



Neutral Citation: [2024] UKFTT 00537 (TC)

Case Number: TC09207

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Centre City, Birmingham

Appeal reference: TC/2022/12309

*INCOME TAX – relief for losses on disposal of shares – section 574 Income and Corporation Taxes Act 1988 – whether claim for relief “in a return” – whether enquiry under Schedule 1A Taxes Management Act 1970 or under section 9A Taxes Management Act 1970 – whether closure notices valid – appeal dismissed*

**Heard on: 9 October 2023  
Judgment date: 13 June 2024**

**Before**

**JUDGE ASHLEY GREENBANK  
TERRY BAYLISS**

**Between**

**ROGER MURPHY**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS  
Respondents**

**Representation:**

For the Appellant: Robert Grierson, counsel, instructed by Reid & Co, solicitors

For the Respondents: Alan Hall, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This is an appeal by the appellant, Mr Roger Murphy against two closure notices: the first in the relation to the tax year 2005/6; and the second in relation to the tax year 2006/7.
2. The two closures notices were issued by the respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC"), and together seek to deny relief under section 574 of the Income and Corporation Tax Act 1988 ("ICTA") claimed by Mr Murphy for a loss made in the tax year 2006/7, but carried back to the tax year 2005/6. The tax at issue is £183,140.43.
3. The loss arose from transactions undertaken by Mr Murphy as part of a tax avoidance scheme known as "Excalibur". The steps in that scheme have been the subject of decisions in the tribunals<sup>1</sup>, which have found that the scheme did not succeed in creating the anticipated loss. Mr Murphy does not challenge those decisions. The matters that are before the tribunal in this appeal concern whether HMRC opened valid enquiries into Mr Murphy's returns and whether the closure notices are valid.

### THE HEARING AND THE EVIDENCE

4. For the hearing, we were provided with a bundle of documents comprising 811 pages and a bundle of authorities. The bundle of documents included a witness statement given by Mr Murphy. Mr Murphy gave evidence and was cross-examined on his statement.
5. Much of Mr Murphy's evidence concerned the manner in which the claim for relief was reflected in his returns. We will address those issues later in this decision, but, as we understand it, there is little dispute between the parties as to the way in which the claim was made. The remainder of his witness statement contained opinions and complaints about the manner in which HMRC had handled his affairs and the delays he had experienced.

### FACTS

6. We have set out our findings of fact in this section.
7. As we have mentioned, the loss for which relief was claimed by Mr Murphy arose from his participation in a tax avoidance scheme. The details of the steps in the scheme are not material to our decision, but, in outline, they were as follows:
  - (1) A new company, Harbour Trading Limited ("Harbour"), was incorporated in the Isle of Man and acquired a small UK trade.
  - (2) On 13 July 2006, Mr Murphy subscribed shares in Harbour at their par value, £24.
  - (3) On 25 July 2006, Mr Murphy sold his shares to an unconnected company, Braye Finance Limited ("Braye"), for a similar sum and granted Braye a put option to sell the shares back to him within 30 days for their "fair value" plus a margin.
  - (4) Braye borrowed to subscribe for one share in Harbour at a significant premium (the amount reflected the participation of other scheme users as well as Mr Murphy). Harbour guaranteed the borrowing.
  - (5) Braye exercised the option and sold the shares back to Mr Murphy for £763,740. Braye repaid its borrowing. This step was funded by borrowing by Mr Murphy, which was also guaranteed by Harbour.

---

<sup>1</sup> *Kerrison v HMRC* [2017] UKFTT 322 (TC), *Kerrison v HMRC* [2019] UKUT 0008 (TCC)

(6) Harbour capitalized a British Virgin Islands (“BVI”) subsidiary, Rose Harbour (BVI) Limited (“Rose”). Rose advanced an interest-free loan to Mr Murphy, who repaid his bank borrowing. The interest-free loan was subsequently written off.

(7) Mr Murphy donated his Harbour shares to a charity.

8. The intended tax analysis was that Mr Murphy’s sale and repurchase of the Harbour shares to and from Braye would fall within section 106A Taxation of Chargeable Gains Act 1992 (“TCGA”), such that the shares acquired from Braye would be identified with the shares sold to Braye for capital gains tax (“CGT”) purposes, giving rise to a substantial capital loss on the basis that Mr Murphy had acquired shares for a significant sum and sold them for a nominal amount. The aim was that Mr Murphy would be entitled to claim relief against income tax for that loss under s 574 ICTA.

9. These arrangements were part of a tax avoidance scheme, known as Excalibur, which was marketed by Premier Strategies Ltd. A scheme reference number was allocated to the scheme under the rules governing the Disclosure of Tax Avoidance Schemes in Part 7 of the Finance Act 2004 (“DOTAS”).

10. On 13 October 2006, Mr Murphy submitted his tax return for the tax year 2005/6 on-line<sup>2</sup>. The return included:

- (1) in Box 18.3, the amount of £179,063.62 as total tax due for that year;
- (2) in Box 18.8, a figure of £183,140.43 as “Any 2006-2007 tax you are reclaiming now”;
- (3) in Box 23.9 (the “white space”), an explanation of the entry in Box 18.8 in the following terms:

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

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

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

Thank you for your tax return for the year ended 5 April 2006.

I am writing to tell you that I intend enquiring into your Return. My enquiry will cover your claim under Section 574 Income Corporation Taxes Act 1988.

The letter later continued:

---

<sup>2</sup> The bundle included several versions of Mr Murphy’s return for the tax year 2005/6 and several versions of his return for the tax year 2007/8. We have concluded (and find as a fact) that the correct returns are the versions filed on-line on 13 October 2006 and 31 January 2008 respectively as the figures used in those versions and the commentary in the white spaces are most consistent with the correspondence between the parties.

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

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

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

(1) in Box 18.8, the total tax due was shown as £144,587.12;

(2) Box 23.9 contains the following additional information:

“During the tax year a loan that I received from Rose Harbour (BVI) Ltd was released at the discretion of the Board of that company. The loan was from a non-close and non resident company of which I was not a shareholder. The release does not give rise to a taxable receipt. During the tax year I gifted my entire shareholding in Harbour Trading Plc to Change4Change, a UK registered charity....”

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

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

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

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

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

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

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

16. Following the issue by HMRC of an Accelerated Payment Notice (“APN”) to Mr Murphy in August 2015, Mr Murphy became a claimant in judicial review proceedings against HMRC. The matters relating to the APN are no longer in issue between the parties and we will not refer to them further in this decision notice.

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

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

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

**Check of your claim for the year ended 5 April 2007**

I have now completed my check of your claim for the year shown above.

**My conclusion**

- The total capital loss claimed in the sum of £763,740.00 is not allowable.
- The claim to set £48,244.79 of that capital loss against 2005-2006 income, is not allowable.
- Your claim showed that a credit was due to you of £134,895.64
- My check has shown that the actual credit due was £0.00
- The difference is £134,895.64.

...

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

**Information about our check of your Self-Assessment tax return for the year ended 5 April 2007**

I have now completed my S9a check of your Self-Assessment tax return for the year shown above. This letter is a Closure Notice issued under Section 28A (1) & (2) Taxes Management Act 1970.

**My conclusion**

The capital loss claimed in the sum of £763,740.00 is not allowable.

I have amended your tax return in line with my decision.

The amount of tax you self-assessed for the year 2006-2007 has not changed.

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

- Your claim showed that a credit was due to you of £48,244.79.
- My check has shown that the actual credit due was £0.00.
- The difference is £48,244.79.

...

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

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

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

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

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

(1) in relation to the closure notice given under paragraph 7 Schedule 1A TMA:

Closure of Enquiry under Sch1A TMA 1970

My conclusion

- The total capital loss claimed in the sun of £763,740.00 is not allowable.
- The claim to set £180,40.43 (sic) of that capital loss against 2005-2006 income is not allowable.
- Your claim showed that a credit was due to you of £183,140.43
- My check has shown that the actual credit due was £0.00
- The difference is £183,140.43.

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

Closure of s9A Enquiry into 06/07 Return

The capital loss claimed in the sum of £763,740.00 is not allowable. The amount of tax that you self-assessed for the year 2006-2007 has not changed.

- The claim to set £763,739.00 of that capital loss against 2005-2006 income is not allowable.
- Your claim showed that a credit was due to you of £0.00
- My check has shown that the actual credit due was £0.00
- The difference is £0.00.

24. Mr Murphy notified his appeal against both closure notices to the tribunal on 23 June 2022.

**THE ISSUES BEFORE THE TRIBUNAL**

25. The issues before the tribunal fall into two broad categories.

(1) The first category are technical issues as to the manner in which Mr Murphy made his claim to “share loss relief” under section 574 ICTA and the procedure under which HMRC has sought to enquire into the claim. We will refer to these issues as the “share loss relief issues”.

(2) The second category are the arguments relating to the form of the closure notices. We will refer to this issue as the “closure notice issue”.

**THE SHARE LOSS RELIEF ISSUES**

26. We will begin with the share loss relief issues. It will assist our explanation is we first set out the relevant statutory background.

## Relevant legislation

27. Mr Murphy's claim to "share loss relief" was made under section 574 ICTA. At the time, section 574 was in the following form:

### **574.— Relief for individuals.**

1.—

(1) Where an individual who has subscribed for shares in a qualifying trading company incurs an allowable loss (for capital gains tax purposes) on the disposal of the shares in any year of assessment, he may, by notice given within twelve months from the 31st January next following that year, make a claim for relief from income tax on—

(a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or

(b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;

but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above. Where such relief is given in respect of the loss or any part of it, no deduction shall be made in respect of the loss or (as the case may be) that part under the 1992 Act.

(2) Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection; and any relief claimed under either paragraph in respect of any income shall be given in priority to any relief claimed in respect of that income under section 380 or 381.

(3) For the purposes of this section—

(a) an individual subscribes for shares if they are issued to him by the company in consideration of money or money's worth; and

(b) an individual shall be treated as having subscribed for shares if his spouse or civil partner did so and transferred them to him by a transaction *inter vivos*.

28. The references to sections 380 and 381 ICTA in subsection (2) of section 574 are to relief given for losses incurred by an individual in a trade, profession, or vocation or an employment. Sections 380 and 381 ICTA in the form that they were in at the time are set out in the Appendix to this decision notice.

29. Section 574 ICTA was repealed with effect from 5 April 2007. For the tax year 2007/8 onwards, the provisions governing share loss relief, including section 574 ICTA, were rewritten as part of the Tax Law Rewrite Project and incorporated in the Income Tax Act 2007 ("ITA"). They are now found in chapter 6 Part 4 ITA (principally, sections 131 to 133 ITA). The provisions relating to the other forms of loss relief in sections 380 and 381 ICTA were also repealed and rewritten as chapter 2 Part 4 ITA – in relation to losses from a trade, profession or vocation ("trade loss relief") – and chapter 5 Part 4 ITA in relation to losses from an employment ("employment loss relief").

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

31. The manner in which claims can be made is governed by section 42 TMA. At the relevant time, it provided, so far as relevant:

**42.— Procedure for making claims etc.**

(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.

(1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.

(2) ... where notice has been given under section 8, 8A or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.

...

(5) The reference in this section to a claim being included in a return include references to a claim being so included by virtue of an amendment of the return.

...

(11) Schedule 1A to this Act shall apply as respects any claim or election which—

(a) is made otherwise than by being included in a return under section 8, 8A or 12AA of this Act,

...

(11A) Schedule 1B to this Act shall have effect as respects certain claims for relief involving two or more years of assessment.

...

32. The effect of Mr Murphy's claim for relief is a matter of dispute between the parties to which we will return later in this decision notice. For present purposes, it is sufficient to note that:

(1) section 42 governs the making of claims "unless otherwise provided";

(2) where section 42 applies, and a return is made under section 8 TMA – which is the provision that enables HMRC to require an individual to file a return – claims and elections, which can be made by being included in the return, must be made in the return (subsection (2));

(3) section 42 directs that Schedule 1A TMA shall have effect in relation to claims or elections which are not made in a return (subsection (11)) and that Schedule 1B TMA shall have effect, in the case of "certain claims for relief involving two or more years of assessment" (subsection (11A)).

33. As we describe later in this decision notice, HMRC's case is that the directions in section 42(11) and (11A) to Schedule 1A and Schedule 1B apply to Mr Murphy's claim to carry back losses, whereas it is Mr Murphy's case that they do not.

34. We will deal first with Schedule 1B TMA. Schedule 1B is headed "Claims for relief involving two or more years". Paragraph 2 of the Schedule addresses loss relief. It provided, so far as relevant:

2.—

(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of



assessment (“the later year”) to be given in an earlier year of assessment (“the earlier year”).

(2) Section 42(2) of this Act shall not apply in relation to the claim.

(3) The claim shall relate to the later year.

(4) Subject to sub-paragraph (5) below, the claim shall be for an amount equal to the difference between—

(a) the amount in which the person is chargeable to tax for the earlier year (“amount A”); and

(b) the amount in which he would be so chargeable on the assumption that effect could be, and were, given to the claim in relation to that year (“amount B”).

(5) Where effect has been given to one or more associated claims, amounts A and B above shall each be determined on the assumption that effect could have been, and had been, given to the associated claim or claims in relation to the earlier year.

(6) Effect shall be given to the claim in relation to the later year, whether by repayment or set-off, or by an increase in the aggregate amount given by section 59B(1)(b) of this Act, or otherwise.

...

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

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

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

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

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

37. Schedule 1A contains provisions governing the making of claims that are not included in a return, enquiries into those claims and the closure of those enquiries. Paragraph 5 contains HMRC’s power to enquire into such claims. It provided:

5.—

(1) An officer of the Board may enquire into—

(a) a claim made by any person, or

(b) any amendment made by any person of a claim made by him,

if, before the end of the period mentioned in sub-paragraph (2) below, he gives notice in writing of his intention to do so to that person or, in the case of a partnership claim, any successor of that person.

(2) The period referred to in sub-paragraph (1) above is whichever of the following ends the latest, namely—

(a) the period ending with the quarter day next following the first anniversary of the day on which the claim or amendment was made;

(b) where the claim or amendment relates to a year of assessment, the period ending with the first anniversary of the 31st January next following that year; and

(c) where the claim or amendment relates to a period other than a year of assessment, the period ending with the first anniversary of the end of that period;

and the quarter days for the purposes of this sub-paragraph are 31st January, 30th April, 31st July and 31st October.

(3) A claim or amendment which has been enquired into under sub-paragraph (1) above shall not be the subject of—

(a) a further notice under that sub-paragraph; or

(b) if it is subsequently included in a return, a notice under section 9A(1) or 12AC(1) of this Act or paragraph 24 of Schedule 18 to the Finance Act 1998.

38. Paragraph 7 contains the relevant provisions governing the completion of those enquiries. It provided, so far as relevant:

**7 Completion of enquiry into claim**

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

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

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

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

In the case of an enquiry falling within paragraph 5(1)(b) above, paragraph (b) above only applies so far as the deficiency or excess is attributable to the claimant's amendment.

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

(a) allow the claim, or

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

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

...

39. Mr Murphy’s case on other hand is that Schedule 1A TMA and Schedule 1B TMA do not apply to his claim for relief. He says that the general provisions applicable to enquiries into tax returns apply. The starting point for these purposes is section 8 TMA which sets out the circumstances in which HMRC may require an individual to make a return for the purposes of income tax and capital gains tax. For the relevant periods, it was in the following form:

**8.— Personal return.**

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is—

(a) the 31st January next following the year of assessment, or

(b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given.

(1AA) For the purposes of subsection (1) above—

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) of ITTOIA 2005 applies.

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, loss, tax, credit or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above “relevant statement” means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.

(5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

40. Mr Murphy says his claim was included in his return for the 2005/6 tax year and the enquiry into the claim should have been undertaken under section 9A TMA in that return. At the time, section 9A provided, so far as relevant:

### **9A Notice of enquiry**

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so (“notice of enquiry”)–

- (a) to the person whose return it is (“the taxpayer”),
- (b) within the time allowed.

(2) The time allowed is–

- (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date;
- (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;
- (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.

...

(6) In this section “the filing date” means the day mentioned in section 8(1A) or, as the case may be, section 8A(1A) of this Act.

41. An enquiry commenced under section 9A TMA is closed by a closure notice under section 28A TMA. It provides, so far as relevant:

#### **28A Completion of enquiry into personal or trustee return**

(1) This section applies in relation to an enquiry under section 9A(1) of this Act.

(1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a “partial closure notice”) that the officer has completed his enquiries into that matter.

(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a “final closure notice”)—

- (a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or
- (b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

(2) A partial or final closure notice must state the officer's conclusions and –

- (a) state that in the officer's opinion no amendment of the return is required, or
- (b) make the amendments of the return required to give effect to his conclusions.

(3) A partial or final closure notice takes effect when it is issued.

...

#### **The parties’ submissions in outline**

42. We will deal with some of the more specific issues arising from the parties’ submissions in our discussion below. But we will first summarize their positions.

43. Mr Murphy's case is, in summary, as follows.

(1) His claim for share loss relief under section 574 ICTA was included "in" the return for the tax year 2005/6. He was entitled to make a claim in that return. Schedule 1B did not apply to prevent his claim from being made in the return.

(2) As he made the claim in the return, the only valid means of enquiry into the claim was for HMRC to open an enquiry under section 9A TMA, which would be closed by a closure notice under section 28A TMA. HMRC's notice of intention to enquire into the claim under paragraph 5 Schedule 1A TMA 1970 and the corresponding closure notice under paragraph 7 Schedule 1A TMA 1970 were invalid.

(3) As the entire claim was made in the 2005/6 return, paragraph 2(3) Schedule 1B TMA could not apply. It was not possible to enquire into the claim by virtue of an enquiry under section 9A TMA in relation to the tax year 2006/7. The closure notice issued by HMRC under section 28A TMA for the tax year 2006/7 could not affect the claim.

44. HMRC's case is, in outline, as follows.

(1) The claim for relief was a claim involving two or more years of assessment to which Schedule 1B TMA applied. Mr Murphy was not entitled to claim share loss relief in his return for the tax year 2005/6.

(2) The claim for share loss relief in this case was made "on" the return for the tax year 2005/6 but not "in" that return. It followed that Schedule 1A TMA applied to the claim: an enquiry into the claim was validly opened under paragraph 5 Schedule 1A TMA and validly closed under paragraph 7 Schedule 1A TMA.

(3) The claim to share loss relief related to the later year, in this case 2006/7 (paragraph 2(3) Schedule 1B TMA). The closure notice in relation to that year was effective to deny the entire claim, including the claim to use the losses in the earlier year (tax year 2005/6).

45. The parties' arguments in relation to the share loss relief issues engage principles derived from the decisions of the courts and tribunals in a series of cases involving claims for loss relief - share loss relief, trade loss relief and employment loss relief. Those cases are the Supreme Court decisions in *HMRC v Cotter* [2013] UKSC 69 ("*Cotter*"), *R (on the application of de Silva) v HMRC* [2017] UKSC 74 ("*de Silva*"), and *R (on the application of Derry) v HMRC* [2019] UKSC 19 ("*Derry SC*"), and the Court of Appeal decision in *Knibbs v HMRC* [2019] EWCA Civ 1719 ("*Knibbs*").

46. Mr Murphy's case in relation to the share loss relief issues relies heavily on the decision of the Supreme Court in *Derry SC*. Mr Murphy says that the cases on which HMRC relies – principally, *Cotter*, *de Silva* and *Knibbs* – do not affect the analysis because they relate to other forms of loss relief (trade loss relief and employment loss relief). Following the decision in *Derry SC*, it is clear that separate principles apply to claims to share loss relief. Although *Derry SC* concerned a claim for share loss relief in relation to periods after the introduction of ITA, Mr Grierson, for Mr Murphy, submits that the introduction of ITA did not affect the position.

47. HMRC say that the decision of the Supreme Court in *Derry SC* does not apply to a claim for share loss relief relating to periods before the introduction of ITA. For claims made in relation to tax years before the tax year 2007/8, such as the claim in this case, the rules governing claims for share loss relief were the same as the other forms of loss relief. The principles in *Cotter*, *de Silva* and *Knibbs* therefore apply.

## Discussion

48. The parties' submissions were wide-ranging, but they raise the following essential questions which we will deal with in turn:

- (1) Was Mr Murphy entitled as a matter of law to deduct the purported loss in computing his income tax liability for the tax year 2005/6 and to include the claim in his tax return for the 2005/6 tax year? (The "first issue")
- (2) If not – and it was an error for Mr Murphy to include the claim in his tax return for the tax year 2005/6 – was his claim nonetheless included "in" his return with the effect that HMRC could only enquire into it under section 9A TMA? (The "second issue")
- (3) If Mr Murphy had made a claim in his return for the tax year 2005/6 with the effect that HMRC could only enquire into it under section 9A TMA, was HMRC nonetheless entitled to enquire into the claim as part of an enquiry under section 9A TMA in relation his return for the tax year 2006/7? (The "third issue")

### *The first issue*

49. Mr Murphy's case in relation to the first issue relies on the Supreme Court decision in *Derry SC*. *Derry SC* involved a claim for share loss relief under section 132 ITA arising from a disposal of shares made in the tax year 2010/11. The taxpayer made a claim on the face of his tax return for the tax year 2009/10 for share loss relief against his income for that year in relation to the loss made on that disposal. In his return for the tax year 2010/11, the taxpayer stated that the relief for the loss had already been claimed and relief obtained in 2009/10. HMRC opened an enquiry into the claim under Schedule 1A TMA. They also opened an enquiry into the tax return for the tax year 2010/11 under section 9A TMA.

50. There were two issues before the Court:

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

51. The Supreme Court, with Lord Carnwath giving the leading judgment, found in favour of the taxpayer on the first issue. This was on the grounds that sections 131 to 133 ITA provided a "clear and self-contained code" for the making of claims to share loss relief. Under those provisions, the taxpayer was entitled to make a claim for loss relief and to specify the year in which it was to be applied. The computational provisions of ITA, in particular, section 23 ITA, were equally clear that the amount of the claim was to be taken into account in computing the taxpayer's "net income" for that year and accordingly in calculating his "tax liability" for that year. Lord Carnwath says this (at *Derry* [35]):

35. While it may be true, as Henderson LJ said, that modern tax legislation in general is much more complex than at the time of Lord Dunedin's classic statement, the purpose of the tax law rewrite was to restore a measure of simplicity and coherence to the principal tax statutes. In any event, one does not need high judicial authority to make the obvious point that the first step in the imposition of a tax is to establish (in Lord Dunedin's words) "what persons in respect of what property are liable". Taken together section 23

and sections 131-132 appear to constitute a clear and self-contained code for the treatment of a claim to share-loss relief such as that of Mr Derry. Sections 132-133 in terms give him an "entitlement" to make the claim, to specify the tax year to which it is to be applied, and to do so by deducting it in the calculation of his "net income" for the purpose of section 23. For good measure section 132(1) provides a specific signpost to Step 2 in section 23. That section in turn makes clear that the "result" of that, and the other steps there set out, is his "tax liability" for the tax year in question.

52. That entitlement was not overridden by Schedule 1B. The Court noted that there was no specific cross-reference in ITA to Schedule 1B in relation to the provisions regarding claims for share loss relief. This was in contrast to the provisions governing the other loss reliefs – where cross-references to paragraph 2 Schedule 1B are found in section 60(2) ITA in relation to trade loss relief and in section 128(7) ITA in relation to employment loss relief. Lord Carnwath says this (at *Derry* [36]-[37]):

36. Having taken such care to walk the taxpayer through the process of giving effect to his entitlement as part of his tax liability for the year specified by him, it would seem extraordinary for that to be taken away, without any direct reference or signpost, by a provision in a relatively obscure Schedule of another statute concerned principally, not with liability, but with management of the tax. Section 1020 makes no specific reference to Schedule 1B, and in any event refers only to "information" in general terms, rather than anything likely to affect the substance of liability. By contrast sections 60(2) and 128(7) are more than mere "signposts", as the judges below characterised them. The words "subject to" are substantive in effect, imposing a qualification on the right otherwise conferred by those provisions. Applying ordinary principles of interpretation, the absence of similar words in section 132 would naturally be taken as indicating that this right is not subject to the same qualification.

37. Turning to the TMA, it is true that words of Schedule 1B taken on their own would be apt to apply to a claim under sections 132-133. However, I do not regard that as enough to displace the clear provisions of the ITA in respect of liability. I do not see this as turning so much on whether one set of provisions is more specific than the other, but rather on the fact that the ITA is in principle the governing statute in respect of tax liability, and as such should take precedence in the absence of any indication to the contrary. Further, unlike the judges below, I see a significant inconsistency between the two sets of provisions: the first gives the taxpayer an unqualified right to claim a deduction in the previous year; the second in effect removes that right by treating it as relating to the current year. I also see force in Ms McCarthy's reliance on the reference in section 42(11A) to "certain claims" for relief involving two or more years. As she says, this may be read as implying that not all such claims are covered, and that one needs to look elsewhere to identify which. (I do not forget that in *Cotter* para 14, Lord Hodge proceeded on the basis that section 42(11A) had the "same" effect in respect of employment loss relief as the specific provision in section 128(7), but the point was not in issue and does not seem to have been subject to argument.)

53. As can be seen from the above extracts, the Supreme Court decision is informed to a significant extent by the structure of ITA. Mr Hall, for HMRC, says that this is a critical factor, and that ITA made a change in the law in that respect, but only in relation to share loss relief. Mr Grierson, for Mr Murphy, says that it is not. He says that the statutes such as ITA which were part of the Tax Law Rewrite Project were intended to restate the law and not to

make material changes (see the preamble to ITA). The ITA provisions were simply restating the position that obtained under the earlier provisions including section 574 ICTA.

54. Lord Carnwath commented on this question in his judgment in *Derry SC*. He said this (at *Derry SC* [38]):

38. The only countervailing consideration, to my mind, is the lack of any obvious explanation, in the statutory history or otherwise, of the different treatment of this form of loss relief. In a post-hearing note Mr Nawbatt gave a detailed account of the treatment of the various forms of loss relief under the previous legislation. This shows, as is common ground, that the pre-2007 law did not draw any material distinction between share loss relief (section 574 ICTA), and trade and employment loss relief (section 380 ICTA). Mr Nawbatt was also able to point to some indications in the ITA Explanatory Notes (e.g. in respect of section 1025, which is not directly relevant to the present case) that the authors of the notes may have assumed that share loss relief would be subject to TMA Schedule 1B, in the same way as the other forms of relief. However, taken at their highest, these indications are far from providing a basis for departing from the ordinary principles of statutory interpretation, absent any suggestion that they produce a result which is absurd or unworkable. Indeed, for the taxpayer's liability to be determined by reference to legal archaeology of this kind would negate the whole purpose of the tax law rewrite. It is neither necessary nor appropriate for the court to speculate as to Parliament's intentions to justify a departure from the natural interpretation of the statutory language.

55. As can be seen from that passage it was common ground between the parties before the Supreme Court in *Derry SC* that “the pre-2007 law did not draw any material distinction” between share loss relief and other forms of loss relief. The implication of this passage is that Lord Carnwath acknowledged that the introduction of ITA may well have changed the law on this issue. However, the Supreme Court made no express finding to that effect.

56. We were referred by Mr Grierson to the decision of the Court of Appeal in *Blackburn v Keeling* [2003] EWCA Civ 1221 (“*Blackburn*”). That case concerned a claim for trade loss relief under what was then section 380 ICTA to be taken into account in computing the taxpayer’s tax code under the regulations that applied to PAYE income tax. The Court of Appeal found, allowing HMRC’s appeal, that the right to claim trade loss relief was triggered by reference to the tax year in which the loss was made, and the taxpayer could not claim relief for the loss (through his tax code) before the loss was established.

57. Mr Grierson directed us in particular to *Blackburn* [16], where Carnwath LJ says this in relation to the application of Schedule 1B TMA:

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

58. This description reflects HMRC’s case on this appeal. Mr Grierson says, however, that it demonstrates that the cross-references to Schedule 1B TMA in section 60(2) ITA and section 128(7) ITA were included in ITA to reflect the decision in *Blackburn* in relation to claims under section 380 ICTA. The cross-references preserve the pre-ITA position for claims to trade loss relief and employment loss relief in relation to post-ITA periods (see



*Knibbs* [74]). In Mr Grierson’s submission, the reason why there is no cross-reference to Schedule 1B TMA in the ITA provisions relating to share loss relief is that rationale did not apply to claims under section 574 ICTA.

59. We are not persuaded that the decision in *Blackburn* takes us any further. It may confirm that Schedule 1B TMA could apply to claims made under section 380 ICTA before the introduction of ITA. But it tells us nothing about the operation of claims for share loss relief under section 574 ICTA prior to the introduction of ITA. Furthermore, in *Blackburn*, section 42(2) TMA could not, in any event, apply because of the nature of the relief that was claimed (see section 42(3) TMA and *Blackburn* [14]).

60. We have not had the benefit of the kind of “legal archaeology” that was clearly before the Supreme Court in *Derry SC*. We have been taken by the parties to section 1029 and Schedule 1 ITA, which contains details of minor and consequential amendments made by ITA. The provisions in that Schedule contain no reference to differences in the manner in which share loss relief and other forms of loss relief should be claimed. We have also been taken to the Explanatory Notes to ITA. Once again, we cannot discern from them any indication as to whether the law regarding claims for share loss relief was considered to be the same as or different from the law for claiming other forms of loss relief before ITA and/or whether there was intended to be a change in the law in ITA.

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

62. On the first issue, we therefore agree with HMRC that Mr Murphy was not entitled to claim share loss relief “in” his return for the tax year 2005/6. Schedule 1B TMA applied and so the loss related to the tax year 2007/8.

### ***The second issue***

63. That leads us to the second issue, that is, even if it was an error for Mr Murphy to make a claim for relief in his tax return for the tax year 2005/6, was the claim nonetheless part of the tax return for that year so that HMRC was required to enquire into the claim as part of an enquiry into his return under section 9A TMA?

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

65. The Supreme Court rejected the taxpayer's argument that the claim was made "in" the return. The only judgment was given by Lord Hodge. He says this (at *Cotter* [24]-[26]):

24. Where, as in this case, the taxpayer has included information in his tax return but has left it to the Revenue to calculate the tax which he is due to pay, I think that the Revenue is entitled to treat as irrelevant to that calculation information and claims, which clearly do not as a matter of law affect the tax chargeable and payable in the relevant year of assessment. It is clear from sections 8(1) and 8(1AA) of TMA that the purpose of a tax return is to establish the amounts of income tax and capital gains tax chargeable for a year of assessment and the amount of income tax payable for that year. The Revenue's calculation of the tax due is made on behalf of the taxpayer and is treated as the taxpayer's self-assessment (section 9(3) and (3A) of TMA ).

25. The tax return form contains other requests, such as information about student loan repayments (page TR2), the transfer of the unused part of a taxpayer's blind person's allowance (page TR3) or claims for losses in the following tax year (box 3 on page Ai3) which do not affect the income tax chargeable in the tax year which the return form addresses. The word "return" may have a wider meaning in other contexts within TMA . But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the TMA , a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year" ( section 8(1) TMA ).

26. In this case, the figures in box 14 on page CG1 and in box 3 on page Ai3 were supplemented by the explanations which Mr Cotter gave of his claim in the boxes requesting "any other information" and "additional information" in the tax return. Those explanations alerted the Revenue to the nature of the claim for relief. It concluded, correctly, that the claim under section 128 of ITA in respect of losses incurred in 2008/09 did not alter the tax chargeable or payable in relation to 2007/08. The Revenue was accordingly entitled and indeed obliged to use Schedule 1A of TMA as the vehicle for its enquiry into the claim (section 42(11)(a)).

66. In this passage, Lord Hodge appears to make a distinction between information included in the tax return form, which is relevant for the purpose of establishing the amount on which the taxpayer is liable to tax for the relevant tax year, and other information which does not affect the amount chargeable in that tax year. Lord Hodge then went on to comment, albeit obiter, on the position that would have been reached if the taxpayer had calculated his own liability (incorrectly) taking account of the loss rather than rely upon the HMRC calculation. He says this (at *Cotter* [27]-[28]):

27. Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/08. Such information and self-assessment would in my view fall within a "return" under section 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer's self-assessment without either amending the tax return (section 9ZB of TMA) or instituting an enquiry under section 9A of TMA .

28. It follows that a taxpayer may be able to delay the payment of tax by claims which turn out to be unfounded if he completes the assessment by

calculating the tax which he is due to pay. Accordingly, the Revenue's interpretation of the expression "return" may not save it from tax avoidance schemes. But what persuades me that the Revenue is right in its interpretation of "return" is that income tax is an annual tax and that disputes about matters which are not relevant to a taxpayer's liability in a particular year should not postpone the finality of that year's assessment.

67. These comments are obiter, but they suggest that, if a claim is erroneously included in a tax return in a manner which affects the taxpayer's self-assessment, the claim would nonetheless be regarded as included in the return so that HMRC would have to proceed with any enquiry into it under section 9A TMA rather than Schedule 1A TMA.

68. Lord Hodge's comments were made in the context of a taxpayer who had filed a paper return. There has been some discussion in the case law as to how (and whether) Lord Hodge's comments apply to a taxpayer who has filed a return on-line and, in particular, where the on-line form does not permit a loss that has been carried back from a later year to be reflected in the calculation of the tax liability for the tax year.

69. This issue was addressed by the Court of Appeal in *R (on the application of Derry) v HMRC* [2017] EWCA Civ 435 ("*Derry CA*"). The Court of Appeal decided the question as to whether the taxpayer was entitled to deduct the relevant loss in calculating his net income for the earlier tax year in favour of HMRC. As we have seen, its decision on that point was then reversed by the Supreme Court, but it then went on to consider the effect of the claim that the taxpayer had erroneously made. On that issue, the Court of Appeal, relying upon the obiter dicta of Lord Hodge in *Cotter*, decided that references to the carried-back loss in the tax return form albeit not in the tax computation should be regarded as being included "in" the return. This was the case even though the claim was not reflected in the calculation of the total tax due – it could not be because the on-line form automatically calculated the tax without taking into account the carried-back loss – and the claim was otherwise referred to in the part of the return that related to the carry back of losses from later years.

70. Referring to Lord Hodge's comments at *Cotter* [27]-[28], Henderson LJ said this at [57]:

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

that the information contained in those boxes cannot be regarded as extraneous to the return. As I understand it, this is the essential point which Lord Hodge was making in *Cotter* at [27], and if I may respectfully say so, I agree with it.

71. As we have discussed, in *Derry SC*, the Supreme Court did not have to address this issue because it decided the case on the other issue before it. Lord Carnwath, with whom all the members of the Court other than Lady Arden agreed, identified the point (*Derry SC* [66]), expressed some concerns about the effect of the Court of Appeal's conclusion (*Derry SC* [68]), but ultimately chose to leave the issue open "for further consideration in an appropriate case" (*Derry SC* [69]). Lady Arden, on the other hand, "provisionally" expressed the view that the Court of Appeal was wrong on this issue (*Derry SC* [82]). In her "provisional" view, the obiter comments of Lord Hodge in *Cotter* should be regarded as limited to taxpayers who filed a paper return and performed a calculation of the tax due which reflected the loss that had been claimed (*Derry SC* [82]). In a case where a taxpayer completed an on-line return, which prevented the relief being taken into account in reducing the total tax, but the "erroneous" claim was referred to elsewhere in the return, the claim for relief did not form part of the return (*Derry SC* [73] and [83]). HMRC was entitled to enquire into the claim under Schedule 1A TMA.

72. In the present case, we have decided that Mr Murphy was not entitled to make a claim for share loss relief in his return for the tax year 2005/6. Mr Murphy filed his return. The return refers to the loss relief in the parts of the return concerned with the carry-back of losses from later years. The amount of the claim is not reflected in the calculation of the tax due for 2005/6 because the box in the return was populated automatically. Nonetheless it is clear on the face of the return that Mr Murphy was claiming to set the loss arising on the disposal of the shares against his taxable income for the tax year 2005/6.

73. This is, of course, the issue that was addressed by the Court of Appeal in *Derry CA*. Henderson LJ expressed the view that, in these circumstances, the claim should be regarded as being included in the return and that HMRC must enquire into the return under section 9A TMA. As this was the ratio of the decision, the decision of the Court of Appeal on this issue is binding upon us. There are circumstances in which the Supreme Court can effectively overrule a decision of the Court of Appeal by an expression of opinion which is strictly obiter. However, those circumstances are very limited: it would in effect require a direction from the Supreme Court as whole that the relevant case was wrongly decided<sup>3</sup>. The reservations expressed by Lord Carnwath together with the provisional view expressed by Lady Arden in *Derry SC*, cannot be taken as meeting that requirement.

74. We must therefore conclude – relying upon the obiter comments of Lord Hodge in *Cotter* as applied by the Court of Appeal in *Derry CA* – that, although Mr Murphy was not entitled to make his claim in his tax return for the tax year 2005/6, he made a claim for share loss relief "in" that return. HMRC were required to proceed with any enquiry under section 9A TMA. They did not do so. The enquiry into the claim under paragraph 5 Schedule 1A TMA was not valid and the relevant closure notice under paragraph 7 Schedule 1A TMA was equally not valid.

### ***The third issue***

75. We must therefore turn to the third issue, which is whether HMRC were entitled to enquire into the claim for share loss relief for the tax year 2005/6 through an enquiry into the tax return for the year in which the loss arose, the tax year 2006/7.

---

<sup>3</sup> *R v Barton and Booth* [2020] EWCA Crim 575 at [104]

76. On this issue, HMRC rely primarily on the decision of the Supreme Court in *de Silva*. *De Silva* concerned claims made by taxpayers, who were partners in limited partnerships, for relief for partnership trade losses carried-back from a later year. The facts are complicated by the involvement of the partnerships, but in summary, HMRC enquired into the partnership returns under section 12AC TMA for the years in which the losses arose (i.e. the later year). Those enquiries were treated as enquiries into the individual partners' personal returns under section 9A TMA by section 12AC(6)(a) TMA. HMRC sought to amend the taxpayers' personal returns to reduce the claims following the completion of those enquiries. The taxpayers argued – relying on the Supreme Court decision in *Cotter* – that the carry-back claims were stand-alone claims rather than claims made in their returns, and so HMRC could only challenge those claims by opening an enquiry into the claims under paragraph 5 Schedule 1A TMA.

77. The Supreme Court decided that HMRC were not required to open an enquiry under Schedule 1A TMA and were entitled to enquire into the loss under section 12AC TMA. Once again, the only judgment was given by Lord Hodge. In his judgment, Lord Hodge notes that the legislation requires that the taxpayers must include in their returns for the year in which the loss is incurred (which he refers to as “Year 2”) information to establish what proportion (if any) of their share of a partnership loss is to be set against income of that year (*de Silva* [26]). Having noted (at *de Silva* [27]) that Schedule 1B would not apply if all the loss was claimed in Year 2, as the claim for relief would only involve one year, Lord Hodge went on to address the position in relation to carry-back claims.

78. The critical passage for our purposes is at *de Silva* [28]-[31], where Lord Hodge says this:

28. If a taxpayer wished to carry back part of the losses incurred in Year 2 to set off against his income of Year 1 by invoking section 380(1)(b) of ICTA, he would also have to make the claim in his return for Year 2. This is the combined effect of section 8(1AA)(a) and Schedule 1B paragraphs 2(3) and (6). As shown in para 18 above, those paragraphs provide that the claim for relief relates to Year 2 and effect is to be given to that claim in relation to Year 2. If HMRC had already given effect to part of the claim under Schedule 1A in Year 1 by giving relief, for example by repayment, the return for Year 2 would still have to state the loss, the claim and the relief already given in order to establish the amounts in which the taxpayer is chargeable to income tax in Year 2. Similarly, if the taxpayer had already received full relief under Schedule 1A in Year 1, he would have to state the same information as to the loss, the claim and the relief already given. By so doing he enables the return to “take into account”, as section 8(1AA)(a) requires, both the relief which is claimed in the return and that which he has already received. In each case that information is a necessary part of his return for Year 2 as it is information required “for the purpose of establishing the amounts” in which the taxpayer is chargeable to income tax for that year of assessment: section 8(1) .

29. In summary, section 8(1AA)(a) defines the amounts in which a person is chargeable to income tax in a year of assessment as net amounts taking account of any relief, a claim for which has been included in the return. The claims to carry back losses relate to Year 2 and effect is given to them in relation to that year: Schedule 1B paragraph 2(3) and (6). It follows, therefore, that the taxpayer must make a claim in his tax return in respect of Year 2 and state the extent to which the relief claimed has already been given in order to establish the amounts in which he is chargeable to income tax for that year of assessment. If too much has already been given as relief,

the self-assessment can take that into account by adjusting the amount in which the taxpayer is chargeable to income tax for Year 2: section 9(1)(a).

30. HMRC may inquire into a return under section 8 or 8A if an officer gives notice of his intention to do so (section 9A(1)) and that enquiry may extend to anything contained in the return, or required to be contained in the return, including any claim: section 9A(4). HMRC were therefore empowered under section 9A to inquire into the taxpayers' carry back claims contained in their Year 2 tax returns. HMRC were not required to institute an enquiry under Schedule 1A in order to challenge the taxpayers' claims.

79. Lord Hodge went on (at *de Silva* [37]) to explain that the decision in *Cotter* did not assist the taxpayers in *de Silva* in the following terms:

37. *Cotter* was concerned with a claim made by an amendment of a tax return form relating to Year 1 which intimated a claim for a loss that would occur in Year 2. That claim had, and could have, no bearing on the amount of tax chargeable and payable by Mr Cotter in respect of Year 1: paras 16 and 17 of *Cotter*. At that stage it was a stand-alone claim to which Schedule 1A applied. The case did not address the possibility of a section 9A enquiry into the tax return in Year 2. HMRC commenced their Schedule 1A enquiry into the claim before the end of Year 2, thereby precluding any enquiry into the claim under section 9A if it were (as it ought to have been) contained in the Year 2 tax return at a later date: Schedule 1A, paragraph 5(3)(b). By contrast, in this case the taxpayers' claims were made in their tax returns for Year 2 (paras 5 and 6 above). *Cotter* gives no support to the taxpayers in this appeal.

80. We take the following principles from these passages from Lord Hodge's judgment.

(1) Where a taxpayer wishes to carry back all or part of a loss to a prior year, relevant information relating to the loss must be included in the return for the year in which the loss arises (i.e. the later year, Year 2) because the loss relates to that year (paragraph 2(3) Schedule 1B TMA). That information includes details of the loss, the claim and the relief already given.

(2) It follows that HMRC may enquire into the loss (and the claim) under section 9A TMA in relation to the later year unless the enquiry is precluded by an enquiry into the claim having been made under paragraph 5 Schedule 1A TMA.

(3) The decision in *Cotter* does not affect this conclusion.

81. *De Silva* concerned claims for trade losses in relation to tax years before the introduction of ITA. There is a question as to whether and to what extent the principles set out in Lord Hodge's judgment in *de Silva* apply to claims for share loss relief for periods to which ITA applies (and to which *Derry SC* applies). However, we do not need to address that issue in this case. As we decided in relation to the first issue, the decision in *Derry SC* does not affect claims for share loss relief in periods prior to the introduction of ITA. The case law concerning claims to other forms of loss relief applies equally to claims for share loss relief in such periods.

82. It follows that the principles derived from Lord Hodge's judgment in *de Silva* apply to the claims made by Mr Murphy in this case. We therefore agree with HMRC on this issue. Mr Murphy was required to include information concerning the loss and the claim in his tax return for the tax year 2006/7. HMRC was entitled to enquire into that loss and the related claim under section 9A TMA.

83. We note that, in his judgement (*de Silva* [37]), Lord Hodge refers to paragraph 5(3) Schedule 1A TMA, which prevents a further notice of intention to enquire being given under section 9A TMA in relation to a claim where notice has previously been given under paragraph 5 Schedule 1A. That is an important limitation, which prevents the same claim being subject to enquiry (and potentially a closure notice) under both regimes. But it does not apply in this case. Although HMRC purported to give notice of intention to enquire into the claim under paragraph 5 Schedule 1A TMA, that notice (as we have decided in relation to the second issue) was invalid. In our view, paragraph 5(3) Schedule 1A TMA cannot be read to preclude a notice being given under section 9A where the prior notice under paragraph 5 Schedule 1A was invalid and could not lead to the issue of a valid closure notice.

84. We acknowledge that our conclusion on this issue leaves open the possibility that a valid enquiry might, in some circumstances, be opened under section 9A TMA in relation to the same claim in two tax years. However, it only arises in a case where the claim has been included “in” the return for two tax years – the tax year in which the loss arose and the tax year to which the loss is carried back. We suspect that is a very limited number of cases. The theoretical possibility only arises in this case because, as we have found in relation to the second issue, Mr Murphy’s “erroneous” claim in the tax year 2005/6 has to be treated as included in the return for that year following the decision of the Court of Appeal in *Derry CA*. It does not in practice arise in this case because HMRC have not opened an enquiry under section 9A TMA in relation to the return for the tax year 2005/6.

#### **THE CLOSURE NOTICE ISSUE**

85. Our conclusion on that issue brings us to the final issue that we need to decide in this case: whether the closure notices issued by HMRC were effective to reject the claims for relief.

#### **The parties’ submissions in outline**

86. Mr Grierson, for Mr Murphy, refers to the test set out by the Court of Appeal in *Raftopoulou* that for a closure notice to be effective “depends on whether it would be read by a reasonable recipient in the position of the taxpayer as [giving the necessary notice]” (*Raftopoulou* [36]). He submits that the closure notice failed to meet that test. Mr Murphy did not understand it and had to seek advice from his solicitors.

87. Mr Hall, for HMRC, says that the closure notice met the test in *Raftopoulou*. Mr Hall referred to the decision of the Upper Tribunal in *HMRC v Mabbutt* [2017] UKUT 289 (TCC) (“*Mabbutt*”). He says the test is objective. It does not matter that Mr Murphy says that he did not understand the notices. The notices were understandable by a reasonable recipient; a reasonable taxpayer reading the notices would have concluded that HMRC were intending to close an enquiry and to disallow the claim in its entirety. In any event, he says, section 114 TMA applies to cure any defect in the notice. Furthermore, if the closure notice is invalid, the enquiry remains open and HMRC can issue a further closure notice to correct any error.

#### **Relevant legal principles**

88. There are two sets of principles that are potentially engaged by the parties’ arguments.

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

demonstrates, must be applied by reference to the context in which the taxpayer received the disputed notice.

90. Second, Mr Hall referred us to section 114 TMA, which he says can cure any defects in the notices. Section 114 TMA provides as follows:

**114.— Want of form or errors not to invalidate assessments, etc.**

(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected—

(a) by reason of a mistake therein as to—

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination.

91. Mr Grierson disputes the assertion that section 114 can apply in these circumstances.

**Discussion**

92. As a starting point, we have already decided that notice of intention to enquire in to the claim under paragraph 5 Schedule 1A TMA was not valid and the closure notice issued by HMRC under paragraph 7 Schedule 1A TMA in relation to that enquiry into the claim was not valid. Section 114 TMA cannot, in our view, apply to overcome these defects. This issue can only arise in relation to the closure notice issued by HMRC under section 28A TMA following the enquiry into the return for the tax year 2006/7.

93. As we have described, the closure notice issued under section 28A TMA contains a clear error in that it refers to a credit of £48,244.79 as having been claimed by Mr Murphy, when the only credit claimed was the credit of £183,140.83 referred to in Mr Murphy's tax return for the tax year 2005/6. It does state that the actual credit due was £0.

94. The notice has, of course, to be read in context. Part of that context is that, at the same time, Mr Murphy also received the closure notice under paragraph 7 Schedule 1A TMA. That notice – even if it had been valid – also contained errors. It stated that Mr Murphy had claimed to set £48,244.79 of his purported capital loss against income in the tax year 2005/6 when he had claimed to set £763,739. It refers to a credit of £134,895.64 as having been claimed by Mr Murphy as a result of the claim to carry back losses, when the credit claimed was the credit of £183,140.83. It also states that the actual credit due was £0.

95. These errors were recognized by the reviewing officer on review. The reviewing officer, however, proceeded on the assumption that the claim for share loss relief could be disallowed by variations to the closure notice given under paragraph 7 Schedule 1A TMA and so does not seek to address the effect of the disallowance of the claim under section 574 ICTA in the variations to the closure notice under section 28A TMA. Those conclusions assumed that the closure notice given under paragraph 7 Schedule 1A TMA was valid. We



have found that is not the case for the reasons that we have given above in relation to the “second issue” of the share loss relief issues.

96. The appeal before us is against the conclusions in the closure notice not the conclusions of the review. If the taxpayer does not accept the conclusions of the review and pursues his or her appeal, the appeal remains an appeal against the conclusions stated or the amendments made by the closure notice (section 31(1) TMA).

97. The question for us therefore is whether the incorrect reference in the closure notice to the credit of £48,244.79 rather than the credit of £183,140.83 can be ignored and the notice can be given effect as disallowing the entire credit claimed by Mr Murphy either on the grounds that a reasonable recipient of the notice in the position of Mr Murphy would have recognized and fully understood that that the notice contained an error and was intended to refer to the full amount of the credit; or that section 114 TMA might apply to correct the error in the notice.

98. The notice itself meets the requirements of section 28A. A reasonable recipient of the notice in Mr Murphy’s position could have no doubt that notice was being given of the closure of the enquiry into the return for the tax year 2006/7, that HMRC had concluded that the claim to set the capital loss that arose in that year against income in the tax year 2005/6 was not allowable, and that the consequence was that credit that had been claimed was being disallowed.

99. The question is whether the error in the notice (the incorrect figure of £48,244.79 for the credit) or the surrounding circumstances (the other closure notice and the errors in it) were sufficient to render the notice ineffective or limit its effect to the denial of the credit to which it referred. We have come to the conclusion that whether on the basis of the case law principles (e.g. in *Mabbutt*) or on the application of section 114 TMA the notice should be regarded as effective to deny the claim for relief. A reasonable taxpayer in Mr Murphy’s position would have clearly understood that the intended effect of the notice was to disallow the entire claim. Mr Murphy had also received the notice under paragraph 7 Schedule 1A, which purported to deny the balance of the claim. Although there were two separate credits to Mr Murphy’s self-assessment account (one in the amount of £48,244.79 and one in the amount of £134,895.64), the only figure that was included in Mr Murphy’s return was the aggregate figure of £183,140.83. That credit was the credit generated by the claim to carry back the loss of £763,739 against income of the tax year 2005/6, all of which is referred to in the notice. The notice is clear that the entire loss is disallowed and the credit reduced to £0.

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

#### **DISPOSITION**

101. For the reasons that we have given above, we conclude that:

- (1) Mr Murphy was not entitled to claim share loss relief “in” his return for the tax year 2005/6;
- (2) however, Mr Murphy made a claim for share loss relief “in” his return for the tax year 2005/6; HMRC’s enquiry into the claim under paragraph 5 Schedule 1A TMA was not valid and the relevant closure notice under paragraph 7 Schedule 1A TMA was also not valid;
- (3) Mr Murphy was required to include information concerning the loss and the claim in his tax return for the tax year 2006/7 and HMRC was entitled to enquire into that loss and the related claim under section 9A TMA;

(4) the closure notice given under section 28A TMA in relation to the enquiry into Mr Murphy's return for the tax year 2006/7 was effective to disallow Mr Murphy's claim for share loss relief.

102. We dismiss this appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

103. 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.

**ASHLEY GREENBANK  
TRIBUNAL JUDGE**

**Release date: 13<sup>th</sup> JUNE 2024**

## APPENDIX

### Sections 380 and 381 ICTA (as in force in the tax years 2005/6 and 2006/7)

#### **380.— Set-off against general income.**

(1) Where in any year of assessment any person sustains a loss in any trade, profession, vocation or employment carried on by him either solely or in partnership, he may, by notice given within [twelve months from the 31st January next following that year, make a claim for relief from income tax on —

(a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or

(b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;

but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above.

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

#### **381.— Further relief for individuals for losses in early years of trade.**

(1) Where an individual carrying on a trade sustains a loss in the trade in—

(a) the year of assessment in which it is first carried on by him; or

(b) any of the next three years of assessment;

he may, by notice given on or before the first anniversary of the 31st January next following the year of assessment in which the loss is sustained, make a claim for relief under this section.

(2) Subject to section 492 and this section, relief shall be given under subsection (1) above from income tax on so much of the claimant's income as is equal to the amount of the loss or, where it is less than that amount, the whole of that income, being income for the three years of assessment last preceding that in which the loss is sustained, taking income for an earlier year before income for a later year.

(3) Relief shall not be given for the same loss or the same portion of a loss both under subsection (1) above and under any other provision of the Income Tax Acts.

(4) Relief shall not be given under subsection (1) above in respect of a loss sustained in any period unless the trade was carried on throughout that period on a commercial basis and in such a way that profits in the trade (or, where the carrying on of the trade forms part of a larger undertaking, in the undertaking as a whole) could reasonably be expected to be realised in that period or within a reasonable time thereafter.

(5) Relief shall not be given under subsection (1) above in respect of a loss sustained by an individual in a trade if—

(a) at the time when it is first carried on by him he is married to [, or a civil partner of, another individual with whom he is living together and]8 who has previously carried on the trade; and

(b) the loss is sustained in a year of assessment later than the third year of assessment after that in which the trade was first carried on by the other individual.

(7) This section applies, with the necessary modifications, in relation to a profession or vocation as it applies in relation to a trade.