R (on the application of De Silva and another) v Revenue and Customs Commissioners

[2016] EWCA Civ 40

COURT OF APPEAL, CIVIL DIVISION

ARDEN, GLOSTER AND SIMON LJJ

13, 14 OCTOBER 2015, 2 FEBRUARY 2016

Loss relief – Claim – Validity – Partnerships – Partners making claims to carry back trading losses when partnerships had already entered into settlement agreements with HMRC in relation to losses – Whether partners entitled to carry back losses claimed – Taxes Management Act 1970, Sch 1B, para 2.

The taxpayers were, at the material times, partners in a number of limited film partnerships ('the partnerships'). The relevant partnerships submitted returns to the Revenue and Customs Commissioners ('HMRC'), in which the partnerships claimed substantial trading losses for 1998–99, 1999–2000, 2000–01 and 2001–02 and claimed relief for expenditure on films. HMRC initiated an enquiry into the returns, determined that the losses and claims for relief should be disallowed in their entirety, and issued closure notices. The partnerships appealed to the First-tier Tribunal. However, those appeals and the partnerships' claims for losses and relief for film expenditure were compromised by agreements in 2011, made pursuant to s 54 of the Taxes Management Act 1970, between HMRC and each of the relevant limited film partnerships ('the partnership settlement agreement'). Under the agreement, the partnerships were allowed relief for film expenditure and had losses recognised at a considerably reduced level from that included in their tax returns. HMRC wrote to the individual partners informing them the partnership appeals had been compromised and the relevant partnership returns had been amended, and that, in consequence, their carry-back claims to set off their shares of the losses and reliefs claimed by the partnerships would be amended in line with the lower figures agreed in the partnership settlement agreement in respect of those losses and reliefs. The taxpayers brought a claim for judicial review, in which they sought to quash HMRC's decisions to disallow their claims to carry-back partnership trading losses at the original higher rate and to allow only claims to carry-back partnership trading losses to reflect the losses agreed in the partnership settlement agreement. The Upper Tribunal dismissed the claim. The taxpayers appealed. HMRC contended that the judge had been wrong to have given no effect to the partnership agreement. The taxpayers submitted, inter alia, that the judge had been wrong to have concluded that their year 01 (namely, earlier years) claims for tax relief, in respect of partnership losses arising in year 02 (namely, subsequent years) were claims included in a return as opposed to stand-alone claims, not included in a return. A forward claim for relief made in year 01, based on anticipated losses in respect of year 02, was a stand-alone claim. The judge had wrongly characterised a stand-alone claim as a claim included in a return. Further, the judge had been wrong to have concluded that the enquiry conducted by

HMRC into the loss claims made by the partnership for the year 02 had also encompassed the related prior year claims made by the individual partners. Because the forward claim was a stand-alone claim, if HMRC wished to challenge it, it had to start an enquiry under Sch 1A to the Act. Carry-back claims were claims which related to two or more years of assessments within Sch 1B of the Act. Therefore, they could not be included in self-assessment tax returns and could only be made by stand-alone claims. Consideration was given to ss 9A, 12AC(3) and 50(9) of, and para 5(1) of Sch 1A to, the Act.

Held – (1) It was not the case that a claim under Sch 1B could only be made by way of a 'stand-alone claim' under Sch 1A, or could only be investigated by means of an enquiry under para 5(1) of Sch 1A. Further, no matter how a claim for relief had initially been 'made', the claim for relief was, nonetheless, required to be included in the return of the individual taxpayer for the year in which the losses had actually been made. The correct procedure for making a Sch 1B claim was either to make it in the return for the loss-making year in question (the year 2 return), or to make an earlier (or indeed later) Sch 1A standalone claim, which was then, subsequently, nonetheless required to be included in the return for the later year. It was not possible to characterise the inclusion in the taxpayers' respective year 01 returns, of their claims to use partnership losses arising in later periods to set off against tax arising in year 01, as simple stand-alone claims for relief made outside a return (see [48]–[50], [57], [58], below).

(2) The judge's conclusion, that the taxpayers had not been parties to the partnership agreement and so had not been directly bound by its terms, was wrong. The settlement agreement had been entered into by the relevant partnerships. There was no dispute that the general partner had had power to enter into such an agreement binding on the individual partners. There had been no suggestion that anything in the terms of the individual partnership agreements had restricted or limited the general partner's authority in any way. The present court rejected the taxpayers' procedural arguments, to the effect that HMRC had not been entitled to enquire into the individual taxpayers' tax returns for the year 02, pursuant to the combined effect of ss 9A and 12AC(3) of the Act, or, as a result of such enquiries, and the subsequent partnership settlement agreement, to amend such returns pursuant to ss 50(9) and 54 of the Act. Even if that was wrong, the effect of the partnership settlement agreement was that the individual partners, having agreed (without reservation) to the limitation of any claims for relief in respect of partnership losses for the relevant years to the amounts set out in the agreement, at a date when the time limit for any enquiry under para 5(1) of Sch 1A had clearly expired, were contractually precluded in any proceedings brought by themselves or by the Revenue from asserting that the relevant partnership losses were greater than those set out in the partnership settlement agreement. The appeal would accordingly be dismissed (see [41], [43], [54]–[58], below); *Cotter v Revenue and Customs Comrs* [2014] 1 All ER 1 considered.

Decision of the Upper Tribunal [2014] STC 2088 affirmed in part.

Notes

For the tax treatment of film-related trading losses, see Simon's Taxes B5.508.

For partnership losses generally, see Simon's Taxes B7.135.

For the Taxes Management Act 1970, Sch 1B, para 2, as in force at the material time, see the Yellow Tax Handbook 2000–01, Part I, p 233.

Cases referred to

Barnard, Re, Martins Bank v Trustee [1932] 1 Ch 269, [1931] All ER Rep 642.

Blackburn (Inspector of Taxes) v Keeling [2003] EWCA Civ 1221, [2003] STC 1162, 75 TC 608.

Revenue and Customs Comrs v Cotter [2013] UKSC 69, [2013] STC 2480, [2013] 1 WLR 3514, [2014] 1 All ER 1.

Appeal

Jorge Manuel de Silva and Bernard Alec Dokelman appealed against the decision of the Upper Tribunal (Sales J) released on 15 April 2014 ([2014] UKUT 170 (TCC), [2014] STC 2088) dismissing their claim for judicial review of the decision of the Revenue and Customs Commissioners refusing to accept claims for loss relief made by Mr De Silva and Mr Dokelman in relation to their investments in certain film partnerships. The facts are set out in the judgment of Gloster LJ.

David Southern QC (instructed by *Reynolds Porter Chamberlain LLP*) for the Appellants.

Alison Foster QC and *Aparna Nathan* (instructed by the *Solicitor for Revenue and Customs*) for the Revenue.

Judgment was reserved.

2 February 2016. The following judgments were delivered.

GLOSTER LJ (giving the first judgment at the invitation of Arden LJ).

INTRODUCTION

[**1**] This is an appeal brought by the appellants, Mr De Silva and Mr Dokelman (together 'the Appellants'), against the decision of the Upper Tribunal (Tax and Chancery Chamber) (Sales J ('the judge')) dated 15 April 2014 ([2014] UKUT 170 (TCC), [2014] STC 2088). By its decision the Upper Tribunal dismissed the Appellants' claim for judicial review of the respondents' ('the Revenue') amendments to the Appellants' tax returns by which the Revenue declined to accept claims by the Appellants for loss relief in relation to their investments in certain film partnerships.

[**2**] The Appellants' case in essence is that the Revenue had one lawful and early opportunity to challenge the Appellants' assertion of entitlement to relief by means of usable losses of the relevant film partnerships, against their income tax bill. The Appellants contend that the Revenue did not take that one chance within the relevant time limit and were barred from any other challenge to the claims made; accordingly, it follows, so the Appellants submit, that the Appellants' claims for loss relief became final and binding and must be allowed by the Revenue. That is said to be so, even though the partnership returns containing the losses were statutorily amended by the Revenue to deny the effect of the totality of the sums claimed by way of relief, as a result of settlement agreements concluded between the Revenue and the relevant partnerships pursuant to s 54 of the Taxes Management Act 1970 ('the TMA').

[**3**] The Appellants submit that the issue of law in the case, which arises on the application of complex provisions of the tax code, has been resolved in their favour by the judgment of the Supreme Court in *Revenue and Customs Comrs v Cotter* [2013] UKSC 69, [2013] STC 2480, [2013] 1 WLR 3514 ('*Cotter*'). The Revenue disputes this.

[**4**] The judge did not accept the Appellants' submissions regarding the effect of *Cotter*. He found that the Revenue had acted correctly and according to law. However, he rejected the Revenue's alternative argument that the settlement agreements concluded between the partnerships and the Revenue precluded the Appellants in any event from contending that they were entitled to the full amount of the loss relief. That issue is the subject of the Revenue's respondent's notice.

[**5**] On the appeal, as below, Mr David Southern QC appeared on behalf of the Appellants. Miss Alison Foster QC and Miss Aparna Nathan appeared on behalf of the Revenue.

FACTUAL BACKGROUND

[**6**] The following summary of the factual background is adapted from the judge's summary as set out in his judgment. However, because I do not agree with the judge's statement at the end of para [8] of the judgment that 'the individual members of the partnerships were not parties to the partnership settlement agreement', nor with his conclusion, in relation to the Revenue's separate argument based on the effect of the partnership settlement agreement, as set out at para [64] of his judgment, I have thought it more appropriate to set out the judge's factual summary to the extent which I accept it, and with certain amendments of my own based on the underlying evidence which was not in contention.

[**7**] The Appellants were at the material times limited partners in a number of limited film partnerships of which Investing in Enterprise Ltd ('IEL') was the general partner. The limited partnerships were established under the Limited Partnerships Act 1907 ('the 1907 Act'). The Appellants became limited partners in such partnerships as a result of their participation in marketed tax avoidance schemes which involved their becoming partners with the aim of accruing trading losses which, it was intended, would be set against amounts they were obliged to remit to the Revenue as income tax.

[**8**] Many of these types of film partnerships owed their existence to special tax incentives granted by Parliament for investment in the production and acquisition of qualifying films. The tax incentives in the years in question in this appeal were contained in s 42 of the Finance (No 2) Act 1992 ('the 1992 Act'), and in s 48 of the Finance (No 2) Act 1997 ('the 1997 Act'). The limited partnerships in question in the present case were financed by contributions from individual investors, including the Appellants. Each partner would make a capital contribution to the partnership, funding approximately 29% from his own resources and the remaining 71% with a loan from a third party lender on limited recourse terms.

[**9**] Under the relevant statutory provisions, in the early years of trading, a limited partner in a film partnership was entitled to set off his allocated share of the losses of a film partnership in a particular year against his general income for that year or any of three previous years, by way of 'carrying back' the losses to any of those previous years. The opportunity to carry back partnership losses in this way was potentially of considerable value to the partner, in that it allowed him to choose to use the losses to offset taxable income across a range of years, depending on when it was most advantageous to him to use the losses in that way.

[**10**] The relevant film partnerships lodged partnership tax returns, completed by the general partner, IEL, pursuant to s 12AA of the TMA in which the partnerships claimed that they had suffered substantial trading losses

for the tax years 1998/1999, 1999/2000, 2000/2001 and 2001/2002, in respect of expenditure they had purportedly incurred on the production or acquisition of qualifying films. Those returns reflected the partnerships' claims to deduct certain expenditure under the film tax relief provisions of s 42 of the 1992 Act, as amended by s 48 of the 1997 Act.

[**11**] The first Appellant, Mr De Silva, made contributions to four of the partnerships in which he was a partner by way of cash and loan. Loss relief claims were made respectively in his 1998/99 self-assessment tax return on or after 25 January 2000, and in his 1999/2000 self-assessment tax return submitted on 11 January 2001. Thus, in his self-assessment tax return for 1998/1999, Mr De Silva included a claim to set off against his general income trading losses in respect of certain partnerships in other years, including 1999/2000, so as to reduce his payment in respect of tax due for 1998/1999 by £16,800, by including that figure in box 18.9 against the entry on the return form: '1999–2000 tax you are reclaiming now'. He also included additional information in his return to explain the detail of the carry back claims he was making to give rise to that figure to offset against his tax liability. The figure represented Mr De Silva's share of relevant partnership losses, including those for 1999/2000, which it was already estimated the relevant partnerships in which he was invested would suffer for that year, as claimed by those partnerships (ie at the high rate of losses and reliefs asserted by the partnerships, which came to be challenged by the Revenue).

[**12**] In his self-assessment tax return for 1999/2000, submitted on or after 11 January 2001, Mr De Silva made similar carry-back claims to set off partnership losses in specified years against his general income in earlier years (and so claim a repayment of tax for those years), again at the high rate of losses and reliefs asserted by the partnerships, as challenged by the Revenue.

[**13**] Initially, the Revenue credited Mr De Silva with £22,400 and £42,000 in respect of such claims for relief.

[**14**] The second Appellant, Mr Dokelman, likewise made contributions to four of the partnerships in which he was a partner by way of cash and loan. In his self-assessment tax return for 2000/2001, he included a claim to carry back partnership losses in the sums of £133,000, £35,000, £52,500 and £35,000 in relation to four film partnerships, to years prior to the tax years in which the partnership losses were, or were expected, to be incurred. Again, these sums were stated at the high levels of losses and reliefs asserted by the partnerships, which were then challenged by the Revenue. The Revenue did not make any payment to Mr Dokelman in respect of his claims to relief.

[**15**] The Revenue, not accepting that the expenditure gave rise to the losses claimed by the partnerships, proceeded to challenge those claims by way of initiating an enquiry into the returns of the partnerships under s 12AC(1) of the TMA within the relevant 12-month period after the filing date. By reason of the provisions of s 12AC(6) of the TMA, the fact that an enquiry had been opened in respect of the partnership returns under s 12AC(1), was deemed to include the giving of notice of enquiry under s 9A(1) of the TMA to each partner in such partnership who at that time had made a return under s 8 of the TMA, or who at any subsequent time made such a return.

[**16**] Following extensive investigations, the Revenue concluded on its enquiry into the partnership returns that the losses and the claims for relief made by the partnerships should be disallowed in their entirety and, in or about July 2003, issued closure notices pursuant to s 20B(1)–(3) of the TMA in respect of

the eight partnerships in which the Appellants were partners, stating the Revenue's conclusions and making the amendments to the partnership returns required to give effect to such conclusions.

[**17**] The partnerships appealed to the Special Commissioners for Income Tax (which subsequently became the First-tier Tribunal (Tax Chamber)) pursuant to s 30(1)B of the TMA against the Revenue's decision to disallow the claimed losses and reliefs. Those appeals, and the partnerships' claims for losses and relief for film expenditure under the 1992 Act, were compromised by agreements dated 25 May and 22 August 2011 made pursuant to s 54 of the TMA between the Revenue and each of the relevant limited film partnerships ('the partnership settlement agreement'). The partnership settlement agreement was executed by IEL, in its capacity as general partner of, and on behalf of, all the relevant film partnerships. The agreement was signed on IEL's behalf by John Croft, one of its directors.

[**18**] Under this agreement, the partnerships were allowed relief for film expenditure and had losses recognised at a considerably reduced level from that included in their tax returns. In effect, the terms of the settlement were:

(i) all expenditure funded by way of non-recourse or limited recourse loans to individual partners was disallowed for the purposes of relief;

(ii) all the remaining expenditure paid as fees to the scheme promoters was disallowed; and

(iii) the relevant film partnerships were allowed relief only in respect of the cash expenditure incurred by them, which broadly matched the cash contributions made by the partners, less fees paid to professionals.

[**19**] The partnership settlement agreement provided inter alia that:

(i) 'The Partnerships and the Commissioners are referred to below as the "Parties" ';

(ii) 'the Partnerships listed in Schedule [X] shall be allowed relief for film expenditure in the year [Y] in the sums stated in that schedule';

(iii) 'All relief allowed to the Partnerships shall be available to the individual members of the Partnerships (the "Partners")';

(iv) 'No penalties shall be levied against the Partners in respect of their tax returns for the years in which the Partnerships of which they are members have been allowed relief under this Agreement.';

(v) 'Upon signature by the Parties, this Agreement shall immediately be fully and effectively binding upon the Parties, subject to section 54 of the Taxes Management Act 1970.'

[**20**] Upon determination in accordance with the partnership settlement agreement of the partnerships' claims for losses and reliefs, which significantly reduced the amount of those losses and reliefs below the sums originally claimed by the partnerships, the Revenue wrote to the individual partners informing them the partnership appeals had been compromised and the relevant partnership returns had been amended, and that, in consequence, their carry-back claims to set off their shares of the losses and reliefs claimed by the partnerships would now be amended in line with the lower figures agreed in the partnership settlement agreement in respect of those losses and reliefs. This had the effect of increasing the overall amount of tax payable by each partner, because, in circumstances where the s 54 agreement reduced or increased any amounts contained in a partnership statement, the Revenue was obliged, by s 50(9) of the TMA, as applied to appeals settled by compromise pursuant to s 54, to give a notice to each of the relevant partners amending the

individual partner's return under s 8 or 8A of the TMA, so as to give effect to the reductions or increases in the amounts contained in the partnership statement.

[**21**] The Revenue's letters to this effect to Mr De Silva were dated 16 September 2011 and 17 November 2011. The Revenue informed him that his relevant self-assessment returns were being amended to reflect his share of the agreed partnership losses, with the result that he was required to pay additional tax of £17,176.80 and £32,400.00.

[**22**] The Revenue wrote to Mr Dokelman in similar terms on 28 October 2011. The Revenue informed him that his 2000/2001 self-assessment return was being amended to reflect the agreed partnership losses, with the result that his entitlement to carry-back partnership losses and set them off against his other income would be reduced.

[**23**] In these proceedings, the Appellants seek to quash the Revenue's decisions, communicated by these letters, to disallow their claims to carry-back partnership trading losses at the original higher rate and to allow only claims to carry-back partnership trading losses to reflect the losses agreed in the partnership settlement agreement. There is no right of appeal against these decisions and it was agreed at first instance between the parties that judicial review was the appropriate way in which they might be challenged.

[**24**] The essence of the Appellants' case is that their claims to carry-back the tax reliefs in issue are not to be regarded as claims made in a personal tax return under s 8 of the TMA, but are properly to be regarded as stand-alone claims for relief in respect of which the Revenue are obliged to apply the challenge procedures contained in Sch lA to the TMA, rather than the challenge procedures applicable in respect of a return made under s 8 of the TMA. The Appellants say that the Revenue failed to operate the challenge procedures under Sch lA as they should have done, and are now out of time to do so. The Revenue says that it was not obliged to use those procedures in order to rectify (as the Revenue would say) the tax returns and claims for carry-back relief made by the Appellants. The Revenue also contends that, in the light of the partnership settlement agreement, the Appellants are in any event precluded from relying upon their claims to loss relief to the extent that such relief goes beyond what was agreed in such agreement.

THE JUDGMENT

[**25**] Having summarised the facts, the judge continued by setting out, at paras [17]–[37] of the judgment, a summary and analysis of the relevant statutory provisions. In my judgment that summary and analysis of the statutory scheme is correct, subject to the points which I make later in this judgment. For convenience, I have set out in the appendix to this judgment certain of the relevant statutory provisions and an analysis of their effect, based on that set out by the judge with some additions and amendments of my own.

[**26**] Interspersed in his analysis of the statutory provisions, the judge articulated certain issues arising in the proceedings and his views in relation to them. Thus, at para [27] he said:

> 'In this case, HMRC opened enquiries into the partnership returns in proper time. The question is whether that had the effect, where it was later agreed under the partnership settlement agreement that the losses included in the partnership returns were to be reduced, of allowing HMRC to re-state the tax shown to be due from the claimants in their relevant individual self-assessment returns.'

[27] At paras [31] and [32], he made the following comments in relation to the partnership settlement agreement and the issues to which it gave rise, as well as expressing his view as to what was the correct answer 'as a matter of substance' (my emphasis throughout):

> '[31] Where, on the other hand, an appeal is settled by an agreement made under s 54, the effect is the same as if the agreement were a decision of the tribunal: see s 54(1). Therefore, when the partnership settlement agreement was entered into, HMRC were required by s 50(9), read with s 54(1), to amend the claimants' individual returns for the tax periods which corresponded to the periods covered by the partnership statements which were amended pursuant to the partnership settlement agreement. *Thus, although the claimants had already claimed to carry back to earlier years the partnership losses allocated to them for those periods as included by them in their returns for those periods, by the partnership settlement agreement the amounts of the partnership losses for those periods as included in their individual returns for those periods fell to be reduced.*
>
> [32] The question which arises in these proceedings is whether the claimants also thereby lost their right to carry back the higher (pre-amendment) partnership losses to set off against their income in earlier years and were accordingly only entitled to carry back the lower (post-amendment) partnership losses. *As a matter of substance, I consider it is clear that as a result of the re-statement of the partnership losses under the partnership settlement agreement the claimants did lose the right to carry back to earlier years the higher (pre-amendment) losses which had been claimed.*'

[28] At para [33] of the judgment, he summarised the Appellants' procedural argument (which Mr Southern for the Appellants has repeated in this court) as follows:

> '[33] However, Mr Southern, who appears for the claimants, submits that this outcome is foreclosed for procedural reasons. He says that this is because the claimants' claims to carry back the higher (pre-amendment) losses to set off against their income in earlier years were so-called "stand alone" claims for relief, governed by a distinct procedural regime for challenge with its own time limits, and under that regime HMRC have become time-barred from being able to challenge the carry-back claims for relief which have been made.'

[29] The judge then went on, in paras [38]–[48] of the judgment (and notwithstanding that he was still ostensibly dealing only with his analysis of the statutory scheme) to express his conclusion that, in the present case, the Appellants' claim to utilise partnership losses arising in a later period by setting them off against their respective incomes in an earlier period was not to be regarded as a simple stand-alone claim for relief made outside a return. He also referred to certain arguments put forward by the Revenue with which he did not find it necessary to deal. What the judge said was as follows:

> '[38] It was common ground that where a claimant made a carry-back claim for relief by setting off partnership losses against his personal income in a period earlier than that to which the partnership losses related, he would also have to include a statement of the partnership losses allocated to him in his individual return for the period to which those losses related (ie in his return for the period corresponding with that covered by the partnership return in which the losses are included).

[39] *Where an individual partner makes a claim to utilise partnership losses arising in a later period by setting them off against his income in an earlier period, I do not think that it is properly to be regarded as a simple "stand-alone" claim for relief made outside a return. It is an inchoate claim for relief which, as a matter of substance, will only be validated when the partnership losses are included in the partner's individual return for the later period, reflecting the partnership statement for that period.* Several of the claims for relief in this case were rather unusual, since they were asserted by the claimants (by way of carry back to earlier periods) at a time before the periods to which the relevant partnership statements and in which the trading losses occurred had closed and those partnership statements had been filed, ie the carry-back claims were made on the basis of what it was expected and estimated the losses attributable to the claimants for those later periods would be. *But the claims for relief could, as a matter of substance, only ultimately be made good if the claimants also eventually included their shares of the partnership trading losses in their own individual returns for the periods in which those losses actually arose.*

[40] In a more usual case, where the partnership losses have arisen in the later year, are included in the partnership statement forming part of the partnership return for that year and also in a partner's individual return for that year, and then the partner asks for those losses to be carried back to be set against his general income in prior years, the position would be that much clearer. A challenge by HMRC to the amount of the losses which could be brought into account for the benefit of the partner would be by way of enquiry into the partnership return and partnership statement and hence by deemed inquiry, under s 12AC(3) of the TMA, into the partner's return. This was, in fact, the position in relation to Mr Dokelman's claim in his return for 2000–01 to bring partnership losses of £133,000 into account.

[41] Where a partner makes a carry-back claim for relief in respect of partnership losses, HMRC suggested that para 5(1) of Sch 1A has the effect that HMRC has the option whether to enquire into it (ie challenge it) at the stage when the carry-back claim is made. HMRC say that para 5(3)(b) of Sch 1A gives them the choice whether to enquire into that claim as a "stand alone" claim or to enquire into the tax return in which the statement of the losses relevant to that claim is later included. If that is correct, then if HMRC choose to investigate the claim as a "stand-alone" claim, para 5(3)(b) would appear to have the effect that they may not then conduct a separate enquiry into the claim when the partnership losses to which it relates are included in the partner's tax return for the period in which the losses arose.

[42] I have to say that I have some doubt about whether the suggestion that HMRC had a choice regarding how to challenge the carry-back claims in this way is correct. *Schedule 1B, particularly when read in the context of the elaborate provisions governing enquiry into partnership returns and the effects of such enquiry, appears to me to have the effect that the appropriate point of challenge to the amount of the partnership losses would be when the claim is made to bring those partnership losses into account in the year in which they arose, which would be a claim contained in the partnership return and the individual partner's return for that year: see below.* There might, I imagine, be some aspects of the carry-back claim which did not turn on the extent of the losses in question and on information to be included in those returns, in respect of which the appropriate means of challenge could be by an

enquiry under para 5(1) of Sch 1A into the carry-back claim itself, rather than into the tax returns to which it related (eg if there were some issue not about the amount of the allowable losses, but about whether the taxpayer had sought to apply them by carry back to a tax year which was properly open to him). In that respect, and to that extent, the carry-back claim would be made "otherwise than by being included in a return under section 8, 8A or 12AA [of the TMA]": see s 42(11)(a) of the TMA. That is not this case.

[43] Similarly, it is possible for a taxpayer to make a claim outside any tax return for repayment of tax to him on the basis of a choice to carry back loss relief from a later year to an earlier year (cf *Cotter* at [16], discussed below), and it may be that if this were done HMRC could re-open the whole matter (including the accuracy of any entries in any tax return relevant to the making of such a claim for repayment, even though they had not sought to challenge those entries by use of the enquiry procedure under s 9A of the TMA) by means of an enquiry under Sch 1A into the carry-back claim itself. I do not say that it necessarily would be open to HMRC to do this—it seems to me to be arguable that if they had not challenged the relevant entries in the returns using the procedure under s 9A they might be precluded from challenging those entries in an enquiry under Sch 1A. However, I do not have to reach any concluded view about this. Again, that is not this case.

[44] It is not necessary here to examine further how an enquiry under para 5(1) of Sch 1A might interact with an enquiry into or tribunal ruling upon a partnership return and partnership statement, or with the operation of Sch 1B, because HMRC did not commence an enquiry into the claimant's carry-back claims as "stand alone" claims. Instead, they commenced an enquiry into the relevant partnership returns and partnership statements when they were filed, which automatically had the effect of amounting to an enquiry into relevant individual returns of the claimants for the corresponding periods by which HMRC challenged the amounts of partnership losses which the claimants sought to bring into account for the purposes of their tax affairs. In proceeding in that way, I consider that HMRC proceeded in an appropriate and lawful manner.

[45] Schedule 1B applies to "stand alone" and other claims which are advanced on a carry-back basis, as here. Paragraph 2(3) states expressly that "The claim shall relate to the later year" and para 2(6) provides that "Effect shall be given to the claim in relation to the later year". The effect of these provisions is that the focus in the case of a carry-back claim such as those in issue here is on the later year, ie the year in which the partnership losses actually arose and were allocated to the partners: cf *Blackburn (Inspector of Taxes) v Keeling* [2003] EWCA Civ 1221, [2003] STC 1162, 75 TC 608, at [15]–[16]. Since in the later year a partner could only claim to have partnership losses brought into account for the purposes of his tax affairs by including them in his individual tax return for that year, this means that the relevant challenge to his claim to have those losses brought into account is by enquiry into his tax return for that year, and such enquiry is deemed to be opened when HMRC open an enquiry into the partnership tax returns: s 12AC(3).

[46] It should also be noted that this interpretation of the effect of Sch 1B has the effect of bringing into line the substantive and procedural position in respect of challenges by HMRC to carry back claims in relation to

partnership losses arising in the later year. It is to be expected, and is a natural inference, that Parliament legislated to achieve this desirable outcome.

[47] In my view, it would be very odd to suppose that Parliament intended to produce an outcome that uncoupled the substantive position and the procedural position in this sort of case, so that although as a matter of substance (as here) a partner was only entitled to have partnership losses at the lower (post-amendment) rate brought into account in his favour, yet HMRC would be prevented from bringing those losses at the lower rate into account for the procedural reason that they had not launched an enquiry into the tax affairs of the partner within the relevant time limit applied to the earlier stage when a claim to carry back such losses was intimated to them, and instead would have to accept that the partner could rely on the higher (pre-amendment) losses. Such a result would cut across the basic principle evident in the scheme of the legislation regarding taxation of partners in respect of partnership profits and losses, which is to look through the partnership to tax the individual partners on their shares of those profits and losses. It would have required clear statutory language to produce such a strange result at odds with the basic scheme of the tax code. Yet there is no such language. On the contrary, the language used in para 2(3) and (6) of Sch 1B is in my view a clear injunction to the opposite effect, requiring focus on how the claim to have partnership losses brought into account is made in the later year and whether challenge is mounted to the claim in the later year by proper procedure and in proper time, as it was here.

[48] This interpretation of the effect of Sch 1B is further reinforced by the way in which it harmonises with s 50 of the TMA. Where there is an appeal by a partnership to the First-tier Tribunal, that tribunal is an independent and impartial tribunal charged with resolving the relevant dispute between HMRC and the partnership and with determining the relevant sums to be treated as included in returns and partnership statements. The principle of the rule of law, as applicable within the context of the tax code, leads one to expect that where the tribunal determines some relevant issue, its decision will be binding and will be given effect. Section 50(9) achieves this by providing that where the tribunal adjusts relevant sums in a partnership statement, HMRC is required to change partners' individual self-assessment returns to give effect to its decision. Mr Southern's submission that HMRC may, for procedural reasons, in certain circumstances be prevented from doing this, or that if HMRC do do this it would have no material effect on the tax position of the individual partners, would undermine the intended effect of s 50(9) and the principle of the rule of law of which it is an expression.'

[**30**] There then followed paragraphs setting out the judge's 'Legal analysis' and his conclusions in relation to the Appellants' submissions on the appeal based on the Supreme Court's decision in *Cotter*. Rather than attempting to summarise these conclusions, I set them out in full:

'Legal Analysis and the Judgment in Cotter

[49] In his submissions, Mr Southern placed particular emphasis on the judgment of the Supreme Court in *Cotter*. He said that the judgment in

Cotter directly supported the legal analysis proposed by the claimants and had the effect that HMRC had proceeded in an unlawful manner and that this judicial review claim should succeed.

[50] I do not accept this submission. In my view, there is nothing in the judgment in *Cotter* which leads to the conclusion that HMRC have acted unlawfully in the circumstances of this case.

[51] In this case, the claimants included claims to set off their shares of the partnership losses in later years in their individual returns for earlier years. This was simply a convenient way of intimating to HMRC that they would wish to set off those losses (which would only in fact arise in the later years) against their income in the earlier years. The parties are agreed that the fact that the claimants proceeded in this way does not mean that those claims were "included in a return" for those earlier years for the purposes of s 42 of the TMA: see *Cotter* at [24]–[25]. In fact, the claimants could have chosen other means, such as a simple letter to HMRC, to indicate that they wished to carry back the partnership losses from the later years to the earlier ones.

[52] Whichever method was used to indicate that the claimants wished to carry back those losses to earlier years, the effect of paras 2(3) and 2(6) of Sch 1B was that their claims to have those losses brought into account in their favour were treated as claims in respect of the later years (i e the years when the partnership losses actually arose). In those later years, the claimants were required to include the information about the losses in their individual returns for those years, as information submitted "for the purpose of establishing the amounts to which a person is chargeable to income tax and capital gains tax" for those years of assessment and "the amount payable by him by way of income tax for that year" (s 8(1) of the TMA; *Cotter*, [26]). It is only if partnership losses can be brought into account for those years of assessment that a right to carry back those losses arises. So, properly speaking, such claims were not simple "stand alone" claims, in the sense in which Mr Southern used that term. HMRC used appropriate means to challenge the relevant entries for partnership losses as included in the claimants' returns for the later years, by making enquiry into those returns by means of making enquiry in proper time into the partnership returns for the relevant periods in which the losses arose (see s 12AC(3)).

[53] For these reasons and the further reasons set out in the analysis of the statutory scheme, above, I therefore reject Mr Southern's contention that Sch 1A has the effect that a challenge to the claimants' claims to carry back the partnership losses had to be made by way of an enquiry into their carry-back claims made in their individual returns for earlier years (before the partnership losses actually arose), and within the time limit for such an enquiry set out in Sch 1A. HMRC were not confined to challenging the carry-back claims intimated in the claimants' returns for the earlier years by giving notice to amend the claims under para 3(1) of Sch 1A (within the time limit stipulated in that paragraph) or by commencing an enquiry into the claims under para 5(1) of Sch 1A (within the time limit stipulated in that paragraph). On the contrary, the appropriate (or, at the least, *an* appropriate) and legitimate means for HMRC to challenge the claimants' claims to bring into account the partnership losses as a foundation for carrying back the benefit of those losses to earlier years was to proceed as they did, by challenging the partnership returns for the years in which the

losses were actually said to have been incurred by means of commencing an enquiry into those returns, which automatically constituted an enquiry into and challenge to the entries relating to those losses in the claimants' self-assessment returns for those years.

[54] In *Cotter,* the taxpayer filed his tax return for 2007–08 in October 2008. In that return, he left it to HMRC to produce the relevant calculation of the tax due from him and he made no claim for loss relief. In January 2009, the taxpayer wrote to HMRC enclosing a provisional loss relief claim for 2007–08 and amendments to his return for that year. The amendments added entries in the return intimating that he had sustained an employment-related loss of £710,000 in 2008–09 for which he claimed relief, to be carried back to 2007–08 to reduce the tax due from him in relation to that year—ie much as the claimants included claims for carry-back relief from later years in their returns for earlier years in this case. The taxpayer said that his tax for 2007–08 should be reduced to nil on this basis. HMRC accepted that the tax return for 2007–08 was amended and stated that enquiries would be opened into the carry-back claim and that return. HMRC said that their enquiry would be under Sch 1A of the TMA (ie on the footing that the carry-back claim was a "stand alone" claim, not included in a tax return). The taxpayer, however, contended that the enquiry was properly to be regarded as an enquiry under s 9A of the TMA into his return for 2007–08, which would have had the effect of postponing his obligation to pay tax said to be due in respect of that year until the enquiry had been completed. HMRC did not accept this, and brought legal proceedings to recover what they maintained was the outstanding tax payable for 2007–08 while their enquiry into the carry back claim remained on foot. The court at first instance ruled in favour of HMRC on this point. The Court of Appeal allowed the taxpayer's appeal, holding that if HMRC wished to dispute an item contained in a tax return they had to follow the enquiry procedure set out in s 9A of the TMA. The Supreme Court allowed HMRC's appeal against this ruling.

[55] It should be noted that the position in *Cotter* was the converse of the position in this case. HMRC maintained successfully that the taxpayer's carry-back claim was a "stand alone" claim, not required to be made in a return, and that their enquiry was made under para 5(1) of Sch 1A; while the taxpayer contended that the enquiry was made under s 9A, as an enquiry into a self-assessment return. But it is important to emphasise that the return which the taxpayer said was the subject of an enquiry under s 9A was his return for 2007–08 (the earlier year), even though the relevant losses on which he sought to rely arose in 2008–09 (the later year). Neither party invited attention to the possible application of s 9A in respect of the return for the later year. That would not have assisted the taxpayer in his efforts to postpone payment of his tax in relation to the earlier year and the Supreme Court did not have to address that question.

[56] By contrast, in the present case, HMRC maintain that their relevant enquiry (which is deemed to include an enquiry under s 9A) is into the partnership returns and corresponding individual partner returns in respect of the later years (ie the years in which the partnership losses actually arose and were reflected as required in the relevant returns), *not* into the individual partner returns for the earlier years. This is, in my judgment, an important point of distinction between *Cotter* and the present case.

[57] In *Cotter,* the Supreme Court was addressing a situation in which the taxpayer had not made a claim for carry-back relief (from 2008–09) in his original tax return for 2007–08, but sought to make it later, in January 2009. Its ruling (see [38]), was that the claim for relief based on a loss in 2008–09 did not afford a defence to HMRC's demand for the payment of the tax assessed for 2007–08. HMRC correctly interpreted the materials sent in by the taxpayer in January 2009 as a claim for relief in respect of losses for 2008–09 which "did not alter the tax chargeable or payable in relation to [2007–08]": see [26], per Lord Hodge for the court.

[58] Lord Hodge continued at [26], "The Revenue was accordingly entitled and indeed obliged to use Sch 1A of TMA as the vehicle for its enquiry into the claim (s 42(11)(a))." At first glance this seems a slightly curious statement, because it leaves out of account the possibility, following on in particular from the operation of Sch 1B to the TMA, that HMRC would be entitled to enquire into the taxpayer's return for 2008–09 and use that enquiry as a vehicle to challenge the claim for relief based on losses in that tax year which the taxpayer wished to carry back to set off against his income in the earlier year. I think the explanation for this is that neither the taxpayer nor HMRC argued that such a possibility was relevant to the particular dispute between them and appear not to have drawn this possibility to the attention of the court. Indeed, so far as one can tell from the facts in the case, the statement seems to be clearly correct and beyond dispute: it does not appear that the taxpayer had sought to make any entry in his return for 2008–09 relevant to his claim for carry-back relief in relation to which an enquiry into *that* return under s 9A of the TMA would be relevant. The interaction of the provisions which I have reviewed above was not the subject of examination by the Supreme Court, because such examination was not necessary on the arguments which it had to address. I do not consider that this sentence in the judgment of Lord Hodge precludes the analysis of the statutory provisions set out above or the possibility of a challenge to the relevant claim in this case by way of an enquiry into the partnership return for the later years and corresponding deemed enquiry into the individual partner returns for the later years.

[59] In my view, the part of Lord Hodge's judgment in which he directly addresses Sch 1B is consistent with and supports the analysis I have set out in this judgment. For the purposes of his examination whether the taxpayer was correct in his contention that his carry-back of a claim relating to 2008–09 was part of his "return" for 2007–08, at para [15] he set out the material provisions in Sch 1B and at para [16] analysed their relevance to the taxpayer's argument as follows:

> "[16] In my view it is clear, in particular from paras 2(3) and (6), that the scheme in Sch 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. On the contrary, the sum for which the taxpayer receives relief in year 2 is the difference between what was chargeable in year 1 and what would have been chargeable 'on the assumption that effect could be, and were, given to the claim in

relation to that year' (para 2(4)). In other words, the relief is quantified on the basis that the tax liability in year 1 has already been assessed."

[60] This analysis appears to me implicitly to include the possibility, which on the arguments presented to him Lord Hodge did not have to examine, that a challenge to the claim for relief based on a carry-back claim which is made in the first manner contemplated by him (by the taxpayer "reducing his liability to pay tax in respect of year 2", ie in his return for year 2) could be made by means of enquiry into that return under s 9A of the TMA (the general provision governing challenges to entries which are properly to be regarded as part of a taxpayer's "return") rather than by means of an enquiry under Sch 1A to the TMA. On the other hand, if, apart from the entries required to be included in his return for year 2, the taxpayer claims "a repayment of tax in year 2", that would be a "stand alone" claim to make use of the relief and the relevant enquiry provision would be that in Sch 1A. The case which the Supreme Court had to consider was of this latter kind, hence the remarks of Lord Hodge in his judgment at para [26] regarding the obligation to use the procedure in Sch 1A.

[61] At para [27] of his judgment, Lord Hodge said that matters in *Cotter* would have been different if the taxpayer had made his own assessment of his tax liability by bringing his carry-back claim for relief into account in the calculation of his tax liability in his return: "Such information and self-assessment would in my view fall within a 'return' under s 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year", and HMRC could not go behind that self-assessment without either amending the return under s 9ZB of the TMA or instituting an enquiry under s 9A of the TMA. That is to say, in such a case the appropriate means of challenge to the claim for relief would be by way of an enquiry under s 9A into the taxpayer's return and not by way of an enquiry under Sch 1A into a "stand alone" claim. This is in line with, and supports, the points made in para [60] above regarding para [16] of the judgment of Lord Hodge. Where an entry relating to carry-back relief is made in the calculation of the tax due for a particular year in a return for that year, the appropriate means of challenge by HMRC is by way of an enquiry into the return itself, not under Sch 1A.

[62] Adapting this observation to the circumstances of the present case, *where an entry which is the foundation for carry-back relief is made in the taxpayer's return for a particular year (here, the entry showing the partnership losses included in the claimants' returns for the later years), an appropriate (if not, in fact, the appropriate) means of challenge by HMRC to that entry and in that respect to the claim for carry-back relief is by way of an enquiry into the return itself, rather than an enquiry under Sch 1A. This was the means of challenge which HMRC has employed in the present case. It is, in my judgment, an entirely lawful means of challenge for them to have used. A taxpayer cannot expect to be immune from a challenge to a claim for carry back relief while still vulnerable to having relevant entries in his tax return for the later year corrected pursuant to a challenge to that return brought in proper time.*

Conclusion

[63] For the reasons set out above, I dismiss this claim for judicial review.'

[**31**] The judge then set out his conclusions in relation to the Revenue's discrete point that, by virtue of the terms of the partnership settlement agreement, the Appellants were in any event precluded from claiming relief for the relevant losses. In rejecting this argument, he said as follows:

> '[64] I should add, by way of postscript, that HMRC made an additional and distinct submission to the effect that by virtue of the partnership settlement agreement and the effect given to it under s 54 of the TMA, the claimants were simply precluded from denying that the relevant amounts of the partnership losses to be brought into account for the purposes of their carry-back claims for relief were any different from those agreed in that agreement. I was not impressed by this submission, to the extent that it was said to have an effect without going through the legal analysis set out above, to trace the impact of the partnership settlement agreement upon the claimants' individual tax returns via the challenges HMRC made to the relevant partnership statements by means of their enquiry into those statements. Had HMRC's defence based on that analysis failed, I would have rejected this separate argument. *The claimants were not parties to the partnership settlement agreement and so were not directly bound by its terms.* The relevance of that agreement in the context of this claim is in my view solely by reason of the combined operation of ss 50 and 54 of the TMA and the way in which they govern the outcome of the enquiries into the relevant partnership statements and the claimants' individual returns which were properly commenced by HMRC.'

THE PARTIES' SUBMISSIONS ON THE APPEAL

[**32**] In summary, Mr Southern for the Appellants submitted as follows.

(i) The judge was wrong to conclude that the Appellants' 'Year 01' (ie earlier years) claims for tax relief, in respect of partnership losses arising in 'Year 02' (ie subsequent years) were claims included in a return as opposed to stand-alone claims, not included in a return. A forward claim for relief made in Year 01, based on anticipated losses in respect of Year 02, was a stand-alone claim. The judge had wrongly characterised a stand-alone claim as a claim included in a return.

(ii) The judge was wrong to conclude that the enquiry conducted by the Revenue into the loss claims made by the partnership for the Year 02 also encompassed the related prior year claims made by the individual partners. Because the forward claim was a stand-alone claim, if the Revenue wished to challenge it, it had to start an enquiry under Sch 1A of the TMA.

(iii) The fundamental error in the judge's reasoning, which invalidated each subsequent step of his reasoning, was his characterisation of carry-back claims as 'inchoate claims'. There was no legislative basis for this concept, and it was inconsistent with the structure and workings of the self-assessment system, in particular the finality principle. It was this erroneous step which allowed the judge to distinguish the Supreme Court's decision in *Cotter*. There was nothing in the legislation which gave suspensory effect to the claim in Year 01 for relief in respect of the losses in Year 02, or made it into something less than a complete claim.

(iv) The effect of this error, and the sweeping up of enquiries into the prior year claims into an enquiry into the current year losses in the loss-making year, would deprive the concept of a stand-alone claim of any independent content, notwithstanding its role as a structural principle of the self-assessment system.

(v) Carry-back claims were claims which related to two or more years of assessments within Sch 1B of the TMA. They therefore could not be included in self-assessment tax returns ('SATRs') and could only be made by stand-alone claims: see s 42(11) and (11A) and Sch 1B, para 2(2); *Blackburn v Keeling* [2003] STC 1162 at [16]. If it were otherwise, the taxpayer could obtain relief from tax before the actual losses which triggers the claim had arisen. This was what the taxpayer had sought to do in *Cotter*, and the Supreme Court said could not be done. Carry-back claims were the quintessential example of stand-alone claims.

(vi) What the judge said was that, whilst, as was common ground, the Box 18.9 entries in this case did not each constitute a 'claim included in a return', they did not constitute claims at all; they were simply provisional claims; when the inchoate claims crystallised into actual claims, that was the point at which they had to be classified; because the triggering event was the reported loss in the partnership statement for the loss-making year (automatically carried over into the personal tax returns of the partners), that was a claim included in a return which could be enquired into under s 9A of the TMA.

(vii) But that was simply not what the Supreme Court had said in *Cotter*. Any extension of the concept of claims included in a return at the expense of the alternative category would automatically extend the scope of claims which allowed payment of tax to be postponed. Depending upon whether a claim belonged in one category or the other, different consequences followed. The two types of claim were made in different ways. The time limits were different; stand-alone claims carried no right to defer the payment of tax; the methods of enquiring into the returns were wholly distinct.

(viii) The judge's approach was also irreconcilable with the finality principle. The self-assessment system imposed heightened responsibilities on the taxpayer and significantly enlarged Revenue powers. As a counter-balance, the self-assessment system introduced the principle of the finality of the assessment. If the taxpayer submitted his return by the filing date (31 January following the end of the year of assessment to which it related), and the Revenue had not opened an enquiry into the return within one year ('the enquiry period'), then the return became final and could not be re-opened by the taxpayer or the Revenue, unless either (i) HMRC could exercise its residual power to raise a 'discovery' assessment, or (ii) the taxpayer could make an error or mistaken claim for overpaid tax.

(ix) In *Cotter*, Lord Hodge identified one situation where an incorrectly made stand-alone claim could be converted into a claim made in a return. That would occur if the taxpayer (i) made his own calculation of tax, and (ii) reduced his liability to tax in the year of assessment by incorporating the stand-alone claim:

'[27] Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return … Such information and self-assessment would in my view fall within a "return" under s 9A of TMA … The Revenue could not go behind the taxpayer's self-assessment without either amending the tax return (s 9ZB of TMA) or instituting an enquiry under s 9A of TMA.'

(x) If, therefore, the Appellants had reduced their tax liability for the year of assessment by incorporating the Box 18.9 figure (forward losses) into the Box 18.3 figure (tax due for year of assessment), the claim would have been a claim included in the return, because the essence of a claim included in a return is that it reduces or postpones tax liability for the year of assessment. This did not occur in the case of the Appellants. Accordingly the claims were and could only be stand-alone claims.

(xi) The meaning and purpose of para 2(3) and (6) of Sch 1B of the TMA did not support and indeed contradicted the judge's analysis.

(xii) If the stand-alone claims in *Cotter* could have been enquired into by proxy in the form of a s 9A enquiry into the losses for the subsequent year, the whole issue of whether payment of tax for the prior year could have been postponed would never have arisen. That argument could only have arisen if the prior year claim was also a claim included in a return. The Supreme Court decided that this was a stand-alone claim (not an 'inchoate claim'). Accordingly, there could be no deferral of the tax due for Year 01. There was no valid ground for distinguishing *Cotter*. Lord Hodge's judgment in *Cotter* provided clear and practical rules for the operation of the self-assessment system.

(xiii) If the carry-back claims were stand-alone claims, then they remained untouched by the s 54 agreement, and its implementation through s 50(9), because the s 54 agreement only related to claims included in the partnership returns.

[33] In summary, Miss Foster, on behalf of the Revenue, submitted that the judge's decision should be upheld for the reasons which he gave, other than in relation to the effect of the partnership settlement agreement. Since her submissions are largely reflected in my reasons for dismissing this appeal, I do not rehearse them in any greater detail at this stage. However I should summarise the Revenue's submissions supporting the Revenue's respondent's notice that the judge was wrong to give no effect to the partnership settlement agreement.

[34] Miss Nathan, who presented the oral submissions on behalf of the Revenue, submitted that para [64] of the judge's judgment as quoted above revealed a material error of law when he concluded that the limited partners were not bound by the terms of the partnership settlement agreement concluded pursuant to the provisions of s 54 of the TMA on the basis that limited partners were not parties to the partnership settlement agreement and accordingly could not be bound by its terms.

[35] She submitted that the relevant partnerships were limited partnerships and, as such, were not legal entities separate from their members: see *Re Barnard, Martins Bank v Trustee* [1932] 1 Ch 269 at 272. In other words they were transparent entities for tax law purposes in the same way as general partnerships. It was trite law that, for tax purposes, a partnership was treated as a transparent entity with the effect that the trade carried on by the partnership was regarded as carried on by the individual partners and the profits and losses accruing to the partnership were treated as the profits or losses of the individual partners: see s 111 of the Income and Corporation Taxes Act 1988 ('ICTA'). Accordingly each partner was liable to income tax in respect of his share of the partnership profits and, conversely, was entitled to relief in respect of his share of partnership losses. Needless to say, if there were no partnership

profits, the partner was not taxable on his share of such non-existent profits and, if there were no partnership losses, the partner was not entitled to relief in respect of such non-existent losses.

[**36**] Limited partnerships were creatures of statute, namely the LPA 1907, which provides that the terms of the Partnership Act 1890 ('the PA 1890') and the common law apply to limited partnerships, except to the extent that they were modified by the provisions of the Limited Partnerships Act 1907 (s 7 LPA 1907). The Revenue relied upon s 6 of the PA 1890 for the submission that the partnership settlement agreement was binding on the individual partners.

[**37**] The Revenue further submitted that it was common ground that the partnerships, acting through duly authorised persons, compromised the appeals relating to the partnership losses by way of s 54 TMA agreements entered into on 25 May 2011 and 22 August 2011. By reason of this compromise: (a) all expenditure funded by way of non-recourse or limited recourse loans was disallowed; (b) all the remaining expenditure paid as fees to the scheme promoters was disallowed; and (c) the remaining expenditure was allowed.

[**38**] The compromise of these appeals was, in the Revenue's contention, undoubtedly a matter relating to the business of the partnerships. Further, such a compromise was clearly intended to bind the partnerships. In those circumstances, all the partners (both limited and general) were bound by the terms of the compromise set out in the partnership settlement agreement concluded under s 54 of the TMA.

[**39**] In these circumstances, it was clear that the requirements of s 6 of the PA 1890 were met and that all the partners (whether limited or general) were bound by the terms of the partnership settlement agreement concluded pursuant to s 54 of the TMA. The judge was wrong in holding otherwise at para [64] of his judgment. The inescapable result of the foregoing, submitted the Revenue, was that the Appellants' claims for loss relief could not stand to the extent that such claims related to partnership losses that were compromised under the partnership settlement agreement.

[**40**] Further, although not expressly dealt with by the learned judge, the Revenue's argument was, in essence, that since judicial review was a discretionary remedy, even if the Appellants' technical argument was correct, as a matter of discretion it would be inappropriate for the court to grant relief. This was because it would not be appropriate for such a remedy to be granted, where the claimant had entered into an agreement with the Revenue forswearing any right to challenge the compromise. The persons bound by the s 54 TMA agreement, viz the Appellants, were ignoring its terms, and claiming for losses to which they have agreed they were not entitled. Accordingly the appeal should be dismissed.

DISCUSSION AND DETERMINATION

[**41**] Before my analysis of the issues raised on the appeal, I should say that I disagree with the judge's conclusion, as set out in para [64] of the judgment that 'the claimants were not parties to the partnership settlement agreement and so were not directly bound by its terms'. In my view this conclusion is wrong.

[**42**] Section 6 of the PA 1890 provides that:

'An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.'

[**43**] The settlement agreement was entered into by the relevant partnerships. There was no dispute that, as general partner, IEL clearly had power to enter into such an agreement binding on the individual partners. There was no suggestion that anything in the terms of the individual partnership agreements restricted or limited IEL's authority in any way. Nor did Mr Southern submit that there was anything in the LPA 1907 which provided to the contrary.

[**44**] The partnership settlement agreement was clearly an instrument 'relating to the business of the firm', which was 'done or executed in the firm name', which showed 'an intention to bind the firm' and which was executed by a person duly authorised. It expressly conferred benefits on the individual partners: thus it provided for the quantum of the reliefs which individual members of the partnerships could claim and provided that they were not to have penalties levied against them. In those circumstances, in my judgment, the partnership settlement agreement was contractually binding upon the Appellants as limited partners and they were bound by its provisions, including the agreement only to claim limited sums by way of relief in respect of partnership losses.

[**45**] The issue then arises as to whether, on the assumption that the Appellants are right in their contention (viz that the Revenue should have opened an enquiry under Sch 1A, para 5(1), and, in the absence of such an enquiry, claims were final), the Revenue is precluded from relying upon those contractual concessions to amend the Appellants' previous self-assessment returns for the relevant years and to claim additional tax.

[**46**] However, before I address that issue, it is necessary to deal with the Appellants' procedural arguments that their claims for relief were stand-alone claims made in Years 01 which could only be the subject of enquiry under Sch 1A, para 5(1), and that, because no such enquiry was initiated by the Revenue within the relevant time period, any further enquiry was precluded.

[**47**] I have to confess that Mr Southern's technical arguments left me with a sense of total unreality. To my mind they were commercially at odds with the clear intention of the statutory scheme in relation to the taxation of partnerships and the consequent taxation of individual partners. His submissions did not, in my view, find any support from the judgment of the Supreme Court in *Cotter*. I agree with Miss Foster that the Appellants' approach is fundamentally flawed.

[**48**] First of all, I reject the Appellants' argument that a claim under Sch 1B to the TMA *can only be made* by way of a 'stand-alone claim' under Sch 1A of that Act, or *can only be investigated by means of an enquiry under para 5(1) of Sch 1A to the TMA*. All that para 2(2) of Sch 1B does is to disapply the rule in s 42(2) of the TMA that, if a claim can be made in a return, it *must* be so made. The effect of disapplying the s 42(2) restriction is that a Sch 1B claim may be made in a return, or may be made as a stand-alone claim outside a return, whether by way of a separate letter, or otherwise.

[**49**] Second, the Appellants' approach fails to recognise that, no matter how a claim for relief has initially been 'made', the claim for relief is nonetheless

required to be included in the return of the individual taxpayer for the year in which the losses were actually made by the partnership (ie here the later year—Year 02). That obligation is imposed by ss 8(1B) and 9 of the TMA and s 380 of ICTA. That is because the claim, if valid, will affect the tax chargeable and payable in the later year: see para 2(3) of Sch 1B. Losses, which may be carried back from a later year to an earlier year, cannot be given effect to in law in that earlier year; in other words they may not be relieved against the tax liability of that earlier year, despite the fact that the quantum of the claim will be calculated by reference to the earlier year. Thus, the correct procedure for making a Sch 1B claim is either to make it in the return for the loss-making year in question (the Year 2 return), or to make an earlier (or indeed later) Sch 1A standalone claim, which is then, subsequently, nonetheless required to be included in the return for the later year.

[**50**] In this respect, I agree with the judge's analysis, as set out in para [39] of the judgment, that it is not possible to characterise the inclusion in the Appellants' respective Year 01 returns, of their claims to use partnership losses arising in later periods to set off against tax arising in Year 01 as simple stand-alone claims for relief made outside a return. As the judge pointed out, these claims were made at a time *before* the periods to which the relevant partnership statements and in which the trading losses occurred had closed and those partnership statements had been filed; ie the carry-back claims were made on the basis of what it was expected and estimated the losses attributable to the Appellants for those later periods would be. But the claims for relief could, as a matter of substance, only ultimately be made good if the Appellants also eventually included their shares of the partnership trading losses in their own individual returns for the periods in which those losses actually arose. In those circumstances I see nothing wrong or unorthodox in the judge's characterisation of those claims as 'inchoate'.

[**51**] This analysis is also supported by the comments of Lord Hodge in *Cotter*, para [25], where he states that, for the purposes of ss 8(1), 9, 9A and 42(11)(a) TMA, 'a 'return' refers to the information in the tax return form which is submitted for 'the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax' for the relevant year of assessment and 'the amount payable by him by way of income tax for that year' (s 8(1) TMA)'. The information in the relevant individual returns for Year 01, relating to claims for relief in respect of Year 02 arising out of the yet to be returned partnership losses, (as was effectively common ground) were not submitted for 'the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax' for the relevant year of assessment and 'the amount payable by him by way of income tax for that year'. They did not satisfy Lord Hope's definition of a return.

[**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 Sch 1A, para 5(1), or, if it did not do so within the prescribed time, *was precluded* from bringing any further enquiry under s 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 s 9A, or specifically in this case, an enquiry under the combined effect of that section and s 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 para [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 Sch 1A, para 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 s 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 s 9A of the TMA in relation to the relevant years in which the partnership losses were incurred.

[**53**] So far as the Appellants' submissions in reliance upon *Cotter* are concerned, I respectfully endorse and adopt the analysis of the judge as set out in paras [57]–[62] of the judgment. *Cotter* was an entirely different case on its facts, where the Supreme Court was addressing a situation in which clearly a stand-alone claim, outside any tax return, had been made for carry-back relief. Moreover no claim for carry-back relief had been made, or intimated, either in the tax return for the earlier year (2007/2008) or in the relevant later year (2008/2009) in which the losses had actually been incurred.

[**54**] For the above reasons I reject the Appellants' procedural arguments to the effect that the Revenue were not entitled to enquire into the individual Appellants' tax returns for the Years 02 pursuant to the combined effect of s 9A and s 12AC(3) of the TMA, or, as a result of such enquiries, and the subsequent partnership settlement agreement, to amend such returns pursuant to ss 50(9) and 54 of the TMA. Accordingly I would dismiss the appeal.

[**55**] Even if I were wrong in the above analysis, in my judgment the effect of the partnership settlement agreement is that the individual partners, having agreed (without reservation) to the limitation of any claims for relief in respect of partnership losses for the relevant years to the amounts set out in the agreement, at a date when the time limit for any enquiry under para 5(1) of Sch 1A had clearly expired, are contractually precluded in any proceedings brought by themselves or by the Revenue from asserting that the relevant partnership losses are greater than those set out in the partnership settlement agreement.

[**56**] For the above reasons I would dismiss this appeal.

SIMON LJ.

[**57**] I agree.

ARDEN LJ.

[**58**] I also agree.

Appeal dismissed.

Katie Green Barrister.

APPENDIX

This appendix sets out and explains the relevant legislation in force at the material times for the purposes of this appeal.

1. The film taxation legislation

a. Section 42 of the Finance (No 2) Act 1992, at the relevant times, and so far as material, provided as follows:

> '**42.** *Relief for production or acquisition expenditure.*
>
> Subject to the following provisions of this section and any other provisions of the Tax Acts, in computing for tax purposes the profits or gains accruing to a person in a relevant period from a trade or business which consists of or includes the exploitation of films, that person shall (on making a claim) be entitled to deduct an amount in respect of any expenditure—
>
> (a) which is expenditure to which subsection (2) or (3) below applies, and …
>
> (4) Any amount deducted for a relevant period under subsection (1) above shall not exceed—
>
> (a) one third of the total expenditure incurred by the claimant on the production of the film concerned or the acquisition of the master negative or any master tape or master disc of it,
>
> (b) one third of the sum obtained by deducting from the amount of that total expenditure the amount of so much of that total expenditure as has already been deducted by virtue of section 41 above, or
>
> (c) so much of that total expenditure as has not already been deducted by virtue of section 68(3) to (6) of the 1990 Act, section 41 above or this section, whichever is less.'

This meant that a taxpayer could elect for what would normally be capital expenditure (and therefore non-deductible) on the making of a film or on its acquisition to be treated as expenditure against income (and therefore deductible).

b. Section 48 of the Finance Act (No 2) Act 1997, extended the scope of this relief, including by allowing expenditure to be written off as soon as the film was completed or acquired. At the relevant times, and so far as material, s 48 provided as follows:

> '*Relief for expenditure on production and acquisition.*
>
> Subject to subsection (4) below, section 42 of the Finance (No. 2) Act 1992 shall have effect in relation to any expenditure to which this section applies as if the following subsection were substituted for subsections (4) and (5) (which for any period limit relief for film production and acquisition expenditure to a third, or a proportionately reduced fraction, of the relievable expenditure)—

"(4) The amount deducted for a relevant period under subsection (1) above shall not exceed so much of the total expenditure incurred by the claimant on—

(a) the production of the film concerned, or

(b) the acquisition of the master negative or any master tape or master disc of it,

as has not already been deducted by virtue of section 68(3) to (6) of the 1990 Act above or this section." '

2. Claims for loss relief

a. The provision which applied at the relevant times to allow taxpayers to set-off losses in one trade against other income was s 380 of the Income and Corporation Taxes Act 1988 ('ICTA'). It provided at the material times as follows:

'*Set-off against general income.*

Where in any year of assessment any person sustains a loss in any trade, profession, vocation or employment carried on by him either solely or in partnership, he may, by notice given within 12 months from the 31 January next following that year, make a claim for relief from income tax on—

(a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or

(b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;

but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above.

Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection.'

b. Section 381 of ICTA provided for relief in respect of losses arising in the early years of a trade. At the material time it provided that relief in respect of losses arising in early years of trade could be carried back for up to three years as follows:

'*Further relief for individuals for losses in early years of trade.*

Where an individual carrying on a trade sustains a loss in the trade in—

(a) the year of assessment in which it is first carried on by him; or

(b) any of the next three years of assessment;

he may, by notice given within two years after the year of assessment in which the loss is sustained, make a claim for relief under this section.

Subject to section 492 and this section, relief shall be given under subsection (1) above from income tax on an amount of the claimant's income equal to the amount of the loss, being income for the three years of assessment last preceding that in which the loss is sustained, taking income for an earlier year before income for a later year.

Relief shall not be given for the same loss or the same portion of a loss both under subsection (1) above and under any other provision of the Income Tax Acts.

Relief shall not be given under subsection (1) above in respect of a loss sustained in any period unless it is shown that the trade was carried on throughout that period on a commercial basis and in such a way that profits in the trade (or, where the carrying on of the trade forms part of a

larger undertaking, in the undertaking as a whole) could reasonably be expected to be realised in that period or within a reasonable time thereafter.'

3. Relationship between partnership and partner taxation

a. A partnership, including a limited liability partnership which carries on a trade, (as the relevant film partnerships maintained they did), is a transparent entity for the purposes of tax. The profits (or losses) of the profits (or losses) of the partnership which are then allocated between the partners in accordance with their partnership interest. Thus s 111 of ICTA provided at relevant times as follows:

'**111.** *Treatment of partnerships.*

(1) Where a trade or profession is carried on by persons in partnership, the partnership shall not, unless the contrary intention appears, be treated for the purposes of the Tax Acts as an entity which is separate and distinct from those persons.

(2) So long as a trade or profession is arried on by persons in partnerships, and any of those persons is chargeable to income tax, the [profits] or losses arising from the trade or profession ("the actual trade or profession") shall be computed for the purposes of income tax in like manner as if—

(a) the partnership were an individual; and

(b) that individual were an individual resident in the United Kingdom.

(3) A person's share in the [profits] or losses arising from the actual trade or profession which for any period are computed in accordance with subsection (2) above shall be determined according to the interests of the partners during that period.

(4) Where a person's share in the [profits] or losses is determined in accordance with subsection (3) above, sections 60 to 63A shall apply as if—

(a) that share of the [profits] or losses derived from a trade or profession carried on by him alone;

(b) that trade or profession ("the deemed trade or profession") had been set up and commenced by him at the time when he became a partner or where the actual trade or profession was previously carried on by him alone, the time when the actual trade or profession was set up and commenced;

(c) as regards each year of assessment, any accounting date or accounting change of the actual trade or profession were also an accounting date or accounting change of the deemed trade or profession;

(d) subsection (2) of section 62 applied in relation to any accounting change of the deemed trade or profession if, and only if, on the assumption that the partnership were an individual, that subsection would apply in relation to the corresponding accounting change of the actual trade or profession; and

(e) the deemed trade or profession were permanently discontinued by him at the time when he ceases to be a partner or, where the actual trade or profession is subsequently carried on by him alone, the time when the actual trade or profession is permanently discontinued.'

4. Returns

a. Administratively both the partnership itself and the individual partners are obliged to make tax returns to the Revenue in relation to each tax year. At the relevant times a partnership was required to complete a partnership return pursuant to s 12AA of the TMA. Section 12AB(1) of the TMA provided that every tax return made by a partnership 'shall include a statement (a partnership statement)' showing, among other things:

> i. the amount of income or loss sustained by the partnership for the period covered by that return (ie on a composite basis); s 12AB(1)(a); and
>
> ii. the amount of such income or loss attributable to each partner; s 12AB(1)(b).

b. Section 12AB(2) and (3) allowed for amendments to be made to a partnership statement, and where they were made s 12AB(4) provided for corresponding amendments to be made to the self-assessment returns of the partners made under s 9 of the TMA.

c. The partnership statement was logically followed by the submission of each individual partner's tax return pursuant to s 8 of the TMA. The individual partner was required to include the relevant share of the partnership profits or losses allocated to him as shown in the partnership statement in his own tax return: s 8(1B) of the TMA. Section 8 provided at the material times so far as relevant as follows:

> '**8.** *Personal return.*
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> (1AA) For the purposes of subsection (1) above—
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
>
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [the principal Act] applies.
>
> (1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under this section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, loss, tax, credit or charge for the period in respect of which the statement is made.
>
> (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of this Act for a period which includes, or includes any part of, the year of assessment or its basis period …'

d. Section 9 required a return under s 8 to include a self-assessment. It provides in relevant part as follows:

'**9.** *Returns to include self-assessment.*

(1) Subject to subsections (1A) and (2), every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source and any tax credits to which section 231 of the principal Act applies

but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of section 233(1), 246D(1), 249(4), 421(1), 547(5) or 599A(5) of the principal Act …

(2) A person shall not be required to comply with subsection (1) above if he makes and delivers his return for a year of assessment—

(a) on or before the 30 September next following the year, or

(b) where the notice under section 8 or 8A of this Act is given after 31 July next following the year, within the period of two months beginning with the day on which the notice is given.

(3) Where, in making and delivering a return, a person does not comply with subsection (1) above, an officer of the Board shall if subsection (2) above applies, and may in any other case—

(a) make the assessment on his behalf on the basis of the information contained in the return, and

(b) send him a copy of the assessment so made;

and references in this Act to a person's self-assessment include references to an assessment made on a person's behalf under this subsection.

(4) Subject to subsection (5) below—

(a) at any time before the end of the period of nine months beginning with the day on which a person's return is delivered, an officer of the Board may by notice to that person so amend that person's self-assessment as to correct any obvious errors or mistakes in the return (whether errors of principle, arithmetical mistakes or otherwise); and

(b) at any time before the end of the period of twelve months beginning with the filing date, a person may by notice to an officer of the Board so amend his self-assessment as to give effect to any amendments to his return which he has notified to such an officer.

(5) No amendment of a self-assessment may be made under subsection (4) above at any time during the period—

(a) beginning with the day on which an officer of the Board gives notice of his intention to enquire into the return, and

(b) ending with the day on which the officer's enquiries into the return are completed …'

5. Opening an enquiry into partnerships returns

Section 12AC(1) of the TMA provided for a power for the Revenue to give notice to enquire into (ie challenge) a partnership return and partnership statement within a certain period (effectively 12 months) after the filing, or other relevant, date. Where notice of enquiry was given, sub-s (3) operated to deem the giving of such notice an enquiry into each partner's personal returns, removing the need for a separate enquiry to be initiated under s 9A of the TMA. Section 12AC(3) provided in relevant part as follows:

> '(3) The giving of notice under subsection (1) above at any time shall be deemed to include—
>
> (a) the giving of notice under section 9A(1) of this Act to each partner who at that time has made a return under section 9 of this Act or at any subsequent time makes such a return …'

6. Opening an enquiry into individual returns

When an individual had submitted a tax return under s 8 of the TMA, an enquiry could be opened under s 9A of the TMA. At the material times it provided as follows:

> '**9A.** *Power to enquire into returns.*
>
> (1) An officer of the Board may enquire into—
>
> (a) the return on the basis of which a person's self-assessment was made under s 9 of this Act, or
>
> (b) any amendment of that return on the basis of which that assessment has been amended by that person, or
>
> (c) any claim or election included in the return (by amendment or otherwise)
>
> if, before the end of the period mentioned in sub-s (2) below, he gives notice in writing to that person of his intention to do so.
>
> (2) The period referred to in subsection (1) above is—
>
> (a) in the case of a return delivered or amendment made on or before the filing date, the period of twelve months beginning with that date;
>
> (b) in the case of a return delivered or amendment made after that date, the period ending with the quarter day next following the first anniversary of the day on which the return or amendment was delivered or made;
>
> and the quarter days for the purposes of this subsection are 31 January, 30 April, 31 July and 31 October …'

7. Completion of an enquiry into individual and partnerships returns

Where an enquiry is opened under s 9A of the TMA, it is completed or closed by the issue of a closure notice under s 28A(1) ibid. Where an enquiry into a partnership return is opened under s 12AC, it is completed by the service of a closure notice under s 28B(1)–(3). In such a case, if the enquiry into the partnership return leads to a restatement of entries in that return which are relevant to a partner's individual return, then the Revenue are required by virtue of s 28B(4) to make amendments to each partner's individual return so as to give effect to the amendments made to the partnership return. At the material times s 28B(1)–(4) provided as follows:

> '(1) An enquiry under section 12AC(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.

a In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

b (b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(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

c (b) the partner's company tax return,

so as to give effect to the amendments of the partnership return.'

8. Appeals against closure notices

i. Section 31(1)(b) of the TMA provides for a right of appeal against a closure notice issued pursuant to s 28B in respect of a partnership's return. It was d under this provision that the partnerships appealed against the closure notices issued by the Revenue in respect of their returns.

ii. Where an appeal is determined by a hearing before the First-tier Tribunal (formerly, the Special Commissioners or General Commissioners), s 50 of the TMA provides for the tribunal to have power to amend the partnership return and the assessed amounts. In particular, s 50(6) and (7) provides that if the e tribunal decides that any amounts contained in a partnership statement are excessive or insufficient, the amounts shall be reduced or increased accordingly. This means that if the tribunal gives a decision to reduce the trading losses allocated to a partner in respect of a particular tax period as shown in a partnership statement, by reason of the trading losses of the partnership being f overstated, the effect would be to reduce the losses which the partner may include in his own individual return relevant to that tax period.

iii. Section 50(9) provides that the Revenue must amend the partner's individual return to reflect the amendments to the partnership statement made by the tribunal. It was in the following terms:

g '30. Section 50(9) TMA 1970, which applies to appeals settled by compromise pursuant to section 54 TMA, provides as follows:

(9) Where any amounts contained in a partnership statement are reduced under subsection (6) above or increased under subsection (7) above, an officer of the Board shall by notice to each of the relevant partners amend—

h (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 reductions or increases of those accounts.'

iv. Where, on the other hand, an appeal is settled by an agreement made under s 54 of the TMA, the effect is the same as if the agreement were a j decision of the tribunal: see s 54(1) which at the material time provided as follows:

'(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the Commissioners, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or

decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Commissioners had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.'

v. Therefore, when the partnership settlement agreement was entered into, (subject to the Appellants' procedural arguments) the Revenue was required by s 50(9), read with s 54(1), to amend the Appellants' individual returns for the tax periods which corresponded to the periods covered by the partnership statements which were amended pursuant to the partnership settlement agreement. In other words the losses disallowed by the compromise were treated as if they had been disallowed by the FTT.

9. Section 42 of the TMA

i. Section 42 of the TMA governs the making of claims to relief from income tax which may or may not be made by including them in a tax return. At the relevant time s 42 provided so far as material as follows:

'**42.** *Procedure for making claims etc.*

(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.

(1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.

(2) Subject to subsections (3) and (3A) below, where notice has been given under section 8, 8A or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.

(3) Subsections (1A) and (2) above shall not apply in relation to any claim which fails to be taken into account in the making of deductions or repayments of tax under section 203 of the principal Act …

(5) The references in this section to a claim being included in a return include references to a claim being so included by virtue of an amendment of the return;

(6) In the case of a trade, profession or business carried on by persons in partnership, a claim under any of the provisions mentioned in subsection (7) below shall be made—

(a) where subsection (2) above applies, by being included in a return under section 12AA of this Act, and

(b) in any other case, by such one of those persons as may be nominated by them for the purpose.

(7) The provisions are [those listed include ss 41 and 42 of the Finance (No 2) Act 1992] …

(9) Where a claim has been made (whether by being included in a return under section 8, 8A, or 12AA of this Act or otherwise) and the claimant subsequently discovers that an error or mistake has been made in the claim, the claimant may make a supplementary claim within the time allowed for making the original claim.

(10) This section (except subsection (1A) above) shall apply in relation to any elections … as it applies in relation to claims.

(11) Schedule 1A to this Act shall apply as respects any claim or election which—

(a) is made otherwise than by being included in a return under s 8, 8A or 12AA of this Act …

(11A) Schedule 1B to this Act shall have effect as respects certain claims for relief involving two or more years of assessment …'

ii. The effect of s 42 may be summarised as follows:

a. taxpayers can claim certain reliefs and this section applies in relation to them; s 42(1);

b. claims must be made in a return if the taxpayer has received notice that they should be filing such a return and it is therefore possible to do so (s 42(2));

c. in respect of trades carried on by a partnership, a claim under the provisions listed in sub-s (7) (which include claims for relief under s 42 of the 1992 Act, such as those made by the partnerships in the present case) must be made in the partnership's return in circumstances where sub-s (2) applies; s 42(6));

d. Schedule 1A of the TMA applies in respect of any claim that is not made in a return; s 42(11);

e. Schedule 1B of the TMA has effect in respect of certain claims for relief involving two or more years of assessment; s 42(11A).

iii. Thus s 42 clearly required a claim for treatment under s 42 of the 1992 Act to be made by the partnership in its partnership return since the claim relates to the partnership itself being entitled to deduct 'an amount in respect of any expenditure'.

10. Schedule 1A to the TMA

Schedule 1A to the TMA governs 'stand alone' claims, that is, claims which are not made in a return. It provided in relevant part as follows:

'SCHEDULE 1A

CLAIMS ETC NOT INCLUDED IN RETURNS

1 In this Schedule—

"claim" [means a claim or election] as respects which this Schedule applies …

Making of claims

2(1) Subject to any provision in the Taxes Acts for a claim to be made to the Board [HMRC], every claim shall be made to an officer of the Board …

(3) A claim shall be made in such form as the Board may determine.

Amendments of claims

3(1) Subject to sub-paragraph (2) below—

(a) at any time before the end of the period of nine months beginning with the day on which a claim is made, an officer of the Board may by notice to the claimant so amend the claim as to correct any obvious errors or mistakes in the [claim] (whether errors of principle, arithmetical mistakes or otherwise); and

(b) at any time before the end of the period of twelve months beginning with the day on which the claim is made, the claimant may amend his claim by notice to an officer of the Board …

Giving effect to claims and amendments

4(1) Subject to sub-paragraphs (1A), (3) and (4) below and to any other provision in the Taxes Acts which otherwise provides, an officer of the Board or the Board shall, as soon as practicable after a claim other than a partnership claim is made, or such a claim is amended under paragraph 3 above, give effect to the claim or amendment by discharge or repayment of tax.

(3) Where any such claim or amendment as is mentioned in sub-paragraph (1) or (2) above is enquired into by an officer of the Board—

(a) that sub-paragraph shall not apply until the day on which, by virtue of paragraph 7(4) below, the officer's enquiries are treated as completed …

Power to enquire into claims

5(1) An officer of the Board may enquire into—

(a) a claim made by any person, or

(b) any amendment made by any person of a claim made by him, if, before the end of the period mentioned in sub-paragraph (2) below, he gives notice in writing of his intention to do so to that person or, in the case of a partnership claim, any successor of that person.

(2) The period referred to in sub-paragraph (1) above is whichever of the following ends the latest, namely—

(a) the period ending with the quarter day next following the first anniversary of the day on which the claim or amendment was made;

(b) where the claim or amendment relates to a year of assessment, the period ending with the first anniversary of the 31 January next following that year; and

(c) where the claim or amendment relates to a period other than a year of assessment, the period ending with the first anniversary of the end of that period;

and the quarter days for the purposes of this sub-paragraph are 31 January, 30 April, 31 July and 31 October.

(3) A claim or amendment which has been enquired into under sub-paragraph (1) above shall not be the subject of—

(a) a further notice under that sub-paragraph; or

(b) if it is subsequently included in a return, a notice under section 9A(1) or 12AC(1) of this Act or paragraph 24 of Schedule 18 to the Finance Act 1998.'

11. Schedule 1B to the TMA

Schedule 1B to the TMA governs claims for relief involving two or more years of assessment, including carry back claims of the kind in issue in this case. It provides in relevant part as follows:

'SCHEDULE 1B

CLAIMS FOR RELIEF INVOLVING TWO OR MORE YEARS

1(1) In this Schedule—

(a) any reference to a claim includes a reference to an election or notice; and

(b) any reference to the amount in which a person is chargeable to tax is a reference to the amount in which he is so chargeable after taking into account any relief or allowance for which a claim is made …

Loss relief

2(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of assessment ("the later year") to be given in an earlier year of assessment ("the earlier year").

(2) Section 42(2) of this Act shall not apply in relation to the claim.

(3) The claim shall relate to the later year …

(6) Effect shall be given to the claim in relation to the later year, whether by repayment or set off, or by an increase in the aggregate amount given by section 59B(1)(b) of this Act, or otherwise …'