[2018] UKFTT 0236 (TC)

TC06469

Appeal numbers: TC/2016/00562
TC/2016/00563

INCOME TAX – enquiry into self-assessment return – enquiry into partnership return – interaction between enquiries – whether both can exist simultaneously – yes – whether closure of partnership enquiry also closes individual enquiry – no – sections 9A and 12AC, Taxes Management Act 1970

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK REID **Appellants**
SIMON EMBLIN

- and -

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

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at the Royal Courts of Justice on 24 May 2017

Michael Sherry, counsel, and Ximena Montes Manzano, counsel instructed by Reid & Co, solicitors, for the Appellant

Kate Selway, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mark Reid and Simon Emblin against closure notices issued to them on 24 and 30 April 2014.

2. Mr Reid is a solicitor and principal in the firm Reid and Co. Dr Emblin is a tax consultant to the firm. Because the issues in their respective appeals are similar, on 30 March 2016 the Tribunal directed that their appeals were to proceed and be heard together. The appeals were allocated to the complex category.

3. At the hearing, the appellants were represented by Michael Sherry and Ximena Montes Manzano, and HMRC were represented by Kate Selway. As the facts are not in dispute, I heard no oral evidence, but a statement of agreed facts and a bundle of documents were produced.

4. In this decision, legislative references are to the provisions of the Taxes Management Act 1970 (“TMA”), unless otherwise stated.

Background Facts

5. The facts are not in dispute between the parties and I find them to be as follows.

6. In 2005, both Appellants participated in what was known as the "Corbiere Scheme". This tax avoidance scheme involved the Appellants entering into transactions involving gilt-edged securities with the intention that they would be able to claim two separate reliefs when the securities were transferred. The reliefs were claimed by the Appellants in the tax year 2004/5.

7. Both Appellants also participated in a film tax avoidance scheme ("the Film Scheme") as members of Future Screen Partners No 1 LLP ("the LLP"). They both claimed that losses arose from their membership of the LLP in the tax year 2004/5.

8. It is not in dispute that both tax avoidance schemes failed, and did not give rise to the tax reliefs claimed. For this reason, the precise nature of these schemes is not considered further.

9. Dr Emblin filed his self-assessment tax return for 2003/04 on 11 January 2005. He claimed relief for the losses arising under the Film Scheme in 2004/05 against his taxable income for 2003/04 using the "white space" in box 4.79 of the partnership supplement to this self-assessment tax return. He was advised by HMRC by letter dated 23 March 2005 that the claim should not have been made in the 2003/04 return, but should have been made in a separate claim. HMRC had therefore amended his 2003/04 return under s9ZB TMA. Dr Emblin gave notice rejecting the corrections, but complied with HMRC's advice and claimed the Film Scheme losses in a letter dated 1 April 2005.

10. Mr Reid submitted his self-assessment tax return for 2003/04 on 31 January 2005. He claimed relief for the losses arising under the Film Scheme in 2004/05 against his

taxable income for 2003/4 using the "white space" in box 4.79 of the partnership supplement to this self-assessment tax return. Mr Reid was not asked by HMRC to make a separate claim for the Film Scheme losses.

11. Mr Reid's self-assessment tax return for 2004/05 was received by HMRC on 31 January 2006, and Dr Emblin's was received on 24 January 2006. In these 2004/05 returns, both Mr Reid and Dr Emblin disclosed details of the Corbiere Scheme and claimed a deduction for manufactured interest. They also made claims for the losses of the LLP arising in 2004/05 under the Film Scheme.

12. On 7 September 2006, HMRC sent notice to the LLP under s12AC that they were enquiring into its partnership tax return for 2004/05.

13. On 25 September 2006, HMRC sent notice to Mr Reid and his then tax accountant (Worton Rock) that they were enquiring into his tax return for 2004/05. The letter stated that HMRC were not satisfied that Mr Reid was entitled to the relief claimed in respect of the Corbiere Scheme. The letter to Worton Rock stated that the enquiry was being conducted under s9A TMA.

14. On 10 January 2007, HMRC sent notice to Dr Emblin that they were enquiring into his tax return for 2004/05 under s9A TMA. The letter stated that HMRC were not satisfied that Dr Emblin was entitled to the relief claimed in respect of the Corbiere Scheme.

15. Correspondence ensued between HMRC, Mr Reid, Dr Emblin, and their representatives. On 23 October 2008, HMRC wrote to both Appellants to state that a decision had been made to litigate the Corbiere Scheme and that:

> "A number of representative cases will proceed to the Special Commissioners to establish that the scheme you have used does not work. Consequently at the moment the 9A enquiry into your return will remain open."

16. On 11 May 2011, HMRC wrote to both Appellants to inform them that a test case had been heard by the First-tier Tribunal, and that the Corbiere Scheme had been held not to be effective, and that accordingly (notwithstanding that the decision had been appealed) tax was nevertheless due. The letter went on to say:

> "The 2005 enquiry cannot be closed at the present time as I understand an enquiry into the loss claimed in respect of the Film Scheme is still under enquiry. Once this enquiry has been settled I will issue a closure notice incorporating all of the necessary amendments."

17. On 3 April 2014, HMRC wrote to Mr Reid confirming that their enquiries into the LLP's partnership returns for the tax years 2004/5, 2005/6, 2006/7 and 2007/8 had been completed and that HMRC would be amending the LLP's partnership return and amending Mr Reid's return/claim to reflect this. HMRC wrote to Dr Emblin in similar terms on 8 April 2014.

18. On 24 April 2014, HMRC sent a closure notice to Mr Reid in relation to the tax year 2004/05. The notice stated that it was issued under s28A(1) and (2) TMA and made amendments to Mr Reid's return to reflect HMRC's decision in respect of the Corbiere Scheme.

19. On 30 April 2014, HMRC wrote to Mr Reid to say that the 24 April closure notice had been worded incorrectly, and a corrected version was enclosed. The wording of the notice was expanded to give an explanation for HMRC's decision and referred to a decision of the Court of Appeal (*Nicholas Barnes v HMRC* [2014] EWCA Civ 31) that had considered the Corbiere Scheme - but otherwise had no impact on the amendments made to Mr Reid's return by the 24 April notice.

20. On the same date (30 April 2014), HMRC sent a closure notice to Dr Emblin in relation to the tax year 2004/05. The notice stated that it was issued under s28A (1) and (2) TMA and made amendments to Dr Emblin's return to reflect HMRC's decision in respect of the Corbiere Scheme.

21. After further correspondence, HMRC wrote to both Appellants on 11 February 2015 setting out their view of the issues and offering each a review of the decision.

22. The offer of a review was accepted by Dr Emblin on 5 March 2015 and by Mr Reid on 10 March 2015. The review periods were extended by agreement to 4 December 2015. However, as the reviews were not completed by that date and the deadline was not further extended, HMRC's position was upheld pursuant to s49E(8) TMA.

23. Notices of Appeal were submitted to the Tribunal by both Appellants on 1 February 2016. On 30 March 2016, the Tribunal issued directions that both appeals be heard together.

Law

24. The power of HMRC to open an enquiry into an individual's tax return is set out in s9A TMA:

> "(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry") -
>
> (a) to the person whose return it is ("the taxpayer"),
>
> (b) within the time allowed
>
> [...]
>
> (3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under s9ZA of this Act.
>
> [...]"

25. Once an open enquiry into an individual's tax return is completed, an officer will issue a closure notice, informing the taxpayer that he has completed his enquiries and set out his conclusions. Section 28A TMA provides:

> "(1) An enquiry under section 9A(1) […] of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions. In this section "the taxpayer" means the person to whom notice of enquiry was given.
>
> (2) A closure notice must either-
>
> (a) State that in the officer's opinion no amendment of the return is required, or
>
> (b) Make the amendments of the return required to give effect to his conclusions."

26. The power to open an enquiry in relation to partnership returns is set out in s12AC TMA:

> "(1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry") -
>
> (a) to the partner who made and delivered the return, or his successor,
>
> (b) within the time allowed
>
> [...]
>
> (6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry -
>
> (a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return, or
>
> (b) under paragraph 24 of Schedule 18 to the Finance Act 1998 to each partner who at that time has made a company tax return or at any subsequent time makes such a return."

27. Section 28B(4) TMA addresses the effect of the closure of an enquiry into a partnership return on the tax returns of the partners or members:

> "(4). Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend -
>
> (a) the partner's return under section 8 or 8A of this Act, or
>
> (b) the partner's company tax return,
>
> so as to give effect to the amendments of the partnership return."

28. Section 42(11) deals with stand-alone claims made otherwise that by being included in a tax return, to which the provisions of schedule 1A TMA are applied. Paragraphs 5 to 9 of schedule 1A address enquiries into such claims. s42(11A) TMA applies the provisions of schedule 1B to claims for relief involving two or more tax years.

The Appellants' submissions – loss carry-back

29. In relation to the loss carry-back claims under the Film Scheme, Dr Emblin's claim was made by his letter dated 1 April 2005 (outside any tax return). Dr Emblin submits that any challenge to that claim has to be made by an enquiry under paragraph 5, schedule 1A TMA. And as HMRC did not open any enquiry into the stand-alone claim, Dr Emblin submits that this claim is valid and final.

30. As regards Mr Reid, his loss carry-back claim under the Film Scheme was included in his 2003/04 tax return. Unlike Dr Emblin, Mr Reid's return was not corrected under s9ZB, and Mr Reid was not asked to make a separate carry-back claim. No notice of enquiry was issued in respect of his 2003/04 tax return. Accordingly, Mr Reid submits that this claim is valid and final.

31. Mr Sherry referred me to the decision of the Supreme Court in *Cotter v HMRC* [2013] UKSC 69 at [34]:

> "Where a taxpayer makes a claim for relief in a tax return form which is on its face relevant to the year of assessment (as, for example, when he claims employment loss relief in year 2) or where the taxpayer chooses under section 9(1) of TMA to calculate the amount of tax that he is due to pay, and allows for the relief in his calculation, the Revenue, if it disagrees, will have the option of correcting the return under section 9ZB of TMA, which extends to errors of principle. If the taxpayer rejects the correction (under section 9ZB (4)), that correction has no effect. The Revenue may give notice of an enquiry under section 9A. When the Revenue completes the enquiry by issuing a closure notice under section 28A, the taxpayer may appeal a conclusion stated or amendment made in the closure notice (under section 31(1) (b) of TMA). Similarly if the Revenue amends the self-assessment during the enquiry under section 9C to prevent loss of tax, the taxpayer may appeal to the tribunal (section 31(1)(a)). Until this procedure is complete, effect is given to the claim, unless it results in a repayment (section 59B(4A) of TMA)."

32. Mr Sherry submits that Mr Reid falls squarely within the terms of the Supreme Court's judgment at paragraphs [27] and [34], as he made a claim for carry-back loss relief in his 2003/04 tax return and calculated his self-assessment allowing for the relief. Mr Sherry went on to submit that the Court of Appeal recognised and followed this approach in *R (oao De Silva) v HMRC* [2016] STC 1333. As HMRC did not open an enquiry into that self-assessment tax return, the claim is valid and final. Absent any s9A enquiry into the 2003/04 tax return, there was no additional tax liability that could be pursued by way of a closure notice in respect of the Film Scheme. In particular, the closure notice issued under s28B(4) related to the enquiry into the LLP for 2004/05 – and was not the closure of a s9A enquiry into the 2003/04 tax year.

33. The Appellants therefore submit that their claims for the carry-back of losses arising under the Film Scheme were never challenged by HMRC, and their claims are valid and final.

The Appellants' submissions – multiple enquiries

34. In essence, the Appellants' case is that the scheme of the legislation is that for any tax return, there can ever only be one enquiry into that tax return, and only one closure of that enquiry (with limited exceptions not relevant to this appeal).

35. At its heart, the Appellants submit that s9A(3) makes it clear that once a tax return is subject to one open enquiry notice, it may not be the subject of another. Once an enquiry has been opened under s9A, no further enquiry notice can be issued. For these purposes, the Appellants submit, s9A(3) does not distinguish between a deemed notice of enquiry under s12AC(6) (in respect of the return submitted by a partnership of which the taxpayer was a partner), or an enquiry notice issued under s9A(1) – because a deemed enquiry under s12AC(6) opens up all aspects of the taxpayer's tax return, including (but not limited to) his participation in the partnership

36. I was referred to a decision of this Tribunal in *King and others v HMRC* [2016] UKFTT 409 (TC), which concerned a dispute between a partnership and some of its (former) partners about differences between the profits shown as allocated to them on the partnership's return and the profits declared on their individual self-assessment returns. HMRC enquired into the discrepancy by starting enquiries into the individual self-assessment tax returns under s9A and into the partnership return under s12AC. The partnership enquiry was closed with a closure notice under s28B – and as this made no amendment to the partnership's return, it did not appeal. The individual enquiries were subsequently closed under s28A. The Tribunal had to consider the interaction between the legislative provisions relating to partnership and individual tax returns. The Tribunal held that the individuals had a right of appeal in respect of the amendments made by HMRC to their individual self-assessments by a s28A closure notice – even though the amendments related to their share of profits of a partnership (and were to some extent similar to the consequential amendments made to individual returns following a s28A partnership closure notice – against which individual partners had no right of appeal). The Appellants submit that this is clear authority to show an enquiry into a partnership return being resolved by a closure notice issued in respect of a partner's individual self-assessment return under s28A – demonstrating that s28B(4) is not a self-contained provision dealing solely with partnership returns.

37. The Appellants submit that interpreting s12AC(6) as deeming a full s9A enquiry to be opened into all of the partners makes sense procedurally and aids administrative expediency. HMRC will not be obliged to open s9A enquiries into all of the partners' tax returns. Provided HMRC open the main s12AC enquiry in time, they will not miss any time limits in s9A and at the end of their enquiry are able to bind all of the partners into their stated conclusions as included in a s28B notice without taking further steps. Indeed, the Appellants submit, what is the purpose of the deemed enquiry commenced by s12AC(6), if s28B(4) is to be treated as a self-contained provision dealing solely with partnership returns? The Appellants make the point that if the closure notice issued under s28B does not close the deemed enquiry into the partners' individual self-assessment tax returns, how is that deemed enquiry otherwise closed?

38. The Appellants submit that there is no distinction between a "deemed" and an "actual" notice of enquiry – and Parliament intended s9A(3) to provide a safeguard for

taxpayers by preventing multiple or parallel enquiries into a single tax return for any given tax year.

39. The Appellants submit that when notice of enquiry was given in respect of the LLP's returns on 7 September 2006, an enquiry was also automatically opened into the Appellants' individual tax returns by virtue of s12AC(6) - and that deemed enquiry was into all aspect of the Appellants' tax affairs (not merely the consequences of the partnership enquiry). Section 9A(3) prohibits the giving of more than one notice of enquiry into a tax return - and for this reason the notices of enquiry dated 25 September 2006 and 10 January 2007 into the individual tax returns were otiose and must be ignored.

40. The Appellants further submit that when the closure of the partnership enquiry was notified to them by letters dated 3 and 8 April 2014 (respectively), those letters satisfied not only the requirements of s28B(4), but also satisfied the requirements of s28A, and so also took effect as a closure notice - closing the single enquiry that had been opened into the Appellants' individual returns under s12AC(6). The closure notices dated 24 and 30 April 2014 were therefore also otiose (as the enquiries had already been closed, and could not be closed again), and must be ignored. Indeed, the Appellants submit that HMRC did not have the power to issue second or third closure notices in respect of their 2004/05 tax returns, and the notices expressed to be issued under s28A are therefore invalid.

41. But even if HMRC are found to have been entitled to open additional section 9A enquiries into the Appellants' 2004/05 personal Tax Return,s and consequently to issue second and third closure notices pursuant to section 28A, the Appellants contend that those closure notices have very limited effect. The section 28A notices made purported amendments in respect of the "manufactured interest payment [which] arose as a result of …participation in a tax avoidance scheme" only. That being the case, the closure notices failed to make adjustments to the Returns in respect of the LLP's trading losses. It therefore follows that the second and third closure notices issued by HMRC on 24 and 30 April 2014 have no effect in relation to the Appellants' carry back claims for partnership loss relief made in Mr Reid's 2003/04 Tax Return and Dr Emblin's 1 April 2005 stand-alone claim. The Appellants therefore submit that the carry-back loss claims remain unamended and should be given full effect.

HMRC's submissions – loss carry-back

42. HMRC submit that any enquiry into the Appellants' claims for carry-back loss relief in respect of the Film Scheme could not be made in their 2003/04 self-assessment tax returns, as the losses relate to 2004/05. Any claims made in the white space in the 2003/04 tax returns were, for the purposes of the TMA, made otherwise than by being included in the relevant tax return (as the relevant self-assessment tax returns would be the ones for 2004/05).

43. The enquiry into the LLP's return opened by the notice dated 7 September 2006 (and addressed to the nominated partner) was, submit HMRC, sufficient to deal with the loss claimed, as it had effect (by virtue of the deeming provision in s12AC(6)) of

opening enquiries of the partnership aspects of the Appellants' individual self-assessments for 2004/05. There was therefore no need for HMRC to open a separate enquiry into Dr Emblin's stand-alone loss carry-back claim.

44. HMRC submit that no matter how a claim for relief was initially made, ss8 and 9 TMA require that the claim must nonetheless be included in the individual's self-assessment tax return for the year in which the losses actually were incurred by the partnership (see also s380 ICTA 1988). Further, HMRC were not precluded from opening an enquiry under s12AC (including the deemed return under s12AC(6)) or under s9A, merely because they chose not to open an enquiry under paragraph 5, schedule 1A into claims made outside a self-assessment tax return (whether free-standing, or whether treated as if made outside a tax return because it was made in a return for another year).

45. I was also referred by HMRC to the case of *De Silva*, and in particular the judgment of Gloster LJ at [52]:

> "Third, even if, contrary to my view, the Appellants' intimations in their Year 01 tax returns to claim relief in respect of earlier years are to be characterised as stand-alone claims for relief, nonetheless I see no reason why the Revenue was obliged in that event to conduct an enquiry into those stand-alone claims pursuant to Schedule 1A, paragraph 5(1), or, if it did not do so within the prescribed time, was precluded from bringing any further enquiry under section 9A of the TMA. Apart from the fact that there is nothing, in my judgment, in the relevant statutory provisions that prevents the Revenue from waiting for the submission of the required partnership and individual returns for Year 02 (by which time the relevant losses have purportedly been incurred and a claim for relief is required to be included in the return) before deciding to initiate an enquiry under section 9A, or specifically in this case, an enquiry under the combined effect of that section and section 12AC(6) of the TMA, commercially there would be little, or no, sense in the Revenue initiating its enquiry before the full facts were known. Contrary to the judge's doubts (see paragraph 42 of the judgment), I consider that the Revenue would have had a choice as to which enquiry route it took, if indeed there had been a separate stand-alone claim made prior to the Year 02 self-assessment returns. But I agree with him that, normally, the appropriate point of challenge for the carry back claim in respect of partnership losses incurred in Year 02 has to be at the time when such losses are included in the partnership return and the individual partner's return for that year. What is clear, however (and was accepted by Miss Foster), is that if the Revenue chooses to challenge, by means of the procedure under Schedule 1A, paragraph 5(1), an earlier stand-alone claim for relief, made in advance of the obligation to include such claim for relief in respect of the relevant losses in the self-assessment return in respect of the year in which they are incurred, then it is not open to the Revenue subsequently to challenge the claim again by means of a section 9A enquiry once the self-assessment return is filed. But that was not what happened in the present case, where the only enquiries which took place were those conducted pursuant to section 9A of the TMA in relation to the relevant years in which the partnership losses were incurred."

46. Accordingly, submit HMRC, *De Silva* does not support the Appellants' contentions. Indeed, it supports HMRC in that they were entitled to challenge the Film Scheme losses by opening an enquiry under s12AC into the LLP's 2004/05 return, being the year in which the losses actually arose.

HMRC's submissions – multiple enquiries

47. HMRC's submission is that the requirements of s9A(3) must be read more literally - and that it only prohibits the giving of more than one actual notice of enquiry into a tax return, and no actual notice of enquiry is given in respect of the deemed enquiry under s12AC(6). So the fact that a notice of enquiry had been given in respect of the LLP's tax return does not mean that notices of enquiry cannot thereafter be given in respect of the Appellants' individual tax returns for the same tax year.

48. HMRC submit that the rational for the deeming provision in s12A(6) is administrative convenience. It obviates the need for actual notices of enquiry to be given to each of the individual partners. If, submit HMRC, the Appellants' argument is correct (that the effect of opening a s12AC(1) partnership enquiry is to open an enquiry into all aspects of an individual partner's tax return), then s28B(4) – requiring partners' returns to be amended after closure of the partnership enquiry – would be superfluous because of the further requirement that would arise to close partners' s9A enquiries under s28A (which requires amendments to be made to give effect to the officer's conclusions).

49. HMRC concede that the issue of the second s28A(1) closure notice to Mr Reid on 30 April 2014 was a mistake. But as the later notice merely expanded on the explanation for the decision (and did not alter the decision already given in the earlier notice of 24 April 2014), the later notice can be ignored.

50. As regards the closure of the enquiries, HMRC submit that s28B(4) only gives powers to an officer to make amendments to an individual's tax return "so as to give effect to the amendments of the partnership return". A notice under s. 28B(4) is not a closure notice but is a separate and subsequent notice amending a partner's return following a closure notice under s. 28B(1) and (2) (I was referred to *Gibbs v HMRC* [2013] UKFTT 236 (TC) at [52]). For this reason, the s28B(4) notice did not close the actual enquiries opened under s9A into the Appellants' tax returns on 25 September 2006 and 10 January 2007.

51. The s28B(4) closure notice in these appeals finalised both the allocation of the LLP's losses to the individual partners and the claims to carry-back those losses. The notice referred to the amendments required to the Appellants' "return/claim", showing that both the share of losses and the associated carry-back claims had been amended. HMRC submit that by reducing the Appellants' losses to nil, the amendment must have also reduced the associated claims to nil – as it is not possible to carry back a loss that does not exist.

Discussion

52. I disagree with Mr Sherry's analysis of the *Cotter* decision, and its relevance to these appeals. In its decision, the Supreme Court placed emphasis on income tax being an annual tax, and liability to income tax being calculated in relation to a particular tax year. Lord Hodge, at [16] says

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

53. It logically follows that any claim in respect of losses arising in 2004/05 have to be claimed in the self-assessment tax return for that tax year (2004/05) – even if they are carried-back to 2003/04. I note that both Appellants included claims for the Film Scheme losses in their self-assessment tax returns for 2004/05 – and I find that these were not "mere clarifications", but were necessary. I note that following the Supreme Court's decision in *Cotter*, the Upper Tribunal revisited its decision in *R (oao Rouse) v HMRC* [2013] UKUT 615 (TCC), where the appellant (as in this appeal – but unlike Mr Cotter) had chosen to include a tax calculation in his self-assessment tax return, and had argued that s9A was therefore the only basis for an enquiry. The Upper Tribunal held that this was not correct, and that it was open to HMRC to open an enquiry under Schedule 1A (or – it would follow – in the case of a partnership loss – by an enquiry into the partnership's return for that same period).

54. I also agree with HMRC that *De Silva* does not support the Appellants' case. It is, at its root, concerned with whether a claim is "included" in a return – and that a year 2 partnership loss carried-back to year 1 (and included in the individual taxpayer's year 1 self-assessment tax return) could not be considered as a claim not included in a return, because the claim had been made before the losses had become final, and before the partnership return had been filed. The Court of Appeal held in *De Silva* that claims made in a "year 1 return" in respect of losses incurred in year 2 were not relevant to the amounts chargeable and payable for "that year" (namely year 1), and so were not "included" in "that year's" (year 1's) return.

55. Both Dr Emblin and Mr Reid sought to claim relief for losses incurred by the LLP in 2004/05 in their 2003/04 self-assessment tax returns. This is not valid – as a claim for a loss arising in 2004/05 cannot be "included" in the return for the prior year.

56. As regards enquiries into partnership tax returns, a notice under s12AC opens the enquiry. It is a notice delivered to the nominated partner only. Notice is not given to the other partners, nor do those other partners have any statutory right to be informed of the enquiry. A closure notice under s28B(1) closes the enquiry. This is delivered to the nominated partner only. Only if the self-assessment returns of the individual partners are amended is notice served on them – under s28B(4). This notice is not a closure notice – and cannot be construed as such. Its only effect is to address consequential

amendments that need to be made to the individual's self-assessment tax return as a result of the closure of the partnership enquiry – and nothing more.

57. This interpretation is supported by the fact that individual partners have no right to be informed when an enquiry is opened into a partnership's tax return, nor are they necessarily notified of its closure (they will only be notified under s28B(4) if there are consequential amendments that need to be made to their individual self-assessment tax returns).

58. I also disagree with the Appellants' submissions that a deemed enquiry under s12AC(6) opens enquiries into all aspects of the tax returns of the partners for that year. I agree with HMRC that the deeming provision in s12A(6) is administrative convenience avoiding the need for actual notices of enquiry to be given to each of the individual partners – the deemed enquiry is effected solely for the purpose of allowing consequential amendments to be made to the partners' self-assessment tax returns arising out of the closure of the partnership enquiry.

59. I also disagree with the Appellants' submission that the existence of a deemed enquiry under s12AC(4) gives rise to a breach of s9A(3). This is because the deemed notice is not an actual notice of enquiry into the individual's return (the actual notice of enquiry was into the partnership's return). s9A(3) must be interpreted as referring only to actual enquires and not to deemed enquiries. To interpret these provisions otherwise would lead to absurd results. Consider, for example, an individual who is a partner two different partnerships. If the Appellants' interpretation is correct, it would lead to the absurd situation that if HMRC opened an enquiry into one of the partnerships' returns, they would be precluded from opening an enquiry into the returns of the other.

60. Mr Sherry asked the question as to how the deemed enquiry opened under s12AC(6) was closed. The answer is that the actual enquiry into the partnership's return is closed by its own closure notice – but that there is no requirement for the partnership closure notice to be served on the individual partners. And there is a certain logic to this – as the individual partners are not served with the notice opening the enquiry into the partnership's return, they are not served with the partnership's closure notice. If there need to be amendments to the self-assessment tax returns of the individual partners in consequence of the partnership enquiry, then those amendments are given effect by a notice under s28B(4).

61. The Appellants' argument that a notice under s28B(4) operates to close a s9A enquiry into a partner's tax return leads to some illogical and obviously unintended results. One example given to me by HMRC was to consider an individual who was a partner in a number of different partnerships. If the Appellants' interpretation was correct, it would not be possible to amend that individual's return further following enquiries undertaken into more than one partnership, because the first s28B(4) notice issued would close the enquiry into the individual's return and no further amendments, arising out of other partnership enquiries, could be entertained.

62. Nor am I persuaded that this Tribunal's decision in *King* supports the Appellants' submissions. The Tribunal found in *King* that partners had a right of appeal in cases

where they disagreed with their other (former) partners about the allocation of partnership profits – in circumstances where they would otherwise be shut out of all appeal rights. The facts of *King* are unusual, and I do not consider that the decision supports an interpretation of s12AC(6) that leads to a conclusion that that the deemed enquiry is not limited to partnership issues.

63. For these reasons, I do not agree with the Appellants that interpreting s12AC(6) as deeming a full enquiry to be opened into all of the partners tax affairs for the relevant year "makes sense procedurally and aids administrative expediency".

64. I was referred by the Appellants to *Marshall v Kerr* (1993) 67 TC 56 (CA) for authority that the deeming provisions should be given their natural and ordinary meaning. Peter Gibson J (with whom Balcombe and Simon Brown LJJ agreed) said the following (at 79A):

> "For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

65. In the House of Lords (which reversed the Court of Appeal on a point not taken below) Lord Browne-Wilkinson approved this passage as the correct approach (at 92H), and it was endorsed by the Supreme Court in *HMRC v DCC Holding (UK) Limited* [2010] UKSC 58. But it is clear also from those decisions that context is everything – and that any deeming effect has to be limited if it conflicts with the underlying policy of the legislation, or where it would lead to unjust or absurd results. In the circumstances of this appeal, I consider (for the reasons I have already given), and therefore find, that to treat the s12AC(6) deemed enquiry as opening an enquiry into all aspects of the partners' tax returns would lead to unjust or absurd results, and conflicts with the underlying policy of the legislation.

Conclusions

66. I find that:

(1) Claims for losses arising under the Film Scheme in 2004/05 (even if carried back to 2003/04) must be (and were in fact) claimed in the Appellants' self-assessment tax returns for 2004/05.

(2) It was open to HMRC to challenge these losses by opening an enquiry under s12AC into the LLP's tax return for 2004/05.

(3) The deemed enquiry into partners' tax returns under s12AC(6) is for administrative convenience only – and does not open actual enquiries into all aspects of the partners' tax returns.

(4) The issue of a notice under s28B(4) is not a closure notice and does not have the effect of closing enquiries opened into a partner's self-assessment tax returns under s9A.

(5) s28B(4) notices have the effect of amending the partners' self-assessment tax returns in respect of their partnership aspects.

(6) In these appeals, the s28B(4) notices amended the self-assessment returns of the Appellants to show nil losses under the Film Scheme. Accordingly there were no losses to be carried-back to 2003/04.

(7) The s28B(4) notices in these appeals did not act as closure notices, and they did not close the s9A enquiries into the Appellants' self-assessment tax returns.

(8) The s9A enquiries into the Appellants' tax returns were validly closed by closure notices issued under s28A to Dr Emblin on 30 April 2014 and to Mr Reid on 24 April 2014.

(9) The second closure notice issued to Mr Reid on 30 April 2014 was invalid. But as it merely gave additional clarification to the earlier notice, and did not include any new matters, its invalidity has no impact on the outcome of these appeals.

67. I therefore dismiss the Appellants' appeals.

68. As I find that the s28B(4) notices were valid and had the effect of amending the Appellants' returns to show nil losses under the Film Scheme, I do not need to consider whether there was any element of double counting by Dr Reid as a result of the claim in his 2003/04 tax return for a £1.7m partnership loss arising in 2003/04, and for £747,654 to be set against his total income for that year under s380(1)(a) ICTA 1988 – in addition to the claim for the carry-back of losses from 2004/05.

Costs etc

69. The appeals were allocated to the complex track, and therefore it is open to the Tribunal to make an order in respect of costs under Rule 10 of the Tribunal's procedure rules. I make the following directions in respect of costs (in the place of the requirements of Rule 10(3) and (4)):

(1) any application by HMRC for costs under Rule 10 be made in writing to the Tribunal and the Appellants, to be received no later than 28 days from the date on which this decision is released (but it need not be accompanied by a schedule of costs),

(2) in the event that such an application is made, the Appellants may make written representations to the Tribunal (which may include considerations relevant to the Appellants' financial means), so as to be received by the Tribunal

(with a copy sent to HMRC) no later than 28 days from the date of HMRC's application,

(3) The Tribunal shall then make such further directions as it considers appropriate.

70. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 25 APRIL 2018

Authorities cited in skeletons but not mentioned in this decision:

Spring Salmon & Seafood v HMRC [2014] UKUT 488 (TCC)
R (oao William Archer) v HMRC (2017) EWHC 296 (Admin)