[2013] UKUT 0615 (TCC)

Case number: TCC-JR/03/2012

PROCEDURE — review of decision — whether conclusions should be changed following later Supreme Court judgment — yes — review undertaken and decision altered

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE QUEEN (on the application of KEVIN ROUSE)

Applicant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants

Tribunal: Mr Justice Warren, Chamber President
Judge Colin Bishopp

Sitting in public in London on 26 November 2013

Michael Jones, counsel, instructed by Denison Till, solicitors, for the Applicant

Scott Redpath, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants

DECISION

1. On 7 August 2013 our decision in this application for judicial review was released. We decided the first of the two issues which were before us in favour of the applicant, Mr Kevin Rouse, and in doing so followed the decision of the Court of Appeal in *Revenue and Customs Commissioners v Cotter* [2012] STC 745. On 3 October 2013 HMRC's appeal to the Supreme Court in that case was heard and on 6 November 2013 judgment ([2013] UKSC 69, [2013] 1 WLR 3514) was given, reversing the decision of the Court of Appeal.

2. In the meantime, HMRC had submitted to us an application for permission to appeal, which we had not determined as we were aware that the Supreme Court's judgment was likely to be available in the near future. Once it was available, HMRC invited us to review our decision, rather than proceed to deal with the application for permission to appeal. It is open to us to adopt that course because of the provisions of rule 45(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008:

> "On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if—
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> (a) when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or
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> (b) since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal's decision, could have had a material effect on the decision."

3. Rule 46 deals with the mechanics of review, and we do not need to deal with it save to observe that it permits us to change our decision in any manner which we consider appropriate. The question before us is whether, as Mr Scott Redpath, counsel for HMRC, argued, we should change the decision in the light of the Supreme Court's judgment, which is of the character to which sub-rule (1)(b) refers, by determining the first issue in favour of HMRC—in other words, by reversing our conclusion on that point. Mr Michael Jones, for Mr Rouse, did not argue that rule 45(1)(b) was not engaged but said that, on proper analysis, the Supreme Court's judgment showed that our conclusion on the first issue was correct. He added that we should exercise the power of review only in a clear case. We do not need to decide whether that proposition is correct since in our view, as we shall explain, this is a clear case.

4. The facts of *Cotter* and of this case are not identical but are very similar. In each case the taxpayer sought relief for losses suffered in one tax year ("year 2"), and elected to use the relief by offsetting it against the tax he had to pay in respect of his income and gains in the immediately preceding tax year ("year 1"). He did so by including a claim for relief in the tax return (meaning the pre-printed form) he submitted for year 1. The claims were not derived from the same relieving provisions and there are some consequential but insignificant differences between the pages of the return used by Mr Cotter (CG1) and Mr Rouse (TR6) to indicate

in the "white space" the nature of their respective claims. Both, however, included the value of the loss on page Ai3. Mr Rouse, but it seems not Mr Cotter, also completed page TCS2, which is headed "Adjustments to tax due", by entering the value of the relief he was claiming in a box provided for the purpose.

5. The difference between the two cases, which Mr Jones said was crucial, is that Mr Cotter (as he was permitted to do) left it to HMRC to calculate for him the tax he owed—the self-assessment which the Taxes Management Act 1970 ("TMA") s 9(1) requires—while Mr Rouse, or more accurately his accountants, undertook the calculation and sent it to HMRC with the return. Mr Cotter submitted his 2007-08 return, in October 2008, without any claim for relief, and HMRC calculated the tax payable on the basis of the return as submitted. He later made an amendment to the return, by adding entries to various boxes in order to include a claim for relief for a loss suffered in 2008-09, to be set against his 2007-08 liability. HMRC re-calculated the tax payable for 2007-08, taking no account of the claim for relief, and came to the same figure. It appears from the reports of the case that Mr Cotter's accountants asserted in correspondence that as a result of the claim no further tax was payable in January 2009, and asked HMRC to amend the self-assessment (that is, the calculation HMRC had made) in order that effect could be given to the relief and the payment otherwise due in January reduced to nil, but the request was refused. Instead, HMRC opened an enquiry into the claim in accordance with para 5(1) of Sch 1A to TMA, at the same time stating that they would not give effect to the claim until the enquiry was closed.

6. Mr Rouse's claim was included in his return as submitted, in the manner we described in paras [6], [26] and [27] of our original decision. As we also indicated at [26], the return was in each case accompanied by a self-assessment. In the return itself (by which, again, we mean the pre-printed form which Mr Rouse completed), on page TCS1 which is headed "Tax calculation summary", Mr Rouse entered in box [1], as the "Total tax, Student Loan repayment and Class 4 NICs due before any payments on account", the figure of £1,049,061.05. That figure was repeated in the self-assessment, as the aggregate of the tax and NICs due after taking credit for tax deducted at source. The self-assessment consisted of a separate sheet, not part of the pre-printed form, prepared by Mr Rouse's accountants. It was headed "Tax Computation" and contained, in addition to a calculation of the tax due for year 1, a calculation of the amounts Mr Rouse was required to pay. The claimed year 2 relief was not brought into the year 1 self-assessment, but was brought into account (described as "Next year's tax claiming now") in order to reduce the aggregate of the balancing payment for year 1 and the first payment on account for year 2 which Mr Rouse was due to make on 31 January. As we said in our original decision, HMRC opened an enquiry into the claim, again in accordance with para 5(1) of Sch 1A.

7. The critical issue, in both cases, was whether HMRC could properly open an enquiry into a claim made in that way in accordance with para 5(1), or they had to do so in accordance with s 9A. We set out the relevant legislation and the parties' arguments on those points in our original decision, and we do not repeat them now. The Court of Appeal decided that s 9A was engaged, and para 5(1) was not; and the Supreme Court took the contrary view. The Court of Appeal

concluded that the claim for relief was contained in the year 1 return simply by virtue of its being made on the tax return form.

8. The only judgment in the Supreme Court is that of Lord Hodge JSC, with whom the other Justices agreed. At [17] and [18] he made the point that income tax is an annual tax, and that the claim for relief which Mr Cotter made was, by virtue of para 2(6) of Sch 1B to TMA, proper to year 2: that is, it could not be brought into the year 1 self-assessment. The benefit of the relief could be used to reduce the amount the taxpayer had to pay on the due dates for meeting his year 1 liability, but it did not affect the amount payable in respect of year 1. It was merely year 2 relief brought forward. Mr Rouse, as Mr Jones accepted, is in the same position.

9. At [20] to [23] Lord Hodge dealt with the competing arguments. For Mr Cotter it was said that a s 9A enquiry extended to "anything contained in the return … including any claim or election contained in the return" and that, as his claim was contained in the return, meaning the pre-printed form, for 2007-08, it followed that s 9A was engaged. For HMRC the argument was that "return" meant "return under section 8", that is a return for a single tax year, and a year 2 claim could not be included in a year 1 return if that meaning was correct.

10. The most important part of Lord Hodge's judgment is as follows:

> "[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).
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> [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).
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> [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)).”

11. Those conclusions were enough to dispose of Mr Cotter’s case: the enquiry which HMRC had opened in accordance with Sch 1A was valid, and they were entitled to withhold the benefit of the relief in accordance with para 4(3) of Sch 1A while the enquiry was pursued.

12. Pausing there, it would seem that Mr Rouse is in the same position. His claim, as he accepts, was for year 2 relief to be available to be offset against the payments he was required to make on (in the case of the first claim) 31 January 2009, but it could not affect his year 1 self-assessment; indeed, Mr Jones agreed that it would have been incorrect to introduce the claim into that self-assessment or to show a figure in box [1] which was arrived at after deducting the year 2 loss relief. Thus the availability of year 2 relief is wholly irrelevant to the amount of tax chargeable or payable in relation to year 1 and irrelevant to the purpose identified by Lord Hodge in [25]. But, he said, Mr Rouse’s position was in fact different from Mr Cotter’s, because of what Lord Hodge said next:

> “[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.”

13. That, said Mr Jones, was what Mr Rouse had done: by furnishing the calculations to which we have referred, rather than leaving HMRC to make the calculations for him, Mr Rouse had introduced the relief for year 2 into his year 1 self-assessment and, as Lord Hodge said, his doing so made the year 2 claim fall within the year 1 return. Thus it was s 9A, and not Sch 1A, which was engaged and the enquiry which HMRC had opened in his case was, as we concluded in our original decision, invalid. Although in so concluding we had followed the Court of Appeal’s judgment in *Cotter*, the reversal of that judgment did not, in Mr Rouse’s circumstances, affect the outcome.

14. We do not agree. In [27] Lord Hodge is dealing with the taxpayer who brings a year 2 claim into his self-assessment for year 1, thereby reducing the tax due in respect of year 1; that is clear from the phrase “as a result of the claim [proper to 2008-09], specific sums or no sums were due as the tax chargeable and payable for 2007/08”. As Lord Hodge’s analysis earlier in his judgment shows, the claim for loss relief in respect of year 2 cannot properly be brought into the year 1 self-assessment. He must, therefore, be contemplating a situation where, erroneously, such a claim has been brought into the year 1 self-assessment. If such a claim has been introduced into a self-assessment by a taxpayer, HMRC would be obliged to adopt one of the courses identified by Lord Hodge: an amendment in accordance with s 9ZB, or a s 9A enquiry. Those mechanisms are provided in order that HMRC may address inaccuracies, or perceived inaccuracies, in a

return—which includes the taxpayer's self-assessment (see TMA s 9(1)). But, as Mr Jones agreed, it would be incorrect to treat the claim in that way; a year 2 claim cannot be used, legitimately, to reduce the year 1 liability. Mr Rouse, moreover, did not do so; as we have said, the calculation of his year 1 liability took no account of the year 2 claim for relief, and revealed a total sum of £1,049,061.05, which HMRC agree is correct. The value of the relief was brought only into the calculation of the payments Mr Rouse was required to make, but that calculation does not form part of the self-assessment. Indeed, it includes other sums—the payments on account—which are also proper only to year 2. There is in our view nothing in [27] which is relevant to Mr Rouse's case.

15. In our judgment, the enquiry HMRC opened in accordance with Sch 1A was correctly opened, and para 4(3) of that Schedule was engaged. Accordingly there was a debit on Mr Rouse's account available to be set off against the VAT credit.

16. It is right, therefore, that we review our original decision. Upon reviewing it, we now reject Mr Rouse's application for judicial review. We determine the first ground of application in favour of HMRC, and affirm our conclusion on the second ground, which now becomes a matter of decision.

Mr Justice Warren
Chamber President

Colin Bishopp
Upper Tribunal Judge

Release date: 04 December 2013