



**TC05220**

**Appeal number: TC/2015/02836**

*CORPORATION TAX – trading losses sought to be relieved by carry-back under s.393A ICTA 1970 as read with para.3, Sch.6, FA 2009 – whether priority is to be given to a loss for an earlier period or to a loss for a later period for which the loss relief claim was said to have been made before the claim to relieve the loss for the earlier period was made – held, priority to be given to the loss for the earlier period – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**COUNTRYFIELD (VILLAGE) HOMES LIMITED      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN WALTERS QC**

**Sitting in public at Birmingham on 4 February 2016**

**Tim Gascoine, TG Tax Consultancy, for the Appellant**

**Brendan Hone, HMRC, for the Respondents**

## DECISION

1. This appeal raises a question of law about the priority in which losses for corporation tax purposes can be set off against the profits of earlier accounting periods under section 393A Income and Corporation Taxes Act 1988 (“ICTA”) read together with paragraph 3, Schedule 6, Finance Act 2009 (“FA 2009”). The facts are not seriously in dispute.

2. Following enquiries by the Respondents (“HMRC”) into the relevant tax returns of the Appellant, Countryfield (Village) Homes Limited (“Countryfield”), which at the relevant times carried on a building trade, the profits for Countryfield’s accounting periods were agreed as follows:

Accounting period (year) ending 31 December 2005	£429,935
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Accounting period (year) ending 31 December 2006	£182,965
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3. Losses for corporation tax purposes for Countryfield’s accounting periods were also agreed as follows:

Accounting period (year) ending 31 December 2007	£134,520
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Accounting period (year) ending 31 December 2008	£167,421
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Accounting period (year) ending 31 December 2009	£479,220
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4. It has also been agreed that the loss for the 2007 accounting period (£134,520) is properly carried back to be set off against the profit for the 2006 accounting period (£182,965), leaving, at that stage, £48,445 profit for the 2006 period unrelieved.

5. Mr Gascoine, for Countryfield, submits that £48,445 of the loss for the 2009 accounting period can be carried back to be set off against the remaining £48,445 profit as yet unrelieved for the 2006 period, reducing that profit to nil, and that £50,000 of the loss for the 2008 accounting period (the maximum eligible for a 3-year carry-back under section 393A ICTA provided for by paragraph 3(3), Schedule 6, FA 2009) can be carried back to be set off the profit for the 2005 accounting period (£429,935), leaving £379,935 profit for the 2005 accounting period unrelieved.

6. Mr Hone, for HMRC, submits that the loss for the 2008 accounting period must be relieved in priority to the loss for the 2009 accounting period. On this basis, £48,445 of that loss can be carried back to be set off against the remaining £48,445 profit as yet unrelieved for the 2006 period, and the balance of £1,555 (£50,000 less £48,445) of the loss for the 2008 accounting period can be carried back to be set off against the profit for the 2005 accounting period (£429,935), leaving £428,380 profit for the 2005 accounting period unrelieved. He submits, further, that no part of the loss for the 2009 accounting period is available for carry-back, because, on the basis outlined, the only profit within the 3-year extended carry-back period (provided for by paragraph 3, Schedule 6, FA 2009) – being the profit of £182,965 for the 2006 accounting period – has already been reduced to nil by way of relief for the losses for the 2007 and 2008 accounting periods.

7. None of the claims for loss relief made by Countrywide were before me. However I understood the parties to be agreed that claims for loss relief were originally made in chronological order, that is, that a claim for relief of the loss for the 2007 accounting period was made first, the claim for relief of the loss for the 2008 accounting period was made next, and finally, in point of chronology, the claim for relief of the loss for the 2009 accounting period was made.

8. HMRC's enquiries were made into the returns for the (profitable) 2005 and 2006 accounting periods. Mr Gascoine submitted that the claims for loss relief in respect of the 2007, 2008 and 2009 accounting periods were originally made by reference to the profits of the 2005 and 2006 accounting periods as per the returns made for those periods and not by reference to the adjusted profits of the 2005 and 2006 accounting periods subsequently agreed following the closure of HMRC's enquiries. He submitted that the enquiries into the returns for the 2005 and 2006 accounting periods effectively put the loss relief claims originally made into abeyance – because none had been accepted by HMRC – and enabled Countryfield to make fresh loss relief claims after the closure of HMRC's enquiries and the agreement of figures for profits for those periods, which were different from the figures in the respective returns. He told me that loss relief claims in respect of the 2008 and 2009 accounting periods were remade after the closure of HMRC's enquiries and that the remade loss relief claim in respect of the 2009 accounting period had been made before the remade loss relief claim in respect of the 2008 accounting period, submitting that there was nothing in the legislation requiring claims for loss relief to be made accounting period by accounting period, in chronological order.

9. Section 393A ICTA is in the following terms (so far as relevant to this appeal):

'(1) ... where in any accounting period ... a company carrying on a trade incurs a loss in the trade, then ... the company may make a claim requiring that the loss be set off for the purposes of corporation tax against profits (of whatever description)

(a) of that accounting period, and

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

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

(2) The period referred to in paragraph (b) of subsection (1) above is ... the period of twelve months immediately preceding the accounting period in which the loss was incurred; but the amount of the reduction that may be made under that subsection in the profits of an accounting period falling partly before the beginning of that period shall not exceed a part of those profits proportionate to the part of the accounting period falling within that period.

...

(10) A claim under subsection (1) above may only be made within the period of two years immediately following the accounting period in which the loss is incurred or within such other period as the Board may allow.’

10. Schedule 6, FA 2009 is entitled: “Temporary Extension of Carry Back of Losses”.  
5 By paragraph 3 the references to twelve months in section 393A ICTA were replaced by references to 3 years, but subject as follows (so far as relevant to this appeal):

‘(2) This paragraph applies to any loss incurred by a company in a trade in a relevant accounting period (but subject to sub-paragraph (3)); and a relevant accounting period is one ending after 23 November 2008 and before 24  
10 November 2010.

(3) The maximum amount of loss to which this paragraph applies in the case of any company is-

(a) £50,000 in relation to losses incurred in relevant accounting periods ending after 23 November 2008 and before 24 November 2009, and

15 (b) £50,000 in relation to losses incurred in relevant accounting periods ending after 23 November 2009 and before 24 November 2010,

...’

11. The 2008 and 2009 accounting periods of Countryfield are therefore both  
20 ‘relevant accounting periods’ for the purposes of paragraph 3, Schedule 6, FA 2009 and the limit of £50,000 of losses available for carry-back over the extended period applies to each accounting period.

12. It seems quite possible that one or both of the claims for relief for the losses for the 2008 and 2009 accounting periods on which Mr Gascoine relies were made  
25 outside the two-year time limit stipulated by section 393A(1) ICTA. I was told that HMRC have not extended the period in which such claims could be made. However, this point was not taken by Mr Hone and I will assume that Countryfield’s case is not defeated by that time limit not having been met.

13. The argument before me turned on the meaning to be given to the words ‘subject to ... any relief for an earlier loss’ where they appear in section 393A(1) ICTA.

30 14. Mr Gascoine submitted that the fact that Countryfield had claimed relief for the loss of the 2009 accounting period before it claimed relief for the loss of the 2008 accounting period meant that no ‘relief for an earlier loss’ had been given in relation to the claim for relief of the loss of the 2009 accounting period, with the consequence that the remaining £48,445 profit as yet unrelieved for the 2006 period (after taking  
35 account of the carry-back of the loss of the 2007 accounting period – see above) was available to be relieved by the loss of the 2009 accounting period. In those circumstances, he submitted, £50,000 of the loss of the 2008 accounting period can be carried back to be set off the profit for the 2005 accounting period. He accepted that if relief had been given first for the loss of the 2008 accounting period (against the  
40 £48,445 profit as yet unrelieved for the 2006 accounting period) then there would be

no profit within the 3-year carry-back period against which the loss of the 2009 accounting period could be relieved.

15. Mr Hone submitted that the words ‘subject to ... any relief for an earlier loss’ where they appear in section 393A(1) ICTA had the effect that relief was to be given for losses in chronological order. That is, he submitted that a loss of an earlier accounting period (2008) had to be relieved before considering whether a loss of a later accounting period (2009) could be relieved.

16. Quite apart from this argument on the meaning of the statutory wording, Mr Hone did not accept that the claim for relief of the loss of the 2009 accounting period had been made before the claim for relief of the loss of the 2008 accounting period.

17. I am in agreement with HMRC on both points. In my judgment the claims for loss relief originally made when the returns for the 2007, 2008 and 2009 accounting periods were made (in chronological order) did not go into abeyance when HMRC opened their enquiry into the returns for the 2005 and 2006 accounting periods. The claims, after all, were for relief of the losses of the 2007, 2008 and 2009 accounting periods, not, in terms, for a reduction of certain specified amounts of the profits of the 2005 and 2006 accounting periods.

18. But, apart from that point, the statutory words ‘subject to ... any relief for an earlier loss’ must, in my judgment refer to a loss which was incurred earlier (i.e. in the 2008 accounting period) than another loss (incurred in the 2009 accounting period). The words are not apt to refer to the order in which claims for loss relief are made. That would require words such as ‘subject to ... any relief for a loss claimed before the claim was made for the loss sought to be set off’. Those words have a wholly different meaning from the actual statutory words which fall to be interpreted and applied in accordance with HMRC’s submissions.

19. For these reasons I dismiss Countryfield’s appeal.

20. 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.

**JOHN WALTERS QC**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 5 JULY 2016**