Judgments

Wickersham v Revenue and Customs Commissioners

[2016] EWHC 2956 (Ch)

Chancery Division, Leeds District Registry

Judge Saffman sitting as a Judge of the High Court

30 November 2016

Judgment

Mr K Gordon for the **Claimant**

Ms A Nathan for the **Defendant**

Hearing date: 28 and 29 September **2016**

Date draft circulated to the Parties 7 October **2016**

Date handed down 30 November **2016**

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I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JUDGMENT

Introduction

1. By his Claim Form and Particulars of Claim the claimant, Mr Mark **Wickersham** seeks an order that the defendant (**HMRC**) pay to him the sum of £63,188.87 plus interest. The claimant is represented by Mr Keith Gordon of counsel and the defendant by Ms Aparna Nathan of counsel.

2. In fact, as Mr Gordon points out in paragraph 25 of his skeleton argument, it seems that the claim for payment may not entirely reflect what the claimant seeks, albeit that would be the effect of his claim. Paragraph 25 suggests that the claim, rather than being a claim for repayment, is simply a claim for relief in respect of tax losses accruing in one year to be deducted in calculating the claimant's net income for the previous year. In the course of argument it was suggested that it is in the nature of a stand alone or freestanding credit. A stand alone or freestanding credit can, at the taxpayer's election, be redeemed by a payment by **HMRC** to the taxpayer or alternatively used to reduce a taxpayer's liability to tax whether that is income tax, capital gains tax or even Value Added Tax.

3. The claim is in the sum of £63188.87 because it is asserted by the claimant that this represents the amount by which the claimant's liability to income tax is reduced by reason of capital losses incurred in the tax year 2011/2012 but carried back to the year 2010/ 2011. He asserts that his entitlement to relief for these losses arises from the provisions of ss131 and 132 *Income Tax Act* 2007 (ITA)

4. By virtue of ss131 and 132 ITA where a taxpayer suffers a capital loss on the disposal or deemed disposal of shares that meet the criteria set out in s131 he is entitled to make a claim for the loss to be deducted in the calculation of his net income for the tax year in which the loss was incurred or the previous year or both tax years.

5. These provisions were enacted to provide investment through tax breaks in companies in certain sectors that the legislature thought justified encouragement. The view of **HMRC** however is that ss131 and 132 have been exploited by the creation of artificial schemes that generate artificial losses which are then invoked by some unscrupulous taxpayers to reduce their tax burden by sums greater than the losses. In other words, such schemes are from time to time not entered with a view to promoting entrepreneurial endeavours but rather to improperly reduce a tax bill.

6. In December 2010 the claimant invested £250,000 in ostensibly qualifying shares in a company called Booth Productions plc. In January 2012 Booth Productions plc was placed in members of voluntary liquidation and the liquidator indicated that the value of its shares was nil. By s131(3)(d) ITA where the value of the qualifying shares has become negligible there is deemed to be a disposal of the shares for the purpose of the share loss relief permitted by s131.

7. **HMRC** clearly suspect that Booth Productions plc was a corporate vehicle for an artificial scheme. However, it is right to point out that **HMRC** in these proceedings do not assert as a fact that the claimant is seeking improperly to avoid tax. Accordingly, it would be improper for me to determine this case on any basis other than that the claimant's investment in qualifying shares in Booth Productions plc was anything other than in accordance with the spirit of the legislation.

8. In his tax return for the tax year ended 2010/2011 the claimant sought to utilise the relief available to him under s131 by setting it off against his income for that year so as to reduce his net income in 2010/2011 to nil (even though the loss was deemed to have occurred in the following tax year1). Absent this relief the claimant's income tax liability would have been £63,188.87 greater. He argues that he did so by completing box 3 on page Ai3 of his tax return form. In that box he recorded that he had suffered a trading loss of £171,531 in the tax year 2011/2012 and in box 4 he stated that he was claiming relief for that loss in the year 2010/2011. The figure of £171,531 represented so much of the loss as was necessary to reduce the claimant's income to the point where income tax in respect of the year ended 2011 was extinguished. The balance of the deemed loss on disposal of £78,469 was intended to be utilised against income in the actual year of loss i.e. 2011/2012 and was, as I understand it, included in the return for that year.

9. The claimant's case is in essence a simple one. It is that his claim for the loss to be deducted in the calculation of his net income for 2010/2011 (notwithstanding that the loss was actually incurred in 2011/2012) makes this a claim to which the provisions of Schedule 1A *Taxes Management Act* 1970 (TMA)

apply and that in addition Schedule 1B applies because, for the reasons set out in paragraph 8 above, the claim for relief straddles 2010/2011 and 2011/2012.

10. The authority for contending that Schedule 1A is invoked is ***HMRC*** *v Cotter* 2013 UKSC 69. That case makes it clear that the claimant's claim for relief in 2010/2011 based on a loss actually incurred in 2011/2012 is a claim outside the tax return (as opposed to the tax return form) because the claim arises out of the loss suffered in 2011/2012 whereas the claim for relief is in respect of the tax year 2010/2011 and accordingly the provisions of Schedule 1A TMA are engaged in their entirety. Ms Nathan accepts that, on the authority of *Cotter*, Schedule 1A and 1B are engaged in this case.

11. Schedule 1A paragraph 4(1) requires **HMRC** to give effect to the relief claim as soon as practicable but if it opens an enquiry into the claim by a deadline specified in the Schedule the obligation to give effect to the relief is suspended pending the outcome of the enquiry. An enquiry is opened by service on the taxpayer of a written notice of an intention to make an enquiry. The claimant asserts that **HMRC** failed to serve notice of an intention to make an enquiry by the deadline with the result that at the latest from that date the claim became final and effect must be given to it.

12. **HMRC** defends on 4 grounds.

i. The claim for relief was not quantified and thus was not a claim that accords to the legislative provisions. (the Lack of Quantification Defence)

ii. That it did complete, in time, the legislative formalities to open an enquiry under Schedule 1A. (The Notice Served Defence)

iii. That, because there is an enquiry on foot in relation to a claim for relief based on the same loss for 2011/2012, the claim is premature. (The Prematurity Defence)

iv. If this claim is in fact not for a repayment but rather a claim for a credit in the form identified in paragraph 2 above then the claim cannot succeed on a true interpretation of the relevant legislation. This argument is based upon the effect of Schedule 1A paragraph 4(4) Taxes Management Act 1970 (TMA). (The paragraph 4(4) Defence).

13. If any of these defences is established then the claim must fail but nevertheless, in accordance with the invitation of counsel, I shall deal with each one in turn as if the preceding defence has not been established.

The Lack of Quantification Defence

14. It is not in dispute that the claimant did not set out in box 3 of his tax return form for 2010/2011 the monetary value of the loss relief claim, rather he set out the actual loss on the deemed disposal. Ms Nathan argues that in these circumstances there has been a claim for relief inconsistent with the requirements of s42 (1A) TMA 1970 and Schedule1B para 2(4). S42 1A TMA states;

"…….. A claim for a relief, an allowance or repayment of tax shall be for an amount which is quantified at the time when the claim is made"

Schedule 1B para 2(4) states;

"*Subject to subparagraph (5), the claim (for loss relief) shall be for an amount equal to the difference between-*

(a) *the amount in which the person is chargeable to tax for the early 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)*

15. It is right that the bold typed heading above box 3 and 4 in the annual return form states "**Trading losses**" but the caption immediately over box 3 refers to "relief". Additional Information Notes issued by **HMRC** in December 2010 under reference SA101 notes 2011 give guidance to a taxpayer on the completion of their returns. In relation to the completion of boxes 3 and 4 the guidance is;

"Enter in box 3 the amount of the 2011/2012 trading (or possibly certain capital) losses you are claiming for……".

16. Ms Nathan argues that, whether or not the correct way to complete box 3 is clear, another part of the return form has to be completed by a taxpayer choosing to claim the relief and that is crystal clear. It is that part of the return form relating to adjustments to tax due and in particular box 15 of that section. That requires completion in relation to adjustments to tax due in 2010/2011 by reason of any repayments that would otherwise be due in 2011/2012 but which the taxpayer seeks to claim in 2010/2011. She points out that that box has not been completed. I should point out however in this connection I was not referred to the claimant's tax return form filed by him but rather the screenshot of the return as it appears to an **HMRC** officer looking at his monitor. The evidence from Mr Lee Sidney, an officer with **HMRC** from whom I heard was that, if the claimant had completed box 15, the screenshot would have shown it.

17. **HMRC**'s position therefore is that no claim that can give rise to a repayment or indeed a freestanding tax credit has been made by the claimant and therefore the claim for such credit or a repayment cannot succeed.

18. Mr Gordon contends that the claimant has complied with the requirements of the legislation and the claim for relief is quantified by the inclusion of the figure of £171,531 as the figure to be carried back to 2010/2011 to be set against income for that year.

19. He argues that is a claim for relief under Schedule 1A paragraph 2 (3) by which **HMRC** **may** determine the form of any claim and, by (5) the form of claim **may** require such information as is set out in paragraphs (a) to (bb) of that subparagraph. Mr Gordon argues that there is no evidence to suggest that **HMRC** have stipulated any such requirements in relation to a claim for the carry-back of losses and indeed that in a notice to admit facts **HMRC** have accepted that "*there is no prescribed form for a Schedule 1A claim".*

20. In any event in this connection, he makes the point referred to in paragraph 2 above the effect that this claim is not specifically a claim for the repayment or discharge of the tax liability but is rather a claim for some of the 2011/2012 loss to be deducted in calculating net income of the claimant for the previous year.

21. Further, insofar as it is suggested by **HMRC** that a tax calculation summary should have been completed upon which the relief is quantified, he argues that any such requirement does not apply to returns made online.

22. Mr Gordon has some observations to make upon the contention that the claim has to be quantified in box 15 referred to in paragraph 16 above. He suggests that that would be an onerous obligation on the part of a taxpayer because it would require a taxpayer who may not be skilled in this area to compute the amount of the value of the claim and in any event the guidance notes for the tax calculation sheets are not readily available. The taxpayer has to ask for them.

23. Finally, he argues that in any event a request for a sum equal to the relief of £63,188.87 was made in the letter before claim and so in any event the claim has been quantified.

24. In my view the claim has been sufficiently quantified to meet the terms of the legislation. The fundamental point is that the relief constitutes a reduction in taxable income. Box 3 of the relevant annual return indicates in this case the amount by which the income ought to be reduced so far as a taxpayer is concerned and box 4 specifies the tax year in respect of which the reduction should occur. That, in my judgment is sufficient. In any event, if these boxes are not intended to quantify the claim it is difficult to see what purpose they serve. Indeed Mr Sidney was asked this question. His response was that his understanding was that boxes 3 and 4 just show the losses in respect of which a taxpayer intends to claim relief but box 15 is intended to show the relief the taxpayer is actually seeking. Even if that is right, it is difficult to see how that would be clear to the taxpayer, especially in the light of the Additional Information Notes for the relevant year to which I have referred in paragraph 15 above. As I have said, these indicate how boxes 3 and 4 are to be completed. It is clear that they have been completed in accordance with those notes. Nowhere is reference made to the fact that some other part of the form, or additional forms, have to be completed if effect is to be given to the relief claimed.

25. I am accordingly satisfied that this claim was sufficiently quantified to meet the requirements of the legislation.

The Notice Served Defence.

26. It is not disputed by Ms Nathan that the claimant's claim for relief against 2010/2011 income falls to be dealt with under the procedure laid down by Schedule 1A TMA. The Schedule sets out the machinery for making and challenging a relief claim in circumstances such as those which apply in this case.

27. Schedule 1A paragraph 4 (1) states;

"…….. An officer of the Board or the Board shall, as soon as possible after a claim….. is made……. give effect to the claim……. by discharge or repayment of tax"

28. Paragraph 5 however gives an officer of the Board the power to enquire into claims. By paragraph 5(1) if he wishes to do so he must "*give notice in writing of his intention to do so to (the taxpayer)"* and, by paragraph 5(2) that notice must be given by the deadline specified in that subparagraph. In this case the last date for giving notice of an intention to enquire under Schedule 1A into the claimant's claim for loss relief was 31 January 2014.

29. If the relevant notice of intention has been given then Schedule 1A paragraph 4(3) is engaged to disapply paragraph 4(1). Paragraph 4(3) states;

"Where any…… claim ….. as is mentioned in subparagraph (1)……is enquired into by an officer of the Board (paragraph 4(1)) shall not apply until the date on which ……the enquiry is completed"

30. As I have said, the basis of the claim therefore is that the claim was made in the 2010/ 2011 tax return form. Pursuant to Schedule 1A paragraph 4(1) there is an obligation to give effect to the claim unless notice of intention to open an enquiry has been given.

31. **HMRC** say that notice of intention was given both on 22 January 2013 and 17 June 2013. In the January letter **HMRC** had written to the claimant advising him in terms that it was opening an enquiry under s9A TMA2. A schedule attached to that letter however stated the following;

"*To protect **HMRC**'s position I am opening alternative enquiries in respect of your claim to relief for this loss. I will be opening an enquiry into your claim under Schedule 1A TMA 1970 (by separate letter): in case the Supreme Court or a Tax Tribunal decides that you did not make the claim by including it in a return.*

I am also enquiring under s9A TMA 1970 into this claim into in this notice of enquiry into your tax return for the year ending 5 April 201 (sic) in case the Supreme Court or a Tax Tribunal decides you made the claim by including it in that return"3

32. In the June letter **HMRC** had written to the claimant saying;

"My enquiry under s9A TMA includes an enquiry into your share loss relief claim……

*As your claim relates to 2011/2012 and was made outside the 2011/12 return, The Supreme Court or Tax Tribunal may decide this is a claim made outside of the return. As such, an enquiry under Schedule 1A TMA 1970 is also required. In circumstances such as this the Court of Appeal confirmed that **HMRC** can, and should, open enquiries under both Schedule 1A and s9A on a protective basis"*

33. **HMRC** argue that either or both of these letters meet the requirement to give notice of an intention to make an enquiry. The claimant disagrees and argues that, at best, they are no more than notice of an intention to give, at some future date, notice of an intention to make an enquiry.

34. In *Flaxmode Ltd v **Revenue and Customs Commissioners*** SpC 67 2008 and STC 666 the Special Commissioner had to consider the provisions of s12 AC TMA under which an officer of the Board may enquiry into a partnership return if he gives notice of his intention to do so. He had to consider whether valid notice of intention had been given. It will be seen that the provision of s12 AC TMA requiring the officer of the board to give notice of his intention to open an enquiry is identical to the provisions under Schedule 1A.

35. It was held that the purpose of the notice was to provide the nominated partner with a warning or intimation of enquiry. That did not require particular formality: all that was needed was something in writing which informed the taxpayer that an enquiry was underway.

36. In paragraph 27 of his judgment the Special Commissioner had this to say;

"It does not seem to me that s12AC requires particular formality about the giving of notice. Chambers English Dictionary (7th edition) defines "notice" as intimation, announcement, information, warning. It seems to me that the purpose of the notice to be given is to warn the taxpayer that an enquiry is underway so that he knows questions may be asked and what time limits may be affected and to provide a mechanical activation of the enquiry procedure. It does not require anything formal: all that is needed is something in writing which informs the taxpayer that an enquiry is underway."

37. In *R (Sword Services Ltd) v* ***Revenue and Customs Commissioners*** **2016 EWHC** 1473 (Admin) at paragraph 71 Cranston J said of s12AC;

"*To my mind, the parliamentary intention behind that provision is to ensure that the taxpayer knows in writing of the enquiry and so has the opportunity to put its case. There is no particular form prescribed for a notice of enquiry and so long as the taxpayer knows of* ***HMRC****'s decision to conduct an enquiry that is sufficient. In this regard Flaxmode Limited is, in my view, correct.*

38. Mr Gordon did not suggest that the notice of intention needs to be particularly formal but he argues that even if a low test of formality is required, **HMRC** have failed to negotiate it in this case. He argues that this is more than academic because the notice has consequences. Not least, as I have said at paragraph 29 above, it provides the authority for **HMRC** not to give effect to a relief claim pending the outcome of the enquiry. In addition, it provides evidence as to when the enquiry started which is important if a taxpayer wishes to invoke the provisions of paragraph 7(5) under which he is entitled to apply to the Tribunal for a direction requiring an officer to issue a closure notice in circumstances where the Tribunal is of the opinion that the enquiry has been dragging on for too long.

39. Mr Gordon draws my attention to a series of emails passing between various officers of **HMRC** which suggest that even they were unsure as to whether notice compliant with Schedule 1A had been served. He argues that if even **HMRC** are unclear as to whether notice has been given then there cannot be sufficient clarity as far as the taxpayer is concerned.

40. He refers me to *Bristol and West plc v* ***Revenue and Customs Commissioners*** **2016** EWCA Civ 397 which is a case dealing with notice to close an enquiry. Briggs LJ approached the matter on the basis that the notice had to be interpreted on the basis of what would be understood by a reasonable person in the position of the intended recipient. In this context the question is essentially a matter of construction to which ordinary principles of construction apply, most recently codified in the case of *Arnold v Britton* 2015 AC 1619.

41. What would a reasonable person understand from the letters from **HMRC** of January and June the relevant parts of which I have set out in paragraphs 31 and 32 above? It is clear that the schedule to the letter of 22 January announces that **HMRC** will be opening alternative enquiries under s9A and Schedule 1A. If that was all that it said then I do not think there could be any doubt that that would be seen by a reasonable person as being notice of intention to open such enquiries. I do not think that the use of the phrase *"I will be opening*" namely the use of the future tense would in itself undermine the integrity of the notice. After all, the obligation imposed by Schedule 1A is simply to give notice of an *intention* to open an enquiry. It is inevitable that an intention will be formed before the act intended is carried out.

42. The real issue in my view is whether the intimation that the enquiry under Schedule 1A will be opened by "separate letter" means that that document is not notice of an intention to do so. Is it, as I described in paragraph 33 above, simply notice of an intention to give notice of an intention?

43. It seems to me that a reasonable person reading the schedule to the letter of January would understand it to be a warning (in the *Flaxmode* sense) that **HMRC** intend to open an enquiry under Schedule 1A. The schedule to the letter specifically says this.

44. In my judgment, a reasonable person would take the reference to the separate letter as meaning that the enquiry was to be opened by a separate letter. The difficulty for the claimant, as I have already repeated, is that Schedule 1A paragraph 5(1) only imposes on **HMRC** an obligation to give notice of an *intention* to open an enquiry. There appears to be no obligation to give notice that an enquiry has in fact been opened.

45. Mr Gordon argues that the giving of the notice and the opening of the enquiry must be synonymous. I am not convinced that that is so. As I suggest in paragraph 41 above, it seems clear that, as a matter of ordinary parlance, the intention to open must precede the opening.

46. In those circumstances it seems to me that, perhaps rather by luck than judgment, **HMRC** has indeed, by the schedule attached to the letter of 22 January, given notice sufficient to comply with the limited requirements of Schedule 1A paragraph 5(1).

47. I should say that in reaching this conclusion I do not overlook Mr Gordon's emphasis on the covering letter and the fact that it notified the claimant of an enquiry under section 9A but makes no reference at all to Schedule 1A. He points out that in *Bristol and West* an email was held to be sufficient to disavow the contents of a letter from **HMRC** which inadvertently indicated that **HMRC** intended to close an enquiry. He argues that if a separate email can disapply the effect of a document from falling within the scope of the legislation then, a fortiori, the disclosure on the face of the document that **HMRC** had merely opened a section 9A enquiry and not a Schedule 1A enquiry must be even stronger. But in my view what that would be seen to mean by the reasonable person is that, while an enquiry has been opened under s9A, the schedule to the letter makes it clear that it is also *intended* to open an enquiry under Schedule 1A.

48. I have to say that I am less persuaded that the letter of 17 June satisfies the requirements of Schedule 1A paragraph 5(1). As Mr Gordon stated, it accurately sets out the law as it was applied before *Cotter* was decided in the Supreme Court- even to the extent of making it unambiguously clear that **HMRC** "can and should" open an enquiry under Schedule 1A but an assumption that therefore that is what it intends to do is in my view an assumption too far.

49. Often people "can and should" do something but do not intend to do it. That is a consequence of human frailty. A person may have the wherewithal to go and visit an aged and infirm relation and it is perhaps something that he or she "should" do. It does not mean that merely because he or she can and should do it that he or she intends to do it.

50. Equally, just because something is "required" does not inevitably mean that the person required to do it intends to do it. It cannot in my view be said that just because a Schedule 1A enquiry is "required" and that **HMRC** "can and should" open one that the claimant knows (in the *Sword Services* sense) that that is what **HMRC** actually intends to do.

51. In the circumstances I am satisfied that, on its own, the letter of 17 June is not sufficient to meet the requirements of Schedule 1A para 5(1) but that the schedule attached to the January letter is sufficient and that accordingly proper notice was given pursuant to Schedule 1A paragraph 5(1) by the schedule attached to the letter of 22 January 2013. The defence, by paragraph 44, contends that both were sufficient notice.

52. However, for completeness and in the event that I am wrong in my conclusion that the schedule attached to the January letter is adequate for para 5(1) purposes, I consider whether both letters taken together are sufficient, bearing in mind that Schedule para 5(1) does not appear to stipulate that the written notice of intention has to be confined to one document.

53. The question is "what would the reasonable person in the position of the recipient understand from both letters? Would he take them as a warning of **HMRC**'s intention to open an enquiry in the *Flaxmode* sense? Would it cause him to know of **HMRC**'s decision to enquire in the *Sword Services Sense*?

54. I am satisfied that a reasonable person would see a combination of both letters as notice of an intention to open an enquiry. Indeed in my view it is more likely than not that, in the light of the contents of the schedule to the January letter, he would see the second letter as the "separate letter" therein referred to. It

is difficult to see what other interpretation a reasonable person in the position of the recipient could reach other than the **HMRC** intend to open an enquiry when faced with a document saying "*I will be opening an enquiry into your claim under Schedule 1A TMA by separate letter*" and a subsequent letter saying that a Schedule 1A inquiry is "*required*" and "*can*" and "*should*" be opened. Those together may not indicate that an enquiry has been opened but together, in my view, they clearly indicate an intention to do so.

The Prematurity Defence

55. Even if no notice has been given, nonetheless **HMRC** argue that this claim cannot be sustained because it is premature because, at this stage, it is based on nothing more than an asserted rather than an established loss. The loss upon which it is based is not established because it is subject to a s9A enquiry.

56. The contention is therefore that any claim for loss relief attributable to the 2010/2011 tax year based upon losses which actually accrued in 2011/2012 cannot be seen to be final because there is an ongoing enquiry which, pursuant to the principles enunciated in *R (oao) De Silva v **HMRC** **2016*** EWCA 40, makes a claim for relief in 2010/2011 "inchoate" until the s9A enquiry into the 2011/2012 position is closed.

57. In essence therefore it is argued by **HMRC** that the claim is premature because the claim in respect of the loss cannot be finalised until the loss itself is finalised. Mr Gordon accepts that if *De Silva* applies then this claim is indeed premature4. However, he argues that it does not apply because it can be distinguished on the basis not least that the taxpayers in *De Silva* were partners.

58. Instead he prays in aid *Cotter* on the basis that it is clear authority from the Supreme Court that where a taxpayer makes a claim for relief outside his return (as here) the claim is a "stand alone "claim. In the claimant's case it is a stand-alone claim in respect of losses intended to reduce income for 2010/2011 and since it is a stand-alone claim it is not impacted by the outcome of any enquiry into loss relief claims for the subsequent year. As he puts it in paragraph 37 of his skeleton argument:

*"Even if **HMRC** were subsequently to conclude (at the end of the s9A enquiry) that the loss relief had been wrongly claimed, that conclusion would be relevant only for the purposes of the 2012 return itself; it cannot and could not affect the stand alone claim previously made. For example, as some of the losses were set against 2011/2012 income, that particular set off might be capable of revision by **HMRC** at the conclusion of the enquiry. However, to the extent that the losses have already been claimed outside the return in relation to income levels in 2010/2011, the only means of challenge would have been an enquiry into the stand alone claim itself. The outcome of any challenge arising from the s9A enquiry into the 2012 return cannot alter the effect of the standalone claim"*

59. As I have said, it is not disputed by Ms Nathan that a claim for relief in respect of 2010/2011 where the losses were incurred in 2011/2012 engages the provisions of Schedule 1A. That is the effect of *Cotter* and she does not shrink from that. Nor does she shrink from the proposition that a claim in circumstances such as those applicable here is a stand-alone claim in the sense envisaged by *Cotter*.

60. However she argues that that is something of a red herring when considered in the light of *De Silva* and the fact that there is an ongoing s9A enquiry into the 2011/2012 tax return. Her point is that the s9A enquiry is an enquiry into that purported loss. Put at its simplest; if the loss is held not to be allowable on the basis that it is an artificial loss then that loss cannot form a basis for relief in the earlier year. Thus, as I have said in paragraph 55 above, the claim for loss in the earlier year is not yet a finalised loss, it is merely an asserted loss unless and until it is allowed and in the meantime it is an undeveloped or inchoate loss and so the claim is premature.

61. She argues that *De Silva* is authority for that proposition and she referred me to the decision of Sales J at first instance (as he then was) and Gloster LJ upholding him in the Court of Appeal.

62. *De Silva* was a judicial review case. It was an application by two partners for a review of the decision of **HMRC** to reassess tax due in an earlier year based on losses claimed as being incurred in a later year where the losses were reduced to a figure lower than that which was actually initially claimed by the taxpayers.

63. The claimants argued that the claims to carry back the losses to the previous years were stand-alone claims for relief under Schedule 1B and **HMRC** were time-barred from challenging them because they had missed the relevant deadline. In that respect the factual matrix of *De Silva* is very similar to the case with which I am concerned save that the taxpayers in *De Silva* were partners and Mr **Wickersham** is an individual. Mr Gordon argues that that is a crucial distinction. Ms Nathan argues that it is not and that the principles enunciated in *De Silva* apply to individuals as they do to partners.

64. Let me refer to the passages in *De Silva* at both first instance and in the Court of Appeal to which Ms Nathan referred me. First that of Sales J at first instance reported at (2014) UKUT 170 paragraph 39;

"*Where an individual partner makes a claim to utilise partnership losses arising in a later period by setting them off against his income in an earlier period, I do not think that it is properly to be regarded as a simple stand alone claim for relief made outside the return. It is an inchoate claim for relief which as a matter of substance will only be validated when the partnership losses are included in the partners' individual return for the later period*"

65. In the Court of Appeal reported at (**2016**) EWCA Civ 40 paragraph 50 Gloster LJ specifically agreed with paragraph 39 above. She went on to emphasise that the claims by the taxpayers in *De Silva* were made for the period before that in which the losses actually accrued (as in this case). She said, at paragraph 50;

"The carryback claims were made on the basis of what it was expected and estimated losses attributable to the taxpayer for those later periods would be. But the claims for relief could, as a matter of substance, only ultimately be made good if the (taxpayer) also eventually included their shares of the partnership trading losses in their own individual returns for the period in which those losses arose. In those circumstances I see nothing wrong or unorthodox in the judge's characterisation of those claims as "inchoate".

66. I remind myself that Mr Gordon was sensible enough to accept that if what is said in *De Silva* applies to individuals as it does to partners then he cannot succeed unless I am prepared to treat *De Silva* as wrong (as to which see paragraph 67 below) or unless the court finds merit in an argument not deployed in *De Silva* but presaged by Mr Gordon in paragraphs 58 and 59 of his skeleton argument. I shall come to that in due course.

67. Of course unless *De Silva* can be realistically distinguished from this case whether it is right or wrong I am bound by it – as Mr Gordon readily accepts in paragraph 39 of his skeleton argument. Equally, unless *De Silva* can be distinguished, *Cotter* cannot come to his aid. True it is that *Cotter* decided that a claim for relief against income in year 1 where the loss giving rise to the claim for relief was incurred in year 2 is an out of return claim and therefore a stand-alone claim, a challenge to which has to be made under Schedule 1A but that in itself is not enough to defeat the prematurity defence if the loss is indeed rendered inchoate until closure of the s9A enquiry into the loss giving rise to the loss relief for which relief is claimed against income earned in 2011/2012. That is clearly the effect of *De Silva.*

68. The issue therefore is whether a claim which is inchoate if made by a partner is final, stand-alone and unimpacted, even by a s9A enquiry into the loss on which it is based, if the claim is made by an individual. In

essence, does the fact that it is a claim by an individual rather than a partner make it, to coin a word, "choate"?

69. It is clear that *De Silva* focuses on the position as regards a partner whereas I am concerned with an individual. The judgments of Sales J and Gloster LJ are replete with references to partners and partnerships but is that a distinction which matters in the context of this case?

70. I accept that there are differences in the tax regime between partners and individuals. One difference is between the treatment of the two different forms of taxpayer set out in s8 TMA. This is the section dealing with tax returns and it provides by s8(1B) that partners must include in their own personal annual return a statement of their share of partnership income. This is over and above the partnership return.

71. Ms Nathan argues that this is only because a partnership is a transparent entity so that the profit and losses of the partnership are treated as the profit and losses of the individual partners with the result that each partner is liable to income tax in respect of his share of the partnership profits or to relief in respect of his share of the losses. Ms Nathan argues that this does not represent a fundamental difference between the status of a taxpayer as an individual and one who is a partner. Indeed her contention is that in so far as profits and losses of a partnership are allocated to individual partners for tax purposes the two types of taxpayer have much more in common than that which separates them.

72. She points out for example that the TMA itself is not overly concerned with any distinction in principle between individuals and partners notwithstanding the fact that a partner has to make an individual return and a partnership return. She draws my attention to s12 AC TMA which specifically makes it clear that giving notice of enquiry in respect of a partnership return is deemed to include the giving of a notice of enquiry into the return of each partner.

73. She argues that the distinction between individuals and partners in the tax legislation is merely to "*iron out the wrinkles in the different ways that they operate*". It is not a distinction in principle.

74. She argues that the principles in *De Silva* do not owe their genesis to the fact that there the court was dealing with partners. The court in that case did not seek to distinguish the case from *Cotter* on that basis but rather on the basis that in *Cotter* the Supreme Court was addressing a situation in which the taxpayer had not made any claim for carry back relief from 2008/2009 in his original tax return for 2007/2008 but rather he sought to make it later, in January 2009. Its ruling was that the claim for relief based on the loss in 2008/2009 did not afford a defence to **HMRC**'s demand for the payment of the tax assessed in 2007/2008 because **HMRC** had been justified in concluding from the materials sent in by the taxpayer in January 2009 that he was claiming relief in respect of losses for 2008/2009 which did not alter the tax chargeable or payable in relation to 2007/20085. As Gloster LJ said in *De Silva* at paragraph 53;

"*Cotter was an entirely different case on its facts, where the Supreme Court was addressing a situation in which clearly a stand-alone claim, outside any tax return, had been made for carry back relief. Moreover, no claim for carry back relief had been made, or intimated, either in the tax return for the earlier year (2007/2008) or in the relevant later year (2008/2009) in which the losses had actually been incurred"*

75. Ms Nathan argues therefore that *Cotter* is actually not relevant. In *Cotter*, as she puts it in paragraph 27 of her skeleton argument, the amount due from the taxpayer in relation to the earlier tax year was already determined and was the subject matter of **HMRC**'s enforcement action. The question was whether the taxpayer could set off an employment loss relief arising in the later year which had yet to be determined to reduce the amount payable by him in the earlier year. It therefore dealt with a different point to that which concerned the court in *De Silva*. In *De Silva* **HMRC** maintained that their relevant enquiry was into the

partnership return and corresponding individual partner returns in respect of the later years (i.e. the years in which the partnership losses actually arose) not into the individual partners' returns for the early years6.

76. Perhaps more importantly, Ms Nathan argues Gloster LJ's explanation as to how *Cotter* and *De Silva* differ referred to in paragraph 74 above makes no reference at all to the fact that *Cotter* concerned an individual while *De Silva* concerned partners.

77. Mr Gordon addresses *De Silva* at great length in his skeleton argument drawing my attention specifically to those tracts in the judgments at both first instance and on appeal that make reference to partners and partnerships.

78. I do not think it is necessary to repeat those parts of the judgments that he reproduces in his skeleton argument but merely to record that I have had regard to them and have particularly noted Sales J's reference paragraph 42 of his judgment to the "*elaborate provisions*" governing enquiry into partnership returns and at paragraph 52 where he observes that "*it is only if partnership losses can be brought into account for the relevant year of assessment that a right to carry back those losses arises"*

79. In addition, Mr Gordon cites *Rowe v* ***HMRC*** 2015 **EWHC** 2293 Admin as confirmation that any inconsistency between *Cotter* and *De Silva* is due to the fact that *De Silva*, like *Rowe*, concerned specific provisions relating to partners. At paragraph 86 of *Rowe*, Simler J notes specifically that *De Silva*, unlike *Cotter*, concerned a partnership loss sought to be carried back by individual partners. She took the view that Sales J was right7 in his conclusion that an enquiry into the partnership return for the year of loss, because it gave rise to a deemed enquiry into each of the partners returns under s12AC (6) TMA, was sufficient to challenge any claims for loss relief following from such loss (whether sideways or carry-back).

80. It has to be said however that I do not glean from that judgment that her conclusion that Sales J was correct was specifically connected to the fact that he was dealing with a partnership.

81. I have considered very carefully Mr Gordon's submissions but I am not persuaded that *De Silva* is distinguishable merely because it concerned partners. I agree with Ms Nathan that the tax treatment of individuals and partners is very closely related and that differences arise not because differences are demanded as a matter of principle but because there are simply operational differences in the manner in which partnerships operate and are taxed and the manner in which individuals operate and are taxed.

82. In addition, I do not see why the principle upon which Ms Nathan relies as articulated by Sales J and reproduced in paragraph 64 above should only apply to partnerships. I cannot see any logical reason for that principle to be applicable to a partner but not an individual. Additionally, I repeat, based upon what she said at paragraph 53 of her judgment in *De Silva* (and reproduced at paragraph 74 above) Gloster LJ did not see the distinction between *Cotter* and *De Silva* as being down to the fact that one concerned a partnership and the other did not.

83. Of course I do not overlook the argument that **HMRC** are obliged by Schedule 1A paragraph 4(1) to give effect to a claim for relief unless an enquiry has been opened but of course on any view there is an enquiry under section 9A which may conclude that the loss in respect of which relief is claimed is artificial and ineligible for relief and I have found that in fact a Schedule 1A enquiry had been validly opened.

84. In any event it seems to me that an important element to remember here is that by virtue of Schedule 1B paragraph 2, where a person makes a claim requiring relief for a loss incurred or treated as incurred in one year of assessment (the later year) to be given in an earlier year of assessment (the earlier year) then, pursuant to paragraph (3), the claim shall relate to the later year.

85. But, perhaps more significantly, Mr Gordon recognises that if *De Silva* is not distinguished and the court is bound by it then the Prematurity Defence must succeed, subject to the point which I have presaged in paragraph 66 above.

86. Mr Gordon argues that the position of **HMRC** is that by virtue of the fact that there is a s9A enquiry into the loss relief claimed in the later year (2011/2012) **HMRC** have an impermissible second bite of the cherry to challenge the carry back to the year 2010/2011.

87. In his 2011/2012 tax return the claimant shows his claim for losses to be used against income earned in 2010/2011 by the completion of box 13 of the later return with the figure of £171,531.

88. Mr Gordon argues that the existing s9A enquiry into the 2011/2012 tax return is insufficient to challenge the carry back claim as made in the 2011/2012 tax return form. He argues that the section 9A enquiry cannot touch upon the entry in box 13 because that is outside the tax return since it relates to a year other than the year to which the tax return relates.

89. He argues that this brings us back squarely into *Cotter* territory because the claim in box 13 cannot impact upon the liability for the later year (2011/2012). In other words the claim does not impact upon the self-assessment for the later year but instead it gives a freestanding credit which notionally relates to the later year. Mr Gordon draws I think on the observations of Lord Hodge in *Cotter* at paragraphs 17 and 18 in which he says;

17 Income tax is an annual tax, and liability to such tax is calculated in relation to a particular tax year…….. Mr Gordon, who appeared for Mr Cotter, did not argue in this court that he was entitled to deduct the relief against income and gains in 2007/2008. He accepted that paragraph 2 (6) of Schedule 1B to the 1970 Act provides that the effect is to be given to the claim in year 2. He was correct to make that concession. Accordingly, the claim did not affect the amount of tax which was chargeable or payable in relation to 2007/2008. There was therefore no issue between the parties as to the correct assessment to tax in that year.

18 ***The revenue****'s use of the taxpayer's income tax liability in 2007/2008 in quantifying his obligation to make payments to account for 2008/2009…….. does not affect the finality of the 2007/2008 assessment. Whatever rights claim for relief might have given the taxpayer in relation to a payment to account for 2008/2009, if* ***the revenue*** *had accepted its validity, it did not affect his obligation to pay the tax payable for 2007/2008."*

90. I do not see however that this argument alters the position that I am bound by the basic principles set out in *De Silva* that losses arising in year 2 but which are invoked for relief in respect of year 1 are inchoate until validated by being included in the tax return for the later period (and, by natural extension, accepted by **HMRC**).

91. In my view therefore the prematurity defence does succeed. I would add that even if I am wrong and the claimant was entitled to judgment for the sum claimed questions might arise as to whether it would be appropriate to stay enforcement at least of some or possibly all of the judgment until the outcome of the s9A enquiry.

The paragraph 4(4) Defence

92. It has to be said that Ms Nathan, having presaged this defence in a brief oral submission, did not really pursue it in her final submissions.

93. Schedule 1A paragraph 4 deals with giving effect to claims (for relief) or amendments. It is pursuant to sub paragraph 1 that **HMRC** must give effect to claims for relief unless an enquiry is opened. Sub para 4 (4) states;

"*Nothing in this paragraph applies in relation to a claim or an amendment of a claim if the claim is not one for discharge or repayment of tax."*

94. By the Particulars of Claim the claimant actually makes a claim for repayment of tax. That would bring it squarely within the purview of Schedule 1A however the point made by Ms Nathan is that which I make paragraph 2 above, namely that by paragraph 25 of the skeleton argument, Mr Gordon argues that the claim is not specifically a claim for the discharge or repayment of tax but rather it is a claim for a free standing tax credit. In those circumstances it is argued that, by virtue of the provisions of paragraph 4(4), it is not covered by Schedule1A. The contention that in reality what the claimant seeks is a freestanding credit was of course one of the arguments that Mr Gordon marshalled in respect of the Lack of Quantification Defence.

95. In my view however even if the claim is for a tax credit, the claimant's claim is for the discharge or repayment of tax to which Schedule 1A applies. It is immediately right to observe that **HMRC** has consistently contended that because this is an out of return claim, it is indeed one to which Schedule 1A applies and that it has initiated the procedure to make an enquiry on that basis, (a contention that I have of course accepted, as set out in my conclusion to the "Notice Served Defence"). It does not sit well to also contend that Schedule 1A has no application. Furthermore, the provisions of ss131 and 132 ITA make it plain that where a taxpayer suffers a capital loss on the disposal or deemed disposal of shares that meet the criteria set out in s131 he is entitled to make a claim for the loss to be deducted in the calculation of his net income for the tax year in which the loss was incurred or the previous year or both tax years. In my view, even if a successful claim only results in a free standing tax credit, it is difficult to see how that can be characterised as anything other than a claim for the "discharge" of tax even if it is not a claim for the "repayment" of tax. I accept that a tax credit can be used not only to pay tax but also penalties but I do not think that that detracts from the proposition that even a tax credit in essence is a means by which tax is "discharged". In this case, even though the loss was incurred in 2011/2012 it is open to the claimant to seek to set it against his net income in 2010/2011. That is specifically permissible pursuant to s132 ITA. The whole essence of a claim for relief is that it discharges the obligation of the taxpayer to pay an amount that, but for the relief, would be due to **HMRC**. It would be odd therefore if this claim fell outside the provisions of Schedule 1A which relates to the giving of effect to such claims.

96. I am accordingly not persuaded that this limb of the defence is established.

Conclusion

97. I have concluded that the defence based upon prematurity is established and that in any event notice of intention to enquire under Schedule 1A had been given by the deadline. It matters not therefore that the other two defences have not been established. As a result of my findings the claim must be dismissed.

Final Remarks

I am grateful to counsel for their very able assistance in this matter.

H H Judge Saffman

1As he was in principle entitled to do pursuant to S132 (1) (b)

2This letter was written before the Supreme Court in *Cotter* clarified the position to the effect that such a claim was not made in the return (even though made in the tax return form)

3Subject to defences referred to in para 63 below

4See Sales J at paragraph 57 of the judgment of first instance approved by Gloster LJ at paragraph 53 of her judgment

5See Sales J para 56 and Gloster LJ para 30

6this case was heard before *De Silva* reached the Court of Appeal