15 November 2017

PRESS SUMMARY

R (on the application of De Silva and another) (Appellants) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2017] UKSC 74
On appeal from [2016] EWCA Civ 40

JUSTICES: Lord Neuberger, Lord Kerr, Lord Reed, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEAL

The appellants are two taxpayers who invested in and became limited partners of various partnerships in implementation of marketed tax avoidance schemes. The schemes were aimed at accruing substantial trading losses through investment in films. The partnerships claimed that they had suffered such losses in several tax years and claimed relief for film expenditure by taking advantage of tax incentives under section 42 of the Finance (No 2) Act 1992. In the early years of trading, a limited partner could use the provisions of sections 380 and 381 of the Income and Corporation Taxes Act 1998 ("ICTA") to set off his allocated share of trading losses of a partnership against his general income for that year, or any of the previous three years of assessment.

HMRC did not accept the partnerships claims for relief and initiated enquiries into their tax returns under section 12AC(1) of the Taxes Management Act 1970 ("TMA"). HMRC disallowed the partnerships' claims for expenditure funded by non-recourse or limited recourse loans to individual partners and also expenditure paid as fees to the promoters of the schemes. The partnerships appealed. Thereafter, on 22 August 2011, the partnership losses were stated at much reduced levels in a partnership settlement agreement. Between September and November 2011, HMRC wrote to the appellants to intimate that their carry-back claims in their personal tax returns would be amended in line with the lower figures for the partnership losses stated in the partnership settlement agreement.

The appellants raised judicial review proceedings against HMRC's decisions which were set out in the letters. They assert that HMRC was entitled to enquire into their claims only under Schedule 1A to the TMA and that, because the statutory time limit for such an enquiry had expired, the appellants' claims to carry back the partnership losses in full had become unchallengeable. The Upper Tribunal rejected the appellants' claim. The Court of Appeal dismissed their appeal. The appellants now appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Hodge gives the lead judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

Section 42 TMA, unless otherwise provided, has effect in relation to a claim for relief. Section 42(2) provides that, where HMRC has given notice to a person requiring him to make and deliver a tax return, a claim for relief must be included in that tax return. In the case of a partnership, certain types of claim for relief (including the type of claim made in this case) shall be made, where section 42(2) applies, in a partnership return **[14-15]**. Schedule 1B to the TMA applies where (as in this case) relief is sought for a

loss incurred in a later year ("Year 2") by carrying it back to an earlier year ("Year 1"). According to paragraph 2(2) of Schedule 1B, section 42(2) is disapplied to such a claim. This disapplication means that a claim may be made under Schedule 1A notwithstanding that HMRC have required the provision of a tax return **[17-20]**.

Enquiries into claims under Schedule 1A are subject to time limits **[21]**. The appellants asserted that their claims were governed only by Schedule 1A because they were "stand-alone" and the fact that HMRC did not open an enquiry within the requisite time limit in Schedule 1A means that their claims became unchallengeable. This assertion was incorrect because of the provisions of the TMA which specify what a taxpayer must include in his return **[22]**.

The disapplication of section 42(2) to claims falling within Schedule 1B does not mean that the taxpayer is released from the requirement to make the claim (i.e. a claim for relief involving two or more years) in his tax return in Year 2. Section 8(1) TMA imposes this requirement **[20]**. Section 8 sets out what a person must produce when given a notice to make and deliver a tax return. Under section 8(1)(a), the person is required to provide information needed "for the purpose of establishing" the amount to which that person is chargeable to income tax. This will include the person's share of partnership income or losses for the period which falls within the year of assessment **[23]**. A person must therefore include in the return for Year 2 his share of the losses of a partnership, of which he was a partner, which have been stated in a relevant statement relating to Year 2 **[24]**.

If a taxpayer wished to claim to offset all of his share of partnership losses in Year 2 against his other income in Year 2 by invoking section 380(1)(a) of ICTA, he would have to include that claim in his return for Year 2 **[27]**. If a taxpayer wished to carry back part of the losses incurred in Year 2 to set off against his liability to income tax in respect of Year 1 by invoking section 380(1)(b) of ICTA, he would also have to make the claim in his return for Year 2. The information required as part of a taxpayer's return for Year 2 will include both the relief which is claimed in the return and that which he has already received (for instance, any relief already received under Schedule 1A) as that information is necessary "for the purpose of establishing" the amounts in which the taxpayer is chargeable to income tax for that year of assessment (section 8(1)) **[28-29]**.

HMRC is empowered to enquire into anything contained in the return, or required to be contained in the return, and was therefore empowered (under section 9A TMA) to enquire into the appellants' carry back claims contained in their Year 2 tax returns. HMRC were not required to institute an enquiry under Schedule 1A in order to challenge the appellants' claims **[30]**.

HMRC by opening an enquiry into the partnership tax returns were deemed to have opened an enquiry into the partners' personal tax returns in respect of Year 2 **[32]**. The partnerships appealed against the conclusions and amendments made by the closure notices following completion of HMRC's enquiries. The partnership settlement agreement made on 22 August 2011 had the same consequences as if the Special Commissioners (now the First Tier Tribunal) had determined the appeal in the manner set out in the agreement **[33]**. This deemed decision empowered HMRC to amend the appellants' personal tax returns (section 50(9) TMA). Section 59B(5)(b) TMA provides for the payment by the taxpayer of sums payable as a result of such an amendment. Therefore, the amendment of the appellants' returns (by letters dated September to November 2011) was lawful and the judicial review challenge fails **[35-36]**. The decision of the Supreme Court in *Cotter v Commissioners for Her Majesty's Revenue & Customs* [2013] UKSC 69 gives no support to the appellants in this appeal **[37]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html