TC04758

Appeal number: TC/2011/06273

CORPORATION TAX – appeal against amendments made by closure notices – denied claim for terminal loss relief – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SPRING SALMON & SEAFOOD LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN
MR PETER SHEPPARD FCIS FCIB CTA AIIT

Sitting in public at George House, Edinburgh on 24 and 25 February 2015

Mr Michael Upton, Advocate, on behalf of the Appellant

Mr Iain Artis, Advocate, instructed by the Office of the Advocate General, on behalf of the Respondents

DECISION

Introduction

1. These are appeals against HMRC's conclusions upon the closure of enquiries into the Appellant's corporation tax self-assessments for the following periods:

(i) period ended 31 July 2002 ("the 2002 period");

(ii) period ended 31 July 2003 ("the 2003 period");

(iii) period ended 31 July 2004 ("the 2004 period"); and

(iv) period ended 31 January 2005 ("the 2005 period").

2. The grounds of appeal in respect of the 2002 period and the 2003 period can be summarised as follows: the appellant is entitled to intangibles relief in respect of goodwill acquired in July 2002 from a non-related party. HMRC are bound by the terms of a closure notice issued to S&R Thomas Partnership on 12 December 2007 which agreed the value of the goodwill acquired. Any tax arising in respect of the 2002 period and the 2003 period has been settled under the terms of agreement with HMRC dated 24 May 2004. HMRC failed to open an enquiry into the amendment made by the Appellant to its corporation tax self-assessment for the 2003 period and as such the losses for the period are final. Further and in the alternative, the Appellant submitted a terminal loss claim affecting the 2002 period and the 2003 period on 30 August 2006 which had the effect of reducing the corporation tax profits to nil; the claim fell within Schedule 1A of the Taxes Management Act 1970 ("TMA") and as HMRC failed to open an enquiry into the claim the profits are nil. The partners of S&R Thomas Partnership were the brothers Roderick Christopher Thomas (50%) and Stuart James Thomas (50%). The two are referred to as "Messrs Thomas" hereafter.

3. In respect of the 2004 period and the 2005 period the Appellant contends that the respective closure notices did not state in clear and unambiguous terms that the terminal loss relief claim was being disallowed either wholly or in part. The notices were void and invalid on the basis that the terminal loss relief claim was not contained within a return nor was it made or given effect by being included in a return; the claim was accordingly governed by Schedule 1A TMA 1970 ("Schedule 1A") and not Schedule 18 of the Finance Act 1998 ("Schedule 18").

Background

4. The background to this appeal is by no means straightforward and before we turn to the substantive matters it may assist the reader to set out a brief overview of the Appellant's history. We should note that Messrs Thomas have been engaged in litigation over the course of a number of years involving themselves individually and the various companies with which they are associated. We do not intend to set out the various disputes which are helpfully summarised at Appendix 2 of Judge Reid QC's

decision in *Spring Salmon & Seafood Ltd v HM Revenue and Customs* [2014] UKFTT 887 (TC).

5. The Appellant was incorporated on 13 March 1998 as Tunevoice Ltd and commenced trading as seafood suppliers on or about 1 May 1998. The Company's name was changed to Spring Salmon & Seafood Ltd on 24 April 1998. Mr Roderick Christopher Thomas is and was throughout the relevant period a named director. Mr Stuart James Thomas became company secretary on 23 May 2004.

6. There were originally 1,000 £1 shares issued in the Appellant, held by solicitors in Edinburgh as nominees. A further 199,000 shares were issued on 1 July 1998 to Bala Ltd, a company registered in the British Virgin Islands and administered in Guernsey. The 1 share issued in Bala Ltd was issued to the MacLennan Trust, a Guernsey registered trust. On 1 July 1998 the original 1,000 shares in the Appellant were also transferred to Bala Ltd so that from that date the Appellant's issued share capital was wholly owned by Bala Ltd. The MacLennan Trust was a discretionary trust settled by Mr Roderick Thomas' brother-in-law and of which Messrs Thomas were beneficiaries. Bala Ltd was wound up in 2007 and the MacLennan Trust was wound up in 2009.

7. Spring Salmon Ltd was incorporated in August 1993. The company was said by HMRC to be controlled by Messrs Thomas. At 30 April 1999 100% of the shares were owned by Hans Lindh, the brother-in-law of Messrs Thomas. The Company ceased trading in February 2003 and changed its name to Thomas Lindh Ltd on 23 November 2003.

8. The S&R Thomas Partnership commenced trading on 1 September 1998 with its activities described as "consultants". A review of the partnership records for the periods ended 5 April 1999, 31 July 2000, 31 July 2001 show that all purchases by the partnership in those periods and the final period were from Spring Salmon Ltd. All partnership sales were to the Appellant except towards the end of the partnership's final accounting period to 26 July 2002 when there were some credits from Credenza Seafoods Limited, a company HMRC contend was controlled, or at least 50% owned, by Messrs Thomas. The partnership was sold as a going concern on 26 July 2002 to the Appellant for £2,835,000 of which it was contended by the Appellant that £35,000 represented trading stock and £2,800,000 was goodwill. HMRC noted that there is no goodwill reflected in the accounts of the S&R Thomas Partnership in any period.

9. Spring Seafoods Ltd commenced trading on 10 March 2004. It changed its name to Spring Capital Ltd on 23 February 2010. Mr Roderick Thomas was, during the relevant periods, a shareholder of the Company and from 12 February 2007 was also the company secretary. He became a director in 2010. Mr Stuart Thomas was a director and shareholder throughout the relevant periods. The Company carried on the trade previously carried on by the Appellant; the circumstances in which it came to do so are not entirely clear to us and, for the purposes of this appeal perhaps do not matter. In *Spring Capital Ltd and HM Revenue and Customs & Ors* [2015] UKFTT 66 (TC) Judge Brannon described the situation as follows (at [21], [22], [218] – [220]):

"As I have said, the manner in which the seafood trade moved from SSS to the appellant is disputed. In a nutshell, the appellant argues that on 22 September 2004 SSS transferred its seafood business to Messrs Thomas. Then, on the same day, Messrs Thomas are said by the appellant to have transferred the seafood business to the appellant for consideration equal to market value – the agreement being evidenced, according to the appellant's evidence, by a minute of agreement dated 22 September 2004 ("the Minute"). In this decision I have referred these transactions as the "tripartite transaction".

HMRC, on the other hand, say that there is no evidence that the tripartite transaction described in the preceding paragraph took place. HMRC say that there was no written agreement evidencing the transfer by SSS to Messrs Thomas and there was no sale agreement evidencing the transfer from Messrs Thomas to the appellant. The accounts of the appellant for 2005 and 2006 make no mention of the appellant having acquired the goodwill attaching to the seafood trade. Furthermore, HMRC say that there was extensive correspondence between the parties in which, if the tripartite transaction had taken place as described, it would naturally have been mentioned. Instead, it was not until a letter from Mr Thomas on 8 April 2011 that the nature of these transactions was first mentioned. HMRC does not dispute that the seafood trade originally carried on by SSS started to be carried on by the appellant at some stage in 2005, but do not accept that the appellant purchased the goodwill attached to the business for market value nor that the appellant bought the business from Messrs Thomas (nor, for that matter, that SSS sold its trade to Messrs Thomas)…

Mr Thomas claimed that on 22 September 2004 SSS transferred its seafood trade to Messrs Thomas and that on the same day Messrs Thomas transferred the trade to the appellant for an amount equal to the market value of the trade – which I have referred to as the "tripartite transaction". I have carefully considered Mr Thomas' evidence, which was challenged in cross-examination, in relation to these two alleged transactions but I regret to say that I do not find it credible. Consequently, I have reached the conclusion that the appellant is not entitled to deductions in respect of a purchase of goodwill. I have reached this conclusion for the following reasons.

The first mention to HMRC of the tripartite transaction came in a letter from Mr Thomas to Mr Stewart dated 8 April 2011 (two days after it was referred to in the appellant's Notice of Appeal), almost 6 1/2 years after it was alleged to have taken place on 22 September 2004. There were many opportunities in the correspondence, which I have set out at some length earlier in this decision, when such a tripartite transaction would naturally have been mentioned by Mr Thomas to HMRC had it occurred on 22 September 2004. Mr Stewart repeatedly requested details concerning the appellant's claim to have purchased goodwill, but this information was not forthcoming. Even allowing for the strained relationship between Messrs Thomas and Mr Stewart, it beggars belief that a taxpayer seeking to claim a very substantial amount of tax relief would not have supplied HMRC with details of the relevant transaction at the earliest opportunity. I do not accept Mr Thomas' suggestion that he merely answered the questions put to him by Mr Stewart: "no more, no less". In many instances Mr Thomas did not do even that. Mr Thomas's replies to Mr Stewart's

enquiries indicate to me that the tripartite transaction was the product of ex post facto imagination rather than a genuine transaction that took place on 22 September 2004.

Furthermore, as I understand it, the Minute was first produced to HMRC by the appellant's advisers RMS Tenon on 29 July 2013. Certainly, it was not produced before 8 April 2011. If I am correct, the only allegedly contemporaneous document explicitly evidencing the second leg of the tripartite agreement was first produced just short of nine years after the transaction occurred which it purported to evidence. If the Minute was indeed contemporaneous with the transfer on 22 September 2004, then for many years thereafter Mr Thomas conducted a lengthy correspondence with HMRC that can only be described as an elaborate game of "hide the ball". I do not find that in the least bit credible. I do not accept the Minute as being contemporaneous evidence of the tripartite transaction and, indeed, do not accept it as genuine record of any transaction that took place."

10. The Appellant ceased trading after 31 July 2004 but on or before 31 January 2005. The company's financial year ended on 31 July in each year save for 2005. On 8 August 2007 the Appellant was struck off the Register of Companies and dissolved by notice in the Edinburgh Gazette on 17 August 2007. On 16 March 2011 the Appellant was restored to the Register.

11. On 1 August 2002 the Appellant filed its corporation tax return for the period ending 31 July 2001.

12. On 9 September 2003 the Appellant filed its corporation tax return for the 2002 period together with a covering letter, tax computation and financial statements.

13. On 23 July 2004 the Appellant filed its corporation tax return for the 2003 period together with a covering letter and financial statements. On the same date the Appellant filed an amendment to its 2002 return which was set out in the covering letter sent with the 2003 return and revised pages of the return.

14. On 26 October 2004 HMRC issued to the Appellant enquiry notices and notices to produce documents and information in respect of the 2002 and 2003 periods. On 3 March 2005 HMRC issued 'jeopardy' amendments under section 9C TMA 1970 in respect of the 2002 and 2003 periods. These were subsequently displaced by the closure notices issued on 25 March 2011 for all periods referred to in paragraph 1 above, including 2002 and 2003.

15. On 30 August 2006 the Appellant submitted its accounts for the 18 month period ending 31 January 2005, its corporation tax self assessment returns for the 2004 and 2005 periods and corresponding tax computations.

16. The facts arising from this chronology, insofar as relevant to this appeal, are set out clearly in the related FTT decision of Judge Mosedale released on 24 May 2013 ([2013] UKFTT 320 (TC)) and UT decision of Warren J released on 29 October 2014 ([2014] UKUT 488 (TC)). The 2001 corporation tax return declared a liability to tax of £69,864. The liability was paid by the Appellant and no enquiry was opened into that return. The Appellant paid £57,000 in respect of its tax liability for the 2002

period in or around March 2003. The tax liability for the 2004 period was declared on the return as £137,637.38. At the same time that the return was submitted the Appellant made an amendment to the 2002 return; the amendment showed a tax liability of £272,012.95.

17. Both the 2003 and 2002 (amended) returns claimed relief for amortisation of goodwill arising out of an acquisition. Both returns also showed the remaining tax liability after the amortisation as "paid".

18. HMRC opened enquiries into both the 2002 and 2003 returns on 28 October 2004. HMRC disputed claim to amortisation of goodwill and disputed whether the tax liability declared by the Appellant had been paid.

19. On 30 August 2006 Mr Thomas, the director of the Appellant, sent with the financial statements for the 18 month period ending 31 January 2005, corporation tax returns for the 2004 and 2005 periods and corresponding tax computations, a letter to HMRC. The letter contained the following:

"The terminal loss of £2,483,777 has been calculated based on the result for the final 12 months of trading (1 February 2004 to 31 January 2005). Accordingly, the supporting computations show the adjustment of the results for the following periods:

12 months ended 31 July 2004

6 months ended 31 January 2005

12 months ended 31 January 2005.

The terminal loss has been off-set against profits of the preceding 36 months. The corresponding corporation tax paid for that period was £605,610 before interest."

20. The Appellant considers that this letter made effective claims to terminal loss relief for the carry back periods which it contends arose out of the further amortisation of goodwill.

21. On 4 January 2007 HMRC issued to the Appellant enquiry notices and requests for information, documents and explanations in respect of the 2004 and 2005 periods.

22. The closure notices in respect of all four periods were issued on 25 March 2011. The 2002 and 2003 closure notices, inter alia, refused the claim to amortisation of goodwill. The 2004 and 2005 closure notices denied, HMRC say, the terminal loss claim.

23. On 11 August 2011 the Appellant appealed the decisions in respect of the 2002 and 2003 periods to the Tribunal. Of its own motion the FTT called a hearing to consider its jurisdiction in respect of the following two questions:

(i) Does the Tribunal have any jurisdiction to consider the Appellant's claim that it has already paid the tax that is owing; and

(ii) Can the Tribunal consider the question of whether the Appellant's claim to terminal loss relief is final in the sense of being unable to be challenged by HMRC?

24. Judge Mosedale held (at [53]) that the FTT does have jurisdiction to determine the validity of claims to terminal loss relief, specifically whether the Appellant's claim of 30 August 2006 was made or had to be made under Schedule 1A TMA or section 393A of the Income and Corporation Taxes Act 1988 and in particular whether a closure notice has validly amended a claim to terminal loss relief. However as the Appellant only appealed against the decisions in respect of periods 2002 and 2003 and not the 2004 and 2005 closure notices the FTT held that it did not have jurisdiction to consider the validity of the 2004 and 2005 closure notices in which the claim to terminal loss relief was denied. In respect of question (i) as to whether tax has actually been paid, the FTT held that it has jurisdiction to consider as a general matter the Appellant's claim that it had already paid its tax liabilities for the 2002 and 2003 periods.

25. We should note at this point that the Appellant's argument that it had paid the tax liabilities for 2002 and 2003 arose out of a Contract Settlement dated 24 May 2004 ("the Agreement") between HMRC, the Appellant, Spring Salmon Ltd (which HMRC contend was controlled by Mr Stuart Thomas and Mr Roderick Thomas), Mr Stuart Thomas, Mr Roderick Thomas and the S&R Thomas Partnership (which HMRC also contend was controlled by Messrs Thomas). The Agreement settled certain outstanding tax enquiries but included a clause which stated that there would be further enquiries in connection with the acquisition of the S&R Thomas Partnership business by the Appellant on 26 July 2002 for £2,800,000 and from which the issue of goodwill arose. The only evidence provided by the Appellant in support of the acquisition of goodwill was a Minute of Agreement signed on 24 July 2002 between Messrs S&R Thomas and the Appellant. On behalf of the Appellant the Minute was signed by Mr Roderick Thomas and Mr Stuart Thomas as director and company secretary respectively. The Appellant paid £1,400,000 each to Messrs Thomas on 26 July 2002. For reasons that will become apparent in due course it is not necessary for us to address these matters in any further detail.

26. The Appellant appealed the 2004 and 2005 closure notices out of time; HMRC did not oppose the bringing of the late appeals. By letter dated 19 December 2013 the Tribunal directed that the appeals for all four periods be consolidated.

The closure notices

27. HMRC contend that the closure notices concluded as follows:

(i) That the Appellant is not entitled to relief for goodwill amortisation in any period or in any amount, nor any relief for losses in the 18 month period to the cessation of trade on 31 January 2005 to the extent that those losses take into account the amortisation of goodwill;

(ii) That the Appellant had not paid the tax of £272,012.95 and £137,637.38 for 2002 and 2003 respectively.

28. The closure notices for 2004 and 2005 were written in similar terms and therefore, for illustrative purposes, we will only highlight some of the contents of the 2005 closure notice which stated:

"I am writing to inform you that I have completed my enquiry into the company tax return for period ended 31 January 2005. I conclude that the return falls to be adjusted by reason of the matters referred to below.

The company accounts for period ended 31 January 2005 and Corporation Tax computation for the same period refer to a claim to relief for goodwill amortisation of £2,394,521. I conclude that the company is not entitled to relief for goodwill amortisation in any amount and that the relief of £2,394,541 referred to in the Corporation Tax computation of 30 August 2006 submitted by the company is to be disallowed in the calculation of CT profits.

This claim to relief arises from the purchase of the business and in particular goodwill costing £2,800,000 referred to at notes 6 and 17 to the company accounts for period ended 31 July 2003. Note 17 advises that the company purchased goodwill for £2,800,000 from the partnership of S & R Thomas. The partners of S & R Thomas are the directors of the company. All of the issued shares in Spring Salmon & Seafood were owned by Bala Ltd that was in turn owned by the Maclennan Trust. The trustees of the Maclennan Trust are participators in Bala and therefore participators in Spring Salmon and Seafood. I conclude that R C Thomas and S J Thomas are participators in Spring Salmon & Seafood within the meaning of Section 417 (1) and (3) ICTA 1988 by reason of being beneficiaries and settlors in the Maclennan Trust…

The loss reflected in the corporation tax computation for the 18 month period to 31 January 2005 submitted by the company is £2,819,065. Having concluded that the company is not entitled to relief for the goodwill amortisation of £2,394,521 referred to above I conclude that the CT loss for the 18 month period is reduced to £424,544 and that the CT loss for the 6 month period to 31 January 2005 is £141,515.

For the avoidance of doubt the corporation tax loss of £424,544 referred to above is on the basis that the company is entitled to relief for the accrued bonuses charge of £900,000 and the wages and salaries charge of £178,230 in the company accounts for the 18 month period to 31 January 2005. I have concluded that PAYE and NIC should have been charged on both of these amounts and have instructed the creation of a PAYE scheme to allow for the issue of Regulation 80 PAYE determinations and Section 8 NIC assessments subjecting the £900,000 and £178,230 to PAYE and NIC….

Having subjected the £900,000 and £178,230 charged in the accounts for the 18 months to 31 January 2005 to PAYE and NIC I conclude that the CT profits for the period ended 31 January 2005 are NIL. The CT computation submitted by the company is on the basis of a claim to carry back any CT loss on the cessation of trade

but I should be grateful if you would confirm how the company wishes to utilise this loss of £141,515 referred to above."

The legislation

29. By virtue of section 393A of the Income and Corporation Taxes Act 1988 ("Section 393A") a trading loss in an accounting period can be set off against profits in that accounting period or certain earlier periods:

"393A. Losses: set off against profits of the same, or an earlier, accounting period

(1) …where in any accounting period … a company carrying on a trade incurs a loss in the trade, then, subject to subsection (3) below, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against profits (of whatever description) –

(a) of that accounting period, and

(b) if the company was then carrying on the trade and the claim so requires, of preceding accounting periods falling wholly or partly within the period specified in subsection (2) below;

and, subject to that subsection and to any relief for an earlier loss, the profits of any of those accounting periods shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this subsection against profits of a later accounting period…

(2A) This section shall have effect in relation to any loss to which this subsection applies as if in subsection (2) above, the words three years were substituted for the words twelve months.

(2B) Where a company ceases to carry on a trade at any time, subsection (2A) above applies to the following –

(a) the whole of any loss incurred in that trade by that company in an accounting period beginning twelve months or less before that time;
and

(b) the part of any loss incurred in that trade by that company in an accounting period ending, but not beginning, in that twelve months which is proportionate to the part of that accounting period falling within those twelve months."

30. Section 343 provides:

(1) Where, on a company ("the predecessor") ceasing to carry on a trade, another company ("the successor") begins to carry it on, and—

(a)on or at any time within two years after that event the trade or an interest amounting to not less than a three-fourths share in it belongs to the same persons as the trade or such an interest belonged to at some time within a year before that event; and

(b) the trade is not, within the period taken for the comparison under paragraph (a) above, carried on otherwise than by a company which is within the charge to tax in respect of it;

then the Corporation Tax Acts shall have effect subject to subsections (2) to (6) below.

In paragraphs (a) and (b) above references to the trade shall apply also to any other trade of which the activities comprise the activities of the first mentioned trade...

(4A) Subsection (2A) of section 393A shall not apply to any loss which (but for this section) would fall within subsection (2B) of that section by virtue of the predecessor's ceasing to carry on the trade, and subsection (7) of that section shall not apply for the computation of any such loss."

31. Paragraph 15 (2) of Schedule 18 Finance Act 1998 which is concerned with amendment of returns by companies provides as follows:

"The notice must be in such form as an officer of Revenue and Customs may require."

32. Paragraph 15 (4) states that:

"Except as otherwise provided, an amendment may not be made more than 12 months after –

(a) the filing date…"

33. Paragraph 58 is concerned with claims involving more than one accounting period:

"(1) This paragraph applies to a claim or election for tax purposes if—

(a) the event or occasion giving rise to it occurs in one accounting period (the period to which it "relates"), and

(b) it affects one or more other accounting periods (whether or not it also affects the period to which it relates).

(2) If a company makes a claim or election which—

(a) relates to an accounting period for which the company has delivered a company tax return and could be made by amendment of the return, or

(b) affects an accounting period for which the company has delivered a company tax return and could be given effect by amendment of the return,

the claim or election is treated as an amendment of the return.

The provisions of paragraph 15 (amendment of return by company) apply.

(3) Schedule 1A to the Taxes Management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company if and to the extent that it is not –

> *(a) made by being included (by amendment or otherwise) in the company tax return for the accounting period to which it relates, and*
>
> *(b) given effect by being included (by amendment or otherwise) in company tax returns for the accounting periods affected by it."*

34. Schedule 1A TMA 1970 provides for claims not included in returns.

The issues in the current appeal

35. We have set out in some detail the background to this appeal in order that the reader can understand the arguments presented to us. By the time of the substantive hearing the scope of the appeal had narrowed.

36. In response to Directions issued on 5 November 2014 which required the Appellant to lodge a statement of issues it considered fell to be determined at this appeal, the Appellant stated:

"…the appellant is compelled to restrict the issues that fall to be determined in this appeal to the two preliminary issues identified by Judge Mosedale in her Decision released on 24 May 2013, namely the "tax paid issue" and the terminal loss relief issue, and the Revenue's refusal of marginal small companies' CT relief."

37. Having considered the Appellant's response the Tribunal directed the issues to be determined as:

> (a) the validity of the 2004 and 2005 closure notices and whether or not the Claim was made in the 2004 and 2005 returns; and
>
> (b) the other outstanding issues in the appeal identified by Judge Mosedale in her Decision.

38. The Appellant's note of argument prepared and served for the purpose of the substantive hearing set out the following as the grounds of appeal relied upon:

"The appellants appeal is only on the ground that the 2006 terminal loss relief claim had the effect of reducing its liability to corporation tax, in particular because the Revenue's omission to open enquiries into it under Schedule 1A to the Taxes Management Act 1970 has the effect of making the claim final and binding. Reference is made to paras. 21(c) and 29(b) of Judge Mosedale's judgment of 24th May 2013."

(At [21(c)]) Judge Mosedale noted the appellant's ground of appeal as being that *"the terminal loss relief claim has the effect of reducing its tax liability"* and at [29(b)]

Judge Mosedale raised the question of "*whether the appellant's claim to terminal loss relief is final in the sense of being unable to be challenged by HMRC?*")

39. At the hearing before us Mr Upton clarified that its appeal would rely solely on submissions and no evidence would be called as the outstanding grounds of appeal depend on questions of the application of the law in light of agreed documents.

40. We were provided with a number of bundles containing correspondence and statements of witnesses. The following is a brief overview of the statements.

41. Mr Anthony Stewart is the HMRC officer with responsibility for completing the enquiries into the returns and accounts of the Appellant and associated taxpayers. He explained that the first number of enquiries were settled by way of a tax agreement/contract dated 24 May 2004. It was noted by Mr Stewart that the only document provided by the Appellant to HMRC in relation to the transaction whereby the Appellant paid £1,400,000 each to Messrs Thomas for goodwill on 26 July 2002 is a Minute of Agreement between "The Firm of Messrs S & R Thomas and Spring Salmon & Seafood Limited" which was signed on behalf of both parties on 24 July 2002 by Messrs Thomas. Mr Stewart explained that there is no goodwill reflected as an asset in the S&R Thomas Partnership returns or accounts for any period throughout the period of trade and the £2,800,000 paid to the partnership for goodwill in that business contrasts with the valuation of the goodwill in the Spring Salmon Ltd accounts of £15,000. Mr Stewart concluded in the Closure Notices for periods ending 31 July 2002, 31 July 2003, 31 July 2004 and 31 July 2005 that the Appellant was not entitled to relief for goodwill amortisation (intangibles relief) in any period. He also concluded that the Appellant had not paid the tax referred to at box 75 of the amended Corporation Tax Self Assessment for period ended 31 July 2002 and the return for period ended 31 July 2003.

42. Mr James Peter Taylor, an employee of HMRC Share and Assets Valuation and Chartered Surveyor provided an expert witness statement in which he provided his opinion of the market value of the goodwill of the S&R Thomas Partnership which was transferred to the Appellant on 26 July 2002.

43. Mr Taylor explained that the sale is deemed to be by private treaty between the vendor and the purchaser and a fundamental factor is that neither the actual suppliers to the partnership (Spring Salmon Ltd) nor the actual customers of the partnership (the Appellant and Credenza Seafoods – the latter of which had 50% of the issued shares owned by Messrs Thomas) or Messrs Thomas are deemed to be parties to the sale. Mr Taylor stated that the partnership was entirely reliant on closely connected companies, with no other established and independent customers or suppliers which, in his view, would leave the prospective prudent purchaser extremely pessimistic as to the partnership's worth to anybody outside of the existing arrangement. Consequently Mr Taylor concluded that the market value of the goodwill should be taken as nil.

44. Mr Nicholas Edward Spargo, an employee of HMRC and Chartered Accountant provided an expert witness statement. Mr Spargo was instructed to outline the relevant requirements that apply to the way in which a business acquisition is accounted for in accordance with UK GAAP (UK Generally Accepted Accounting

Practice) and whether the Appellant's 31 July 2002 balance sheet accorded with UK GAAP in recognising purchased goodwill of £2,800,000.

45. Mr Spargo concluded that under UK GAAP an entity can use either merger accounting or acquisition accounting to account for a business acquisition. Merger accounting must be used where the acquisition is not of one entity by another but the formation of a new reporting entity as a substantially equal partnership where no party is dominant. In all other cases the acquisition must be accounted for under acquisition accounting.

46. Under merger accounting the acquired assets and liabilities are recognised in the acquirer's financial statements at the amounts recorded in the acquired business; no goodwill arises. Under acquisition accounting the identifiable assets and liabilities are included on the acquirer's balance sheet at their fair value at the date of acquisition. The difference between the aggregate of those fair values and the fair value of the purchase consideration is recognised as purchased goodwill which, if positive, is then amortised over its useful economic life.

47. Mr Spargo was unable to form an opinion as to whether recognition of purchased goodwill of £2,800,000 in the Appellant's 31 July 2002 balance sheet is in accordance with UK GAAP, primarily because he had seen no evidence that the Minute of Agreement accurately reflects what actually happened. If indeed the Appellant did acquire a business on 26 July 2002 Mr Spargo could not provide an opinion as to whether goodwill of £2,800,000 should have been recognised because he had no evidence of the following:

- That the acquired business had stock and customer contracts at the date of acquisition;
- That the fair value of the acquired stock was £35,000; or
- Whether any customer contracts acquired by the Appellant are capable of being disposed of or settled without disposing of the acquired business; and the fair value of those customer contracts at the date of acquisition.

48. If the Appellant did not acquire a business on 26 July 2002 Mr Spargo concluded that purchased goodwill of £2,800,000 should not be recognised in the 2002 balance sheet.

Submissions

Periods 2002 and 2003

49. It was noted by Mr Artis that the Appellant's note of argument fails to address the tax paid issue. Given that no evidence was offered by the Appellant it was inferred by HMRC that the issue had been abandoned. Mr Artis contends that it is not open to the Appellant to raise the new argument at paragraph 2 of its Statement of Issues that the FTT has no jurisdiction to determine the tax paid issue because it it is not a ground

of appeal contained in the notice, it is misconceived and does not assist in determining the matters under appeal.

50. Mr Artis highlighted the absence of any evidence to demonstrate that the Appellant acquired goodwill or that any goodwill acquired by it had the value claimed by the Appellant in its accounts, tax computations or returns for any period under appeal.

51. The consequence of the abandonments is, Mr Artis submits, fatal to the Appellant's appeals in relation to periods 2002 and 2003 because if the Appellant is unable to show that it had any goodwill to be written down in 2002 or 2003 to the purported value and the Appellant is unable to show that it paid tax as claimed, the HMRC's conclusions and amendments on the closure of the enquiries for 2002 and 2003 must stand.

52. That submission was made without prejudice to the question of whether, and to what extent, the claim made in relation to the 2004 period and/or the 2005 period (if the Appellant is entitled to carry back loss relief) is to be given effect by way of the discharge or repayment of tax under Schedule 1A paragraph 4(1) TMA 1970:

"Subject to sub-paragraphs [(1A), (3) [to (5)]] below . . .,] an officer of the Board or the Board shall, as soon as practicable after a claim other than a partnership claim is made, or such a claim is amended under paragraph 3 above, give effect to the claim or amendment by discharge or repayment of tax."

53. Mr Upton clarified in oral submissions that the Appellant had abandoned the arguments highlighted by Mr Artis. He confirmed that the sole ground of appeal is that the 2004 and 2005 closure notices are not valid in law and were incompetent to refuse the terminal loss relief claim.

54. In those circumstances both parties invited us to dismiss the appeals against the 2002 and 2003 closure notices.

Periods 2004 and 2005

HMRC's submissions

55. HMRC contend that in essence this is a procedural argument, there being no real challenge to the substance of the closure notices. Furthermore, HMRC say, it is more accurate to characterise the issue as one of effectiveness rather than validity as the enquiries were validly opened and validly closed; on no view can it be said that the closure notices were per se invalid. The only question is whether their scope extended to an enquiry into the terminal loss relief claim ("the Claim").

56. Mr Artis submitted that the issue in respect of 2004 and 2005 can be summarised as whether the Claim was subjected to enquiry so that the closure notices are effective to deny relief. If the closure notices are effective then the Appellant has no basis for showing that it incurred any losses other than those which the closure notices deemed to exist.

57. Mr Artis noted that the Appellant contends that the closure notices did not, with sufficient clarity, refuse the Claim and it is suggested that the Appellant was left in reasonable doubt by the terms of the closure notices. However as there is no evidence on this issue HMRC submit that it cannot be adjudicated upon and furthermore it is not an issue that is properly before the Tribunal.

58. Mr Artis began by outlining what was provided by the Appellant in relation to the 2004 and 2005 periods. With the letter dated 30 August 2006 the Appellant submitted:

(a) an appeal against penalties for late returns;

(b) a request for payment of a rebate of £642,835 plus interest;

(c) CT600 short form tax return forms for the 12 months ended 31 July 2004 and 6 months ended 31 January 2005;

(d) Its accounts for the 18 month period ending 31 January 2005;

(e) Its corporation tax computations for "the relevant periods";

(f) An explanation that the terminal loss of £2,483,777 had been calculated based on the final 12 months to 31 January 2005; and

(g) An explanation as to how the terminal loss had been used.

59. The 2004 return declared that the accounts and computations attached to the return relate to a different period to the return and that more than one return is being made. The box is ticked to notify that a repayment is due for an earlier period.

60. The turnover on the return is declared as £1,689,231. No profits or losses are declared. Instead profits chargeable to corporation tax are declared to be nil. It is declared that there were no trading losses in this or a later accounting period under section 393A ICTA 1988 and the self-assessment to tax payable is nil.

61. On page 3 of the return there is a declaration that £686,526 of Case 1 trading losses had arisen, calculated under section 393 ICTA 1988. The form was signed by Mr Roderick Thomas.

62. The 2005 return was in similar terms. It declared that there was no turnover, profits, deductions or reliefs. Profits chargeable to corporation tax were stated as nil. On page 3 of the return there is a declaration that £2,144,192 of Case 1 trading losses had arisen, calculated under section 393 ICTA 1988.

63. No separate accounts were provided for 2004 and 2005. The accounts delivered covered the 18 month period to 31 January 2005. HMRC contend that the tax computations provided were required to make sense of the individual accounting periods. In the profit and loss account turnover for the 18 month period is stated as £2,533,846. A loss on "ordinary activities" before taxation is given as £2,846,495. That is stated after deduction of £2,439,776 for depreciation and amortisation. "Tax relief" on the loss is stated to be due, amounting to £634,613. In the balance sheet intangible fixed assets are stated as nil (£2,394,521 at 31 July 2003). At Note 1 on

page 5 of the accounts it is stated that the remaining balance of "goodwill" has been fully written off. At Note 3 on page 6 it is explained that the operating profit is stated, inter alia, after that write-off. At Note 6 which is headed "Taxation" on page 7 it is stated that at 31 January 2005 £605,875 was due to the company in respect of "UK corporation tax terminal loss relief" (plus interest) and goes on to explain:

"In the opinion of the Director, the amortisation of goodwill is allowable as a deduction against profits for tax purposes. The goodwill was acquired from the S&R Thomas Partnership, which is not connected with the beneficial owners of the company. Accordingly, amortisation of £2,394,521 (2003 - £400,000) has been treated as tax deductible in these amounts."

64. At Note 7 under the heading "Intangible Fixed Assets" the cost (£2,800,000) and amortisation (£405,479 at 1 August 2003; £2,394,521 in period) of "Goodwill" is confirmed.

65. The tax computations cover the 18 month period from 1 August 2003 to 31 January 2005. The 12 month period to 31 July 2004 and the 6 month period to 31 January 2005 are described as "notional."

66. The computations show a loss of £2,819,055 for the 18 month period to 31 January 2005 after charging "goodwill amortisation" of "2,394,521. The loss is allocated between the notional periods as follows:

- £677,031 to the 12 months in the 2004 period (after charging £400,000 "goodwill amortisation" in that period); and
- £2,142,034 to the 6 months in the 2005 period (after charging £1,994,521 "goodwill amortisation" in that period).

67. The computations for the 12 months to 31 January 2005 assert a loss chargeable to corporation tax of £2,483,777 after charging £2,194,521 for "goodwill amortisation." Under the heading "Terminal Loss Relief" that loss is claimed against tax charged and, the Appellant says, paid in three periods comprising the latter half of 2000/01 and the whole of periods 2002 and 2003.

68. The closure notices in respect of periods 2004 and 2005 concluded that:

(a) the Appellant was not entitled to relief for goodwill amortisation as had been stated in the company accounts and the claim for relief for goodwill amortisation of £2,394,521 was disallowed in the calculation of CT profits;

(b) The CT loss for the 18 month period was reduced to £424,544; the loss for 2004 reduced to £283,029 and the loss for 2005 reduced to £141,515.

69. In oral submissions Mr Artis accepted that there was strictly no express denial of the Claim but submitted that the Claim was denied by the fact that the amounts claimed were denied.

70. It was noted by Mr Artis that the Appellant's had completed Box 122 in the relevant returns to state that trading losses had arisen under section 393 ICTA 1988 which provides for "Losses other than terminal losses." The Claim purportedly made by the Appellant does not fall within section 393 as the Appellant had no succeeding accounting period and no continuing trade after 31 January 2005; the losses arose from the cessation of trade and the claimed writing off of the goodwill the Appellant claimed to have acquired from the S&R Thomas Partnership. Aside from the fact that the Claim does not fall within section 393, Mr Artis also noted that, in any event, this section makes no provision for the carrying back of a loss. The returns were therefore inaccurate.

71. For terminal losses to be carried back the Claim had to be made under section 393A ICTA 1988. The Appellant accepts that this is the correct provision. In oral submissions Mr Artis drew the distinction between the statutory provisions for making a claim and the mechanics of giving effect to a claim. In taking us through the wording of section 393A, he highlighted subsection (2) by virtue of which the claim must relate to the accounting period in which it was made, as distinct from other periods which may fall to be affected by the claim.

72. In reliance on Warren J in *Spring Salmon & Seafood Limited* Mr Artis contends that the Appellant's reference to "claims" for terminal loss relief is erroneous; there can be only one claim. The time limit of two years set out in section 393A (10) operates from the accounting period in which the loss is incurred.

73. The application of section 393A should be as follows:

(a) The Appellant ceased trading (in the absence of evidence to the contrary) on 31 January 2005;

(b) Section 393A (2A) applies to:

- The whole of the loss incurred in the accounting period beginning 12 months or less before 31 January 2005 – i.e. the whole of the loss incurred in the accounting period beginning 1 August 2004; and
- The proportionate part of any loss incurred in an accounting period ending in that 12 months – i.e. 6 months' worth of losses incurred in the accounting period beginning 1 August 2003 and ending on 31 July 2004.

(c) The Appellant's claim may therefore require the whole of the loss incurred in the six months ending 31 January 2005 to be set off against the profits of 2005 and 2004, 2003 and 2002 (being the three years immediately preceding the accounting period in which those losses were incurred) and require that six months worth of the losses incurred in 2004 be set off against the profits of the three years immediately preceding 2004 (namely 2003, 2002 and 2001).

74. However, the first requirement for section 393A to apply is that the Appellant must have incurred a loss in its trade. HMRC concluded that there was no such loss

and the Appellant has provided no evidence to the contrary. HMRC argues that this alone is sufficient to determine the appeal in favour of HMRC.

75. Mr Artis submits that irrespective of whether or not the Appellant made a claim, no loss has been established and therefore the issue of the validity of HMRC's refusal of the claim takes the Appellant's case no further.

76. Mr Artis referred us to Warren J's decision in *Spring Salmon & Seafood Limited* at [27] – [30]:

> *"I will return to that in a moment, but first I need to look at the 2004 and 2005 closure notices. They each refer to the accounts for the period ending 31 January 2005 and the corporation tax computation which refer to a claim for goodwill amortisation of £2,394,521. The inspector's conclusion was that SSSL was not entitled to relief for goodwill amortisation in any amount so that the relief claimed was to be disallowed in calculating SSSL's corporation tax profits. Later on in the notices, the inspector wrote this:*
>
> *"The loss reflected in the corporation tax computation submitted for the 18 month period to 31 January 2005 submitted by the company is £2,819,065. Having concluded that the company is not entitled to relief for the goodwill amortisation of £2,394,521 referred to above I conclude that the CT Loss for the 18 month period is reduced to £424,544 and that the CT loss for the 6 month period to 31 January 2005 is £141,515.....*
>
> *....The CT computation submitted by the company is on the basis of a claim to carry back any CT loss on the cessation of trade but I should be grateful if you would confirm how the company wishes to utilise this loss of £141,515 referred to above."*
>
> *It is perfectly clear from the 2004 and 2005 closure notices that no deduction was to be allowed for goodwill amortisation with the result that the loss, so far as attributable to that amortisation, which SSSL had claimed to set off under section 393A was not a loss at all. If the Claim was included in the 2005 return, then the enquiry which was in fact opened under paragraph 24 was a valid enquiry into the Claim. There can be no doubt, and Mr Upton accepted, that in those circumstances the closure notices were effective to disallow the Claim.*
>
> *But if the Claim was not included in the 2005 return (or perhaps the 2004 return), then his submission is that the only way of challenging the Claim was by opening an enquiry under Schedule 1A, which was not done. The 2004 and 2005 closure notices cannot, as a matter of construction, be read, in his submission, as a determination that the loss claimed cannot be carried back. Or, if it can be read that way, it is void because HMRC had no power to make such a ruling given that it had failed to open an enquiry under the relevant provision.*

However, even in these circumstances, it cannot, in my view, be suggested that the 2004 and 2005 closure notices were ineffective to bring about an amendment to the 2004 and 2005 returns, in contrast with the Claim. Whatever else is or is not to be seen as included in the returns, it is clear that the financial statements and corporation tax computations accompanying the letter of 30 August 2006 formed part of the return (although whether the claim to set of the terminal trading loss formed part of the return is a matter I will come to later). Without those documents, the returns are incomplete, in particular the 2005 return contains no entry for turnover and there would be an absence in both returns of a self assessment required by paragraph 7 Schedule 18 and supporting tax computation. And what is also clear is that the 2004 and 2005 closure notices were effective to amend the actual returns at box 122 to reduce the loss figures inserted."

77. Mr Artis argues that there is no terminal loss which can form the subject of relief, irrespective of how the Claim was made because the return for the accounting period to which the Claim relates has been the subject of enquiry, the conclusions of which denied that any loss was incurred.

78. It was noted by Mr Artis that section 343 ICTA 1988 allows the loss of one company to be carried forward against the profits of the same trade of another company where, within certain limitations, the other company has begun to carry on the same trade as the first company and where the two companies are in substantially the same ownership. The relevance to this case of this provision is that the Appellant ceased trading on or about 31 January 2005 and on 5 March 2007 Spring Capital Ltd (then called Spring Seafoods Ltd) notified HMRC that it had taken over the Appellant's trade and was amending its corporation tax self-assessment for the periods ending 9 March 2005 and 30 April 2005 "to reflect the losses of the trade" giving rise to a loss for corporation tax purposes amounting to £2,159,915.

79. Mr Artis brought to our attention the related case of *Spring Capital Ltd v HMRC* (TC/2011/01784) to which the Appellant was joined as a party and is bound by the Tribunal's findings of fact. It was a matter of agreement between the parties that Spring Capital Ltd had a *prima facie* entitlement to carry forward losses under section 343 to the extent that there were losses available. The quantum of losses available to carry forward awaits our findings in this appeal.

80. The effect of section 343 (4A) (set out at paragraph 30 above) is to dis-apply section 393A (2A) and (2B). This has the effect that the period that losses can be carried back is restricted to the 12 months immediately preceding the accounting period in which the loss is incurred.

81. Schedule 18 FA 1998 prescribes how the claim is to be made. Insofar as is relevant:

"4: References in this Schedule to the delivery of a company tax return are to the delivery of all the information, accounts, statements and reports required to comply with the notice requiring the return…

7 (1): Every company tax return for an accounting period must include an assessment (a "self-assessment") of the amount of tax which is payable by the company for that period—

(a) on the basis of the information contained in the return, and

(b) taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period.

(2) For this purpose a company tax return is regarded as a return for an accounting period if the period is treated in the return as an accounting period and is not longer than twelve months, even though it is not, or may not be, an accounting period….

10 (1): In Part VII of this Schedule (general provisions as to claims and elections) paragraphs 57 to 59 contain provisions as to the circumstances in which a claim or election may or must be made, or is to be treated as having been made, in a company tax return….

15 (1): A company may amend its company tax return by notice to an officer of Revenue and Customs.

(2) The notice must be in such form as an officer of Revenue and Customs may require.

(3) The notice must contain such information and be accompanied by such statements as an officer of Revenue and Customs may reasonably require.

(4) Except as otherwise provided, an amendment may not be made more than twelve months after—

(a) the filing date, or

(b) in the case of a return for the wrong period, what would be the filing date if the period for which the return was made were an accounting period….

25 (1): An enquiry into a company tax return extends to anything contained in the return, or required to be contained in the return, including –

(a) any claim or election included in the return,

(b) any amount that affects or may affect –

(i) the tax payable by that company for another accounting period…

58 (1) This paragraph applies to a claim or election for tax purposes if –

(a) the event or occasion giving rise to it occurs in one accounting period (the period to which it "relates"), and

(b) it affects one or more other accounting periods (whether or not it also affects the period to which it relates).

(2) If a company makes a claim or election which –

(a) relates to an accounting period for which the company has delivered a company tax return and could be made by amendment of the return, or

(b) affects an accounting period for which the company has delivered a company tax return and could be given effect by amendment of the return, the claim or election is treated as an amendment of the return

The provisions of paragraph 15 (amendment of return by company) apply.

(3) Schedule 1A to the Taxes management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company if or to the extent that it is not –

(a) made by being included (by amendment or otherwise) in the company tax return for the accounting period to which it relates, and

Given effect by being included (by amendment or otherwise) in the company tax returns for the accounting periods affected by it."

82. Mr Artis contends that for the Appellant's 2005 and 2004 returns to comply with the requirements of paragraphs 4 and 7 of Schedule 18, the return forms must be read in conjunction with the accounts, computations and explanations set out in the covering letter dated 30 August 2006, all of which therefore form part of the return.

83. The fact that no entry was made in the relevant box on the return form is immaterial. Mr Artis contends, in applying the requirements of paragraph 58 that as the Appellant was not out of time to amend its return for 2005 on 30 August 2006, even if the Claim was not made in the return it can be "treated" as an amendment under paragraph 58(2) of Schedule 18.

84. Whether deemed to have been made in the return or "treated" as an amendment to the return, the enquiry was effective to enquire into the losses upon which the claim is based by virtue of paragraph 25 Schedule 18.

85. The Appellant was out of time to amend its returns in respect of periods 2002 to 2004. Consequently paragraph 58(3) of Schedule 18 imposes Schedule 1A TMA but only to the extent that the Claim had not been given effect to by being included in the returns for those accounting periods affected by it.

86. Schedule 1A provides that relief can be given to the Claim by the discharge or repayment of tax. An enquiry under Schedule 1A was therefore not the proper avenue; there is no valid claim in respect of which losses can be carried back and given effect to until the enquiry into the period to which the losses relate is completed.

87. Mr Artis submits that Schedule 1A, save to the extent set out in paragraph 88 above, applies to individuals and partnerships. The Appellant's argument that Schedule1A applies is misconceived.

88. Mr Artis submits that the case of *Revenue & Customs Commissioners v Cotter* [2013] UKSC 69 can be distinguished on the basis that *Cotter* involved personal taxation where the taxpayer made no self-assessment based on a claim for loss relief made in his return; the taxpayer's claim for relief was submitted after the return and HMRC had calculated his liability on his behalf. The Court held that an enquiry should have been opened under s 9A TMA as opposed to Schedule 1A TMA. Mr Artis drew attention to Lord Hodge's judgment at [23] and [27]:

"In judging the rival contentions it is in my view important to recall the sequence of events which I set out in paragraphs 2 – 7 above. First, Mr Cotter gave information relating to his tax affairs in his initial return form. But he did not carry out the calculation of the tax which he was due to pay for 2007/08. Secondly, the Revenue made that calculation. Thirdly, Mr Cotter then provided the information about his provisional loss relief claim in his amendment of the tax return. Fourthly, the Revenue reviewed the return and confirmed its assessment of the tax due for 2007/08, treating the claimed relief as irrelevant to that assessment. Finally, Mr Cotter's advisers disagreed with the Revenue's view but did not seek to amend the tax return (under section 9ZA of TMA) by carrying out their own calculation of tax. In particular, I do not construe the letter of 30 January 2009 from Mr Cotter's accountants as an amendment of his tax return. The accountants did not purport to produce a self-assessment calculation. Their amendment of the return was confined to the intimation of the claim. The statement in the letter of 30 January 2009 that no further 2007/08 taxes would be payable was merely an assertion in a covering letter.

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."

89. Mr Artis also relied on the Upper Tribunal in *R (ex parte de Silva and Dokelman) v HMRC* [UKUT] 0170 (TCC) ("*De Silva*") in which it was said:

"[58] Lord Hodge continued at [26], 'The Revenue was accordingly entitled and indeed obliged to use Sch 1A of TMA as the vehicle for its enquiry into the claim (s 42(11)(a)).' At first glance this seems a slightly curious statement, because it leaves out of account the possibility, following on in particular from the operation of Sch 1B to the TMA, that HMRC would be entitled to enquire into the taxpayer's return for 2008–09 and use that enquiry as a vehicle to challenge the claim for relief based on losses in that tax year which the taxpayer wished to carry back to set off against his

income in the earlier year. I think the explanation for this is that neither the taxpayer nor HMRC argued that such a possibility was relevant to the particular dispute between them and appear not to have drawn this possibility to the attention of the court. Indeed, so far as one can tell from the facts in the case, the statement seems to be clearly correct and beyond dispute: it does not appear that the taxpayer had sought to make any entry in his return for 2008–09 relevant to his claim for carry-back relief in relation to which an enquiry into that *return under s 9A of the TMA would be relevant. The interaction of the provisions which I have reviewed above was not the subject of examination by the Supreme Court, because such examination was not necessary on the arguments which it had to address. I do not consider that this sentence in the judgment of Lord Hodge precludes the analysis of the statutory provisions set out above or the possibility of a challenge to the relevant claim in this case by way of an enquiry into the partnership return for the later years and corresponding deemed enquiry into the individual partner returns for the later years.*

[59] In my view, the part of Lord Hodge's judgment in which he directly addresses Sch 1B is consistent with and supports the analysis I have set out in this judgment. For the purposes of his examination whether the taxpayer was correct in his contention that his carry-back of a claim relating to 2008–09 was part of his 'return' for 2007–08, at para [15] he set out the material provisions in Sch 1B and at para [16] analysed their relevance to the taxpayer's argument as follows:

> *'[16] In my view it is clear, in particular from paras 2(3) and (6), that the scheme in Sch 1B allows a taxpayer, who has suffered a loss in a later year ("year 2") and seeks to attribute the loss to an earlier year of assessment ("year 1"), to obtain his relief by reducing his liability to pay tax in respect of year 2 or by obtaining a repayment of tax in year 2. It does not countenance by virtue of the relief any alteration of the tax chargeable and payable in respect of year 1. On the contrary, the sum for which the taxpayer receives relief in year 2 is the difference between what was chargeable in year 1 and what would have been chargeable "on the assumption that effect could be, and were, given to the claim in relation to that year" (para 2(4)). In other words, the relief is quantified on the basis that the tax liability in year 1 has already been assessed.*

[60] This analysis appears to me implicitly to include the possibility, which on the arguments presented to him Lord Hodge did not have to examine, that a challenge to the claim for relief based on a carry-back claim which is made in the first manner contemplated by him (by the taxpayer 'reducing his liability to pay tax in respect of year 2', ie in his return for year 2) could be made by means of enquiry into that return under s 9A of the TMA (the general provision governing challenges to entries which are properly to be regarded as part of a taxpayer's 'return') rather than by means of an enquiry under Sch 1A to the TMA. On the other hand, if, apart from the entries required to be included in his return for year 2, the taxpayer claims 'a repayment of tax in year 2', that would be a 'stand alone' claim to make use of the relief and the relevant enquiry provision would be that in Sch 1A. The case which the Supreme

Court had to consider was of this latter kind, hence the remarks of Lord Hodge in his judgment at para [26] regarding the obligation to use the procedure in Sch 1A.

[61] At para [27] of his judgment, Lord Hodge said that matters in Cotter would have been different if the taxpayer had made his own assessment of his tax liability by bringing his carry-back claim for relief into account in the calculation of his tax liability in his return: 'Such information and self-assessment would in my view fall within a 'return' under s 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year', and HMRC could not go behind that self-assessment without either amending the return under s 9ZB of the TMA or instituting an enquiry under s 9A of the TMA. That is to say, in such a case the appropriate means of challenge to the claim for relief would be by way of an enquiry under s 9A into the taxpayer's return and not by way of an enquiry under Sch 1A into a 'stand alone' claim. This is in line with, and supports, the points made in para [60] above regarding para [16] of the judgment of Lord Hodge. Where an entry relating to carry-back relief is made in the calculation of the tax due for a particular year in a return for that year, the appropriate means of challenge by HMRC is by way of an enquiry into the return itself, not under Sch 1A.

[62] Adapting this observation to the circumstances of the present case, where an entry which is the foundation for carry-back relief is made in the taxpayer's return for a particular year (here, the entry showing the partnership losses included in the claimants' returns for the later years), an appropriate (if not, in fact, the appropriate) means of challenge by HMRC to that entry and in that respect to the claim for carry-back relief is by way of an enquiry into the return itself, rather than an enquiry under Sch 1A. This was the means of challenge which HMRC has employed in the present case. It is, in my judgment, an entirely lawful means of challenge for them to have used. A taxpayer cannot expect to be immune from a challenge to a claim for carry-back relief while still vulnerable to having relevant entries in his tax return for the later year corrected pursuant to a challenge to that return brought in proper time."

The Appellant's submissions

90. On behalf of the Appellant Mr Upton contends that the Appellant's letter of 30 August 2006 expressly claimed the loss for the 36 months from 1 February 2001 to 31 January 2004. He submits that the claims were made singularly in the letter, which also enclosed the computation and at the same time the returns for 2004 and 2005 were submitted. Section 393A allows for such a carry-back and it was only the periods prior to 31 July 2004 in which the Appellant had profits against which to claim relief. It was clarified by Mr Upton in oral submissions that although the return had referred to a claim being made under section 393, there can be no doubt that the claim was made under section 393A; a matter which HMRC do not dispute.

91. The Appellant submits that that 2004 and 2005 closure notices did not refuse the claims for terminal loss relief or, in the alternative they did not do so with sufficient clarity for that to be the correct construction of them.

92. Mr Upton submits that the closure notices are invalid because they proceeded under Schedule 18 FA 1998; he contends that those provisions do not apply where, as

here, the claims had not been made in a return or in an amendments to a return. Any challenge to the claims should have proceeded under Schedule 1A TMA; in the absence of any such challenge the claims are final and binding.

93. Mr Upton highlighted the relevant provisions of section 393A in support of the argument that the claims were to set off losses in accounting periods ending in the last 12 months of trade against profits in earlier accounting periods. The loss was sustained between 1 February 2004 and 31 January 2005 and set-off against profits earned in *"preceding accounting periods falling wholly or partly within the period"* (section 393A (1) (b)) of three years ending on 31 January 2004.

94. The statutory three year period straddled the Appellant's accounting periods as follows:

- Period ending 31 July 2001 – the last six months
- Period ending 31 July 2002 – the whole 12 months
- Period ending 31 July 2003 – the whole 12 months
- Period ending 31 July 2004 – the first six months

95. Mr Upton referred us to HMRC's guidance "CT600 Guide" in which terminal loss relief claims can be intimated in a separate computation; he argues that this is what Mr Thomas did in his letter dated 30 August 2006.

96. The computation of 30 August 2006 included reference to the total loss in the year to 31 January 2005 as £2,483,777 and a section headed "TERMINAL LOSS RELIEF" ascribing elements of that total sum to the periods 2000-2001, 2001-2002 and 2002-2003 and leaving a figure as the "BALANCE UNRELIEVED". These were, the Appellant contends, clearly claims for terminal loss relief under section 393A ICTA 1988.

97. The terminal loss was not entered in whole or in part in the sections of the returns which related to reliefs under section 393A ICTA 1988. The closure notices did not assert that the claims to relief, the loss and components of the loss were found in the returns. The notices refer to the Appellant's accounts and computation of 30 August 2006 but they relate to the returns and contents of the returns, which did not include the claims; it therefore follows that the 2004 and 2005 closure notices do not state a conclusion about the claims.

98. Mr Upton relies on *Cotter* at [22]:

"The Revenue's argument was that a claim was included in a "return" for the purposes of sections 8(1), 9, 9A and 42 of TMA only if it affected or as Ms Simler put it, could "feed into", the calculation of tax payable in respect of the particular year of assessment."

99. He contends that the computation shows that the claims were expressly made in respect of 2001 – 2003 and did not affect or feed into a calculation of tax payable in respect of 2004 or 2005; therefore even on a functional approach the claims could not be regarded as being included in the 2004 and 2005 returns.

100. The comments in *De Silva* which refer to *Cotter* are relevant (see [58] and [61] of *De Silva*). The analogy can be made that section 9A in *De Silva* is analogous to Schedule 18 in this appeal; as the closure notices proceeded under Schedule 18 they cannot be construed as determining the claims. However Mr Upton submits that *De Silva* is distinguishable on the basis that it was concerned with enquiries into partnerships.

101. In oral submissions Mr Upton highlighted the absence of any specific reference by HMRC to a refusal of the Appellant's claims within the closure notices and he noted that HMRC accept that there had been losses in 2004 and 2005. It is the Appellant's case that its Claim was amended but not refused in principle. If the Tribunal accepts this to be the position then the Claim must be given effect to which renders these appeals unnecessary. In the alternative, there was no competent decision made on the Claim only a decision on quantum.

102. Mr Upton submitted that *Cotter* cannot be distinguished on the basis that it concerned income tax as the principle as to what is to be treated as contained in a return still applies. We were referred to the judgment of Warren J in *Spring Salmon and Seafood Ltd* at [24 (a) and (b)]:

"Paragraph 3: HMRC may by notice require a company to deliver a return containing such information relevant to the tax liability of the company or otherwise relevant to the application of the Corporation Tax Acts to the company as may reasonably be required by the notice.

Paragraph 5: a notice under paragraph 3 must specify the period to which the notice relates. It is implicit in that that the information which is required to be contained in a return is information which relates to that period just as information required to be included in a personal tax return relates to the year of assessment in question: for a recent general discussion, see the judgment of Lord Hodge JSC in HMRC v Cotter [2013] UKSC 69, [2013] 1 WLR 3515 ("Cotter")."

103. It was submitted that section 9A is, in effect, the equivalent of Schedule 18. Information in a tax return may embrace information sent with the form but not actually in it but in that case, for it to be taken as part of the return it is a necessary condition that it needs to be taken into account to achieve the purpose of the return, i.e. the purpose of establishing the amounts in which the taxpayer is chargeable to tax for the relevant year of assessment and the amount payable by him by way of tax for that year. This was not the case in respect of the Appellant's letter of 30 August 2006.

104. In respect of paragraph 58 (1) "*the event or occasion giving rise to the claims*" was the loss in the year to 31 January 2005. It occurred in the accounting periods covering those 12 months. It therefore "*related*" to those accounting periods. However it affected one or more other accounting periods i.e. the three years ending

on 31 July 2003 as well as the accounting periods covering the year to 31 January 2005.

105. In terms of paragraph 58(2)(a) the claims related to the accounting periods covered by the 2004 and 2005 returns but they could not be made by amendment of those returns because (a) the return forms contained no provision for that to be done; and (b) a return is the filing of information for the purpose of calculating the liability to tax for the year to which the return relates but the claims were not made for the purpose of a calculation of the Appellant's liability for either 2004 or 2005. A claim for relief which is made in a later year but in respect of the profit of an earlier year does not affect the amount of tax which is chargeable or payable in relation to the later year, which is the year into which the enquiry was made against which this appeal is brought.

106. In terms of paragraph 58 (2) (b) the claims affected other accounting periods for which the Appellant had delivered returns but could not be given effect by amendment of those returns because the deadline for amendments had expired. Therefore the claims were not to be "treated as an amendment of the return". Consequently paragraph 58(3) applies and therefore so does Schedule 1A.

107. For HMRC to succeed the whole of the documents of 30 August would have to fall within the 2004 and 2005 returns. However paragraph 58(3) provides that inclusion of part of a claim within a return is not the inclusion of the whole; to the remainder Schedule 1A applies.

Late application

108. On behalf of the Appellant Mr Upton made a late application to amend its grounds of appeal to include issues relating to PAYE and NIC. In essence Mr Upton submits that in order to avoid double taxation the losses set out in the closure notice require amendment to take account of PAYE and NIC matters.

109. HMRC opposed the application, which introduced a matter not previously raised in the Notices of Appeal or written submissions. In any event, Mr Artis noted that the closure notice states that allowance has been made for these deductions.

110. Furthermore, Mr Artis submits that evidence would be required as to what amounts were charged in the PAYE/NIC scheme and the issue cannot be properly dealt with on submissions alone. Mr Artis argues that the time limits for amending the relevant returns have long since passed and the terms of the closure notices cannot be amended. If the Appellant failed to account properly for PAYE/NIC at the time then the opportunity remains lost.

Decision

111. We should note that the grounds of appeal that were not pursued at the hearing by the Appellant were not considered and we make no comment on them.

2002 and 2003 periods

112. By consent between the parties the appeals against the 2002 and 2003 periods are dismissed and the amendments made by those closure notices stand.

2004 and 2005 periods

113. If the Claim was made in the 2004 or 2005 return, the parties accept that the enquiries under paragraph 24 of Schedule 18 FA 1998 validly encompassed enquiries into the Claim and the closure notices were effective to deny the relief by way of the Claim. If the Claim was not made in a return the parties agree that any enquiry should have been opened under Schedule 1A TMA 1970 and the closure notices were ineffective to deny relief by way of the Claim, subject to the provisions of section 343 (4A) ICTA 1988.

114. We began by considering the authorities to which we were referred.

Analysis of *Cotter*

115. In *Cotter* the taxpayer filed his self-assessment tax return for 2007/2008. No claim for loss relief was included nor did the taxpayer calculate the tax due for that tax year, leaving it to HMRC to calculate. His accountants subsequently wrote to HMRC enclosing a provisional 2007/2008 loss relief claim arising from an employment related-loss in the tax year 2008/2009 and amendments to the 2007/2008 self-assessment form. HMRC opened an enquiry into the loss relief claim and informed the taxpayer that no effect would be given to any credit for the loss until those enquiries were complete. HMRC issued a fresh tax calculation which assessed the taxpayer's liability in the same sum as the original assessment. The taxpayer's accountant asserted that no further taxes were payable for 2007/2008 because of the loss claim. HMRC opened an enquiry into the amendment and the 2008/2009 loss claim under Schedule 1A TMA 1970. It was argued by the taxpayer's representatives that HMRC could only inquire under section 9A of the 1970 Act.

116. In the Supreme Court Lord Hodge provided the following explanation at [16]:

"In my view it is clear, in particular from paragraphs 2(3) and (6), that the scheme in Schedule 1B allows a taxpayer, who has suffered a loss in a later year ("year 2") and seeks to attribute the loss to an earlier year of assessment ("year 1"), to obtain his relief by reducing his liability to pay tax in respect of year 2 or by obtaining a repayment of tax in year 2. It does not countenance by virtue of the relief any alteration of the tax chargeable and payable in respect of year 1."

117. Lord Hodge went on to explain that income tax is an annual tax and the liability to such tax is calculated in relation to a particular tax year. He noted that the claim, which arose from losses in 2008/2009 did not affect the amount of tax which was chargeable or payable in relation to 2007/2008.

118. The fact that the relief did not affect the tax relating to 2007/2008 was fundamental to HMRC's reason for opening its enquiry under Schedule 1A to the 1970 Act. As Lord Hodge explained at [24] – [25]:

"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…

The tax return form contains other requests, such as information about student loan repayments…or claims for losses in the following tax year…which do not affect the income tax chargeable in the tax year which the return form addresses…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""

119. As Lord Hodge went on to explain at [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."

120. In so far as is relevant to this appeal, the principles we took from *Cotter* are as follows: we bore in mind that the legislation applicable in *Cotter* differed to that in the present case, but in general terms it seemed clear to us that we could properly conclude that a clear distinction exists between the tax year to which a claim relates and other tax years which may, or may not be affected by that claim. Furthermore the information to be considered to be part of a return is that which is necessary to establish the amount of tax chargeable and payable for the year to which that return relates. Where the taxpayer calculates his self-assessment by reference to the claim (in that it has a bearing on the liability due) in the return for the relevant year HMRC cannot go behind that assessment without making an amendment or opening an enquiry which would be treated as an enquiry into that return.

Analysis of *De Silva*

121. In *De Silva* HMRC refused claims by the taxpayers for loss relief in relation to investments by them in certain film partnerships. The relevant film partnerships lodged tax returns pursuant to section 12AA TMA 1970 in which they claimed

substantial trading losses for the tax years 1999/2000, 2000/2001 and 2001/2002 in relation to which relief was claimed. Following an enquiry HMRC did not accept the losses and claims for relief and issued closure notices accordingly. Subsequently an agreement was reached between HMRC and the partnerships ("the Agreement") under which losses were recognised at a considerably reduced level. The individual members of the partnerships were not parties to the Agreement.

122. In his self-assessment tax return for 1998/1999 Mr De Silva included a claim to set off trading losses in respect of certain partnerships in other years. In his self-assessment tax return for 1999/2000 Mr De Silva made similar carry-back claims to set off losses against his income in earlier years. HMRC notified the taxpayer that the carry-back claims would be amended in line with the lower figures settled in the Agreement. In a judicial review claim the taxpayers argued that the reliefs were not to be regarded as claims made in a personal tax return under section 8 TMA but stand alone claims for relief and therefore Schedule 1A to the TMA applied.

123. Sales J explained at [39] – [40]:

"*Where an individual partner makes a claim to utilise partnership losses arising in a later period by setting them off against his income in an earlier period, I do not think that it is properly to be regarded as a simple "stand alone" claim for relief made outside a return. It is an inchoate claim for relief which, as a matter of substance, will only be validated when the partnership losses are included in the partner's individual return for the later period, reflecting the partnership statement for that period. Several of the claims for relief in this case were rather unusual, since they were asserted by the Claimants (by way of carry back to earlier periods) 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 Claimants for those later periods would be. But the claims for relief could, as a matter of substance, only ultimately be made good if the Claimants 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 a more usual case, where the partnership losses have arisen in the later year, are included in the partnership statement forming part of the partnership return for that year and also in a partner's individual return for that year, and then the partner asks for those losses to be carried back to be set against his general income in prior years, the position would be that much clearer. A challenge by HMRC to the amount of the losses which could be brought into account for the benefit of the partner would be by way of enquiry into the partnership return and partnership statement and hence by deemed enquiry, under section 12AC(3) of the TMA , into the partner's return. This was, in fact, the position in relation to Mr Dokelman's claim in his return for 2000/2001 to bring partnership losses of £133,000 into account."

124. Sales J did not accept that *Cotter* assisted the taxpayers; he explained that the intimation by the taxpayers that they would wish to set off their shares of the partnership losses in their individual returns for earlier years could have just as easily

been communicated to HMRC by way of letter or other such means; it did not follow that the claims were "included in a return". He went on to highlight the distinction between *De Silva* and *Cotter* at [56]:

"…in the present case, HMRC maintain that their relevant enquiry (which is deemed to include an enquiry under section 9A) is into the partnership returns and corresponding individual partner returns in respect of the later years (i.e. the years in which the partnership losses actually arose and were reflected as required in the relevant returns), not into the individual partner returns for the earlier years. This is, in my judgment, an important point of distinction between Cotter and the present case."

125. We also noted the comments of Sales J at [60] by which he distinguished between a claim made in a return where, by that claim, the taxpayer sought to reduce his liability for the relevant year and a "stand alone" claim which may be contained in the relevant return but which does not form part of the information required to assess the amount of tax payable but may result in, for example, a repayment.

Analysis of *Spring Salmon & Seafood Ltd* (UT)

126. We agreed with the comments of Warren J in the UT (at [22])that a claim made under section 393A is a single claim which may be given effect to by setting off the loss from which that claim arises against profits of other accounting periods:

"Two points should be noted about these provisions. First, where there is a trading loss in an accounting period, the claim which can be made under section 393A is a single claim notwithstanding that it is given effect to by setting off the loss against profits of other accounting periods: separate claims are not made in relation to each accounting period affected by the claim. Secondly, the loss is set off first against other profits of the accounting period in which the loss was incurred, and then against the profits of the immediately preceding period and so on. It is not possible for a taxpayer to elect to set the loss off against profits of an earlier period (when for instance the tax rates might be higher) leaving the profits of the later accounting period unaffected."

127. In applying this guidance to the appeal before us we treated the Appellant as having made one claim in respect of a trading loss in its final 18 month trading period which must first be set off against profits in the accounting period in which the loss was incurred and then against the profits of the period immediately preceding it and so on.

128. Section 393A is the starting point which provides for the relief that can be claimed by a taxpayer. Schedule 18 of the Finance Act 1998 makes provision for how the claim is made.

129. Paragraph 7 of Schedule 18 FA 1998 requires that every company tax return must include a self-assessment of the amount of tax which is payable by the company for that period on the basis of the information contained in the return, and taking into

account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period.

130. Paragraph 8 of Schedule 18 Finance Act 1998 sets out how the calculation of tax payable is to be determined:

"The amount of tax payable for an accounting period is calculated as follows.

First step

Calculate the corporation tax chargeable on the company's profits:

Take the amount of the company's profits for that period on which corporation tax is chargeable.

Apply the rate or rates of corporation tax applicable to the company.

Second step

Then give effect to any reliefs or set-offs available against corporation tax chargeable on profits…

Fourth step

Then deduct any amounts to be set off against the company's overall tax liability for that period…"

131. At [24] Warren J stated at:

"Paragraph 25: this provides that an enquiry may extend to anything contained in the return or required to be contained in the return including

"(a) any claim or election in the return,

(b) any amount that affects or may affect –

(i) the tax payable by that company for another accounting period.…."

HMRC is thus able to enquire into any aspect of a return including any claim for relief included in the return. In such a case, if the claim for relief contained in the return is rejected by a closure notice following an enquiry, the rejection is effective not only so far as concerns the accounting period to which the return relates, but also to any other accounting period which might be affected by the claim.

Paragraph 57: this paragraph applies to a claim or election which affects only one accounting period. That is clearly not so in relation to SSSL's claim for carry back loss relief since the claim affects more than one accounting period.

Paragraph 58: this paragraph applies to a claim if both (a) the event giving rise to the claim occurs in one accounting period (the period to which the claim "relates")

and (b) it affects one or more other accounting periods. In the present case, SSSL's claim to set off the terminal trading loss "relates" to the 18 month accounting period but also affects earlier accounting periods. The case therefore falls within paragraph 58.

Paragraph 58(2)…therefore envisages a situation in which a claim can be made in a return for an accounting period notwithstanding that the claim affects another accounting period. As under paragraph 57, it may be that the company can make the claim for relief in its company tax return for the accounting period to which the claim "relates" within the meaning of paragraph 58(1)(a).

I should note paragraph 58(3) which provides that Schedule 1A TMA (claims not included in returns) is to apply to a claim made by a company to the extent that it is not (a) made by being included (by amendment or otherwise) in the return for the accounting period to which it relates and *(b) given effect by being included (by amendment or otherwise) in company tax returns for the accounting periods affected by it. In the context of the present case, if SSSL's claim was not and could not have been included in the 2005 return, then Schedule 1A would be engaged."*

132. We agreed with and adopted the comments of Warren J in the UT; paragraph 58 is clearly relevant to the appeal before us in that (i) the event giving rise to the claim occurred in one accounting period (the period to which the claim relates i.e. the Appellant's final 18 month accounting period) and (ii) it affects one or more other accounting periods.

Discussion

133. We considered what documents the Appellant had provided to HMRC. In addition to the 2004 and 2005 returns the Appellant also sent to HMRC the financial statements for the 18 month period ending 31 January 2005, the tax computations corresponding to the returns and the letter of 30 August 2006.

134. In the 2004 return the Appellant left blank the section to be completed for trading losses of this or a later accounting period under section 393A at box 30. Similarly the Appellant did not indicate at box 31 if amounts carried back from later accounting periods were included in box 30. At box 70 the Appellant declared the corporation tax chargeable as "nil" and at box 122 trading losses were stated as £686,526. The 2005 return was similarly completed and declared trading losses at box 122 as £214,192. The self-assessment of tax payable at box 86 was not completed on the 2005 return but was stated as "nil" on the 2004 return.

135. The letter dated 30 August 2006 set out how the terminal loss of £2,483,777 was calculated with reference to the supporting computations. The letter went on to state that the terminal loss had been set off against profits of the preceding 36 months. The attached computations included the terminal loss relief and the goodwill amortisation to reach the profit and loss figures. The goodwill amortisation was also treated as tax deductible within the accounts supplied.

136. The goodwill amortization claimed by the Appellant in its final accounting period was fundamental to Appellant's terminal loss claim. Furthermore the claim arose as a result of the cessation of trade and related to the final 18 month accounting period. That claim could have been made in the 2004/2005 return or by amendment to the 2005 return; indeed we could not logically see why it would not be included in the 2005 return. We also considered that it was impossible to draw a line in the tax computations, as it appeared the Appellant invited us to do, such as would have the effect that part of the computations could be considered as part of the return yet other parts would not.

137. As to whether the claim was contained in the 2004/2005 return, as we have said the matters giving rise to the loss and which were essential to the claim formed part of the documents submitted by the Appellant. Irrespective of the fact that the Appellant had not completed box 30 on either return, the fact remains that the tax properly chargeable in the year to which the respective returns related could not be understood without the computation, letter and financial documents supplied by the Appellant. Moreover, the loss "fed into" or formed part of the assessment of tax due in the relevant year to which the return related.

138. We considered the impact of the authorities set out above. As clearly stated in *Cotter*: *"…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."* We concluded that principle is equally applicable to corporation tax and in the circumstances of this case HMRC properly opened the enquiries under Schedule 18 FA 1998.

139. We agreed with the comments of Warren J at [42] that:

"It is at least strongly arguable, and my inclination is to think that it is correct that the decision in Cotter has no impact on that conclusion. The figure for amortization of goodwill claimed in the final accounting period was an essential figure in the calculation of the terminal loss and features in the return for that period. It thus feeds into the tax calculation for that period making it strongly arguable that Cotter is irrelevant to the issue in point."

140. We considered whether the claim could be considered a "stand alone" claim as explained in *De Silva*. We concluded that it was not; the Appellant's claim clearly affected the year to which the return related and formed part of the information necessary for the purpose of establishing the amount of tax payable.

141. Having concluded that the claim was contained in the Appellant's return, we went on to consider the validity of the closure notices which included the following statements:

"The loss reflected in the corporation tax computation submitted for the 18 month period to 31 January 2005 submitted by the company is £2,819,065. Having concluded that the company is not entitled to relief for the goodwill amortisation of £2,394,521 referred to above I conclude that the CT Loss for the 18 month period is

reduced to £424,544 and that the CT loss for the 6 month period to 31 January 2005 is £141,515 ….

…The CT computation submitted by the company is on the basis of a claim to carry back any CT loss on the cessation of trade but I should be grateful if you would confirm how the company wishes to utilise this loss of £141,515 referred to above."

142. It seemed clear to us that the closure notices, which refer to the Appellant's accounts and computations (which include the goodwill amortisation) disallowed the relief and therefore the claim. In our view it was not necessary nor was there any requirement that the notices made express reference to the terminal loss claim. On the basis of the documentation the only reasonable conclusion that could have been drawn by the Appellant was that the claim had been disallowed. We found that the enquiries were valid and moreover, the closure notices unequivocally set out the disallowance of the claim.

143. We should also note that even if we had not concluded that the claim was included in the 2004/2005 return, we were satisfied that the Appellant was not out of time to amend the 2005 return and therefore any claim could have been treated as an amendment to that return by virtue of paragraph 58(2) of Schedule 18.

Effect of section 343

144. The effect of section 343 on the Appellant's claim follows as a matter of law where there has been a cessation of trade which (subject to certain limitations) a successor carries on. It is not reliant on any claim made by a successor, although we note that such a claim has been made by Spring Capital Limited whose appeal is the subject of ongoing litigation. The only bearing a claim under section 393A(1) has is referred to in section 343(3) which provides that the relief available to a successor is to the extent that the predecessor would have been so entitled.

145. Notably subsection (4A) provides that section 393A(2A) does not apply to any loss which would fall within section 393A(2B), the effect of which is to restrict the losses to be carried back to the 12 months immediately preceding the accounting period in which the loss is incurred.

146. We were satisfied that section 343 applies to the Appellant's terminal loss relief claim, to the extent that any loss exists. The position was set out clearly by Judge Brannan in *Spring Capital Limited and Others* [2015] UKFTT 66 (TC) and we respectfully adopt his comments therein, in so far as relevant to this appeal. We would highlight the following observations (at [30], [31], [286] – [289]):

"On 5 March 2007, Mr Stuart Thomas wrote to HMRC as follows:

"AMENDMENTS TO CTSAs FOR PERIODS ENDED 9/3/2005 and 30/4/2005 [Reference number]

We refer to our Self-Assessment for the period ended 9 March 2005.

During the period the company took over and began carrying on the trade previously carried on by [SSS]. Under the provisions of Section 343 ICTA 1988 the company is now amending its Self-Assessment to reflect the losses of that trade in its Return. Accordingly box 37 of the Return (Profits chargeable to corporation tax) is amended to a loss of £2,156,915.00. Box 86 (tax payable) is amended to nil.

Please confirm receipt of these amendments and make repayment of the tax overpaid as soon as possible."

This is the first mention, so far as I am aware, of the loss carry-forward claim under section 343 ("the section 343 claim"). By way of explanation, in very broad terms, section 343 allows the loss of one company to be carried forward against the profits of the same trade of another company where, within certain limitations, the other company has begun to carry on the same trade as the first company and where the two companies are in substantially the same ownership….

It therefore seems to me that prima facie the appellant is entitled to carry forward losses of SSS under section 343.

The question of what losses were available for carry forward at the date of the cessation of SSS's trade is the subject of another appeal to this Tribunal under reference TC/2011/06273.

Essentially, that appeal, as I understand it, concerns the effect of certain loss carry-back claims made by SSS on its losses available for carry-forward. In other words, HMRC contend that some or all of the losses which are being claimed under section 343 have already been utilised by SSS when it made carry-back claims.

The parties agreed, however, that the issue of the quantum of losses to be carried forward under section 343 should await the outcome of the appeal under reference TC/2011/06273. Any such losses would, of course, only be available to be offset against profits of the same trade."

147. We did not accept the Appellant's argument that HMRC cannot rely on section 343 as the Appellant had not been informed that it would affect the period over which losses could be carried back. Aside from whether or not the Appellant had been told, in respect of which, in our view HMRC bore no burden, the applicability or otherwise of section 343 is a matter of law. *Prima facie* the requirements of section 343(1) are fulfilled; the extent of any relief available by reference to liabilities and assets is a matter yet to be determined by Judge Brannan but one which does not prevent section 343 coming into play. We should also note that findings of fact were made by Judge Brannan in that appeal to which this Appellant had been joined as the fourth respondent. We do not consider it appropriate, nor in our view would we be right, to go behind the findings made by Judge Brannan.

148. The effect of section 343 therefore is that the earlier accounting periods affected by the loss no longer include 2002 or 2003 but are restricted to those in the 12 months immediately preceding the accounting period in which the loss was incurred.

Quantum

149. Having concluded that the claim was made in the 2004 or (more logically) the 2005 return and that the enquiries opened by HMRC were valid in law, we were satisfied that the only losses available to the Appellant to carry back (or potentially forward under Section 343) are those which the closure notices allowed.

150. We should note that there was no evidence before us as to the loss said to be incurred by the Appellant and upon which its claim was based. We concluded that the lack of any such evidence is fatal to its claim; by virtue of s393A entitlement to make a claim arises where a loss has been incurred in a trade. There was no evidence of any such loss. In those circumstances we were satisfied that the losses found to exist were as set out in the closure notices:

- £283,029 for the 12 months to 31 July 2004; and
- £141,515 for the 6 months to 31 January 2005.

Alternative submissions

151. We rejected the Appellant's argument that the closure notices only amended the quantum of the loss relief claimed and should be deemed to be an acceptance, in principle, of the claim. Having concluded that the closure notices were set out in clear terms which disallowed the losses which formed the claim for terminal loss relief we were satisfied that an implicit acceptance of a loss could not properly be read into the notices.

152. In respect of the Appellant's application to amend its grounds of appeal, we orally refused the application at the hearing. Our reasons were that the application, which was made on the final afternoon of submissions in litigation which has been ongoing for a considerable period of time, came altogether too late in the day. Furthermore we noted that the closure notices make reference to PAYE and NIC having been considered:

"…I have concluded that PAYE and NIC should have been charged and have instructed the creation of a PAYE scheme to allow for the issue of Regulation 80 determinations and Section 8 NIC assessments…having subjected…the accounts to 31 January to PAYE and NIC I conclude that the CT profits for period ended 31 July 2004 are NIL"

153. In those circumstances we did not see how, without evidence on the matter, we could consider this issue.

Conclusion

154. At the hearing we agreed, by consent between the parties, to dismiss the appeals in relation to 2002 and 2003.

155. We reminded ourselves of the questions posed by Judge Mosedale at [53] of the Decision, namely whether:

a. The Appellant's claim of 30 August 2006 was made and/or had to be made under Schedule 1A TMA and/or section 393A;

b. HMRC validly opened enquiries and under the correct provisions; and

c. HMRC's purported amendment of the claim in the 2004 and 2005 closure notices to nil was effective.

156. We concluded that the claim of 30 August 2006 was made, and had to be made under section 393A; consequently we found that the enquiries were validly opened under the correct provisions. It therefore follows from those conclusions that the amendment of the claim by HMRC in the 2004 and 2005 closure notices to nil was effective.

157. The appeal is dismissed.

158. The parties requested and we direct that the issue of costs be reserved.

159. 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.

JENNIFER DEAN

TRIBUNAL JUDGE
RELEASE DATE: 30 November 2015