



TC06952

Appeal number: TC/2017/08791

Income tax – 100% relief for expenditure on qualifying film – s 42 Finance (No 2) Act 1992 and s 48 Finance (No 2) Act 1997 – delay in obtaining certificate as to status of film – whether claim made out of time – alternative claim for subsequent year under s 140 Income Tax (Trading and Other Income) Act 2005 – whether allocation of expenditure to relevant year made out of time – whether valid provisional claim made – whether certification of film by Hungarian authorities under European Convention on Cinematic Co-production sufficient – appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

BETWEEN

INNVOTEC 6 LLP

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public at Centre City Tower, Birmingham on 1 November 2018, with subsequent written submissions

John Horler of Horler Tax Limited, for the Appellant

David Street, presenting officer, for the Respondents

DECISION

Introduction

1. This appeal is concerned with the availability of accelerated relief for expenditure incurred by the appellant on the purchase of the master negative of a film for some £5.8 million in November 2004. The appellant claims relief for the full purchase cost in the year 2004-05 pursuant to section 42 Finance (No 2) Act 1992 (“FA92”), as applied by section 48 Finance (No 2) Act 1997 (“FA97”); in the alternative, it claims relief for the same amount in the year 2005-06 pursuant to section 140 Income Tax (Trading and Other Income) Act 2005 (“ITTOIA”).

2. HMRC do not dispute the availability of the relief on “anti-avoidance” grounds; they essentially argue that as the requisite certificate from the Department of Culture, Media and Sport (“DCMS”) was not provided in respect of the film in question until 2014, the appellant has failed to satisfy the statutory grounds for either relief in time.

The facts

3. I received a bundle of documents and heard oral testimony from:

(1) Andrew Bradley of HMRC, formerly an investigator in their Film Team. Mr Bradley had been involved in correspondence on behalf of HMRC on this matter from January 2015 until March 2017, when he had moved to a different role within HMRC. He had issued HMRC’s “view of the matter” letter dated 18 January 2016.

(2) Anna Mansi, Head of Certification at the British Film Institute. Ms Mansi had worked in the Certification Unit since 2005, when it had been part of the DCMS. The unit had subsequently moved to the UK Film Council and, in 2011, to the British Film Institute. She had been a Certification Analyst and Certification Manager before taking up her present role.

4. I find the following facts.

5. The appellant acquired the master negative of a film called “Day of Wrath” (“the Film”) from the co-producers in November 2004 for £5,884,951¹. It subsequently leased the Film back. It then claimed a revenue deduction of this amount in its partnership self-assessment return for the year 2004-05, which was submitted to HMRC on 18 January 2006.

6. In the meantime, on 29 December 2004, its representative had submitted an application to the Certification Unit at the Department of Culture, Media and Sport (“DCMS”) under paragraph 3 of Schedule 1 to the Films Act 1985 for the master version of the Film to be certified as a qualifying film for the purposes of sections 40A to 43 FA92. DCMS raised a number of queries about the application, which were not clarified to its satisfaction. In the absence of satisfactory responses, they regarded the application as withdrawn, and closed their file on 2 January 2008. An application had also been made to the Hungarian Film Office for a certificate that the Film was a “co-production film with Hungarian participation”, and such certificate was granted, either on 4 April 2005 or on 5 July 2007 (the email correspondence in

¹ This was the figure reflected in the appellant’s original self-assessment return. Other amounts were mentioned in the papers before me, mostly varying by a small margin. The amount stated in respect of the expenditure in the certificate finally issued by DCMS on 28 January 2014 – see [11] below – was however significantly different, in the sum of £4,016,889. No explanation was given for the difference, though Ms Mansi stated that the figure in the certificate would have originated from the appellant.

the papers before me was ambiguous). I do not need to resolve the uncertainty about the correct date, for the reasons set out below.

7. HMRC gave notice on 11 August 2006 of their intention to enquire into the whole of the appellant's 2004-05 return partnership. As part of the enquiry, they sought a copy of the DCMS "qualifying film" certificate.

8. In the meantime, the appellant submitted its self-assessment partnership return for the year 2005-06 on 25 January 2007. On 13 November 2007, HMRC gave notice of their intention to enquire into aspects of the appellant's 2005-06 return. The specified aspects were not included in the bundle before me, but in the result, the enquiry was closed on the basis set out below.

9. Ultimately, HMRC closed both enquiries by issuing closure notices on 4 April 2011 (re-issued to Rohit Khandhia, the new nominated partner of the appellant on 26 May 2011). The effect of the closure notice in relation to 2004-05 was to amend the appellant's self-assessment return by disallowing the deduction for the cost of acquisition of the master negative of the Film. In relation to 2005-06, the effect was to disallow a loss of £1,264, equal to an amount of "other finance charges" claimed as a deduction in the return; there had been no claim in the 2005-06 return to deduct any part of the cost of acquisition of the master negative of the Film.

10. The details of the appeals notified to HMRC against the closure notices were sketchy in the extreme in the bundles before me, which provided a very incomplete picture.

11. It is apparent, however, that in the course of the subsequent correspondence DCMS were persuaded to re-open their file on the basis of a re-submitted application dated 23 September 2013 from Mr Horler, and ultimately to issue a certificate dated 28 January 2014 in respect of the Film, confirming that the master negative was a qualifying negative for the purposes of sections 40 to 43 FA92, section 48 FA97 and Chapter 9 of ITTOIA. In the certificate, it was stated that DCMS's assessment had been "based on total expenditure of £4,016,889". The difference between this figure and the amount claimed by the appellant by way of relief was not raised as an issue or explored in the proceedings before the Tribunal.

12. There was a gap of nearly three years in the correspondence included in my bundle from the closure notices dated 26 May 2011 until a letter dated 13 May 2014 from HMRC to Mr Horler. In that letter, there was reference to earlier (clearly extensive) correspondence. In any event, HMRC rejected the appellant's claim, both on the grounds that no certificate had been issued by DCMS at the time the claim was originally made, and on the ground that the appellant was out of time to appeal against the closure notices issued on 26 May 2011 (this latter ground was subsequently dropped).

13. Further correspondence clearly then ensued, but the next correspondence in the bundle before me was a letter dated 24 October 2014 from HMRC to a different representative for the appellant. In that letter, HMRC said this:

"In our opinion, although the Tribunal could obviously decide otherwise, the appeal is unlikely to succeed. The conclusion of the closure notice was correct – at the time of the claim the certificate did not exist, and further to that, it still did not exist at the point the closure notice was issued. It was not issued until nearly three years later and as such, I fail to see how an appeal could be successful. There is a key difference between the certificate existing but not having been supplied and it simply not being in existence.

...

With regards to the claim needing to be valid before it is made – this is not just HMRC’s view, it is what is written in the legislation.

The claim for relief was required under Section 42 F2A 92. Section 48 F2A1997 amended the amount of relief that could be claimed under S42. This is the legislation that governed the Innvotec 6 claim for Day of Wrath.

Section 42(1) says ‘...that person shall (on making a claim*) be entitled to deduct an amount...’. it goes on to say that it applies when expenditure is incurred on the master negative for a qualifying film.

*Underlining is my emphasis.

Section 43 F2A 1992 provides interpretations for Sections 41 and 42 F2A 1992. It defines a ‘qualifying film’ as ‘...a master negative of a film certified by the Secretary of State...’. Day of Wrath did not meet this criterion.

So for the expenditure to be relievable in the period a valid claim was required. For a claim to be valid it must be in respect of a qualifying film – which Day of Wrath was not.

...

The legislation that Mr Horler is referring to (Section 43A(2) TMA 1970) allows adjustments to be made that could have been made at the original point in time, but were not (see the legislation below). For example certain expenditure was not claimed by a business as it may have already been in a loss position and so it would not have been beneficial to claim it at that point, but following an enquiry that increased profits a claim can be made to take account of this. S43A(2) has no application here as no claim could have been made at the time as no certificate existed and therefore Day of Wrath was not a qualifying film. In any case S43A(2) has a time limit of one year following the closure of the enquiry. So even if a claim could have been made, it would have been out of time – the amendments were made in August 2011, being in 2011/12, so the time limit expired in April 2013.

43A Further assessments: claims etc

(2) Without prejudice to section 43(2) above but subject to section 43B below, where this section applies –

(a) any relevant claim, election, application or notice which could have been made or given within the time allowed by the Taxes Acts may be made or given at any time within one year from the end of the year of assessment in which the assessment is made,

*Underlining is my emphasis.”

14. Mr Bradley became involved in the matter on behalf of HMRC in January 2015 and following a brief exchange of emails and a conversation with Mr Horler on 18 February 2015, he consulted with colleagues and then wrote a letter dated 31 July 2015 to Mr Horler. No copy

of that letter was in my bundle, but in his witness statement Mr Bradley referred to it in the following terms:

“After consulting with colleagues, on 31 July 2015, I sent a letter to Mr Horler to advise that I had considered the appeal. My view, and that of my colleagues, was that Section 42 Finance (No. 2) Act 1992 requires that, at the time the claim is made, the film must be a qualifying film. Therefore, to allow the relief to be given in the year ended 5 April 2005, the film would have to have been certified by 31 January 2007, the last day on which the partnership could amend the return. I asked Mr Horler to withdraw the appeal.”

15. He then went on to refer to further correspondence, in which Mr Horler had argued that even if no relief could be given in 2004-05, it should be given in 2005-06, on the basis of the argument before the Tribunal set out below. Mr Bradley had replied, indicating HMRC’s view that failure to secure the DCMS certificate by 31 January 2008 meant that it was also too late for relief to be given in 2005-06, even under the slightly amended version of the legislation then in force.

16. In the absence of any reply, on 18 January 2016 Mr Bradley issued what he described in his witness statement as “a formal Decision Letter... detailing HMRC’s view of the matter”. This letter, which was headed:

“Innvotec 6 LLP
Appeal against the findings in the enquiry for the year ended 5 April 2005
Decision Letter – HMRC’s view of the matter”

17. In this letter, he referred to the fact that an appeal (apparently against HMRC’s decision to amend the appellant’s 2004-05 return so as to disallow relief for the acquisition expenditure) had been “received and accepted”. He referred to the fact that:

“the appeal further contended that if the first challenge was unsuccessful, the loss should be allowed in 2005/06 under the new legislation at Section 140 Income Tax (Trading and Other Income) Act 2005. The reason being that claims were no longer required for relief under this section.”

18. The letter went on to reject the appeal, essentially on the grounds summarised above.

19. On 5 December 2017 the Tribunal received a notice of appeal (from a different adviser) against HMRC’s decision to disallow the relevant expenditure in 2004-05 and against their refusal to allow it in the alternative in 2005-06. Whilst the appeal was originally submitted in the name of Rohit Khandhia, the appellant was substituted as appellant at its request, HMRC not objecting.

20. Mr Street confirmed that HMRC now accept that both the appellant’s original appeal to them and this appeal to the Tribunal should be entertained notwithstanding any lateness. To the extent necessary, I formally gave permission accordingly.

The legislation

21. The provision pursuant to which the original claim for 2004-05 was made was section 42 FA92, which provided in relevant part as follows:

“Relief for production or acquisition expenditure

(1) Subject to the following provisions of this section and any other provisions of the Tax Acts, in computing for tax purposes the profits or gains accruing to a person in a relevant period from a trade or business which consists of or includes the exploitation of films, that person shall (on making a claim) be entitled to deduct an amount in respect of any expenditure –

(a) which is expenditure to which subsection (2) or (3) below applies, and

(b) in respect of which no deduction has been made by virtue of section 40B above and no election has been made under section 40D above.

...

(3) This subsection applies to any expenditure of a revenue nature incurred by the claimant on the acquisition of the master negative of a film or any master tape or master disc of a film where –

(a) the film was completed in the relevant period to which the claim relates or an earlier relevant period, and

(b) the master negative, tape or disc is a qualifying film, tape or disc.”

22. The section went on to provide that, in general terms, the amount of relief allowable in any one year was limited to one third of the total expenditure incurred. However, by virtue of section 48 FA97, that limit was removed in relation to certain expenditure to which that section applied. For present purposes, the relevant expenditure was as set out in section 48(2) & (3) FA97, which provided as follows:

“(2) Subject to subsection (3) below, this section applies to so much of any expenditure falling within paragraphs (a) and (b) of section 42(1) of the Finance (No 2) Act 1992 as is expenditure in relation to which each of the following conditions is satisfied, that is to say –

(a) the expenditure is incurred on or after 2nd July 1997 and before 2nd July 2005;

(b) the film concerned is a film with a total production expenditure of £15 million or less; and

(c) the film concerned is a film completed on or after 2nd July 1997.

(3) This section does not apply to so much of any expenditure falling within section 42(3) of the Finance (No 2) Act 1992 as exceeds the amount of the total production expenditure on the film concerned.”

23. The mechanism by which the limit was removed was by substituting the following subsection (4) into section 42 FA92 in place of the normal provisions which imposed the “one third” limit:

“(4) The amount deducted for a relevant period under subsection (1) above shall not exceed so much of the total expenditure incurred by the claimant on –

(a) the production of the film concerned, or

(b) the acquisition of the master negative or any master tape or master disc of it,

as has not already been deducted by virtue of section 40B or section 41 above or this section.”

24. In order to claim relief under section 42 FA92 (including relief as enhanced by section 48 FA97), the requirements of section 42(6) FA92 had to be observed:

“(6) A claim under this section shall be made –

(a) for the purposes of income tax, on or before the first anniversary of the 31st January next following the year of assessment in which ends the relevant period to which the claim relates,

(b) for the purposes of corporation tax, not later than two years after the end of the relevant period to which the claim relates,

and shall be irrevocable.”

25. By virtue of section 43 FA92, “qualifying film” (as referred to in section 42(3)(b) FA92) was defined as “a master negative of a film certified by the Secretary of State under Schedule 1 to the Films Act 1985 as a qualifying film for the purposes of section 40D above”; and there were corresponding definitions of “qualifying tape” and “qualifying disc”, referring to similar certificates from the Secretary of State.

26. The statutory framework changed for 2005-06. Section 42 FA92 ceased to apply to the appellant and instead sections 135 to 140 of ITTOIA applied. If relief is denied under section 42 FA92, the appellant claims relief under section 140 ITTOIA, which provided, in relevant part, as follows:

“140 Certified master versions: acquisition expenditure on limited-budget films

(1) This section applies if –

(a) the person carrying on the trade has incurred acquisition expenditure in respect of the original master version of a film in, or before, the relevant period,

...

(d) the original master version is a certified master version,

...

(f) the total production expenditure in respect of the original master version is £15 million or less...

...

(3) A deduction is allowed for the amount of the acquisition expenditure allocated to the relevant period...

(4) The person carrying on the trade may allocate up to 100% of the acquisition expenditure to the relevant period.

(5) But the total amount allocated under this section may not exceed the total production expenditure in respect of the original master version.

...”

27. Schedule 1 to the Films Act 1985 made provision for the DCMS to provide certificates as to the qualifying status of films. It was drafted on the basis that it applied to “British Films”, but also included a provision in paragraph 4(5) which said this:

“Her Majesty may by Order in Council provide for films to be treated as British films for the purposes of this Schedule if they are made in accordance with the terms of any agreement between Her Majesty’s Government in the United Kingdom and any other government, international organisation or authority.”

28. The European Convention on Cinematographic Co-production (“the Convention”), which was opened for signature on 2 December 1992, came into force for the United Kingdom on 1 April 1994. By Article 2 of an Order in Council made on 13 April 1994 (The European Convention on Cinematic Co-production Order 1994/1065), it was provided as follows:

“A film with respect to which the requirements of Schedule 1 to the Films Act 1985, as to the eligibility of a film for certification as a British film, are not fulfilled shall be treated as a film with respect to which those requirements are fulfilled if –

(a) the film is a co-production to which the Convention applies; and

(b)

(i) where there are two co-producers, one is established in the United Kingdom and the other is established in one of the countries set out in the Schedule to this Order, or

(ii) where there are three or more co-producers, one is established in the United Kingdom and at least two others are established each in a different country set out in that Schedule.”

29. The Film was agreed to be a co-production with co-producers established in the UK and Hungary (which was included in the Schedule to the above Order). It appears a Spanish co-producer was also involved at some point, but Spanish involvement appears to have ended before it became relevant for the purposes of certification under the Convention.

30. Article 4 in the Convention provided as follows:

“Article 4 – Assimilation to national films

1. European cinematographic works made as multilateral co-productions and falling within the scope of this Convention shall be entitled to the benefits granted to national films by the legislative and regulatory provisions in force in each of the Parties to this Convention participating in the co-production concerned.

2. The benefits shall be granted to each co-producer by the Party in which the co-producer is established, under the conditions and limits provided for by the legislative and regulatory provisions in force in that Party and in accordance with the provisions of this Convention.”

The issues and outline arguments

31. The main question before the Tribunal was whether the appellant had made a valid “claim” under section 42(1) FA92 for a deduction as provided for by section 48 FA97 in respect of the relevant expenditure in computing taxable profits for 2004-05, bearing in mind in particular section 42(6) FA92. If that question were answered in the negative, such that no relief was available for 2004-05, the consequential question was whether the appellant had validly “allocated” any of the acquisition expenditure so as to qualify for a deduction for such expenditure pursuant to section 140(3) ITTOIA in computing taxable profits for the year 2005-06.

Arguments for the appellant

32. Mr Horler argued, in outline, that the appellant’s “claim” for 2004-05 had been validly made (albeit on a provisional basis) by the inclusion in the partnership return for that year of a deduction of £5,884,951, along with a note in the “additional information” box on the return form as follows:

“The partnership loss represents the full cost of the films claimed under FA1997 (No 2) s48.

The returns are provisional as DCMS approval has not been obtained on the films produced by this partnership.

The film purchased by Innvotec 6 was ‘Days of Wrath’.”

33. It was sufficient, he argued, that the film had ultimately achieved certification by DCMS even though that did not take place until much later.

34. Alternatively, he argued that the effect of the Convention was that the certificate issued by the Hungarian authorities on 4 April 2005 (or 5 July 2007) was sufficient to entitle the appellant to the same tax treatment as if that certificate had been issued by the DCMS.

35. Even if the above two arguments failed, the effect of section 43A Taxes Management Act 1970 (“TMA”) in conjunction with section 43C TMA was that the appellant was permitted to make a late claim under section 42 FA92 which HMRC were required to accept.

36. Finally, if relief was not available for 2004-05, the expenditure could be validly allocated to 2005-06 and relief claimed in that year, as there was no statutory time limit for making the allocation referred to in section 140(3) ITTOIA.

Arguments for HMRC

37. Mr Street argued, in outline, that the Film only became a “qualifying film” for the purposes of section 42 FA92 on 28 January 2014 when the DCMS certificate was issued. This erected a number of hurdles in relation to the 2004-05 claim:

(1) Under section 42(3) FA92, expenditure on the acquisition of a master negative is only covered (potentially giving rise to relief) where the negative acquired “is” a

qualifying film. When the appellant incurred its expenditure on acquiring the master negative of the Film, it was not a qualifying film and therefore the expenditure fell outside the scope of section 42(3) altogether.

(2) Alternatively, section 42(3) might be read as requiring that the relevant film was a “qualifying film” at the time the relevant claim was made. Again, in the present case, that requirement would not be satisfied.

(3) Even if the purported claim had been submitted on 31 January 2007 (the last date upon which a claim was permitted for 2004-05 pursuant to section 42(6) FA92, and also the last date upon which the appellant would have been permitted to amend its partnership return under section 12ABA(2) TMA), that would still have been nearly seven years before the DCMS certificate in respect of the Film was issued, accordingly any argument that the achievement of certification by the last date on which the 2004-05 return could be amended was sufficient was (even if correct) irrelevant.

38. There were similar consequences in relation to the 2005-06 claim, as section 140 ITTOIA was similarly structured:

(1) Section 140 ITTOIA (which confers the relevant relief) is stated to apply if a number of conditions are satisfied; those conditions are set out in section 140(1), and include:

“(a) the person carrying on the trade has incurred acquisition expenditure in respect of the original master version of a film in, or before, the relevant period,

...

(d) the original master version is a certified master version,

...”

39. “Certified master version” was defined in section 132(3) ITTOIA to mean, in relation to a film, “an original master negative, tape or disc which is certified under paragraph 3 of Schedule 1 to the Films Act 1985 as a qualifying film, tape or disc for the purposes of this Chapter”. The use of the present tense in this definition meant, in Mr Street’s primary submission, that since there was no certificate in relation to the Film at the time the appellant incurred the acquisition expenditure on it, it was not at that time a certified master version and accordingly the condition in section 140(1)(d) ITTOIA was not satisfied, so negating any relief under that section.

40. Section 140 ITTOIA did not require a formal “claim”, but it did require the taxpayer to “allocate” the expenditure to the relevant period. The appellant had done nothing to indicate any intention to make such an allocation in its original return for 2005-06; so even if the legislation should not be read as Mr Street primarily contended, the appellant had still failed to make an “allocation” of the expenditure to 2005-06, either by the deadline for submitting the return (31 January 2007) or by the deadline for it to amend the return under section 12 ABA TMA (31 January 2008); essentially whatever it had done during that period (and there was no evidence before the Tribunal that it had done anything) could not have amounted to a valid allocation because there was not any expenditure which qualified for such allocation until January 2014 when DCMS issued their certificate.

41. Mr Street argued that the extended time limit in section 43A(2)(a) TMA (as applied by section 43C(2) TMA) did not apply, because it only applied where the original claim could have been made within the applicable time limit – and in the present case, by the time that time limit expired (31 January 2007 for the year 2004-05, as laid down in section 42(6) FA92), the appellant would not have been able to make a valid claim because the DCMS certificate for the Film had not by then been issued. Furthermore, even if the extension in section 43A(2)(a) TMA could be allowed, it would still not assist the appellant, because all it would do would be to extend the time limit to 5 April 2013 (12 months after the end of the year of assessment in which the 2004-05 partnership return had been amended pursuant to HMRC’s closure notice issued on 26 May 2011); and at that time, the DCMS certificate had still not been issued, so the appellant would still have been incapable of making a valid claim.

42. Mr Street rejected any suggestion that a “provisional” claim such as that purportedly included in the appellant’s return for 2004-05 would be effective and in some way perfected by the later issue of the certificate by DCMS. There was nothing in the legislation to suggest there was any scope for a provisional claim of this nature.

43. So far as the appellant’s claim to rely on the Hungarian certification was concerned, he submitted that Article 4 of the Convention, in referring to the benefits being granted “under the conditions and limits provided for by the legislative and regulatory provisions in force”, effectively referred straight back to the conditions under which the UK legislation granted the tax relief, which in turn required a certificate from the UK authorities.

Discussion and decision

Is the grant of approval by the Hungarian authorities relevant?

44. Mr Horler effectively argued that the grant of approval by the Hungarian authorities should be treated as equivalent to the issuing by DCMS of the relevant certificate under the Films Act.

45. I cannot accept this. The essence of the Convention is that the contracting parties agree to confer on “multilateral co-productions” falling within it the same benefits as they confer on “national films”. It is made perfectly clear, however, by Article 4(2) that those benefits shall be granted to each co-producer established in a contracting state “under the conditions and limits provided for by the legislative and regulatory provisions in force” in that contracting state. Those legislative provisions in the UK require that the film be “certified by the Secretary of State under schedule 1 to the Films Act 1985”, and until such certificate is issued, the legislative provisions in force in the UK for the granting of relief have not been satisfied.

46. This is reinforced by the terms of the 1994 Order in Council referred to at [28] above. It does not provide that a co-production film certified in another contracting state is thereby deemed to be certified by the DCMS, it provides that the requirements for eligibility for certification as a “British film” shall be “treated as fulfilled” in the relevant circumstances. This provided a different route to the issue of a qualifying certificate by DCMS, it did not override the requirement for such a certificate to be issued. The fact that a co-production film under the Convention could be “treated as” a British film under paragraph 4(5) of Schedule 1 to the Films Act 1985 simply meant that the DCMS was empowered to issue a certificate in respect of a co-production film as if it had been a British film. That is precisely what it did, but not until January 2014.

47. I therefore consider the grant of approval by the Hungarian authorities to be irrelevant to this appeal.

What is required for a “claim”, and what is the effect of the appellant’s “provisional claim”?

48. In the context of section 42 TMA, the “claim” that is required is a claim “to deduct an amount in respect of... expenditure of a revenue nature incurred by the claimant on the acquisition of the master negative of a film or any master tape or master disc of a film where...the film was completed in the relevant period to which the claim relates or an earlier period, and... the master negative, tape or disc is a qualifying film, tape or disc.” This last requirement is only satisfied if the relevant film is “certified by the Secretary of State under Schedule 1 to the Films Act 1985 as a qualifying [film, tape or disc]”.

49. From this, it appears to me that for a claim to be valid and effective, the DCMS certificate must already have been issued by the time the claim is made, otherwise a central requirement for its existence is absent.

50. In this case, the appellant purported to make a “provisional” claim in its 2004-05 partnership return “as DCMS approval has not yet been obtained...” As this cannot in my view amount to a valid claim, it can at best only be regarded as either:

(1) notification of an intention to make a valid claim once the DCMS certificate was issued, or

(2) an attempt to notify a claim which would automatically come into effect immediately upon issue of the DCMS certificate.

51. The distinction between the two (and the effectiveness in law of the second) might be relevant if, for example, the appellant had sought to revoke the “claim” for any reason (which would not be permissible under section 42(6) FA92 if it was indeed a valid claim) or if the DCMS certificate had been issued on, say, 31 January 2007 but had not been received by the appellant or sent to HMRC until some time later with a purportedly amended or renewed claim. As I do not consider the correct categorisation of the “claim” in this case within (1) or (2) above makes any difference to the outcome of this case, I express no further views on the matter.

52. The appellant clearly had the right to amend its partnership return for 2004-05 up to 31 January 2007 and if the DCMS certificate had been issued by then, it would have been able to make such an amendment in order to make a proper and complete claim for relief under section 42 FA92. It does not appear to me to be a coincidence that the time limit for making such an amendment coincides with the time limit under section 42(6) FA92 for the actual making of the claim.

53. As to HMRC’s argument that the phrase “the master negative... is a qualifying film...” in section 42(3)(b) FA92 means that relief is only available where the certificate has already been issued at the time the expenditure is incurred, I consider that argument to be misconceived. I consider that the use of the word “is” in section 42(3)(b) FA92 should be approached in a similar way to the use of the same word in *RCI Europe v Woods* [2003] EWHC 3129 (Ch) at [33] to [42]. I note that exactly the same formulation is used in section 42(2) FA92 in relation to production expenditure (as opposed to acquisition expenditure) and clearly no certificate can be issued under the Films Act 1985 until the film has been completed (which would mean that all production expenditure was necessarily incurred at a time when no certificate existed, thus, on Mr Street’s interpretation, precluding any relief on production expenditure). It seems to me that the purpose of section 42(3), like that of section 42(2), is to ensure that a claim can only be made in respect of expenditure on a qualifying film, and accordingly as long as the relevant certificate is issued by the time the claim is made, it can qualify as a valid claim. If a claim is

made prematurely, i.e. before the DCMS certificate is issued, then it is invalid (subject to the possibility, which I leave open, of the claim being so phrased that it only takes effect as a claim upon issue of the certificate); the consequence is that no claim has validly been made, so the taxpayer may submit a valid claim by amending the return to include it, once the certificate has been issued, subject only to compliance with the time limits for doing so which I have set out above.

54. I therefore consider that the claim as originally made in the 2004-05 return was not a valid claim. In accordance with the usual rules, the appellant had until 31 January 2007 to amend its 2004-05 return to include a valid claim, but did not do so. Accordingly relief under section 42 for 2004-05 is not available unless the 31 January 2007 deadline is extended by operation of sections 43A and 43C TMA, to which I now turn.

Effect of sections 43A and 43C TMA

55. Mr Horler argues that these provisions extend the time limit contained in section 42(6) FA92.

56. The purpose of section 43A TMA is to provide an extension of time within which claims etc can be made for any particular tax year where an assessment has been made on the taxpayer for that year. The underlying logic is obvious – if the taxpayer had reliefs available which he/she originally decided not to use because they were not necessary in the light of the return as submitted, then if the return is upset and further tax liabilities are imposed, it is appropriate for the taxpayer to have an opportunity to reconsider whether to claim the unused reliefs in order to reduce or eliminate the “new” tax liability. By virtue of section 43C, the concept is extended to cover not just assessments but also amendments made following closure of enquiries.

57. In the present case, as the partnership return for 2004-05 was amended by HMRC’s closure notice issued on 26 May 2011, the effect of section 43A(2) (combined with section 43C) is that the appellant’s claim for relief, if it “could have been made... within the time allowed by the Taxes Acts”, may be made at any time up to 5 April 2013.

58. This still does not assist the appellant. There are two issues:

(1) Because the DCMS certificate had not been issued by 31 January 2007, it would not have been possible for the appellant to have made a valid claim “within the time allowed by the Taxes Acts”; and

(2) Even if that were wrong, the appellant could still not have made a valid claim on or before 5 April 2013, as no certificate had by then been issued by the DCMS.

59. Thus I do not consider the appellant can be assisted by section 43A/43C TMA.

60. Mr Horler referred also to section 43C(4) TMA, arguing that it provided a further extension of the “window” for making a claim if an HMRC assessment (or amendment of a return) were appealed by the taxpayer, until one year after the “final determination” of the appellant’s appeal.

61. I consider this misunderstands the effect of section 43C(4) TMA. It only applies “where it is necessary to make any adjustment by way of an assessment on any person” in order to give effect to (or as a result of allowing) a “consequential claim”. A “consequential claim” is effectively a claim which, under section 43A TMA, may be made as referred to at [56] above.

It can readily be seen that if a taxpayer responds to an assessment (or amendment) by making a claim for a relief which would have been available in any event, it may effectively be “borrowing” that claim from another tax year; if that is the case, then HMRC need the ability to re-open that other tax year in order to assess for the tax that was previously sheltered by the relief which has been so borrowed, which could well be out of time under the normal rules. In other words, section 43C(4) TMA provides an extension on HMRC’s time limits to assess, it does not extend time for a taxpayer to make a claim.

2005-06

62. We are not here concerned with a “claim” at all, simply an “allocation”. On close examination, the appellant’s partnership return for 2005-06 did not include or reflect any allocation of the acquisition expenditure to that year, nor was any subsequent amendment made to it which sought to do so.

63. Mr Horler does not point to any specific act of allocation, in his skeleton argument he submitted that “in this case the full amount of the expenditure can be allocated to [2005-06] as it now meets all the requirements of section 140(1) [ITTOIA]”. He went on to submit that “There is no statutory time limit on when an amount can be allocated to a period. This would appear to be deliberate” and “Where a return is not under enquiry it would clearly not be possible to alter the tax return after the time limit has passed. That is not the case here.”

64. He therefore seemed to be suggesting that no particular form was required in order to make an “allocation” of expenditure to 2005-06, which could be done at any time.

65. I do not consider this can be right. If it were, it would result in total uncertainty. A taxpayer could, without any degree of formality, allocate (and presumably re-allocate) expenditure at will from year to year. There does not appear to be any statutory description of what is required in order to make an “allocation”, but since it is a process which results in definite tax consequences, I infer that such allocation must be either made or reflected in the taxpayer’s self-assessment return for the relevant year.

66. As the appellant did not originally seek to allocate the relevant acquisition expenditure to the year 2005-06 in its self-assessment return for that year, nor did it seek to amend that return so as to include such an allocation, and the appellant is now out of time for making any such amendment, it follows that the claim in relation to 2005-06 must fail.

67. Even if the appellant had sought to amend its return for 2005-06 to include such an allocation before the expiry of the time limit for doing so (31 January 2008), I do not consider it would have been permissible for it to do so. This is because, by that time, the DCMS certificate had not been issued and accordingly the film was not by then a “certified master version” within the meaning of section 132(3) ITTOIA and accordingly the requirement of section 140(1)(d) ITTOIA was not satisfied in respect of it.

68. Section 43A TMA, as applied by section 43C TMA, does not assist the appellant in relation to the year 2005-06 any more than it does in relation to 2004-05. Even if an “allocation” were covered by the phrase “relevant claim, election, application or notice” in section 43A(2)(a) TMA (which I doubt), the time within which it could have been made would only have been extended by that section up to 5 April 2013 (see [57] above) and as there was still no DCMS certificate issued in respect of the Film by that time, the appellant would not have been able to make a valid allocation of the expenditure to 2005-06 in any event.

69. It follows that I do not consider any relief can be given for the year 2005-06 in respect of the acquisition expenditure.

Summary and conclusion

70. I do not consider the certification of the Film by the Hungarian authorities can be accepted as constituting the master negative, tape or disc of the Film as a “qualifying film, tape or disc” for the purposes of relief under section 42 FA92 or the original master version of the Film as a “certified master version” for the purposes of relief under section 140 ITTOIA – see [47] above.

71. I do not consider the appellant to have made a valid claim for relief in respect of the year 2004-05, whether in the original return or subsequently – see [54] above.

72. I do not consider that any available extension of time under sections 43A and 43C TMA affects matters – see [59] above.

73. I do not consider the appellant to have made a valid allocation of the expenditure on acquisition of the Film to the year 2005-06, whether in the original return for that year or subsequently – see [66] above.

74. Even if an extension of time for making such allocation were available pursuant to section 43A and 43C TMA (which I doubt), the extended time limit expired before the appellant could have made any valid allocation – see [68] above.

75. It follows that the appellant is not entitled to relief for either 2004-05 or 2005-06. The appeal is accordingly DISMISSED.

76. HMRC have acknowledged that if this appeal is dismissed, the appellant will still be entitled to relief for the expenditure under section 40B FA92 or section 135 ITTOIA.

Right to apply for permission to appeal

77. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**KEVIN POOLE
TRIBUNAL JUDGE**

RELEASE DATE: 28 JANUARY 2019