[2018] UKFTT 270 (TC)

TC06500

Appeal number: TC/2017/06410

INCOME TAX – claim to carry back trading loss of LLP attributable to partner to previous tax year – whether claim in return out of time: yes – whether appealable decision: no, **Raftopoulou** ***followed - whether in time claim made outside return – whether failure by HMRC to give effect to claim appealable – effect of carry-back claim on tax, penalties and surcharges of earlier year.***

INCOME TAX – appeals against penalties under s 93 TMA and Schedule 55 FA 2009 – appeals against surcharges under s 59C TMA – whether permission should be given to make late appeals to HMRC – whether appeals notified to Tribunal late: **NT-ADA Ltd (Upper Tribunal)** ***considered – appeals allowed in part***

FIRST-TIER TRIBUNAL
TAX CHAMBER

GAVIN FAULKNER **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at the Law Courts, Sheffield on 30 April 2018

The Appellant in person

Ms Elizabeth Edley, HM Revenue and Customs, for the Respondent

DECISION

1. There were two discrete matters considered at the hearing.

2. There were appeals, and in some cases the antecedent issue of whether to allow late appeals, against penalties for failure to file returns in time and surcharges for failure to pay income tax in time.

3. I also had to consider whether I had jurisdiction to allow an appeal against a refusal by the respondents ("HMRC") to give effect to a claim by Mr Faulkner ("the appellant") to set a loss incurred by him as a member of a limited liability partnership ("LLP") in the tax year 2007-08 against his general income for 2006-07.

4. Had the penalties and surcharges been the only issues in this case then I would not have issued a "full" decision, but the loss claim issue raised a number of points of law (and to some extent fact) some of which were the subject of recent decisions in the Supreme Court and the Court of Appeal.

Facts

5. Both parties had prepared bundles of documents which did not significantly overlap but which did enable a substantially complete picture of the facts to emerge. The appellant also amplified some of his letters to HMRC in oral evidence and he was cross-examined by Ms Edley. He also produced a set of financial statements for the LLP for the period 1 February 2007 to 31 March 2008, the only accounts it had filed at Companies House in Belfast (as the LLP was incorporated under the Limited Liability Partnerships Act 2002, an Act of the Northern Ireland Assembly[1]).

6. I accept Mr Faulkner's oral evidence and from this and the documents I find as fact the matters set out in §§7 to 56. And in each of the tax years concerned I find as fact that the appellant was served with a notice to file a return on 6 April immediately following the end of the tax year.

[1] It seems that no distinction is drawn in UK tax law between an LLP incorporated in Great Britain under the Limited Liability Partnership Act ("LLPA") 2000 (which did not, except as to tax, extend to Northern Ireland when originally enacted) and an LLP incorporated under the LLPA 2002 (NI). There is no definition in UK income tax law so far as I can see of an LLP, so it seems it must include both a GB LLP and an NI LLP. Indeed s 118ZA Income and Corporation Taxes Act 1988, which was inserted into that Act by s 13 LLPA 2000, was expressed to apply to Northern Ireland even before there was such a thing as an NI LLP. From 1 October 2009 LLPA 2000 applies to Northern Ireland, and LLPA 2002 (NI) was repealed. Whether references in UK tax law to an LLP cover LLPs incorporated in other jurisdictions (eg Jersey as to which see *R v Commissioners of Inland Revenue, ex parte Bishopp; R v Commissioners of Inland Revenue, ex parte Allan* 72 TC 322*)* is not clear and not necessary to decide.

Returns & liabilities to tax and penalties.

2006-07

7. The return for this year was delivered on 15 September 2008, more than 6 months late. The income shown on the return was £38,744 and the total of the income tax and Class 4 National Insurance Contributions ("NICs") on the return was £9,301.47. Determinations[2] of penalties of £200 for the failure to file on time were made and notified to the appellant as were surcharges for late payment of the tax amounting to £930 (twice 5% of the tax).

2007-08

8. The return for this year was delivered on 9 February 2012, more than 3 years late. The return showed no income tax liability, and a claim to carry back a loss of over £200,000 to 2006-07 against that year's income and to carry the balance forward.

9. Determinations of penalties of £200 for the failure to file on time were made and notified to the appellant as were surcharges for late payment of the tax amounting to £1,116 (twice 5% of the total of two payments on account and a s 28C Taxes Management Act 1970 ("TMA") determination).

2008-09

10. The return for this year was filed on 3 May 2012, more than 2 years late. The return showed no income tax liability.

11. Determinations of penalties of £200 for the failure to file on time were made and notified to the appellant as were surcharges for late payment of the tax amounting to £1,674 (twice 5% of the total of two payments on account and a s 28C TMA determination).

2009-10

12. The return for this year was delivered on 4 May 2012, more than 15 months late. The return showed no income tax liability.

13. Determinations of penalties of £200 for the failure to file on time were made and notified to the appellant.

2010-11

14. The return for this year was delivered on 7 May 2012, more than 3 months late. The return showed no income tax liability.

15. Penalties of £100 and £70 for the failure to deliver the return on time were assessed on the appellant.

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[2] "Determination" is the word used in s 93 Taxes Management Act 1970 ("TMA") in place of the more usual "assessment".

2011-12

16. The return for this year was filed on 7 May 2012, before the filing date. The return showed no income tax liability.

2012-13

17. The return for this year was delivered on 26 February 2016, more than 2 years late. The return showed no income tax liability.

18. Penalties of £100, £900, £300 and £300 for the failure to deliver the return on time were assessed on the appellant.

2013-14

19. The return for this year was delivered on 9 March 2016, more than 1 year late. The return showed no income tax liability.

20. Penalties of £100, £900, £300 and £300 for the failure to deliver the return on time were assessed on the appellant.

2014-15

21. The return for this year was delivered on 9 March 2016, more than 1 month late. I presume a late filing penalty was issued and paid, but there is nothing in the papers to indicate whether this was so, and I make no finding about it.

2015-16

22. The return for this year was delivered on 26 May 2016, so was in time.

The correspondence

23. On 2 February 2009 the appellant wrote to the Area Director, Greater Belfast Area of HMRC, informing that officer of HMRC that he had completed his 2006-07 return and was due to pay the tax on it. He added that he was supposed to submit his 2007-08 return on 31 January 2009 (2 days before the date of his letter) but had been delayed in doing so by "circumstances beyond his control".

24. He then gave the background to the delay and stated that he was a member of Taymack LLP whose company number was NC000188 and whose tax reference was 8242974589. The circumstances beyond his control that he referred to were that he was a non-designated member of the LLP and that the LLP's "Partnership Statement Shorts"[3] ("the Shorts") had not been distributed to its members, and that these were

[3] A Partnership Statement (Short) is an integral part of an SA800 Partnership Tax Return made by one of the partners nominated for that task (see fn. 4). It is used where the partnership's only income is from a trade or profession or is "taxed interest or alternative finance receipts from a bank or building society". It shows the share of the profit, loss or income attributable to each partner and requires the partner's tax details to be given. The return says on its face that each partner will need a copy of their allocation of income to fill in their personal tax return. It is that copy that the appellant refers to as the "Short".

being delayed by the designated[4] members of the LLP for reasons unknown to the appellant. They were the only members of the LLP who could authorise the signing of the accounts and control their distribution.

25. The importance of the Shorts was, he said, that he had losses for 2007-08 to carry back to 2006-07. His request to the Area Director was that any penalties against his returns should be put on hold as he had no opportunity to submit the returns.

26. On 2 April 2009 the appellant wrote again to the Area Director, saying he had not had a reply to his letter of 2 February 2009. He said that to update HMRC he had requested a copy of the Shorts from the accountancy firm who were producing the annual accounts. He repeated the matters set out in §25.

27. On 13 October 2009 the appellant wrote again to the Area Director, saying he had not had a reply to his letters of 2 February or 2 April 2009. He said that to update HMRC he had received a copy of the Financial Statements ("FS") of the LLP from the accountants, but not the Shorts, and he had identified a number of discrepancies between the FS and his own records and gone back to the accountants. He repeated the matters set out in §25.

28. On 11 January 2010 the appellant wrote again to the Area Director, saying he had not had a reply to his letters of 2 February, 2 April or 13 October 2009. He said that he had found from his Self Assessment ("SA") Statement that HMRC had been applying penalties to his account. He said he had asked HMRC around mid-October for a 2007-08 return but was told to download one from the Internet.

29. He said he had been informed verbally by the designated members of the LLP that they were withholding the Shorts but gave no reasons, and that he had not received replies from the accountants. He further said that the 2008-09 filing date was approaching but he would not be able to file this or the 2007-08 return without the necessary information and would not be able to carry back his losses. He repeated that any penalties against his returns should be put on hold and that the same should apply to future penalties.

30. On 5 May 2010 the appellant wrote again to the Area Director, saying he had not had a reply to his letters of 2 February, 2 April and 13 October 2009 and 11 January 2010. He repeated the matters he had raised in the 11 January letter.

31. On 19 January 2011 Mrs Hopkin of HMRC's Debt Management Office in Llanishen, Cardiff wrote to the appellant about his debt to them, which she said stood at £61,979.98, and threatened distraint action.

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[4] In an LLP there is at least one "designated member" who, under the regulations made under LLPA 2000 and LLPA 2002 (NI) is the equivalent of the company secretary of a limited company. For tax purposes it is the "nominated" partner or member, in the case of an LLP, (see fn. 3) to whom a notice to make and deliver that partnership tax return may be given and who is then required to make the return (see s 12AA(2) TMA). But in Schedule 55 FA 2009 the person who TMA calls the nominated partner is called the representative partner, and the representative partner is the only person allowed to appeal against the penalty.

32. On 21 January 2011 the appellant replied to Mr (*sic*) Hopkin referring to his unanswered letters to the Area Director and repeating the matters raised in the 11 January 2010 letter.

33. On 1 February 2012 Mark Bryant, a Technical Officer in HMRC's PAYE & Self Assessment Office, wrote to the appellant attaching copies of the pages requested from the appellants 2006-07 return. The request was said to have been made on the phone by the appellant.

34. On 3 May 2012 the appellant wrote to "whom it may concern" in HMRC PAYE & SA Office. In this he said that he had been completing his returns and showed the dates of filing of the returns from 2007-07 to 2011-12 and said that he had been delayed by third parties in filing these returns. He explained that he had only received the necessary information about his LLP losses shortly before the return for 2007-08 was filed (on 3 May 2012) and that the two designated members had entered into IVAs[5] and that the assets of the LLP were in the hands of receivers.

35. He did not envisage receiving Shorts for 2008-09 to 2011-12 and added that he had reported the LLP to Companies House

36. He also referred to partnership late filing penalties he had received and asked for their rescission as he was not in control of that matter.

37. Finally he asked for his 2006-07 liabilities on his SA Statement to be updated to reflect the loss carry back claim.

38. On 2 July 2012 Mrs J Marcetic of HMRC PAYE & Self Assessment, Cardiff replied. She said that he had claimed £37,188 losses to carry back to 2006-07 but his general income for that year was £38,744, so that his claim needed to be amended along with the carry forward figure. She asked for a revised claim.

39. She referred to the partnership penalty saying that only the nominated[6] partner was allowed to appeal, and that they could only be cancelled if that partner had a valid reason for late filing. She said an appeal had been made against the late filing partnership penalty but could not be considered until the partnership return was received.

40. On 10 July 2012 the appellant replied stating he had tried to amend his return online but was not able to do so[7], so he asked for the claim to be amended by HMRC. He also asked again for rescission explaining his problems with the designated member.

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[5] Individual Voluntary Arrangements, a form of insolvency process.

[6] In fact the only partner who may appeal against a penalty is the "representative partner" who may, but need not necessarily, be what HMRC call the "nominated partner" if by that they mean the partner falling within s 12AA(2) TMA.

[7] Probably because the computer would not allow an amendment to be made so long after the filing date, given the time limit for amendment in s 9ZA TMA..

41. On 27 September 2012 Sharon Freeman of HMRC Local Compliance in Redruth wrote to the appellant. This letter was not in the bundle, but the appellant in later correspondence says that the letter told him that the deadline for making a "S64 claim"[8] for 2007-08 was 31 January 2010.

42. On 4 November 2012 the appellant wrote to say he was working outside the UK and his mail was being delayed. He referred to all his previous letters in 2009 and 2010. He said that HMRC's letter of 2 July 2012 had not mentioned deadlines so he assumed that a decision to accept the reason he had given for late filing had been accepted, and asked for effect to be given to his claim. He also repeated his information about the partnership tax returns and penalties.

43. On 4 January 2013 he wrote again to Sharon Freeman asking for "closure on this matter" as he was entering a business contract and needed to know his UK tax liabilities.

44. Subsequent correspondence concerned debt recovery, until on 15 November 2014 the appellant wrote to HMRC PAYE & SA in Liverpool about his return for the tax year 2012-13. He stated that he had been delayed by a third party in the process of completing the return. He had, he said, recently received his personal withholding tax certificate from a contractor for whom he had been working. He requested that the penalties he had been charged be rescinded as the circumstances of the delay were outside his control.

45. He attached a certificate from Quantum Qatar WLL dated 4 October 2014 showing that that entity had withheld QAR (Qatari Riyals) 51,475.49 from payments made to the appellant in the periods August 2012 to May 2014. This tax was 5% of the amounts paid, and a schedule of payments and tax withheld by month was enclosed. (It seems that there were roughly 5 QAR to the £ at the time.)

46. In evidence the appellant said he had left the UK to work in the Middle East in mid-2012 which was why he was filing all outstanding returns in the first half of that year. He was in the UK in 2013-14 for a short period only but was not claiming to have been non-resident.

47. On 2 June 2017 the appellant wrote to HMRC Self Assessment. The letter was headed in bold capitals:

> "Self Assessment Tax Returns – appeal against tax, surcharges, interest and penalties received in the following tax years:"

48. He then listed tax years 2006-07 to 2015-16 and the date each return was received by HMRC.

49. He stated in the body that he was making appeals against all the matters referred to for all the tax years listed. He recounted his correspondence with HMRC starting with his letter of 3 May 2012 and going up to his letter to Debt Management of 11 June

[8] ie s 64 Income Tax Act 2007

2013. He asked for a proper review of his affairs, a giving effect to his loss claim and the rescission of all surcharges, interest and penalties.

50. He said he believed he had done everything he could to avoid the surcharges etc but the exceptional circumstances were out of his control. He had filed his returns as soon as he had received the necessary information.

51. He added that the LLP was struck off on 26 April 2016.

52. On 27 July 2017 Mrs L Pedersen, a Technical Support Inspector in HMRC PAYE and Self Assessment, replied on the issue of the loss carry back claim repeating the deadline, and saying that an out of date claim could be accepted by HMRC under the collection and management powers in s 5 Commissioners for Revenue and Customs Act 2005 ("CRCA"), but in practice late claims are only admitted where a taxpayer had effectively been prevented from making an in date claim for reasons beyond their or their agent's control and where that claim "was made within a reasonable time thereafter (*sic*)".

53. She informed the appellant that the partnership return for 2007-08 was received by HMRC on 22 January 2009 showing his loss of £223,480 and that "this information was therefore available to you in plenty of time to make an in date claim under S64 ITA 2007". She said that no further information had been provided to HMRC to change the position.

54. Also on 27 July 2017 Miss L Smith from the same office wrote four letters to the appellant in identical terms, apart from the tax year mentioned in each, those tax years being 2007-08 to 2010-11 inclusive. The letters said that:

> "the deadline has passed for appealing against the:
>
> - late filing penalty
> - 6-month late filing penalty
> - 12-month late filing penalty"[9]

55. The letters asked for the appellant to provide his excuse for the failure to appeal within the 30 day deadline and told him that if HMRC did not accept the excuse as reasonable he could apply to the Tribunal for his "case to be reviewed".

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[9] The reference to a 12 month penalty in relation to years before 2010-11 is misconceived and wrong, as under s 93 TMA there are only fixed penalties for being one day late and 6 months late and those were the only penalties charged on the appellant under s 93. I assume that the template for a reply to a late appeal against a Schedule 55 FA 2009 penalty has been used in error. That in itself though would not explain the absence of a reference to a daily penalty. But it was HMRC's illogical practice to reject as late appeals against initial, 6 month and 12 month penalties but to accept them as not late against daily penalties, apparently so they could be stayed behind *Donaldson v HMRC*. This was done even where, as was usually the case, the daily and 6 month penalties were assessed on the same day and the notice of the assessment included both! And by July 2017 *Donaldson* had been settled.

56. On 25 August 2017 the appellant completed the online appeal notification and enclosed a letter to the Tribunal referring to all five HMRC letters of 27 July and asking for his case to be reviewed by the Tribunal.

The matters before the Tribunal

57. In her statement of case Ms Edley showed the matters under "appeal" (her quotation marks) as

> (1) A request to carry back losses from 2007-08 to 2006-07 which she said was out of time and it was not within the jurisdiction of the Tribunal to consider HMRC's decision on that matter.
>
> (2) An application by the appellant to give late notices of appeal to HMRC in relation to 2007-08 to 2010-11 in respect of penalties for not filing returns on time and surcharges (2007-08 and 2008-09 only) for late payment of tax.

58. As to the second point it seemed to me that there was an argument that certain letters from the appellant from 2 February 2009 onwards could be seen as appeals against penalties and surcharges for 2007-08 and 2008-09. And his letter of 3 May 2012 could equally be regarded as an appeal against the initial late filing penalty for 2010-11 (and that later correspondence could be regarded as an appeal against the daily and 6 month penalties for that year).

59. In these circumstances I give permission for any appeals that were in fact late to be made to HMRC and I waive any formalities that might have been necessary to notify the appeals to the tribunal.

60. It also seemed to me however that there was more to the case than just the four years referred to in the statement of case.

61. First, the appellant seems to have appealed against tax, penalties and surcharges for 2006-07 as he maintained that he was entitled to have them rescinded as a result of the carry back of losses. This appeal was also out of time and so needed to be considered with the appeals for the subsequent four years.

62. Second, there were penalties for late filing of returns for 2012-13 and 2013-14 of £1,600 for each year. In relation to 2012-13 his letter of 15 November 2014 could be seen as an appeal against the penalties by then imposed (initial penalty, daily penalty and 6 month penalty). It was also a late appeal but HMRC did not object to it at the time. I consider the lateness of this appeal in the discussion section.

63. Finally, the HMRC records show that partnership late filing penalties were assessed on the appellant for 2010-11. Under paragraph 25(4) Schedule 55 Finance Act ("FA") 2009 only the representative partner may bring an appeal. As it seems that partnership penalties under s 93A TMA for earlier years were cancelled by HMRC, I assume that the representative partner (one of the designated partners) did appeal, and as it seems that the 2010-11 penalties were reduced to nil, it is not necessary for me to consider them.

64. I consider the issues separately in relation to each year in the discussion section below, where I also consider the relevant law. As the provisions of Schedule 55 FA 2009 will be familiar to most readers of this decision who have got this far I have put the relevant parts of that Schedule in an appendix. Other less familiar law is included in the text where necessary.

65. As for the 2006-07 appeals, the penalties and surcharges stand unless both the claim to carry the trading loss arising in 2007-08 succeeds and that success has the consequence that the tax for 2006-07 is reduced or cancelled and so the penalties and surcharges must also be cancelled. I therefore consider these matters in my discussion of the loss claim.

Discussion – appeals against penalties and surcharges

2007-08

66. The appellant was made liable to late filing penalties for this tax year by s 93 TMA. This provided relevantly:

> "(1) This section applies where—
>
> (a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 … of this Act … to deliver any return, and
>
> (b) he fails to comply with the notice.
>
> (2) The taxpayer shall be liable to a penalty which shall be £100.
>
> …
>
> (4) If—
>
> (a) the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date, …
>
> (b) …
>
> the taxpayer shall be liable to a further penalty which shall be £100.
>
> …
>
> (6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.
>
> (7) If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty under subsection (2) above, together with any penalty under subsection (4) above, shall not exceed that amount.
>
> (8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above that is notified to the tribunal, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the tribunal may—

> (a) if it appears ... that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or
>
> (b) if it does not so appear ... confirm the determination.
>
> (9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date, would have been payable by the taxpayer under section 59B of this Act for the year of assessment.
>
> (10) In this section--
>
> "the filing date" in respect of a return for a year of assessment (Year 1) means—
>
> (a) 31st January of Year 2, …
>
> …
>
> "the period of default", in relation to any failure to deliver a return, means the period beginning with the filing date and ending with the day before that on which the return was delivered."

67. In this case the appellant has proved, by making and delivering the return for the tax year, that the liability to tax shown on the return is nil. Therefore the penalties cannot exceed nil. I see in fact from the papers that the two penalties for this tax year were reduced to nil on 9 February 2012 by an "adjustment from tax return" which I assume is the giving effect to s 93(7) TMA.

68. There is a second reason why these penalties could not stand. They are imposed on the appellant by a determination under s 100 TMA (as s 93(8) makes clear). In *Khan Properties Ltd v HMRC* [2017] UKFTT 830 (TC) I said that the effect of s 100(1) TMA's saying:

> "… an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate."

was that it required "a flesh and blood human being who is an officer of HMRC to make the assessment, that is to decide to impose the penalty and give instructions which may be executed by a computer (s 113(1D) TMA)."

69. I have seen no evidence in the papers that the penalty was imposed other than automatically by a computer, and so it is invalid for that reason.

70. It follows from this that I do not need to consider whether there were any in time appeals against penalties or, if there were not, whether to grant permission to the appellant to give them to HMRC.

71. The appellant was also charged £1,116 in surcharges under s 59C TMA. That section provides:

"(1) This section applies in relation to any income tax … which has become payable by a person (the taxpayer) in accordance with section … 59B of this Act.

(2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.

(3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.

…

(5) An officer of the Board may impose a surcharge under subsection (2) or (3) above; and notice of the imposition of such a surcharge—

(a) shall be served on the taxpayer, and

(b) shall state the day on which it is issued and the time within which an appeal against the imposition of the surcharge may be brought.

(6) A surcharge imposed under subsection (2) or (3) above shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the end of the period of 30 days beginning with the day on which the surcharge is imposed until payment.

(7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

(8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.

(9) On an appeal under subsection (7) above that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may—

(a) if it appears … that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or

(b) if it does not so appear …, confirm the imposition of the surcharge.

(10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

(11) The Board may in their discretion—

(a) mitigate any surcharge under subsection (2) or (3) above, or

(b) stay or compound any proceedings for the recovery of any such surcharge,

and may also, after judgment, further mitigate or entirely remit the surcharge.

(12) In this section—

"the due date", in relation to any tax, means the date on which the tax becomes due and payable;

"the period of default", in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid."

72. The imposition of these surcharges is apparent from a "statement of liabilities" sent to the appellant with HMRC's letter of 19 January 2011 exhibited by the appellant. This does not show the date the surcharges were imposed, but from the amount of interest charged it seems that it was in mid-2010. The reason for issuing the surcharges when no tax had become due under s 59B TMA from a self-assessment was it seems because a determination under s 28C TMA had been issued charging an amount of £1,858.83. Section 28C (as it stood in 2010-11 onwards) provided:

"(1) This section applies where—

(a) a notice has been given to any person under section 8 … of this Act (the relevant section), and

(b) the required return is not delivered on or before the filing date.

(1A) An officer of the Board may make a determination of the following amounts, to the best of his information and belief, namely—

(a) the amounts in which the person who should have made the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) the amount which is payable by him by way of income tax for that year;

and subsection (1AA) of section 8 … of this Act applies for the purposes of this subsection as it applies for the purposes of subsection (1) of that section.

(2) Notice of any determination under this section shall be served on the person in respect of whom it is made and shall state the date on which it is issued.

(3) Until such time (if any) as it is superseded by a self-assessment made under section 9 … of this Act (whether by the taxpayer or an officer of HMRC) on the basis of information contained in a return under the relevant section, a determination under this section shall have effect for the purposes of Parts VA, VI, IX and XI of this Act as if it were such a self-assessment.

(4) Where—

(a) proceedings have been commenced for the recovery of any tax charged by a determination under this section; and

(b) before those proceedings are concluded, the determination is superseded by such a self-assessment as is mentioned in subsection (3) above,

those proceedings may be continued as if they were proceedings for the recovery of so much of the tax charged by the self-assessment as is due and payable and has not been paid.

> (5) No determination under this section, and no self-assessment superseding such a determination, shall be made otherwise than—
>
> (a) before the end of the period of 3 years beginning with the filing date; or
>
> (b) in the case of such a self-assessment, before the end of the period of twelve months beginning with the date of the determination.
>
> (6) In this section "the filing date" in respect of a return for a year of assessment (Year 1) means either—
>
> (a) 31st January of Year 2, or
>
> (b) if the notice under section 8 … was given after 31st October of Year 2, the last day of the period of three months beginning with the day on which the notice is given."

73. By virtue of s 28C(3) the tax shown on the determination is treated as income tax payable as if it were tax shown on a self-assessment. It is therefore deemed payable by s 59B TMA and a surcharge is valid where payment of the tax shown on it is late. This does not explain however why each surcharge was £558 as it is required to be 5% of the outstanding tax which would in that case be £11,160.

74. The clue may be in the same schedule attached to HMRC's letter of 19 January 2011 as this shows that for 2007-08 there were two payments on account charged under s 59A TMA of £4,650.58 each, based on the tax assessed for 2006-07. The surcharge appears to be 5% of the total of the two payments on account plus the determination. But a payment on account is not income tax (see s 59A(7) TMA). What I think has happened is that the determination has been made in a sum which is the excess of HMRC's estimate of the income tax in accordance with s 28C(1A)(b) over the payments on account. But what that paragraph requires is a determination of the full amount of tax chargeable (compare the wording of s 28C(1A) with the same wording in s 9(1) TMA and the different wording dealing with payments on account in s 59B(1) TMA).

75. Thus the surcharges should have been in the sum of £92.29 each (5% of £1,858.83 the amount actually determined). Determinations however are superseded by a later filing of a return, and in this case the return when filed showed no liability. It seems from two documents in the bundles that the surcharges were in fact eliminated. A statement of liabilities sent to the appellant in 2013 and which he exhibits shows no trace of his owing surcharges for this year. Another document for the overall position for 2007-08 as of 12 Feb 2018 shows under surcharges "£0.00".

76. This is somewhat surprising for two reasons. First, there is nothing in s 59C to suggest that if the tax payable under s 59B changes after surcharges have been imposed, whether because they were based on a s28C determination and that is superseded or because of, say, an amendment to a return, that the surcharges can be revisited. Second, the return was not delivered until 9 February 2012. This is three years and nine days after the filing date and more than 12 months after the date of the determination (see s 28C(5)), so even if supersession can alter the surcharge, supersession here does not seem legally possible.

77. But mine not to reason why: the position seems to be that no surcharge remains extant, and I assume the determination has been superseded (there is no appeal against a determination, so I have no jurisdiction to decide anything about it). It is possible that the surcharge was removed by HMRC under their powers of mitigation in s 59C(11) TMA.

78. It follows from this that I do not need to consider whether there were any in time appeals against surcharges or, if not, whether to grant permission to the appellant to give them to HMRC. Nor do I need to consider whether I have any jurisdiction to amend or cancel the surcharges: s 59C(9) implies that on appeal the only course open to a Tribunal is to consider whether there was a reasonable excuse for not paying the tax on time, and the appellant has offered none for that particular failure.

2008-09

79. In relation to penalties the position is the same as that for 2007-08, save that the "adjustment" to the penalty under s 93(7) derives from the return filed on 4 May 2012. It follows from this that I do not need to consider whether there were any in time appeals against penalties or if not whether to grant permission to the appellant to give them to HMRC.

80. In relation to surcharges, the position also appears to be the same, figures apart, as in 2007-08. Each surcharge of £837 represents 5% of £16,740. This is the total of the first and second payments on account of £5,580 each and of a s 28C determination also of £5,580. The interest figure as at 20 October 2011 suggests the s 28C determination was made in 2010. For the reasons given in §§74 and 75, the surcharge should have been £279.

81. The return was made on 4 May 2012 so was in time to supersede the determination as the three years allowed by s 28C runs from 31 January 2010. The surcharges would then fall away, if supersession can change the surcharge. Again it may be that the surcharge was removed by HMRC under their powers of mitigation in s 59C(11) TMA.

82. It follows from this that I do not need to consider whether there were any in time appeals against surcharges or, if not, whether to grant permission to the appellant to give them to HMRC.

2009-10

83. In relation to penalties the position is the same as that for 2007-08 and 2008-09, save that the "adjustment" to the penalty under s 93(7) derives from the return for that year also filed on 4 May 2012. It follows from this that I do not need to consider whether there were any in time appeals against penalties or if not whether to grant permission to the appellant to give them to HMRC.

84. No surcharges for late payment were imposed[10].

2010-11

85. In this year the penalties of £100 and £70 were assessed under Schedule 55 FA 2009 on 20 March 2012 and 5 July 2012 for the appellant's failure to deliver his return by the due date of 31 January 2012 (£100) and by a date 3 months after that (£900). The appellant does not dispute that the penalties were imposed and the notices served on him. In his letter of 3 May 2012 the appellant has set out his reasons for his failure to deliver returns for 2007-08 to 2011-12 on time. He has consistently, over a period of three years made the same pleas for penalties to be rescinded because of his inability to obtain his "Shorts", that is the figure of the trading loss of the partnership that is attributable to him.

86. The appellant's efforts to obtain this information show to me that he has been very mindful of his responsibilities as a taxpayer to make and then deliver a correct return. He obviously thought that it was clearly in his interests to make and deliver the 2007-08 return in particular as soon as he could to obtain the benefit of the carry-back claim, so it cannot be said that he was deliberately delaying to obtain an advantage: quite the opposite – the matter was as he said out of his control. In my view this is an obvious case of a reasonable excuse, and I therefore cancel the penalties.

87. I add that the fact that the first occasion on which this excuse was offered predates the first penalty does not prevent it applying in any years to which it was relevant. HMRC on their website have for a long time stressed that taxpayers who anticipate being unable to file on time should contact HMRC to explain why they have a reasonable excuse. It is also clear from his evidence that once the appellant got the necessary information he delivered his returns as soon as reasonably possible after this.

2011-12

88. The return was delivered on time and there was no tax to pay, so there were no penalties.

2012-13

89. For this year late filing penalties under Schedule 55 FA 2009 were assessed for the appellant's failure to deliver by the due date of 31 January 2014 (£100), by a date 3 months after that (£900), 6 months after the due date (£300) and 12 months after the due date (£300).

90. For this year the appellant puts forward as his excuse that he was waiting to get his Qatari withholding tax certificates. He wrote to HMRC on 15 November 2014 which is some three weeks after the appeal date for the daily and 6 month penalties

[10] Because no surcharges appear to be due from the appellant for any year, I do not need to consider whether the statement in s 59C(5) TMA that "an officer of Board may impose a surcharge" requires an officer of HMRC to take a decision to impose the surcharge with the result that an automatic imposition by a computer does not suffice as a valid imposition.

which were assessed on 24 September, and more than seven months after the likely date of the initial penalty.

91. HMRC in their letter of 20 December 2014 took the appellant's letter as an appeal against the initial penalty as well as the daily and 6 month penalties. They rejected the appeal against the initial penalty as out of time but dealt with the other two saying there was no reasonable excuse.

92. The appellant was told in one letter of 12 December 2014 that he could ask for a review of the decision to assess the daily and 6 month penalties and in another of the same date that he could ask the Tribunal to consider the refusal by HMRC to accept the appeal against the initial penalty. He did nothing about either letter. There is no time limit in which to notify the tribunal of an application for permission to give an appeal to HMRC under s 49 TMA, and I accept that his notification to the Tribunal on 25 August 2017 is a valid application for such permission.

93. The appeals against the other penalties are governed by the provisions of s 49A to s 49I TMA. Under s 49D a person who has appealed may notify their appeal to the Tribunal, with no time limit. This does not apply, and a 30 day time limit does, if either HMRC have given a notification of their view of the matter in question under s 49B TMA or they have given a notification under s 49C.

94. Section 49B applies where a person has requested a review. The appellant did not. Section 49C applies where HMRC offer a review. If they offer a review then they must notify the person of their view of the matter in question. HMRC do not have to offer a review: s 49A(2)(b) says HMRC "may" offer a review. HMRC's letter of 12 December 2014 does not use the word "offer" or any cognate expression. It says "you can … ask HMRC to carry out a review", "if you ask HMRC to carry out a review" and "if you choose to have a review".

95. The question of what constitutes an offer of a review was considered by the Upper Tribunal in *HMRC v NT-ADA Ltd (formerly NT Jersey Ltd)* [2018] UKUT 59 (TC) (Judges Roger Berner and Sarah Falk). That case was concerned however with the VAT regime for reviews which differs considerably from that for income tax. The chief and most significant difference is that in the VAT review provisions an offer of a review against an HMRC decision is mandatory where the person concerned is the appellant. There is no ability in that person to request a review. It is not then surprising that the Upper Tribunal came to the view that an offer may be couched in a variety of wordings, including those of request.

96. The Upper Tribunal at [47] noted the difference between the VAT and the income tax rules. They referred to an income tax case, *Thames & Newcastle Ltd v HMRC* [2014] UKFTT 667 (Judge Anne Redston and me as member, as I then was) in which the tribunal held that a letter saying that a taxpayer could request a review was not an offer of one, but the Upper Tribunal did not suggest it was wrong to do so in the context of income tax. In the income tax provisions it is clear that the two notions, an offer of a review and a request for one are alternatives available in every case. It would be strange to my mind to hold that a total absence of a reference to an offer and the

presence of three references to the appellant being able to ask for, request or choose to have a review nonetheless amounted to an offer within s 49C TMA, and was not leaving it to the appellant to request one under s 49B TMA.

97. The letter did give HMRC's view of the matter, namely that the appellant had no reasonable excuse because it was his responsibility to submit returns by the due date (a view which would mean that no person could ever have a reasonable excuse). It did however go on to say that he could have sent in estimated figures which could be amended at a later date. But this view of the matter was neither within s 49B nor s 49C, so s 49D applies with no time limit, not the time limits in s 49G or s 49H. It follows I accept that his notification to the Tribunal on 25 August 2017 is an in time notification of his appeals against the daily and 6 month penalties.

98. Having decided that there is an in time application for permission to appeal against the initial penalty I have to decide whether to grant permission. Given that I was considering the daily penalty and 6 month penalty appeals as of right and so the excuse put forward applied to all three I see no prejudice to HMRC in granting permission. I also waive any formalities that might be necessary to notify the appeal to the tribunal.

99. I have decided that in relation to the three penalties for this year that were appealed the appellant had a reasonable excuse for his failure to file on time. The appellant being a quantity surveyor is no doubt a "details" person. It is obvious from his lengthy unilateral correspondence with HMRC about his 2007-08 and later returns that he would not expect HMRC to accept estimates, especially where a claim to repayment was in issue – such a claim is in fact required to be "quantified" (see s 42(1A) TMA).

100. The withholding certificate was an important document in his eyes. I do not know whether he needed it to claim double tax relief, but it is certainly possible. He received it shortly before his letter of 15 November and the certificate itself is dated 4 October 2014.

101. There was also a 12 month penalty in this case which would have been issued in February 2015. There is no appeal in the papers I have dated in 2015 or indeed 2016. In my view there is no appeal against this penalty before the Tribunal. If there had been I would not have considered that the reasonable excuse that existed until the appellant got his withholding certificate continued beyond the end of October at the latest, and so the failure to file the return before 1 February 2015 could not be excused.

2013-14

102. For this year the return was over 12 months late. Penalties under Schedule 55 FA 2009 were assessed for the appellant's failure to make and deliver the return by the due date of 31 January 2015 (£100), by a date 3 months after that (£900), 6 months after the due date (£300) and 12 months after the due date (£300).

103. However the papers show that on 26 July 2017 these penalties were cancelled. I do not know why, neither did Ms Edley. Despite the appellant's appeals there is nothing for the tribunal to consider.

2014-15 and 2015-16

104. There were no penalties imposed for these years despite the appeals.

Partnership penalties imposed on the appellant

105. The papers show that for 2008-09, 2009-10 and 2010-11 (at least) penalties were determined or assessed on the appellant on account of the nominated member's failure to make and deliver the partnership return on time. These penalties arose under s 93A TMA or paragraph 24 Schedule 55 FA 2009. No mention is made in HMRC's bundle about the penalties for any year apart from 2010-11 about which the papers show that the penalties were apparently cancelled by some adjustment in March and September 2012, possibly as a result of an appeal by the representative partner. There is nothing for the Tribunal to decide about these.

Interest

106. The appellant has appealed against interest charges for all relevant years. I have no jurisdiction to decide anything about interest on unpaid tax, surcharges or penalties. Where amounts of tax, penalties or surcharges are amended as a result of this decision, then the interest should also be consequentially changed. Any representations about interest should be made by the appellant to HMRC if he is not satisfied with their response in terms of interest charges to the consequences of this decision.

Discussion – loss claim

107. The appellant's return for the tax year 2007-08 delivered on 9 February 2012 contained entries on the "Partnership (short)" pages[11] as follows:

> at box 7 "Your share of the partnership profit and loss": £-223480.00
>
> at box 19 "Adjusted loss for 2007-08": £223480.00
>
> at box 21 "Loss to be carried back to previous year(s) and set-off (*sic*) against income (or capital gains)": £37118.00
>
> at box 22 "Total loss to carry forwards after all other set-offs – including unused losses brought forward": £186362.00

108. In the white space the appellant said "A claim is being made under Section 64 Income Tax Act 2007 such that current year losses of £37,118 are being carried back to be relieved against general income of the tax year 2006/07."

[11] These are not the "Shorts" discussed in fn. 2, but pages SA104S for an individual partner's own tax return. The figures on these pages are expected to be the same as the figures on the copy of the "shorts" given to a partner by the nominated partner.

The Tribunal's jurisdiction over refusal of a late claim

109. The claim made in the return was undoubtedly out of time though – s 64(5) Income Tax Act 2007 ("ITA") says:

> "The claim must be made on or before the first anniversary of the normal self-assessment filing date for the loss-making year."

110. The "normal self-assessment filing date" is defined by s 989 ITA. It "in relation to a tax year, means the 31 January following the tax year". That was 31 January 2010.

111. HMRC cited an authority in support of the proposition that the Tribunal has no jurisdiction to extend a time limit for making a claim, *Privet v Commissioners of Inland Revenue* [2001] SpC 279 (Special Commissioner Brian O'Brien). That decision being at an equivalent level in the judicial hierarchy to this tribunal, is not binding on me. However there is a recent and binding authority on this matter, *Raftopoulou v HMRC* [2018] EWCA Civ 818 (Arden and David Richards LJJ).

112. In *Raftopoulou* the Court of Appeal considered whether a letter from HMRC saying that a claim was out of date constituted an enquiry and simultaneously a closure notice which was appealable. David Richards LJ, giving the only reasoned judgment, said at [40]:

> "In my judgment, in common with the view of the UT in *Portland Gas*, a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so. On the facts of this case, it is unnecessary to go further and consider what additional actions on the part of HMRC would constitute an enquiry."

113. He made it clear that not every communication from HMRC in response to a claim amounted to either a correction or an enquiry. There was another species of communication which involved neither and where any decision by HMRC that was adverse was not appealable to this tribunal, but was amenable only to judicial review proceedings. A statement by HMRC that, after scrutiny of the date of the claim and the applicable legislation, the claim was out of date and would not be given effect to was just such a communication.

114. The circumstances in this case differ from those in *Raftopoulou* in this respect. In that case the claim was made outside the return, and was governed by the provisions of Schedule 1A TMA, especially paragraph 5 (enquiries into claims) and paragraph 3 (HMRC amendments of claims - which may be objected to by the claimant). In this case the claim responded to by Mrs Marcetic, Ms Freeman and eventually Mrs Pedersen of HMRC was made in the return.

115. But other provisions of TMA, notably s 9A (enquiries) and s 9ZB (HMRC amendments or corrections) have the same effect and field of operation as the provisions of Schedule 1A mentioned. Just as in Schedule 1A, there must be a third

way of communication, made as a result of scrutiny of the validity, including timeliness, on its face of a claim made in a return.

116. In my view then neither the letter of 2 July 2012 by Mrs Marcetic, nor that of 27 September 2012 by Sharon Freeman nor that of 27 July 2017 by Mrs Pedersen constitutes enquiries into the return under s 9A(2)(a) (enquiries into claims), let alone notices of closure of such an enquiry. There can be no appeal to this Tribunal against their decisions as set out in their letters.

117. Mrs Pedersen's letter rightly said that the Commissioners of Her Majesty's Revenue and Customs' powers of collection and management in s 5 CRCA permit HMRC to allow an out of date claim even if the legislation does not expressly provide for them to allow such a claim. But the Commissioners failure to exercise those powers in a claimant's favour is no more justiciable before the Tribunal than is the refusal to give effect to the claim because it is out of date (see eg *R v CIR (ex parte Unilever plc)* 68 TC 205).

Was there an earlier in time claim?

118. But that is not necessarily the end of the matter. The question that arose in my mind when I read the papers was whether any of the correspondence from the appellant in the period February 2009 to January 2010 could constitute a claim and if so whether the claim could validly be made. Such a claim would obviously be one made outside the return (as in *Raftopoulou)* because at the time it was made the return for 2007-08 had not been delivered.

119. The answer to this question depends on the construction of s 42 and Schedules 1A and 1B TMA. These provide relevantly in this case:

> "**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) … 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 ... of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.
>
> …
>
> (11) Schedule 1A to this Act shall apply as respects any claim or election which—
>
> (a) is made otherwise than by being included in a return under section 8 … 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.

SCHEDULE 1A CLAIMS ETC NOT INCLUDED IN RETURNS

1 In this Schedule—

"claim" means a claim or election as respects which this Schedule applies;

…

"profits"—

(a) in relation to income tax, means income,

…

2—(1) Subject to any provision in the Taxes Acts for a claim to be made to the Board, every claim shall be made to an officer of the Board.

(2) No claim requiring the repayment of tax shall be made unless the claimant has documentary proof that the tax has been paid by deduction or otherwise.

(3) A claim shall be made in such form as the Board may determine.

(4) The form of claim shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim.

(5) The form of claim may require--

(a) a statement of the amount of tax which will be required to be discharged or repaid in order to give effect to the claim;

(b) such information as is reasonably required for the purpose of determining whether and, if so, the extent to which the claim is correct;

(bb) the delivery with the claim of such accounts, statements and documents, relating to information contained in the claim, as are reasonably required for the purpose mentioned in paragraph (b) above;

…

4—(1) Subject to … any other provision in the Taxes Acts which otherwise provides, HMRC shall, as soon as practicable after a claim … is made … give effect to the claim or amendment by discharge or repayment of tax.

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

SCHEDULE 1B

CLAIMS FOR RELIEF INVOLVING TWO OR MORE YEARS

1—(1) In this Schedule—

…

(b) any reference to the amount in which a person is chargeable to tax is a reference to the amount in which he is so chargeable after taking into account any relief or allowance for which a claim is made.

…

2—(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred … in one year of assessment ("the later year") to be given in an earlier year of assessment ("the earlier year").

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

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

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

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

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

…

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

…"

120. From this legislation and from case law the following propositions may be stated generally in relation to a claim outside a return.

(1) If a notice to file a return has been issued, the claim must be made in the return.

(2) The claim must be quantified – the amount of the loss to be used must be at least capable of being calculated – s 42(2) TMA.

(3) Unlike the position with a return which must be delivered to the officer of HMRC who served the notice to file (s 8(1)(a) TMA) the requirement is only that the claim be made to "an officer of the Commissioners of Her Majesty's Revenue and Customs" - paragraph 2(1) Schedule 1A TMA).

(4) If no specific form has been prescribed, and none has in the case of a trading loss carry back claim outside a return, there is no formality (*Gallic Leasing Ltd v Coburn (HM Inspector of Taxes)* 64 TC 399 and *R v. Commissioners of Inland Revenue (ex parte Mattessons Wall's Ltd)* 68 TC 205) and no requirement for a statement of truth or the other matters set out in paragraph 2(5) Schedule 1A TMA.

(5) When a claim is made HMRC must give effect to it (unless an enquiry is opened) by discharge of tax (ie removing the charge imposed on the claimant by assessment where the tax is not yet paid) or repayment of tax (repaying tax already paid that on the basis of the claim was not payable) if that is what the claim is for – paragraph 4(1) Schedule 1A.

(6) In a Schedule 1B case there are further ways of giving effect to the claim, by increasing the tax that must be deducted to find the amount payable for the loss year or any other way of giving effect to the claim – paragraph 2(6) Schedule 1B.

121. The first of these propositions is relevant here, as the appellant was served with a notice to file a return for 2007-08 and eventually filed a return that contained a claim to carry back the loss. Can he then also make a claim outside a return before filing the return? The answer is: yes. This right arises from paragraph 2(2) Schedule 1B which provides that s 42(2) TMA (which makes it mandatory for a claim that could be included in a return to be so included) does not apply in a Schedule 1B (claim affecting more than one year) case. This particular provision has been the subject of consideration in *R (on the application of De Silva and another) v Commissioners for Her Majesty's Revenue and Customs* ("*de Silva*"). In the Court of Appeal[12] Gloster LJ, giving the only reasoned judgment with which Simon and Arden LJJ agreed, said:

> "48. First of all, I reject the Appellants' argument that a claim under Schedule 1B to the TMA *can only be made* by way of a 'stand-alone claim' under Schedule 1A of that Act, or *can only be investigated by means of an enquiry under paragraph 5(1) of Schedule 1A to the TMA*. All that paragraph 2(2) of Schedule 1B does is to disapply the rule in section 42(2) of the TMA that, if a claim can be made in a return, it *must* be so made. The effect of disapplying the section 42(2) restriction is that a Schedule 1B claim may be made in a return, or may be made as a stand-alone claim outside a return, whether by way of a separate letter, or otherwise.
>
> 49. Second, the Appellants' approach fails to recognise that, no matter how a claim for relief has initially been "made", the claim for relief is nonetheless *required to be included* in the return of the individual taxpayer for the year in which the losses were actually made by the partnership (i.e. here the later year – Year 02). That obligation is imposed by sections 8(1B) and 9 of the TMA and section 380 of ICTA. That is because the claim, if valid, will affect the tax chargeable and payable in the later year: see paragraph 2(3) of Schedule 1B. Losses, which may be carried back from a later year to an earlier year, cannot be given effect to in law in that earlier year; in other words they may not be relieved against the tax liability of that earlier year, despite the fact that the quantum of the claim will be calculated by reference to the earlier year. Thus, the correct procedure for making a Schedule 1B claim is either to make it in the return for the loss-making year in question (the Year 2 return), or to make an earlier (or indeed later) Schedule 1A standalone claim, which is then, subsequently, nonetheless required to be included in the return for the later year.
>
> 50. In this respect, I agree with the judge's analysis, as set out in paragraph 39 of the judgment, that it is not possible to characterise the inclusion in the Appellants' respective Year 01 returns, of their claims to use partnership losses arising in later periods to set off against tax arising in Year 01 as simple stand-alone claims for relief made outside

[12] [2016] EWCA Civ 40

> a return. As the judge pointed out, these claims were made at a time *before* the periods to which the relevant partnership statements and in which the trading losses occurred had closed and those partnership statements had been filed; i.e. the carry back claims were made on the basis of what it was expected and estimated the losses attributable to the Appellants for those later periods would be. But the claims for relief could, as a matter of substance, only ultimately be made good if the Appellants also eventually included their shares of the partnership trading losses in their own individual returns for the periods in which those losses actually arose. In those circumstances I see nothing wrong or unorthodox in the judge's characterisation of those claims as 'inchoate.'"

122. In the passages from *de Silva* I have quoted, the italicisations are Gloster LJ's emphasis and the underlinings are mine. In the Supreme Court[13] Lord Hodge said:

> "20. Paragraph 2(2) of Schedule 1B disapplies section 42(2) in relation to such a claim. That has the effect that a claim may be made under Schedule 1A, notwithstanding that an officer of HMRC has required the provision of a tax return, for example in Year 1 outside a tax return. But I agree with Sales J and the Court of Appeal that HMRC are correct in their submission that that disapplication does not mean that the taxpayer is released from making the claim in his tax return in Year 2. As I will seek to show (paras 23-29 below), section 8(1) imposes that requirement.
>
> 21. Schedule 1A is headed 'Claims etc not included in returns'. Paragraph 2 provides for a claim to be made to an officer of HMRC in such form as HMRC may determine, but HMRC have not specified any particular form of claim and accept claims made by letter. Paragraph 4(2) requires an officer of HMRC to give effect as soon as practicable after a partnership claim is made under section 42(6) by a nominated person to such a claim as respects each of the relevant partners by discharge or repayment of tax, unless HMRC inquire into the claim. Similar provision is made in paragraph 4(1) for the prompt processing of non-partnership claims. Schedule 1A therefore requires HMRC to respond promptly to claims for relief and thus assist the cash flow of taxpayers who have relevant and valid claims. But HMRC are also empowered to challenge claims: paragraph 5 provides for inquiries into Schedule 1 claims and contains time limits for the opening of such inquiries. Such an enquiry postpones the obligation to give effect to the claim (paragraph 4(3)) and on completion of the inquiry HMRC may by closure notice amend the claim (paragraph 7(1))."

and at [31]:

> "A claim to carry back loss relief made early under Schedule 1A may need the Year 2 losses to be established before effect is given to the claim."

---

[13] [2017] UKSC 74. Lord Hodge's judgement was agreed with by Lords Neuburger, Kerr, Reed and Hughes.

Here the underlinings are mine.

123. With these propositions and binding judgments in mind I turn to the correspondence. The first letter from the appellant on 2 February 2009 tells an officer of the Commissioners, the Area Director Greater Belfast Area, (who I assume is in fact the officer who sent the notice to file to the appellant, as his address at the time was in Northern Ireland) that he had losses to carry back to the tax year 2006-07 which he was intending to show in his return for 2007-08 which he was unable yet to file.

124. No response was received to that letter or three further ones in similar terms made before 31 January 2010 (the deadline for a claim under s 64 ITA 2007). Looking at those letters alone it is somewhat difficult to say that the claim had been quantified, as the appellant was asking for penalties to be removed on the basis that he was unable to obtain the figures he needed to make the claim in his return.

125. But Mrs Pedersen's letter of 27 July 2017 to the appellant (see §52) puts a very different complexion on matters. In that letter she states that HMRC were already in possession before the appellant's first letter of the precise amount of the loss which was attributable to the appellant, £223,480, and used that information to demonstrate to the appellant that his request for penalties to be suspended or rescinded was not reasonable[14].

126. HMRC were also in possession of the figure of the appellant's general income for 2006-07 so that they could see that the only amount which the appellant could claim to carry back was that precise amount – s 65 ITA 2007.

127. In these circumstances it seems to me to be the case that the appellant made a properly quantifiable claim to an officer of HMRC outside his return (as he was permitted by paragraph 2(6) Schedule 1B TMA to do) within the time limit in s 64(5) ITA 2007.

128. HMRC did not react to that claim in any way. They did react to the subsequent claim made by the appellant in his return (something that he was required to do – see *de Silva*), but not to the Schedule 1A claim. In particular they did not open an enquiry or issue a closure notice so there was nothing against which the appellant had a right of appeal, as shown authoritatively in *Raftopoulou*.

129. What HMRC should have done if they appreciated that the appellant had made a valid and in time claim under Schedule 1A was to give effect to the claim as soon as was practically possible after it was made (paragraph 4(1)) or begin an enquiry into the claim under paragraph 5. Given what the Supreme Court said in *de Silva* HMRC *might* have been entitled to say that the appellant should file his return before they gave effect

[14] In saying this she was wrong. She could not have examined the correspondence from the appellant as he made it abundantly clear that he had *not* received the "Shorts" because the designated partner was withholding them.

to the claim[15], but that is a hypothetical matter because they did not react at all, they did not enquire into the claim and they certainly did not give effect to it.

130. *Raftopoulou* shows that the only remedy for a claimant faced with HMRC's refusal to take a step such as giving effect to claim as paragraph 4(1) is judicial review (as was done in similar circumstances in *R v Commissioners of Inland Revenue (ex parte Opman International UK)* [1985] 59 TC 352).

131. If further confirmation were needed of the position it can be seen in the Supreme Court decision in *de Silva*. At [9] Lord Hodge said:

> "The taxpayers have challenged HMRC's decisions which were set out in those letters by a claim for judicial review. They assert that HMRC are obliged to give effect in full to their claims to carry back the partnership losses because HMRC did not open an enquiry into the claims under Schedule 1A to the TMA in order to challenge them and are now barred by the passage of time from doing so. …"

132. It is very difficult to believe that the applicants for judicial review in that case would have thought that there was another remedy available to them within this Tribunal's jurisdiction and there was no suggestion that they had such a remedy which would have prevented their application for judicial review.

133. It follows that I have no jurisdiction to require HMRC to give effect to any in time Schedule 1A claim. The appellant's possible remedies, which might include, as well as judicial review (though time limits may be against him there, as well as the cost), a complaint to HMRC and thence to the Revenue Adjudicator or the Parliamentary Ombudsman, are all outside the scope of this tribunal's jurisdiction.

134. But I hope that what I have said will prompt HMRC to give further consideration to the appellant's claim, particularly bearing in mind what I have said about HMRC's handling of the case, by which I mean HMRC's complete silence in the face of the appellant's many letters in 2009 and 2010 addressed to the appropriate officer in HMRC and Mrs Pedersen's revelation about HMRC's knowledge of the amount of the loss in 2009 and her failure to note that which the appellant had consistently sated, that he had not received that information. If they do reconsider the case they should in my view, as well as considering whether an in time valid claim was made, also consider whether a revised view of their approach to s 5 CRCA in relation to the undoubted late claim in the return could be taken.

How should the claim have been given effect to?

135. But there is an aspect of giving effect to the claim on which I must comment. The appellant has made it clear that he thinks that the effect of the claim to carry back the

---

[15] It is not entirely clear to me that that is what Lord Hodge was saying, and there are passages which suggest that a claim outside a return governed by Schedule 1B may be given effect to without the filing of a return. The facts in *de Silva* and in *HMRC v Cotter*, which was also considered by the Supreme Court ([2013] UKSC 69) and where Lord Hodge again gave the only judgment, are also not quite the same as in this case.

loss to 2006-07 is that the tax paid in that year will be repaid, the penalties for late filing will be discharged because of the operation of s 93(7) TMA and that the surcharges and interest will be removed.

136. That would have been the case before self-assessment was introduced for 1996-97 onwards (though of course there were no surcharges before then). But it has been held that this is not the case. In *Norton v Thompson (HM Inspector of Taxes)* [2003] SpC 399 the Special Commissioner (Adrian Shipwright) dealt with this very issue. He said:

> "*What is the effect of the claim for relief?*
>
> 45. Section 380(1)(b) of the TA provides that where an individual has a trading loss for a year of assessment that individual may:
>
> > '… by notice given within twelve months from the 31st January next following that year [of assessment], *make a claim for relief from income tax on—...*
> >
> > (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 [emphasis supplied].'
>
> The section provides that there is to be a relief the measure of which is tax on so much of the income of the previous year as the loss could reduce.
>
> 46. Section 380 of the TA does not say that the taxable income is reduced, it merely says that relief from income tax is given on so much of the income of the preceding year as is equal to the loss. This does not alter when income tax is payable in respect of the earlier year."

and

> "48. Paragraph 2 of Sch 1B to the TMA 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). Sub-paragraph (3) provides that 'The claim shall relate to the later year'. This is consistent with finality for each year of assessment for self-assessment purposes.
>
> 49. The paragraph then provides that the claim is to be given effect to on the assumption that effect could have been given to the claim in relation to the earlier year not that the earlier year is reopened and the taxable amount is reduced (see para 2(4) and (5) of Sch 1B to the TMA). It does not say that effect is to be given to it in the earlier year."

137. The Special Commissioner goes on to "gratefully adopt" a passage in *Blackburn (HM Inspector of Taxes) v Keeling* (2003) 75 TC 608 where Carnwath LJ (as he then was) says about Schedule 1B:

> "This elaborate deeming provision has the effect (so far as it applies) that, where under s 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 para 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 para 2(6)."

138. In *de Silva* Lord Hodge also commented on the way a claim to which Schedule 1B applies is given effect to. He says:

> "19. Paragraph 2 of Schedule 1B thus is concerned with relief sought for a loss incurred in the later year (which I will call 'Year 2') by carrying it back to the earlier year ('Year 1'). Significantly, paragraph 2(3) makes it clear that the claim relates to Year 2. The quantification of the claim is governed by paragraph 2(4): the claim is the difference between amount A and amount B on the counterfactual assumption that effect could have been and was given to the claim in Year 1. That assumption is counterfactual because paragraph 2(3) and paragraph 2(6) relate the claim and the giving effect to the claim to Year 2."

And see also the passages in §122.

139. Thus if HMRC were to give effect to the appellant's claim now it would be by making a repayment of tax equal to the amount of tax shown on his tax return for 2006-07 and paid by the appellant. But for all purposes of the Taxes Acts the position for 2006-07 remains as it is now, with a (now fulfilled) liability to penalties, surcharges and interest which cannot be amended.

140. I should add that it may occur to HMRC that there ought to have been restrictions to the claim in accordance with the provisions of Chapter 2 Part 4 ITA 2007, as it did occur to me when looking at the law in relation to the loss claim before the hearing. I raised with the appellant the possibility that s 107 ITA 2007 might apply, as I had seen from the abbreviated accounts of Taymack LLP for the period ended 31 March 2008 that the total equity in the LLP at that date was less than £100,000. Section 107 limits the amount of a loss to the individual member of the LLP's contribution to the LLP not withdrawn. The appellant produced full financial statements for the LLP from which I could see that his contribution was not less than his share of the loss claimed, and in any event substantially greater than the loss claimed as a carry back to 2006-07.

141. This still leaves the question of the appeal against penalties and surcharges for 2006-07. The appellant's letter of 2 February 2009 could be regarded as an appeal against them. As the were imposed on 19 February and 5 August 2008 (penalties) and 5 November 2008 (surcharges) they were late. Given what I have said above there is in my view no point in giving permission to appeal late as the outcome of the appeal would inevitably be to uphold them, even if the loss claim was admitted.

Decision

Penalties under s 93 TMA 2006-07

142. I refuse the appellant permission under s 49(2)(b) TMA to give a late notice of appeal to HMRC.

Surcharges under s 59C TMA 2006-07

143. I refuse the appellant permission under s 49(2)(b) TMA to give a late notice of appeal to HMRC.

Penalties under s 93 TMA 2007-08, 2008-09 and 2009-10

144. To the extent the penalties have not already been cancelled, under s 93(8)(a) TMA I set the determinations aside.

Surcharges under s 59C TMA 2007-08 and 2008-09

145. I do not appear to have any power to make a decision about surcharges where no reasonable excuse for the failure to pay the tax on time is put forward, but it seems that HMRC have waived them.

Penalties under Schedule 55 FA 2009 2010-11

146. Under paragraph 22(1) Schedule 55 I cancel the penalties of £100 and £70.

Penalties under Schedule 55 FA 2009 2012-13

147. Under paragraph 22(1) Schedule 55 I cancel the penalties of £100, £900 and £300 (paragraph 5).

148. Under paragraph 22(1) Schedule 55 I affirm the penalty of £300 (paragraph 6)

Penalties under Schedule 55 FA 2009 2011-12, 2013-14, 2014-15 and 2015-16

149. Despite the appeals made either no penalties were assessed or (2013-14 only) they were assessed and then removed. I therefore have no decision to make.

Loss claim under s 64 ITA 2007

150. In his letter of 25 August 2017 the appellant may be seen as making an appeal against Mrs Pedersen's letter of 27 July 2017 and to have notified that appeal to the tribunal. Because the tribunal has no jurisdiction to entertain the appeal I must and do strike it out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273 (L.1)).

151. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 16 MAY 2018

APPENDIX

SCHEDULE 55 PENALTY FOR FAILURE TO MAKE RETURNS ETC

PENALTY FOR FAILURE TO MAKE RETURNS ETC

1—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

…

(4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	Return or other document
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970
3	Income tax or corporation tax	(a) Return under section 12AA(2)(a) or (3)(a) of TMA 1970 (b) Accounts, statement or document required under section 12AA(2)(b) or (3)(b) of TMA 1970

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

3 P is liable to a penalty under this paragraph of £100.

4—(1) P is liable to a penalty under this paragraph if (and only if)—

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

5—(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

6—(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

…

(5) … the penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

…

SPECIAL REDUCTION

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

INTERACTION WITH OTHER PENALTIES AND LATE PAYMENT SURCHARGES

17—(1) Where P is liable for a penalty under any paragraph of this Schedule which is determined by reference to a liability to tax, the amount of that penalty is to be reduced by the amount of any other penalty incurred by P, if the amount of the penalty is determined by reference to the same liability to tax.

(2) In sub-paragraph (1) the reference to "any other penalty" does not include—

(a) a penalty under any other paragraph of this Schedule, or

(b) a penalty under Schedule 56 (penalty for late payment of tax).

…

ASSESSMENT

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of the liability to tax which would have been shown in a return.

19—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

23—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

DETERMINATION OF PENALTY GEARED TO TAX LIABILITY WHERE NO RETURN MADE

24—(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.

(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates—

(a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and

(b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return).

…