Upper Tribunal
(Tax and Chancery Chamber)
ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

[2017] UKUT 0205 (TCC)
Appeal Number: UT/2016/0032

THE HONOURABLE LORD BANNATYNE

Sitting in public at George House, Edinburgh
On 14 and 15 March, 2017

Between

SPRING SALMON & SEAFOOD LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Upton, Advocate, instructed by Russell + Aitken LLP, solicitors, Edinburgh

For the Respondent: Graham Maciver, Advocate, instructed by the Office of the Advocate General for the respondents

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of the First-tier Tribunal of 30 November 2015. In terms of that decision the First-tier Tribunal dismissed the appellant's two appeals

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against each of two closure notices into two corporation tax returns of the appellant for periods ending in 2004 and 2005. The First-tier Tribunal held, reading short, that the enquiries were validly opened under the correct statutory provisions so as to effectively reduce substantially claims by the appellant for terminal loss relief.

The Issue

2. It was not a matter of contention between the parties that the enquiries by the respondents had been opened and closed in terms of Schedule 18 to the Finance Act 1998 ("Schedule 18").

3. The contention on behalf of the appellant (both before the First-tier Tribunal and this Tribunal) was that Schedule 18 applied with respect to enquiries as to what was contained in a return or required to be contained in a return. The claim to carry back terminal loss relief (which it was asserted was the claim refused in terms of the enquiries) was a stand-alone claim which could not validly be dealt with in terms of Schedule 18 and accordingly required a separate enquiry in terms of Schedule 1A of the Taxes Management Act 1970 ("Schedule 1A"). The refusal of the claims, it was thus argued, had been made following an incompetent process of enquiry. The argument then went on: the closure notices had not affected the claims at issue.

The Background

4. The general background is set out at paragraphs 4 to 28 of the First-tier Tribunal's decision. It is also conveniently summarised in the decision 1 June 2016 of Judge Reid QC of the Upper Tribunal on the application for permission to appeal this matter to the Upper Tribunal. I believe it is sufficient, for the purposes of this appeal, to set out the terms of that summary:

> "9. SSSL (the appellant) carried on business as seafood suppliers from about May 1998. It was essentially controlled and operated by or through the Thomas family and various of its manifestations. A partnership known as the S&R Partnership (the partners being Rod and Stuart Thomas) began trading as *consultants* in about September 1998. In July 2002, it sold or purported to sell its business to SSSL for £2,835,000 of which £2,800,000 was attributed to goodwill. £1.4m was paid by SSSL to each of the partners in July 2002. It is this so-called goodwill which lies behind and has spawned many fiscal claims including the terminal loss relief claim which is the subject of these proceedings.
>
> 10. Another Thomas family company, Spring Seafoods Ltd (Seafoods), apparently began trading in March 2004. It has been claimed that in September 2004, SSSL transferred its business to the partnership and that the partnership immediately transferred it to Seafoods at market value. Seafoods changed its name to Spring Capital Ltd in 2010. In a subsequent tax appeal by Spring Capital, the FTT refused to accept that these arrangements were genuine.

:

11. When SSSL finally ceased trading at or about the end of January 2005, Seafoods apparently took over SSSL's business and carried on its trade.

12. While there is inconsistency in the background facts, this does not matter for present purposes and need not be explored further.

Tax Returns

13. In its return for 2002 and 2003, submitted in September 2003 and July 2004, SSSL claimed relief for amortisation of goodwill. In its returns for 2004/05 SSSL claimed loss relief of £2,483,777. They also sought to carry it back and set it off against profits of the three preceding years. Whether it is correct to say they did so as part of the returns or as a stand-alone claim is controversial.

The Closure Notices

14. The March 2011 closure notices refused all these claims for amortisation of goodwill (otherwise referred to as intangibles relief) and terminal loss relief. The closure notices for 2004/05 returns concluded that SSSL was not entitled to relief for goodwill amortisation which was therefore disallowed in the calculation of corporation tax profits.

15. The terminal loss relief claim is the claim to carry back the asserted loss of £2,819,065, based, principally, on the asserted claim for relief for goodwill amortisation of £2,394,521 in the final 18 month accounting period, and which has been disallowed.

16. The closure notices for 2004 and 2005 do not use the phrase *terminal loss relief.* What they say is that the loss reflected in the corporation tax computations submitted by SSSL for the 18 months to 31 January 2005 was £2,819,065, of which £2,394,521 was claimed to be for relief for goodwill amortisation. The notices denied that relief for goodwill amortisation noting that the computations submitted by SSSL were on the basis of a claim to carry back any CT loss on the cessation of trade. The conclusion in the notices was that the corporation tax loss for the 18 month period was £424,544 and not the sum of £2,891,065 reflected in SSSL's tax computations. The closure notices requested confirmation of how SSSL wished to utilise the loss of £424,544."

Submissions on behalf of the Appellant

5. Mr Upton began by briefly setting out the statutory context of the appeal, which he described as, the relationship between two schedules, namely: Schedule 18 and Schedule 1A.

6. These two schedules reading short set up two parallel regimes for enquiries by the respondents each with its own defined scope.

7. It was Mr Upton's broad position that if a piece of information was put forward in a return then lawful investigation had to be undertaken by the respondent under

Schedule 18. On the other hand if a claim was not part of a tax return then it could only be lawfully enquired into in terms of Schedule 1A.

8. Parliament had seen fit to lay down two separate procedures for enquiries by the respondents, each with a different scope. It followed from the foregoing that: for an enquiry under Schedule 18, as undertaken by the respondents in the present case, to be valid the matter enquired into must fall within the scope of a Schedule 18 enquiry. Mr Upton's contention was that the matter enquired into did not fall within the scope of Schedule 18.

9. Having briefly set out the statutory context he turned to the documentation which had given rise to the enquiries by the respondents which was as follows: a letter from the appellant to the respondents dated 30 August 2006. The letter was headed "Terminal loss relief". It sought repayment of £642,835 of corporation tax. It claimed terminal loss relief of £2,483,777 which was said to have been based on "the result for the final 12 months of trading (1 February 2004 to 31 January 2005)." It sought to set off the terminal loss relief claim against the profits of the preceding 36 months. This letter was accompanied by a number of documents:

- The appellant's financial statement for the 18 months ended 31 January 2005.
- Company short tax return forms covering the following periods: 12 months ended 31 July 2004 and 6 months ended 31 January 2005 being the returns for 2004/05.
- A sheet headed "Corporation Tax Computations for the accounting period 1 August 2003 to 31 January 2005". This document is produced in appendix I to this decision.

10. Mr Upton then turned to the decision of the First-tier Tribunal and submitted that given the above background the First-tier Tribunal had erred in law in holding at paragraph 142 that the closure notices had properly disallowed the claims for terminal loss relief.

11. Mr Upton described the above finding as an untenable conclusion. It was his short point that these were enquiries which it was accepted by the respondents were opened into returns, namely, in terms of Schedule 18 and therefore could not competently disallow the claim for terminal loss relief. It was his position that the respondents in order to effectually deal with the terminal loss claims would have been bound to open a second enquiry in terms of Schedule 1A.

12. In expanding upon that submission he said this: a return enquiry (in terms of Schedule 18) addresses the content of the return and therefore what was critical to understand for the purposes of this appeal, was: what is the definition of a return? The answer to that question is to be found in the decision of the Supreme Court in HMRC v Cotter 2013 1 WLR 3514.

13. The sole Judgment in the Supreme Court is that of Lord Hodge with whom the other Justices agreed.

14. The material part of Lord Hodge's Judgment is to be found between paragraphs 24 and 26 where he says this:

> "[24] Where, as in this case, the taxpayer has included information in his tax return but has left it to the revenue to calculate the tax which he is due to pay, I think that the revenue is entitled to treat as irrelevant to that calculation information and claims, which clearly do not as a matter of law affect the tax chargeable and payable in the relevant year of assessment. It is clear from sections 8(1) and 8(1AA) of the 1970 Act (section 8(1AA) (inserted by section 121(3) of the Finance Act 1996)) that the purpose of a tax return is to establish the amounts of income tax and capital gains tax chargeable for a year of assessment and the amount of income tax payable for that year. The revenue's calculation of the tax due is made on behalf of the taxpayer and is treated as the taxpayer's self assessment: (section 9(3A) of the 1970 Act: section 9(3A) (inserted by paragraph 1(2) of Schedule 29 to the Finance Act 2001).
>
> [25] The tax return form contains other requests, such as information about student loan repayments (page TR2), the transfer of the unused part of a taxpayer's blind person's allowance (page TR3) or claims for losses in the following tax year (box 3 on page Ai3) which do not affect the income tax chargeable in the tax year) which the return form addresses. 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 of 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.
>
> [26] In this case, the figures in box 14 on page CGI and in box 3 on page Ai3 were supplemented by the explanations which Mr Cotter gave of his claim in the boxes requesting 'any other information' and 'additional information' in the tax return. Those explanations alerted the revenue to the nature of the claim for relief. It concluded, correctly, that the claim under section 128 of the 2007 Act in respect of losses incurred in 2008/09 did not alter the tax chargeable or payable in relation to 2007/2008. The revenue was accordingly entitled and indeed obliged to use Schedule 1A of the 1970 Act as the vehicle for its enquiry into the claim."

15. In light of the guidance given in Cotter as to the meaning of a return the core of Mr Upton's argument was this: a claim to set off a loss which is said to arise in a later year against a profit in an earlier year did not affect the tax of the later year. A carry back claim as made by the appellant did not establish a tax liability in the later year

and therefore was not a part of the return. This was the case regardless of how and when the claim was made.

16. He stressed this: the definition of tax return as set out by Lord Hodge in Cotter did not depend on form, rather what was important was function. Thus information on a return may not form part of the return. Equally, he accepted that a tax computation, which accompanied a return, on a paper separate from the return, could on a functional approach be part of the return.

17. What was important in the instant case, in light of the approach of Lord Hodge, was the function and purpose of the letter of 30 August 2006 and the documents accompanying it.

18. Mr Upton went on to argue this: the loss relief claims were not made on the return forms (this matter was not contentious). They did not require to be made in the return forms. They were not information or material relevant to calculating the tax for the years covered by the returns. Neither, therefore, in form or substance did these claims form part of the returns.

19. With respect to the document headed "Corporation Tax Computation" there was a section headed Terminal Loss Relief. It was his position that the section headed Terminal Loss Relief did not form part of the returns, although he accepted that the rest of the said document formed part of the returns.

20. He argued that on the functional approach to a tax return formulated by the Supreme Court in Cotter the Corporation Tax Computation sheet had to be divided into two parts: one part which formed part of the tax return and one which did not, namely that relating to terminal loss relief. The part headed Terminal Loss Relief was not part of the returns as it did not bear upon the tax payable in the years to which the tax returns related.

21. The appellant had claimed terminal loss relief in terms of section 393A of the Income and Corporation Taxes Act 1988, which provides:

> "**393A.-Losses: set off against profits of the same, or an earlier, accounting period.**
>
> (1) Subject to section 492(3) 2, where in any accounting period ending on or after 1st April 1991 a company carrying on a trade incurs a loss in the trade, then, subject to subsection (3) below, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against profits (of whatever description)-
>
> (a) of that accounting period, and
>
> (b) if the company was then carrying on the trade and the claim so requires, of preceding accounting periods falling wholly or partly within the period specified in subsection (2) below;
>
> and, subject to that subsection and to any relief for an earlier loss, the profits of any of those accounting periods shall then be treated as reduced by the amount of the loss, or

by so much of that amount as cannot be relieved under this subsection against profits of a later accounting period.

(2) The period referred to in paragraph (b) of subsection (1) above is (subject to subsection (2A) below) the period of twelve months immediately preceding the accounting period in which the loss is incurred; but the amount of the reduction that may be made under that subsection in the profits of an accounting period falling partly before the beginning of that period shall not exceed a part of those profits proportionate to the part of the accounting period falling within that period.

(2A) This section shall have effect in relation to any loss to which this subsection applies as if, in subsection (2) above, the words 'three years' were substituted for the words 'twelve months'.

(2B) Where a company ceases to carry on a trade at any time, subsection (2A) above applies to the following-

(a) the whole of any loss incurred in that trade by that company in an accounting period beginning twelve months or less before that time; and

(b) the part of any loss incurred in that trade by that company in an accounting period ending, but not beginning, in that twelve months which is proportionate to the part of that accounting period falling within those twelve months."

22. The particular point which Mr Upton sought to draw from the terms of the provision was that the effect of such a claim was on the profits for previous accounting periods. It involved a loss in a later year being carried back to earlier years where profits had occurred. Thus in the instant case the appellant sought to carry back the terminal loss relief to previous years.

23. Mr Upton submitted that the error in law of the First-tier Tribunal was most clearly shown in the following statement:

> "We considered whether the claim could be considered a 'stand alone' claim as explained in *De Silva*. We concluded that it was not; the appellant's claim clearly affected the year to which the return related and formed part of the information necessary for the purpose of establishing the amount of tax payable" (see para 140).

24. That he submitted was plainly wrong as the claim to carry back against earlier periods did not affect the amount of tax payable in the later years to which the returns related.

25. Mr Upton directed my attention to one further section of the First-tier Tribunal's decision, namely at paragraph 136 where it held this:

> "That claim could have been made in the 2004/2005 return or by amendment to the 2005 return; indeed we could not logically see why it would not be included in the 2005 return. We also considered that it was impossible to draw a line in the tax computations, as it appeared the Appellant invited us to do, such as would have the

effect that part of the computations could be considered as part of the return yet other parts would not."

26. This was a clear error of law: (a) it was a misconstruction of the return forms which contained no provision for making of terminal loss relief claims in respect of earlier years and (b) it proceeded on a misunderstanding of the purpose of a return as defined by Lord Hodge in Cotter. At paragraph 138 of its decision, the First-tier Tribunal had correctly set out the law as stated in Cotter, however, it had then proceeded to misapply the law.

27. It was his position that what the First-tier Tribunal should as a matter of law have done was to draw a line in the Corporation Tax Computation document so that the terminal loss relief claim was on one side and not part of the return and the rest of the computations on the other side and part of the return. They required to do this as the terminal loss relief claim did not in light of the decision in Cotter form part of the return.

28. Fundamentally, the First-tier Tribunal had confused two separate matters. It had held that because the carry back claims involved calculation of a loss in a later year that that loss had a bearing on the calculation of tax in the later year. This did not follow. The carry back claim had no effect on the liability to tax in the later year. It affected tax in the earlier years. This view had caused them to believe that the terminal loss relief claim formed part of the later years returns and therefore to hold wrongly that an enquiry into the returns was a valid and effectual way to deal with an enquiry into the terminal loss relief claim.

29. He accepted that the terminal loss relief claim was based largely on amortisation of goodwill but critically the claim affected the tax liability of earlier years. The First-tier Tribunal did not recognise this essential difference and this was where it erred.

30. Mr Upton then moved in his submissions to look at the statutory framework governing enquiries by the respondents.

31. Mr Upton first turned to look at Schedule 18, the provision in terms of which the enquiries had taken place.

32. He began by looking at paragraph 7 which provides as follows:

> "(1) Every company tax return for an accounting period must include an assessment.. of the amount of tax which is payable by the company for that period
>
> (a) On the basis of the information contained in the return, and
>
> (b) Taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period."

33. Mr Upton submitted that the above set out the purpose of the return namely: the assessment of the amount of the tax payable for that period. What the return related

to was reinforced by the reference in paragraph 8 to "the amount of tax payable for an accounting period is calculated as follows:".

34. He noted the terms of paragraph 14 which in normal circumstances provided 12 months from the end of the accounting period for which the return is made for the return to be filed.

35. Paragraph 15 provides as follows:

> "(1) A company may amend its company tax return by notice to the Inland Revenue.
>
> (2) The notice must be in such form as the Inland Revenue may require.
>
> (3) The notice must contain such information and be accompanied by such statements as the Inland Revenue may reasonably require.
>
> (4) Except as otherwise provided, an amendment may not be made more than twelve months after –
> (a) The filing date, or
> (b) in the case of a return for the wrong period what would be the filing date if the period for which the return was made were an accounting period."

36. Mr Upton observed that some importance had been attached by the First-tier Tribunal to this paragraph. He submitted that nothing in this provision had any application to the instant case. There was nothing in the letter of 30 August 2006 which sought to amend any return. In any event by the date of that letter it was out of time to amend the 2002 and 2003 returns. A terminal loss relief claim which sought to carry the claim back for three years was always out of time for amendment of the return. Section 393A necessarily intended it as a stand-alone claim.

37. The enquiry in the instant case had been carried out in terms of paragraph 24 which provides:

> "(1) The Inland Revenue may enquire into a company tax return if they give notice to the company of their intention to do so… within the time allowed.
>
> (2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the filing date.
>
> (3) If the return was delivered after the filing date, notice of enquiry may be given at any time up to and including 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the return was delivered.
>
> (4) If the company amends its return, notice of enquiry may be given at any time up to and including 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the amendment was made.

:

(5) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment… by the company of its return."

38. Paragraph 25(1) set out the scope of an enquiry in terms of paragraph 24 and provides as follows:

> "(1) An enquiry into a company tax return extends to anything contained in the return…including –
>
> (a) any claim or election included in the return,
> (b) any amount that affects or may affect-
>
> (i) the tax payable by that company for another accounting period, or
> (ii) the tax liability of another company for any accounting period,
>
> subject to the following limitation.
>
> (2) If the notice of enquiry is given-
>
> (a) as a result of an amendment by the company of its return, and
> (b) at a time when it is no longer possible to give notice of enquiry under paragraph 24(2) or (3),
>
> the enquiry into the return is limited to matters to which the amendment relates or which are affected by the amendment."

39. The scope of the enquiry could not therefore validly cover a terminal loss relief claim in that as a matter of law that claim did not form part of the return for the reasons which he had earlier advanced.

40. Paragraph 32 sets out the provisions for the completion of the enquiry:

> "(1) An enquiry is completed when the Inland Revenue by notice… inform the company they have completed their enquiry and state their conclusions."

41. Finally he turned to paragraph 58(3) which provides:

> "Schedule 1A to the Taxes Management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company if or to the extent that it is not –
>
> (a) made by being included (by amendment or otherwise) in the company tax return for the accounting period to which it relates, and
> (b) given effect by being included (by amendment or otherwise) in company tax returns for the accounting periods affected by it."

42. The above is a reference to the parallel track, namely: Schedule 1A. Thus Schedule 18 itself recognises that it has a twin.

43. Mr Upton then looked at Schedule 1A, which relates to claims not included in the return. In terms of paragraph 1(a) it applies to income tax and in terms of paragraph 1(c) corporation tax.

44. Paragraph 5 set out the scope of the enquiry as follows:

> "(1) An officer of the Board may enquire into –
>
> (a) a claim made by any person, or
> (b) any amendment made by any person of a claim made by him,
>
> if, before the end of the period mentioned in sub paragraph (2) below, he gives notice in writing of his intention to do so to that person or, in the case of a partnership claim, any successor of that person."

45. Thus in summary Mr Upton's argument came to this: the terminal loss relief claim was one to carry back a loss to an earlier accounting period. Therefore, in light of the approach of Lord Hodge in Cotter it formed no part of the returns as it had no effect on the tax liability in the later years. The terminal loss relief claim was neither made nor fell to be treated as being made in terms of the 2004/2005 returns. A Schedule 18 enquiry on a proper construction only related to information contained in a return or relief or allowances for which a claim is made in the return, thus the terminal loss relief claim could not be validly determined and refused in terms of a Schedule 18 enquiry.

46. Mr Upton stressed that this was not a technical or procedural argument which he was seeking to advance. Nor was he seeking to achieve an artificial result, where the respondents could not rely on the conclusion of their Schedule 18 enquiries, simply because they had not written a letter saying that there was also an enquiry under Schedule 1A.

47. What was important to understand was that where one was dealing with tax legislation, as here, a strict approach had to be taken to its construction. He directed my attention to Craies on Legislation, the 10th edition at paragraph 29.1.5.1 where this is said:

> "The presumption against taxation results in fiscal legislation being construed in a particular strict way. The 'Ramsay Principle' is the starting point for the recent attitude to the construction of fiscal statutes 'against the Crown'. Lewison J set out the history and application of the principle in the review of the position in Berry v Revenue and Customs Commissioners as follows:
>
> 'The Ramsay Principle'".

:

48. Lewison J then sets out his conclusions as regards the Ramsay Principle and its development. For the purposes of his argument the two which Mr Upton relied upon were at (v) and (vi) which provide as follows:

> "(v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole (WT Ramsay Ltd v IRC 1981 STC 174 at 179…; Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [29]…
>
> (vi) However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in Astall v Revenue and Customs Commissioners [2010] STC 137 at [34]… As Lord Hoffmann put it in an article 'Tax Avoidance' [2005] BTR 197):
>
> > 'It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there': See Mayes v Revenue and Customs Commissioners [2009] EWHC 2443 (Ch) at [30]…"

49. Mr Upton described Schedule 18 as a highly prescriptive and detailed set of statutory provisions. There was accordingly no room for glossing it with equities. A literal approach had to be taken to it.

50. At paragraph 58 of Schedule 18, sub paragraph 3 provides that Schedule 1A

> "applies to a claim or election made by a company if or to the extent that it is not-
>
> (a) made by being included (by amendment or otherwise) in the company tax return for the period to which it relates, and
>
> (b) given effect by being included… in company tax returns for the accounting periods affected by it."

51. Accordingly Schedule 1A applies if to any extent the claim is not included in the return.

52. Looking at the matter in light of Cotter as to what is part of a return then if it is at the very least to some extent outwith the return the procedure in terms of Schedule 1A is required to be followed.

53. Mr Upton closed this section of his submissions by referring to a number of guidance documents issued by the respondents which he submitted supported his position.

54. EM6715 – Claims and Elections: Enquiries into Companies, which states:

"Another problem is that a claim to which TMA70/SCH 1A applies could be received with a return by being

- written in a blank space of the return (eg at the end of a supplementary page or in the margins of the main return).

- in the body of the covering letter.

- on a separate sheet of paper which is sent with the return.

- in the CT computation.

so making it difficult to spot or easy to overlook."

55. Mr Upton submitted that what is contemplated in the foregoing guidance is exactly what happened in the instant case.

56. EM6725 – Claims: Opening Two Enquiries, which states:

"Where you open an enquiry into a stand-alone claim you may also need to open an enquiry into the subsequent return where:

- the information you need will be in the return.
- your enquiry is still open when the return is filed and the outcome may affect the return.
- you want to enquire into separate issues in the return.

Where you have two enquiries open at the same time, one into the claim under Schedule 1A and one into the return you must send separate closure notices for each of the two. This may occur at the same time or separately depending on when your enquiries are complete in each case."

57. The above showed that it was routine to open two enquiries side by side which of course was what the appellant was submitting should have been done in the instant case.

58. Company Taxation Manual, which states:

"Paragraph 58(3) applies the rules in TMA70/SCH 1A if, and to the extent that, a company cannot make a claim in a return or amended return. You then have to give effect to the claim by discharge or repayment – See CTM90635."

The following example summarises the rules outlined in this and the previous paragraphs

…

- If Company C is out of time to amend the return for accounting period ended 31 March 2010 the carry back element of the claim falls within the TMA70/SCH1A rules. You would give effect to the claim by discharge or repayment.

- Company C indicates in the CT computation for accounting period ended 31 March 2011 that the claim for loss relief is to the accounting period ended 31 March 2010.

You should regard this as:

- the making of an amended return for accounting period ended 31 March 2010, if that return is not out of time for amendment, or

- if the return is out of time for amendment, the making of a claim under TMA70/SCH 1A."

59. The above he submitted was directly contrary to the finding at paragraph 140 of the First-tier Tribunal's decision (earlier set out in full).

60. Overall he submitted that the guidance of the respondents tended to support the position which he was advancing.

61. Mr Upton finally turned to look at R (on the application of De Silva) v Revenue and Customs Commissioners 2016 EWCA Civ 40. With respect to this case Mr Upton sought to make a single point. He understood that the respondents would seek to rely on this case, however, he sought to distinguish De Silva from the instant case, by arguing that there was a single critical difference between De Silva and the instant case. The difference was that in De Silva the tax which was the subject of the case was income tax whereas the tax which was the subject of the instant matter was corporation tax. In terms of the income tax provisions, the effect of a carry back claim was on the tax liability of the later year and not that of the earlier year. Thus the calculation was carried out against the earlier year's profits but the consequence so far as tax liability was concerned was in the later year. There was, however, no such provision with respect to corporation tax. With respect to corporation tax the consequence of such a carry back claim is on the calculation of the tax in the earlier year or years. Thus he submitted the case of De Silva, with respect to the issue of corporation tax, was of no assistance in showing that a carry back claim formed part of the return in the later year. When working out the tax consequences of such a claim a different approach had been taken by Parliament with respect to corporation and income tax.

62. For the foregoing reasons he submitted that the First-tier Tribunal had erred in law.

The Second Argument

63. In the course of his oral submissions Mr Upton sought to put forward a second and entirely separate argument, which in summary was this:

> "That the respondents on a proper construction of the closure letters had not addressed the carry back claims within those letters and therefore had not properly closed those claims."

64. Mr Maciver for the respondents submitted that this argument did not fall within the permission to appeal as granted by Judge Reid QC.

65. The permission granted by Judge Reid QC allowed permission to appeal on this basis:

> "58. I shall therefore grant permission to appeal but on condition that the grounds of appeal address and only address the question whether, having regard to the facts found by the FTT, HMRC, if they wished validly to challenge the claim for carry back of terminal loss relief contained within the package of documents referred to above, were bound to open a separate enquiry into that claim under Schedule 1A of TMA."

66. Mr Upton submitted that this was wide enough to cover his second argument.

67. I am clearly of the view that on no proper reading of the permission to appeal could it be said to cover such an argument. On an ordinary and natural meaning of the words of the permission to appeal it is only wide enough to cover the first argument put forward by Mr Upton.

68. Mr Upton, although he submitted the permission to appeal was wide enough to cover this second ground, sought to amend the ground of appeal to expressly cover it. This motion was opposed by Mr Maciver. I refused this motion. First, it seemed to me that there was no proper basis put forward as to why I should allow the grounds of appeal to be expanded to include this entirely separate argument. Judge Reid QC gave a full, careful and cogent Judgment with respect to the granting of permission and the permitted scope of the appeal. He wrote a 58 paragraph decision on this issue. He had been fully addressed both in writing and orally by Mr Upton in relation to these matters. I could identify no reason why I should not follow Judge Reid QC's decision regarding the scope of the appeal. Beyond that, given the whole procedural background of this case, including a lengthy hearing before Judge Reid QC, this motion, made at the end of Mr Upton's oral submissions before me came far too late. In these circumstances I did not think it appropriate to grant leave to amend the ground of appeal. For these reasons I refuse to consider this second argument which Mr Upton sought to advance.

Reply for the Respondents

69. The essential point in the respondents' reply was this: there is a single claim for terminal loss relief and the attempt to carry that back is not a separate claim or series of separate claims. Mr Maciver submitted that the appellant's case was littered with references to their being multiple claims. He asserted that the appellant appeared to argue that there was a separate claim in 2005 when the loss was said to have arisen; 2004 to which it seeks to carry back relief (which remains a live issue in this appeal) and 2003 and 2002, to which it had sought to carry back relief but in respect of which it had now abandoned its claim. Such an approach was incorrect in law.

70. There were two stages in considering a claim for terminal loss relief:

    1. Is the claim made for terminal loss relief a good one?

    2. If that claim is a good one then can it be carried back.

71. Everything is contingent upon the issue of the terminal loss claim being a good one.

72. The claim for terminal loss relief related to and was made in the 2005 return and accordingly the return enquiry route as set out in Schedule 18 was the one which should have been followed by the respondents.

73. Turning to section 393A he submitted that it was clear from the wording of subsection 1 that the provision is concerned with a single loss giving rise to a single claim for relief. The carrying back of the claim is not of itself a claim under this section.

74. The appellant's trade terminated once. It had one loss which occurred on its termination of trade in respect of amortisation of goodwill and it sought to carry that back to previous years.

75. Mr Maciver submitted that the foregoing analysis fitted with the reasoning of the Upper Tribunal President Warren J in his decision in Spring Salmon & Seafood Limited v the Commissioners for Her Majesty's Revenue and Customs dated 29 December 2014 who said this at paragraph 12:

> "SSSL considers that this letter (the letter of 30 August 2006) made an effective claim to terminal loss relief. This loss relief claim arose… out of the further amortisation of goodwill. For the purposes of the appeal before me, it is accepted by HMRC that the letter, together with the 2004 and 2005 returns, the financial statements and the computation schedule were effective to make such a claim under section 393A Income and Corporation Taxes Act 1988… to which I will come in due course. I will refer to it in this decision as 'the claim.'"

76. Mr Maciver observed that in the foregoing paragraph Warren J had described this as a claim in the singular.

77. Mr Maciver then said this: the content of company tax returns is defined by Schedule 18. Paragraph 7 thereof provides that every tax return must include an assessment of the amount of tax which is payable, taking into account any relief. Paragraph 8 sets out the mechanism for doing so; including giving effect to any relief. It follows: first that a claim for relief is required to be included in the return to which it pertains; and two that the relief is an element affecting the tax to be paid under that return.

78. Thus in the present case, the tax returns for 2004 and 2005 were submitted to the respondents together with a calculation by which the appellant reached its conclusions as to its entitlement to terminal loss relief and the amount thereof. It would have been possible to enter the relevant figures in the returns themselves, albeit that the appellants did not in fact do so.

79. In (De Silva), the argument made, that claims for relief in earlier years, in respect of losses arising in a later year constituted stand-alone claims which were subject only to Schedule 1A enquiries, was rejected. In rejecting that claim the court founded *inter alia* upon the requirement that a claim for relief be included in the return for the year to which the loss pertained. The court thus held that the respondents had been entitled to enquire into those claims as being made in the returns for the years to which they pertained and, was not obliged to make that enquiry under Schedule 1A.

80. He argued that the said reasoning was equally applicable in the present case. It was accordingly his position that (De Silva) supported the respondents' position.

81. Mr Maciver then directed my attention to a number of parts of the reasoning of Warren J in the opinion to which I have earlier referred which he submitted supported his position as to the meaning and effect of Schedule 18, the nature of the terminal loss claim and its being related to the final accounting period.

82. First he relied upon what was said by Warren J at paragraph 22:

> "Two points should be noted about these provisions (section 393A). First, where there is a trading loss in an accounting period, the claim which can be made under section 393A is a single claim notwithstanding that it is given effect to by setting off the loss against profits of other accounting periods: separate claims are not made in relation to each accounting period effected by the claim. Secondly, the loss is set off first against other profits of the accounting period in which the loss was incurred, and then against the profits of the immediately preceding period and so on. It is not possible for a taxpayer to elect to set the loss off against profits of an earlier period (when for instance the tax rates might be higher) leaving the profits of the later accounting period unaffected."

83. He argued that this paragraph supported his argument that there was a single claim and not multiple claims.

84. At paragraph 24 Warren J turned to examine the provisions of Schedule 18 with respect to the scope of an enquiry in terms thereof and says this:

> "g. Paragraph 25: this provides that an enquiry may extend to anything contained in the return or required to be contained in the return including:
>
> > '(a) any claim or election in the return,
> > (b) any amount that affects or may affect –
> > (i) the tax payable by that company for another accounting period…'
>
> h. HMRC is thus able to enquire into any aspect of a return including any claim for relief included in the return. In such a case, if the claim for relief contained in the return is rejected by a closure notice following an enquiry, the rejection is effective not only so far as concerns the accounting period to which the return relates, but also to any other accounting period which might be affected by the claim."

85. Later in paragraph 24 he considers the provisions of paragraph 58 of Schedule 18, which relates to claims or elections involving more than one accounting period and analyses the provision in this way:

> "j. Paragraph 58: this paragraph applies to a claim if both (a) the event giving rise to the claim occurs in one accounting period (the period to which the claim 'relates') and (b) it affects one or more other accounting periods. In the present case, SSSL's claim to set off the terminal trading loss 'relates' to the 18 month accounting period but also affects earlier accounting periods. The case therefore falls within paragraph 58.
>
> k. Paragraph 58(2) applies where a company makes a claim which (a) relates to an accounting period for which the company has delivered a return and could be made by amendment of the return or (b) affects an accounting period for which the company has delivered a company tax return and could be given effect to by amendment of the return. In such a case, the claim is treated as an amendment of the return. Suppose to take an example, that, in the present case, SSSL had filed the 2005 return without referring to its loss claim and suppose that it had made such a claim in a letter a few weeks later. If it is the case that such a claim could have been made by amendment of the 2005 returns, then the claim would be treated as having been made by such amendment. Paragraph 58 therefore envisages a situation in which a claim can be made in a return for an accounting period notwithstanding that the claim affects another accounting period. As under paragraph 57, it may be that the company can make the claim for relief in its company tax return for the accounting period to which the claim 'relates' within the meaning of paragraph 58(1)(a).
>
> i. I should note paragraph 58(3) which provides that Schedule 1A TMA (claims not included in returns) is to apply to a claim made by a company to the extent that it is not (a) made by being included (by amendment or otherwise) in the return for the accounting period to which it relates and (b) given effect by being included (by amendment or otherwise) in company tax returns for the accounting periods

affected by it. In the context of the present case, if SSSL's claims was not and could not have been included in the 2005 return, then Schedule 1A would be engaged."

86. Further on he analyses the position advanced by Mr Upton (which was the same as advanced before me) and says this at paragraphs 39, 40 and 42:

"39. He submits, however, that it is clear that Claim was not made in either of those returns but was a claim made outside any return and thus open to challenge by HMRC only by an enquiry under Schedule 1A TMA, an enquiry which has never been opened and is now too late to open. He may be right that the Claim was not made in either of the returns. But he may be wrong: I say that because I consider it to be well arguable (a) that it was open to SSSL as a matter of law to make its claim as part of the 2004 and/or 2005 returns and (b) that, given that possibility, the letter dated 30 August 2006 and its accompanying documents are all to be taken as part of the return and that the Claim was made in the return. I do not propose to decide whether either (a) or (b) is correct although my current inclination is to think that they are both correct. Nonetheless, I will say a little about each of them.

40. As to (a), it is clear that the terminal loss which is the subject matter of the claim 'relates' (within the meaning of paragraph 58 Schedule 18) to the final 18 month accounting period and is properly to be contained in the 2004 and/or 2005 returns. The Claim thus relates to matters which had to be included in the 2004 and/or 2005 returns. In those circumstances, it would be entirely appropriate that the Claim should be made in the returns. It would, to my mind, be very odd if the Claim could not be made in this way.

…

42. And so I conclude that it is at least strongly arguable that the Claim could have been made in the 2004 and/or 2005 returns. It is at least strongly arguable, and my inclination is to think that it is correct that the decision in *Cotter* has no impact on that conclusion. The figure for amortisation of goodwill claimed in the final accounting period was an essential figure in the calculation of the terminal loss and features in the return for that period. It thus feeds into the tax calculation for that period making it strongly arguable that *Cotter* is irrelevant to the issue in point."

87. For the foregoing reasons Mr Maciver submitted that the respondents had validly enquired into the terminal loss relief claim in terms of Schedule 18.

Discussion

88. The issue for the court is as identified by Judge Reid QC in his decision regarding permission to appeal and is this: whether, having regard to the facts found by the FTT, HMRC, if they wished validly to challenge the claims for carry back of terminal loss relief were bound to open a separate enquiry into that claim under Schedule 1A.

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89. I am satisfied that the answer to that question is no.

90. The argument advanced by Mr Upton was at its heart a very simple and short one: a claim to carry back terminal loss relief from a later year, so that it may affect an obligation to pay tax in respect of an earlier accounting period is not a communication directed to establishing the amount of tax chargeable in the later year and accordingly as a matter of law, in light of Lord Hodge's guidance in Cotter does not form part of the return. Rather it is a stand alone claim. The argument then goes on to say that therefore an enquiry into the return is not valid to consider the carry back claims with respect to terminal loss relief.

91. First I am of the view that the argument advanced by Mr Upton is fundamentally flawed. The argument is I believe wrong in the way it treats the terminal loss claim. Specifically, it divides the terminal loss relief claim into a number of claims. It does so in this way by seeking to characterise the carry back claims for the various years as being stand-alone claims.

92. It is critical to understand that the appellant made a single claim for terminal loss relief. That loss was said to arise out of amortisation of goodwill. The appellant sought to use the carry back provisions to carry that loss back to earlier years. That loss was asserted to arise in the final 18 month accounting period ending 31 January 2005. The claim for which the appellant sought relief "related" within the meaning of paragraph 58(1)(a) of Schedule 18 to the said period. Accordingly adopting the reasoning of Warren J at paragraph 40 of his decision, which I find to be highly persuasive, "it is properly to be contained in the 2004 and/or 2005 returns".

93. I would adopt Warren J's analysis at paragraphs 24, 39, 40 and 42 and on this first basis I am satisfied that it was properly open to the respondents to open an enquiry in terms of Schedule 18 and to issue closure notices in terms thereof. There was no requirement on them to open an enquiry in terms of Schedule 1A.

94. Secondly, it is instructive to note that there are two components in a terminal loss relief claim. First the taxpayer must have incurred a loss in its trade. That loss relates to the period in which it is incurred and not to the periods to which it is sought to carry it back. If that is established the loss can be carried back.

95. However, if on the other hand the loss is not shown to be sound then there is no loss to carry back. Thus there is a necessary prerequisite for the application of the carry back provisions, namely: that a loss is established.

96. In the instant case that loss is said to have arisen through amortisation of goodwill.

97. Mr Upton in his argument sought to draw a bright line between the carry back claim which he asserted did not bear on the tax chargeable in terms of the later year and the amortisation of goodwill which is the asserted foundation for the loss.

:

98. This division is most clearly illustrated by his seeking to draw a line in the Corporation Tax Computations document which was submitted with the letter of 30 August 2006. On the one side he has the amortisation of goodwill and on the other side is the carry back of the terminal loss claim.

99. This approach I am persuaded is incorrect for the following reasons:

- It fails to take account of there being a single claim for terminal loss relief.
- It is based on a misconception as to what is terminal loss relief. It completely fails to consider the first component in establishing such a claim namely: a loss.
- It fails to take account of when that loss occurred, namely in the last 18 months of trading (in the later year).
- It fails to have regard to the fundamental importance of amortisation of goodwill to the appellant's claim for terminal loss relief.
- It fails to have regard to the effect that the amortisation of goodwill had with respect to deciding upon the appellant's tax liability in the later year.

100. The goodwill amortisation is the core of the appellant's claim for relief. As I have already commented, without the establishment of the goodwill amortisation and thus a loss, the terminal loss relief failed. It was fundamental to the terminal loss relief claim. That loss undoubtedly formed part of the calculation of tax due in relation to the later year. Thus applying Lord Hodge's guidance in Cotter, the essential core of the appellant's claim for terminal loss relief, the figure for goodwill amortisation, formed part of the return for the later year.

101. In his decision on permission to appeal the decision of the First-tier Tribunal Judge Berner at paragraph 12 described the two elements of the claim as having a symbiotic nature and opined that this clearly militated against any arguable case that the claim to carry back was a "stand alone" claim. I agree with and would adopt this analysis.

102. Judge Reid QC in his decision on permission to appeal makes a similar point at paragraph 57 where he says this:

> "My inclination is that it would be surprising if it were to be concluded that a carry back claim, which has no substance because the claim for relief for the goodwill amortisation, on which the entirety of the carry back claim is based, has no merit; and thus there is no such relief to carry back, is nevertheless a valid claim which must be given effect to unless an enquiry into the claim is opened expressly under Schedule 1A TMA and concludes that it has no merit."

103. I agree with this analysis and would adopt it. I cannot see that it is a proper construction of section 393A to divide it into two separate and distinct parts, which then require two separate enquiries in the way which underlies the submissions advanced by Mr Upton.

104. It appears to me that on the basis of the foregoing analysis the claim made by the appellant properly falls within the scope of an enquiry in terms of Schedule 18 as defined by paragraph 25 thereof. It was thus a valid approach for the respondents to open and issue closure notices in terms of Schedule 18 and it was not necessary to validly deal with the claim to open an enquiry in terms of Schedule 1A.

105. I am persuaded that support for the foregoing analysis can be found in the decision of the Court of Appeal in De Silva.

106. The argument put forward in De Silva on the part of the taxpayer was in all essentials the same as that advanced by Mr Upton and was to this effect: claims for relief in earlier years, in respect of issues arising in a later year, properly understood were stand alone claims and required a Schedule 1A enquiry. In rejecting that the court *inter alia* founded upon the requirement that a claim for loss relief be included in the return for the year to which the loss pertained. At paragraph 49 Gloster LJ with whom the other judges agreed opined:

> "… the claim for relief was nonetheless required to be included in the return of the individual taxpayer for the year in which the losses were actually made by the partnership (ie here the later year – year 02). That obligation is imposed by sections 8(1)(b) and 9 of the TMA and section 380 of the ICTA."

107. The court held on that basis (see paragraphs 46 to 52) that the respondents had been entitled to enquire into those claims as being made in the returns for the years to which they related, and were not obliged to make the enquiry in terms of Schedule 1A.

108. In the present case for the reasons which I have earlier set out the appellant was under a requirement to include the claim for relief in the return for the year in which the losses were actually made. I have held that the appellant was under this requirement on the basis of Schedule 18 and in De Silva the taxpayer was under this requirement in terms of entirely different provisions. However, I do not believe because the requirement arises in terms of separate provisions that in any way affects the applicability of the underlying reasoning in De Silva and renders it not applicable to the instant case. The critical point is that in both cases there was a requirement to include the claim for relief in the return for the year in which it arose (the later year).

109. Accordingly applying the reasoning in De Silva to the present case, it was competent for the respondents to deal with the claim under Schedule 18 and they were not required to open a separate 1A enquiry.

110. Beyond the above I note at first instance in De Silva the judge at paragraph 61 considers certain of the guidance of Lord Hodge in Cotter and says this:

> "At paragraph 27 of his judgment Lord Hodge said that matters in Cotter would have been different if the taxpayer had made his own assessment of his tax liability by bringing his carry back claim for relief into account in the calculation of his tax liability in his return: 'Such information and self-assessment would in my view fall within a 'return' under S9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year; and HMRC could not go behind that self-assessment without either amending the return under section 9ZB of the TMA or instituting an enquiry under section 9A of the TMA. That is to say, in such a case the appropriate means of challenge to the claim for relief would be by way of an enquiry under section 9A into the taxpayer's return and not by way of an enquiry under Schedule 1A into a 'stand-alone' claim."

111. The judge then took from this the following principle:

> "This is in line with, and supports the points made in paragraph [60] above regarding para [16] of the judgment of Lord Hodge. Where an entry relating to carry back relief is made in the calculation of the tax due for a particular year in a return for that year, the appropriate means of challenge by HMRC is by way of an enquiry into the return itself, not under Schedule 1A."

112. He then turns at paragraph 62 to apply those observations to the circumstances of the case before him:

> "Adapting this observation to the circumstances of the present case, when an entry which is the foundation for carry back of relief is made on the taxpayer's return for a particular year (here, the entry showing the partnership losses included in the Claimant's returns for the later years), an appropriate (if not, in fact, the appropriate) means of challenge by HMRC to that entry and in that respect to the claim for carry back relief is by way of an enquiry into the return itself, rather than an enquiry under Schedule 1A. This was the means of challenge which HMRC has employed in the present case. It is, in my judgment, an entirely lawful means of challenge for them to have used. A taxpayer cannot expect to be immune from a challenge to a claim for carry back relief while still vulnerable to having relevant entries in his tax return for the later year corrected pursuant to a challenge to that return brought in proper time."

113. This analysis is adopted by Lady Justice Gloster at paragraph 52.

114. I would adopt this analysis. Applying it to the circumstances of the instant case: there is an entry in the return for amortisation of goodwill (by reference to the Corporation Tax Computations document), which is the foundation for the carry back relief. That loss is a part of the returns submitted with the 30 August 2006 letter. Thus following the analysis of the judge at first instance in De Silva the appropriate means of challenge to that entry and therefore to the claim for carry back relief would be by means of an enquiry into the return itself as was in fact done. Thus it is the lawful means to enquire into a carry back relief claim to enquire into the return.

115. Moreover, Gloster LJ in rejecting the view that there was a stand-alone claim said this at paragraph 50:

> "But the claims for relief could, as a matter of substance, only ultimately be made good if the Appellants also eventually included their shares of the partnership trading losses in their own individual returns for the periods in which those losses actually arose."

116. Applying that analysis to the present case: the claims to carry back could as a matter of substance only be made good on the loss arising from amortisation of goodwill being made in the return. So as in De Silva the appropriate mode of enquiry was into the return.

117. In De Silva at paragraph 47 Gloster LJ said that the argument of the taxpayer "left me with a sense of total unreality". As I have said the argument, which in essence was put forward on behalf of the taxpayer in that case and the argument put forward on behalf of the appellant here is almost exactly the same, I equally was left by that argument with a sense of total unreality.

118. Lastly, I note the following observations of Lady Justice Gloster at paragraph 52 which support the conclusion I have reached:

> "Contrary to the judges doubts… I consider that the Revenue would have had a choice as to which enquiry route it took, if indeed there had been a separate stand-alone claim made prior to the year 02 self-assessment returns. But I agree with him that, normally, the appropriate point of challenge for the carry back claim in respect of partnership losses incurred in Year 02 has to be at the time when such losses are included in the partnership return and the individual partner's return for that year."

119. With respect to the argument advanced by Mr Upton that De Silva could be distinguished I am not persuaded by the argument. I accept as regards income tax the effect of the carry back claim is on the tax liability of the later period and there is no analogous provision in regard to corporation tax. However, that does not provide a proper basis for distinction. I have earlier set out the reasons why I believe the observations made in De Silva are, despite this difference, applicable to the circumstances of the instant case.

120. At paragraph 140 of its decision the First-tier Tribunal said this:

> "We considered whether the claim could be considered a 'stand alone' claim as explained in *De Silva*. We concluded that it was not, the Appellant's claim clearly affected the year to which the return related and formed part of the information necessary for the purpose of establishing the amount of tax payable."

121. With that conclusion, for the reasons I have given, I agree.

122. For the above reasons I cannot find any error in law in the judgment of the First-tier Tribunal. I am satisfied that the respondents adopted the correct mode of enquiry. It was a lawful means of challenge. The closure notices lawfully determined the matter. The refusal of the claim was valid. The terminal loss relief claim could not be viewed as a stand alone claim. I accordingly refuse the appeal.

Lord Bannatyne
Sitting as a Judge of the Upper Tribunal
(Tax and Chancery Chamber)

Release Date: 2 June 2017