



(a) Neutral Citation Number: [2024] EWHC 2175 (Ch)

Claim No: RL-2023-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
REVENUE LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 21 August 2024

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Between:

MR IAN AUSTICK
- and -

Claimant

THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS

Defendants

MICHAEL AVIENT (instructed by **Levy and Levy**) appeared for the **Claimant**
JOSHUA CAREY and **SAM WAY** (instructed by the **General Counsel and Solicitor to**
HM Revenue and Customs) appeared for the **Defendants**

Hearing dates: 24 July and 7 August 2024

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday, 21 August 2024 at 10:30am

DEPUTY JUDGE ROBIN VOS:**Introduction**

- 1 The claimant, Mr Austick, seeks declarations that he has no tax liabilities for the tax years ended 5 April 2000 and 5 April 2001 beyond the liabilities shown in his self-assessment tax returns for those years. The claim is brought under CPR Part 8 on the basis that there are no significant factual disputes.
2. The purpose of the claim is to prevent the defendants, HMRC, from recovering a significant proportion of a tax repayment of £35,000 which they made to Mr Austick in April 2001. The tax repayment relates to losses of £87,500 which he claimed to have incurred as a partner in the Baby Spice Ninth Limited Partnership (the “Partnership”) in the tax year ended 5 April 2001 but which he asked to be set against his income for the tax year ended 5 April 1998.
3. HMRC enquired into the Partnership’s tax return. This enquiry was settled on the basis that the losses were significantly less than the amount which had originally been claimed by the Partnership. The result was that Mr Austick’s share of the losses was reduced from £87,500 to £20,000.
4. HMRC are now seeking to recover from Mr Austick that part of the tax repayment which relates to the disallowed losses of £65,000 together with interest on that amount. The total amount at stake is something over £50,000. It appears however from Mr Austick’s details of claim that there are a further 15 taxpayers in a similar position with the total amount of tax in dispute being approximately £500,000.
5. The underlying basis for Mr Austick’s claim is that the procedure adopted by HMRC for disallowing the Partnership losses does not give rise to any enforceable tax liability.
6. Following the issue of the claim form in July 2023, HMRC filed an acknowledgement of service which, as well as disputing the substance of the claim, stated that the proceedings should have been brought by way of judicial review.

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7. HMRC followed this up on 24 August 2023 by filing an application to strike out Mr Austick's Statement of Case under CPR Part 3.4 on the basis that the Court had no jurisdiction to entertain the claim and that, in any event, an action for a declaration was inappropriate. HMRC later clarified that they were also relying on CPR Part 11 in relation to the lack of jurisdiction.
8. By an Order dated 26 February 2024, Master Brightwell ordered that the strike-out application and the disposal of the claim should be dealt with at a rolled up hearing.
9. Given that this is a rolled up hearing both of the claim itself and the strike-out application, it makes no sense to consider the strike-out on the basis that the Statement of Case discloses no reasonable grounds for bringing the claim (CPR 3.4(2) (a)).
10. In addition, Mr Carey, appearing on behalf of HMRC, does not pursue any strike-out under CPR 3.4(2)(c) (failure to comply with rules).
11. This just leaves a possible strike-out on the basis that there is an abuse of process in bringing the claim as a Part 8 claim rather than by way of judicial review (CPR 3.4(2) (b)).
12. As I have mentioned, HMRC also rely on CPR 11 but, in my view, this adds nothing in the circumstances of this case to the application under CPR 3.4. In addition, it is difficult to see how it can be said that the High Court does not have jurisdiction even if it is right that the claim should have been brought by way of judicial review.
13. I will deal with the strike-out application first and then go on to consider the underlying merits of the claim.

Background facts

14. As would be expected with a Part 8 claim, there is no significant dispute in relation to the facts although there is one factual issue where Mr Austick seeks to put HMRC to proof that a particular notice was given to him. I will come on to this.

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15. In January 2001, Mr Austick became a partner in the Partnership. This was a film scheme which was intended to generate trading losses which could be set against other income and which could be carried back to set against income of previous years.
16. Mr Austick submitted his tax return for the tax year ended 5 April 2000 at some point prior to the deadline of 31 January 2001. This return did not mention the Partnership losses.
17. However, on 10 April 2001, Mr Austick's agent wrote to HMRC to notify them that Mr Austick had become a partner in the Partnership, that his share of the Partnership losses for the tax year ended 5 April 2001 was £87,500 and that Mr Austick wished to set those losses against his income for the tax year ended 1998, which meant that he was entitled to a tax repayment of £35,000.
18. The letter asked HMRC to treat the letter as a formal amendment to Mr Austick's tax return for the year ended 5 April 2000 by ticking two boxes, both of which related to the use of losses from the subsequent tax year.
19. HMRC gave effect to this by amending the two boxes on the tax return for the year ended 5 April 2000 and generating what they described as a "free-standing credit" of £35,000 which was repaid to Mr Austick later in April 2001.
20. Mr Austick submitted his tax return for the year ended 5 April 2001 at some point before the deadline on 31 January 2002. This contained an entry in the white space as follows:

"2000/01 trading losses on the Baby Spice Ninth Limited Partnership of £87,500 of which I became a partner with effect from 15 January 2001 and claimed against 1997/98 income.

Tax has already been repaid of £35,000."
21. As I have said, HMRC enquired into the Partnership tax return for the tax year ended 5 April 2001. Closure notices were issued in 2003. The Partnership appealed against the closure notices. Those appeals were settled by agreement in August 2011 and most of the losses which had been claimed were disallowed. Mr Austick's share of the reduced loss was £20,000 instead of the £87,500 originally claimed.

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22. Where a partnership return is amended by way of a closure notice, HMRC are required by Section 28B(4) Taxes Management Act 1970 (“TMA”) to send a notice (which I will refer to as a Partner notice) to each of the partners in the partnership amending the partner’s own self-assessment tax return for the relevant year “so as to give effect to the amendments of the partnership return”.
23. A similar provision applies where there has been a settlement of an appeal (due to the combined effect of ss 54(1), 50(7) and 50(9) TMA). Neither party suggested that anything turned on whether the relevant provision in this case is s 28B(4) TMA or s 50(9) TMA. For convenience, I will refer to notices given under s 28B(4), as the parties have done throughout these proceedings.
24. HMRC say that such a notice was given to Mr Austick at some point on or around 4 November 2011. They are unable to provide the notice itself (or even confirm the precise date it was sent) but have instead provided a witness statement from one of their officers, Joshua Scholey (with exhibits) referring to certain material from which the Court is invited to infer that the notice was in fact given.
25. This material includes extracts from HMRC’s self-assessment notes and Mr Austick’s self-assessment statements which show that, on 4 November 2011, the free-standing credit of £35,000 originally allowed by HMRC was reduced by £26,993.84 by way of what is described in Mr Austick’s self-assessment statement as an “over-repayment charge”.
26. I will deal with the inferences to be drawn from the evidence as part of my discussion of the underlying merits. However, as I explain below, I do not consider that I need to decide this factual dispute for the purposes of the strike-out application.
27. HMRC’s view is that the giving of the Partner notice under s 28B(4) TMA crystallises the relevant tax liability which they now seek to enforce.
28. It is common ground that there is no right of appeal to the First-tier Tax Tribunal against the Partner notice. This is presumably because its purpose is simply to give

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effect to an amendment to the Partnership return in respect of which the Partnership will have had a right of appeal.

29. Enforcement of the liability which HMRC say is due was however stayed pending the resolution of a judicial review application made by another taxpayer which culminated in a decision of the Supreme Court in *R (De Silva) v HMRC* [2017] UKSC 74 in which judgment was given on 15 November 2017. The issue in that case, as it is in this claim, was whether HMRC had followed the correct procedures in making their enquiries in order for a tax liability to arise.
30. For reasons not fully (or at least adequately) explained by HMRC, they did not progress Mr Austick's case (and indeed approximately 500 other cases which had been suspended) until 2022.
31. On 16 May 2022, HMRC wrote to Mr Austick to explain that, following the Supreme Court judgment in *De Silva*, they were satisfied that they had followed the correct procedure and that he was now due to pay the outstanding tax. They stated that the agreement to suspend the collection of the tax would therefore come to an end in 30 days.
32. Mr Austick disputed this and a series of correspondence passed between his advisers and HMRC.
33. Despite this correspondence, on 14 November 2022, HMRC issued an enforcement notice which permitted HMRC to take further action to recover the tax due, for example going to Mr Austick's house and taking goods to be sold in order to pay the debt. HMRC debt collectors did subsequently go to Mr Austick's house but it does not appear that any goods were in fact seized.
34. Mr Austick did not, however, react to the enforcement notice until 6 March 2023 when his agent wrote to HMRC reiterating their view that no tax was due and stating that an application would be made to the High Court seeking a declaration to that effect unless HMRC agreed to cease their enforcement action.
35. HMRC did not accept this but, instead, on 10 April 2023, wrote to Mr Austick to say that they were considering taking legal action to collect the debt.

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36. This prompted Mr Austick to instruct solicitors who wrote a further letter before action on 4 July 2023. In the absence of any response from HMRC, Mr Austick issued his Part 8 claim on 31 July 2023.

Strike-out application

37. The question is whether Mr Austick's Statement of Case should be struck out under CPR Rule 3.4(2)(b) on the basis that it is an abuse of process.

38. Mr Carey notes the general rule (referred to at paragraph 3.4.3.7 of the White Book) that:

“It is an abuse of process to bring by ordinary claim proceedings which should normally be brought by judicial review in order to take advantage of the longer limitation period in ordinary claims” (referring to *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 as authority for this).

39. Mr Avient, appearing for Mr Austick, does not dispute the general proposition but notes that the Supreme Court in *HMRC v Cotter* [2013] UKSC 69 concluded at [32] that the County Court and the High Court had jurisdiction:

“to determine in collection proceedings whether the taxpayer's claim for relief for losses incurred in [year 2], which he had made in his tax return form for [year 1], constituted a defence to the Revenue's claim for immediate payment of the tax which it had calculated as payable in respect of [year 1]”.

40. The situation in *Cotter* was that Mr Cotter had claimed to be able to set a loss off against his other income. HMRC had enquired into the claim for the loss and had not therefore given effect to it pending the outcome of their enquiry. Their view was that, until the enquiry was concluded, the tax in question was due.

41. Mr Cotter would be able to make an application to reclaim the tax if his claim to set off the loss was successful. Should HMRC disallow the loss following their

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enquiries, Mr Cotter would have a right to appeal to the First-tier Tax Tribunal against HMRC's conclusion.

42. HMRC had brought proceedings in the County Court to enforce a tax liability which they considered to be due. Mr Cotter argued that the County Court did not have jurisdiction and that proceedings should have been brought in the First-tier Tax Tribunal.
43. It can therefore be seen that there are significant differences between *Cotter*, where HMRC had themselves taken proceedings, the challenge to jurisdiction was from the taxpayer and the suggestion was that the proceedings should have been brought in the First-tier Tax Tribunal, and the present case, where no proceedings have been brought by HMRC and the question is whether proceedings should be by way of judicial review, not whether they should have been brought in the First-tier Tax Tribunal.
44. Mr Avient submits that these differences are not material. In his view, what is important is that the proceedings were in the context of enforcement action by HMRC as this is what tips the proceedings from being about public law issues into something which relates to private rights.
45. Given the issue of the enforcement notice by HMRC in November 2022 and the terms of the letter written by Mr Austick's agent to HMRC in March 2023 (asking them to cease their enforcement action) Mr Avient argues that these proceedings have been brought as a defence to HMRC's attempts to enforce the alleged tax liability and so the same principles, as set out by the Supreme Court in *Cotter*, should be applied. In substance, he says, these proceedings are "collection proceedings" just as they were in *Cotter*.
46. In support of this, Mr Avient refers to the decision of the Upper Tribunal in *R (Derry) v HMRC* [2015] UKUT 416 (TCC). In that case, the situation was very similar to Mr Austick's case in that Mr Derry had made a claim to carry back losses from one year to an earlier year, although the losses in his case related to a disposal of shares rather than being a trading loss which meant that the rules were somewhat different.
47. However, as with this case, the real question in *Derry* was whether HMRC had used the right statutory provisions in the course of their enquiries into Mr Derry's tax

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returns and whether, as a result, Mr Derry actually had a tax liability. Mr Derry brought a claim for a judicial review of HMRC's demand for tax.

48. It appears Morgan J himself raised at [69] the question as to whether the proceedings should have been brought by way of judicial review. He concluded at [70] that the judicial review procedure was inappropriate. The basis for this was that the claim was a challenge to the demand for tax and that the demand did not itself affect the question as to whether there was in fact a tax liability. It was simply part of the mechanism for collecting any tax which might be due.
49. The Judge suggested at [71] that "the normal step would be for the taxpayer to wait to be sued in the County Court or the High Court and then to defend the claim made in accordance with the demand" (noting that the Supreme Court in *Cotter* had confirmed that such points could be raised in the context of those proceedings). In addition, Morgan J went on to say that he could "not see why the taxpayer could not seek declaratory relief in advance of being sued by HMRC".
50. Morgan J also expressed the view at [72] that, if HMRC gave a notice which entitled them to exercise its powers to take control of goods in circumstances where the taxpayer did not think that any tax was due, "it would be open to the taxpayer to claim an injunction to restrain the threatened action". Although HMRC submitted that such a claim would need to be by way of judicial review, Morgan J's view was as follows:

"I doubt if the taxpayer would have to seek a judicial review in order to obtain such an injunction. I do not see why he could not seek an injunction on the basis that HMRC is threatening to interfere with his possession of his goods. The taxpayer could rely on his ownership and/or possession of the goods. It does not seem to me to be necessary to frame the claim in public law."
51. All of these comments in *Derry* are obiter as the Judge decided the claim in any event as the parties were apparently content to proceed and had made submissions in relation to the underlying judicial review claim.
52. Although the decision in *Derry* was appealed to the Court of Appeal and then to the Supreme Court, the only comment on this aspect was from the Court of Appeal *R*

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(*Derry*) v HMRC [2017] EWCA Civ 435) where Henderson LJ noted at [16] the comments made by Morgan J but declined to express a view on whether he “was right to say that this was not an appropriate case for judicial review” given that neither party had raised any procedural objections.

53. The possibility of judicial review was not raised in *Cotter* (as would be expected since it was HMRC and not the taxpayer who had brought the proceedings). The fact that the High Court had jurisdiction to consider whether the taxpayer’s outstanding claim was a defence to HMRC’s claim does not therefore answer the question as to whether, if the taxpayer brings proceedings in the High Court, those proceedings should be by way of an ordinary civil claim or by way of judicial review.
54. Mr Carey draws attention to the decision of the Court of Appeal in *Knibbs v HMRC* [2019] EWCA Civ 1719. That case was very similar to the current case in that it dealt with the procedure by which HMRC should challenge claims to carry back trade loss relief from the year in which the losses were incurred to a previous year.
55. In particular it was said that an enquiry into the tax return for the year the loss arose, coupled with a Partner notice under s 28B TMA, was ineffective to prevent a taxpayer from being entitled to the tax they had reclaimed in respect of earlier years or to enable HMRC to recover tax which they had already repaid (see paragraphs [13], [14] and [23]).
56. Like Mr Austick, the taxpayers were seeking declarations that, given the way in which HMRC had dealt with the enquiries, no enforceable tax debt was due. As in this case, HMRC submitted that the proceedings should have been brought by way of judicial review. The Court of Appeal’s conclusion in *Knibbs* is set out at [25-26] as follows:

“25 We are satisfied that, in the present case, the correct procedure for individual partners to challenge the amendments made to their returns was by judicial review, and not by ordinary civil proceedings. There are a number of reasons for this. First, there are no private law rights involved. This is not, for example, a case where a claimant is seeking to enforce a contractual right. Second, the time limits are a strong factor in favour of judicial review being the correct procedure. Both appeals to the F-TT and applications for permission

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to pursue judicial review are subject to short time limits. It makes no sense at all that an individual taxpayer or a Partnership has a period of 30 days in which to appeal to the F-TT against a closure notice, but an individual partner should have six years in which to make what is, in effect, the same challenge to a notice given under s 28B(4). Third, the challenges in these cases affect a large number of people and raise no issues of fact that might be unsuitable for determination in judicial review proceedings. Fourth, the requirement for permission to pursue judicial review does not make it an unsuitable procedure in the circumstances of this case, any more than in the many other cases (tax and non-tax) to which it applies. It is no more than a filter to weed out groundless cases.

26 We are accordingly satisfied that the Judge was right in his conclusion that, irrespective of the merits of the substantive issues of law arising in these cases, the Part 7 proceedings should be struck out as an abuse of the process of the Court.”

57. The report does not explain to what extent HMRC had sought to enforce the tax liabilities against the relevant taxpayers but there is no suggestion from the Court of Appeal that this was (or should be) a relevant factor.
58. Mr Carey also notes that the principles set out in *Knibbs* were applied by Fancourt J in *Barklem v HMRC* [2024] EWHC 651 (Ch). Again, there are some similarities with that case in that it related to the carry back of trading losses from a film Partnership although the underlying reason put forward by the taxpayer for the lack of any enforceable tax liability was not based on the same procedural questions but instead was based on an argument that, in the light of HMRC’s conclusions from their settlement with the Partnership, there was in fact no Partnership in existence and so a Partner notice under s 28B(4) TMA could not validly be given. The challenge was therefore to the ability of HMRC to give a Partner notice rather than the effect (or lack of effect) of such a notice, which was more the focus in *Knibbs*.

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59. As in this case, the taxpayer argued that a normal civil claim (in that case, a Part 7 claim) rather than a judicial review was appropriate as the purpose of the proceedings was “to negate a liability asserted by HMRC” (see [60]).
60. The Judge did not accept this but instead concluded at [67] on the authority of *Knibbs*, “that to bring this claim for declaratory relief as a Part 7 claim, well out of time for bringing a judicial review claim, is an abuse of process”.
61. The Judge in particular noted at [64] that:
- “Neither is a Part 7 claim seeking to establish that HMRC could not or could not properly give a s 28B(4) notice to the claimant justified because HMRC threatened bankruptcy proceedings: the Administrative Court or the Bankruptcy Court can grant a temporary injunction, if required, to restrain presentation of a bankruptcy petition”.
62. In this case, the central issue which is raised by Mr Austick is whether, based on the procedure adopted by HMRC, the giving of a Partner notice under s 28B(4) TMA is, in the circumstances, effective to create an enforceable tax liability. This is the very same question which was raised in *Knibbs*. As the Court of Appeal concluded, this is a public law issue and does not involve private rights.
63. As I have said, Mr Avient submits that this is not right and that, once enforcement action is taken, private rights become involved and the proceedings become collection proceedings. However, as the Court of Appeal noted at [10] in *Knibbs*:
- “The appropriate procedure to be adopted by the claimant in challenging HMRC’s refusal to give effect to their carry back claims is to be judged by reference to the claims asserted by them in the High Court proceedings, together with any other relevant information.”
64. When looking at the declarations sought by Mr Austick (which is the substance of his claim), it is clear that, as in *Knibbs*, these relate to the way in which Mr Austick made his claim for relief, the way in which HMRC decided to enquire into his claim and

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whether a s 28B TMA Partner notice could amend Mr Austick's tax return in a way which gave rise to an enforceable tax liability.

65. Although the claim is made in the context of enforcement action taken by HMRC, I agree with Fancourt J in *Barklem* that the fact that HMRC has threatened legal proceedings, or has taken some enforcement action short of initiating legal proceedings, does not affect the answer to the question as to whether bringing the claim as an ordinary civil claim rather than by way of judicial review is an abuse of process. The reasoning of the Court of Appeal in *Knibbs* still applies in those circumstances.
66. As I have said, the position in *Cotter* was very different as the challenge to jurisdiction was put forward by the taxpayer as a defence to proceedings which had already been brought by HMRC and related only to whether the proceedings should have been brought in the First-tier Tax Tribunal rather than the County Court (or High Court). There was no discussion of the question as to whether, if the taxpayer brought pre-emptive action, that could be done by way of an ordinary civil claim rather than by way of judicial review.
67. This conclusion is of course contrary to the view taken by Morgan J in *Derry* who thought that, in the context of threatened enforcement action to be taken by HMRC, it would be open to a taxpayer to seek an injunction and/or declarations as part of an ordinary civil claim rather than by way of judicial review. It is unfortunate that *Derry* does not appear to have been brought to the attention of Fancourt J in *Barklem* in this context. However, as I say, I prefer the approach in *Barklem*.
68. The starting point is that claims which relate primarily to public law issues rather than private rights should be brought by way of judicial review. There are exceptions to this rule, one of those exceptions being where a public authority brings enforcement proceedings in a Court or Tribunal.
69. As confirmed by the Supreme Court in *Cotter*, if HMRC themselves bring proceedings, the taxpayer may challenge the existence of the tax debt by way of defence and, in so doing, may argue that HMRC have followed the wrong procedure or that the actions undertaken by them do not have the effect of giving rise to a tax liability. This is based on fairness. The taxpayer has no control over whether HMRC

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bring legal proceedings to enforce an alleged tax liability. However, if they do, the taxpayer should not be deprived of the opportunity to argue that no liability in fact exists.

70. On the other hand, if the taxpayer is themselves bringing proceedings, the taxpayer does have a choice as to whether those proceedings are brought by way of ordinary civil proceedings or by way of judicial review. There is therefore no reason in principle to depart from the general rule that, if the substance of the claim relates to public law issues, the proceedings should be brought by way of judicial review, simply because the bringing of proceedings has been triggered by HMRC's threat of enforcement action. The reasons given by the Court of Appeal in *Knibbs* as to why judicial review is the appropriate procedure to follow still apply.
71. I accept that, at first sight it might be surprising that a taxpayer can raise the sorts of points which Mr Austick seeks to put forward by way of a defence to enforcement proceedings issued by HMRC but cannot take pre-emptive action by way of an ordinary civil claim seeking declarations or injunctions where HMRC have threatened (or started to take) enforcement action.
72. However, the requirement to bring proceedings by way of judicial review does not deprive a taxpayer of the ability to seek the declarations or injunctions in question. It just means that a taxpayer seeking to challenge HMRC's actions must follow a particular procedural route.
73. In particular, the time limit for bringing proceedings is a powerful factor in favour of judicial review. As David Richards LJ noted at [25] in *Knibbs*, it would be surprising if a taxpayer who only had 30 days to appeal to the First-tier Tax Tribunal against a closure notice should have six years to make what is, in effect, the same challenge to a Partner notice under s 28B(4).
74. Mr Avient submits that *Barklem* has no relevance to Mr Austick's claim given that, in *Barklem*, the challenge was to HMRC's ability to give a s 28B(4) TMA Notice and so the challenge is to HMRC's decision as opposed to the effect of that decision. However, I do not accept this distinction as it is clear from the decision of the Court of Appeal in *Knibbs* that the effect of a s 28B(4) Partner notice on a carry back claim is just as much a public law issue as a decision to give the notice in the first place.

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75. Although Morgan J in *Derry* considered that it was not appropriate to bring a judicial review claim where enforcement action has been threatened (and I have explained the reasons why I disagree with that conclusion), I note that he accepts at [70] that “there is a public law decision involved in deciding to serve a demand”. I cannot therefore see why such a demand (in this case, the enforcement notice sent by HMRC in November 2022) should not be challenged by way of judicial review even if it is not the demand notice itself that creates any tax liability.
76. Mr Avient also seeks to distinguish *Knibbs* on the basis that one of the declarations sought by Mr Austick is that any amendment to Mr Austick’s tax return for the year ended 5 April 2001 cannot, in any event, affect his liability to tax for the tax year ended 5 April 2000. Mr Avient makes the point that HMRC do not contest this (their case being that the tax liability arises in relation to the tax year ended 5 April 2001).
77. However, this does not seem to me to be a relevant distinction when looking at Mr Austick’s claim in the round. What he is saying is that the actions taken by HMRC do not enable them to recover any part of the tax which they have already repaid. Looking at the two tax years separately is, in my view, an artificial distinction.
78. Mr Avient also places significant weight on the fact that HMRC have not, in his view, proved that a Partner notice under s 28B(4) TMA was in fact sent to Mr Austick. However, I accept Mr Carey’s submission that this is just as much a matter for judicial review as the effect of such a notice if it were given. If HMRC are trying to recover tax based on a particular procedure set out in statute but have not followed that procedure (by not giving the Partner notice), this would be a ground for quashing any demand for the tax and/or HMRC’s decision to remove part of the free-standing credit of £35,000 which they had originally allowed.
79. Mr Avient goes on to make a point in relation to time limits based on the alleged failure to give a Partner notice. He says that if there was no decision by HMRC (because no s 28B(4) TMA Partner notice was in fact given), there cannot be a time limit for bringing proceedings and so the 30 day time limit which might apply to the issue of a closure notice is not relevant and is not therefore a reason why Mr Austick should be forced to bring the proceedings by way of judicial review as opposed to an ordinary civil claim.

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80. However, again, the answer to this is that it is clear that HMRC did make a decision in 2011 even if they did not issue a Partner notice as they reduced the free-standing credit and subsequently demanded payment of the tax. Given the 30 day time limit to appeal against a closure notice, it is not unreasonable to expect a taxpayer to take prompt action to challenge other decisions of HMRC especially where those decisions are, in substance, giving effect to the equivalent of a closure notice (in this case the Partner notice – whether or not it was in fact given).
81. Mr Avient also notes that, in *Knibbs*, it was accepted on behalf of the taxpayers at [24] that they could have brought proceedings for a judicial review. That is not accepted by Mr Austick. However, it seems to me that this is not relevant. It is not apparent that the Court of Appeal was influenced by this concession in deciding that taxpayers in these circumstances could only challenge HMRC's action by way of judicial review and not by way of ordinary civil proceedings.
82. For completeness, I should mention the third factor identified by the Court of Appeal in *Knibbs* at [25] as to why judicial review is the appropriate route which relates to the fact that a large number of other people would be affected by the decision. Although the number of people affected may be smaller than in *Knibbs* (where there were said to be hundreds of taxpayers in a similar position), it appears that, in this case, there are still 15 other cases where the same points are relevant and so this also points towards judicial review being the correct approach.
83. In conclusion, I consider that Mr Austick's claim should have been brought by way of judicial review (and I note that it took from May 2022 to March 2023 before Mr Austick even threatened proceedings which were not then brought until July 2023 and so the time limit point is relevant) and not by way of an ordinary civil claim (whether under CPR Part 7 or Part 8).
84. The question as to whether a statement of case should be struck out as an abuse of process is of course a discretionary decision. However, there is nothing in the circumstances of this claim which suggests to me that it would be wrong to strike out the Statement of Case.

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85. Despite my decision to strike out the Statement of Case, I will go on and consider the underlying merits of the claim given that both parties made full submissions on these issues.

The substantive claim

86. Mr Austick seeks a number of declarations but, in substance, what he is asking the Court to confirm is that, based on the way in which he completed his tax returns and reported the Partnership losses to HMRC and the subsequent actions taken by HMRC, he cannot be required to repay to HMRC any part of the tax repayment which he received in April 2001 despite the subsequent agreement that the Partnership losses were in fact significantly less than the amount originally claimed.
87. There are four grounds which Mr Austick puts forward in support of his claim:
- (1) The evidence does not establish that HMRC in fact sent a Partner notice to Mr Austick. If no notice has been sent, no amendments would have been made to Mr Austick's tax return for the tax year ended 5 April 2001 and so no tax can be due.
 - (2) The tax repayment received by Mr Austick results from an amendment made by him to his self-assessment calculation for the tax year ended 5 April 2000. As HMRC have not enquired into his tax return for that year, they cannot therefore recover any part of the repayment.
 - (3) Mr Austick did not make a claim for relief for the Partnership losses in his tax return for the year ended 5 April 2001 (having, he says, obtained relief by way of an amendment to his self-assessment for the tax year ended 5 April 2000) and so, even if a Partner notice was given by HMRC, this can have no effect on his tax liability.
 - (4) Even if Mr Austick did make a claim for relief for the Partnership losses in his tax return for the year ended 5 April 2001 and even if a Partner notice was given in the form asserted by HMRC, the Partner notice was ineffective to create an additional tax liability for the year ended 5 April 2001, as alleged by HMRC.

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88. The first ground put forward by Mr Austick does not depend on the technicalities of the tax legislation. I will therefore deal with this first before going on to consider the other three points made by Mr Austick in the light of the relevant statutory provisions.

Ground 1 – did HMRC send Mr Austick a Partner notice?

89. Mr Avient submits, on behalf of Mr Austick, that there is no evidence that a s 28B(4) Partner notice was sent by HMRC to Mr Austick. He suggests that the burden of proof is on HMRC. His reason for this is that, as HMRC are asserting a tax debt, it is up to them to show that the debt exists in the same way that they would have to do if they were to bring enforcement proceedings.
90. Mr Carey however submits that, as it is Mr Austick who is making a claim, it is up to him to prove his claim and therefore the burden of proof is on him. In principle, I agree with Mr Carey. It is for Mr Austick to prove his claim. However, having said this, I do not consider that the question as to who bears the burden of proof is determinative in this case as I am satisfied, on the balance of probabilities, that a Partner notice was sent to Mr Austick.
91. HMRC have provided a witness statement from one of their officers, Mr Scholey, who, in 2019, took over responsibility for the cases which HMRC refer to as the “John Scott & Co Promoter Group” of which Mr Austick forms a part. Mr Scholey has reviewed HMRC’s files and exhibits a number of relevant documents.
92. Being a Part 8 claim, Mr Scholey was not cross-examined. He was also not involved in 2011 when the Partner notice was said to have been sent. However, the important parts of his evidence relate to the documents which he provides and other factual evidence which he has gleaned from his review of HMRC’s files.
93. As Mr Avient notes, Mr Scholey does, at some points, stray into giving his own opinions as to the inferences which should be drawn from the evidence which is, of course, a matter for the Court. I have not therefore taken any account of these parts of his witness statement.
94. Mr Scholey explains that HMRC’s investigations related to a number of partnerships organised by a business called Investing in Enterprise Limited. He exhibits a copy of

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the settlement agreement between HMRC and the various partnerships which lists 53 separate partnerships including the “Baby Spice Ninth Partnership” of which Mr Austick was a member. Mr Scholey also exhibits a document showing the allocation of the revised losses between the partners in the Partnership which shows that this partnership had 11 partners.

95. Mr Avient speculates, based on these figures, that there may have been about 500 separate individuals involved in the various partnerships. This in fact chimes with Mr Scholey’s evidence that, in 2022, there were approximately 500 cases which had been suspended pending the decision of the Supreme Court in *De Silva*.
96. HMRC have been unable to find the Partner notice which they say was sent to Mr Austick but Mr Carey invites the Court to infer, based on the self-assessment notes which HMRC hold for Mr Austick and the way in which other individuals who were partners in other partnerships within the relevant group were dealt with, that a Partner notice was sent to Mr Austick. HMRC have provided evidence in relation to two such partners, Mr De Silva (the taxpayer whose judicial review claim was considered by the Supreme Court) and Ms Mechan.
97. In his evidence, Mr Scholey notes that HMRC had produced a template s 28B(4) Partner notice, a copy of which he has provided, and which appears to have been produced in October 2011.
98. A letter in this format was sent to Mr De Silva on 16 September 2011, although the letter to Mr De Silva does not include a sentence which is in the template from October 2011 mentioning that the legislation allowing HMRC to amend his personal return is s 28B(4) TMA.
99. A similar letter was sent to Ms Mechan on 4 November 2011. This letter did include the reference to s 28B(4) TMA.
100. The self-assessment notes for Ms Mechan contain an entry on 3 November 2011 stating that following the closure of the Partnership enquiry, her share of the losses had been reduced and the freestanding credit/return had been amended. It seems reasonable to infer that the s 28B(4) Partner notice sent to Ms Mechan on 4 November

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2011 represents the amendment/reduction which HMRC refer to in the self-assessment notes.

101. The only entry relating to a reduction in losses and an amendment to a free-standing credit/return in Mr De Silva's self-assessment notes is dated 11 November 2011. There is no entry for September 2011 when the letter which has been provided by HMRC is dated. Mr Carey notes that the judgment of the Supreme Court in *De Silva* refers at [8] to a second letter sent by HMRC to Mr de Silva on 17 November 2011. However, that is not part of the evidence in this case and so I take no account of it.
102. Mr Austick's own self-assessment notes show that on 4 November 2011, following the closure of the Partnership enquiry, his losses were reduced and free-standing credit amended. This might indicate that a s 28B(4) Partner notice was sent to Mr Austick around 4 November 2011 in the same way as the notice was sent to Ms Mechan on 4 November 2011. However, as Mr Avient submits, there is no reference to anything having been sent to Mr Austick, let alone a Partner notice.
103. However, the next note on HMRC's self-assessment notes for Mr Austick, which is dated 30 December 2011, records that a letter was received from Mr Austick's agent on 22 December 2011. The note goes on to say "re 'consequential' amendment, agent requests we suspend collection".
104. In my view, the only reasonable inference from this is that a Partner notice was indeed sent and was received by Mr Austick's agent. The reference to a "consequential amendment" strongly suggests a purported amendment of Mr Austick's tax return following the completion of the Partnership enquiry and the disallowance of losses, given that the requirement in s 28B(4) TMA is that once the Partnership enquiry has been concluded, HMRC amend the returns of each of the partners to "give effect to the amendments to the partnership return". This is the reason why a s 28B(4) notice is often referred to as a "consequential amendment".
105. Bearing in mind the existence of the template s 28B(4) Partner notice and the fact that a letter in identical form was sent to Ms Mechan at around the same time and a letter which was identical save for the reference to s 28B(4) was sent to Mr De Silva not long before, it seems to me more likely than not that the notice which was sent to Mr Austick's agent was in that form. This is supported by the fact that the form of the

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notice purports to amend the taxpayer's personal return and contains a demand for tax, both of which matters are referenced in Mr Austick's self-assessment note made on 30 December 2011.

106. Mr Avient objects to this conclusion for a number of reasons. First of all, he points out that HMRC have only been able to provide Partner notices sent to two other individuals who were not even partners in the same partnership in circumstances where there were potentially around 500 partners involved. However, I would not expect HMRC to provide multiple similar notices, even if they were available and the absence of any similar examples does not seem to me to reduce the strength of the inference based on the documents which have been provided.
107. Mr Avient also makes the point that the notice sent to Mr De Silva was not the same as the template (or the notice sent to Ms Mechan) as it did not refer to s 28B(4) TMA. Indeed, he suggests that it was not even a s 28B(4) Partner notice given that somebody at HMRC had clearly removed the sentence referring to s 28B(4) TMA.
108. We can however only speculate as to why that sentence does not appear in the letter sent to Mr De Silva. It appears that the letter sent to him pre-dates the template found by Mr Scholey in HMRC's papers and so it is perhaps possible that an earlier template did not contain this sentence.
109. In any event, given that the rest of the letter is identical to the letter sent to Ms Mechan and to the template, this does not in my view cast any serious doubt on the substance of the Partner notice which, based on the inferences I have made, I consider was sent to Mr Austick's agent.
110. Another concern raised by Mr Avient is that the notices sent to Mr De Silva and Ms Mechan attached a tax calculation which had clearly been produced by HMRC in a computerised format. Mr Avient questioned why HMRC would not be able to locate such a tax calculation for Mr Austick if a Partner notice had in fact been sent to him attaching such a calculation.
111. I have no evidence in relation to this but, if HMRC are unable to find the Partner notice itself, it does not seem to me surprising that they also cannot find the tax

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calculation which was attached to it. It does not, to my mind, lend any support to the suggestion that no notice was in fact sent.

112. I should note that Mr Austick has provided a witness statement confirming that he has no record or recollection of having received a letter from HMRC in November 2011 along the lines of the template letter.
113. However, it does not seem to me that much weight can be placed on this given that the statement was made more than 12 years after the letter is said to have been sent. It would not be surprising if Mr Austick could not recall having received the letter. The contemporaneous evidence provided by Mr Austick's self-assessment notes and the letters which HMRC have been able to locate are, in my view, a more reliable guide to what is likely to have happened.
114. My conclusion therefore, based on the evidence available to me, is that, on or around 4 November 2011, HMRC sent Mr Austick (or his agent) a s 28B(4) Partner notice substantially in the form of the template provided by HMRC. I will therefore move on to look at the more technical grounds put forward by Mr Austick in the light of that finding.

Trade loss carry back relief

115. At the relevant time, s 381 Income and Corporation Taxes Act 1988 allowed a taxpayer to make a claim to set trading losses off against any income of the three tax years prior to the year in which the loss was sustained.
116. The procedure for making claims is set out in s 42 TMA. The general rule is that a claim must be made by being included in a self-assessment tax return (s 42(2) TMA). However, s 42(11A) brings into play schedule 1B to TMA for "certain claims for relief involving two or more years of assessment".
117. Paragraph 2 of schedule 1B to TMA applies to a claim for carry back losses, including trading losses. To the extent relevant, paragraph 2 of schedule 1B TMA provides as follows:

“2(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a

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payment made, in one year of assessment ('the later year') to be given in an earlier year of assessment ('the earlier year').

- (2) Section 42(2) of this Act shall not apply in relation to the claim.
- (3) The claim shall relate to the later year.
- (4) ...
- (5) ...
- (6) Effect shall be given to the claim in relation to the later year, whether by repayment or set-off, or by an increase in the aggregate amount given by s 59B(1)(b) of this Act, or otherwise."

118. There are two important points to note. The first is that s 42(2) TMA is disapplied by paragraph 2(2) of schedule 1B which means that the claim is not required to be made in a self-assessment tax return.
119. The second point is that, in accordance with paragraphs 2(3) and 2(6), the claim relates to the year of assessment in which the loss is incurred (in this case, the tax year ending on 5 April 2001) and effect must be given to it in that year. Some of the authorities which I will mention refer to this later year as "year 2" and I will at time refer to it in the same way. Similarly, the earlier year in respect of which the relief is claimed is sometimes referred to as "year 1". In this case, I will refer to the tax year ending on 5 April 2000 as year 1, as the suggestion is that Mr Austick amended his self-assessment for that year to give effect to the losses, even though he in fact claimed to set the losses off against his income for the year ended 5 April 1998.
120. In *De Silva*, the Supreme Court decided at [28] that the result of these provisions, when combined with s 8(1AA) TMA (which has the effect that the information contained in a self-assessment tax return must take into account any reliefs which are being claimed in the return), is that a taxpayer who wishes to carry back trade losses against income of a previous year must make that claim in their tax return for the year in which the loss arises.

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121. Although a carry back claim must therefore be included in the year 2 tax return (notwithstanding paragraph 2(2) of schedule 1B to TMA), there is nothing to prevent a taxpayer from making a carry back claim before the year 2 tax return is submitted. In accordance with paragraph 2(2) of schedule 1B to TMA, this claim does not need to be made in a tax return.
122. Section 42(11) TMA provides that schedule 1A to TMA governs the procedure for making a claim outside a tax return (sometimes referred to as a stand-alone claim). It is not necessary for present purposes to consider the precise requirements of schedule 1A to TMA other than to note that it only applies to claims which are made otherwise than by being included in a self-assessment return.
123. It was established by the Supreme Court in *Cotter* at [25] that, for the purposes of s 42(11) TMA:
- “A ‘return’ refers to the information in the tax return form which is submitted for ‘the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax’ for the relevant year of assessment and ‘the amount payable by him by way of income tax for that year: s 8(1) of the 1970 Act.”
124. The result of this was that, although Mr Cotter has filled in various boxes on his tax return for the tax year ended 5 April 2008 claiming to carry back losses incurred in the tax year ended 5 April 2009, the claim was not made in the “return” as, in accordance with paragraphs 2(3) and 2(6) of schedule 1B to TMA, the claim could not, and did not, affect his tax liability for the tax year ended 5 April 2008 (as effect had to be given to the claim in the tax year ended 5 April 2009). The claim was therefore a stand-alone claim under schedule 1A to TMA.
125. In *Cotter*, it was important that Mr Cotter had not attempted to calculate his own tax liability but, instead, had left HMRC to calculate the tax. Lord Hodge observed at [27] that:
- “Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such

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circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/2008. Such information and self-assessment would in my view fall within a ‘return’ under s 9A of the 1970 Act as it would be the taxpayer’s assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer’s self-assessment without either amending the tax return ... or instituting an enquiry under s 9A of the 1970 Act.”

126. Although this observation was obiter, it was accepted by the Court of Appeal in *Derry* at [57] where Henderson LJ noted that:

“There is a clear distinction between, on the one hand, the inclusion of information which is irrelevant in law to the taxpayer’s liability for the year of assessment covered by the return, and, on the other hand, the taxpayer’s self-assessment of the tax which he is due to pay. Irrelevant information of the former type, even if entered in the return at the implicit invitation of the Revenue, is not to be regarded as included in the return when it comes to enquiring into the taxpayer’s liability for the relevant year. But a taxpayer’s self-assessment is a different matter. Plainly, errors of many kinds may be made in such an assessment, and they may include errors about the availability of a relief. If the Revenue is dissatisfied with the taxpayer’s self-assessment, its remedy is either to amend the return or to open an enquiry into it under s 9A of TMA 1970.”

127. Although, on appeal, the Supreme Court (*R (Derry) v HMRC* [2019] UKSC 19) cast some doubt on the conclusion reached by Henderson LJ, ultimately the majority preferred at [69] not to reach any conclusion on the point. Lady Arden went further and reached a provisional conclusion at [82] that the Court of Appeal may have been wrong (at least in the context of an online return). However, as the First-tier Tax Tribunal noted in *Murphy v HMRC* [2024] UKFTT 00537 (TC) at [73], the decision of the Court of Appeal in *Derry* on this point remains binding as it was not overruled by the Supreme Court.

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128. As will be seen, the question as to whether Mr Austick made a stand-alone schedule 1A claim or whether he amended his self-assessment for the tax year ended 5 April 2000 is a key plank in the submissions put forward on behalf of Mr Austick by Mr Avient. This is the substance of ground 2 put forward by Mr Austick.

Ground 2 – Did Mr Austick amend his self-assessment for the tax year ended 5 April 2000?

129. It is necessary at this stage to explain the actions taken by Mr Austick in relation to his tax returns for the years ended 5 April 2000 and 5 April 2001.

130. As far as the tax year ended 5 April 2000 is concerned, Mr Austick's tax return showed a tax liability of £2,923.65 in box 18.3. This falls within the section which must be completed if the taxpayer wants to calculate their own tax liability and therefore represents his self-assessment tax calculation. There was no claim in the tax return, as submitted, to carry back any losses.

131. However, on 10 April 2001, Mr Austick's agent wrote to HMRC on his behalf with a request to amend his tax return for the year ended 5 April 2000. Given the importance placed by both parties on this letter, I set out the relevant parts of it below:

“Our above client became a partner in the Baby Spice Ninth Limited Partnership on 15 January, 2001.

The partnership is a film maker and losses for tax purposes for 2000/01 amount to £87,500.

...

Our client wishes these losses to be offset against 1997/98 income and on this basis we calculate a tax repayment is due of £35,000.

Will you therefore treat this letter as being a formal amendment to the 1999/2000 tax return previously submitted in that:

(1) Box 18.9 on page 7 should be ticked.

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(2) Box 22.5 on page 8 should be ticked.

We trust this information is clear and will enable you to deal with the tax repayment.”

132. As already mentioned, later in April 2001, HMRC did indeed make a repayment of £35,000, treating it as a “free-standing credit” which would be the appropriate description where a stand-alone claim to carry back losses is made under schedule 1A to TMA.

133. Box 18.9 of the tax return is part of the section headed “Do you want to calculate your tax?” the instructions for box 18.9 read:

“Tick box 18.9 if you are reclaiming 2000-2001 tax now (and enter the amount in the ‘additional information’ box on page 8).”

134. Box 22.5 is part of the “other information” section of the tax return. The taxpayer is told to tick box 22.5:

“If you want to claim relief now for 2000-2001 trading or certain capital losses. Enter the amount and year in the ‘additional information’ box below.”

135. It will be noted that Mr Austick did not, in his agent’s letter of 10 April 2001, seek to amend his tax return for the year ended 5 April 2000 by including anything in the additional information box on page 8 of the tax return. However, reading the letter as a whole, it can, in my view, be inferred that it was intended that the information provided in the letter should be treated as the information which, in accordance with the instructions for boxes 18.9 and 22.5, should be included in the additional information box.

136. It makes no sense to seek to amend the return simply by ticking the two boxes and not providing the requested information. As Mr Avient points out, this is supported by the fact that the information is provided in the first part of the letter which is then followed by the words: “Will you therefore please ...”. It is clear that the amendment

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is based on the information provided and that the ticking of the boxes would achieve nothing if not combined with the relevant information.

137. I therefore proceed on the basis that the additional information box is amended to refer to the fact that there were Partnership trading losses of £87,500 for the tax year ended 5 April 2001, that Mr Austick was claiming for these losses to be set against his income for 1997/98 and that he considered that the result of this was that he was due a tax repayment of £35,000. This corresponds with the information requested in the instructions against box 18.9 (the amount of the 2000/2001 tax which the taxpayer is reclaiming now – £35,000 and the amount of the losses and the year they are being set against - £87,500 and 1997/98 respectively).
138. Mr Avient notes that, in accordance with s 9ZA TMA, it is open to a taxpayer to amend their self-assessment return (which includes the self-assessment itself) and so there is no reason in principle why the letter of 10 April 2001 could not have made such an amendment. The question however is whether it in fact did so.
139. However, even on the basis of my findings as to the amendments made by the letter of 10 April 2001, it does not appear to me that this constitutes an amendment to Mr Austick's self-assessment for the tax year ended 5 April 2000. The losses are being set against income arising in 1997/98 and so there is no basis for amending the self-assessment for the tax year ended 5 April 2000.
140. Of course, as Henderson LJ points out in *Derry* at [57], a taxpayer's self-assessment may be erroneous and, if so, HMRC may challenge it by opening an enquiry under s 9A TMA.
141. However, in this case, there is no evidence of any mistaken attempt to amend Mr Austick's self-assessment. Although he states that he is entitled to a repayment of £35,000, he does not say what year this relates to and there is no attempt to recalculate the tax liability for the tax year ended 5 April 2000, for example taking into account the tax due under the tax return as originally submitted of £2,923.65 (which would have reduced the repayment had it been intended to relate to the tax year ended 5 April 2000).

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142. The fact that there was no amendment to the self-assessment for the tax year ended 5 April 2000 is, to my mind, supported by the wording on the tax return. Box 18.9 refers to a taxpayer “reclaiming 2000-2001 tax” not amending the amount of tax due for the tax year ended 5 April 2000 even though this box is in the section headed “Do you want to calculate your tax?”. Similarly, box 22.5 requires the taxpayer to state the amount and the year in respect of which relief for 2000-2001 trading losses is claimed. That year is of course the tax year ended 5 April 1998 not the tax year ended 5 April 2000.
143. Although Mr Avient places reliance on the decision of the Court of Appeal in *Derry*, the situation there was different, including the tax return form.
144. In *Derry*, Mr Derry claimed relief in the tax year ended 5 April 2010 for capital losses realised on a disposal which took place in the tax year ended 5 April 2011. The relief he was claiming was therefore (in his mind) for the year to which the tax return related.
145. Mr Derry also completed his own calculation of the tax due by filling in pages of his tax return which were pages TC1 and TC2 (presumably standing for “tax calculation”). This included on page TC2 a section headed “Adjustments to tax due” which included the explanation “You may need to make an adjustment to increase or decrease your tax for 2009-10 because you are ... carrying back to 2009-10 certain losses from 2010-11”.
146. Mr Derry completed box 15 in this section which appears to be similar to box 18.9 on Mr Austick’s tax return in that it was headed “Any 2010/11 repayment you are claiming now”. He went on to explain in the “Any other information” box that this resulted in a “corresponding reduction in tax payable in the year ended 5 April 2010”.
147. It was on this basis that Henderson LJ concluded at [54] that “the purpose of the claim, self-evidently, was to reduce the amount of tax due in 2009/10” and at [57] that “the boxes on p TC2 for “adjustments to tax due” must in my view be regarded as containing information required to be contained in the return, where the taxpayer elects to perform his own self-assessment, because such adjustments form an integral part of the calculation of the tax due to be paid by him for the year”.

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148. As I have said, Mr Austick’s position is different. There is nothing in the letter of 10 April 2001 to indicate any intention that the tax due for the tax year ended 5 April 2000 should be reduced. There is no express statement to that effect, unlike in Mr Derry’s case.
149. Henderson LJ reached his conclusion based on the comments made by Lord Hodge in *Cotter*. As Lord Hodge explained at [27], matters would only have been different:
- “if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/2008”.
150. As I have said, in Mr Austick’s case, there was no explanation in the letter of 10 April 2001 what sums might be due (or repayable) for the tax year ended 5 April 2000.
151. In my view, the letter of 10 April 2001 therefore represents a stand-alone claim under schedule 1A to TMA and, whilst making a claim to carry back losses from the year ended 5 April 2001 and making amendments to the tax return form for the tax year ended 5 April 2000 to reflect that, does not expressly or implicitly amend Mr Austick’s self-assessment for the tax year ended 5 April 2000.
152. Those amendments and the information in the additional information box on the tax return form were not therefore part of the “return” for the purposes of s 42(11) TMA and were capable of falling within schedule 1A to TMA.
153. This conclusion is, in my view, supported by the entries made by Mr Austick on his tax return for the tax year ended 5 April 2001. In the additional information box (23.6), he stated:
- “2000-01 trading losses on the Baby Spice Ninth Limited Partnership of £87,500 of which I became a partner with effect from 15 January 2001 are claimed against 1997/98 income.
- Tax has already been repaid of £35,000.”

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154. In the partnership pages of that tax return, Mr Austick completed box 4.7 to show his share of the partnership loss of £87,500 and, in box 4.16 shows that the loss to carry back is £87,500.
155. These entries are precisely what the Supreme Court in *De Silva* explained at [28] was needed in relation to a carry back claim under schedule 1B in circumstances where the taxpayer had already received full relief as a result of a previous claim under schedule 1A.
156. In *Murphy*, the First-tier Tax Tribunal came to the same conclusion on the facts as Henderson LJ in *Derry* at [74]. However, the facts in *Murphy* were much more similar to those in *Derry* in that the claim was for share loss relief and was to set the loss realised in the subsequent year against income of the year for which the claim was included in the relevant tax return. Given what was said in *Derry* it must be inferred that the Tribunal concluded that it was clear from Mr Murphy's return that he was seeking to reduce his tax liability for that tax year. As I have said, this is not the case for Mr Austick.

Ground 3 – was there a claim under schedule 1B for the tax year ended 5 April 2001?

157. The relevance of this ground is that, if there was no claim for relief under schedule 1B to TMA in Mr Austick's tax return for the year ended 5 April 2001, Mr Avient submits that HMRC could not enquire into the carry back of losses as part of their enquiry into his tax return for that year and any s 28B(4) Partner notice could not increase his tax liability for that year as a result of reducing the available losses.
158. Mr Avient's submissions in relation to this issue are based on Mr Austick having amended his self-assessment for the tax year ended 5 April 2000. Mr Avient argues that, whilst Mr Austick may have mistakenly reduced his self-assessment for the tax year ended 5 April 2000 to produce a repayment of £35,000, he has not in fact made a claim to carry back losses as *De Silva* establishes that a claim made in the year 1 tax return is not valid in law.
159. There was, therefore, says Mr Avient, no need for Mr Austick to claim relief under schedule 1B in his tax return for the year ended 5 April 2001 as he had already obtained the tax repayment he was seeking by (incorrectly) amending his self-

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assessment for the previous tax year. Mr Avient suggests that the entries on Mr Austick's tax return for the year ended 5 April 2001 should therefore be taken as being for information only and to prevent any possibility of him using the Partnership losses in some other way and therefore to obtain relief twice for the same losses.

160. As I have found that Mr Austick did not in fact amend his self-assessment for the tax year ended 5 April 2000, this point does not arise. In circumstances where the letter of 10 April 2001 constituted a stand-alone claim under schedule 1A TMA, it is clear that the entries made by Mr Austick on his tax return for the year ended 5 April 2001 do amount to a claim to carry back losses under schedule 1B TMA and contain all the information needed for that purpose (see [153-155] above).
161. As an alternative, Mr Avient suggests that the entries on the tax return for the year ended 5 April 2001 cannot, in any event, constitute a claim under schedule 1B TMA as they have no effect on the self-assessment calculation for that year.
162. I can see that there could be some force in this argument as schedule 1B is clear that effect must be given to the claim in year 2. It might therefore be expected that the effect of any claim would be to reduce the amount of tax payable (and potentially give rise to a repayment) for year 2. However, this is not the way in which the online tax return form works as the entries on the tax return form for year 2 relating to the carry back of losses do not affect the figure shown in box 18.3 (which is the figure shown for the tax due when the taxpayer calculates their own tax liability).
163. Having said that, it is clear from the decision of the Supreme Court in *De Silva* at [28] that the obligation is only to state on the year 2 tax return the information relating to the loss, the claim and the relief already given. This “enables the return to ‘take into account’ as s 8(1AA)(a) requires, both the relief which is claimed in the return and that which he has already received”.
164. The precise way in which those matters are taken into account is not explained in *De Silva* but there is no doubt that the Supreme Court accepted that, where such information is provided, it will amount to a claim for the purposes of schedule 1B TMA. I do not therefore accept Mr Avient's submission in relation to this.

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165. I now need to consider Mr Austick's final ground which relates to the effect (or lack of effect) of the Partner notice and the consequential amendments made by that notice.

Ground 4 - Effect of the Partner notice

166. Based on the template which, as I have found, is the form of the Partner notice which was sent to Mr Austick, the relevant provisions of the Partner notice are as follows (the words in square brackets being those which the template requires to be completed in accordance with the position of the particular taxpayer in question and which I have completed (to the extent I am able to do based on the evidence before me) to reflect Mr Austick's position):

"I am writing to let you know that appeals against closure notices issued in respect of enquiries into the above Partnership's returns for the year ended [5 April 2001] have been concluded under s 54 Taxes Management Act 1970, by agreement with the nominated partner, Investing in Enterprise Limited.

As a result of the agreement, the Partnership return for [2001] has been amended. Your allocation of the partnership loss arising for the year [2000/01] has been agreed at [£20,000]. I am now amending your own return/or carry back claim to reflect this change.

I have enclosed details of my calculations.

...

I have also updated your self-assessment statement to reflect the change to your personal return. As of [3 November] your statement shows that you are due to pay a total of £[]. This amount includes all the items on the statement, not just the results of my check. This figure may change on a daily basis if other amounts become due or interest is added. I enclose a copy of your statement.

...

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Please pay £[26,993.84] by [4 December 2011]. This is the tax you are due to pay for the year I have checked.”

167. Mr Avient submits that the terms of the Partner notice cannot give rise to any additional tax liability for the year ended 5 April 2001 as all it does is to amend the amount of the available Partnership losses and to assert that an amount of tax is due.
168. In support of this, he relies on the decision of the Supreme Court in *De Silva* where Lord Hodge explains at [31] how HMRC may recover tax relief which they have already given but which is subsequently found not to be due.
169. In short, Lord Hodge interprets the words “or otherwise” at the end of paragraph 2(6) of schedule 1B to TMA as permitting HMRC to adjust the amount chargeable to income tax for the purposes of s 8(1AA)(a) TMA (and therefore also for s 9(1)(a) TMA – which requires the self-assessment return to include a self-assessment). The effect of this would be to increase the amount of tax due for the relevant year which would in turn allow HMRC to recover the sums which were wrongly paid by way of relief.
170. Mr Avient notes that, in this case, the Partner notice does not purport to adjust the amount chargeable to income tax for the year ended 5 April 2001 and submits that, on this basis, it cannot have the effect which Lord Hodge describes at [31] in *De Silva*.
171. Mr Carey suggests that this is taking a too formalistic approach to the observations of Lord Hodge in *De Silva* and submits that it is sufficient that the Partner notice makes it clear that losses are disallowed and that, as a result, a further amount of tax has become due.
172. In my view, Mr Carey is right. Lord Hodge cannot be taken as requiring HMRC, in the Partner notice, to specify an additional amount of income which has become subject to tax as a result of the consequential amendments made by the s 28B(4) notice. Given the context of the claim in *De Silva*, this cannot be the case. This can be seen from the next section of his judgment in which Lord Hodge goes on to explain what HMRC did. He records at [34] that HMRC issued letters which altered the taxpayers’ personal returns so as to give effect to the reduction in the losses. He describes the letters at [8] noting two points:

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- 172.1 The carry back claims in their personal returns would be amended in line with the lower figures for the Partnership losses which had been agreed in the partnership settlement agreement.
- 172.2 Mr De Silva had to pay additional tax of a specified amount.
173. This is of course precisely what the letter to Mr Austick says. There is no mention by Lord Hodge of the letter containing a specific quantification of any additional income which should be treated as chargeable to tax for the relevant tax year.
174. This conclusion is also in line with the decision of this Court in *Knibbs* at [103(i)]. Mr Justice Warren explains that:
- “If the closure notice not only disallows the loss but also (i) expressly rejects the carry back claim (on the basis that there is no loss to support the claim) and (ii) states that the taxpayer owes by way of tax a sum equal to the amount of the disallowed loss, I do not consider that it could seriously be contended that this did not amount to an amendment of the year 2 tax return which effected an alteration of the amount chargeable to income tax for the purposes of s 9(1)(a). ... by stating that the amount of the payment made when originally giving effect to the claim is now owed by way of tax, that can only mean payable by way of adjustment of the tax which is chargeable since no other way of recovering the payment has been suggested. This, in substance, is an amendment to the self-assessment even if the words used are not equivalent to “I hereby amend the figure in your self-assessment for the amount chargeable to income tax from £X to £Y”.”
175. The decision in *Knibbs* was in the context of a closure notice rather than a Partner notice under s 28B(4). Mr Avient objects that a closure notice is qualitatively different to a Partner notice under s 28B(4) TMA (see *R (Amrolia) v HMRC* [2020] EWCA Civ 488 at [54] and [57]).
176. Whilst this may be true, Henderson LJ acknowledges in *Amrolia* at [55] that a Partner notice may go beyond the minimum required and deal with computational matters such as making appropriate adjustments to the taxpayer’s self-assessment and

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therefore result in an enforceable demand for payment. Where the Partner notice does take this approach, I can see no reason why the effect should not be the same as a closure notice which contains the same information (in this case the disallowance of the loss, the rejection of the carry back claim and a statement of the tax which the taxpayer now owes as a result of the disallowed loss).

177. In my view, the Partner notice given to Mr Austick under s 28B(4) TMA must be interpreted as implicitly adjusting the amount chargeable to income tax for the purposes of s 8(1AA)(a) TMA and s 9(1)(a) TMA so as to result in the amount of tax which HMRC explain in the Partner notice is due (being the tax repayable as a result of the disallowance of the majority of the losses).

Conclusion

178. Mr Austick's claim should be struck out as an abuse of process. Any claim should have been brought by way of judicial review being, in substance, a challenge to the consequences of the process followed by HMRC in attempting to recover the tax which they considered to have been wrongly repaid to Mr Austick.
179. Mr Austick did not amend his self-assessment for the tax year ended 5 April 2000 but instead made a stand-alone schedule 1A TMA claim to carry back trading losses from the tax year ended 5 April 2001 against his income for the tax year ended 5 April 1998.
180. Mr Austick also made a claim under schedule 1B to carry back those losses in his tax return for the year ended 5 April 2001.
181. The Partner notice issued by HMRC to Mr Austick on or around 4 November 2011 was effective to give rise to an enforceable tax liability for the tax year ended 5 April 2001.
182. Mr Avient urged me to make declarations as to the amount of tax now due from Mr Austick to HMRC even if I were to find in favour of HMRC. However, as I explained at the hearing, it is not in my view possible to do so given that I have no evidence of the movements on Mr Austick's self-assessment account since 2011. It is therefore impossible for me to say what the current amount of tax due from Mr Austick to

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HMRC might be in respect of either of the tax years in question (or in respect of anything which may have happened subsequently).

183. In any event, it does not seem to me to be appropriate to make such a declaration. It is not something which Mr Austick asked for in his claim form or his details of claim and it is not something which HMRC have asked for. I would not therefore make any declarations even if I were not striking out the claim but instead would simply dismiss the claim.
184. I would invite the parties to agree an appropriate form of order giving effect to this judgment.