[2014] UKUT 0488 (TCC)

Appeal number FTC/109/2013

CORPORATION TAX – appeal in F-tT against amendments made by closure notices – jurisdiction – claim for terminal loss relief – denied in closure notices relating to other years – whether jurisdiction to consider the appeal – no – appeal to Upper Tribunal dismissed

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

SPRING SALMON & SEAFOOD LIMITED

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Mr Justice Warren, Chamber President

Sitting in public at George House, Edinburgh on 2 October 2014

Michael Upton, Advocate, instructed by Russel + Aitken on behalf of the Appellant

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

Introduction

1. This is an appeal from part of the decision of Judge Mosedale released on 24 May 2013 following a hearing on 13 May 2013 ("**the Judge**" and "**the Decision**"). The relevant part of the Decision concerned the jurisdiction of the Tax Chamber ("**the Tribunal**") over certain aspects of the appeal by the appellant, Spring Salmon & Seafood Ltd ("**SSSL**").

2. The Judge sets out the background facts in [2] to [21] of the Decision. Basing myself heavily on that, I can summarise the facts insofar as relevant to the present appeal in the following paragraphs.

3. SSSL filed its corporation tax return for the year which ended in 2001. It declared a liability to tax and paid some £69,864 in tax. No enquiry was opened into that tax return.

4. In around March 2003, SSSL filed its corporation tax return for its accounting period which ended on 31 July 2002 ("**the 2002 return**") and paid some £57,000 in respect of its tax liability for that period.

5. Some time in 2004, SSSL filed its corporation tax return for its accounting period which ended on 31 July 2003 ("**the 2003 return**"). It showed a tax liability of £137,637.38. At the same time, it filed an amendment to its 2002 return. The amendment showed a tax liability of £272,012.95.

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

7. HMRC's response was, on 28 October 2004, to open an enquiry into both the 2002 and 2003 returns ("**the 2002 and 2003 enquiries**"). HMRC disputed the

claim to amortisation of goodwill and disputed whether the tax liability declared by SSSL been paid.

8. SSSL ceased to trade at some time on or before 31 January 2005 but after 31 July 2004; the precise date does not matter for present purposes.

9. On 30 August 2006, Mr Thomas, a director of SSSL, wrote to HMRC on behalf of the company. I should add a little detail to the Judge's description of this letter. With the letter, Mr Thomas enclosed a copy of SSSL's financial statements for the 18 months ended 31 January 2005 ("**the financial statement**") and also "detailed corporation tax computations for the relevant periods" ("**the computation schedule**").

10. The letter also enclosed short-form tax returns covering the final 18 months of trading for the following periods:

    a. 12 months ended 31 July 2004 ("**the 2004 return**"); and

    b. 6 months ended 31 January 2005 ("**the 2005 return**").

11. The letter contained the following:

> "The terminal loss of £2,483,777 has been calculated based on the result for the final 12 months of trading (1 February 2004 to 31 January 2005). Accordingly, the supporting computations show the adjustment of the results for the following periods:
>
> 12 months ended 31 July 2004
> 6 months ended 31 January 2005
> 12 months ended 31 January 2005.
>
> The terminal loss has been off-set against profits of the preceding 36 months. The corresponding corporation tax paid for that period was £605,610 before interest."

12. SSSL considers that this letter made an effective claim to terminal loss relief. This loss relief claim arose (or is said to arise) out of the further amortisation of goodwill. For the purposes of the appeal before me, it is accepted by HMRC that the letter, together with the 2004 and 2005 returns, the financial statements and the computation schedule were effective to make such a claim under section 393A Income and Corporation Taxes Act 1988 ("**section 393A**") to which I will come in due course. I will refer to it in this decision as "**the Claim**".

13. HMRC subsequently opened enquiries on 4 January 2007 into the "corporation tax self assessment periods ended" on 31 July 2004 and 31 January 2005 ("**the 2004 enquiry**" and "**the 2005 enquiry**").

14. On 25 March 2011, closure notices were issued, following completion of the four enquiries which I have mentioned, for each of the four periods concerned. I will refer to them as "**the 2002, 2003, 2004 and 2005 closure notices"** respectively.

15. The 2002 and 2003 closure notices, among other matters, refused the claim to amortisation of goodwill. The Judge describes the 2004 and 2005 closure notices as, among other matters, denying the Claim. I will come to that point in more detail later since SSSL's case is that those closure notices, on their true construction, did no such thing.

16. On 12 April 2011, SSSL lodged with HMRC an appeal against all four closure notices. On 11 August 2011, SSSL lodged with the Tribunal an appeal against the amendments which had been made to the 2002 and 2003 returns by the 2002 and 2003 closure notices. That appeal comprises the proceedings which were before the Judge and in which the appeal to me is made. SSSL did not lodge an appeal with the Tribunal against the 2004 and 2005 closure notices.

17. Since the date of the Decision, appeals against the 2004 and 2005 closure notices have been lodged with the Tribunal. HMRC have not opposed the bringing of these late appeals. The Tribunal has allowed them to proceed so that there are now four appeals before it which have been conjoined.

18. SSSL's grounds of appeal in relation to the 2002 and 2003 closure notices are, to adopt the Judge's summary description, that

    a. it is entitled to the claimed amortisation relief;

    b. it has paid the tax as claimed in any event.

    c. the Claim has the effect of reducing its tax liability.

19. In the current proceedings, the Tribunal raised of its own motion two questions on jurisdiction only one of which is relevant to the appeal before me. The relevant question was formulated by the Judge in this way: Can the Tribunal consider the question whether SSSL's claim to terminal loss relief (*ie* the Claim) is final in the sense of being unable to be challenged by HMRC?

The legislation

20. To answer that question, it is necessary to refer to some of the legislation. Section 393A is the section which allows a trading loss for an accounting period to be set off against profits of any description of that accounting period or certain earlier periods. This is the provision under which SSSL has made the Claim. Section 393A(1) provides as follows:

> "393A. **Losses: set off against profits of the same, or an earlier, accounting period**
> (1) Subject to section 492(3) [which is not relevant to the present appeal], where in any accounting period ending on or after 1st April 1991 a company carrying on a trade incurs a loss in the trade, then, subject to subsection (3) below, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against profits (of whatever description) –

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

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

21. The relevant carry-back period under subsection (2) is the 12 months immediately preceding the accounting period in which the loss in incurred. That period is extended to 3 years under subsection (2A) in relation to losses falling within subsection (2B) which provides as follows:

"(2B) Where a company ceases to carry on a trade at any time, subsection (2A) above applies to the following –
(a) the whole of any loss incurred in that trade by that company in an accounting period beginning twelve months or less before that time; and
(b) the part of any loss incurred in that trade by that company in an accounting period ending, but not beginning, in that twelve months which is proportionate to the part of that accounting period falling within those twelve months."

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

23. In the present case, if SSSL did incur a relevant trading loss in the 18 month accounting period ending on 31 January 2005, carry back is, in principle, available for earlier accounting periods in accordance with subsections (1) and (2) read with subsection (2A). This would appear to mean accounting periods falling wholly or partly within the period of 3 years immediately preceding that 18 month period; but since there is, I understand, some dispute between the parties about precisely what period is involved, I say no more about that.

24. Company tax returns, assessments and related matters are dealt with under Schedule 18 Finance Act 1998 ("**Schedule 18**"). The provisions concerning returns mirror, to some extent, but are not a precise reflection of, the provisions relating to personal tax returns found in the Taxes Management Act 1970 ("**TMA**"). I do not propose to set out any save a few of the provisions, but note the following paragraphs of Schedule 18:

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

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

c. Paragraph 7: every return for an accounting period must include a self-assessment of the amount of tax which is payable by the company for that period (a) on the basis of the information contained in the return and (b) "taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period". As to that, paragraph 8 is relevant.

d. Paragraph 8: paragraph 8(1) sets out how the calculation of tax payable is to be carried out. So far as relevant for present purposes, the first step is to calculate the profits on which corporation tax is chargeable. In the present case, the central underlying dispute is whether the amortisation of goodwill is allowable as a deduction in calculating those profits. The second step of the calculation requires effect to be given to certain reliefs and set-offs available against corporation tax chargeable and the fourth step of the calculation requires certain amounts to be set off against the company's overall tax liability. The specific reliefs concerned under each step are listed; they do not include relief under section 393A. Paragraph 8(2) then provides that, except as otherwise provided, references in Schedule 18 to "the amount of tax payable by a company for an accounting period" are to the amount shown in the company's self assessment as the amount payable.

e. Paragraph: 10(1): this states that paragraphs 57 and 58 contain provisions as to the circumstances in which a claim or election may or must be made, or is to be treated as made, in a company tax return.

f. Paragraph 24: this confers power on HMRC to enquire into a company tax return upon giving appropriate notice.

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

> "(a) any claim or election in the return,
>
> (b) any amount that affects or may affect –
>
> (i) the tax payable by that company for another accounting period……"

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

i. Paragraph 57: this paragraph applies to a claim or election which affects only one accounting period. That is clearly not so in relation to SSSL's claim for carry back loss relief since the claim affects more than one accounting period. However, in a case where a claim under section 393A affects only the year in which the trading loss was incurred, as where the company has other profits which exceed the loss so that the loss must be set off against those profits leaving nothing to carry back, it may be that the company could make the claim for relief in its company tax return. If a claim can be made in the return, it must be so made: see paragraph 57(2). But if, when the claim is made, the return has already been delivered, the claim is to be treated as if it had been made by an amendment of the return if it could have been made by an amendment: see paragraph 57(3).

j. Paragraph 58: this paragraph applies to a claim if both (a) the event giving rise to the claim occurs in one accounting period (the period to which the claim "relates") and (b) it affects one or more other accounting periods. In the present case, SSSL's claim to set off the terminal trading loss "relates" to the 18 month accounting period but also affects earlier accounting periods. The case therefore falls within paragraph 58.

k. Paragraph 58(2) applies where a company makes a claim which (a) relates to an accounting period for which the company has delivered a return and could be made by amendment of the return or (b) affects an accounting period for which the company has delivered a company tax return and could be given effect to by amendment of the return. In such a case, the claim is treated as an amendment of the return. Suppose, to take an example, that, in the present case, SSSL had filed the 2005 return without referring to its loss claim and suppose that it had made such a claim in a letter a few weeks later. If it is the case that such a claim could have been made by amendment of the 2005 returns, then the claim would be treated as having been made by such an amendment. Paragraph 58 therefore envisages a situation in which a claim can be made in a return for an accounting period notwithstanding that the claim affects another accounting period. As under paragraph 57, it may be that the company can make the claim for relief in its company tax return for the accounting period to which the claim "relates" within the meaning of paragraph 58(1)(a).

l. I should note paragraph 58(3) which provides that Schedule 1A TMA (claims not included in returns) is to apply to a claim made by a company

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

The enquiries

25. The letters opening the 2002 and 2003 enquires were both headed "Notice of Enquiry into Corporation Tax Self Assessment for Return Period Ended 31 July [2002 and 2003 respectively] Paragraph 24 Schedule 18 FA 1998". It is clear, therefore, that no enquiry was opened under Schedule 1A TMA but this is wholly unsurprising since, at that stage, there had been no claim to loss relief under section 393A (and the loss giving rise to the terminal loss relief had not been incurred). As I understand it, the main objection which HMRC had to the 2002 and 2003 returns related to an item claiming amortisation of goodwill, the same objection in principle, but with different figures, which is raised in relation to the losses which are asserted in the 2004 and 2005 returns. The letters opening the 2004 and 2005 enquiries are headed in similar terms. It is clear that no enquiry was opened under Schedule 1A in relation to any claim for loss relief.

The closure notices

26. Taking the 2002 and 2003 closure notices first, these are not concerned with the Claim. The conclusion of each enquiry was, among other matters, that the deduction in the accounts and returns for goodwill amortisation should be disallowed. The inspector amended the returns to give effect to his conclusions on

those and other matters. This is all now subject to appeal by SSSL in the Tax Chamber. One of the grounds of appeal, and the one material to the present appeal before me, is as follows:

> "Further and in the alternative the company submitted a terminal loss claim affecting both periods on 30/8/06 which had the effect of reducing the CT profits for the relevant periods to nil. The claim fell within the provisions of schedule 1A TMA 1970. HMRC failed to open an enquiry into the claim and the losses. Accordingly, the CT profits for the period are nil."

27. I will return to that in a moment, but first I need to look at the 2004 and 2005 closure notices. They each refer to the accounts for the period ending 31 January 2005 and the corporation tax computation which refer to a claim for goodwill amortisation of £2,394,521. The inspector's conclusion was that SSSL was not entitled to relief for goodwill amortisation in any amount so that the relief claimed was to be disallowed in calculating SSSL's corporation tax profits. Later on in the notices, the inspector wrote this:

> "The loss reflected in the corporation tax computation submitted for the 18 month period to 31 January 2005 submitted by the company is £2,819,065. Having concluded that the company is not entitled to relief for the goodwill amortisation of £2,394,521 referred to above I conclude that the CT Loss for the 18 month period is reduced to £424,544 and that the CT loss for the 6 month period to 31 January 2005 is £141,515…..
>
> ….The CT computation submitted by the company is on the basis of a claim to carry back any CT loss on the cessation of trade but I should be grateful if you would confirm how the company wishes to utilise this loss of £141,515 referred to above."

28. It is perfectly clear from the 2004 and 2005 closure notices that no deduction was to be allowed for goodwill amortisation with the result that the loss, so far as attributable to that amortisation, which SSSL had claimed to set off under section 393A was not a loss at all. If the Claim was included in the 2005 return, then the enquiry which was in fact opened under paragraph 24 was a valid enquiry into the

Claim. There can be no doubt, and Mr Upton accepted, that in those circumstances the closure notices were effective to disallow the Claim.

29. But if the Claim was not included in the 2005 return (or perhaps the 2004 return), then his submission is that the only way of challenging the Claim was by opening an enquiry under Schedule 1A, which was not done. The 2004 and 2005 closure notices cannot, as a matter of construction, be read, in his submission, as a determination that the loss claimed cannot be carried back. Or, if it can be read that way, it is void because HMRC had no power to make such a ruling given that it had failed to open an enquiry under the relevant provision.

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

The Decision

31. I do not propose to go through the whole of that part of the Judge's thorough decision which relates to the question she asked set out at paragraph 19 above.

She was clearly correct when she said, at [53] of the Decision, that the Tribunal can determine whether:

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

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

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

32. At [69], she correctly noted that the fact that the Tribunal has jurisdiction to determine certain matters does not mean that SSSL's claim to terminal loss relief is something which can be determined in the proceedings actually before the Tribunal. And at [70], she noted that the Tribunal only has jurisdiction over matters raised in a Notice of Appeal. Whist not disagreeing with that, I would put it slightly differently. The Tribunal's functions are prescribed by the legislation which provides for appeals to be made to it from decisions of HMRC. The Tribunal has jurisdiction to decide many sorts of issue (although not all issues since it does not have a general judicial review jurisdiction) the resolution of which are necessary to a decision on the matter in hand. In the present case, the 2002 and 2003 closure notices made certain amendments to the 2002 and 2003 returns. As I have already said, it is clear that no enquiry had been opened under Schedule 1A TMA but, as I have already observed, this is wholly unsurprising since, at that stage, there had been no claim to loss relief under section 393A (and the loss giving rise to the terminal loss relief had not been incurred). The 2002 and 2003 closure notices said nothing about the loss relief claim. It is in that

context that the Judge sets out the nature of the appeal as set out in the notice of appeal:

> "This is an appeal against HMRC's decisions to amend the company's CT self-assessments for the P/E 31/7/02 and 31/7/03."

33. The Judge correctly observes that the proceedings before her related solely to the 2002 and 2003 closure notices. The 2004 and 2005 closure notices were not then the subject matter of any appeal although they were one of the grounds of appeal.

34. She then records SSSL's submission that either the Tribunal or the Court of Session would be bound to find in its favour that its terminal loss claim is valid because the enquiry into it was invalid. In other words, the closure notices are void and of no effect. She disagrees with that submission, considering that the closure notices would at most be voidable. This was because Parliament had provided a route for challenging the closure notices which, at that stage, SSSL had not done. She accepts that SSSL might be right in saying that the enquiry should have been opened under Schedule 1A TMA adding that, even if it is right, that does not make the closure notices void (by which I am sure she means void in relation to the loss relief claim: they were clearly not void in relation to the amendment of the returns).

35. Then comes what is perhaps the crux of her decision:

> "Parliament give [SSSL] a procedure to challenge [the returns] which [SSSL] has elected not to use: it cannot challenge them in proceedings related to closure notices issued in respect of earlier tax years"

concluding (see [83] of the Decision):

> "The validity of the 2004 and 2005 closure notices cannot be challenged in these proceedings because these proceedings solely concern the 2002 and 2003 closure notices."

36. The relevance of that appears from the next paragraph [84] of the Decision:

> "It follows from this that my view is that, unless and until the 2004 and 2005 closure notices, which denied the claim to terminal loss relief are successfully challenged by the mechanism provided by Parliament (ie an appeal against the 2004 and 2005 closure notices to this Tribunal) those closure notices are effective to deny the relief."

37. So her answer to the question which she had asked herself is that the Tribunal could not, in the appeals then before the Tribunal, consider the question whether SSSL's claim to terminal loss relief is final in the sense of being unable to be challenged by HMRC. She struck out the relevant ground of appeal: see [121] of the Decision.

38. Before I say anything more about that conclusion, I need to say something about Mr Upton's case in relation to the 2004 and 2005 closure notices. He now accepts, although I am not sure if this was always so, that <u>if</u> (contrary to his submission) the Claim was made in the 2004 and/or 2005 returns, then (i) the 2004 and 2005 enquiries were enquiries into the Claim as well as into other aspects of the returns and (ii) the 2004 and 2005 closure notices were effective to disallow the Claim.

39. He submits, however, that it is clear that the Claim was not made in either of those returns but was a claim made outside any return and thus open to challenge by HMRC only by an enquiry under Schedule 1A TMA, an enquiry which has never been opened and is now too late to open. He may be right that the Claim was not made in either of the returns. But he may be wrong: I say that because I consider it to be well arguable (a) that it was open to SSSL as a matter of law to make its claim as part of the 2004 and/or 2005 returns and (b) that, given that possibility, the letter dated 30 August 2006 and its accompanying documents are all to be

taken as part of the return and that the Claim was made in the return. I do not propose to decide whether either (a) or (b) is correct although my current inclination is to think that they are both correct. Nonetheless, I will say a little about each of them.

40. As to (a), it is clear that the terminal loss which is the subject matter of the Claim "relates" (within the meaning of paragraph 58 Schedule 18) to the final 18 month accounting period and is properly to be contained in the 2004 and/or 2005 returns. The Claim thus relates to matters which had to be included in the 2004 and/or 2005 returns. In those circumstances, it would be entirely appropriate that the Claim should be made in the returns. It would, to my mind, be very odd if the Claim could not be made in this way.

41. Let me test that conclusion by reference to an example and two variants.

    a. Suppose that a company, ACo, ceases business. In its final accounting period it makes a trading loss of £100,000; but it has other profits in that same accounting period of £120,000. It is able to set of the loss against the profit. It can only do so if it makes a claim to that effect. It must surely be able to make that claim in its return for the final accounting period; it should not be forced to make a claim in a separate document nor should a claim actually made in the return form or in a document submitted with and as part of the return be treated as one made other than in a return. This is a case covered by paragraph 57 of Schedule 18.

    b. Now, the first variant, suppose that the other profits are only £80,000, so that there is a loss of £20,000 to carry back to the previous accounting period if the claim so requires. This is a case covered by paragraph 58 of

Schedule 18. Again, it must surely be the case that ACo could make its claim, including the carry-back requirement, in its return for the final accounting period. Any other conclusion would be difficult to reconcile with paragraph 58(2). That paragraph applies where, among other cases, a company makes a claim after it has delivered a return and where the claim "could be made by amendment of the return". It is clearly envisaged that there can be cases where a claim which affects more than one accounting period can be made by amendment of a return already delivered. It must follow that a claim of a type which can be made by amendment is capable of being made in the original return. It seems to me that a claim under section 393A is such a claim: there is nothing in the section which requires it to be made in any particular way and, in particular, nothing which requires it to be made other than in a return.

c. Now, the second variant, suppose that ACo has no other profits in its final accounting period against which the terminal loss can be offset so that the whole of the loss is sought to be carried back. The claim remains a claim which relates to the final accounting period. The fact that there are no profits in the final accounting period against which the terminal loss can be offset should not preclude the claim being made in the return for that period. There is no principle which points to the conclusion that the claim can be made in the return under the first variant discussed above, but not under the second variant.

42. And so I conclude that it is at least strongly arguable that the Claim could have been made in the 2004 and/or 2005 returns. It is at least strongly arguable, and my inclination is to think that it is correct that the decision in *Cotter* has no impact on

that conclusion. The figure for amortization of goodwill claimed in the final accounting period was an essential figure in the calculation of the terminal loss and features in the return for that period. It thus feeds into the tax calculation for that period making it strongly arguable that *Cotter* is irrelevant to the issue in point.

43. As to (b), I have already concluded that the information contained in the letter dated 30 August 2006 and its accompanying documents are to be seen as part of the return. It must then be strongly arguable that the Claim, which can be found only in those documents if it is to be found anywhere, is also to be seen as part of the return once it is accepted that the Claim could have been made in the 2004 and/or 2005 returns.

44. Returning to the Decision, Mr Upton suggests that the Judge's conclusion was based on the premise that the 2004 and 2005 closure notices should stand unless and until challenged in an appeal specifically directed at them (an appeal which has now been launched) even if the claim was not included in either of the 2004 and 2005 returns. In that case, of course and to repeat, his submission is that no relevant enquiry has been opened and effect must be given to the claims. And so, it is said, the Judge was wrong in her premise, the premise infected her entire reasoning and her decision cannot stand.

45. There might be something in Mr Upton's point if it were clear that the Claim was not made in either of the 2004 and 2005 returns. But that is far from clear as I have already indicated. And if, contrary to his submissions, the Claim was made in either of those returns, the 2004 and 2005 closure notices are effective to reject the Claim. In those circumstances, the appropriate forum for determining the validity of the 2004 and 2005 closure notices is the tribunal or court which is

properly to be seized of the matter in accordance with the statutory procedure: that is to say the Tribunal in the context of an appeal against those closure notices. The correct forum is not the court nor is it the Tribunal in the context of other proceedings (namely the appeals in respect of the 2002 and 2003 closure notices). Whether this is a matter of jurisdiction in its strict sense or whether it is the slightly different question whether a jurisdiction which exists should ever be exercised, does not much matter. In relation to that, the passage from the opinion of Lord Nicholls in *Autologic plc v Inland Revenue Commissioners* [2006] 1 AC 118, cited by the Judge at [79] of the Decision is instructive. Just as there was really no real discretion in that case to allow the case to proceed in the "wrong" forum (because, although there was technically jurisdiction, it would be an abuse of process for the case to proceed), so too in the present case, even if strictly the Tribunal has jurisdiction to decide the issue in the appeals in relation to the 2002 and 2003 closure notices, it should not accept that jurisdiction. I therefore agree with what the Judge concluded in [84] of the Decision.

46. That is enough to dispose of the appeal. But I want to add something about SSSL's remedies assuming that Mr Upton is right in his submissions that the Claim was not made in either of the 2004 and 2005 returns and that the failure of HMRC to open an enquiry into the claim made in August 2006 results in their being unable to resist a claim to set off the terminal trading loss against the profits for the earlier accounting periods. I do not at the moment understand how that would assist SSSL in relation to the 2002 and 2003 returns. SSSL's case is that Schedule 1A applies. On that case, effect must be given to the Claim under paragraph 4(1) Schedule 1A by discharge or repayment of tax. Effect is not given to the Claim by, and does not require an amendment of, the 2002 and 2003 returns

with a consequent adjustment to the assessment. Indeed, I know of no power for HMRC to effect such an amendment.

47. Mr Upton suggests that the 2003 and 2004 closure notices were incorrect because, as I understand the submission, the amendment effected to the 2002 and 2003 returns to reflect the result of the enquiries fails to take into account the impact of the Claim (which on SSSL's case is now not open to challenge); it is not right that the return should be amended to the disadvantage of SSSL when there is a claim for set-off, pursuant to the Claim, against the profits relevant to those returns. I do not accept that submission. It is to confuse the contents of the return and the assessment with the manner of giving effect to section 393A. On the basis that the Claim was not made in a return, effect is given to the relief by a repayment of tax. This does not, as I have said, necessitate an amendment to the 2002 or 2003 returns. The returns should reflect the actual results for the relevant earlier accounting periods with the relief being given separately under paragraph 4(1) Schedule 1A.

48. I therefore perceive the 2004 and 2005 closure notices as having no relevance to the challenge by SSSL to the 2002 and 2003 closure notices and the amendments to the 2002 and 2003 returns <u>even if</u> it is right in its case that it is clearly entitled to a right of set off in relation to the earlier periods. This perception might be seen as leading only to the conclusion that this particular ground of appeal is unarguable and so is a matter for strike-out of the relevant ground of appeal rather than a matter going to jurisdiction. However, in my view it does go, as well, to the question whether the Tribunal has jurisdiction or should exercise such jurisdiction as it has. The Tribunal ought not to adopt jurisdiction to decide a point of law when that point, whichever way it is decided, will not affect the

outcome of the case. In my judgment, whether SSSL is entitled to carry back loss relief or not can make no difference to the outcome of SSSL's appeal in respect of the 2002 and 2003 closure notices and returns. If SSSL's case that Schedule 1A applies is correct, relief is not effected through an amendment to the 2002 and 2003 returns. But if that case is wrong, HMRC have adopted the correct route of challenge and SSSL's attack on the 2002 and 2003 closure notices is misconceived.

49. Quite apart from all of the above, one might question why the appeal before me has been pursued given that SSSL has now made, and been allowed to bring out of time, appeals in relation to the 2004 and 2005 closure notices which appeals are now conjoined with the earlier appeals. All of the relevant points can, and no doubt will, be argued in full at the hearing. Mr Artis questions why the appeal has been pursued, submitting that the appeal to me is academic: the appeals in relation to the 2004 and 2005 closure notices being before the Tribunal, the issue which was struck out by the Judge will be before the Tribunal for decision. I agree. This is a compelling reason for dismissing the appeal. Even if I had thought the Judge had erred in law (which I do not) in reaching her conclusion and were thus to allow the appeal, it would then be open to me to take account of the change of circumstance (namely the bringing of the new appeals and their joinder with the other appeals) and to exercise my functions under section 12 of the Tribunals Courts and Enforcement Act 2007 by declining to set aside her actual decision (*ie* striking out the ground of appeal) or by remaking the decision to the same effect.

50. SSSL's interest in pursuing this appeal, however, is really to obtain a decision in its favour on substantive matters (the validity of the 2004 and 2005 closure notice and whether or not the Claim was made in the 2004 and 2005 returns) which I, at

least, consider is a matter for the decision of the Tribunal. To be fair, Mr Upton may to some extent have moved away from that position simply inviting me to set aside the Decision so far as the Judge answered her question adversely to SSSL and to remit the case to the Tribunal to proceed accordingly. However, it seems to me that I could only do that if I were to decide a number of points in his favour, points which I consider should be left to the Tribunal.

51. He says, in addition, that the appeal is not academic because if his arguments are correct, then SSSL may not need to insist on the appeals against the 2004 and 2005 closure notices. But as he acknowledges, this rests on the contention that those notices, valid or not, did not embrace the Claim. It is not appropriate for the Upper Tribunal to determine that contention. It must be decided by the Tribunal in the context of an appeal in relation to the 2004 and 2005 closure notices.

Disposition

52. The appeal is dismissed.

Mr Justice Warren
Chamber President
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