[2015] UKFTT 0660 (TC)

TC04778

Appeal number: TC/2013/00489

CORPORATION TAX – taxpayer becoming UK resident – trading losses incurred in first two accounting periods – late notification of chargeability – HMRC issuing notice to file company tax returns – whether self-assessment subject to four year time limit – whether losses 'existed' and available to set off against profits of later periods – discovery assessment and penalty determination – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BLOOMSBURY VERLAG GMBH

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
MR ROLAND PRESHO FCMA

Sitting in public at Bedford Square, London WC1 on 13 December 2013

Akash Nawbatt, counsel, instructed by Deloitte LLP for the Appellant

John Corbett, Officer, of HMRC's Appeals and Review Unit for the Respondents

DECISION

Introduction

1. Bloomsbury Verlag GmbH ("**the Company**") appeals against the corporation tax charged and the penalties determined for its accounting periods ended 31 December 2005 and 31 December 2007. The tax for 2005 is charged by way of a discovery assessment made on 14 September 2012 in the amount of £146,546.70. The tax for 2007 arises from a closure notice and Revenue amendment of the same date in the amount of £66,073.50. A penalty determination was issued on 24 September 2012 for failure to notify that the Company was chargeable to tax for each of the periods concerned. The tax-geared penalty is £29,309 for 2005 and £13,215 for 2007.

2. The Company appealed on 10 October 2012 and requested a review under section 49B of the Taxes Management Act 1970 ("**TMA**") in respect of both periods. Its grounds of appeal were that the Company had incurred trading losses in prior accounting periods that should automatically be offset against the trading profits of the 2005 and 2007 periods. It said that it had no taxable profits in either period. The tax and penalties should therefore be reduced to nil.

3. HMRC's review appears fairly perfunctory. In his letter of 12 December 2012 the reviewing officer summarised some of (but not all) the issues that had been raised and concluded that the letter notifying the decision to raise the assessment and issue the closure notice "*correctly sets out HMRC's policy in respect of the matter in dispute*". Given the extensive correspondence leading up to this stage of events this might have been anticipated and was presumably "the nature and extent of the review as appeared appropriate to HMRC in the circumstances" (see section 49E(2) TMA).

4. Prior to the review, on 19 October 2012, the Company had made representations within a time frame agreed with HMRC. It also wrote on 1 November 2012 'correcting' certain information that it regarded as inaccurate in a letter of 30 October 2012 to the Company from its inspector which it assumed would be among the material submitted to the Reviewing Officer. Under section 49E(4) TMA the review "must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them". It was not possible to tell from the letter notifying the Reviewing Officer's conclusion whether this had been done and the Company accordingly wrote following the notification raising six issues (four of which related to the earlier correspondence and its representations), which it considered had not been satisfactorily dealt with. In response HMRC informed the Company that "*the review … is finalised and there is nothing in statute to allow a reconsideration of the review or a reopening to consider further representations or arguments or even to expand on or explain comments made in the conclusion*".

5. Although not a matter for our decision, it seems to us that the question is whether HMRC has properly performed the statutory function that Parliament has placed upon it, namely to review and to take account of the taxpayer's representations. It is important to taxpayers (and to this Tribunal which has to deal with the unresolved issues) that HMRC should perform (and be seen to perform) their statutory function

properly. Parliament recognises that different cases may require different standards of review ("the nature and extent of the review"). However, if on the face of review letter it appears that matters have been overlooked or representations have not been taken into account, the review may be incomplete and not "finalised" at all. In the present case the Company pursued the matter by notifying its appeal to the Tribunal on 11 January 2013.

6. There was no real dispute as to the facts of the case, which we record below. The sole issue is whether on those facts the trading losses for the 2003 and 2004 periods, which HMRC did not dispute as such, were capable of being carried forward under section 393(1) Income and Corporation Taxes Act 1988 ("**ICTA**") and offset against the trading profits of 2005 and 2007. HMRC said that in the circumstances of the case the Company had not established its entitlement to the trading losses as required by Schedule 18 and that they therefore did not 'exist' to be carried forward.

7. In relation to one matter that arose at the hearing we invited written submissions from the parties following the hearing (see paragraph 112 below). Following the hearing and prior to the release of our decision, the Company requested permission to make further submissions following the decision of the Upper Tribunal in *The Queen (on the application of Andrew Michael Higgs) v HMRC* [2015] UKUT 92 (TCC). Accordingly, we issued our decision to the parties in draft and invited their written submissions on the draft and the decision in *Higgs*. In due course both parties made written submissions and this final decision has duly taken those submissions into account.

The Facts

Introduction

8. The Company was a German incorporated wholly owned subsidiary of Bloomsbury Publishing Plc ("**Plc**"). Plc acquired the Company on 14 March 2003 and it became UK resident by virtue of its being centrally managed and controlled in the UK thereafter. It remained UK resident at least until its sale by Plc to a German subsidiary of the Bonnier media group on 28 March 2012.

9. On becoming UK resident the Company came within the charge to corporation tax and by the operation of section 12 ICTA the Company started an accounting period on 14 March 2003. That period ended on 31 December 2003 and each subsequent accounting period ended on 31 December until 2010. Thereafter the Company changed its accounting reference date to 28 February and its final full accounting period was that ending 29 February 2012, with a short accounting period ending on 28 March 2012 (based on the assumption that it then ceased to be UK resident).

10. The Company did not immediately appreciate that a particular consequence of the management arrangements that were adopted from 14 March 2003 meant that it had come within the charge to corporation tax as a UK tax resident company. It was only on 31 March 2010 that Deloitte LLP wrote on behalf of the Company to HMRC to inform HMRC that, following a review, Deloitte had concluded that the Company had become UK resident on 14 March 2003. This notification took the form of an 'Error or Mistake Claim' under paragraph 51 of Schedule 18 to the Finance Act 1998

(hereafter “**Schedule 18**”) in respect of the Company’s accounting period ended 31 December 2006. HMRC agreed, following a review, that the Company was tax resident from 14 March 2003.

11. As it is relevant to one the Company’s submissions (see paragraph 86 below), we set out the relevant passages of Deloitte’s letter of 31 March 2010 by which they notified HMRC of the Company’s state of affairs. Having indicated their conclusion that the Company was resident, Deloitte continued:

> “*We are currently in the process of preparing the detailed UK corporation tax returns and computations for [the Company] for the accounting periods ended 31 December 2003 through to 31 December 2009 inclusive and will also set out the evidence on which the conclusion we have reached with [Plc] is based.*
>
> *Our work to date has identified that [the Company] incurred combined Schedule D Case I trading losses and non-trading loan relationship deficits in its accounting periods ended 31 December 2003, 2004, 2006 and 2009 of £1.36m, £1.48m, £0.14m and £0.76m respectively, while it made taxable profits in its accounting periods ended 31 December 2005, 2007 and 2008 of £0.4m, £0.3m and £0.1m respectively.*
>
> *We will be filing [the Company’s] corporation tax computations and returns in due course and will be asking you to exercise your discretionary powers under paragraph 74(2) Schedule 18 Finance Act 1998 to allow a late claim for group relief by [Plc] from [the Company] for part or all of the tax losses incurred by [the Company] during the accounting periods ended 31 December 2003 and 2004. We will also be asking you to exercise your discretionary powers under s393A(10) ICTA 1998 to allow a late claim for [the Company] to carry back its tax losses incurred in its accounting period ended 31 December 2006 against its profits arising in the accounting period ended 31 December 2005.*”

The notice to file returns

12. On 20 September 2010, the officer concerned issued notices under paragraph 3 of Schedule 18 requiring the Company to file a company tax return for the accounting periods 2004 to 2009. We heard no explanation as to why the 2003 period was omitted. It may have been because the 2003 period was more than six years earlier, that being the time limit set by paragraph 46(2) in a case involving a loss of tax brought about by a company’s or related person’s carelessness (see paragraphs 26 and 47 below). HMRC subsequently suggested in correspondence that the notices for the 2004 and 2005 periods were issued “in error”, a point with which we deal later (see paragraph 41 below). The Company filed returns on 17 December 2010 (i.e. before the filing date specified by paragraph 14(1)(d) of Schedule 18) for all the periods covered by the officer’s notice, and a ‘voluntary’ return for the period ended 31 December 2003.

13. The profits and losses that were returned for each of the four periods in question were as follows:

Accounting Period	Profit/(Loss)	Return filed	Return due
31 December 2003	£(1,269,883)	17 December 2010	N/A
31 December 2004	£(1,515,349)	17 December 2010	20 December 2010
31 December 2005	£488,489	17 December 2010	20 December 2010
31 December 2007	£357,161	17 December 2010	20 December 2010

The Company's 2003 return

14. The Company submitted a detailed tax computation for 2003 in Euros (converted into sterling) and accounts (in German). The computation recorded the trading loss for the period and the intention to surrender it by way of group relief (as indicated in Deloitte's letter of 31 March 2010).

15. The Company Tax Return (Form CT600 (2002) Version 1) that the Company used for 2003 contained the following introductory language:

> "This form (or an Inland Revenue approved substitute version of it), together with any relevant *Supplementary Pages*, must be used whenever a company is required by form *CT603 (the Notice)* to deliver a company tax return for any period ended on or after 1 July 1999"
>
> (Italics as in the original)

16. Under a heading "General advice on CTSA", the notes to the CT600 stated that:

> "Under CTSA, companies have to use the format set out by the Inland Revenue. They will be able to do so by completing the official return form, a photocopy of it, or a software or substitute version approved by the Inland Revenue".

The notes indicated that the form could be downloaded from the Inland Revenue's website or ordered by telephone or fax. They also made clear that they did not provide a comprehensive account of CTSA or of how corporation tax liabilities should be computed.

17. In terms of the guidance as to which sections of the CT600 had to be completed, the notes stated as follows:

> "All trading companies must complete Section 2. All companies must then complete either the Short calculation (Section 3) **or** the Detailed calculation (Section 4). Advice at the beginning of each calculation will help you decide which one is appropriate. If you have no entries, or only zero entries (where

there are losses), to make you need not complete Section 3 or 4, but you should complete Section 5 or 6 as appropriate.

Complete Section 5 if you are claiming capital allowances or enhanced expenditure on Research and Development or land remediation expenditure.

Complete Section 6 if, in this period, the company has any of the losses or excess amounts listed there. Group companies must also show the maximum amounts they intend to surrender by way of group or consortium relief."

(Capitalisation and emboldening as in the original)

18. The Company included the detailed calculation in Section 4 in its return. The introduction to the Section instructed it to complete the Section if it had entries to make other than zeros. Box 3 "trading and professional profits" was accordingly blank and the subscript note to box 3 instructed it to complete Section 6 if there was a loss and directed it to note 5 of the Company Tax Return Guide. Box 33 showed zero profits chargeable to corporation tax.

19. Box 72 provided the figure of tax payable and included the words, "this is your self-assessment of tax payable". Beneath box 72 it instructed the Company to enter "0.00 if you calculate that no tax is payable" and directed it to notes 20 and 34 of the Company Tax Return Guide. The Company duly entered "0.00". Note 20 dealt with when tax is payable and stated that, "Corporation tax is due without assessment, and every return must by law include a self-assessment of the tax payable". Note 34 dealt with quarterly instalment payments by large companies and group payment arrangements. It noted that, "box 72 must always show the calculation of tax payable (the self-assessment). The fact that tax is paid through a nominated GPA company does not affect this entry."

20. The Company also completed Section 6 as directed by the note to box 3. Box 96 showed "trading losses Case 1 calculated under section 393 ICTA 1988" of £1,269,883. The Company was again directed to note 5. Note 5 made clear that the Company must provide a calculation of the profit or loss of the trade and directed it to enter the loss in box 96.

21. As this was the Company's opening accounting period on becoming UK resident (so that any prior period trading losses were excluded) box 4 was left blank. Box 4 would record the trading losses brought forward claimed against and to be deducted from the trading profits in box 3. The subscript note to box 4 directed the Company only to include losses made in the same trade and for it not to enter an amount larger than what was needed to cover the profits in box 3. It directed the Company to notes 5 and 6 of the Company Tax Guide. Note 6 (to the extent relevant) repeated the points about set off of losses.

The Company's returns for later periods

22. As for the 2003 period, the Company submitted for each of its later periods a detailed tax computation in Euros, converted into sterling, and accounts (in German). The 2004 computation recorded the trading loss for the period and the intention to

surrender part of it by way of group relief, with a balance of £708,734 carried forward.

23. The Company Tax Return used for the 2004 period was CT600 (2004) Version 2. The introductory language had been revised from 2003 but still referred to form CT603. The form (as produced to us) did not incorporate the same detailed notes as in CT600 (2002) Version 1 for 2003 but directed a company to the advice contained in the Company Tax Return Guide 2004. Boxes 3 and 4 still covered trading and professional profits and trading losses brought forward, as before but without the subscript notes; both boxes were unfilled. The tax payable now appeared at box 86, labelled "this is your self-assessment of tax payable"; as in 2003 it showed £0.00. Box 122 showed trading losses Case I of £1,515,349.

24. The 2005 computation showed part of the trading loss brought forward (£488,489) as used in that period. The Company Tax Return used for the 2005 period was CT600 (2005) Version 2. The introductory language was similar to that of 2004. Boxes 3 and 4 covered trading and professional profits and trading losses brought forward, as in 2004. The entry for box 3 was £488,489 and a similar amount of "trading losses brought forward claimed against profits" was shown in box 4. Box 5 (Net trading and professional profits) was shown as zero. The tax payable was again to be entered in box 86, labelled "this is your self-assessment of tax payable"; as in 2003 and 2004 it showed £0.00. Box 122 (Trading losses Case I) was left blank.

25. Further trading losses brought forward (including losses incurred in 2006) were then utilised in 2007. The return for the 2007 period was made on CT600 (2007) Version 2. The introductory language was similar to that of 2004 and 2005. Boxes 3 and 4 covered trading and professional profits and trading losses brought forward, as in 2005. The entry for box 3 was £357,161 and a similar amount ("trading losses brought forward claimed against profits") was shown in box 4. Box 5 (Net trading and professional profits) was set at zero. The tax payable was again box 86, labelled "this is your self-assessment of tax payable"; as in the previous periods it showed £0.00. Box 122 (Trading losses Case I) was left blank.

HMRC's response

26. Following an initial response by HMRC on 11 February 2011, in which they agreed that the Company was resident in the United Kingdom, HMRC wrote in more detail on 20 June 2011 to make the point that the earliest in-date year when the returns were received in December 2010 was the period ended 31 December 2006 and that the returns for the 2003, 2004 and 2005 periods were out of time and therefore invalid given the four year time limit in paragraph 46 of Schedule 18.

27. The letter went on to indicate that the losses for 2003 and 2004 were not available and that there was a loss of tax in 2005 arising from the Company's carelessness in failing to notify chargeability. Consequently, the officer intended to raise a discovery assessment for 2005 and levy a penalty in respect of that period. No enquiry was opened into any of the 2003, 2004 or 2005 periods. However, an enquiry was opened into the 2007 return on 16 December 2011. Details of the eventual assessment for 2005 and the closure notice for 2007 are set out in paragraph 1 above.

The relevant statutory provisions

The charge to corporation tax

28. Section 6(1) ICTA provides that:

> "Corporation tax shall be charged on profits of companies, and the Corporation Tax Acts shall apply, for any financial year for which Parliament so determines, and where an Act charges corporation tax for any financial year the Corporation Tax Acts apply, without any express provision, for that year accordingly."

29. The tax is charged on profits of companies wherever arising (s.8(1) ICTA) but a company not resident in the United Kingdom is within the charge to corporation tax only if it carries on trade through a permanent establishment there (s.11(1) ICTA). Accordingly, a company not previously resident or trading in the United Kingdom that becomes UK resident will first come within the charge to corporation tax at that time. It was not suggested that the Company had carried on any trade in the United Kingdom prior to 14 March 2003.

30. Corporation tax is assessed and charged for an accounting period of a company on the full amount of the profits arising in the period subject to such deductions as the Corporation Tax Acts permit (s.12(1) ICTA). Section 12(2)(a) specifically provides that an accounting period shall begin for the purposes of corporation tax whenever the company, not then being within the charge to corporation tax comes within it by becoming resident in the United Kingdom. In so far as the company is carrying on a trade at that time, section 337(1)(b) ICTA also provides that the company's income shall be computed as if it were the commencement of the trade, whether or not the trade is in fact commenced.

31. "Profits" for these purposes means income and chargeable gains (s.6(4)(a) ICTA). A company's income is computed in accordance with income tax principles (s.9 ICTA) and its chargeable gains are computed in accordance with the principles applying to capital gains tax (s.8(3) Taxation of Chargeable Gains Act 1992). It is unnecessary to deal at any length with either income tax or capital gains tax principles. At this stage, it suffices to note that HMRC did not dispute the accuracy of the Company's return (showing that it had no corporation tax profits) for its first two accounting periods ending 31 December 2003 and 2004. Accordingly, the Company was within the charge to corporation tax but had no profits to charge to tax in those periods.

Relief for trading losses

32. In the case of a company that incurs trading losses, section 393 ICTA provides (so far as relevant):

> "(1) Where in any accounting period a company carrying on a trade incurs a loss in the trade, the loss shall be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods; and (so long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced

by the amount of the loss, or by such of that amount as cannot, under this subsection or on a claim (if made) under section 393A(1) be relieved against the income or profits of an earlier accounting period.

…

(7) The amount of a loss incurred in a trade in an accounting period shall be computed for the purposes of this section in the same way as trading income from the trade in that period would have been computed.

…

(10) In this section references to a company carrying on a trade refer to the company carrying it on so as to be within the charge to corporation tax in respect of it."

33. In correspondence HMRC referred to (and relied upon) the rewritten version of section 393 ICTA in section 45 Corporation Tax Act 2010, in particular sub-section (6) which states that "relief under this section is subject to restriction or modification in accordance with the provisions of the Corporation Tax Acts". HMRC said that this meant that the provisions of Schedule 18 operated to exclude the loss where no tax return and self-assessment were made in time. Given that all years with which we are concerned are prior to the enactment and coming into force of this provision it is not relevant to our consideration of the point in issue and it was not referred to at the hearing. We note, however, that section 45(6) has no direct antecedent in section 393 and is described in the Table of Origins of the 2010 Act as "drafting". The Explanatory Notes to the Act indicate that examples of the type of restriction or modification that the draftsman had in mind were those found in the rest of Chapter 2 of Part 4 to the 2010 Act, restrictions arising from the write off of government investment in a company under Chapter 7 of Part 4 and the restrictions on certain partnership losses in Chapter 3 of Part 22 to the 2010 Act.

The administrative provisions

34. As will be seen, the basis of HMRC's refusal to recognise the losses stems from the corporation tax administrative provisions that are contained in Schedule 18 to the Finance Act 1998 (see paragraph 57 below). Schedule 18 has effect in place of those provisions of the TMA dealing with returns, assessments and claims by companies and also penalties (s.117(1)(a), (b) FA 1998). Schedule 18, the TMA and the Tax Acts are construed and have effect as if Schedule 18 were contained in the TMA (s.117(2)). The "Tax Acts", except so far as the context otherwise requires, comprise the Income Tax Acts and Corporation Tax Acts but not the TMA itself (s.831(2) ICTA). The "Taxes Acts" include the TMA (s.118(1) TMA).

35. Given the nature of the arguments raised by both parties as to the correct construction and application of the Schedule 18 provisions we have referred to those provisions *in extenso* in reaching our decision. The following paragraphs of our decision summarise the main provisions that arise for consideration in this case.

36. Paragraph 2(1) of Schedule 18 requires a company that is chargeable to tax for an accounting period but which has not received a notice requiring it to deliver a company tax return, to give notice to HMRC (or the Inland Revenue in 2003) that it is so chargeable. The notice must be given within 12 months from the end of the accounting period in question. A company that fails to give notice is liable to a tax-geared penalty.

37. As noted in paragraph 10 above, the Company failed to give notice of its chargeability until 31 March 2010. It was accordingly late in giving notice for each of the periods ended 31 December 2003 to 2008. In consequence it was potentially liable to a penalty for those periods, depending upon the tax payable in each period. The Company did not seek to argue (correctly in our view) that it was not "chargeable to tax" for 2003 and 2004 on the basis that it had no profits to charge to tax in either period.

38. Part II of Schedule 18 (paragraphs 3 to 20) sets out requirements relating to company tax returns. Paragraph 3(1) of Schedule 18 enables HMRC, by notice, to require that a company deliver a company tax return. Such a notice must specify the period to which the notice relates (para 5(1) Sch 18). A company tax return is then required, effectively, for every accounting period that begins or ends in the specified period. Where the company is outside the charge to corporation tax for the whole of the specified period, a return is required for the whole of the period (para 5(2)-(4) Sch 18). As already noted, by notices dated 20 September 2010 HMRC required the Company to deliver a Company Tax Return for the years from 31 December 2004 through to 31 December 2009 but no such notice was given in respect of the accounting period that commenced on 14 March 2003 and ended on 31 December 2003.

39. The return must be delivered to HMRC not later than the "filing date" (para 3(4) Sch 18). This date will ordinarily be the last day of a twelve month period from the end of the period for which the return is made (para 14(1)(a) Sch 18). Where it ends later, however, the filing date is the last day of a three month period from the date on which the notice was served (para 14(1)(d) Sch 18).

40. Accordingly, in the present case the returns for the periods ended 31 December 2004 to 2008 were all due on 20 December 2010, being the end of three months from 20 September 2010 when the officer concerned served the notices. All the Company's returns were therefore 'in time' even though the Company's notification of chargeability for all but the 2009 period was late (see paragraph 13 above).

41. As we have previously noted, in correspondence HMRC suggested that certain notices to file returns were issued "in error". This was explained on the basis that "the issue of such notices in error can [neither] require [nor] create a right to make a self-assessment if the law does not provide an opportunity to do so". At the hearing, however, HMRC contended that they were entitled to issue a notice to deliver a company tax return for any period. Thus, we did not understand HMRC to say that there was any "error" as such (and in correspondence the Company referred to the fact that the officer concerned had told it that he was issuing the notices "deliberately in order to oblige the company to file the returns"). The point was that the giving of a

notice did not (in HMRC's contention) provide a basis for circumventing the time limit under paragraph 46 that they said applied to a self-assessment.

42. We consider in due course the effect of a notice under paragraph 3 and whether a company is at liberty to deliver a valid company tax return without having received a notice under paragraph 3 to do so. As already noted, no notice was served in respect of the Company's opening accounting period ended 31 December 2003 but the Company nevertheless prepared a company tax return for that period, signed and dated 16 December 2010, and submitted on 17 December 2010.

43. Part V of Schedule 18 (paragraphs 36 to 49) is headed "Revenue Determinations and Assessments". Paragraph 36 deals with the situation in which no return is delivered, by the filing date (if known) or otherwise by a 'long-stop' date, in response to a notice requiring a company tax return. In that case an officer may make a determination setting out the amount of the tax payable by the company to the best of the officer's information and belief. Paragraph 37 allows a determination to be made where a company tax return is delivered in respect of an accounting period specified in the notice but it appears that there may be another accounting period in the specified period in respect of which no return has been made.

44. Paragraph 39(1) provides that a determination under either paragraph 36 or paragraph 37 has effect "for enforcement purposes" as if it were a self-assessment by the company. This means for the purposes of the TMA provisions dealing with payment of tax, collection and recovery, interest on overdue tax and miscellaneous and supplementary provisions and the tax-related penalty provisions of Schedule 18, as well as the provisions of the Corporation Taxes Acts enabling unpaid tax assessed on the company to be assessed on other persons.

45. If the company delivers a company tax return for the relevant period after a determination under either paragraph 36 or paragraph 37 has been made, the determination is superseded by the self-assessment contained in the return (paragraph 40). However, this does not apply to a return made more than three years after the day on which the power to make the determination first became exercisable or more than twelve months after the date of the determination, whichever is the later (paragraph 40(3)). (Before the Finance Act 2008 amendments noted in paragraph 50 below the period specified in paragraph 40(3)(a) was five years rather than three.)

46. Paragraph 41(1) of Schedule 18 provides (so far as relevant) that:

> "(1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that—
>
> > (a) an amount which ought to have been assessed to tax has not been assessed …
>
> The officer may make an assessment (a "discovery assessment") in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax."

This was the basis on which HMRC proceeded in respect of the 2005 accounting period. Paragraphs 42 to 45, however, limit the circumstances in which a discovery assessment can or cannot be made, in particular in situations where the company has submitted a company tax return. This appears to us to be relevant to whether the discovery assessment for 2005 was validly made (see paragraph 138 below). The provisions establishing the time limits for assessments are considered under the next sub-heading.

47. Paragraph 88 applies to amounts required to be included in a company tax return that may affect the tax payable by the company for another accounting period. It provides that such amounts shall be conclusively determined once they can no longer be altered.

48. Paragraph 97 deals with construction of references to assessment and provides—

> "Any reference in the Tax Acts (however expressed) to a person being assessed to tax, or being charged to tax by an assessment, include a reference to his being so assessed, or being so charged—
>
> > (a) by a self-assessment under this Schedule, or an amendment of such a self-assessment, or
> >
> > (b) by a determination under paragraph 36 or 37 of this Schedule (which until superseded by a self-assessment, has effect as if it were one)."

Time limits

49. Paragraph 46 is headed "General Time Limits for Assessments" and provides for the following time limits on the making of an assessment—

> "(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than 4 years after the end of the accounting period to which it relates.
>
> (2) An assessment in a case involving a loss of tax brought about carelessly by the company (or a related person) may be made at any time not more than 6 years after the end of the accounting period to which it relates (subject to sub-paragraph (2A) and to any other provision of the Taxes Acts allowing a longer period).
>
> (2A) An assessment in a case involving a loss of tax—
>
> > (a) brought about deliberately by the company (or a related person),
> >
> > (b) attributable to a failure by the company to comply with an obligation under paragraph 2, or
> >
> > (c) attributable to arrangements in respect of which the company has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs),

may be made at any time not more than 20 years after the end of the accounting period to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

50. The time limits specified in paragraph 46 (as also other time limits in Schedule 18) were amended by section 118 of and Schedule 39 to the Finance Act 2008. Prior to these amendments paragraph 46 was as follows—

"(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than six years after the end of the accounting period to which it relates.

(2) In a case involving fraud or negligence on the part of—

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time,

an assessment may be made up to 21 years after the end of the accounting period to which it relates.

(3) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment."

51. This was the version of paragraph 46 that was in force at the time at which Deloitte wrote on behalf of the Company to notify HMRC that the Company had been resident in the United Kingdom since 14 March 2003 and indicating that the Company proposed to submit company tax returns for all periods since then. By the time at which HMRC raised their discovery assessment for 2005, however, the amendments made by the Finance Act 2008 had been brought into effect by the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009, S.I. 2009/403 ("**The Order**").

52. The amendments to Schedule 18 are in paragraphs 37 to 47 of Schedule 39 to the Finance Act 2008. Article 2(2) of the Order set the appointed day for these paragraphs to come into force as 1 April 2010. Paragraph 8 of the Order, however, provided as follows—

"Paragraph 46(2A)(b) and (c) of Schedule 18 to the Finance Act 1998 (general time limits for assessments) shall not apply where the end of the accounting period to which the assessment relates is on or before 31st March 2010, except in a case involving negligence on the part of—

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time."

The Parties' Arguments

53. The dispute between the parties, as initially conducted in correspondence, focussed almost exclusively on the operation and application of Schedule 18 to the Company's circumstances. In the end, however, section 393 ICTA was placed at the forefront of the Company's arguments and its arguments on the proper construction and application of Schedule 18 were put forward to counter HMRC's arguments as to why the losses under section 393 ICTA did not exist for relief in later periods. We summarise the parties' arguments on that basis. Given the variety of points made in correspondence, at the hearing and subsequently in written submissions, we limit our summary to an outline of each party's case and deal with the detail as necessary in our discussion of the issues.

Relief for trading losses

54. Mr Nawbatt for the Company noted that HMRC did not dispute that the Company had incurred trading losses in 2003 and 2004. As unutilised trading losses he said that they were automatically available against future trading income without the need for any return or self-assessment in those periods. He said that section 393(1) required no claim, assessment or election to carry the trading losses forward and no time limit applied. The language of section 393(1) was mandatory: "the loss shall be set off". The only requirement was that the trading loss should have been incurred when the Company was within the charge to corporation tax, which it was.

55. He drew attention to what Sir Thomas Bingham MR had said in *R v IRC ex parte Unilever* (1996) 68 TC 205 at 228—

> "The taxpayer's entitlement to deduct trading losses from other profits in the same year, although provided by statute, gives effect to a very basic principle. A tax regime which did not provide such entitlement could scarcely be regarded as equitable. A right of set-off against earlier or later accounting periods is less fundamental. But a tax on a corporation's profit which did not permit account to be taken of trading loss would be offensive to ordinary notions of fiscal fairness."

56. Although this statement does distinguish current period losses from the losses of other periods, Mr Nawbatt submitted that if it was Parliament's intention that losses should only exist for carry forward and later set off when they had been included in a self-assessment (let alone a self-assessment within a particular time limit) that restriction on their use would require clear statutory language; under CTSA there was none. Accordingly, the profits for the Company's 2005 and 2007 accounting periods should automatically be treated as reduced by the amount of the trading losses incurred in and carried forward from 2003 and 2004. These arguments (supplemented in various respects) were repeated with some force in the Company's later written submissions (see paragraph 93 below).

The requirement for losses to be included in a valid company tax return

57. Mr Corbett for HMRC did not dispute that the Company had incurred losses in 2003 and 2004 in the amount in question nor did he disagree fundamentally with the

Company's basic reading of section 393 ICTA. His point for HMRC was the simple one that under corporation tax self-assessment ("CTSA"), trading losses had to be established in the same way as trading profits and could only be established by self-assessment through a valid company tax return. Under CTSA there was no other mechanism for establishing and quantifying the losses. This was made explicit by paragraph 88 of Schedule 18.

58. Paragraph 7 required that every company tax return had to include a self-assessment and paragraph 46 applied a four year time limit to the making of any assessment, including a self-assessment. It followed that no return could be made for an accounting period once the time limit had passed for making an assessment. In this respect paragraph 97 specifically provided that an assessment included a self-assessment. Accordingly, the Company was out of time to render a company tax return and self-assess for 2003 and 2004. The losses incurred in those periods therefore did not 'exist' to carry forward to the 2005 and 2007 periods.

59. For the Company Mr Nawbatt said that HMRC's attempt to restrict the use of the trading losses by reference to the provisions of Schedule 18 confused the procedure for assessing and collecting tax with the computational requirements of the Corporation Tax Acts. Schedule 18 was designed to operate on the basis that taxpayers should always pay the correct amount of tax properly computed. Mr Nawbatt said that self-assessment was simply an assessment of tax payable. There was no requirement to assess or set out the amount of any trading losses. A self-assessment would be either a positive amount of tax payable or nil. The losses would be recorded in the return, separate from the self-assessment. The language of paragraph 7 indicated that the self-assessment was something separate from the return but based on the information contained in the return. In the present case the trading losses had in fact been included in the Company's returns that had been filed on 17 December 2010. There was no time limit attaching to the delivery of a first return for any period. Furthermore, the Company was required to deliver a return for the 2004 period pursuant to HMRC's notice under paragraph 3.

60. In this respect Mr Nawbatt noted (because it was relevant to the consideration of how Schedule 18 applied to the Company's circumstances) that the 2004 losses sufficed to eliminate the profits of 2005 and 2007 (given that the Company had also incurred losses in 2006). Accordingly, even if HMRC were correct that the losses incurred in 2003 were unavailable (because the Company's tax return for that period was a 'voluntary' return and had not been required by any notice under paragraph 3 of Schedule 18), the profits of the 2005 and 2007 periods would be reduced to nil by the losses available to be carried forward.

Discussion

Introduction

61. HMRC did not dispute that *if* the Company had notified the Inland Revenue in time that it had come within the charge to tax on 14 March 2003 and that *if* it had thereafter duly made its corporation tax returns (incorporating the appropriate self-assessments), no tax would have been payable. The Company's failure to notify the Inland Revenue in time that it had come within the charge to corporation tax,

however, produced the result, on HMRC's view, that the Company must pay corporation tax for 2005 and 2007 because no relief was available for the losses that it had incurred in 2003 and 2004.

62. Those losses were 'incurred' (or, at least, HMRC have never disputed that they were not) but according to HMRC they did not 'exist' because they had never been 'self-assessed'. From the Company's perspective, HMRC have added insult to injury by determining a penalty based on tax that would never have been payable had the Company realised from the outset that it was UK resident. From HMRC's perspective this was just the natural consequence of the Company's failure. From each party's perspective the merits justified their position: the question for us is what does the law prescribe?

63. As a starting point it is appropriate to recall Lord Dunedin's explanation of the relationship between charge and assessment in *Whitney v Commissioners of Inland Revenue* [1926] AC 37 at 52—

> "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is a liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

64. In *Whitney's* case, the tax in question (supertax) was assessed and charged by the Special Commissioners. In the intervening years fundamental reforms to income tax administration transferred the assessing function to inspectors of taxes and left the Special Commissioners constituted as one of the immediate predecessor bodies of this Tribunal. CTSA (as income tax self-assessment a few years earlier) was a further fundamental restructuring of the system of tax administration including assessment. In this respect Schedule 18 must plainly be read and construed as a coherent and largely self-contained system of administration within the context of the scheme of corporation tax as a whole. Nevertheless, the relevant provisions of Schedule 18 still take their place as the second stage in Lord Dunedin's three stages.

65. This is evident in the context of income tax, where tax is usually charged on particular income. In the case of corporation tax the Act explicitly "charges" the "profits of companies" (s.6(1) ICTA) and then identifies the person "chargeable": a resident company being chargeable on all its profits wherever arising (s.8(1) ICTA) and a non-resident company being chargeable only on its profits (wherever arising) attributable to a UK permanent establishment through which it is carrying on trade (s.11(1), (2) ICTA).

66. The position of assessment in the general scheme of the tax is indicated by section 8(3) ICTA which makes the point that corporation tax is charged by reference to financial years but that assessments to corporation tax are made on a company by reference to accounting periods. Section 8(3) as amended for accounting periods ending after 30 September 1993 following the introduction of the "Pay and File" system of corporation tax administration, and first enacted in sections 82 and 83 of the Finance (No 2) Act 1987 (both effective from 31 December 1993), provided that—

> "Corporation tax for any financial year shall be charged on profits arising in that year; but corporation tax shall be computed and chargeable (and any assessments shall accordingly be made) by reference to accounting periods, and the amount chargeable (after making all proper deductions) of the profits arising in an accounting period shall, where necessary, be apportioned between the financial years in which the accounting period falls."

67. This formulation survived the introduction of CTSA and remained in place until rewritten in section 8 of the Corporation Tax Act 2009. The results of each of the Company's accounting periods would have had to have been apportioned to financial years to the extent that that was necessary for the purposes of determining and assessing its liability to corporation tax in any period.

Relief for trading losses prior to CTSA

68. Computation and charge at the first stage therefore necessarily precede assessment as the second stage. The relief for trading losses under section 393(1) is plainly part of the first stage. This is apparent from the manner in which "profits" (being what is charged to corporation tax) are determined: the aggregate of income and chargeable gains, each computed under the particular rules of income tax and capital gains tax. The Company's income, to the extent that it arose from the conduct of a trade in the periods in question, was computed under the rules of Schedule D Case I. Section 393(1) mandates that a trading loss of an earlier accounting period shall be set off against the trading income of succeeding periods. This can only be at the 'pre-charge' stage of computing a company's trade income of a succeeding period, which will then form one component of the company's income to be added to its chargeable gains (if any) to produce the "profits" that are charged to tax.

69. This analysis was confirmed by the Court of Appeal in *Sun Life Assurance Co of Canada (UK) Ltd v HMRC* [2010] STC 1173 where (although in the more complex computational framework of life assurance taxation) Lord Justice Moses said this:

> "[14] As I have indicated, this appeal is concerned with the right, or as the taxpayer would say, its duty to carry forward unused losses from previous years. It is important, therefore, to recall that there is no dispute but that were the taxpayer to be charged to tax under Case I, it would be under an obligation to deduct from its trading income the losses unused in previous years."

He then set out the relevant provisions of section 393 ICTA before continuing:

> "[15] It is important to note, firstly, that section 393(1) imposes a duty on a company to set off unused losses from previous years. Secondly, that it

provides for relief but that relief is only in respect of trading income; it is, in other words, a relief specific to a particular source (trading income is defined as income which falls or would falls within Case I (s. 393(6))…

[16] Accordingly, were the Revenue to choose to charge the taxpayer on its total profits under Case I, it is undisputed and indisputable that the taxpayer would be required to carry forward its unused previous years' losses under s. 393(1)…

[28] In my view, s. 393 is plainly a provision applicable to Case I Schedule D … it is only applicable to Case I of Schedule D since the relief for which it provides is restricted to income from a trade; it is, in short, specific to that single source. Case I refers only to tax in respect of a trade and s. 393 relieves only trading income…

[40] It is not disputed that s. 393 is a section which gives relief. Without it, there would be no carry forward of past years' losses. But it does not follow that the duty to set off such losses against trading income is not part of the computation of the profits in accordance with the provisions applicable to Case I. The first stage of the computation requires not only a figure for trading profits to be computed (i.e. income less the expense of earning that income), but also at that first stage, the compulsory set off against that income of the losses brought forward. That obligation to set off is part of the process of computation and I can see no basis for saying that it is not part of the computation of the Case I profits merely because s. 393 is a relieving provision. The scheme for corporation tax operates by a process of computation and then aggregation. If authority is needed it can be found in the description of the scheme of corporation tax by Peter Gibson LJ in Commercial Union Assurance Co plc v Shaw 72 TC 101,126G:

> "The scheme of the corporation tax legislation requires, first the ascertainment of income from a particular source and chargeable gains, as reduced by any relief applicable to income from that source or to those gains, then the ascertainment of the total profits by aggregating the income from the various sources and the gains as reduced by any relief applicable to those total profits, and once the amount of the net total profits has been ascertained the corporation tax prima facie chargeable on the total profits can be determined. That corporation tax may in turn be reduced or extinguished by other reliefs which are expressed to apply to that tax. Only then is the amount of corporation tax payable ascertained."

[41] S. 393 can only operate to reduce trading income. Thus it operates at the very first stage of the computation. Any set off against trading income must be computed before aggregation and thus before the net total profits are ascertained. After aggregation other reliefs may apply. Against the aggregated profits, group relief may operate to reduce the total aggregated

profits and thereafter other reliefs (like s. 338) may operate to reduce, not the income of the company, but the corporation tax for which it is liable.

[42] Contrary to the view of Patten J at [42], the relief does alter the profits calculated on a Case I basis. The judge is correct to say that the very first stage must be to strike a figure for the trading income, but non sequitur that the very next stage, whereby that income is reduced by losses carried forward, is not part of the computation…

[44] Accordingly, I conclude that the judge was wrong to decide that the mere fact that s. 393 is a relieving provision affords a basis for deciding that it is not a provision applicable to Case I in accordance with which the taxpayer's profits are computed…"

70. On the basis that the Act contemplates that past trading losses should reduce current trading income to arrive at the final amount of trading profits that should be brought into charge as part of the current period's corporation tax profits, it might be thought (to adopt Lord Dunedin's words) that "it is antecedently highly improbable that the statute should not go on to make that [relief] effective". It is this thought that is at the heart of the Company's submissions. It leaves open, however, the process by which past trading losses are identified, quantified and made available to be carried forward so as automatically to reduce later trading income.

71. Given that the Act is concerned to charge "profits" to tax and is therefore only concerned with losses to the extent that the Act allows losses to reduce profits (or particular components of profits such as trading income), section 393(7) provides the necessary direction that trading losses are to be computed "for the purposes of this section in the same way as trading income from the trade in that period would have been computed". Quite apart from the fact that section 393(1) sits within the computational framework for trading income at the first stage, the language of subsection (7) specifies precisely the purposes for which it operates and its relationship with trading income (rather than the profits that will eventually be assessed).

72. We therefore think that subsection (7) offers no support for HMRC's proposition (see paragraphs 33 and 57 above) that it operates to require trading losses, like trading profits, to have been recognised within a company tax return that includes an in-time self-assessment if they are to be available to be carried forward to later periods. Subsection (7) provides the rule for computing trading losses but one must look elsewhere to see when they must be computed and what (if any) administrative requirements attach to the ability to carry them forward to and set them off against trading income in a later period.

73. A related point is that losses are not assessed to tax at all. Only profits are charged and therefore assessed to tax. In a period in which a company has only losses (such as 2003 and 2004 in the Company's case), there are no profits to assess: in former years there would be no assessment or any estimated assessment for a period would have been vacated once it was accepted that there were no profits to charge for the period.

74. This is presumably why section 393(1) originally prescribed that relief for earlier losses against the trading income of a succeeding period should only be given on the making of a claim. Furthermore, section 393(11) prescribed that—

> "A claim under subsection (1) above must be made within six years after the end of the accounting period in which the loss is incurred, and must be so made notwithstanding that relief cannot be given in respect of the loss until after the end of that period of six years."

75. This requirement dates back to paragraph 11(4) of Schedule 6 to the Finance Act 1966 and was added to the relief for trading losses provided by section 58 of the Finance Act 1965 (the original version of section 393(1) ICTA). It was presumably added because it was realised following the enactment of section 58 that it was unclear whether the claim that section 58 required to be made was a claim by reference to the original period of loss or a succeeding period in which the loss was claimed to reduce the trading income of that later period. It appears from contemporary commentary that the Inland Revenue's published practice was not to insist on a formal claim to carry forward losses but to accept claims of an informal nature as part of the computation. Nevertheless, the legislative origins of the relief for trading losses (at least as they relate to corporation tax) support HMRC's view that something needs to be done by reference to the period of loss to identify and quantify the trading loss before a period in which the loss can actually be used to reduce the trading income of that later period.

76. The requirement to make a claim for the trading loss to be carried forward was removed by section 99 of the Finance Act 1990 with effect for accounting periods ending after 30 September 1993 (the day appointed for the introduction of Pay and File). This change to section 393(1) was part of a wider reform in the context of Pay and File that included changes to the rules for claims for group relief and claims for capital allowances. In the case of capital allowances, allowances made in taxing a trade were treated as trading expenses and prior to these changes were deductible as such without the need for any claim. Under paragraph 7 of Schedule 16 to the Finance Act 1990 all capital allowances had to be claimed by being included in a corporation tax return under section 11 TMA (including any amendment of a return).

77. Under section 11 TMA (as amended for Pay and File) an inspector could by notice require a company to deliver a return of such information as was reasonably required relevant to the application of the Corporation Tax Acts to the company, together with such accounts, statements and reports as were reasonably required as so relevant. In its original form, section 11 merely required a company to deliver a return of its profits computed in accordance with the Acts, specifying (*inter alia*) the income taken into account in computing those profits with the amount of income from each source. The need to make a claim under section 393(1) ICTA fitted with that 'lesser' obligation under section 11 TMA.

78. Under Pay and File, section 41A TMA (inserted by section 95 Finance Act 1990) required an inspector who was satisfied that a return afforded correct and complete information concerning an amount of losses incurred in a trade to determine that amount. Conversely, if he was not so satisfied with the return, he could determine the amount of trading losses to the best of his judgment. Companies were not given an

explicit power to require a determination but the statutory language was mandatory ("shall") and the Inland Revenue's instructions indicated that inspectors must make a determination on receipt of a return that showed a determinable amount. A determination under section 41A was treated as similar to an assessment, with the taxpayer having equivalent appeal rights. A determination under section 41A was not, however, an assessment and further illustrates that losses are not the subject matter of an assessment.

79. Sections 11 and 41A TMA were among the provisions of the Management Act that were superseded by Schedule 18 to the Finance Act 1998 when CTSA become effective for accounting periods ending on or after 1 July 1999. Mr Corbett for HMRC referred to section 41A TMA but otherwise neither party sought to take us through the history of the provisions giving effect to relief for trading losses of a period being carried forward against the trading income of later periods. Of course, Schedule 18 falls to be construed and applied according to its terms and it may therefore have had the effect of removing any requirement to establish trading losses in the period in which they are incurred. Nevertheless, in the absence of any explicit provision dealing with the matter (such as the requirement for a taxpayer to claim relief or a power allowing an inspector to determine the losses) and where it is a matter of dispute, we think it relevant background to note that from virtually the outset of the corporation tax until the adoption of CTSA, taxpayers have had to establish their entitlement to trading losses in the period of loss (initially through a claim and subsequently though the return coupled with a Revenue determination) even though relief for those losses, once established, has been automatic in later periods.

Relief for trading losses under CTSA: introduction and issues

80. The Company submitted company tax returns for the periods ended 31 December 2003 and 31 December 2004, each quantifying the trading losses that it had incurred in the period. It was by reference to those returns that the Company said that it was entitled to automatic relief for those losses against the trading income that it generated in the periods ending 31 December 2005 and 2007 (relying on *Sun Life Assurance Co of Canada (UK) Ltd v HMRC*). This was its primary argument at the hearing but while it is an important consideration, for the reasons that we have given, we do not regard it as a complete answer. In effect HMRC do not dispute that section 393(1) provides an automatic set-off of earlier period trading losses against later period trading income *if the losses have been established*. The question is what (if anything) does CTSA require a company to do to establish that its trading losses exist so that they can be carried forward and set against later period trading income?

81. As regards that question it is appropriate at this stage to unbundle some of the detail of the arguments presented by the parties in correspondence, at the hearing and in later written submissions for or against the outcome that the Company seeks:

> (1) HMRC said that paragraph 7 requires that every company tax return must include a self-assessment and paragraph 46 states that no assessment may be made more than 4 years after the end of the accounting period to which it relates. A self-assessment is a form of assessment and it is inconceivable that there should be no time limit for self-assessment. Time

limits are a key part of Schedule 18 to provide the necessary finality and certainty. Paragraph 46 is "subject to any provision of the Taxes Acts allowing a longer period in any particular case" but there is no such provision in relation to self-assessment. Paragraph 48 explicitly excludes self-assessments from the right of appeal against assessments, indicating that references to "assessment" in Part V can include "self-assessment". Furthermore, paragraph 97 ("Construction of references to assessment") specifically provides that references in the Tax Acts to assessment include self-assessment. Accordingly, in HMRC's submission, both the 2003 return and that for 2004 were not validly made because they were not capable of including an in-time self-assessment. They were therefore ineffective to establish the trading losses incurred in those periods.

(2) The Company answered HMRC's contentions as follows:

(a) Paragraph 97 only applies to references in the "Tax Acts" and Schedule 18 is not part of the Tax Acts. In any event, paragraph 97 does not state that references to "assessment" are to be read as including "self-assessment".

(b) Paragraph 46 is within Part V of Schedule 18, which is entitled "Revenue determinations and assessments". Part V contains HMRC's powers to deal with a company's failure to deliver a return once notified to do so or following the delivery of an incomplete or inaccurate return. Accordingly, paragraph 46 does not apply to self-assessments but only to discovery assessments under Part V of Schedule 18. In particular, HMRC's construction involves attaching a different meaning to "assessment" in each of paragraph 46(1), (2) and (3). Paragraph 48 refers to "self-assessment" because paragraph 39 treats a determination as a self-assessment.

(c) In any event, the time limits under paragraph 46 apply to assessments and do not apply to a company tax return or to the determination of any loss as part of the information provided in the return. No time limits attach to these. A company tax return is distinct from and is not itself an assessment. It is subject to separate provisions dealing with who can require, prepare, amend, file, make and correct it. Paragraph 88 distinguishes the 'return' from the assessment or self-assessment. There can be no assessment of a loss.

(d) However, even if the time limit in paragraph 46(1) does apply to self-assessment, it is expressly subject to any provision of the Taxes Acts (which do include Schedule 18) that allows a longer period. Paragraph 14 allows a longer period (namely, the "filing date") in a case in which HMRC have by notice required the delivery of a return. In this case, the Company was under an obligation to deliver a return in respect of the 2004 period by 20 December 2010. The company relied in this respect on *Tamar Enterprises v HMRC* [2012] UKFTT 626 (TC).

(e) In addition, if the time limits in paragraph 46 do apply to self-assessment, the Company would be entitled to the benefit of paragraph 46(2A) for the 2003 period because it would be a self-assessment in a case involving an alleged loss of tax attributable to the Company's failure to comply with its obligation under paragraph 2.

(3) In relation to the Company's contention at (2)(d) above, HMRC noted that *Tamar* was a default paper case and the Tribunal had not had to consider the issue. HMRC did not pursue the point raised in correspondence that the notices under paragraph 3 had been given "in error" (because the Company was out of time to render a valid return for the periods in question). Instead, HMRC said that they were entitled to issue a notice for a company to deliver a company tax return for a specified period, which would provide the information HMRC needed to determine the company's liability to tax and, if necessary, issue a discovery assessment (as they had done for the 2005 period). The company tax return would nevertheless not be a valid return from the company's perspective because it could not include an in-time self-assessment. The mere issue of a notice under paragraph 3 to deliver a return could not validate a self-assessment that as a matter of law was not otherwise valid.

(4) In relation to the Company's contention at (2)(e) above, HMRC said that paragraph 46(2A) only applied to a discovery assessment under paragraph 41 and not to a self-assessment. There was no loss of tax in 2003 by reference to which the extended time limit in paragraph 46(2A) could operate; similarly in relation to 2004 under paragraph 46(2). There was, however, a loss of tax in 2005 justifying a discovery assessment for that period because no trading losses had been established for 2003 and 2004. The reference in paragraph 46(2) and (2A) to "a case involving a loss of tax" did not open up the 2003 and 2004 periods for the purpose of determining whether there was a loss of tax in the 2005 period.

82. As regards this last point, we have noted that the Order bringing into force the amendments to the Schedule 18 time limits excluded paragraph 46(2A)(b) and (c) in the case where the period to which the assessment relates is on or before 31 March 2010 except in a case of negligence (see paragraph 52 above). The Company was said to have been careless in failing to given notification of chargeability but it was not said to have been negligent. On the basis that the loss of tax was not brought about deliberately by the Company it therefore appears that its failure to comply with its obligation under paragraph 2 of Schedule 18 to notify chargeability for 2003 by 31 December 2004 was not a failure that would have had the effect of extending the time limit for assessment from 6 to 20 years if there had been a loss of tax in the 2003 period. We note that this last point appears to apply equally to HMRC's assessment for the 2005 period, such that the Company must have been negligent for paragraph 46(2A)(b) to allow their assessment more than six years after the end of the period in question.

83. Certain aspects of HMRC's contentions at first sight look distinctly unattractive. First, HMRC say that they can require a company to deliver a return for a period under paragraph 3 but that the return that the company delivers pursuant to the requirement to do so cannot be a valid return because it cannot include an in-time self-assessment. This is even though the purpose of giving notice under paragraph 3 is to obtain the necessary information to decide whether an extended time applies for making a discovery assessment under paragraph 41. It suggests that a self-assessment is a species of assessment that may never be made more than four years after the end of the accounting period. Thus, although paragraph 46(1), (2) and (2A) each refers to "an assessment", it is only paragraph 46(1) that encompasses a self-assessment.

84. Secondly, HMRC must presumably say that none of the provisions of Schedule 18 relating to the content of a company tax return or its amendment can apply to the 'return' that their notice requires the company to deliver in these circumstances. In particular, they must say that paragraph 88 cannot extend to any trading losses contained in the return notwithstanding that as losses they involve no assessment to tax. Finally, even though it can be seen from the information that HMRC obtain as a result of their notice under paragraph 3 that there would be no loss of tax had the company complied fully with its obligations under Schedule 18, nevertheless HMRC can make a 'corrective' discovery assessment to recover tax by 'ignoring' that information (at least in so far as it relates to trading losses). In this respect paragraph 65 of Schedule 18 provides that where an assessment is made on a company in a case involving a loss of tax resulting from the company's carelessness, the tax charged by the assessment must take account of any relief to which the company would have been entitled for that accounting period on any claim or application made within the time allowed by the Taxes Acts. HMRC say nevertheless that this does not encompass the trading losses in this case.

85. Having regard to the acknowledged facts of the case and the parties' various submissions, we have identified the following issues for our determination:

> (1) Was Deloitte's letter of 31 March 2010 (see paragraph 11 above) an in-time assessment of the Company's liability for 2003 and 2004, so establishing its entitlement to carry forward the trading losses for those periods to 2005 and 2007?
>
> (2) As regards the Company's 2003 trading losses—
>
> > (a) Did the Company submit a valid Company Tax Return that was effective to quantify for carry forward to future periods the 2003 trading losses given that HMRC had issued no notice to the Company under paragraph 3 requiring it to submit a Company Tax Return for that period?
> >
> > (b) Even if the return was validly made (on a 'voluntary' basis rather than pursuant to a paragraph 3 notice) was it effective to quantify for carry forward to future periods the 2003 trading losses given that (in HMRC's submission) it did not contain an in-time self-assessment? Stated in the alternative, does the paragraph 46 time limit (or any other time limit) apply to the

submission of a Company Tax Return (assuming a return can be made ‘voluntarily’)?

(3) As regards the Company’s 2004 trading losses, was the Company Tax Return submitted by the Company pursuant to the paragraph 3 notice requiring it to do so effective to quantify for carry forward to future periods the 2004 trading losses given that (in HMRC’s submission) the return did not contain an in-time self-assessment? Stated in the alternative, does the paragraph 46 time limit (or any other time limit) apply to the submission of a Company Tax Return notwithstanding that the return is submitted pursuant to a paragraph 3 notice?

(4) As regards the 2005 and 2007 periods, does the ability of a taxpayer to carry forward and set off trading losses incurred in an earlier period against current period trading income depend upon those trading losses having been included in a Company Tax Return for the earlier period which was submitted pursuant to a paragraph 3 notice and which incorporates an in-time self-assessment?

(1) Was Deloitte’s letter of 31 March 2010 an in time assessment of the Company’s liability?

86. At the hearing Mr Nawbatt pointed out that when Deloitte notified HMRC on 31 March 2010 that the Company had been chargeable to corporation tax since 14 March 2003, the time limit for an assessment under paragraph 46(1) was still six years. He contended that Deloitte’s letter was capable of amounting to a self-assessment and was accordingly in time for 2004. The letter set out the losses that had been incurred in 2003 and 2004 and indicated that no tax was payable for those periods. He said that the statute prescribed no particular form or document in which a self-assessment had to be made. Paragraph 7(1) simply provided that a company tax return must include an assessment by the company of the amount of tax which was payable based on the information contained in the return. The paragraph did not stipulate that a company may only make a self-assessment in a company tax return and did not address the form or basis of self-assessment made by companies outside their tax returns. For their part, HMRC pointed out that a self-assessment within paragraph 7 had to be based on the information contained in the return and that the letter was not based on any such information.

87. We set out relevant extracts from Deloitte’s letter of 31 March 2010 at paragraph 11 above. The letter does not purport to be a company tax return. As Deloitte indicated, they were in the process of preparing detailed UK corporation tax returns and they were merely communicating the results that their work to date had identified. As they explicitly said, “*we will be filing [the Company’s] corporation tax computations and returns in due course*”.

88. The House of Lords in *Gallic Leasing Ltd v Coburn* (1991) 64 TC 399 considered what was needed to constitute a valid claim for group relief in a situation in which the Inland Revenue had not exercised their power to prescribe a particular form of claim. The Law Lords concluded that a claim in such a case must at least be a claim by an identified claimant to relief against identified or identifiable profits for an identified

accounting period. It rejected the Inland Revenue's argument that the claim had to provide the inspector with all the necessary information to accept (and give effect to) or to reject the claim. In the present case Deloitte's letter of 31 March 2010 may have identified the type of loss and have provided an indication of the scale of trading losses in each period. It did not, however, purport to be a return or self-assessment.

89. In any event, we do not think that there can be 'official' and 'unofficial' systems of company tax returns and self-assessments. *R v Commissioners of Inland Revenue ex parte Unilever plc* illustrates that HMRC (and before it the Inland Revenue) may in exercise of their general management powers develop or accede to particular ways of dealing with a company's affairs that go beyond what the statute strictly allows, and this may extend beyond the affairs of a particular company if HMRC make their 'practice' in these matters generally known. In matters of administration such as the filing of company tax returns it may not always be entirely clear whether HMRC are in fact exercising a specific power conferred by the statute to prescribe how matters should be dealt with administratively (such as to prescribe a particular form of claim) or are in fact exercising their general management powers to depart from a specific statutory requirement (such as may have originally been the case in allowing 'informal' claims under section 393(1)). This Tribunal can only have regard to what the statute allows.

90. In this respect a company tax return must comply with specific requirements and the self-assessment included in the return must be the outcome of the computation specified in paragraph 8 of Schedule 18 based on the information contained in the return. There is nothing in Schedule 18 to suggest that a self-assessment can be in some other form and submitted outside the return. The delivery of the return for a period (and the assessment that it must contain) ordinarily starts time running by reference to which HMRC must give a notice of enquiry (see paragraph 24(2)). This can scarcely be by reference to a letter that on its face denies that it is the very thing that it has to be.

(2)(a) Can a company make a 'voluntary' return and self-assessment of its tax liability?

91. Leaving aside the letter of 31 March 2010, the more difficult questions are:

> (1) whether a company can 'voluntarily' deliver a company tax return in a form that HMRC have made publicly available; and, if so,
>
> (2) whether there is any time limit for doing so and, if so,
>
> (3) whether that time limit depends upon there being tax to assess or whether losses are different.

92. Mr Nawbatt for the Company contended at the hearing that nothing in Schedule 18 prevented it from 'voluntarily' delivering a company tax return and self-assessing its liability to corporation tax for any period. Schedule 18 prescribed no time limit within which to do so: essentially the time limits in Schedule 18 (see e.g. paragraphs 15, 16 and 24) only applied once a company tax return for a particular period had first been delivered. The Corporation Tax Acts charged a company's profits to tax and it was always open to a company to comply with its obligation to pay that tax by

delivering a return. Paragraph 3 and Part V of Schedule 18 provided HMRC with the powers that it needed for those cases in which a company did not ‘voluntarily’ comply or otherwise was found not to have delivered an accurate or complete return. It did not, however, circumscribe ‘voluntary’ compliance.

93. This was the situation of the Company’s tax return for the 2003 period, which it ‘volunteered’ on 17 December 2010 notwithstanding that the officer had not required that the Company deliver a return for that period by his notice of 20 September 2010. The Company repeated its arguments at some length in its written submissions made by reference to our draft decision and *Higgs*. The thrust of its written arguments focussed in particular on the Company’s situation:

(1) It had notified HMRC that it was chargeable to tax for the 2003 accounting period as it was required to do under paragraph 2 of Schedule 18. That notification was late but it was nonetheless a valid notification.

(2) Whether by oversight or as a matter of Departmental policy or otherwise, HMRC had not acted on the notification and had failed to require the Company to deliver a return for 2003. By that failure (for whatever reason) HMRC was now seeking to deny the Company the benefit of relief for the trading losses that it had incurred in 2003.

(3) Parliament could not have intended that HMRC should be able to deny a taxpayer the benefit of section 393(1) relief (when it no longer required a specific claim or determination) by effectively making the relief depend upon whether or not HMRC chose to require a return for the loss making period. If a company were known to be loss making in any period HMRC could decide not to require a return for that period and in that way block relief for the losses in a later period.

(4) In the Company’s case it had submitted a return for 2003 in the requisite form together with a computation of the trading losses (which HMRC had not disputed). Nothing in Schedule 18 precluded or prohibited a company from voluntarily submitting a company tax return in a publicly available form. Accordingly, it was not open to HMRC to deny the Company relief under section 393 by ‘administrative inaction’ (whether on the part of a particular officer or as a matter of Departmental policy) under paragraph 3 of Schedule 18.

(5) In the alternative the Company suggested that HMRC were bound to act under paragraph 3 of Schedule 18 to require a return if requested to do so by a company.

(6) The Company also suggested that paragraph 88 of Schedule 18 would not prevent a company including in a computation for a later period an amount in respect of trading losses incurred in an earlier period and brought forward to be relieved under section 393. This would be consistent with the return for the later period including “such information, accounts, statements and reports … relevant to the tax liability of the company, or otherwise relevant to the application of the Corporation Tax Acts to the company”. The computations for the later period could then give effect to the trading losses carried forward from the earlier period

irrespective of whether or not they have been returned in the previous period in response to a notice under paragraph 3 requiring a company tax return.

(7) Finally, the Company said that a conclusion that it could not submit a voluntary return for 2003 and that the failure to issue a notice under paragraph 3 deprived it of its trading losses was inconsistent and irreconcilable with *Higgs*.

94. The decision in *Higgs* concerned the corresponding income tax provisions. On 6 April 2007 HMRC had issued a notice under section 8 TMA requiring Mr Higgs to file a tax return for the year 2006/07. He failed to do so until 2 November 2011. The tax liability for 2006/07 shown in his return was £18,830 but he had made payments on account for that year of £46,317. HMRC refused to repay the overpayment of £27,487 on the ground that Mr Higgs' return was submitted too late to be a valid return because the 4 year deadline set by section 34(1) TMA for making a valid self-assessment expired on 5 April 2011. The time limit in section 34(1) TMA corresponded to that in paragraph 46(1) of Schedule 18 and raised the issue whether "an assessment" in section 34(1) included a self-assessment.

95. Several of the issues that were raised in *Higgs* and were subject to submissions by the taxpayer and HMRC in that case have their counterpart in the Company's case. Unsurprisingly, the income tax self-assessment regime ("**ITSA**") and CTSA have similar features of which, to mention three:

(1) whether a return and the self-assessment that the return must contain should be viewed separately or are indivisible (see *Higgs* at [35]);

(2) whether HMRC may serve a section 8 TMA notice at any time, even after the 4 year assessment time limit has expired (see *Higgs* at [39]); and

(3) whether the 4 year time limit applies to self-assessments as well as Revenue assessments.

96. Given that ITSA and CTSA are subject to separate legislative regimes, the position under one does not automatically dictate the position under the other. Nevertheless, where the relevant features of the two regimes correspond it would be surprising to reach a different conclusion on their relevant effect. At least, one would expect to be able to detect in the administrative policy as it applies on the one hand to individuals and income tax and on the other hand to companies and corporation tax, some distinct policy reason why Parliament might have legislated to produce different administrative outcomes.

97. The corresponding provisions to paragraphs 2 and 3 of Schedule 18 are in sections 7 and 8 TMA. In the case of income tax, section 7(1) TMA requires that every person who is chargeable to tax for a year of assessment must give notice of that fact to HMRC. Under section 8 TMA he may be required by notice to make and deliver a return. In Mr Higgs' case, however, he had been required to deliver a return for 2006/07 and the issue was the effect of his having done so after the 4 year time limit for assessment had expired. The issue of a voluntary return that has arisen in the Company's case for the 2003 period accordingly does not have a counterpart in *Higgs*.

98. HMRC's further written submissions on whether a company may validly submit a voluntary company tax return (i.e. without any notice under paragraph 3 requiring it to do so) were largely limited to rejecting the Company's suggestion that HMRC could operate a discretionary (and possibly arbitrary and unfair) policy of not issuing notices so as to block companies carrying forward trading losses under section 393(1). Their explanation of why no paragraph 3 notice had been given for 2003 in the Company's case was that the period was outside HMRC's policy regarding the issuing of returns. In their submission the reason why the Company was unable to use its 2003 trading losses was because it had been so late in notifying its liability for 2003 that it had fallen outside the period for which HMRC would ordinarily require a return to be made.

99. The Company's proposition that a company may volunteer a return has considerable attractions as a general one: if Parliament has charged certain income, profits or gains to tax, why should HMRC turn away a company that voluntarily complies with its obligation to pay? What is there to prevent a taxpayer owning up to some error and volunteering the tax that it now realises it should have paid? In the Company's case, of course, its 'voluntary' return for 2003 is designed to support a claim to set off trading losses in later periods rather than to volunteer further tax.

100. Although, as Lord Dunedin indicates in *Whitney*, liability does not depend upon assessment, the obligation to pay tax does. Historically, the assessment procedure was vested in the Inland Revenue. In *Whitney* the majority of the Law Lords thought it sufficient for the Inland Revenue (in the form of the Special Commissioners) to send the assessment to the taxpayer in New York by post, an action that might be considered rather similar to a company under self-assessment posting a completed return in the publicly available form to HMRC. One question, therefore, is whether self-assessment sufficiently vests the procedure in taxpayers that they are entitled to initiate the procedure by submitting a tax return without any intervention from HMRC.

101. We do not believe that Schedule 18 has moved matters that far. A company's obligation to deliver a return and self-assess tax depends upon it receiving notice from HMRC to that effect. In the absence of such notice paragraph 2 places the company under a duty to notify an officer of HMRC that it is chargeable. The expression "chargeable to tax" has no fixed meaning and takes its meaning from the context (see *Nicholas Barnes v HMRC* [2014] EWCA Civ 31 per Vos LJ at [38]). In the present context it must mean "within the charge to corporation tax" and not that there are in facts profits to be charged to tax for the period.

102. Once the company has fulfilled its duty to give notice, it then rests with an officer of HMRC (acting in accordance with Departmental policy and within the legitimate bounds of HMRC's care and management powers) to require delivery to him of a company tax return with the prescribed information for the specified period. This is reflected in the introductory language of CT600 which refers explicitly to form CT603, the notice to deliver a tax return. While HMRC may publish the form of the return and details of the information that the company must ordinarily provide, nothing in paragraphs 2 to 5 suggests that a company can initiate the Schedule 18 procedure except by notifying HMRC that it is chargeable to tax for an accounting period.

103. The Company, of course, puts the matter the other way: in other words, it says that there is nothing in Schedule 18 to suggest that it *cannot* submit a return without any requirement under paragraph 3 to do so. Its *duty* to submit a return only arises if HMRC have given a notice requiring the company to do so. Furthermore, the Company says that HMRC's admission that it operates a policy in certain circumstances (such as the present) of not requiring a return plainly suggests that a company should be entitled to submit voluntarily a company tax return if Parliament's express intention of allowing relief for past trading losses to be taken into account in producing the right measure of future taxable profits is not to be frustrated.

104. The Company has not persuaded us, however, that Schedule 18 allows for a company to make a 'voluntary' return. Its duty is to notify liability and that is contrasted with the discretion then given to HMRC to require the company to deliver a return. It is not just that paragraph 3(1) envisages that "an officer may by notice require (if it is necessary to do so) a company to deliver a return". The notice dictates what flows from that requirement: in particular, what the taxpayer must provide and the period of assessment in issue. The fact that Parliament has placed in HMRC's hands (consistent with their role in these matters) a 'discretion' whether or not to require a return is not an invitation to HMRC to exercise that discretion in an arbitrary or unfair manner and does not provide them with a mechanism for indirectly denying taxpayers the benefit of reliefs to which they would otherwise be entitled. The fact is that the Company was significantly late in notifying its liability for 2003. It is that factor rather than any policy on HMRC's part to deny the Company the benefit of its trading losses that has produced this outcome. In this respect we can see no reason to interpret Schedule 18 just so as to resolve the Company's problem for 2003 when the structure and language of the Schedule is otherwise. Mr Justice Barling's remarks at paragraph [45] in *Higgs* are equally applicable in this case, save in this case in favour of HMRC's interpretation of the legislative provisions.

(2)(b) and (3) Does any time limit apply to the making of a company tax return?

105. Our conclusion on 'voluntary' returns means that the Company cannot rely on its 2003 return as such (not being required pursuant to any notice issued under paragraph 3). If, however, that is wrong, there would remain the question whether HMRC can ignore the Company's 2003 return on the basis that it is out of time. That question arises in any event in relation to the Company's 2004 return, which it submitted following a notice under paragraph 3.

Is the return separate from the self-assessment and subject to no time limit whether or not the self-assessment is in time?

106. The Company says that the time limit, if it applies at all, only applies to making of a self-assessment and not the submission of the return (see paragraphs 59 and 81(2)(c) above). In this respect paragraph 7(1) requires that every company tax return for an accounting period must include an assessment of the amount of tax which is payable by the company for that period and in doing so the computation must follow the form specified in paragraph 8 to arrive at the amount of tax payable. In this respect, we do not think that the Company is correct to say that the assessment is 'separate' from the return. Schedule 18 certainly refers to the "return" (in terms of what is contained in it) and to the "assessment" (in terms of the amount of tax payable

based on the content of the return) as different things. Expressly, however, the assessment is something that must be included in a return and we do not see this as meaning that it should be regarded as a separate piece of paper that must just be put in the same envelope as the return. To our mind it is an integral part of the return without which the return is incomplete.

107. We think that this follows from paragraphs 15 and 16 (dealing with amendment and corrections to the return) and the provisions of Part IV dealing with enquiries into the return. A company's entitlement under paragraph 15 to amend its return makes no reference to it amending the assessment included in the return as a result. The same is true of any amendment to the return by an officer of HMRC under paragraph 16, including the correction of arithmetical mistakes. This must therefore include an amendment to the self-assessment as an element of the return that derives from the information included in the return and calculation under paragraph 8. Under Part IV, an officer enquires into a return and the enquiry extends to anything contained in or required to be contained in the return. On completion of the enquiry the officer amends the return to give effect to his conclusions and an appeal lies against an amendment of the return, and not an amended self-assessment as something apart from the return.

108. Paragraph 30 explicitly recognises the possibility that, prior to the completion of the enquiry, the amount stated in the company's self-assessment may need to be amended to prevent a loss of tax: in other words, the officer may change the amount shown in the assessment without at that stage altering the content of the return from which the company derived the tax stated in the self-assessment via the computation under paragraph 8. Similarly, paragraph 31(3) indicates that an amendment to the return during the course of an enquiry may affect the amount stated in the self-assessment as the amount of tax payable, even though the effect of the amendment to the return may be deferred until the conclusion of the enquiry.

109. We do not consider, therefore, that a return can be distinguished from the self-assessment that it contains. Accordingly, if the 4 year time limit under paragraph 46 applies to a self-assessment we think that that affects the return as a whole and not just the self-assessment that it must contain. The corollary of this conclusion, however, is that we also would not accept HMRC's contention that a notification under paragraph 3 can require the company to deliver an 'out-of-time' return solely to provide HMRC with the information that it needs to make a discovery assessment and without involving a requirement for the company in question to self-assess. A self-assessment is a necessary and integral part of the company tax return that must be included with such information, accounts, statements and reports as the notice to file may reasonably require and which fixes the tax payable based on the content of the return and the calculation described in paragraph 8.

110. Although paragraph 5(4) indicates that a company outside the charge to corporation tax for the whole of a specified period (for example, a controlled foreign company) can be subject to a notice requiring it to deliver a company tax return, no part of that specified period will, in those circumstances, constitute an accounting period. Accordingly, there will be no requirement under paragraph 7 to include in that return any assessment of the tax payable.

111. That is not the case, however, where the company is within the charge to tax but there are no profits to charge to tax and therefore to assess for the period in question. If the time limit only attached to the assessment required by paragraph 7, it would be open to a company to submit a company tax return at any time to establish its entitlement to losses (subject only to the issue of whether the return had to be delivered pursuant to a notice to do so). On the basis that the return cannot be separated from the assessment it must contain, the next question is whether the time limit in paragraph 46 applies to a self-assessment.

Does the paragraph 97 apply to Schedule 18?

112. We turn then to the question of time limits and deal first with paragraph 97 of Schedule 18. At the hearing Mr Nawbatt drew attention to the fact that paragraph 97 only extended to "the Tax Acts", which (as defined) do not include the Taxes Management Act. Accordingly, he said, paragraph 97 was not relevant to the interpretation and application of paragraph 46 because Schedule 18 was to be treated as part of the Management Act (s.117(2) FA 1998). The Company had not previously raised this point and Mr Corbett ask us to adjourn or postpone the hearing to allow him time to consider it. We did not consider that the point warranted the inconvenience to all concerned of that course of action. We accordingly allowed the parties time instead to make written submissions on the point after the hearing.

113. In their written submission, HMRC made three points, as follows:

> (1) It is plain from paragraph 7 that a self-assessment is an instance of an assessment, to which the general time limits of paragraph 46(1) apply;
>
> (2) It is clear from section 117(2) Finance Act 1998 that the meaning of assessment in both Taxes Acts and Tax Acts include self-assessment when relevant; and
>
> (3) The words in parenthesis in paragraph 97, namely: "Any reference in the Tax Acts (<u>however expressed</u>)", give a wider meaning than the term Tax Acts itself and that it should be read along with section 117(2) to include Taxes Act.

114. We think that HMRC's first point is a separate point to that arising from paragraph 97 and we consider it further below. As regards HMRC's second point, section 117(2) provides that, "Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act". References to "assessment" in both the Taxes Acts (which include the Taxes Management Act) and the Tax Acts (which do not) may well include self-assessment when relevant but that conclusion does not turn upon section 117(2). That section makes clear that Schedule 18 is treated as if it were part of the Taxes Management Act (and therefore not part of the Tax Acts). Thus, in construing the reference to "assessment" in paragraph 46 of Schedule 18, that paragraph is treated as being within the Management Act and not the Tax Acts. The provisions of paragraph 97 therefore do not extend to paragraph 46. HMRC's third point seems misconceived. The words in parenthesis relate back to the words "Any reference" and not "the Tax Acts".

115. If Parliament had intended paragraph 97 to extend to the Management Act (including Schedule 18) it could easily have done so by referring to the Taxes Acts and not the Tax Acts. The drafting in this respect is deliberate because paragraph 97 does not set out to provide that assessment includes self-assessment. The expressions with which paragraph 97 is concerned are "a person being assessed to tax" or "being charged to tax by an assessment". The paragraph ensures that such expressions include self-assessed to tax or charged by a self-assessment, amendment and determination. It is unnecessary to extend those expressions to such matters in the context of the Management Act (including Schedule 18) and, indeed, if paragraph 97 applied to Schedule 18 it would tend to destroy any distinction that the Management Act seeks to draw between such different procedural steps. This is because the Management Act is the source of the provisions that extend Lord Dunedin's second stage of assessment to the entirely separate procedural steps of self-assessment, amendment and determination, that must then be equated with the terminology of "assessment to tax" and "charged to tax by assessment" which is used in the Tax Acts.

116. Accordingly, rather than equating assessment and self-assessment in the Management Act (including Schedule 18), paragraph 97 indicates that self-assessment, amendment and determination are distinct procedural steps that can be distinguished from assessment in that traditional form that existed prior to the adoption of CTSA. This does not, however, answer the question whether "assessment" in paragraph 46(1) includes self-assessment and therefore applies a 4 year time limit to the delivery of a valid company tax return as HMRC contend.

Does the paragraph 46 time limit apply to a self-assessment?

117. The statutory language of paragraph 7 plainly suggests that a "self-assessment" is a species of assessment. On the basis that "*assessment particularises the exact sum which a person liable has to pay*" self-assessment places what was previously HMRC's function at that stage of the imposition of the tax on the shoulders of the taxpayer. However, it is the same function in different hands. Schedule 18 uses the expression "assessment" or its derivatives (such as "assessable") in a variety of contexts. In doing so it identifies "assessment", a "discovery assessment" and "self-assessment" (see paragraph 98). A self-assessment can only be made by a taxpayer by being "included" in a return and reflects the fulfilment of a requirement placed upon the taxpayer company by paragraph 7 as a result of the company being required to deliver a return. A discovery assessment can only be made by an officer of HMRC in the exercise of their power to do so.

118. Paragraphs 30 and 31 naturally refer to the company's "self-assessment" in the context of an amendment during the course of an enquiry (the reference to "the assessment" in paragraph 30(1)(b) plainly referring to the self-assessment mentioned in paragraph 30(1)(a)). Similarly, paragraphs 39 and 40 refer to "self-assessment". By way of contrast, paragraph 41(1)(a) and (b) refer to tax that ought to have been "assessed" and to an "assessment to tax" that has become insufficient. In both cases, what matters is the absence or insufficiency of assessment rather than the form of the assessment that should or has been made. The remedy is for an officer to make a discovery assessment.

119. Part V of Schedule 18 is entitled "Revenue determinations and assessments". In so far as it is relevant to a construction of the provisions of Part V, the more natural reading of the title is to understand it as referring to "Revenue determinations and Revenue assessments". In the same fashion, the title to paragraph 42 and paragraph 42(3) itself refer to "a discovery assessment or determination", which in their context must refer to a discovery assessment or discovery determination.

120. As HMRC noted in argument, the expressions "Revenue determination" and "Revenue assessment" are not otherwise used or defined in Schedule 18. Nevertheless, in the context of the Schedule as a whole and the particular function of Part V we think that their meanings are tolerably clear: a determination is necessarily action by HMRC in exercise of the powers that they are granted under Part V to deal with cases in which a company fails to deliver a return following a notice requiring it to do so (a determination under paragraph 36), where the company's return does not cover the entire period specified in the notice (a determination under paragraph 37) or where a return affects the tax payable by the company for another accounting period or the tax liability of another company (a discovery determination under paragraph 41(2)). Likewise, a Revenue assessment is an assessment pursuant to an exercise of the power that HMRC is granted under the Schedule to secure that tax that ought to be assessed is assessed.

121. Ordinarily, this will be by way of a discovery assessment, as defined in paragraph 41. In a situation in which the company has not yet been required to deliver a return for a particular period (so that there is no power to make a determination), we think that this may also be brought about by way of a notice under paragraph 3 requiring the company to deliver a return that must then, by virtue of paragraph 7, include an assessment. This is consistent with the idea that an assessment is still essentially an administrative act by HMRC particularising the tax payable by the company but one that in the first instance may be brought about by HMRC giving notice to the company requiring it to file a company tax return which must include the assessment as part of the return.

122. We think that this follows from a careful reading of Part V. Paragraph 39 provides for the effect of a determination under paragraphs 36 and 37. The circumstances in which HMRC can exercise these powers are those in which the company will have been given notice requiring it to deliver a return for a particular period but where it has failed to do so. Any amount of tax payable (including amounts assessable as if they were corporation tax) that ought to have been assessed for that period will not have been assessed. The time at which HMRC's power to make a determination is specified by paragraphs 36(2) and 37(2) and the time within which HMRC may make a determination is specified by paragraphs 36(5) and 37(4). The power under paragraph 41(1)(a) to make an assessment of an amount that ought to have been assessed to tax may not be excluded by the powers under paragraphs 36 and 37 to make a determination. However, in a case in which a notice to file a return has been given but no return has been delivered by the relevant date, the correct course must usually be to make a determination rather than a discovery assessment.

123. This follows from paragraphs 39 and 40. Paragraph 39 directs that the determination under paragraph 36 or 37 has effect for enforcement purposes (as defined in paragraph 39(2)) as if it were a "self-assessment". Once the company

delivers its return for the missing period, paragraph 40 provides that the actual self-assessment included in the return supersedes the HMRC's determination. The reason why Parliament refers to "self-assessment" in paragraphs 39 and 40, and not just to "assessment", is readily apparent. Furthermore, it will plainly be less convenient in such circumstances for an officer to make a discovery assessment, even if he can say that he has discovered an amount that ought to have been assessed to tax but which has not, because there is then no provision for the self-assessment that must be included in the company's return to replace the officer's discovery assessment.

124. Paragraph 41(1) defines a "discovery assessment" and paragraphs 42 to 45 refer explicitly to "discovery assessments" because they operate to restrict HMRC's power to make a discovery assessment. Leaving aside paragraph 42(3) (which refers to "the assessment or determination", i.e. the discovery assessment or determination previously referred to in sub-paragraph (3)), the exception to this is in paragraph 42(2). This states that the restrictions in paragraphs 43 to 45 do not apply to "an assessment or determination" which only gives effect to a discovery determination duly made with respect to an amount stated in another company's company tax return. The reason for this appears to be that sub-paragraph (2) is referring to an assessment or determination that flows from a duly made discovery determination (i.e. one that satisfies the restrictions in paragraphs 43 to 45) and is making it clear that the restrictions do not apply separately to such a derivative assessment or determination. Those restrictions could only apply if the assessment or determination in question was a discovery assessment or discovery determination (as defined) but the draftsman's choice in not describing the assessment or determination as such seems clear.

125. In contrast to paragraphs 41 to 45, paragraph 46 refers to "assessment" and not to a discovery assessment as such. Nevertheless, we have concluded that the time limits imposed by paragraph 46 do not apply to a self-assessment under paragraph 7. We have reached this conclusion for the following reasons:

(1) Although paragraph 7 indicates that a self-assessment is a species of assessment, the self-assessment arises from a company's obligation to deliver a company tax return pursuant to a notice under paragraph 3 requiring it to do so. The company's duty under paragraph 2 to give notice of chargeability in the absence of a notice under paragraph 3 is expressed to be without time limit. The only time limit is the time that the company is allowed to perform its duty without penalty for failure. Similarly the officer's power to give notice requiring a company to deliver a return for a specified period is expressed to be without time limit. This is in contrast to the other procedural steps of Schedule 18.

(2) Paragraph 7 is explicit that every company tax return for an accounting period <u>must</u> include an assessment. HMRC say that in the Company's case they can require the delivery of a company tax return to provide them with the information that they need to decide whether they should make a discovery assessment under paragraph 41 but the imperative language of paragraph 7 is against them on this. The notice under paragraph 3 is expressed is terms of the return that the company must deliver but the form of the return and the company's obligation in delivering the return requires

the inclusion of an assessment of the amount of tax payable by the company for the period.

(3) This is the logical starting point for the whole process of identifying the company's liability for a particular period and the amount of tax that is properly payable by it for that period. Once that process is under way it will proceed in line with the procedure and the time limits laid down in Schedule 18. Given a liability to tax, however, and an obligation to file a return once notice has been given to do so, there is no particular reason why a company should be able to evade its liability by omitting the assessment that paragraph 7 directs it to include in its return or why, following the delivery of a return, HMRC should be required to make a discovery assessment under paragraph 41 to recover the tax that the company's return identifies as due and in respect of which it is directed by paragraph 7 to include a self-assessment.

(4) The fact that the return that the company is obliged to deliver indicates that the amount of tax which is payable by the company for the period is zero, does not appear to make any difference. It can be suggested that there is no obligation under paragraph 7 to include an assessment in a return where no amount of tax is payable for a period. In that event the time limits attached to the making of an assessment under paragraph 46 would be irrelevant. This raises the issue whether a 'loss' is capable of assessment: HMRC suggest that the trading losses incurred in 2003 and 2004 are only capable of being carried forward to 2005 and 2007 if they have been subject to assessment in 2003 and 2004. A loss can be included in a return (in the sense of being computed and reported as incurred) but we do not think that it is capable of assessment as such. The only possible assessment where the overall result for an accounting period is a loss is an assessment showing that no amount of tax is payable by the company for the period based on the outcome of the computation specified in paragraph 8. To the extent that this is what paragraph 7 requires in those circumstances, the inclusion of a nil assessment in the return must be as valid as one that shows a positive amount of tax payable.

(5) The shift from the use of "discovery assessment" in paragraphs 41 to 45 to the use of plain "assessment" in paragraphs 46 to 48 clearly indicates the capacity of the latter paragraphs to extend beyond the discovery assessments described in the former paragraphs. Paragraph 41 defines a "discovery assessment" (see paragraph 98) and paragraphs 42 to 45 necessarily use that expression because those paragraphs relate specifically to such assessments. Paragraphs 46 to 48 refer only to "assessment" because the draftsman no doubt has in mind that the Taxes Acts may prescribe other occasions on which an assessment may be made; indeed, paragraph 46(1), (2) and (3) each explicitly recognises that the Taxes Acts may make other provision for particular classes of case.

(6) That does not necessarily lead to the conclusion, however, that a self-assessment under paragraph 7 is an assessment that is subject to the time limits prescribed by paragraph 46. We do not think that it is. As we have noted, HMRC's case requires that "an assessment" in paragraph 46(1)

includes a self-assessment but "an assessment" in paragraph 46(2) and (3) does not. In the overall context of the paragraph this seems unlikely. Paragraph 46(3), which deals specifically with the time limit for making an assessment, is not apt to apply to a self-assessment. Similarly, the assessment procedure laid down in paragraph 47 does not apply to a self-assessment despite its reference to "an assessment". Notably, a self-assessment does not involve the issue and service of a notice of assessment as envisaged by paragraph 47(1). Although a self-assessment may only be altered in accordance with the provisions of Parts II and IV of Schedule 18 (which are express provisions of the Taxes Acts), the language of paragraph 47(2) is standard language of some antiquity.

(7) In this last respect, each of the time limits in paragraph 46 relate to the time at which an assessment "may be made". This ties in with the language of paragraph 41 under which an officer "may make" an assessment and that of paragraph 42 under which "the power to make" a discovery assessment is only exercisable in specific circumstances. More specifically, however, it reflects the longstanding language of assessment, which distinguishes the formal act of making the assessment from the notification of the assessment to the taxpayer. There is no absolute reason why, under CTSA, the "making of an assessment" cannot extend to the company's action of "including" an assessment in its return. Nevertheless, the origins of this expression and its continued use in Schedule 18 are more closely associated with the formal administrative act by a person in whom a power of assessment is vested. Following a notice to do so, a company is under an obligation to self-assess the tax payable by the inclusion in its return of a computation and an assessment of the amount payable. HMRC remains the body with the power to make an assessment. In this regard, section 113(1B) TMA provides that:

> "Where the Board or an inspector or other officer of the Board have in accordance with … paragraph 41 of Schedule 18 to the Finance Act 1998, or any other provision of the Taxes Acts, decided to make an assessment to tax, and have taken all other decisions needed for arriving at the amount of the assessment, they may entrust to some other officer of the Board responsibility for completing the assessing procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the assessment on the person liable for tax."

(8) Paragraph 48 recognises the possibility that a reference to "any assessment" in these paragraphs could be taken to include a self-assessment. Paragraph 48(1) provides that "an appeal may be brought against any assessment" which, without qualification, might be said to confer a general right of appeal in respect of a self-assessment. Given that a self-assessment is a company's own assessment of the amount of tax it might be thought that it is unnecessary to qualify that right. In addition, paragraph 48(2) clearly indicates that the type of assessment that the paragraph has in mind is one that requires notice by an officer. The only notice required for a self-assessment is a notice to deliver a return, which is not a notice of an assessment

(9) In other respects, certain provisions of paragraphs 46 to 49 are only apt to apply to an assessment that is made on the company rather than one that the company itself includes in its return, even though those paragraphs refer to "assessment" rather than specifically to "discovery assessment". This is especially true of paragraph 46(3) in respect of an objection that an assessment has been made out-of-time and paragraph 47 dealing with assessment procedure. These illustrate that not every reference to "assessment" includes "self-assessment". At the same time the draftsman does not referred explicitly to "discovery assessments" in paragraphs 46 to 48 because he is presumably mindful that the Taxes Acts may prescribe other occasions on which an assessment may be made, so that the provisions of those paragraphs (including the general time limits) are not restricted to discovery assessments within the meaning of paragraph 41.

126. The decision in *Higgs* does not directly answer the issue that we have had to address under Schedule 18 but we note that we have arrived at a conclusion in this respect that is consistent with Mr Justice Barling's in that case

(4) Does the Company's entitlement to set-off trading losses in 2005 and 2007 depend upon the losses being included in a valid in-time return for 2003 and 2004?

127. It follows from what we have concluded so far on the previous issues, that the Company cannot establish its 2003 trading losses by reference to its 2003 return because it was not a return that was required by any notice under paragraph 3 (and therefore was not a valid Company Tax Return even though no time limit applies to the self-assessment that it purportedly contained). The Company can, however, establish its 2004 trading losses by reference to its 2004 return because that was a return that HMRC required it to make for that period and the return was not out of time given that (as we have just concluded) the paragraph 46 time limit does not apply to the taxpayer's self-assessment in a return.

128. However, in its written submissions the Company put forward a further argument, summarised in paragraph 93(6) above, to the effect that it remained entitled to set off the losses in 2005 and 2007 in any event irrespective of their inclusion in any earlier return. This submission is not relevant to the 2004 trading losses which, given our conclusion on time limits, are available in 2005 and 2007 in any event. It is, however, relevant to the 2003 trading losses which we would otherwise conclude are not available in 2005 and 2007 given that they have not been included in a valid Company Tax Return for 2003.

129. In many respects the Company's submission follows naturally from its argument that section 393 directs that past trading losses can be carried forward and set off against future trading income, and also from the absence of any specific requirement to claim the losses or for HMRC to determine their amount (as was previously the case). HMRC were on notice of the Company's written submissions on this issue and requested (and were granted) additional time to make their written submissions in response. HMRC's written submissions did not specifically address the Company's point but merely agreed with our preliminary view that the 2003 trading losses were not available in 2005 and 2007 given our conclusion on Issue (2)(a).

130. The point made by the Company is essentially this: the 2005 and 2007 returns incorporated in Box 4 an amount of trading losses brought forward and claimed against trading income. Section 393 entitled it to relief for trading losses incurred in an earlier period and in the context of its 2005 and 2007 returns (and what they required) and its self-assessment for those periods, the Company should be entitled to establish that they had been incurred, were properly computed and remained available to be taken into account in those periods.

131. This approach, in the Company's submission, was consistent with the return that HMRC required for 2005 and 2007, being "such information, accounts, statements and report—(a) relevant to the tax liability of the company, or otherwise relevant to the application of the Corporation Tax Acts to the company" and the presence of a box in the CT600 return for the company to include "accounts and computations for the period to which the return relates". Those requirements would include any brought forward trading losses available for relief in the period irrespective of whether they have been returned in a previous tax return submitted in response to a paragraph 3 notice.

132. In this respect, given that HMRC have not called into question the computation of the 2003 trading losses (but have only challenged their availability given the absence of a valid Company Tax Return for that period), it is not possible to say that the Company's self-assessments for 2005 and 2007 are necessarily wrong. HMRC might say that they have not had the opportunity to check the amount of the Company's 2003 trading losses but this arises from HMRC's choice not to issue a notice under paragraph 3 following the Company's notification of liability; this was not a choice that HMRC were bound to make but one that they made because in their view there was an absolute procedural impediment to the Company's ability to carry forward the losses that it said it had incurred in 2003.

133. Paragraph 88 of Schedule 18 makes provision for "an amount stated in a company tax return for an accounting period which is required to be included in the return" and which affects or may affect the tax payable by the company for another accounting period. The amount in question is conclusively determined in relation to that other period once it can no longer be altered as part of the return in which it is required to be included. The basic provision specifying what is required in a return is that which is reasonably required by the notice under paragraph 3(1). As the actual returns for each of the periods in question indicated, this includes the amount of any trading losses incurred in the period.

134. Paragraph 88 establishes a regime for such matters and which will apply as and when HMRC require such an amount to be stated in a return. No doubt, if the return did not require trading losses (or some other negative amount) to be included in the return, the provisions of paragraph 88 would not apply and the amount would not then be taken to be conclusively established for a later period. In that regard, HMRC must in our view plainly devise a form of return that is designed to give effect to the Corporation Tax Acts. They cannot use the form of return as a means of depriving a company of particular relief to which it is entitled under those Acts any more than they can arbitrarily refuse to issue a notice to submit a return with the intention of denying the benefit of a relief that would otherwise be available.

135. The present case may appear to come close to doing so save that Schedule 18 plainly allows a company to establish the amount of its trading losses by entry of the amount in the return for the period that HMRC have devised. The reason why the Company was unable to establish its entitlement to its 2003 trading losses through its 2003 voluntary return, however, is because HMRC did not require it to deliver a return in which it could include the losses. But because the officer did not issue a notice requiring a return for the 2003 period, paragraph 88 cannot apply to that period. HMRC cannot on the one hand deny that the 2003 return is a valid return but on the other hand rely on paragraph 88 (which operates consequentially upon the submission of a valid return for the period) to say that the Company has no established losses for that period.

136. Its 'voluntary' return for the 2003 period either counts as a return (in which case the trading losses were included in it as HMRC required as part of their standard form for the period and the return is no longer capable of being altered) or it does not count as a return because it was not delivered pursuant to any notice requiring it to be delivered. In that latter case there has been no amount stated in a company tax return for the period that was required to be included in that return and there was nothing that could be conclusively determined as envisaged by paragraph 88 (as no longer capable of alteration in the manner envisaged by that paragraph). Accordingly, given that the 2005 and 2007 returns allow the Company to claim trading losses for earlier periods against trading income arising in 2005 and 2007, there appears to be nothing to prevent the Company setting off it 2003 trading losses in computing its trading profits for 2005 and 2007 and in self-assessing its profits for those periods on that basis.

Decision

137. Drawing our analysis together we have accordingly concluded as follows—

> (1) As regards the 2003 period, the Company eventually notified its chargeability for the period but HMRC have never required it by notice under paragraph 3 to deliver a company tax return for that period. The Company's 'voluntary' return is not a company tax return, not being required or delivered as envisaged by Schedule 18. The corollary, however, is that paragraph 88 does not apply (so that the 2003 losses are not determined in relation to any later period at zero).
>
> (2) As regards the 2004 period, the officer required the Company to deliver a company tax return for that period. The Company did so within the time allowed. In its return it stated the amount of its trading losses for the period, as it was required to do. It included, as it had to, a self-assessment which in the circumstances was £0.00. That self-assessment, being specifically required to be included in the return by paragraph 7 and not being one that had to be made by HMRC, was not subject to the time limit specified by paragraph 46. HMRC's sanction, had the Company failed to deliver a return pursuant to the notice to do so, would have been to determine the tax payable within the three years permitted under paragraph 36(5). Paragraph 88 operated to determine for later periods the amount of the 2004 trading losses and they should automatically be taken

into account as reducing the Company's trading income in those later periods (subject to any other use that can be made of them).

(3) As regards the 2005 period, the 2004 losses can be set off as indicated in (2) above. We also think that there is nothing to prevent the 2003 losses being set off in 2005 given that relief under section 393 is allowed as part of the computation of trading profits for the year and there is no longer any requirement to claim the losses or to have them determined in an earlier year. The fact that they relate to a year in which HMRC did not require the Company to submit a company tax return does not appear to prevent it establishing the existence of the losses and their availability for set off in self-assessing its profits in a later year, and we so decide.

(4) As regards the 2007 period the same principles will apply as in 2005.

138. We accordingly allow the Company's appeal so that the tax and penalties sought for both periods are reduced to zero.

139. As regards 2005, we also think that the course that HMRC should have adopted, having served a notice requiring the Company to deliver a return for that period, was to open an enquiry into the return under paragraph 24 and to then have proceeded to a closure notice. That would have provided the context within which to establish the 2003 trading losses if there was any doubt as to their computation. Alternatively, HMRC could have cured its omission and issued a paragraph 3 notice in relation to the 2003 period. In any event, we have some doubt whether HMRC had power to raise a discovery assessment under paragraph 41 in this case once the Company had delivered its return for 2005 pursuant to the notice to do so having regard to the restrictions on making discovery assessments in paragraphs 42 to 44 of Schedule 18. In their written submissions HMRC maintained that the discovery assessment was validly made but in any event it is unnecessary for us to reach any decision on this point given our conclusion on the availability of the trading losses incurred in both 2003 and 2004.

140. 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.

MALCOLM GAMMIE

TRIBUNAL JUDGE
RELEASE DATE: 14 December 2015