.

(See Step 2 of the calculation in section 23.)

(2) If the claim is made in relation to both tax years, the claim must specify the year for which a deduction is to be made first.

(3) Otherwise the claim must specify either the year of the loss or the previous tax year.

(4) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the year of the loss.

133 How relief works

(1) This subsection explains how the deductions are to be made.

The amount of the loss to be deducted at any step is limited in accordance with section 25(4) and (5).

Step 1

Deduct the loss in calculating the individual's net income for the specified tax year.

Step 2

This step applies only if the claim is made in relation to both tax years.

Deduct the part of the loss not deducted at Step 1 in calculating the individual's net income for the other tax year.

(2) Subsection (1) is subject to sections 136(5) and 147 (which set limits on the amounts of share loss relief that may be obtained in particular cases).

(3) If an individual—

(a) makes a claim for share loss relief against income ("the first claim") in relation to the year of the loss, and

(b) makes a separate claim for share loss relief against income in respect of a loss made in the following tax year in relation to the same tax year as the first claim,

priority is to be given to making deductions under the first claim.

(4) Any share loss relief claimed in respect of any income has priority over any relief claimed in respect of that income under section 64 (deduction of losses from general income) or 72 (early trade losses relief).

(5) A claim for share loss relief does not affect any claim for a deduction under TCGA 1992 for so much of the allowable loss as is not deducted under subsection (1)."

19. Mr Derry points out that there is no express provision in Chapter 6 of Part 4 of ITA which refers to Schedule 1B of TMA. By way of contrast he refers to

section 60(2) (in Chapter 2 of Part 4) and section 128(7) (in Chapter 5 of Part 4) which are in the same terms, as follows:

> "This Chapter is subject to paragraph 2 of Schedule 1B to TMA 1970 (claims for loss relief involving two or more years)."

20. In order to put section 60(2) and section 128(7) in context, it is necessary to comment on the various Chapters in Part 4 of ITA. Chapter 2 of Part 4 deals with a number of different claims, which operate in different ways, as to relief for trade losses. Sections 64 and 65 contain provisions which are similar to those in sections 132 and 133. Chapter 3 of Part 4 provides for certain restrictions on trade loss relief. Chapter 4 of Part 4 provides for a number of different claims in relation to losses from property businesses; these provisions are not in terms which are similar to sections 132 and 133. Chapter 5 of Part 4 provides for relief to be claimed for losses in an employment or office. Sections 128 and 129 contain provisions which are similar to sections 132 and 133. Chapter 7 of Part 4 provides for claims for loss relief against miscellaneous income but it does not contain provisions which are similar to sections 132 and 133.

21. Finally, in relation to ITA, section 1020(2) provides:

> "For further information about claims and elections, see TMA 1970 (in particular, section 42(2), (10) and (11) and Schedule 1A)."

The relevant provisions of TMA

22. Section 8 of TMA provides for a taxpayer to serve a personal return. Section 9 of TMA provides (subject to certain exceptions) that a personal return is to include a self-assessment. Section 9A provides for an officer of HMRC to enquire into a return. Section 28A provides for the service of a closure notice to complete an enquiry under section 9A. Section 31 provides for a right of appeal against any conclusion stated or amendment made by a closure notice under section 28A.

23. Section 42 of TMA provided at the relevant time, so far as relevant:

> "**42 Procedure for making claims**
>
> (1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.
>
> (1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.
>
> (2) Subject to subsections (3) and (3A) below, where notice has been given under section 8, 8A or 12AA of this Act, a claim

shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.

…

(5) The references in this section to a claim being included in a return include references to a claim being so included by virtue of an amendment of the return … .

…

(11) Schedule 1A to this Act shall apply as respects any claim or election which-

(a) is made otherwise than by being included in a return under section 8, 8A or 12AA of this Act, …

(11A) Schedule 1B to this Act shall have effect as respects certain claims for relief involving two or more years of assessment.

… ."

24. Schedule 1A to TMA contains detailed provisions as to claims which are not included in a return. By paragraph 2(3) of Schedule 1A, such a claim must be made in such form as HMRC determine. Paragraph 4 of Schedule 1A refers to HMRC giving effect to a claim by discharge or repayment of tax. By paragraph 5 of Schedule 1A, an officer of HMRC may enquire into such a claim. Paragraph 7 of Schedule 1A provides for the service of a closure notice to complete an enquiry under paragraph 5. Paragraph 9 of Schedule 1A provides a right of appeal against any conclusion stated or amendment made by a closure notice under paragraph 7.

25. Schedule 1B to TMA provided at the relevant time, so far as material:

"1(1) In this Schedule—

(a) any reference to a claim includes a reference to an election or notice; and

(b) any reference to the amount in which a person is chargeable to tax is a reference to the amount in which he is so chargeable after taking into account any relief or allowance for which a claim is made.

…

2(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of assessment ("the later year") to be given in an earlier year of assessment ("the earlier year").

(2) Section 42(2) of this Act shall not apply in relation to the claim.

(3) The claim shall relate to the later year.

(4) Subject to sub-paragraph (5) below, the claim shall be for an amount equal to the difference between—

(a) the amount in which the person is chargeable to tax for the earlier year ("amount A"); and

(b) the amount in which he would be so chargeable on the assumption that effect could be, and were, given to the claim in relation to that year ("amount B").

(5) Where effect has been given to one or more associated claims, amounts A and B above shall each be determined on the assumption that effect could have been, and had been, given to the associated claim or claims in relation to the earlier year.

(6) Effect shall be given to the claim in relation to the later year, whether by repayment or set-off, or by an increase in the aggregate amount given by section 59B(1)(b) of this Act, or otherwise.

(7) For the purposes of this paragraph, any deduction made under section 62(2) of the 1992 Act (death: general provisions) in respect of an allowable loss shall be deemed to be made in pursuance of a claim requiring relief of be given in respect of that loss."

26. Paragraph 3 of Schedule 1B provides for relief for fluctuating profits of farming etc within Chapter 16 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). Paragraph 4 of Schedule 1B provides for relief claimed by virtue of section 224(4) of ITTOIA. Paragraph 5 of Schedule 1B provides for the carry-back of post-cessation receipts and refers to section 257 of ITTOIA. Paragraph 6 of Schedule 1B provided for the backward spreading of certain payments but is no longer in force.

27. In a later section of this decision, I will deal with provisions of TMA, and other provisions, dealing with the collection and recovery of tax which is due.

Certain provisions of ITTOIA

28. Mr Derry also referred to certain provisions in ITTOIA which referred to Schedule 1B of TMA. Section 223(2) and 224(2) stated that the relevant provisions were subject to paragraph 3 of Schedule 1B to TMA and section 257 stated that the relevant provisions were subject to paragraph 5 of Schedule 1B to TMA.

Collection and recovery of tax

29. Part VI of TMA provides for the collection and recovery of tax. Section 60 of TMA provides for a demand by HMRC for tax which is due and payable from the person charged to tax. Until 6 April 2014, section 61 permitted HMRC to distrain upon the goods and chattels of the person charged to tax; the right to distrain required a prior demand by HMRC: see section 61(1). Since 6 April 2014, section 61 of TMA does not apply in England and Wales.

30. Since 6 April 2014, HMRC has a right "to take control of goods" in a case where a taxpayer does not pay a sum which is due under an enactment. Section 127 of Finance Act 2008 provides that HMRC can, in such a case, use the procedure in Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 ("TCEA") to recover the sum due by way of tax. Under Schedule 12 of TCEA, only an enforcement officer authorised by section 63(2) of TCEA may take control of goods. There is a relevant exemption in relation to an officer of HMRC: see sections 62(2) and 63(3)(b) of TCEA. Paragraph 7 of Schedule 12 provides that an enforcement officer may not take control of goods unless the debtor has been given notice and the same paragraph provides for Regulations to be made as to the period and form of such notice. Paragraph 66 of Schedule 12 to TCEA identifies the remedies available to a debtor where an enforcement agent breaches a provision of Schedule 12 or acts under an enforcement power which is defective. Paragraph 66 permits the debtor to bring proceedings under that paragraph and confers certain powers on the court but the list of powers is without prejudice to any other powers of the court. The Taking Control of Goods Regulations 2013 have been made pursuant to the powers contained in TCEA. Part 2 of the Regulations specifies the procedure to be used for taking control of goods. Paragraphs 6, 7 and 8 deal with the minimum period of notice, the form and contents of such notice and the method of giving such notice.

31. Sections 65, 66 and 68 of TMA provide for court proceedings for the purpose of recovering tax which is due and payable. Section 65 deals with such proceedings in the magistrates courts, and sections 66 and 68 provide that tax due and payable may be sued for and recovered as a debt due to the Crown by proceedings in the county courts or the High Court.

Does Schedule 1B apply to Mr Derry's claim to relief under Chapter 6 of Part 4 of ITA?

32. For the purposes of this discussion, I will assume that Mr Derry is eligible under Chapter 6 of Part 4 of ITA to claim relief against his income by reason of a capital loss on the sale of shares. The question then arises as to how the various statutory provisions operate to give effect to that eligibility.

33. Section 132(1) of ITA provides that Mr Derry "may make a claim" for the loss to be deducted in calculating his net income both for the year of the loss, for the previous tax year or for both tax years. In this case, the year of the loss was 2010-2011 and the previous tax year was 2009-2010. Subsections (2) and (3) of 132 allow Mr Derry, when making a claim, to specify the year for which the deduction is to be made first, so that it was open to Mr Derry to specify the tax year 2009-2010 as the relevant year. Section 133 provides that the loss is to be deducted in calculating Mr Derry's net income for the specified tax year.

34. Step 2 in Section 23 of ITA allows Mr Derry to deduct the amount of a relief under Chapter 6 of Part 4 from his income to produce his "net income" which is chargeable to tax. Step 2 refers to the relief to which the taxpayer is entitled "for the tax year".

35. The relevant sections of ITA refer to Mr Derry making a claim. However, ITA does not spell out how a claim is to be made. The procedure for making a claim is dealt with in TMA, in particular in section 42 of TMA. Section 42(1) provides that where any provision of the Taxes Acts provides for relief to be given on the making of a claim, section 42 has effect in relation to the claim "unless otherwise provided". By virtue of section 118 of TMA taken together with the schedule to the Interpretation Act 1978, "the Taxes Act" includes "the Tax Acts" which includes "the Income Tax Acts" which means all enactments relating to income tax, which includes ITA. Therefore, section 42 applies in relation to the claim which Mr Derry is permitted to make under section 132 of ITA "unless otherwise provided". I do not consider that there is any provision which does otherwise provide. Chapter 6 of Part 4 does not otherwise provide; nor does section 23 of ITA. Those provisions leave open how a relevant claim is to be made and so they do not "otherwise provide".

36. I note that section 1020 of ITA refers to TMA "for further information" about claims and then refers "in particular" to subsections (2), (10) and (11) of section 42 and Schedule 1A. As these cross-references are for information purposes, I do not consider that they "otherwise provide" for the purposes of section 42(1) of TMA that the other provisions of section 42 do not apply to claims to relief under ITA. Further, the subsections of section 42 referred to in section 1020 of ITA are "in particular" which does not suggest that the other subsections of section 42 are not to apply to claims to relief under ITA.

37. Mr Derry stresses that Chapter 6 of Part 4 of ITA does not contain a provision such as section 60(2) in Chapter 2 of Part 4 nor section 128(7) in Chapter 5 of Part 4. Neither side put forward any persuasive policy reason for a difference in the treatment of claims under Chapters 2, 5 and 6 in this respect. The difference in treatment certainly suggests the possibility that whereas paragraph 2 of Schedule 1B was to apply to Chapters 2 and 5, it was not to apply to Chapter 6. However, I consider that the difference in the statutory provisions is not clear enough to it being "otherwise provided" for the purposes of section 42(1). I consider that the provisions of section 60(2) and 128(7) are in the nature of signposts to paragraph 2 of Schedule 1B. The fact that there is no similar signpost in Chapter 6 gives one reason to reflect on the possible reasons for that but in the end I do not regard this matter as clear enough to amount to it being otherwise provided for the purposes of section 42(1).

38. I have also considered whether the detailed provisions of sections 132 and 133 of ITA, taken together with section 23 of ITA, are inconsistent with the operation of paragraph 2 of Schedule 1B or whether they amount to specific provisions which should be regarded as overriding what might be regarded as the general provisions of paragraph 2 of Schedule 1B. In relation to these points, I have the following comments. Sections 64 and 65 of Chapter 2 of Part 4 of ITA and sections 128 and 129 of Chapter 5 of Part 4 of ITA are

expressed in similar terms to sections 132 and 133. It is clear that sections 64 and 65 and 128 and 129 are meant to operate in accordance with paragraph 2 of Schedule 1B of TMA. It is therefore difficult to argue that there is something in sections 132 and 133 which is inconsistent with paragraph 2 of Schedule 1B so that one or other sets of provisions must yield to the other to make them workable. The two sets of provisions therefore can operate in conjunction. For example, the way in which section 64(2)(b) (referring to deducting a loss when calculating the income for the previous tax year) works is in accordance with sub-paragraphs (1), (3), (4) and (6) of paragraph 2 of Schedule 1B of TMA. Section 132(1)(b) can operate in the same way when it refers to the taxpayer being entitled to deduct the loss when calculating the net income for the previous tax year. Of course, it is necessary to read sections 64 and 65 and also 128 and 129 compatibly with paragraph 2 of Schedule 1B because sections 60(2) and 128(7) expressly so provide. Nonetheless, I conclude that sections 132 and 133 are compatible with paragraph 2 of Schedule 1B so that one is not driven to choosing between the two sets of provisions but can operate them in conjunction with each other.

39. As to the argument that one set of provisions is general and the other is specific, so that the specific prevails over the general, I consider that both sets of provisions are specific in character. Sections 132 and 133 of ITA are specific as to the entitlement to make a claim to deduct capital losses from income; section 42 and Schedule 1B of TMA are specific as to the procedure for making claims and as to the effect of claims.

40. There was some discussion as to the meaning of the words "certain claims for relief including two or more years of assessment" in section 42(11A) of TMA. I consider that those words are used because Schedule 1B identifies "the certain claims" to which it applies. I do not read the words of section 42(11A) as if they provided that Schedule 1B only applies to claims which are identified in some other statute as claims to which Schedule 1B is to apply.

41. The operation of Schedule 1B to TMA was considered by the Supreme Court in Revenue & Customs Commissioners v Cotter [2013] 1 WLR 3514. This case concerned a claim under Chapter 5 of Part 4 of ITA. It was accepted that paragraph 2 of Schedule 1B of TMA applied. At [14], Lord Hodge JSC (with whom the other members of the Supreme Court agreed) referred to this being the effect of section 128(7) of ITA which expressly provided that Chapter 5 was subject to paragraph 2 of Schedule 1B to TMA. He then referred to section 42(11A) of TMA and stated that section 42(11A) provided for the same result. Accordingly, he regarded section 128(7) as duplicating the effect of section 42(11A). This comment strongly supports the reasoning which I have set out above. However, there was no issue in Cotter as to whether paragraph 2 of Schedule 1B applied and, in any case, the interpretation of section 42(11A) might conceivably be different when there is no express provision equivalent to section 128(7) of ITA. Accordingly, I do not hold that the decision in Cotter binds me to construe section 42(11A) the same way in relation to Chapter 5 of Part 4 but, nonetheless, Lord Hodge's comment is helpful in resolving the issue in this case.

42. In any case, the decision in Cotter is helpful in that it contains, in particular at [16] and [17], a detailed explanation of how paragraph 2 of Schedule 1B of TMA works even when it is read in conjunction with sections 128 and 129 of ITA, which refer to making a deduction from income in a previous tax year; as I have stated more than once, sections 128 and 129 are similar to sections 132 and 133.

43. I was also referred to the two decisions of the Upper Tribunal (Tax and Chancery Chamber) in R (Rouse) v Revenue and Customs Commissioners [2013] STC 2452 and [2014] STC 230. The first decision was reached following the decision of the Court of Appeal in Cotter and the second decision involved a review of the earlier decision following the decision of the Supreme Court in Cotter. The Upper Tribunal considered in detail whether it was appropriate for HMRC to open its enquiry under section 9A of TMA or under Schedule 1A of TMA. What is said to be relevant about the decisions is that the taxpayer claimed relief under both Chapter 2 and Chapter 6 of Part 4 and the argument and the decisions proceeded on the basis that section 42(11A) and paragraph 2 of Schedule 1B to TMA applied to a claim to relief under Chapter 6 of Part 4 of ITA. However, because there was no argument on that point, the decisions do not constitute an authority on that point.

44. At my request, counsel made detailed submissions on the legislative history of section 42 of, and Schedule 1B to, TMA and similarly made submissions as to the legislative history of Part 4 of ITA. I am most grateful to them for their diligence. I have carefully considered whether the legislative history helps to determine the correct interpretation of the relevant provisions. In the end, I conclude that there is nothing sufficiently clear cut in the legislative history to assist me in that way.

45. My conclusion on the first issue is that Mr Derry's claim to relief under Chapter 6 of Part 4 of ITA is subject to the provisions of section 42 dealing with claims and in particular is subject to paragraph 2 of Schedule 1B to TMA.

The effect of Mr Derry's tax return for 2009-2010

46. Mr Derry has provided a witness statement which exhibits a document which he says represented his tax return for 2009-2010. I have also been provided with a very detailed witness statement of Mr Dean of HMRC in which he describes the way in which a tax return is made online and what was done in this case. In the end, the only real difference between the parties as to the form and content of this tax return is that Mr Derry says that he also submitted an additional sheet with his return, which sheet was said to contain his personal tax computation. Mr Derry has provided me with this sheet which shows tax payable of £95,546.36 but the sheet continues by identifying a claim for relief in the sum of £165,800 resulting in a claimed tax refund of £70,253.64.

47. Mr Derry instructed his accountants to complete his tax return online. He did not complete it personally. The sheet in question appears to have been prepared by his accountants as it refers to "CLIENT: Mr J I Derry". Mr Dean's witness statement gives a very detailed account of what happened in

this case and he says in terms that Mr Derry's accountants did not provide to HMRC the sheet on which Mr Derry now relies. Neither Mr Derry nor his accountant have served a witness statement in response to Mr Dean. I find that Mr Dean's account is inherently probable and has not been rebutted. I therefore find that neither Mr Derry nor his accountants provided the sheet to HMRC as part of the 2009-2010 tax return.

48. In his 2009-2010 tax return, Mr Derry identified various heads of income, about which there is no dispute in these proceedings. On page TR6 of the return, it is stated:

> "The reduction in tax payable in box 15 of page TC2 relates to the loss carry back claim arising from the carry back of losses of GBP 414,500 as set out on page Ai3. The corresponding reduction in tax payable in the year ended 5 April 2010 following this loss carry back claim is GBP 165,800 being GBP 414,500 at 40 per cent."

49. The relevant box on page Ai3 referred to trading losses of £414,500 and claimed relief in respect of those losses for the tax year 2009-2010.

50. Box 18 on Ai4 stated:

> "Box 3 of page Ai3 shows capital losses realised on disposal of subscriber shares in an unlisted trading company in year ended 5 April 2011. These losses have been carried back to year ended 5 April 2010 and relief claimed under s131, s132 ITA 2007."

51. The tax return contained a two page tax calculation summary, pages TC1 and TC2. Box 1 on page TC1 is under the heading "Self assessment" and provided "Total tax Student Loan repayment and Class 4 NICs due before any payments on account" and stated the figure of £95546.36. On page TC2, box 15 was under the heading "Adjustments to tax due" and box 15 stated "Any 2010-2011 repayment you are claiming now" and stated the figure of £165800.00. Box 16 on page TC2 under "Any other information" stated:

> "The reduction in tax payable in box 15 of page TC2 relates to the loss carry back claim arising from the carry back of losses of GBP 414,500 as set out on page Ai3. The corresponding reduction in tax payable in the year ended 5 April 2010 following this loss carry back claim is GBP 165,800 being GBP 414,500 at 40 percent."

52. I consider that it is clear that Mr Derry's tax return for 2009-2010 assessed his liability to tax in the sum of £95,546.36. That is the figure stated in the appropriate place in the return for the amount of tax payable. It is also clear that Mr Derry wished to claim relief for what he said were his capital losses. I consider that the tax return should be construed against the background of the relevant legal provisions. Under Chapter 6 of Part 4 of ITA, Mr Derry is able to make a claim in relation to such capital losses against the income in the year

2010-2011 and also the year 2009-2010 but such a claim relates to the year 2010-2011 and does not reduce the tax payable for the year 2009-2010. Against that background, I consider that the presence of the claim for capital losses does not displace the clear assessment to tax in the sum of £95,546.36. It is not necessary to consider what would be the right construction of the tax return if the relevant legal provisions had provided that Mr Derry's claim could operate to reduce the tax payable for the year 2009-2010. I can see that that question would be open to argument but it does not arise in this case.

Have HMRC validly opened an enquiry into the 2009-2010 tax return pursuant to Schedule 1A to TMA?

53. Assuming that Mr Derry had made capital losses in the year 2010-2011, in relation to which he could claim relief under Chapter 6 of Part 4 of ITA, then it is agreed that it was open to him to make such a claim in his tax return for the year 2009-2010, rather than in some other document.

54. Section 9A of TMA permits HMRC to open an enquiry into a return. Section 42(11) of TMA gives effect to Schedule 1A in relation to claims made otherwise than by being included in a return. Paragraph 5 of Schedule 1A of TMA allows HMRC to open an enquiry into such a claim.

55. The question then arises whether an enquiry into Mr Derry's claim is to be dealt with in accordance with section 9A or in accordance with 42(11) of, and Schedule 1A to, TMA. I consider that the answer to that question is provided by the decision of the Supreme Court in Cotter. The facts of that case (as described at [23] are more complicated than the straightforward facts of the present case. The ratio of the decision is at [25] where it is stated:

> "The word "return" may have a wider meaning in other contexts within the 1970 Act. But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the 1970 Act, a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year": section 8(1) the 1970 Act, as substituted firstly by section 178(1) of the Finance Act 1994 and then further amended by section 121(1) of the Finance Act 1996 and by section 114 of and Schedule 27 to the Finance Act 2007."

56. Applying that ratio to the facts of this case, it is clear that Mr Derry's claim to relief under Chapter 6 of Part 4 of ITA was a claim within section 42(11) of and Schedule 1A to TMA. Accordingly, HMRC were entitled to open an enquiry under Schedule 1A to TMA on 4 January 2012. That enquiry has not since been completed.

57. Reference was made to paragraph [27] of Lord Hodge's judgment in Cotter where he referred to a different result which would be appropriate in a case where the taxpayer had erroneously used a claim arising in a subsequent year

to reduce the amount calculated as payable in the tax year the subject of the return. However, that is not what has happened here on the basis of my earlier finding as to the effect of the return for the year 2009-2010. I add that my conclusions are in accordance with the second decision of the Upper Tribunal in Rouse [2014] STC 230.

Disregarding the payment to Mr Derry of £70,497.90, what sum was HMRC entitled to demand in respect of tax?

58. Based on the above reasoning, Mr Derry was liable to pay £95,546.36 on 31 January 2011 and in the absence of any complication caused by the fact of HMRC's payment of £70,497.90 to Mr Derry, HMRC would have been entitled to make a demand on Mr Derry in accordance with his liability.

The consequences of the payment to Mr Derry of £70,497.90

59. I referred earlier to the fact that HMRC paid the sum of £70,497.90 to Mr Derry on 18 October 2011. Mr Derry contends that this payment amounted to HMRC "giving effect" (for the purposes of paragraph 4 of Schedule 1A to TMA) to Mr Derry's claim to relief under Chapter 6 of Part 4 of ITA which was a claim to relief in the sum of £165,800. Mr Derry then contends that it is to be inferred from the amount of the payment that HMRC gave effect to the claim by first discharging Mr Derry's liability to pay £95,546.36 and then paying the balance of the claim of £165,800 to Mr Derry. I note however that the balance of £165,800 would be £70,253.64 whereas the payment made to Mr Derry was £70,497.90.

60. Mr Dean's witness statement gives a detailed explanation as to the circumstances in which the payment was made to Mr Derry. That explanation describes the detailed internal workings and thoughts of HMRC. Mr Dean says that the payment to Mr Derry involved a mistake on the part of HMRC. However, I consider that the legal consequences of the payment must be judged by reference to objective matters, in particular any communications passing between HMRC and Mr Derry. As it happens, neither side has gone into any detail in relation to these objective matters.

61. I will attempt to extract from such evidence as there is what objectively happened in relation to the relevant payment. Mr Dean describes the internal procedures of HMRC leading to them entering a provisional free standing credit (an "FSC") on their system. It seems that initially HMRC entered an FSC of £165,800, at a time when the system showed tax due of £95,546.36. Then HMRC removed or changed the earlier FSC so that it became an FSC of £70,253.64 but the tax due remained at £95,546.36. I refer to these internal matters only because Mr Dean stated that Mr Derry's accountants contacted HMRC "pressing for reinstatement of the FSC". That would suggest that the accountant had access to some figures used internally by HMRC. I was told at the hearing that it is possible for taxpayers and their advisers to have access to some internal figures used by HMRC. Mr Dean's statement suggests the possibility the accountant might have known of the reduced amount of the FSC. Mr Dean then explained that on 18 October 2011, the sum of £70,497.90 was paid to Mr Derry. I was not told how the payment was made and, more

importantly, I was not told whether Mr Derry was given any explanation for this payment at that time. However, Mr Dean does state that Mr Derry was sent a statement of account on 5 December 2011 and he exhibits what might be a later version of that statement (the position is not clear in that the exhibited statement refers to a credit being introduced on 31 January 2012). In that statement, there are two credits totalling £95,546.36 and there is a reference to a repayment of £70,497.90. There is no reference to the sum of £165,800.

62. Mr Derry did not give any detailed evidence as to the payment of £70,497.90 although he did say in his witness statement that HMRC refunded £70,253.64.

63. Mr Derry accepted at the hearing that the payment of £70,497.90 does not prevent HMRC enquiring into the claim to relief (given that I have now held that HMRC were otherwise entitled to enquire into the claim under Schedule 1A to TMA). He also accepted that when the enquiry and any possible appeals are resolved then the state of the account would be established and all appropriate payments or repayments would be made. Further, Mr Derry did not contend that the payment has given rise to any private law estoppel against a claim in debt brought by HMRC. The Statement of Grounds in support of the application for judicial review did refer to Mr Derry having a legitimate expectation that HMRC "would not seek to resile from that position", but the evidence served on behalf of Mr Derry goes nowhere to establish any substantive or procedural legitimate expectation. On the other hand, HMRC accepted when they withdrew their demand of 21 February 2014 and replaced it with their demand of 6 June 2014 that they would not at the present time proceed to demand the return of £70,497.90 but did wish to demand the tax due as shown in the return for 2009-2010.

64. I consider that the legal consequences of the payment of £70,497.90 are very far from clear. In view of Mr Derry accepting that it is open to HMRC (given my other findings) to open an enquiry under Schedule 1A to TMA, it is difficult to hold that the payment amounted to HMRC giving effect to Mr Derry's claim under paragraph 4 of Schedule 1A. Further, on the detailed facts, the communications between the parties, to the extent that I have been shown them, do not amount to a clear statement that Mr Derry is entitled to a repayment of the different figure of £70,253.64 together with a discharge of the tax due of £95,546.36.

65. In these circumstances, having regard to the limited nature of the evidence about the payment and the comments I will make in the next section of this decision as to the procedures used by Mr Derry to bring this matter before the Upper Tribunal, I am not persuaded that it would be right to make a final determination against Mr Derry in relation to his contention that the payment amounted to HMRC giving effect to his claim to relief for the purpose of paragraph 4 of Schedule 1A to TMA.

What should the Upper Tribunal do?

66. I now wish to address the implications of the procedure used by Mr Derry to bring this matter before the court and, later, the Upper Tribunal.

67. These proceedings were brought in the Administrative Court as a claim for judicial review. On 9 July 2014, Ms McGowan QC (now McGowan J) granted permission to Mr Derry to seek judicial review and, in accordance with his request, she transferred the proceedings to the Upper Tribunal (Tax and Chancery Chamber).

68. The claim in these proceedings was said to be for judicial review of a decision of 21 February 2014 by which HMRC demanded £166,044.26 plus interest from Mr Derry. It was said that the demand was invalid and any action that HMRC might take in relation to it would be ultra vires and unlawful. It was said that HMRC had made an error of law in issuing the demand so that the demand should be quashed and an order made prohibiting HMRC from taking any enforcement action in reliance on the demand. In support of the application, it was said that Mr Derry had no right of appeal against the demand.

69. At the hearing, I questioned whether these proceedings had properly been brought by way of judicial review. Mr Derry then applied to amend the relief sought so that in addition to an order quashing the relevant demand and prohibiting HMRC from taking any enforcement action in reliance on it, the Upper Tribunal was asked to declare that the tax due and payable by Mr Derry for the year 2009-2010 was Nil. In the alternative, the Upper Tribunal was asked to grant such other remedy as it considered appropriate.

70. I do not think that the procedure used in this case was appropriate. The application proceeds on the basis of a misunderstanding of the function and effect of a demand by HMRC under section 60 of TMA. That section allows HMRC to serve a demand if there is tax due and payable. If there is no tax due and payable, then the demand is of no effect. The service of a demand does not create a debt or other liability if there is no pre-existing debt. If HMRC do serve a demand where there is a pre-existing debt, then they can take steps to recover or collect that debt. Accordingly, the decision by HMRC to serve a demand does not create a liability or alter a pre-existing liability. It may be that there is a public law decision involved in deciding to serve a demand but it is not a public law decision which creates or alters a liability and, where there is no pre-existing liability, the decision would not normally need to be quashed. It would be an unusual case where it would be necessary to apply to the court to quash the decision to serve a demand.

71. Mr Derry says that there is no right of appeal against a demand. Strictly, that is correct but that is because the demand does not create or alter any liability. In fact, the statement is potentially inaccurate because there are steps which can be taken to call into question the validity and effect of a demand. The normal step would be for the taxpayer to wait to be sued in the county court or the High Court and then to defend the claim made in accordance with the demand. The decision of the Supreme Court in Cotter establishes that the county court and the High Court have jurisdiction to determine the kind of dispute which arises in the present case as to whether a taxpayer owes the tax which is said by HMRC to be due and payable. Further, if a taxpayer can defend such a claim in the county court or the High Court I do not see why the taxpayer could not seek declaratory relief in advance of being sued by HMRC.

72. Mr Derry points to the fact that following the service of a demand under section 60 of TMA, HMRC might seek to take control of his goods under Schedule 12 to TCEA. Strictly speaking it is not necessary to serve a demand under section 60 of TMA before proceeding in that way; the former position under section 61 of TMA was different. Under the procedures in relation to taking control of goods, HMRC has to give notice of its intended action. If HMRC gave such a notice and the taxpayer wished to challenge that action on the ground that there was no tax due and payable, then it would be open to the taxpayer to claim an injunction to restrain the threatened action. In their submissions before me, HMRC referred to such a claim to an injunction as being available as part of a claim for judicial review. I doubt if the taxpayer would have to seek a judicial review in order to obtain such an injunction. I do not see why he could not seek an injunction on the basis that HMRC is threatening to interfere with his possession of his goods. The taxpayer could rely on his ownership and/or possession of the goods. It does not seem to me to be necessary to frame the claim in public law.

73. Turning then to the relief sought by Mr Derry in this case, he has sought a declaration that the tax due and payable for 2009-2010 was Nil. I have held that the tax due and payable for that year was £95,546.36 subject to any possible argument based on the payment made by HMRC of £70,497.90. As to that possible argument, I have held that it would not be right to shut Mr Derry out from advancing some argument of this kind based on material which he might have available but which he did not deploy in the present proceedings for judicial review.

74. Notwithstanding the inappropriate procedure used in this case, the parties have argued a number of points and I have decided them. I consider that I ought to grant declarations to give effect to what I have decided. I consider that I have jurisdiction to do so under section 15(1)(d) of TCEA, having regard to the provisions of section 15(2), (3), 18 and 19(3) of TCEA.

75. The parties should now seek to agree a draft of an order which gives effect to this judgment. If a party wishes to apply for costs, and the matter is not agreed, then that party is to apply to the Upper Tribunal in writing within 21 days of the release of this decision.

MR JUSTICE MORGAN

RELEASE DATE: 28 July 2015