UT Neutral citation number: [2025] UKUT 00165 (TCC)

UT (Tax & Chancery) Case Number: UT-2024-000113

Upper Tribunal

(Tax and Chancery Chamber)

Hearing venue: The Rolls Building

London EC4A 1NL

Heard on: 8 April 2025

Judgment date: 3 June 2025

INCOME TAX — share loss relief pursuant to s.574 Income and Corporation Tax Act 1988 – incurred in 2006-07 but claimed and carried back against income on 2005-06 return – Schedule 1B TMA 1970 applies so as to treat claim as relating to 2006-07 – standalone claim not made 'in' 05-06 return because information provided did not go to the calculation of tax - thus HMRC validly opened enquiries both into a) the claim made outside the 05-06 return pursuant to Schedule 1A TMA, and b) 06-07 return under section 9A TMA – both closure notices valid as reasonable recipient would understand them to deny all relief claimed despite incorrect figures included – Appellant's appeal dismissed and HMRC's cross-appeal allowed

Before

MR JUSTICE RICHARD SMITH

JUDGE RUPERT JONES

Between

ROGER MURPHY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Grierson of counsel as representative

For the Respondents: Mr Joshua Carey and Mr Sam Way of counsel instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

INTRODUCTION

1. The Appellant appeals the decision of the First-tier Tribunal ("FTT") dated 13 June 2024 dismissing his appeal: [2024] UKFTT 00537 (TC) ("the Decision"). The appeal concerns the procedural requirements for HMRC to issue valid enquiry notices and closure notices in respect of share loss relief claimed by the Appellant to have been incurred in the year 2006-07 ("06-07") but carried back and included on his self-assessment tax return for 2005-06 ("05-06").

2. HMRC opened enquiries into: i) the Appellant's claim included on his return for 05-06 as a standalone claim pursuant to Schedule 1A to the Taxes Management Act 1970 ("TMA"), and; ii) his tax return for 06-07 under s.9A TMA. Thereafter they issued closure notices in respect of each enquiry denying the relief claimed. It was common ground that if the Appellant was entitled to, and did, make his claim for share loss relief 'in' the 05-06 tax return, then neither of those enquiries could have extended to that claim because HMRC did not open an enquiry under s.9A into the Appellant's 05-06 return. In those circumstances HMRC would not have lawfully denied the claim.

THE FTT DECISION

3. In deciding the appeal, the FTT determined three issues that arose into the validity of HMRC's enquiries into the share loss relief claim, namely whether:

   (1) the Appellant was entitled to make a claim for share loss relief under s.574 of the Income and Corporation Tax Act 1988 ("ICTA") for losses incurred in the 06-07 tax year carried back and included on his tax return for 05-06. The FTT decided in favour of HMRC that the Appellant was not entitled to carry back the claim in the 05-06 return and it was to be treated as relating to 06-07 by virtue of paragraph 2(3), Schedule 1B TMA.

   (2) even if the Appellant was not so entitled, the Appellant had made such a claim "in" (as opposed to "on") his tax return for 05-06 such that HMRC could only enquire into it under s.9A TMA. The FTT decided in favour of the Appellant that the claim for share loss relief had been made in the return so that HMRC were required to have opened any enquiry under s.9A TMA and the enquiry they did open, under Schedule 1A TMA, was invalid.

(3) even if the Appellant had made the claim in his 05-06 tax return, the Appellant's claim was required to be included in his 06-07 tax return. The FTT found that this was required such that HMRC were entitled to enquire into the 06-07 return under s.9A TMA 1970 and the enquiry notice for 06-07 was valid.

4. As a result of finding the Schedule 1A TMA enquiry to be invalid, the only closure notice issue that arose before the FTT was whether HMRC had validly closed the s. 9A TMA enquiry into the Appellant's 06-07 return. The FTT found in favour of HMRC that the s.9A enquiry was validly closed by a s.28A TMA closure notice because, despite a number of incorrect figures included within it, the reasonable recipient of the notice would understand that the share loss relief claim in respect of 06-07 had been denied in full.

5. The FTT therefore dismissed the Appellant's appeal on the basis of the valid enquiry and closure notices under ss.9A and 28A TMA respectively in relation to the tax return for 06-07 which denied all relief.

THE GROUNDS OF APPEAL TO THE UPPER TRIBUNAL

6. The Appellant appeals to the Upper Tribunal ("UT"), based on narrative grounds of appeal, with permission granted by the FTT. The grounds were not numbered nor concisely identified but consisted of a general challenge to the FTT's conclusions unfavourable to the Appellant. In essence, the grounds are that:

   (1) The FTT erred by holding that the Appellant was not permitted to make a claim for share loss relief in his tax return for 05-06 and it should be treated as relating to the 06-07 return. The *ratio* of the Supreme Court judgment in *R (on the application of Derry) v HMRC* [2019] UKSC 19 *("Derry SC")* is binding and schedule 1B TMA does not apply to share loss relief claims under ICTA. The FTT was wrong to distinguish *Derry SC* on the basis that it only applied to share loss relief claims under s.132 Income Tax Act 2007 ("ITA"). Thus paragraph 2(3), Schedule 1B does not govern a share loss relief claim made under s.574 ICTA. The claim can be made in either the year incurred or the preceding tax year and does not have to be treated as relating to the later year (06-07). ("The First Share Relief Issue").
   (2) The FTT erred in finding that there was a valid closure notice in respect of the 06-07 return pursuant to s.28A TMA when it was not sufficiently clear: the figures referred to in respect of the relief claimed and denied were incorrect. The FTT failed to apply *Raftopoulou v HMRC* [2018] EWCA Civ 818 ("*Raftopoulou*") in determining whether the closure notice of 25 July 2019 was valid, alternatively the FTT failed to give sufficient weight to the Appellant's written and oral evidence that he did not understand the meaning of the closure notice. ("The Closure Notice Issue").

7. HMRC, in turn, applied for permission to cross appeal against the FTT decision that the claim was made in the 05-06 return and hence that the Schedule 1A TMA enquiry was invalid. They submit that the FTT erred because the claim was not made in the 05-06 return. Even though included on its face, the information provided did not feed into the self-assessment calculation. Hence it was a standalone claim made outside the return and HMRC validly opened their enquiry into it ("The Second Share Relief Issue").

8. We are satisfied that permission to appeal is required on the Second Share Relief Issue. Although HMRC contend for the same effect as the Decision – to deny the Appellant's loss relief claim - they do so for different (additional or alternative) reasons, namely that there was a valid Schedule 1A TMA closure notice which provided an alternative and additional basis on which relief might be lawfully denied: see *Oisin Fanning v Revenue and Customs* [2022] UKUT 21 at [27]-[28] addressing *HMRC v SSE Generation Ltd* [2021] EWCA Civ 105:

> "28(3) If the Respondent is seeking to persuade the FTT to make a different decision, it is likely to need permission to appeal. However, if the Respondent succeeded on a particular issue before the FTT because the FTT accepted one of a number of arguments while rejecting other arguments, the Respondent can raise those unsuccessful arguments in a Respondent's Notice (see [77] of Rose LJ's judgment [in SSE Generation]) because the Respondent would not, in so doing, be seeking a different decision."

9. We grant HMRC permission to appeal on the Second Share Relief Issue because, for the reasons set out below, this ground of cross-appeal has a realistic prospect of success.

10. The overall effect of the grant of permission to appeal and HMRC's response to the notice of appeal is that all of the issues before the FTT, other than the third share loss relief issue, are now before the UT on this appeal.

THE HEARING

11. Mr Grierson of counsel appeared for the Appellant at the hearing on 8 April 2025. Mr Carey and Mr Way of counsel appeared for HMRC. We are grateful to each of them for their written and oral submissions.

12. During the hearing, we requested that HMRC should thereafter provide a comparative table setting out ss.380 & 574 ICTA and ss.131-133 ITA. This was provided on 14 April 2025 following the hearing. Mr Grierson objected that the table also included the provisions of paragraph 2, Schedule 1B TMA and we have excluded that part from our consideration.

FACTUAL BACKGROUND

13. References in square brackets [] are to paragraph numbers in the FTT Decision unless stated or context requires otherwise.

14. The factual and procedural background to the appeals were set out in the Decision at [6]-[24]. It is necessary to recite the most relevant findings as follows:

> "7. As we have mentioned, the [share] loss for which relief was claimed by Mr Murphy arose from his participation in a tax avoidance scheme [Excalibur].
>
> …

10. On 13 October 2006, Mr Murphy submitted his tax return for the tax year 2005/6 online[1]. The return included:

(1) in Box 18.3, the amount of £179,063.62 as total tax due for that year;

(2) in Box 18.8, a figure of £183,140.43 as "Any 2006-2007 tax you are reclaiming now";

(3) in Box 23.9 (the "white space"), an explanation of the entry in Box 18.8 in the following terms:

Box 18.8 - This refers to a tax credit arising on a loss from 2006/07 and claimed against income in 2005/06 under s574 ICTA. I claim under TA 1988 s574(1)(b) that an amount equal to the amount of the loss to be set against my income for 2005/06 but not, for the avoidance of doubt, set against my income for 2006/07. The loss is calculated as follows Sales Proceeds 24.22 Less Cost 763,763.98 Loss 763,739.76.

The figure at Box 18.8 was not taken into account in the calculation of the total tax entered at Box 18.3 because the on-line form populated the box automatically and did not take into account the relief claimed under section 574 ICTA. Mr Murphy did not disclose the DOTAS reference number of the scheme in his return.

11. In a letter dated 28 February 2007, HMRC gave notice to Mr Murphy of their intention to enquire into Mr Murphy's claim under section 574 ICTA. The notice was given under paragraph 5 of Schedule 1A to the Taxes Management Act 1970 ("TMA") on the basis that the claim had been made "outside of a return". The letter was headed "Enquiry under Paragraph 5 Schedule 1A Taxes Management Act 1970 – 2006/7". The letter stated:

> Thank you for your tax return for the year ended 5 April 2006.
>
> I am writing to tell you that I intend enquiring into your Return. My enquiry will cover your claim under Section 574 Income Corporation Taxes Act 1988.

The letter later continued:

> Your claim has been made outside of a return and is, therefore governed by Schedule 1A TMA 1970. Para 5 of Schedule 1A allows for enquiries to be made into claims.

12. A letter of the same date to Mr Murphy's agent, Eaton & Co, confirmed that an enquiry was being opened under paragraph 5 Schedule 1A TMA.

13. On 31 January 2008, Mr Murphy submitted his tax return for the tax year 2006/7. This return was also submitted on-line. In that return:

> (1) in Box 18.8, the total tax due was shown as £144,587.12;
>
> (2) Box 23.9 contains the following additional information:
>
> > "During the tax year a loan that I received from Rose Harbour (BVI) Ltd was released at the discretion of the Board of that company. The loan was from a non-close and non resident company of which I was not a shareholder. The release does not give rise to a taxable receipt. During the tax year I gifted my entire shareholding in Harbour Trading Plc to Change4Change, a UK registered charity…."

1. The bundle included several versions of Mr Murphy's return for the tax year 2005/6 and several versions of his return for the tax year [2006/7]. We have concluded (and find as a fact) that the correct returns are the versions filed on-line on 13 October 2006 and 31 January 2008 respectively as the figures used in those versions and the commentary in the white spaces are most consistent with the correspondence between the parties.

(3) the capital gains pages show that shares in Harbour Trading Plc were acquired on 13 July 2006, and sold for £24 on 25 July 2006, generating a loss of £763,740.00, which appears in Box 8.2;

(4) Box 8.13B of the capital gains pages shows losses of £763,739 "claimed against income of 2005-06";

(5) in Box 8.22 of the capital gains pages, Mr Murphy entered the following additional information in the "white space":

> "Additional Information: The shares in Harbour Trading Plc were originally subscribed for by me and then disposed of to a third party, Braye Finance Limited, for there (sic) full market value. Pursuant to an option agreement entered into with Braye Finance Limited, the shares were then sold back to me, within 30 days of the disposal. As a result of the share identification rules, the reacquisition of these shares generated a capital loss of 763,739.76. Claim for loss against the year ended April 5th 2006 was made on the return of income and submitted to the revenue on October 13, 2006".

Once again, Mr Murphy did not disclose the DOTAS reference number of the scheme in his return.

14. In a letter dated 20 May 2008, HMRC gave notice of intention to an enquire into Mr Murphy's return for the tax year 2006/7. A letter from HMRC to Mr Murphy's then agent, Meager Wood Locke & Co, of the same date confirms that the notice was given under section 9A TMA.

15. In a letter dated 31 July 2008, Mr Murphy's agent advised HMRC of the DOTAS scheme reference number in relation to the claim for relief under section 574 ICTA.

…

17. On 19 April 2017, the First-tier Tribunal issued a decision in *Kerrison v HMRC* [2017] UKFTT 322 (TC), in which the Excalibur scheme was considered and the appeal against the refusal of the taxpayer's claims for relief were dismissed. On 22 January 2019, the Upper Tribunal dismissed the taxpayer's appeal (*Kerrison v HMRC* [2019] UKUT 0008 (TCC)).

18. On 25 July 2019, HMRC issued two closure notices to Mr Murphy.

(1) The first was intended to be a closure notice under paragraph 7 Schedule 1A TMA in respect of the claim for relief under section 574 ICTA denying Mr Murphy relief under that section. The notice stated:

> **Check of your claim for the year ended 5 April 2007**
>
> I have now completed my check of your claim for the year shown above.
>
> **My conclusion**
>
> •The total capital loss claimed in the sum of £763,740.00 is not allowable.
>
> •The claim to set £48,244.79 of that capital loss against 2005-2006 income, is not allowable.
>
> •Your claim showed that a credit was due to you of £134,895.64
>
> •My check has shown that the actual credit due was £0.00
>
> •The difference is £134,895.64.
>
> …

(2) The second was intended to be a closure notice under section 28A TMA in respect of the enquiry into the return for the tax year 2006/7. The notice stated:

> **Information about our check of your Self-Assessment tax return for the year ended 5 April 2007**
>
> I have now completed my S9a check of your Self-Assessment tax return for the year shown above. This letter is a Closure Notice issued under Section 28A (1) & (2) Taxes Management Act 1970.
>
> **My conclusion**
>
> The capital loss claimed in the sum of £763,740.00 is not allowable.
>
> I have amended your tax return in line with my decision.
>
> The amount of tax you self-assessed for the year 2006-2007 has not changed.
>
> The claim to set £763,739.00 of that capital loss against 2005-2006 income, is not allowable.
>
> □ Your claim showed that a credit was due to you of £48,244.79.
>
> □ My check has shown that the actual credit due was £0.00.
>
> □ The difference is £48,244.79.
>
> …

19. The figures in the closure notices regarding the amount of the credit claimed by Mr Murphy were plainly wrong. The amount of share loss relief claimed by Mr Murphy was £183,140.43 and he had sought to set that full amount against his income for the tax year 2005/6 under section 574 ICTA.

20. Mr Murphy did not understand the notices that had been sent to him. He requested advice from his solicitors, Reid & Co in an email dated 29 July 2019. Reid & Co. wrote to HMRC on 16 September 2019. In that letter, Reid & Co. argued, inter alia, that Mr Murphy's claim to carry-back losses under section 574 ICTA was included in the return for the tax year 2005/6 and so any enquiry into that claim should have been made under section 9A TMA. The enquiry under paragraph 5 Schedule 1A TMA was invalid and so the purported closure notice was also invalid.

21. Reid & Co also wrote to HMRC on 16 October 2019. In that letter Reid & Co. reiterated their argument that the notice of intention to enquire into Mr Murphy's claim under section 574 ICTA under paragraph 5 Schedule 1A TMA was invalid. Reid & Co. also argued that the closure notices did not meet the test set out in *Raftopoulou v HMRC* [2018] EWCA Civ 818 ("*Raftopoulou*") at [20] and [36] and so were invalid.

22. Following correspondence between Reid & Co. and HMRC, Mr Murphy appealed against both closure notices on 28 November 2019, with the agreement of HMRC notwithstanding that the appeals were in strict terms out of time.

23. In a letter dated 14 January 2022, HMRC confirmed their view of the position and offered a review, which was accepted by Mr Murphy. The review was completed on 30 May 2022. In a letter of that date, HMRC varied the closure notices in the following terms:

> (1) in relation to the closure notice given under paragraph 7 Schedule 1A TMA:
>
> <u>Closure of Enquiry under Sch1A TMA 1970</u>
>
> My conclusion

 The total capital loss claimed in the sun of £763.740.00 is not allowable.

 The claim to set £180,40.43 (sic) of that capital loss against 2005-2006 income is not allowable.

 Your claim showed that a credit was due to you of £183,140.43

 My check has shown that the actual credit due was £0.00

 The difference is £183,140.43.

(2) in relation to the closure notice for the tax year 2006/7 issued under section 28A TMA:

Closure of s9A Enquiry into 06/07 Return

The capital loss claimed in the sum of £763.740.00 is not allowable. The amount of tax that you self-assessed for the year 2006-2007 has not changed.

 The claim to set £763,739.00 of that capital loss against 2005-2006 income is not allowable.

 Your claim showed that a credit was due to you of £0.00

 My check has shown that the actual credit due was £0.00

 The difference is £0.00.

…"

FIRST SHARE LOSS RELIEF ISSUE

The FTT Decision

15. The FTT identified the first issue in the following terms at [48(1)]:

    (1) Was Mr Murphy entitled as a matter of law to deduct the purported loss in computing his income tax liability for the tax year 2005/6 and to include the claim in his tax return for the 2005/6 tax year? (The "first issue")

16. The FTT's answer was "no". It concluded at [61]-[62] that paragraph 2(3), Schedule 1B TMA applied such that the claim was to be treated as relating to the tax year 06-07. The reasoning in *Derry SC* that Schedule 1B did not apply to ITA, did not apply to ICTA:

    "61. The wording of section 574 ICTA and section 380 ICTA in the form that they were in immediately before ITA is very similar once the wording that relates to the particular form of loss is removed. Whilst we acknowledge that there are some material differences in the nature of share loss relief as compared to the other forms of loss relief – for example, in the manner in which the provisions of section 574 ICTA isolate the loss arising from the relevant disposal from the general computation of gains and losses for the year – we have not been directed to any provision in the law before the introduction of ITA which would suggest that there was a material difference in the manner in which share loss relief and the other forms of loss relief were to be claimed and enquired into. We can only conclude – consistent with the implication from Lord Carnwath's judgment in *Derry SC* – that there was no material difference in the law applicable to the manner in which share loss relief and the other forms of loss relief prior to ITA (i.e. that Schedule 1B TMA applied) and that ITA made a material change to the law in that respect, but only in relation to claims for share loss relief.

62. On the first issue, we therefore agree with HMRC that Mr Murphy was not entitled to claim share loss relief "in" his return for the tax year 2005/6. Schedule 1B TMA applied and so the loss related to the tax year [2006/7]."

The Law

Legislation

17. The Appellant's claim to "share loss relief" was made under s.574 ICTA. At the time, this provided so far as relevant:

> "574.— Relief for individuals.
>
> 1.—
>
> (1) Where an individual who has subscribed for shares in a qualifying trading company incurs an allowable loss (for capital gains tax purposes) on the disposal of the shares in any year of assessment, he may, by notice given within twelve months from the 31st January next following that year, make a claim for relief from income tax on—
>
> (a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or
>
> (b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;
>
> but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above. Where such relief is given in respect of the loss or any part of it, no deduction shall be made in respect of the loss or (as the case may be) that part under the 1992 Act.
>
> (2) Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection; and any relief claimed under either paragraph in respect of any income shall be given in priority to any relief claimed in respect of that income under section 380 or 381.
>
> .."

18. As can be seen from s.574(1) ICTA, an individual was entitled to make a claim for share loss relief to set a capital loss against income of the tax year in which the loss accrued (sub-paragraph (a)) or the preceding tax year (sub-paragraph (b)).

19. The reference in s.574(2) to ss.380 and 381 ICTA are to relief given for losses incurred by an individual in a trade, profession, or vocation or an employment. S.380 ICTA provided at the relevant time:

> "380.— Set-off against general income.
>
> (1) Where in any year of assessment any person sustains a loss in any trade, profession, vocation or employment carried on by him either solely or in partnership, he may, by notice given within [twelve months from the 31st January next following that year, make a claim for relief from income tax on—
>
> (a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or
>
> (b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income; but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above.

(2) Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection."

20. In issue on this appeal is whether s.574(1) ICTA is governed by s.42 TMA, and particularly s.42(11A) which imports the provisions of Schedule 1B TMA. At the material time, s.42 provided, so far as relevant:

"42.— Procedure for making claims etc.

(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) … 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.

…

(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.

…"

21. S.42(11A) TMA imports Schedule 1B TMA as having effect for "certain claims for relief involving two or more years of assessment". Schedule 1B is headed "Claims for relief involving two or more years".

22. Paragraph 2 of Schedule 1B TMA addresses standalone claims for loss relief in general terms. It does not distinguish between different types of loss relief and does not limit its application to only certain types of relief. The 'certain claims' to which it applies (by virtue of section 42(11A)) are specified and identified in paragraph 2(1): claims for carried back loss relief for the earlier year. The paragraph provided, so far as relevant:

"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").

…

(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.…"

23. Paragraph 2(3) is particularly important as it treats carried back claims made in respect of the earlier year as relating to the later year. The FTT observed at [35]-[36]:

"35. So where Schedule 1B applies to a claim for loss relief:

(1) the claim does not have to be made in the return (paragraph 2(2));

(2) the claim relates to the later year (i.e. the year in which the loss arises) and not the earlier year (the year to which the loss is being carried back) (paragraph 2(3)); and

(3) the amount of the claim is determined by reference to the reduction in the tax liability of the taxpayer in the earlier year on the assumption that effect were given to the claim (paragraph 2(4)).

36. Schedule 1B creates a separate and specific regime in which a claim that falls within paragraph 2 is treated as a standalone claim – in HMRC's terminology a "free-standing credit" – which although it affects the amount of tax actually paid in the earlier tax year is dealt with separately from the return for that year. It is HMRC's case that Mr Murphy's claim for the tax year 2005/6 falls within that regime."

24. As the FTT also observed: "Section 574 ICTA was repealed with effect from 5 April 2007. For the tax year 2007/8 onwards, the provisions governing share loss relief, including section 574 ICTA, were rewritten as part of the Tax Law Rewrite Project and incorporated in the Income Tax Act 2007 ("ITA"). They are now found in chapter 6 Part 4 ITA (principally, sections 131 to 133 ITA)."

25. S.131 ITA is the first of three sections under Chapter 6, dealing with "Share loss relief against general income". S.131 provides that an individual is eligible for share loss relief if he incurs "an allowable loss for capital gains tax purposes" on the disposal of any "qualifying shares" in "any tax year", defined as "the year of the loss". "Qualifying shares" include shares in a "qualifying trading company", the conditions for which are set out in sections 134 to 143.

26. S.132 ITA provides so far as relevant:

"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."

27. Notable within subsection 132(1), as Lord Carnwath observed at [35] in *Derry SC*, is the specific reference back to Step 2 in the calculation of income tax liability under s.23. S.23 ITA was a 'new' provision that was not contained in nor directly mirrored in ICTA.

28. S.133 ITA provides:

"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 sections 24A and 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)."

29. Again, the reference in s.133(1) to "net income" takes the reader back to s.23 ITA where that concept is defined and also makes reference to the limits on the amount of loss to be deducted by virtue of ss.24A and 25.

30. The provisions relating to the other forms of loss relief in ss.380 and 381 ICTA were also repealed and rewritten as chapter 2 Part 4 ITA, ss. 60-101 – in relation to losses from a trade, profession or vocation ("trade loss relief") - and chapter 5 Part 4 ITA, ss.128-130 - in relation to losses from an employment ("employment loss relief").

31. In contrast to Chapter 6 ITA (ss.131-133 above) on share loss relief which makes no mention of Schedule 1B TMA, both subsections 60(2) and 128(7) ITA specifically and expressly make these types of relief claims subject to the application of paragraph 2, Schedule 1B TMA:

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

Case law

Knibbs

32. Before turning to *Derry SC* concerning the application of Schedule 1B TMA to claims for share loss relief under ITA, we explain how the appellate courts have considered trade loss relief. This relief was available under s.380 ICTA (and considered in *De Silva* to which we return in the discussion section) and then under the successor provision, s.64 ITA.

33. In *Knibbs v HMRC* [2019] EWCA Civ 1719 ("*Knibbs*"), the Court of Appeal explained the process by which claims to carry-back trade loss relief for post 2007 claims under s.64 ITA are governed by Schedule 1B TMA. It concluded that paragraph 2(3), Schedule 1B TMA applied to post 2007 claims for trade loss relief to treat them as relating to the later year. According to David Richards LJ at [45]-[47]:

> 45. Schedule 1B is headed "Claims for relief involving two or more years". As we have already noted, claims for loss relief involving two or more years, i.e. carry-back claims, are expressly made subject to paragraph 2 of Schedule 1B by section 60(2) of ITA.
>
> 46. Paragraph 2 of Schedule 1B is headed "Loss relief" and materially provides as follows:
>
> "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').
>
> …
>
> (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."
>
> 47. It follows from these provisions that, where a taxpayer wishes to make a carry-back claim for loss relief, the claim does not need to be included in a return, because section 42(2) of TMA

is disapplied by paragraph 2(2). The effect of sub-paragraphs (3) and (4) was explained by Lord Hodge JSC in *De Silva* [2017] 1 WLR 4384 , para 19:

> "Paragraph 2 of Schedule 1B thus is concerned with relief sought for a loss incurred in the later year (which I will call 'Year 2') by carrying it back to the earlier year ('Year 1'). Significantly, paragraph 2(3) makes it clear that the claim relates to Year 2. The quantification of the claim is governed by paragraph 2(4): the claim is the difference between amount A and amount B on the counterfactual assumption that effect could have been and was given to the claim in Year 1. That assumption is counterfactual because paragraph 2(3) and paragraph 2(6) relate the claim and the giving effect to the claim to Year 2.""

Derry SC

34. The application of Schedule 1B TMA to share loss relief claims under s.132 ITA (but not ICTA) was considered by the Supreme Court in *Derry SC.* The Court concluded that Schedule 1B did not apply to such claims. The FTT at [50] accurately summarised the issues before the Supreme Court in *Derry SC,* upon which summary, we cannot improve:

> "50. There were two issues before the Court:
>
> (1) first, whether the taxpayer was entitled to deduct the relevant loss in calculating his net income for the tax year 2009/10 and his tax liability for that year under section 23 ITA or whether, as HMRC argued, that right was overridden by Schedule 1B TMA so that the loss, although claimed in the tax year 2009/10, was to be treated as "relating to" the tax year 2010/11; and
>
> (2) second, whether, if it was an error of the taxpayer to make a claim for relief in his tax return for the tax year 2009/10, that claim was nonetheless part of the tax return for that year."

35. The FTT at [51]-[52] summarised and quoted the *ratio* of Lord Carnwath's judgment on the first issue at [35]-[37] as follows:

> "51. The Supreme Court, with Lord Carnwath giving the leading judgment, found in favour of the taxpayer on the first issue. This was on the grounds that sections 131 to 133 ITA provided a "clear and self-contained code" for the making of claims to share loss relief. Under those provisions, the taxpayer was entitled to make a claim for loss relief and to specify the year in which it was to be applied. The computational provisions of ITA, in particular, section 23 ITA, were equally clear that the amount of the claim was to be taken into account in computing the taxpayer's "net income" for that year and accordingly in calculating his "tax liability" for that year. Lord Carnwath says this (at *Derry* [35]):
>
> > 35. While it may be true, as Henderson LJ said, that modern tax legislation in general is much more complex than at the time of Lord Dunedin's classic statement, the purpose of the tax law rewrite was to restore a measure of simplicity and coherence to the principal tax statutes. In any event, one does not need high judicial authority to make the obvious point that the first step in the imposition of a tax is to establish (in Lord Dunedin's words) "what persons in respect of what property are liable". Taken together section 23 and sections 131-132 appear to constitute a clear and self-contained code for the treatment of a claim to share-loss relief such as that of Mr Derry. Sections 132-133 in terms give him an "entitlement" to make the claim, to specify the tax year to which it is to be applied, and to do so by deducting it in the calculation of his "net income" for the purpose of section 23. For good measure section 132(1) provides a specific signpost to Step 2 in section 23. That section in turn makes clear that the "result" of that, and the other steps there set out, is his "tax liability" for the tax year in question.
>
> 52. That entitlement was not overridden by Schedule 1B. The Court noted that there was no specific cross-reference in ITA to Schedule 1B in relation to the provisions regarding claims

for share loss relief. This was in contrast to the provisions governing the other loss reliefs – where cross-references to paragraph 2 Schedule 1B are found in s.60(2) ITA in relation to trade loss relief and in s.128(7) ITA in relation to employment loss relief. Lord Carnwath says this (at Derry [36]-[37]):

> 36. Having taken such care to walk the taxpayer through the process of giving effect to his entitlement as part of his tax liability for the year specified by him, it would seem extraordinary for that to be taken away, without any direct reference or signpost, by a provision in a relatively obscure Schedule of another statute concerned principally, not with liability, but with management of the tax. Section 1020 makes no specific reference to Schedule 1B, and in any event refers only to "information" in general terms, rather than anything likely to affect the substance of liability. By contrast sections 60(2) and 128(7) are more than mere "signposts", as the judges below characterised them. The words "subject to" are substantive in effect, imposing a qualification on the right otherwise conferred by those provisions. Applying ordinary principles of interpretation, the absence of similar words in section 132 would naturally be taken as indicating that this right is not subject to the same qualification.
>
> 37. Turning to the TMA, it is true that words of Schedule 1B taken on their own would be apt to apply to a claim under sections 132-133. However, I do not regard that as enough to displace the clear provisions of the ITA in respect of liability. I do not see this as turning so much on whether one set of provisions is more specific than the other, but rather on the fact that the ITA is in principle the governing statute in respect of tax liability, and as such should take precedence in the absence of any indication to the contrary. Further, unlike the judges below, I see a significant inconsistency between the two sets of provisions: the first gives the taxpayer an unqualified right to claim a deduction in the previous year; the second in effect removes that right by treating it as relating to the current year. I also see force in Ms McCarthy's reliance on the reference in section 42(11A) to "certain claims" for relief involving two or more years. As she says, this may be read as implying that not all such claims are covered, and that one needs to look elsewhere to identify which. (I do not forget that in Cotter para 14, Lord Hodge proceeded on the basis that section 42(11A) had the "same" effect in respect of employment loss relief as the specific provision in section 128(7), but the point was not in issue and does not seem to have been subject to argument.)"

36. The FTT at [53] drew upon the distinctions between the share loss relief provisions in ICTA and ITA as highlighted by the Lord Carnwath at [38] in further observations:

> "53. As can be seen from the above extracts, the Supreme Court decision is informed to a significant extent by the structure of ITA. Mr Hall, for HMRC, says that this is a critical factor, and that ITA made a change in the law in that respect, but only in relation to share loss relief. Mr Grierson, for Mr Murphy, says that it is not. He says that the statutes such as ITA which were part of the Tax Law Rewrite Project were intended to restate the law and not to make material changes (see the preamble to ITA). The ITA provisions were simply restating the position that obtained under the earlier provisions including section 574 ICTA.
>
> 54. Lord Carnwath commented on this question in his judgment in *Derry SC*. He said this (at *Derry SC* [38]):
>
> > 38. The only countervailing consideration, to my mind, is the lack of any obvious explanation, in the statutory history or otherwise, of the different treatment of this form of loss relief. In a post-hearing note Mr Nawbatt gave a detailed account of the treatment of the various forms of loss relief under the previous legislation. This shows, as is common ground, that the pre-2007 law did not draw any material distinction between share loss relief (section 574 ICTA), and trade and employment loss relief (section 380 ICTA). Mr Nawbatt was also able to point to some indications in the ITA Explanatory Notes (e.g. in respect of section 1025, which is not directly relevant to the

present case) that the authors of the notes may have assumed that share loss relief would be subject to TMA Schedule 1B, in the same way as the other forms of relief. However, taken at their highest, these indications are far from providing a basis for departing from the ordinary principles of statutory interpretation, absent any suggestion that they produce a result which is absurd or unworkable. Indeed, for the taxpayer's liability to be determined by reference to legal archaeology of this kind would negate the whole purpose of the tax law rewrite. It is neither necessary nor appropriate for the court to speculate as to Parliament's intentions to justify a departure from the natural interpretation of the statutory language.""

Outline of the Appellant's case

37. Mr Grierson submitted that the FTT erred in its conclusion at [61]-[62] of the Decision on the First Share Relief Issue. He argued that the Appellant correctly made his claim under the carry-back provision of s.574(1)(b) of ICTA which permitted relief for a loss of £183,140.43 on the disposal of shares incurred in year 06-07 to be claimed and included in his return for 05-06, the previous year of assessment.

38. He contended that *Derry SC* was binding in its application to s.574 ICTA and HMRC could not pray in aid paragraph 2(3), Schedule 1B to TMA 1970 to treat the Appellant's claim for share loss relief as relating to the later year, namely 06-07 rather than 05-06. There was no direct reference made within s.574 ICTA to s.42 TMA nor to schedule 1B TMA applying.

39. Mr Grierson argued that the *ratio* of *Derry SC* at [36]-[38] applied equally to share loss relief under s.574 ICTA as it did to s.132 ITA: s.574(1)(b) provided its own comprehensive self-contained code both in relation to method and time limit for making claims to share loss relief *"by notice given within twelve months from the 31st January next following that year"*. The procedural and management provisions found in 'a relatively obscure schedule' to the TMA could not displace the clear provisions of the primary taxing statute, ICTA, which permitted share loss relief incurred in 06-07 to be claimed in either year 05-06 or 06-07.

40. He also submitted that the signposts to paragraph 2, Schedule 1B TMA in s.60(2) ITA (on trade loss relief) and s.128(7) ITA (on employment loss relief) are a statutory enactment of [16] of the judgment of the Court of Appeal in *Blackburn v. Keeling* [2003] EWCA Civ 1221 ("*Blackburn*") in relation to s.380 ICTA 1988 which was the provision in ICTA governing both trade loss relief and employment loss relief now found in ss.60 and 128 ITA. However, this is not relevant to the present case where the Appellant properly made his claim for a different type of loss relief, namely share loss relief, in his return for the earlier year, 05-06.

41. Mr Grierson therefore contended that the fact that Parliament did not include a similar signpost to paragraph 2, Schedule 1B TMA in s.132 ITA (on share loss relief) demonstrates that Parliament considered and intended that Schedule 1B TMA did not apply to its predecessor provision, s 574 ICTA, under which the Appellant made the claim for share loss relief in his 05-06 return.

42. In summary, he argued that any valid enquiry would have to have been opened under s.9A TMA into the 05-06 return. No such enquiry was opened (it was opened under Schedule 1A TMA as an enquiry into a standalone claim). The consequence of all this was that

HMRC's denial of the relief claimed in the closure notice was not valid. The separate enquiry opened by HMRC under s.9A TMA 1970 into the Appellant's return for the later year 06-07 was not competent to enquire into the Appellant's claim under the carry-back provision of paragraph s.574(1)(b) ICTA in his return for the earlier year 05-06; that is because that purported enquiry was not opened in relation to the return in which the claim was made.

Discussion and Analysis

43. As persuasively as they were made, we reject Mr Grierson's submissions and agree with those of Mr Carey. This ground does not give rise to any error of law on the part of the FTT.

44. We agree with the FTT's reasoning and its conclusion at [61] that schedule 1B TMA applied to claims for share loss relief under s.574 ICTA so that the Appellant's claim was to be treated as relating to 06-07 rather than 05-06. We find no error of law in the FTT's conclusion that *Derry SC* only applied to s.132 ITA share loss relief claims and not in relation to s.574 ICTA share loss relief claims.

45. There were two parts to the FTT's reasoning for its conclusion.

46. The first is that prior to the ITA, Schedule 1B TMA applied to share loss relief and other forms of loss relief – employment and trade loss relief - under ICTA.

Prior to the ITA all loss relief claims under ICTA were to be made or treated in a similar way – Schedule 1B TMA applied

47. There is no doubt that Schedule 1B TMA applied to trade loss relief claims made under s.380 ICTA.

48. In *Blackburn*, the Court of Appeal had allowed for the possibility (without finally determining the point) that a claim to carry back trading losses is a claim which relates to the later year and paragraph 2(3), Schedule 1B TMA applies to s.380 ICTA (see [14-16]).

49. At [16], Carnwath LJ, as he then was, observed as follows in relation to the possible application of Schedule 1B TMA "(so far as it applies)" to s.380 ICTA:

> "16. This elaborate deeming provision has the effect (so far as it applies) that, where under section 380(1)(b) loss relief is claimed on income in the preceding year, the claim nonetheless "relates" to the later year (para 2(3)). The amount of the claim is computed using the formula in paragraph 2(4), based on the income in the previous year; but it does not affect the tax position in the earlier year (para 2(3)). It gives rise to a "free-standing credit" (in the Revenue's language) which can be used in any of the ways set out in paragraph 2(6)."

50. Contrary to Mr Grierson's submission, the Court of Appeal expressly declined to determine the issue of the applicability of Schedule 1B to s.380 ICTA claims and simply rehearsed the competing arguments at [39]-[41]. The FTT rightly observed at [59] of its Decision that this authority took the arguments in this appeal no further.

51. However, the Supreme Court in *R (on the application of De Silva & Anor) v. HMRC* [2017] UKSC 74, [2017] 1 WLR 4384 ("*De Silva*") did conclude that Schedule 1B TMA applied to trade loss relief under s.380 ICTA. It held that relief claimed under ss.380 and

381 ICTA must be claimed in Year 2 and effect given to it in that year by virtue of paragraph 2(3) & (6) of Schedule 1B TMA. The Supreme Court noted that "a claim to carry back losses is a claim for relief involving two or more years of assessment and as the taxpayers' claims are of that nature" (at [17]). Lord Hodge therefore stated at [28]:

> "28. If a taxpayer wished to carry back part of the losses incurred in Year 2 to set off against his income of Year 1 by invoking section 380(1)(b) of ICTA, he would also have to make the claim in his return for Year 2. This is the combined effect of section 8(1AA)(a) and Schedule 1B paragraphs 2(3) and (6). As shown in para 18 above, those paragraphs provide that the claim for relief relates to Year 2 and effect is to be given to that claim in relation to Year 2…"

52. In *Knibbs*, the Court of Appeal affirmed *De Silva* and found that Schedule 1B TMA also requires that the claim for trade loss relief under s.64 ITA be made in Year 2 and effect given in that Year. According to David Richards LJ at [59]:

> "59. This reasoning therefore provides clear authority, at the highest level, that where a claim to carry back trading losses is made, the taxpayer must make a claim in his tax return in respect of Year 2, and state the extent to which the relief claimed has already been given: see [29]. This obligation, one might think, is a natural corollary (our wording, not Lord Hodge's) of the fact that the carry-back claim relates to Year 2, and effect must be given to it in relation to that year: ibid. The obligation is reinforced by the further fact that, if the taxpayer wishes to carry back only part of the losses incurred in Year 2, it is obviously necessary for him to make the claim in his Year 2 return, because only thus can the amount in which the taxpayer is chargeable to income tax in Year 2 be ascertained: see [28]. The same also applies even if the taxpayer has already received full relief in Year 1, by means of a claim under schedule 1A, because that information still forms a necessary part of the Year 2 return. Only in this way can the "net amounts" referred to in section 8(1AA)(a), for which the taxpayer is chargeable to tax in Year 2, be ascertained: ibid."

53. Significantly, the Court of Appeal in *Knibbs* also found that it was bound by *De Silva* to find that the same applied to pre-2007 claims under s.380 ICTA and that these must be treated in the same way as claims under s.64 ITA: see [30], [35] and [67].

54. Furthermore, the implication of *Knibbs* and *De Silva* is that, prior to the implementation of ITA in 2007, share loss relief under s.574 ICTA was also to be claimed and processed in the same way as employment and trading loss relief under ss.380-381 ICTA. The mechanism for claiming share loss relief under ICTA was similar to that for claiming employment and trade loss relief. ICTA appears to provide for the claims for all three reliefs in similar fashion and a brief comparison of ss.380-381 and s.574 ICTA demonstrates this.

55. As the FTT noted at [54] of the Decision, Lord Carnwath expressly stated as much in *Derry SC* at [38]: "This shows, as is common ground, that the pre-2007 law did not draw any material distinction between share loss relief (section 574 ICTA), and trade and employment loss relief (section 380 ICTA)."

56. Ss.380, 381 and 574 ICTA make no material distinction between the manner in which the three reliefs are to be claimed and none of the provisions make any reference to Schedule 1B TMA but it has nonetheless been found to apply to s.380 ICTA. Contrary to the Appellant's reliance on *Derry SC* at [36]-[37], although there is no express reference to

Schedule 1B TMA in the ICTA provisions by which the relief is provided, it nevertheless applies by virtue of s42(1) & (11A) TMA.

57. Mr Grierson submits that there is an inconsistency between the decision in *Derry SC* on the one hand, and [20] of the decision of the Supreme Court in *De Silva* and [28] and [70]-[76] of the judgment of the Court of Appeal in *Knibbs* on the other hand, and the Upper Tribunal is bound to follow the later and higher authority of the Supreme Court in *Derry SC* which supports the Appellant's case.

58. We disagree. There is no inconsistency between any of these authorities.

59. There is additional support for our conclusion from the statutory analysis. Importantly, s.574(2) ICTA makes specific reference to the priority of share loss relief over other reliefs in ss.380 and 381 ICTA. This also implies that each of the three reliefs would be claimable in the same way.[2]

60. We therefore agree with the FTT that there was no material difference in the law applicable to the manner in which share loss relief and the other forms of loss relief in ICTA were to be claimed. We also agree with the FTT that, although there is no express reference to Schedule 1B TMA within any of the ICTA loss relief provisions, it nonetheless applies to each because *De Silva* puts beyond doubt that it applies to s.380 ICTA. There need not be any specific reference to Schedule 1B TMA in the statute which provides the relief itself, ICTA, for Schedule 1B to apply. Schedule 1B TMA is to apply by virtue of s.42(11A) TMA.

61. There was accordingly no error of law by the FTT in concluding that Schedule 1B TMA applies to s.574 ICTA share loss relief claims as it did to s.380 ICTA trade loss relief claims.

The ITA made a limited but material change in the law from ICTA on share loss relief claims

62. The second part of the FTT's reasoning at [61] was that there is good reason to conclude that *Derry SC* is not binding in relation to s.574 ICTA because the ITA made a material change to the law as to the application of Schedule 1B TMA to share loss relief claims.

63. We also agree. We respectfully reject Mr Grierson's submission that ITA was purely intended to include a rewrite of ICTA and made no change of the law in relation to claims for share loss relief. He relied upon a report to the House of Lords and House of Commons Joint Committee on Tax Law Rewrite Bills and an academic article in Statute Law Review to submit that ITA was only a consolidating and rewrite statute.

64. However, ss.131-133 ITA specifically distinguish share loss relief by not referring to Schedule 1B TMA whereas ss.60(2) and 128(7) ITA expressly stipulate that trading and

[2] It might also provide a potential issue if trade and employment loss relief could only be claimed in the later year because Schedule 1B applied, but share loss relief could be claimed in respect of either year because Schedule 1B did not apply. This would then mean that the priority of share loss relief over other reliefs will not be effective in respect of the earlier year, because they are not claimable, but it will be for the later year. We accept that this potential issue also arises as a result of *Derry SC* because s.133(4) ITA provides for the priority of share relief over the trade loss reliefs in ss.64 and 72 ITA 2007. The latter reliefs would, for years since 2007, only be claimable in respect of the later year while share loss relief would be claimable in respect of either year.

employment loss reliefs are subject to schedule 1B TMA. The implication of [38] of *Derry SC* is that, after the implementation of the ITA, the existing application of Schedule 1B TMA to ss.380-381 ICTA was made express in relation to their successor ITA provisions but there was a material departure in relation to share loss relief under s.132 ITA: Schedule 1B was not expressed to, nor did, apply to share loss relief claims under s.132 ITA.

65. Therefore, the ITA did not simply clarify, codify or restate the law but involved a material change in this limited respect from ICTA (whatever the stated intention of the law revision project). There is support for this proposition in *Knibbs* at [66] in which the Court of Appeal relied on Lady Arden's judgment in *Derry SC* at [86] for the conclusion that the ITA made minor changes from the previous legislation:

> 66. We should also refer to some of the comments made by Lady Arden at [84] to [90], which Lord Carnwath said should be read with the guidance given by Sales J quoted above. After noting that the Preamble to ITA says that its purpose was "to restate, with minor changes, certain enactments relating to income tax; and for connected purposes", Lady Arden continued:
>
> > "86. So, ITA is not a pure or "straight" consolidation Act. However, as the Explanatory Notes cited by Lord Carnwath JSC confirm, it is not (except for the minor changes) intended to change the law. That is a matter which the courts must in my judgment respect when interpreting the new legislation. …"

66. It is also apparent that share loss relief provisions in ITA and ICTA are different. It is understandable how the Supreme Court in *Derry SC* came to view ss.131-133 ITA as a self-contained code for claiming share loss relief which, in the absence of express reference to Schedule 1B TMA applying, prevailed over it. Lord Hodge partly relied upon this at [35].

67. We accept Mr Grierson's submission that s.574(1) ICTA stipulates the form and time limits for making a share loss relief claim and s.132 ITA introduces nothing new in that regard. Ss.380(1) & 574(1) ICTA each make provision for the form of a claim including the time limit in which it is to be made, just as ss. 64(5) & 132(4) ITA do. Nonetheless, ss.131-133 ITA do more than simply transpose or mirror s.574 ICTA. Notably, even to the casual observer, ss.131-133 ITA provide a more detailed or complete code for claiming and calculating the amount of share loss relief than s.574 ICTA. A comparison table is set out in Annex A.

68. S.132 ITA contains more detailed requirements than s.574(1) ICTA on the process or procedure for making the claim and s.133(1)-(3) ITA contains more requirements on the calculation of the claim than s.574(1)(a) & (b) ICTA. For example, the extra provisions in s.133 on the calculation of the loss to be deducted do not appear in s.574(1). Ss.132(1) & 133(1) ITA expressly incorporate or refer to s.23 ITA, a new provision, on how the income tax liability is to be calculated. Lord Hodge in *Derry SC* noted and relied upon these provisions at [35] in support of ITA providing a self-contained code. However, they do not appear in ICTA.[3]

[3]It is also worth observing that paragraphs 2(4)-(7), Schedule 1B TMA arguably provide more detail than s.574(1) ICTA on how to calculate the amount of claim and give effect to it (they are closer to s.133(1)-(3) ITA) so it cannot even be said that s.574 ICTA provides a more complete code than paragraph 2, Schedule 1B.

69. Thus, we agree with the FTT that there was a material change in law as to how claims might be made for share loss relief from s.574 ICTA to ss.131-133 ITA and that Schedule 1B TMA applied to the former, not the latter.

Appellant's other arguments considered

70. Statutory comparison aside, we briefly address the Appellant's broader point that the *ratio* of *Derry SC* at [36]-[37] applies equally to ICTA: that the 'relatively obscure' Schedule 1B TMA to the Act governing the management of taxes - should not displace the primary taxing statute, ICTA, which imposes liabilities and grants reliefs, particularly when the primary taxing statute provides a code for claiming and calculating relief.

71. For the reasons set out above, we do not agree that the reasoning in *Derry SC* means that Schedule 1B TMA applies to ICTA as it does to ITA.

72. We do of course accept that there is a similar range of loss relief claims available under ICTA and ITA in addition to share loss relief and the corresponding provisions largely mirror each other, but with notable exceptions. We have also noted that there is some reasoning in *Derry SC* which might apply as much to share loss relief claims under ICTA and ITA. Nonetheless, while the FTT and UT are bound by the *ratio* in *Derry SC* in relation to the ITA, they are not so bound in relation to ICTA which was not considered.

73. The Appellant's argument in relation to his ability to make the claim in his tax return for 05-06, both before the FTT and in this appeal, is based on an analysis of ICTA as if it was directly considered in *Derry SC*. However, the Supreme Court in *Derry* was concerned with a claim made under the successor legislation. Subsequent legislation on the same subject matter may only be relied on as an aid to interpretation where the legal meaning of an enactment is doubtful (see *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7 at [59]). Mr Grierson has not persuaded us that the effect of s.42(11A) and Schedule 1B TMA upon s.574 ICTA is doubtful.

74. *Derry SC*, being a decision interpreting ITA, is of little assistance in construing ICTA. The prior legislation was not in issue in that case. As we have explained above, in *Derry SC* the parties agreed "that the pre-2007 law did not draw any material distinction between share loss relief (s.574 ICTA 1988) and trade and employment loss relief (s380 ICTA 1988)" (see [38]). The decision is itself based on a rejection of the type of "legal archaeology" on which this Appellant's argument in this case was based in favour of a comparison between the wording of the ITA conferring different types of loss relief (see [35]-[36]). Such a comparison is not required for a case determining whether Schedule 1B applies to a claim which pre-dates the ITA. The decision in *Derry SC* was informed significantly by the structure of the ITA.

75. Mr Carey also points out that Lord Hodge's reasoning in relation to s.132 ITA was influenced by the heading to the section 'Entitlement to claim' and at [36] relied in part on the fact that ss.131-133 "walk the taxpayer through the process of giving effect to his *entitlement* as part of his tax liability for the year specified by him". S.574 ICTA does not speak of an entitlement to claim the relief in the same manner.

76. For these reasons, the *ratio* of *Derry SC* does not apply to this case. The provisions of s.574(1) ICTA do not displace the express provisions of s.42(11A) TMA and paragraph 2(3), Schedule 1B which apply to share loss relief under that predecessor Act even if not to relief pursuant to s.132 ITA.

77. Mr Grierson also argued that at [55] of the Decision the FTT misconstrued and misapplied the passage from [38] of the judgment of Lord Carnwath in *Derry SC* set out in [54] of the Decision. He argued that Lord Carnwath expressly rejected there the approach taken by the FTT at [55] of the Decision, in fact stating the following in relation to the parties' agreement in *Derry* that "the pre-2007 law did not draw any material distinction" between share loss relief and other forms of loss relief: "However, taken at their highest, these indications are far from providing a basis for departing from the ordinary principles of statutory interpretation". Whatever the appropriate implication, if any, of Lord Carnwath's observations, this does not affect our analysis for the reasons set out above – *Derry SC* applies to ITA, not ICTA.

78. Mr Grierson also submitted that [56] to [59] of the Decision give inadequate weight to the fact that, following the decision of the Court of Appeal in *Blackburn*, when Parliament enacted the share loss relief provision in s.132 of ITA, it decided not to include a cross reference to Schedule 1B of TMA, whereas Parliament did include such an express cross reference in the trade loss and employment loss relief provisions of ss.60(2) and 128(7) ITA.

79. As we have explained, *Blackburn* did not, in fact, decide what Mr Grierson submits – it was *De Silva* that determined that Schedule 1B TMA applied to s.380 ICTA and that 2017 Supreme Court decision postdated the introduction of the ITA by ten years. Therefore, this does not support ITA as being intended to replicate the existing position under ICTA in all respects nor that there was a distinction between the application of trade and share loss relief under ICTA with Schedule 1B applying to the former but not the latter.

80. Mr Grierson also sought to introduce a new argument that Schedule 1B TMA does not apply to s.574 ICTA because s.42(1) TMA states the section applies "unless otherwise provided". He submitted that s.42 is disapplied wherever a primary taxing statute provides inconsistently with s.42(1), including for a different mechanism for claims involving more than one year. He notes that this point has never been made in any of the arguments in any of the cases that have come before the courts, it has never been considered and some prior authorities were wrongly decided.

81. We disagree with Mr Grierson's submission for the reasons given by Mr Carey.

82. Mr Carey submitted that the reason the point had never been argued or determined in other cases was that it was obviously wrong. The proviso in s.42(1) is not engaged by implication or by inconsistent other statutory provisions – just as paragraph 2(3), Schedule 1B TMA applies even though it provides for an inconsistent outcome to s.574(1)(a) & (b) ICTA. The proviso phrase 'unless otherwise provided' in s.42(1) TMA is only engaged if there is express disapplication by a provision within the TMA or other legislation. Mr Carey gave two examples of other provisions by which s.42 TMA has been expressly excluded from applying to that legislation: s.201(5) of the Capital Allowances Act 2001 and reg.12(1) of The Registered Pensions Schemes (Relief at Source) Regulations 2005.

83. We are satisfied that the proviso phrase 'unless otherwise provided' in s.42(1) TMA, requires an express statutory provision that s.42 is to be disapplied. It is not disapplied by implication. S.42(1) provides that s.42(11A), and hence Schedule 1B TMA, is to apply to the Taxes Acts, unless otherwise provided. The general interpretation in s.118 TMA defines the Taxes Act, providing that this is all statutes relating to income tax and capital gains tax:

> "tax", where neither income tax nor capital gains tax nor corporation tax nor development land tax is specified, means any of those taxes .. ,
>
> "the Taxes Acts" means this Act and—
>
> (a) the Tax Acts ... and
> (b)the Taxation of Chargeable Gains Act 1992 and all other enactments relating to capital gains tax…

Summary

84. In summary, there are three primary reasons for agreeing with the FTT's conclusion at [61]-[62]: first, the earlier authorities (*De Silva*, *Knibbs* and *Derry SC*) which confirmed that Schedule 1B TMA applied to s.380 ICTA trade loss relief claims and implied that Schedule 1B TMA applied to all loss relief claims under ICTA in similar fashion; second, the Supreme Court in *Derry SC* relied in part for its conclusion in relation to the ITA by the absence of express reference to Schedule 1B within the share loss relief provisions in ss.131-133 ITA in contradistinction to the references in ss.60(2) and 128(7); third, we have highlighted differences between the share loss relief provisions in ICTA and ITA which support there being a material change in the law in the way the relief was to be claimed – the self-contained code on share loss relief in ss.131-133 ITA is more detailed than s.574 ICTA and is more obviously complete on its own terms.

Conclusion

85. In conclusion, there was no error of law in the FTT finding that i) prior to the introduction of ITA in 2007 all ICTA share loss reliefs were to be claimed in the same way with Schedule 1B TMA applying; ii) after its introduction, there was a material change in law and Schedule 1B TMA applied to employment and trade loss relief claims but not to share loss relief claims. The FTT was right to decide that the judgment in *Derry SC* does not support the contention that Schedule 1B TMA does not apply to share loss relief claims under s.574 ICTA. For the reasons set out above, the pre-ITA position was that no express reference to Schedule 1B in the statute providing for any loss relief to be carried back was required for it to apply to such a claim. In relation to s.574(1) ICTA, Schedule 1B TMA is invoked because the claim by its nature relates to two years of assessment (as in s.42 TMA, *Knibbs* and *De Silva*), not because there is any specific or express statutory signpost to Schedule 1B TMA. Further, the FTT was right to find that it was bound by *De Silva* (and *Knibbs* at [67] to like effect) and that the Appellant's claim in 05-06 should be treated as relating to (and made in the return for) the tax year 06-07.

86. A claim for relief pursuant to s.574 ICTA is a claim to which Schedule 1B TMA applies. The claim therefore "relates to the later year", and the FTT made no error in relation to the First Share Loss Relief Issue. The Appellant's appeal on this ground is dismissed.

SECOND SHARE LOSS RELIEF ISSUE

87. The FTT identified the Second Share Loss Relief issue in the following terms at [48(2)] of the Decision:

> (2) If …it was an error for Mr Murphy to include the claim in his tax return for the tax year 2005/6 – was his claim nonetheless included "in" his return with the effect that HMRC could only enquire into it under section 9A TMA? (The "second issue")

88. The FTT concluded at [72]-[74] that HMRC was not entitled to enquire into the 05-06 return as if the relief claim were made outside a return. Thus, the enquiry notice, and closure notice under schedule 1A TMA were invalid – the enquiry for the return should have proceeded under section 9A TMA:

> "72. In the present case, we have decided that Mr Murphy was not entitled to make a claim for share loss relief in his return for the tax year 2005/6. Mr Murphy filed his return. The return refers to the loss relief in the parts of the return concerned with the carry-back of losses from later years. The amount of the claim is not reflected in the calculation of the tax due for 2005/6 because the box in the return was populated automatically. Nonetheless it is clear on the face of the return that Mr Murphy was claiming to set the loss arising on the disposal of the shares against his taxable income for the tax year 2005/6.
>
> 73. This is, of course, the issue that was addressed by the Court of Appeal in *Derry CA*. Henderson LJ expressed the view that, in these circumstances, the claim should be regarded as being included in the return and that HMRC must enquire into the return under section 9A TMA. As this was the ratio of the decision, the decision of the Court of Appeal on this issue is binding upon us. There are circumstances in which the Supreme Court can effectively overrule a decision of the Court of Appeal by an expression of opinion which is strictly obiter. However, those circumstances are very limited: it would in effect require a direction from the Supreme Court as whole that the relevant case was wrongly decided. The reservations expressed by Lord Carnwath together with the provisional view expressed by Lady Arden in *Derry SC*, cannot be taken as meeting that requirement.
>
> 74. We must therefore conclude – relying upon the obiter comments of Lord Hodge in *Cotter* as applied by the Court of Appeal in *Derry CA* – that, although Mr Murphy was not entitled to make his claim in his tax return for the tax year 2005/6, he made a claim for share loss relief "in" that return. HMRC were required to proceed with any enquiry under section 9A TMA. They did not do so. The enquiry into the claim under paragraph 5 Schedule 1A TMA was not valid and the relevant closure notice under paragraph 7 Schedule 1A TMA was equally not valid."

The Law

Legislation

89. S.42(11) TMA provides that "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…".

90. The starting point for these purposes is s.8 TMA which sets out the circumstances in which HMRC may require an individual to make a return for the purposes of income tax

and capital gains tax and what that return must include (s.8(1AA)). For the relevant periods, it was in the following form:

> 8.— Personal return.
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
> (a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
> (1A) The day referred to in subsection (1) above is—
> (a) the 31st January next following the year of assessment, or
> (b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given.
> (1AA) For the purposes of subsection (1) above—
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) of ITTOIA 2005 applies.
> ...

91. S.9A TMA provided, so far as relevant, for enquiries to be opened into s.8 returns, by an officer of HMRC giving a notice of enquiry:

> 9A Notice of enquiry
> (1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")–
> (a) to the person whose return it is ("the taxpayer"),
> (b) within the time allowed.
> (2) The time allowed is–
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date;
> (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;
> (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.
> For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.
> …
> (6) In this section "the filing date" means the day mentioned in section 8(1A) or, as the case may be, section 8A(1A) of this Act."

92. As provided by s.42(11), Schedule 1A TMA contains provisions governing the making of claims that are not included in a return, enquiries into those claims and the closure of those enquiries. Paragraph 5, Schedule 1A contains HMRC's power to enquire into such

claims. It provides, so far as relevant, for the opening of an enquiry by the giving of a notice within the specified period:

> "5.—
>
> (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.
>
> (2) The period referred to in sub-paragraph (1) above is whichever of the following ends the latest, namely—
>
> (a) the period ending with the quarter day next following the first anniversary of the day on which the claim or amendment was made;
>
> (b) where the claim or amendment relates to a year of assessment, the period ending with the first anniversary of the 31st January next following that year; and
>
> (c) where the claim or amendment relates to a period other than a year of assessment, the period ending with the first anniversary of the end of that period;
>
> and the quarter days for the purposes of this sub-paragraph are 31st January, 30th April, 31st July and 31st October.
>
> ..."

Case law

93. The FTT at [64]-[71] explained the effect of two relevant authorities that address this issue. The first is *HMRC v Cotter* [2013] UKSC 69 (*"Cotter"*), in the Supreme Court at [24]-[28].

Cotter

94. At [64] the FTT explained the issues in *Cotter*:

> 64. In relation to the effect of the claim on Mr Murphy's return, we turn first to the Supreme Court decision in *Cotter*. That case involved a claim for employment loss relief for a loss sustained in the tax year 2008/9, but carried back to the tax year 2007/8. The taxpayer's return for the tax year 2007/8 was initially filed in paper form. In that return, the taxpayer did not claim the relevant loss and did not calculate his own tax liability for the year, but left it to HMRC to do so. The claim to carry back the loss to the tax year 2007/8 was subsequently made by the taxpayer's accountants on his behalf. The accountants also submitted an amended return for the tax year 2007/8. HMRC sought to enquire into the claim under Schedule 1A TMA.

95. At [24]-[26] of *Cotter*, Lord Hodge rejected the taxpayer's argument that the claim was made in the return because Mr Cotter had not calculated the tax which he was due to pay as part of his return. For the purposes of s.8(1) TMA, a return refers to the information in the return submitted by the taxpayer as to the amount of tax chargeable and payable and therefore it was a claim made outside the return to which Schedule 1A TMA applied:

> 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 TMA 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(3) and (3A) of TMA).
>
> 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 TMA . But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the TMA , 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) TMA).
>
> 26. In this case, the figures in box 14 on page CG1 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 ITA in respect of losses incurred in 2008/09 did not alter the tax chargeable or payable in relation to 2007/08. The Revenue was accordingly entitled and indeed obliged to use Schedule 1A of TMA as the vehicle for its enquiry into the claim (section 42(11)(a)).

96. The FTT noted the effect of these paragraphs at [66] of the Decision setting out the further *obiter* comments of Lord Hodge in *Cotter* at [27]-[28] that if the taxpayer had calculated his liability to tax in the tax calculation summary as part of his self-assessment return then the claim would have been made in the return:

> 66. In this passage, Lord Hodge appears to make a distinction between information included in the tax return form, which is relevant for the purpose of establishing the amount on which the taxpayer is liable to tax for the relevant tax year, and other information which does not affect the amount chargeable in that tax year. Lord Hodge then went on to comment, albeit obiter, on the position that would have been reached if the taxpayer had calculated his own liability (incorrectly) taking account of the loss rather than rely upon the HMRC calculation. He says this (at *Cotter* [27]-[28]):
>
> > 27. Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/08. Such information and self-assessment would in my view fall within a "return" under section 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer's self-assessment without either amending the tax return (section 9ZB of TMA) or instituting an enquiry under section 9A of TMA.

> 28. It follows that a taxpayer may be able to delay the payment of tax by claims which turn out to be unfounded if he completes the assessment by calculating the tax which he is due to pay. Accordingly, the Revenue's interpretation of the expression "return" may not save it from tax avoidance schemes. But what persuades me that the Revenue is right in its interpretation of "return" is that income tax is an annual tax and that disputes about matters which are not relevant to a taxpayer's liability in a particular year should not postpone the finality of that year's assessment.

Derry CA

97. The next relevant authority is *R (on the application of Derry) v HMRC* [2017] EWCA Civ 435 (*"Derry CA"*).

98. At [57] of *Derry CA*, Henderson LJ referred to Lord Hodge's *obiter* observations at [27]-[28] of *Cotter* on the position where a taxpayer calculates their tax liability. Henderson LJ decided that the principle also applies to information provided by the taxpayer in an electronic return which is relevant to the calculation of a tax liability such as boxes 15 & 16 in the return on 'adjustments to tax due'. The inclusion of that information is not extraneous to the return which means that the claim is included in the return:

> 57. This part [[27]-[28]] of Lord Hodge's reasoning [in *Derry SC*] was obiter, but it followed from his careful analysis of the statutory scheme of schedule 1B and of the information which is properly to be regarded as "included in a return" for the purposes of the claims provisions in TMA 1970. There is a clear distinction between, on the one hand, the inclusion of information which is irrelevant in law to the taxpayer's liability for the year of assessment covered by the return, and, on the other hand, the taxpayer's self-assessment of the tax which he is due to pay. Irrelevant information of the former type, even if entered in the return at the implicit invitation of the Revenue, is not to be regarded as included in the return when it comes to enquiring into the taxpayer's liability for the relevant year. But a taxpayer's self-assessment is a different matter. Plainly, errors of many different kinds may be made in such an assessment, and they may include errors about the availability of a relief. If the Revenue is dissatisfied with the taxpayer's self-assessment, its remedy is either to amend the return or to open an enquiry into it under section 9A of TMA 1970. As pointed out at [20] above, such an enquiry may extend to anything contained (or required to be contained) in the return. The boxes on page TC 2 for "adjustments to tax due" must in my view be regarded as containing information required to be contained in the return, where the taxpayer elects to perform his own self-assessment, because such adjustments form an integral part of the calculation of the tax due to be paid by him for the year in accordance with sections 23 and 24 of ITA . It follows that the information contained in those boxes cannot be regarded as extraneous to the return. As I understand it, this is the essential point which Lord Hodge was making in Cotter at [27], and if I may respectfully say so, I agree with it.
>
> [Emphasis added]

99. The FTT addressed *Derry CA* at [67]-[69]. The FTT explained that the Court of Appeal had decided in *Derry CA* that the position would be different from *Cotter* if an electronic return had been involved. If a claim is included in a tax return in a manner which affects the taxpayer's self-assessment then there is no dispute it is made in the return. However, the FTT decided that the *obiter* comments in *Derry CA* were to the effect that, if the calculation of income tax liability in electronic returns automatically prevents a loss from being carried back from a later year to an earlier year but there are nonetheless references to the carried back loss in the return, the claim is still made in the return:

> 69. This issue was addressed by the Court of Appeal in *R (on the application of Derry) v HMRC* [2017] EWCA Civ 435 ("*Derry CA*"). The Court of Appeal decided the question as to whether

> the taxpayer was entitled to deduct the relevant loss in calculating his net income for the earlier tax year in favour of HMRC. As we have seen, its decision on that point was then reversed by the Supreme Court, but it then went on to consider the effect of the claim that the taxpayer had erroneously made. On that issue, the Court of Appeal, relying upon the obiter dicta of Lord Hodge in *Cotte*r, decided that references to the carried-back loss in the tax return form albeit not in the tax computation should be regarded as being included "in" the return. This was the case even though the claim was not reflected in the calculation of the total tax due – it could not be because the on-line form automatically calculated the tax without taking into account the carried-back loss – and the claim was otherwise referred to in the part of the return that related to the carry back of losses from later years.
>
> [Emphasis Added]

Derry SC

100. The final authority to be considered is *Derry SC*. *Derry SC* did not decide the second issue in the appeal addressed by *Derry CA* at [57], summarised in the former at [3]:

> 3…The second [question] relates to the effect of the inclusion of such a claim (even if erroneous) within Mr Derry's return for the previous year, in circumstances where the Revenue have failed to institute a timeous enquiry into the return under Taxes Management Act 1970 as amended ("TMA") section 9A ("the tax return issue")…The second raises issues as to the correct understanding and effect of Mr Derry's return, in the light of the law and practice relating to the self-assessment regime, having regard in particular to the guidance given by this court in *Revenue and Customs Comrs v Cotter* [2013] UKSC 69; [2013] 1 WLR 3514 ("*Cotter*").

101. As the FTT explained, the Supreme Court left the point open because Lord Carnwath, with whom the majority agreed, stated at [68]-[69] in *Derry SC*:

> 68. I am not satisfied that these issues have been fully explored in argument before us, which has concentrated on the entitlement to relief rather than the means of enforcement. As has been seen, there remain unresolved uncertainties as to the correct interpretation of the entries in the on-line form and their treatment by the Revenue. In addition, we heard little discussion of the relationship of the enquiries respectively under section 9A and Schedule 1A paragraph 5. Apart from timing, I did not understand it to be suggested that there was any material difference between the processes. While it may be prudent for the Revenue to institute an enquiry under the former section, if there is any doubt about what is properly to be treated as part of the return, it does not necessarily follow that the Revenue is thereafter bound by the contents of the return for all purposes. If it later emerges that a claim was wrongly included in the return for that year (for example, because it should have been treated as subject to TMA Schedule 1B), it may at least be arguable that the Revenue should not be precluded at that later stage from opening an enquiry on the correct basis.
>
> 69. These are potentially important issues. Since we do not have to decide them in the context of the present case, I would prefer to leave them open for further consideration in an appropriate case with the benefit of full examination of the relevant law and practice.

102. However, Lady Arden went further and, *obiter*, provisionally disapproved of the judgment in *Derry CA* on this issue. At [82]-[83] of *Derry SC*, Lady Arden set out her reasons for disapproval, expressing the view that the conclusion of *Cotter* at [27] applies equally to paper and online returns and that, unless a claim feeds into the tax calculation and amount payable in that year, then it is not included in the statutory "return". She therefore considered that HMRC are not required to enquire into the return (under section 9A TMA) and instead could enquire into the claim (under Schedule 1A TMA):

82. The Court of Appeal reached the conclusion that the claim made by Mr Derry was relevant to the calculation of the tax due (see para 47 above) but they took no account of Mr Dean's evidence. However, if that evidence is accepted, it would seem to me provisionally to follow that that their conclusion was wrong and that the effect described by Lord Hodge in para 27 of *Cotter* (para 51 above) would apply only in this case to a paper return in which the taxpayer performed his calculation of tax due taking the claim into account. It follows that the Court of Appeal would be in error in applying Lord Hodge's reasoning to an online return (see per Henderson LJ cited at para 52 above).

83. If that is correct, then as I see it (as I have said) provisionally, unless the ratio in *Cotter* is to be in some way qualified for online tax return forms (which is not suggested), the relief claimed through Box 15 would not form part of the statutory "return" even if the true interpretation of Box 15 is that it is permitting an adjustment to the tax. I do not consider that a taxpayer would necessarily have been misled by this since he would see that his entry had no effect on the figure in Box 1. On that basis, HMRC would not have to open an enquiry into the return where the taxpayer had filled in Box 15 with an erroneous claim as opposed to an enquiry into the claim. I would provisionally so hold for the reasons that I have given.

[Emphasis Added]

HMRC's case in outline

103. In their cross-appeal HMRC submit that the FTT erred in law at [72]-[74] by deciding that the claim to share loss relief was made in the Appellant's 05-06 return. They contend that the claim to share loss relief was made outside, or on the face of, the return rather than in the return. Mr Carey argued:

(1) The share loss relief claim is not a claim which can affect the amount of tax chargeable and payable for the earlier year. The relevance of the earlier year is that the amount of the claim is calculated by nominally deducting the relief given from income in that earlier year, but it does not affect the tax chargeable and payable in that earlier year. According to *HMRC v Cotter* [2013] UKSC 69, as it does not affect the tax chargeable and payable in that earlier year, it is not a matter that may be included "in" the return for that year. The Appellant was obliged to include the claim in the tax return for the later year as it was a claim which related to the later year (para 2(3), Schedule 1B TMA 1970).

(2) The Appellant as a matter of fact made the claim on the face of his return for 05-06. Such a claim was not made "in" the Appellant's tax return for that year. By virtue of s.42(11) TMA, Schedule 1A applied to the claim.

104. He submitted that the FTT erred and was not bound to follow *Derry CA* for each of the following reasons:

(1) A decision of the Court of Appeal, such as *Derry CA*, on a point which has later been considered by the Supreme Court and expressly stated not to arise for decision is not binding according to the ordinary rules of precedent. In *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 ("*Al-Mehdawi*) at 881F per Taylor LJ, the Court of Appeal decided that decisions of the Court of Appeal were not binding "where the House of Lords, in giving the final decision of a case, expressly indicates that on the true facts, the issue resolved by the Court of Appeal did not require to be decided."

(2) The present case should have been distinguished on its facts from *Derry CA*.

The Appellant's case in outline

105. Mr Grierson submitted that the FTT came to the right conclusion for the right reasons at [72] to [74]. He argued that the enquiry into the Appellant's 05-06 return opened by HMRC under paragraph 5, Schedule 1A TMA to enquire into the Appellant's claim under section 574(1)(b) ICTA was not competent or valid. The power to enquire under paragraph 5, Schedule 1A to TMA 1970 only applies to "Claims Not Included In Returns", whereas the Appellant's claim was included in his 05-06 return as it was relevant information that went to the amount of tax chargeable per *Derry CA* at [57]. *Derry CA* was directly binding on this point for the reasons the FTT explained.

106. He therefore contended that HMRC's Closure Notice dated 25 July 2019 into the Appellant's return for the earlier year 05-06, purportedly made under paragraph 7, Schedule 1A TMA, was not valid. The Closure Notice was not founded on a valid enquiry into the Appellant's return for the earlier year 05-06.

Discussion and Analysis

107. The FTT considered itself bound by *Derry CA* at [57] to find that the Appellant's claim to share loss relief was made in the 05-06 return and could not be enquired into under Schedule 1A TMA (Decision at [74]).

108. We agree with Mr Carey that the FTT erred in coming to this conclusion for the two reasons he submitted.

Derry CA not binding: the ordinary rules of precedent

109. The FTT considered at [72]-[74] that it was bound by the decision of *Derry CA* on the issue of whether a claim is made in a return where a taxpayer includes such a claim in their tax return and intends for it to take effect in their own calculation of tax due.

110. We are satisfied that the FTT erred in law in deciding it was bound by *Derry CA* on this issue. According to *Al-Mehdawi*, a decision of the Court of Appeal is not binding where the Supreme Court in giving the final decision on the case decided the appeal on the first issue and decided that the second issue, on which the Court of Appeal made a decision, did not need to be decided or resolved (as in *Derry SC* per Lord Carnwath at [68]-[69]). This is notwithstanding the further doubt cast on *Derry CA* in the *obiter* comments of Lady Arden in *Derry SC* at [82]-[83] that the Court of Appeal's decision on the issue may be wrong and the figures in boxes 15 & 16 of the return for adjustments to tax were not part of the statutory return.

111. The FTT was not bound by *Derry CA* and was free to determine the issue of whether the claim to share loss relief was made in the return on the basis of the correct application of *Cotter* to the facts of this case. In doing so, it would have come to the conclusion set out below.

Distinguishing *Derry CA*

112. Further and in any event, even if the decision in *Derry CA* did constitute binding authority, the principle did not apply to this case because it should be distinguished on the facts. The way in which the Appellant's claim was made in Boxes 18.8 & 23.9 in the return did not bring it within the scope of the principle in *Derry CA* nor *Cotter*.

113. In *Derry*, the taxpayer performed his own self-assessment of the tax due, taking into account the claim for share loss relief in boxes 15 & 16 headed 'adjustments to tax due'. This included a re-calculation of the tax chargeable and payable from that which had been automatically calculated by the online system - see [43] & [45] of *Derry SC*:

> 43. He also calculated his own tax and completed the tax calculation summary pages (pages TC1 and 2) in the 2009-10 return as follows. On page TCl (headed "self-assessment"), in Box 1 ("total tax … due before any payments on account"), the figure of £95,546.36 appeared automatically as a result of entries made elsewhere on the form. Page TC2 (headed "adjustments to tax due") stated –
>
> > "You may need to make an adjustment to increase or decrease your tax for 2009-10 because you are ... carrying back to 2009-10 certain losses from 2010-11 ..."
>
> In Box 15 ("Any 2010/11 repayment you are claiming now") Mr Derry inserted the figure of £165,800; and in Box 16 ("Any other information") the words:
>
> > "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%."
>
> …
>
> 45. The legal effect of these entries is a matter of dispute. In the first place the Revenue do not accept that the personal tax computation is properly to be characterised as "generated by the 2010 Return" (in Henderson LJ's words). They accept that Mr Derry self-assessed his own tax liability for 2009/10, but their position is that his self-assessed liability was in the sum of (plus) £95,546.36, given in Box 1 on page TC1, not the figure after taking account of loss relief. The reference to the loss relief claim was to be treated as additional information in respect of a "free-standing credit"…

114. In *Derry*, the adjustment to tax figure of £165,800 was taken into account in the self-assessed tax liability – even though HMRC disputed that the loss relief should be taken into account. Thus the facts of *Derry* and the decision of *Derry CA* can be distinguished on the facts from this case, where the Appellant referred to a claim in boxes 18.8 ("tax you are reclaiming now") and 23.9 ("other information") on his return but that claim was not taken into account in the calculation of the self-assessment, either by the automated system or manually by the taxpayer stating a different calculation.

115. In the present case, the Appellant made a claim for an amount of loss relief in box 18.8 as explained in box 23.9, the white space, on his return for the tax year 2005-06. Although the Appellant may have been seeking to reduce his liability for that year, the claim was not in fact taken into account in the Appellant's calculation of the tax chargeable and payable for that year. As the FTT found at [72]: "The amount of the claim is not reflected in the calculation of the tax due for 2005/06 because the box in the return was populated automatically." The information in the electronic form did not and could never have affected the self-assessment calculation and it was a choice to use the online system rather than a paper return.

116. The Appellant therefore did not 'force' a claim into the tax return which he was not permitted to make, such as by adjusting figures in boxes of the return that would

automatically affect the tax calculation. The tax calculation in the electronic return was restricted in the manner contemplated by Lady Arden in *Derry SC* at [80]:

> 80. Again provisionally, there is no reason as it seems to me why the online form should not preclude an adjustment which would produce a result which was incompatible with the Taxes Acts. The objective in designing a tax return form, including an online form, is to help the taxpayer file a tax return which properly shows his liability, no more and no less. Indeed, Lord Hodge in *Cotter* specifically envisaged that HMRC could take steps to prevent a taxpayer making claims in the online form which he was not entitled to make: see para 24 set out by Lord Carnwath at para 51 above.

117. Therefore, we are of the view that the *obiter* comments outlined in [27] of *Cotter* are limited to the situation in which a taxpayer has brought an incorrect claim into the calculation of tax due for that year. This is not possible where the Appellant is prevented, by the programming and setup of the online tax return form from taking a claim which he is not entitled to make in that return into account in the calculation of the tax due for that year. There is no injustice to the taxpayer in this regard, the claim for relief will be made and processed, even if it is claimed in the wrong year, it is just that it will not be treated as a claim made in the return if it is enquired into.

118. We are therefore satisfied that the FTT erred in law in its conclusion at [74]. We allow HMRC's cross-appeal on this ground and its decision on the Second Share Loss Relief Issue should be set aside and remade.

Remaking

119. In this case, although the Appellant made the claim on the tax return form, as it did not in fact factor into the Appellant's calculation of the tax chargeable and payable for 2005-06, see [10] of the decision, it was not a claim made 'in' the return.

120. The boxes (18.8 & 23.9) completed by the Appellant in respect of the claim do not represent information which affects the tax chargeable and payable, as is required by [24]-[26] *Cotter,* or even adjustments to tax due if [57] of *Derry CA* is binding, for the purposes of being 'in' the return. It was not in dispute, and the FTT found, that the Appellant stated on the return that the loss incurred in 06-07 should be set against his income for 05-06, whether or not the Appellant intended that the claim should feed into the calculation of his tax chargeable and payable for 05-06. In any event, whether intended or not, the claim did not in fact form part of the calculation of tax chargeable or the adjustments to tax due.

121. The consequence of the FTT's findings is that, under s.42(11) TMA, the claim was "made otherwise than by being included in a return". We therefore remake the decision: Schedule 1A TMA therefore applied to the claim, and the enquiry opened by HMRC in a notice given under paragraph 5, Schedule 1A was effective to enquire into the claim made on the face of but outside the Appellant's return for 05-06. The enquiry was validly opened under Schedule 1A TMA. Whether there was subsequently a valid closure notice for the purpose of paragraph 7, Schedule 1A so as to disallow the claim for relief is considered below.

122. We should also address paragraph 5(3), Schedule 1A TMA which provides that a claim which has been enquired into under 5(1) of Schedule 1A shall, if it is subsequently included in a return, not be the subject of an enquiry notice under s.9A TMA. We agree

with Mr Carey that the valid paragraph 5, Schedule 1A enquiry notice in relation to the claim made outside the 05-06 return did not preclude the subsequent s.9A notice of enquiry into the 06-07 return. This is because the standalone claim made on the face of the 05-06 return was not included in the 06-07 return (which simply referred back to the earlier claim) but was treated as relating to 06-07 by virtue of para. 2(3), Schedule 1B.

123. Therefore the potential problem generated by the FTT's conclusion and considered at [83]-[84] of the Decision no longer arises – there will not be two s.9A enquiries into two different returns making the same claim in relation to two different years. HMRC opened i) a paragraph 5, Schedule 1A TMA enquiry into the claim in respect of the 06-07 loss which was made outside the 05-06 return by treating it as relating to 06-07; and ii) an enquiry into the 06-07 return in respect of the loss as it was required to be given effect as a claim made in 06-07. It cancelled the claim in the Schedule 1A TMA closure notice and cancelled the relief in the return in the s.28A TMA closure notice.

THE CLOSURE NOTICE ISSUE

The FTT Decision

124. Having decided that the Appellant's claim for share loss relief was made in the 05-06 return, the FTT concluded that HMRC's enquiry under paragraph 5, Schedule 1A TMA was not valid because it should have been made under s.9A TMA. It thus decided that the closure notice issued under paragraph 7, Schedule 1A TMA was not valid (because it should have been made under s.28A).

125. Nonetheless, the FTT still had to consider the validity of the closure notice issued by HMRC under section 28A TMA following the valid s.9A TMA enquiry into the 06-07 return. The s.28A TMA closure notice contained figures that were agreed to be inaccurate. The FTT concluded that the closure notice was nonetheless valid because a reasonable recipient in the circumstances of the Appellant would have understood that, notwithstanding the notice containing erroneous figures, it was intended to refer to the full amount of the relief sought and deny all of it.

126. The FTT decided at [98]-[100]:

> 98. The notice itself meets the requirements of section 28A. A reasonable recipient of the notice in Mr Murphy's position could have no doubt that notice was being given of the closure of the enquiry into the return for the tax year 2006/7, that HMRC had concluded that the claim to set the capital loss that arose in that year against income in the tax year 2005/6 was not allowable, and that the consequence was that credit that had been claimed was being disallowed.
>
> 99. The question is whether the error in the notice (the incorrect figure of £48,244.79 for the credit) or the surrounding circumstances (the other closure notice and the errors in it) were sufficient to render the notice ineffective or limit its effect to the denial of the credit to which it referred. We have come to the conclusion that whether on the basis of the case law principles (e.g. in *Mabbutt*) or on the application of section 114 TMA the notice should be regarded as effective to deny the claim for relief. A reasonable taxpayer in Mr Murphy's position would have clearly understood that the intended effect of the notice was to disallow the entire claim. Mr Murphy had also received the notice under paragraph 7 Schedule 1A, which purported to deny the balance of the claim. Although there were two separate credits to Mr Murphy's self-assessment account (one in the amount of £48,244.79 and one in the

amount of £134,895.64), the only figure that was included in Mr Murphy's return was the aggregate figure of £183,140.83. That credit was the credit generated by the claim to carry back the loss of £763,739 against income of the tax year 2005/6, all of which is referred to in the notice. The notice is clear that the entire loss is disallowed and the credit reduced to £0.

100. For these reasons, we conclude that the closure notice given under section 28A TMA in relation to the enquiry into Mr Murphy's return for the tax year 2006/7 was effective to disallow Mr Murphy's claim for share loss relief.

The Law

Legislation

127. An enquiry commenced under s.9A TMA is closed by a closure notice under s.28A TMA which, so far as relevant, provides:

"28A Completion of enquiry into personal or trustee return
(1) This section applies in relation to an enquiry under section 9A(1) of this Act.
...
(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "final closure notice")—
(a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or
(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.
(2) A partial or final closure notice must state the officer's conclusions and –
(a) state that in the officer's opinion no amendment of the return is required, or
(b) make the amendments of the return required to give effect to his conclusions.
(3) A partial or final closure notice takes effect when it is issued.
…"

128. An enquiry commenced under paragraph 5, Schedule 1A TMA is closed by a closure notice under paragraph 7, Schedule 1A TMA which, so far as relevant, provides:

"7 Completion of enquiry into claim

(1) An enquiry under paragraph 5 above is completed when an officer of the Board by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions.

(2) In the case of a claim for discharge or repayment of tax, the closure notice must either–

(a) state that in the officer's opinion no amendment of the claim is required, or

(b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess.

...

(3) In the case of a claim that is not a claim for discharge or repayment of tax, the closure notice must either–

(a) allow the claim, or

(b) disallow the claim, wholly or to such extent as appears to the officer appropriate.

(4) A closure notice takes effect when it is issued…"

129. It is in issue whether s.114 TMA can cure any defects in the closure notices – the FTT found that it could. S.114 TMA provides as follows:

> 114.— Want of form or errors not to invalidate assessments, etc.
>
> (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.
>
> (2) An assessment or determination shall not be impeached or affected—
>
> (a) by reason of a mistake therein as to—
>
> (i) the name or surname of a person liable, or
>
> (ii) the description of any profits or property, or
>
> (iii) the amount of the tax charged, or
>
> (b) by reason of any variance between the notice and the assessment or determination.

Case law

130. The Court of Appeal in *Raftopoulou v HMRC* [2018] EWCA Civ 818 ("*Raftopoulou*") explained the test for a closure notice to be effective or valid. According to David Richards LJ at [20] and [36]:

> 20. It was common ground before the UT, and before us, that there was no prescribed form for an enquiry notice or a closure notice. To be effective, an enquiry notice or a closure notice must be understood by a reasonable person in the position of the intended recipient (the taxpayer in this case), having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim or close an enquiry (as the case may be)
>
> …
>
> 36. The UT said [2016] STC 656, para 103, that it will always be a question of fact whether HMRC have "enquired into" a claim. I do not consider that to be correct. There can be no enquiry into a claim without HMRC giving the notice required by paragraph 5. Whether the letter or other communication in question gave the necessary notice depends on whether it would be read by a reasonable recipient in the position of the taxpayer as doing so. The same is true of any document said to be a closure notice. These are questions of law.

131. The test for the effectiveness of a closure notice mirrors that for an effective enquiry notice (the notice giving effect to the opening of an enquiry such as under s.9A TMA or paragraph 5, Schedule 1A TMA). This test was also explained by the Upper Tribunal in *HMRC v. Mabbutt* [2017] UKUT 289 (TCC) *("Mabbutt")* at [45], [79] and [89]:

> 45…The question whether the disputed notice sufficiently makes a taxpayer aware of HMRC's intention to open an enquiry into a particular tax return is an objective one. The test is whether a reasonable taxpayer, in the circumstances of the taxpayer in question, would have understood that HMRC intended to open an enquiry into a particular tax return. It is not a matter of the parties' intentions or actual knowledge. We consider that this objective test applies as much to the question whether certain documents could be said to form part of the notice as it does to the

question whether the notice itself sufficiently informed the taxpayer of the intended enquiry to be a valid section 9A TMA notice…

…

79. In the light of our conclusion that the Mabbutt letter (either alone or taken together with the Dickinsons letter) constituted a valid section 9A notice it is, strictly, unnecessary for us to consider whether any alleged defect in the notice can be cured by section 114 TMA. Nonetheless, because the point was fully argued before us, we shall briefly give our views on this third ground of appeal. We necessarily assume in what follows that we are wrong in our conclusion on the second ground. It is convenient to deal with the cross-appeal at the same time.

…

89. In our view, if the mistaken reference to the "year ended 6 April 2009" in the Mabbutt letter vitiated the letter for the purposes of section 9A, the defect could be cured under section 114(1) TMA.

Outline of the Appellant's case

132. Mr Grierson submitted that HMRC's purported Closure Notices were not in the correct form and were not valid according to the test in *Raftopoulou*. The FTT found as a fact at [20] that the Appellant did not understand the two Closure Notices dated 25 July 2019. This finding was based on what the Appellant said in cross examination on his witness statement and an email he sent to his solicitors on 29 July 2019: "… I cannot understand what the reason for the letter is, especially as it has not affected my SA account. I need advice as to what it means and the implications if any."

133. Mr Grierson contended that there was a *non sequitur* and inconsistency as between the FTT's finding of fact at [20] of the Decision and its subsequent findings at [98] and [99]. The findings were so irrational that no Tribunal or Court: "acting judicially and properly instructed as to the relevant law" (per *Edwards (H. M. Inspector of Taxes) v. Bairstow and Harrison* [1956] AC 14 at [78]) could have reached the conclusion at [100] that: "the closure notice given under s.28A TMA in relation to the enquiry into Mr Murphy's return for the tax year 2006/7 was effective to disallow Mr Murphy's claim for share loss relief".

134. He submitted that if the FTT had been "acting judicially and properly instructed as to the relevant law" it would have concluded that the two purported Closure Notices of 25 July 2019, including the one in relation to the return for the later year 06-07, failed the test laid down at [36] in *Raftopoulou.* He argued that there is no suggestion by the FTT that this lack of understanding by the Appellant was the perception of anyone other than a "reasonable recipient in the position of the taxpayer", namely the Appellant, to use the test at [36] in *Raftopoulou.*

135. Mr Grierson also argued that the invalidity of HMRC's enquiry letters cannot be cured by s.114 TMA. Firstly, an enquiry does not fall within any of the matters expressly referred to in s.114(1). Secondly, nor does an enquiry impliedly fall within s.114(1) by virtue of the *ejusdem generis* rule of statutory construction. All the matters referred to in s.114(1) TMA apply to the final stage of an assessment or collection procedure rather than the opening of an enquiry.

136. Therefore, the FTT erred in reaching the conclusion it did.

Discussion and Analysis

<u>The Closure Notice under s.28A TMA in respect of the 06-07 return</u>

137. The FTT referred expressly to *Raftopoulou* and directed itself as to the applicable law in accordance with the above passage at [89] of the Decision. That self-direction as to the law was correct:

> 89. First, we have been referred to case law principles governing the effectiveness of notices. Mr Grierson referred us to the Court of Appeal decision in *Raftopoulou*, Mr Hall to the Upper Tribunal decision in Mabbutt. In the present context, we do not find any material difference in the principles espoused in those cases. The relevant question for us is whether a reasonable recipient in the position of the taxpayer as giving the necessary notice (*Raftopoulou* [36], *Mabbutt* [79]). The test is clearly an objective one and, as the case law demonstrates, must be applied by reference to the context in which the taxpayer received the disputed notice.

138. It was common ground before the FTT that the two closure notices dated 25 July 2019 contained errors as to the amount of the credit or relief that was being disallowed. While those errors were partially corrected in HMRC's review conclusion letter, the appeal to the FTT was against HMRC's closure notice and any review thereof.

139. Turning to the 06-07 closure notice, the FTT was required to construe it and determine what a reasonable person would have understood it to mean in light of all the factual circumstances. The FTT's conclusion was an issue of law (*Raftopoulou* at [36]). The reasonable recipient would need to understand that: a) the notice closed the specific enquiry under s.9A TMA into the 06-07 return; and b) that all the share loss relief claimed, treated as made in the return, was denied.

140. There is no doubt about a) – the closure notice explains this clearly on its face but can also be read in the context of the letters giving notice to the Appellant and agent under s.9A TMA opening the enquiry which explained which return was being enquired into.

141. As for b), the conclusion of the closure notice as to how much of the relief claim was granted, the letter explained that the amount of the capital loss claimed and the claim to set that capital loss against 05-06 income were not allowable. This was explained by the FTT at [98]. The point before the FTT was the lack of clarity as to the amount of the relief claimed and denied. The FTT's conclusion at [99] was that, notwithstanding the incorrect figures being included, the reasonable person would have understood that the entire loss was disallowed and the credit reduced to £0. The FTT gave detailed and rational reasons for that conclusion at [99].

142. There was no error of law in its reasoning or conclusion. The FTT took into account all the factual circumstances of which the reasonable recipient would be aware, including the two closure notices received and the nature and amount of the claim made.

143. In his written and initial oral submissions, Mr Grierson suggested that the FTT's decision as to the meaning of the closure notice was a matter of fact not of law. This was incorrect. The construction of the document - what the reasonable recipient would understand it to mean - is a question of law (per *Raftopoulou* at [36]). It is not a matter on which the taxpayer's evidence is required or necessarily even relevant.

144. In any event, even if the conclusion was based upon findings of fact, the FTT's decision may only be impugned on the basis that it is perverse (per *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14). The Appellant's own evidence that he did not understand the

meaning of the closure notice was accepted by the FTT at [20]. The FTT clearly had that finding of fact in mind when considering the closure notice issue. However, the FTT also had the primary evidence before it of both closure notices themselves. That was sufficient evidence for the FTT to reach its conclusion at [100] that the reasonable person would have understood the closure notice under s.28A TMA for 06-07 to disallow the entire loss claimed by the Appellant.

145. In summary, we conclude that there was no error by the FTT in upholding the 06-07 closure notice made under s.28A TMA as valid and effective for the reasons it gave at [97]-[100]. This included the surrounding circumstances and important context of receiving two closure notices which would reasonably be read together as denying all loss relief claimed as explained at [99]. Despite the incorrect numerical references contained within them, it would have been clear to the reasonable recipient of the 06-07 closure notice that the claim to share loss relief was denied in full. The Appellant's subjective understanding of the meaning of the closure notice did not need to be relied upon as it could not determine the objective assessment the FTT was required to make which was a matter of law. The subjective understanding of the Appellant regarding the notice forms no proper basis to find that the FTT erred in law and does not outweigh or prevail over that objective assessment.

146. We note that no permission was granted for an appeal against the FTT's alternative conclusion at [99] that the errors in the closure notice fell within the ambit of s.114 TMA and could be cured on that basis alone. Absent a challenge to that alternative basis for the FTT's conclusion, the Appellant's argument as to the application of the principles from *Raftopoulou* would be insufficient to challenge the FTT's finding.

147. Nonetheless, in his written submissions and oral argument Mr Grierson did seek to argue that the FTT erred in finding that s.114 TMA applied. He submitted that section 114 TMA could not apply to either enquiry notices or closure notices.

148. In relation to enquiry notice we do not need to decide the point – the validity of the enquiry notices and application of s.114 TMA have never been in issue before the FTT nor us and no permission was granted to argue this point. In any event, the enquiry notices were unambiguous as to the types of enquiries of which they were giving notice and any defects would be saved by the principles in *Mabbutt*. Therefore, the scope and application of s.114 TMA does not arise. In any event, [89] of *Mabbutt* provides authority to support the conclusion that s.114 may cure a defect in a s.9A enquiry notice:

> 89. In our view, if the mistaken reference to the "year ended 6 April 2009" in the Mabbutt letter vitiated the letter for the purposes of section 9A, the defect could be cured under section 114(1) TMA.

149. In relation to closure notices, we also disagree with Mr Grierson – the wording of s.114(1) TMA is plainly apt to cure a defect in a closure notice because the provision may cure numerical defects in: 'An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts'. A closure notice is of the same or similar type as an assessment or determination because an amendment to a claim or return included in a closure notice may impose liability to tax in a similar way to an assessment or determination. As such, it is an 'other proceeding'.

150. Accordingly, there was no error of law in the FTT's further and alternative conclusion that the defects in the numerical calculations in the 06-07 closure notice could be cured pursuant to s.114 TMA. This closure notice gave valid notice of the conclusion that the claim for relief given effect as if made in the 06-07 return should be denied in full.

151. The Appellant's appeal on this ground is dismissed.

Closure notice in respect of Schedule 1A enquiry into the standalone claim made outside the 05-06 return in respect of share loss relief in 06-07

152. The conclusions on both the First Share Loss Relief Issue and Closure Notice Issue set out above are sufficient to dispose of this appeal in favour of HMRC. There was no error of law in the FTT conclusions at [101] that:

> (1) Mr Murphy was not entitled to claim share loss relief "in" his return for the tax year 2005/6;…
>
> (3) Mr Murphy was required to include information concerning the loss and the claim in his tax return for the tax year 2006/7 and HMRC was entitled to enquire into that loss and the related claim under section 9A TMA;
> (4) the closure notice given under section 28A TMA in relation to the enquiry into Mr Murphy's return for the tax year 2006/7 was effective to disallow Mr Murphy's claim for share loss relief.

153. However, we have found there to be an error in the conclusion under the Second Share Loss Relief Issue that:

> (2): however, Mr Murphy made a claim for share loss relief "in" his return for the tax year 2005/6; HMRC's enquiry into the claim under paragraph 5 Schedule 1A TMA was not valid and the relevant closure notice under paragraph 7 Schedule 1A TMA was also not valid

154. We have set aside that part of the FTT Decision and remade it, finding that the claim was not made in the 05-06 return and HMRC's enquiry under paragraph 5, Schedule 1A TMA into the claim (made on the return) was valid.

155. We therefore go on to consider a point not determined by the FTT: whether the closure notice under paragraph 7, Schedule 1A TMA was valid. In so doing, we are entitled to look at all the evidence by virtue of s.12(4) of the Tribunals, Courts and Enforcement Act 2007. We may make any decision which the First-tier Tribunal could make if it were re-making the decision and may make such findings of fact as we consider appropriate.

156. We deal first with the same issue that the FTT considered in relation to the 06-07 return: whether the closure notice gave effective notice of the amount of loss relief denied. The FTT considered the nature of the numerical errors in the Schedule 1A closure notice at [20] and [98]-[100]. The Schedule 1A TMA closure notice was part of the factual context that would have informed the reasonable recipient of the s.28A TMA closure notice that the claim to share loss relief in respect of tax year 06-07 should be denied. We have already agreed with the FTT's reasoning at [98]-[100].

157. We also accept Mr Way's submission on behalf of HMRC that the same reasoning applies equally to the Schedule 1A TMA closure notice. Each notice would be read in the context of the other – they were part of the surrounding factual circumstances. We are satisfied that the reasonable recipient of the Schedule 1A TMA closure notice would equally understand that all relief had been denied in respect of the claim despite the

numerical inaccuracies. In the alternative, the defects in the numbers should be cured pursuant to s.114 TMA.

158. This leaves the final remaining argument of Mr Grierson that the Schedule 1A TMA closure notice was ineffective and invalid because: a) it did not refer to Schedule 1A TMA on its face such that it was not clear to what claim, return or enquiry it related; or b) the notice did not specify that it was in relation to a standalone claim made outside the 05-06 return – the notice made no reference to the 05-06 return. Again, it would not be clear to what claim or enquiry the closure notice related.

159. We reject these submissions.

160. We are satisfied that the reasonable recipient of the closure notice would understand that it related to the enquiry opened under paragraph 5, Schedule 1A TMA in relation to the claim, made outside the 05-06 return, for share loss relief in the tax year 06-07. We come to that view despite the absence of reference to the 05-06 return or reference to Schedule 1A TMA in the closure notice.

161. The letter giving notice from HMRC was dated 25 July 2019. It began by stating:

> …
>
> **Check of your claim for the year ended 5 April 2007**
>
> I have now completed my check of your claim for the year shown above[4].
>
> **My conclusion**
> -The total capital loss claimed in the sum of £763,740.00 is not allowable.
> …
> The claim to set £48,244.79 of that capital loss against 2005-2006 income, is not allowable.
> …
> - My check has shown that the actual credit due was £0.00
>
> …
>
> **My reasoning**

[4] The wording is to be contrasted with the letter of the same date which was the closure notice under s.28A TMA. The relevant differences are underlined:

> "…
> **Information about our check of your Self-Assessment tax return for the year ended 5 April 2007**
> I have now completed my s.9A check of your Self-Assessment tax return for the year shown above.
> This letter is a closure notice issued under section 28A(1) & (2) Taxes Management Act 1970.
> **My conclusion**
> -The total capital loss claimed in the sum of £763,740.00 is not allowable.
> …
> The claim to set £763,739.00 of that capital loss against 2005-2006 income, is not allowable.
> …
> -My check has shown that the actual credit due was £0.00
> …
> **My reasoning**
> You disclosed the use of the Excalibur arrangements along with the DoTAS number 61650101 on your tax return of 2006-07…"

> You disclosed the use of the Excalibur arrangements along with the DoTAS number 61650101 on your tax return of 2006-07…
> …
> [Emphasis added]

162. From this, the letter was clear that it was closing an enquiry into a claim for share loss relief in respect of the year ended 5 April 2007 (06-07) claimed against 2005-2006 income.

163. The reasonable recipient in all the circumstances of the Appellant would have the benefit of the following factual context in addition to the terms of this notice by which to understand it:

a) The Appellant made his claim for share loss relief on the face of his 05-06 return even if it was in respect of the tax year 06-07 and he referred to this claim in his 06-07 return;
b) He had received two notices opening enquiries:
i) the first dated 28 February 2007 specifying that it related to the share loss relief claim relating to the 05-06 return under paragraph 5, Schedule 1A TMA; and
ii) the second dated 20 May 2008 specifying that it related to the return for the 06-07 tax year (with a covering letter explaining the enquiry was under s.9A TMA);
c) He had received a second closure notice on the same date, 25 July 2019, which specified that it was issued under s.28A TMA;
d) His authorised and instructed agent had received a covering letter of the same date which stated that "Please find enclosed S9A & Sch1A Closure Notice issued to your client today in respect of the Excalibur scheme".

164. The reasonable recipient would also be taken to understand the basic legal context (the legislative scheme by which s.9A enquiries were closed by closure notices under s.28A and paragraph 5, Schedule 1A enquiries by paragraph 7, Schedule 1A notices).

165. Thus, we are satisfied the reasonable recipient would understand the letter in question to be a Schedule 1A TMA closure notice closing the enquiry opened on 28 February 2007 into the claim made on the 05-06 return for share loss relief in relation to 06-07. The reasonable recipient would understand that the closure notice dated 25 July 2019 referring to the 'check of your claim' must be closing that enquiry under Schedule 1A TMA.

166. From these circumstances, the reasonable recipient would understand that there had been two enquiries opened and closed:

i) the first enquiry had been opened on 28 February 2007 under Schedule 1A TMA in relation to the Appellant's claim for share loss relief in respect of 06-07 made on the 05-06 return and closed in the letter dated 25 July 2019 as set out above (the Schedule 1A TMA closure notice); and
ii) the second enquiry opened on 20 May 2008 under s.9A into his tax return for 06-07 and closed by the second letter dated 25 July 2019 which was a closure notice under s.28A TMA for the 06-07 return and specified as much.

167. We are fortified in this conclusion by the fact that although the closure notice did not refer to any legislation (let alone Schedule 1A TMA) the notice correctly specified the

year in respect of which the share loss relief claim was made (06-07), the year in which it was to be set against income (05-06), that it referred to a claim rather than a return and that it denied all relief claimed. The recipient would therefore understand that his claim in respect of share loss relief for 06-07, even if made on his 05-06 return, had been denied in full.

168. The matter which did give us pause for thought is whether the reasonable recipient of the Schedule 1A TMA closure notice would understand which return or claim was being enquired into.

169. We are of the view that the law does not require the reasonable recipient of a paragraph 7, Schedule 1A closure notice to be informed of a particular return to which the enquiry relates, in contrast to a s.28A closure notice. Instead, they must understand what claim is being enquired into because Schedule 1A TMA concerns claims made outside returns.

170. In this case, the reasonable recipient would understand that it was the claim for share loss relief (and that claim was made only on the 05-06 return and not in or on the 06-07 return which only made reference to it). Therefore, the failure of the closure notice to refer to the 05-06 return (and simply to the 06-07 tax year) does not undermine its validity.

171. Even if the closure notice is required to make clear the particular return in relation to which the enquiry is being closed, the reasonable recipient would understand that this letter must be the Schedule 1A TMA closure notice in respect of the claim and that claim was made on the face of the 05-06 return.

172. This is for the following reasons:

a) the two contrasting enquiry notices received specifically referring to the different years of the tax returns and the differing types of enquiries under different provisions of the TMA as follows (differences underlined):

i) The letter dated 28 February 2007 states:

'**Enquiry under Paragraph 5 Schedule 1A** [TMA] **- 2006-07**
Thank you for your Tax Return for the year ended 5 April 2006
I am writing to tell you that I intend enquiring into your Return. My enquiry will cover your claim under section 574 [ICTA]].

ii) The letter dated 20 May 2008 states:

'**Enquiry into your 2006-07 Self Assessment tax return.**
Thank you for your Tax Return for the year ended 5 April 2007
I am writing to tell you that I intend enquiring into your Return. My enquiry is into the amount of your self assessment.
(This enquiry was accompanied by a letter of the same date, 20 May 2008 to the Appellant's then agent which stated 'I enclose a copy of the notice to enquire issued to Mr Murphy today. The enquiry is being conducted under S9A [TMA]);

b) the accompanying s.28A TMA closure notice of the same date, 25 July 2019, referred to the enquiry into the 06-07 return; and

c) the accompanying covering letter of the same date sent to its agent, Dains LLP, stated: 'Please find enclosed S9A & Sch1A Closure Notice issued to your client today in respect of the Excalibur scheme';

d) the closure notice letter itself referred to the 'check of your claim' and 'The claim ...of that capital loss against 2005-06 income.'

173. Therefore, even if the Schedule 1A TMA closure notice was required to give notice to the reasonable recipient so that they would understand which enquiry was being closed in respect of which specific return and the year in respect of which the claim was made, they would understand it to be the claim made on the 05-06 return in relation to the loss said to have been incurred in 06-07 but set off against 05-06 income.

174. We therefore remake the FTT's decision and uphold the validity of the Schedule 1A TMA closure notice. This forms an alternative and additional basis on which the Appellant's claim to share loss relief was lawfully denied by HMRC.

DISPOSITION

175. We dismiss the Appellant's appeal. There was no error of law in the following conclusions of the FTT:

> (1) Mr Murphy was not entitled to claim share loss relief "in" his return for the tax year 2005/6; ..;
>
> (3) Mr Murphy was required to include information concerning the loss and the claim in his tax return for the tax year 2006/7 and HMRC was entitled to enquire into that loss and the related claim under section 9A TMA;
>
> (4) the closure notice given under section 28A TMA in relation to the enquiry into Mr Murphy's return for the tax year 2006/7 was effective to disallow Mr Murphy's claim for share loss relief.

176. We allow HMRC's cross-appeal. There was an error of law in the FTT's decision that there was no valid enquiry opened into the claim made in the 05-06 return and thus the closure notice issued was invalid. We set aside that part of the FTT's decision. We remake it and find that the Appellant's claim to share loss relief was not made in the 05-06 return but was made on the return as a standalone claim. HMRC issued a valid notice of enquiry and valid closure notice for the purposes of paragraphs 5 and 7, Schedule 1A TMA denying the claim to share loss relief to set off against income in 05-06 which was to be treated as made in relation to 06-07, the year in which it was incurred.

177. Thus, the Appellant's claim to share loss relief incurred in 06-07 was denied by HMRC in two valid closure notices.

MR JUSTICE RICHARD SMITH

JUDGE RUPERT JONES

UPPER TRIBUNAL JUDGES

Released on: 03 June 2025

Annex A

S. 574 ICTA — Relief for individuals.	SS. 131-133 ITA
	Section 131 Share Loss Relief
(1) Where an individual who has subscribed for shares in a qualifying trading company incurs an allowable loss (for capital gains tax purposes) on the disposal of the shares in any year of assessment,	Section 131(1) provides that an individual is eligible for share loss relief if he incurs "an allowable loss for capital gains tax purposes" on the disposal of any "qualifying shares" in "any tax year", defined as "the year of the loss".
… [see Cont. below]	
…	"Qualifying shares" under (2) are defined to include shares in a "qualifying trading company", the conditions for which are set out in sections 134 to 143.
(3) For the purposes of this section—	
(a) an individual subscribes for shares if they are issued to him by the company in consideration of money or money's worth; and	"Disposal" is defined under (3)
(b) an individual shall be treated as having subscribed for shares if his spouse or civil partner did so and transferred them to him by a transaction inter vivos."	"Allowable loss" is limited by the conditions in (4)
	Section 132 provides:
	Entitlement to claim
[(1) Cont.]	(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 –
he may, by notice given within twelve months from the 31st January next following that year, make a claim for relief from income tax on—	(a) for the year of the loss,
(a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or	(b) for the previous tax year, or
	(c) for both tax years.
	(See Step 2 of the calculation in section 23.)
(b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;	(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.
but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above. Where such relief is given in respect of the loss or any part of it, no deduction shall be made in respect of the loss or (as the case may be) that part under the 1992 Act.	(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."

	Section 133 ITA (headed "How the relief works") provided: **"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 **[**F1sections 24A and 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.
(2)Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection; and any relief claimed under either paragraph in respect of any income shall be given in priority to any relief claimed in respect of that income under section 380 or 381.	(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)."