Neutral Citation Number: [2023] EWCA Civ 722

Case No: CA-2022-001055

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Mr Justice Marcus Smith and Upper Tribunal Judge Jonathan Richards
[2022] UKUT 84 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2023

Before :

LADY JUSTICE ASPLIN
LADY JUSTICE SIMLER
and
LORD JUSTICE NUGEE

- -

Between :

CIVIC ENVIRONMENTAL SYSTEMS LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Michael Firth (instructed by direct access) for the **Appellant**
Charles Bradley (instructed by **HMRC Solicitor's Office**) for the **Respondents**

Hearing date: 20 June 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Nugee:

Introduction

1. This appeal from the Upper Tribunal (Tax and Chancery Chamber) (**"the UT"**) concerns carry-back of losses for corporation tax purposes.

2. The Appellant company, Civic Environmental Systems Ltd, (**"CES"**) made a loss in the year ended 30 April 2008 of £444,747. It claimed to carry back that loss and set it off against its profits for the period ended 30 April 2007, which were then thought to be £142,039. That left the remaining £302,708 of losses to be carried forward to set off against later years. The First-tier Tribunal (**"the FTT"**) subsequently decided, however, that CES's profits for 2007 had been understated and should be increased by £540,000.

3. Both the FTT and, on appeal, the UT decided that notwithstanding this increase to CES's profits for 2007 it remained the case that only £142,039 of the 2008 loss could be set off against the 2007 profits. CES appeals, with permission granted by Asplin LJ, and contends that the entirety of the 2008 loss of £444,747 should be set off against the 2007 profits.

Facts in more detail

4. The relevant facts are not now in dispute. CES commenced trade on 8 June 2006 as a waste regeneration systems provider. Its first accounts were for the period 8 June 2006 to 30 April 2007 (**"the 2007 period"**). These showed a profit before taxation of £142,039. A corporation tax return was duly completed for the 2007 period, showing profits of £142,039 and corporation tax due of £41,371.95. This was dated 20 March 2008, and stamped as received on 27 March 2008. We were told that CES paid the tax shown due of £41,371.95, although we were not told precisely when.

5. CES's next accounts were for the year ended 30 April 2008. These showed a loss before taxation of £444,747 (made up of a trading loss of £444,748 and £1 of interest received). A corporation tax return was completed for the year. The front page of the form invites the person completing the return to put an X against the appropriate box(es) and an X was duly placed against the box marked "A repayment is due for an earlier period", and also against "I attach accounts and computations for the period to which this return relates". The computation attached gave the following figures:

"Losses for the Year	(444,747)
Losses Carried Back	(142,039)
Losses Carried Forward	(302,708)"

This return was dated 14 May 2009 and was filed on 22 May 2009. Mr Michael Firth, who appeared for CES, accepted that this claim to carry back losses was given effect to by HM Revenue and Customs (**"HMRC"**) repaying the £41,371.95 that had been paid. Again we were not told precisely when, but Mr Firth said that it would have been done quite quickly.

6. In the meantime HMRC had on 31 March 2009 opened an enquiry into CES's return for the 2007 period. This ultimately resulted in a closure notice dated 8 August 2012 being issued to CES. The notice included the following:

> "I have completed my enquiry into your tax return for the above mentioned period. This notice amends the return to give effect to my conclusions."

It then set out those conclusions, which can be summarised as follows:

Additional income	£308,118
Total taxable profits	£450,157
Total tax payable	£212,076.60
Tax originally paid	£41,371.95
Additional tax due (before interest)	£170,704.65.

It may be noted that the closure notice did not contain any reference to CES's election to carry back the loss for 2008, nor to the fact that CES had claimed (and by 2012 had no doubt long since had) a repayment of the £41,371.95 tax originally paid.

7. CES appealed the closure notice to the FTT. The appeal was heard with a number of appeals on other points on which nothing now turns. The decision of the FTT (Judge Tony Beare and Mr Charles Baker) was released on 26 November 2020. So far as relevant to the current issue, they first decided (at [193]) that £540,000 should have been included as additional income in CES's tax return for the 2007 period, thereby taking the profit for the period to £682,039. That conclusion has not been appealed and the detailed reasons why they came to that conclusion do not now matter, but it may be noted that £255,000 of the additional £540,000 had in fact been included by CES in its tax return for the year ended 30 April 2009, when it should have been included in the return for the year ended 30 April 2007.

8. The FTT then considered whether it was open to CES to carry back losses additional to those which it claimed to carry back in its 2008 tax return. They concluded that it was not (at [195]).

9. CES appealed that latter decision (among others) to the UT with the permission of the FTT. The appeal was heard by Marcus Smith J and Judge Jonathan Richards (as he then was) and their decision was released on 17 March 2022 at [2022] UKUT 84 (TCC). They dismissed the appeal on the carry back point. In summary they regarded the FTT's decision as correctly flowing from the fact that CES's claim to carry back the loss was made after 30 April 2009 which was the deadline for amending its return for the 2007 period.

10. CES now appeals on the ground that the UT erred in reaching this conclusion.

11. Despite Mr Firth's well-structured and able submissions, I consider that the UT reached the right conclusion, and I would dismiss the appeal.

Carry back of losses – s. 393A Income and Corporation Taxes Act 1988

12. It is convenient to start with the relevant statutory provisions. There is a substantial amount of agreement as to how they applied in the present case, and I will set them out with an explanation of how it is agreed they applied before coming to the arguments on the points on which the parties are not agreed.

13. I can start with the right to claim a carry back of losses for the purposes of corporation tax. This was at the relevant time to be found in s. 393A of the Income and Corporation Taxes Act 1988 (**"ICTA 1988"**). This has now been replaced by s. 37 of the Corporation Tax Act 2010, which we were told was to similar effect, but we are concerned with the earlier section. This had been added to ICTA 1988 by the Finance Act 1991 in relation to losses incurred in accounting periods ending on or after 1 April 1991 and provided, so far as relevant, as follows:

> "**393A Losses: set off against profits of the same, or an earlier, accounting period**
>
> (1) Subject to section 492(3), where in any accounting period ending on or after 1st April 1991 a company carrying on a trade incurs a loss in the trade, then, subject to subsection (3) below, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against profits (of whatever description)—
>
> (a) of that accounting period, and
>
> (b) if the company was then carrying on the trade and the claim so requires, of preceding accounting periods falling wholly or partly within the period specified in subsection (2) below;
>
> and, subject to that subsection and to any relief for an earlier loss, the profits of any of those accounting periods shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this subsection against profits of a later accounting period.
>
> (2) The period referred to in paragraph (b) of subsection (1) is (subject to subsection (2A) below) the period of twelve months immediately preceding the accounting period in which the loss is incurred; but the amount of the reduction that may be made under that subsection in the profits of an accounting period falling partly before the beginning of that period shall not exceed a part of those profits proportionate to the part of the accounting period falling within that period.
>
> …
>
> (10) A claim under subsection (1) above may only be made within the period of two years immediately following the accounting period in which the loss is incurred or within such further period as the

Board may allow."

14. In the present case CES was entitled to, and did, make a claim under this provision (neither s. 492(3), which concerned oil extraction activities, nor s. 393A(3) being relevant). CES did this in its 2008 tax return which required the loss it had made in 2008 to be carried back to the 2007 period and set off against the profits for that period. That was in May 2009, and the s. 393A claim was therefore made in time, being within 2 years of the end of the 2008 accounting period as required by s. 393A(10).

15. This section did not permit a taxpayer company to elect how much of a loss to carry back. The way in which it was expressed by the UT was as follows (at [78]):

> "It is common ground that the claim to carry back the loss for the 2008 period was necessarily a claim to carry back the entirety of that loss (to the extent that there were profits in the 2007 period available for set-off against that loss)."

As Mr Firth put it the claim made by a taxpayer company is a claim to require the loss to be set off against earlier profits, not a claim to carry back part of the loss.

16. However, as noted by the UT, one can only set off a loss against profits to the extent that there are profits available for set-off. In practical terms what this means is this. When CES put in its 2009 tax return it thought that its profits for the 2007 period were £142,039. That is why in the computation attached to the return it identified the "Losses carried back" as £142,039. That was not a claim to carry back only £142,039 of the 2008 loss, something that CES had no right to do; it was, properly understood, a claim to carry back the (whole of the) 2008 loss, but in circumstances where it believed that only £142,039 of that loss would be able to be used.

17. Where a taxpayer company made a claim to carry back a loss under s. 393A(1), but only part of it could in fact be used in this way, the unused part was available to be carried forward and set off against the profits of future periods. This was the effect of s. 393(1) ICTA 1988 which at the relevant time provided as follows:

> "**393 Losses other than terminal losses**
>
> (1) Where in any accounting period a company carrying on a trade incurs a loss in the trade, the loss shall be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods; and (so long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this subsection, or (if a claim is made under section 393A(1)) under section 393A(1) or 393B(3), against income or profits of an earlier accounting period."

18. In the present case it can be seen from the computation attached to CES's 2008 return

(paragraph 5 above) that CES thought that it had £302,708[1] to carry forward. That was not by itself a guarantee that it would be capable of being used against future profits as that would depend on whether CES continued trading and made profits in future periods, but it was not disputed that this was all in fact set off against future profits, although we were not given the details of this.

Company tax returns – schedule 18 to the Finance Act 1998

19. It is convenient next to refer to the statutory provisions relating to company tax returns. These are found in schedule 18 to the Finance Act 1998 (**"FA 1998"**), given effect to by s. 117 FA 1998.

20. Part II of schedule 18 is concerned with company tax returns. It includes the following provisions:

    (1) Paragraph 3(1) provides that an officer of HMRC may require a company to deliver a tax return (a "company tax return").

    (2) Paragraph 3(4) provides that the return must be delivered to the officer not later than the filing date. This is defined in paragraph 14. The definition is elaborate but the effect in the present case was that CES had 12 months from the end of each period to file its return for that period.

    (3) Paragraph 7(1) provides that every company tax return for an accounting period must include an assessment (a "self-assessment") of the amount of tax payable by the company for that period, taking into account "any relief or allowance for which a claim is included in the return".

    (4) Paragraph 15(1) provides that a company may amend its company tax return by notice to an officer of HMRC, but paragraph 15(4) provides that except as otherwise provided an amendment may not be made more than 12 months after the filing date. In the present case that means that CES could amend its return for the 2007 period up to 30 April 2009.

21. Part IV of schedule 18 is concerned with enquiries into company tax returns. It includes the following provisions:

    (1) Paragraph 24(1) provides that an officer of HMRC may enquire into a company tax return if he gives notice to the company of his intention to do so within the time allowed. In the present case HMRC duly opened an enquiry into CES's return for the 2007 period.

    (2) Paragraph 32 provides for the completion of enquiries. It now provides for the giving of partial or final closure notices, but at the relevant time simply provided that an enquiry was completed when an officer of HMRC by notice (a "closure notice") informed the company that they had completed their enquiry and stated their conclusions.

    (3) Paragraph 34 provides what is to happen when a closure notice is issued. By

[1] In some of the documents before us the loss for 2008 is given as £444,748 and the unused part carried forward as £302,709, the difference of £1 no doubt being attributable to the £1 interest received in 2008. I have not sought to consider which figure would technically be correct, as nothing turns on it.

paragraph 34(2) the notice must either state that in the officer's opinion no amendment of the relevant return is required or:

> "make the amendments of that return that are required–
>
> (i) to give effect to the conclusions stated in the notice …"

Paragraph 34(2A) permits the officer to make consequential amendments to other returns, as follows:

> "The officer may by further notice to the company make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the … closure notice."

(4) Paragraph 34(3) gives the company a right of appeal against an amendment of its tax return under paragraph 34(2) or (2A). I will come back below to the function of the FTT on such an appeal.

22. Part VII of schedule 18 contains general provisions as to claims and elections. It includes paragraphs 58 and 59 which provide as follows:

> "*Claims or elections involving more than one accounting period*
>
> 58 (1) This paragraph applies to a claim or election for tax purposes if —
>
> (a) the event or occasion giving rise to it occurs in one accounting period (the period to which it "relates"), and
>
> (b) it affects one or more other accounting periods (whether or not it also affects the period to which it relates).
>
> (2) If a company makes a claim or election which—
>
> (a) relates to an accounting period for which the company has delivered a company tax return and could be made by amendment of the return, or
>
> (b) affects an accounting period for which the company has delivered a company tax return and could be given effect by amendment of the return,
>
> the claim or election is treated as an amendment of the return.
>
> The provisions of paragraph 15 (amendment of return by company) apply.
>
> (3) Schedule 1A to the Taxes Management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company if or to the extent that it is not—

> (a) made by being included (by amendment or otherwise) in the company tax return for the accounting period to which it relates, and
>
> (b) given effect by being included (by amendment or otherwise) in company tax returns for the accounting periods affected by it.
>
> *Other claims and elections*
>
> 59 (1) Schedule 1A to the Taxes Management Act 1970 applies to a claim or election for tax purposes which is not within paragraph 57 or 58, whether or not it is included (by amendment or otherwise) in a company tax return.
>
> (2) The provisions of this Schedule do not apply where or to the extent that the provisions of Schedule 1A apply."

23. In the present case the effect of paragraphs 58 and 59 is as follows. CES's claim under s. 393A was a claim within paragraph 58(1) as the loss arose in one accounting period (2008) and affected another accounting period (2007). CES had already delivered a return for the 2007 period. Had CES made the claim at a time when that return could still be amended it would have been treated as an amendment under paragraph 58(2). But under paragraph 15 the time limit for making an amendment to the 2007 return was 30 April 2009. The claim was not made until May 2009. So it could not take effect as an amendment of the 2007 return. That meant that under paragraph 58(3) the claim fell to be dealt with under schedule 1A to the Taxes Management Act 1970 (**"TMA 1970"**); and by paragraph 59(2) that in turn meant that the provisions of schedule 18 did not apply to the claim.

Claims not included in returns – schedule 1A to TMA 1970

24. That takes me to schedule 1A to TMA 1970. This is headed "Claims etc. not included in returns" and includes the following provisions:

(1) Paragraph 1 contains definitions, including a definition of "claim" as meaning "a claim or election as respects which this schedule applies".

(2) Paragraph 3(1)(b) provides that the claimant may amend his claim at any time within 12 months of the day the claim was made.

(3) Paragraph 4(1) provides that subject as there stated:

> "an officer of the Board or the Board shall as soon as practicable after a claim … is made … give effect to the claim … by discharge or repayment of tax."

As already referred to (see paragraph 5 above), it is accepted that in the present case HMRC did give effect to CES's claim by repaying the £41,371.95 that it had paid.

Function of FTT on appeal – s. 50 TMA 1970

25. Finally, I should refer to s. 50 TMA 1970. This is found in Part V TMA 1970, which concerns appeals and other proceedings, and so far as relevant provides:

> "**50 Procedure**
>
> …
>
> (6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is undercharged to tax by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are insufficient; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly."

Analysis

26. It is now possible to identify the issue between the parties. It can I think be quite shortly stated as follows. When CES appealed to the FTT against the closure notice in relation to the 2007 period (pursuant to paragraph 34(3) of schedule 18 FA 1998), the function of the FTT under s. 50(6) and (7) TMA 1970 was to decide whether CES had been overcharged or undercharged by the assessment in the closure notice. In making that decision was the FTT bound to give effect to the claim under s. 393A ICTA 1988 or to ignore it?

27. Mr Firth said that the FTT was bound to give effect to it. The effect of a claim under s. 393A was that "the profits of [the 2007 period] shall then be treated as reduced by the amount of the loss" (that is the 2008 loss). In deciding whether CES had been overcharged or undercharged in the assessment, the FTT had to decide the correct amount of CES's profits for the 2007 period, and this required it to apply s. 393A. There was only one correct figure for profits for the year, and that was so whether one was looking at the correctness of the assessment on an appeal, or whether the question arose under schedule 1A TMA 1970.

28. This argument was skilfully advanced by Mr Firth, but I am not persuaded by it. As the UT said (at [79]):

> "If s393A were the only relevant provision that would be a powerful case. However, the statutory provisions relating to carry back of losses were materially overhauled following the introduction of self-assessment for both individuals and companies. The reason for the overhaul is straightforward to understand. The ethos behind the self-assessment regime was that a taxpayer's own return for a period should be final unless specifically disturbed by, for example, a closure notice issued following an enquiry into that return. There was a degree of conflict between that ethos and the idea that a return for an earlier year could be disturbed by carry back of a loss arising in a later year."

I agree.

29. The way in which I see it is this. The right to make a claim to carry back a loss is conferred on a taxpayer company by s. 393A. But this does not stand alone. It is supplemented by other provisions which detail both how the taxpayer can make a claim and how such a claim is to be given effect to. The significant one for present purposes is paragraph 58 of schedule 18 to FA 1998. The effect of this is that if a taxpayer makes a loss in one year (**"year 2"**) and wishes to carry it back to the previous year (**"year 1"**), the mechanism for giving effect to the claim differs depending on whether it is still open to the taxpayer to amend its year 1 return.

30. If it is still open to the taxpayer to amend the year 1 return, then by paragraph 58(2) the claim is to be treated as doing so. The return must (by paragraph 7(1) of schedule 18) include the company's own assessment of the amount of tax payable for the period, taking into account any relief or allowance for which a claim *is included in the return* (see paragraph 20(3)) above). That means that the self-assessment in the return as amended will include (or be treated as including) a calculation of the tax payable which gives effect to the s. 393A claim. For example, if CES's return for 2008 containing the s. 393A claim had been filed on or before 30 April 2009 (as indeed it ought to have been), the amended return for 2007 would then have included (or have been treated as including) a self-assessment calculating the tax payable along the following lines:

Profits for the period	£142,039
Less 2008 loss carried back	£142,039
Taxable profits	£0
Tax payable for period	£0

31. If an officer of HMRC had then opened an enquiry into that amended return, and concluded that the profits for the underlying period should in fact have been say £300,000, they would have issued a closure notice giving effect to their conclusions by restating these figures along the following lines:

Profits for the period	£300,000

Less 2008 loss carried back	£300,000
Taxable profits	£0
Tax payable for period	£0

32. Had there then been an appeal to the FTT, and the FTT had concluded that the profits for the period were in fact £600,000, they would have given effect to this by increasing both the profits for the period and the effect of the offset under s. 393A as follows:

Profits for the period	£600,000
Less 2008 loss carried back	£444,747
Taxable profits	£155,253

And they would then have increased the assessment accordingly.

33. None of that as I understood it was disputed by Mr Charles Bradley, who appeared for HMRC. But if instead the claim under s. 393A is made at a time when it is too late for the return for year 1 to be amended by the taxpayer (as was the case here) then it seems to me to follow from paragraph 58 that the claim is not to be given effect to in this way but in a different way, that is under schedule 1A TMA 1970.

34. That means that the self-assessment by the taxpayer in the 2007 return is unaffected by the claim under s. 393A as it is not a "claim included in the return" (paragraph 7(1)). I think it follows that if an officer of HMRC opens an enquiry into that return they are not concerned with the effect of the claim under s. 393A either. The enquiry is by paragraph 24(1) of schedule 18 an enquiry "into a company tax return". So if the return does not include the claim under s. 393A, there seems to me nothing to enquire into in that respect. So I consider that HMRC was right in the present case to issue a closure notice which did not take any account of the claim under s. 393A (see paragraph 6 above).

35. That in turn means, as Mr Bradley submitted, that the FTT, in deciding whether CES was overcharged or undercharged by the assessment in the closure notice, was equally correct to leave the s. 393A claim out of account. The FTT was hearing an appeal against HMRC's assessment. On normal principles one would expect a court or tribunal hearing an appeal against a decision to consider if the decision was right or not given the material that the decision-maker took, or ought to have taken, account of. If HMRC was correct to leave the s. 393A claim out of account in enquiring into the return, then I think it follows that the FTT was equally right to do so. The appeal did not in my judgement require, nor indeed entitle, the FTT to take account of the effect of the s. 393A claim, a matter that was quite properly not before HMRC.

36. That does not of course mean that CES did not have a s. 393A claim, or that no effect was given to it at all. What it means is that the mechanism for giving effect to the claim was not through the schedule 18 procedure of returns, amendment of returns, enquiries into returns, and appeals against assessments in closure notices. Instead it was given effect to through the schedule 1A procedure, the very purpose of which, as its heading shows, is to make provision for claims that are *not* included in returns (see

paragraph 24 above). It is not inaccurate to describe such a claim as a free-standing claim, in the sense that it is not processed under the schedule 18 procedures but is dealt with separately.

37. The effect of a successful claim under schedule 1A is (by paragraph 4(1)) a discharge or repayment of tax. This is to be given effect as soon as practicable, and Mr Firth accepted that this had been done in the present case. As he also accepted, it is obvious that one cannot have a repayment of tax that has not been paid (or, I would add, a discharge of tax that has not yet been assessed to be due). When CES made its s. 393A claim, the only tax that had then been assessed as due for the 2007 period was the self-assessment in its 2007 return that £41,371.95 was payable; and the only tax paid for that period was the £41,371.95 that it had paid. So HMRC acted correctly in repaying that sum as it is agreed that it did. I do not see how it could properly have repaid any other sum, nor was there anything else to discharge.

38. If this is right, and to my mind it is, then what CES would need to point to is some provision enabling a freestanding s. 393A claim that had been dealt with under schedule 1A to be reopened in the event that the profits for the 2007 period were increased by HMRC in a closure notice or by the FTT on appeal. But we were not shown anything in schedule 1A (or anywhere else) that has this effect. There is a provision in paragraph 3(1)(b) of schedule 1A enabling a taxpayer to amend a claim (see paragraph 24(2) above) but this is admittedly of no assistance to CES as such an amendment can only be made in the 12 months after the claim is made and there is no power to extend this time-limit; in any event, Mr Firth said (and he may well be right) that since the claim was to carry back the (whole of the) 2008 loss and use it insofar as possible, there was no amendment that was either necessary nor could have been made. But quite apart from this what CES really needs is not a power to amend its claim, but a power to reopen a claim that has been already dealt with, and it is not suggested that there is one.

39. In summary in my judgement the position is this. CES's s. 393A claim was not given effect to as an amendment to its 2007 return. It was therefore correctly not taken into account either by HMRC in the closure notice or by the FTT in their decision on appeal. Instead it was given effect to as a freestanding claim under schedule 1A. That correctly resulted in repayment of the tax that had been paid. There is no mechanism to enable that claim to be re-opened on the basis that the profits for the period have subsequently been increased by HMRC or the FTT.

40. That is sufficient to dispose of the appeal. Mr Firth, in a careful argument, put forward a number of propositions in support of the appeal. Insofar as I have not already dealt with them, I will explain briefly why they do not cause me to change my view.

41. First, he said that a claim under s. 393A is not a claim to carry back part of a loss but a claim to carry back the whole loss. I agree and that has not been disputed (paragraph 15 above).

42. Second, he said that the effect of s. 393A was to reduce the profits for year 1 by the amount of the loss. I agree that that is what s. 393A provides, but as I have sought to explain what s. 393A does is confer the right to make a claim to that effect on the taxpayer. The way in which such a claim is to be given effect to has to be found

elsewhere in the legislation.

43. Third, he said that there was no inconsistency between s. 393A and the provisions of schedule 1A. This was I think directed at the UT's decision which considered an argument put forward on behalf of CES that the provisions in s. 393A should prevail over the provisions in schedule 1A, based on what Lord Carnwath JSC had said in *R (Derry) v HMRC* [2019] UKSC 19 at [37]. I agree with Mr Firth that the two provisions are not inconsistent. But I do not think the UT ever said they were. What the UT said in [89(4)] was:

> "In our judgment, the better interpretation is that Schedule 1A sets out provisions that give effect to the reduction of profits specified by s.393A." (emphasis in original)

I agree with this. If a claim under s. 393A is not made in time so as to be given effect to by way of amending the return for year 1, it is given effect to as a freestanding claim through the provisions of schedule 1A. As I have sought to explain that may, and in this case did, have a different effect. But that is not because of an inconsistency between schedule 1A and s. 393A, but a consequence of how the provisions operate.

44. Mr Firth said that schedule 1A must assume that the profits for the period are reduced as otherwise no tax could become repayable. I agree that where there is a successful claim under schedule 1A, it is necessarily implicit in the discharge or repayment of tax under paragraph 4(1) that HMRC is satisfied that the profits for year 1 should have been reduced by the amount of the claim, as otherwise there would be no justification for discharge or repayment of the tax for that period. So here in agreeing to repayment of the £41,371.95 tax that had been repaid, HMRC must have accepted that the effect of the claim under s. 393A was that, for the purposes of the claim to repayment, the profits for the 2007 period should be regarded as reduced by £142,309 to nil, as indeed CES had claimed. But for the reasons I have given, I do not think that had any effect on the amount shown in CES's return for the period, nor do I think that it had any greater effect.

45. Mr Firth next said that the tax that was repaid was the tax due for the 2007 period. I agree. He said that this showed that the profits for that period were reduced, and that HMRC was wrong to say that the profits could only be disturbed by an amendment of the return. I agree, as I have just said, that for the purposes of the repayment claim under schedule 1A, HMRC must have been satisfied that the profits should be regarded as reduced by £142,039. But I think that HMRC is right that this does not disturb the assessment in the 2007 return. The suggestion that it did is to ignore the clear distinction made in paragraph 58 of schedule 18 between a claim made before, and a claim made after, the time-limit for amendment of the return. As the UT said at [90]:

> "Parliament has quite clearly legislated in paragraph 58 of Schedule 18 of FA 1998 to provide for carry back claims made before this deadline to be treated differently from carry back claims made afterwards."

46. Mr Firth referred to schedule 1B TMA 1970 which applies to claims by individuals for relief involving two or more years. Paragraph 2 of schedule 1B concerns a claim

requiring relief for a loss incurred in one year of assessment (year 2) to be given in an earlier year of assessment (year 1). Paragraph 2(2) provides that such a claim relates to year 2, not year 1; and paragraph 2(6) provides that effect shall be given to the claim in year 2, whether by repayment or set-off. Mr Firth said that those provisions made it clear that a claim under schedule 1B did not disturb year 1, whereas there was no corresponding provision in schedule 1A.

47. I agree that the effect of schedule 1B is clear, and that schedule 1A does not contain the same provisions. But I accept Mr Bradley's submission that in the case of companies the practical effect of paragraphs 58 and 59 of schedule 18 FA 1998 is that a claim that is dealt with under schedule 1A is expressly dealt with outside the schedule 18 procedure of returns, amendments, closure notices and appeals, and is therefore to be regarded as something freestanding and not disturbing the year 1 profits as shown in those returns.

48. Mr Firth's next point was that even though paragraph 3(1)(b) of schedule 1A gives the taxpayer a right to amend its claim, there was in the present case nothing to amend. I have already said that I agree that he may well be right about that (although I note that paragraph 2(5)(b) provides that the form of claim may require a statement of the amount of tax which will be required to be discharged or repaid, and if this is done, then this aspect of the claim at any rate could be amended if the profits of year 1 were increased). But this point does not undermine my analysis.

49. Mr Firth then said that a taxpayer who made no claim in time under s. 393A(10) could be better off than one who did, which would be a surprising result. The point is this. Under s. 393A(10) a taxpayer who wishes to make a claim under s. 393A must do so within 2 years of the end of year 2 "or within such further period as the Board may allow" (see paragraph 13 above). The Commissioners for HMRC therefore have a discretion to allow a late claim. They have issued a statement of practice (Statement of Practice 5 (2001)) as to their general approach to late claims under, among other provisions, s. 393(10). This includes (at paragraph 10) the following:

> "In general the Commissioners for HMRC's approach will be to admit claims which could not have been made within the statutory time limits for reasons beyond the company's control. This would include, for example, cases where:
>
> - at the date of expiry of the time limit, the company or its agents were unaware of profits against which the company could claim relief
>
> - the amount of a profit or loss depended on discussions with an inspector which were not complete when the time limit expired, and the delay in agreeing figures is not substantially the fault of the company or its agents".

50. In these circumstances Mr Firth said that a taxpayer such as CES who made a claim within the 2 years would on HMRC's case be stuck with the profits as they then were, but a taxpayer who waited until the amount of profits were finally known might be better off. I can see that this is a possibility but if in the present case CES had waited until the profits were finalised that would not be until 2020 when the FTT decision

was released, over 13 years after the end of the 2007 period, and I think it would have been taking a considerable risk in relying on the exercise of HMRC's discretion after such a long period. By making the claim within the 2 years it exchanged the uncertainty of relying on HMRC's discretion for the certainty of the claim being in time, and the prompt repayment of the £41,371.95 which it had paid. I do not think this particular argument takes one much further. It is implicit in any system which imposes time limits that a person who complies with a time limit and claims as of right might have less, or different, information than one who waits and applies out of time and therefore has to seek a discretionary extension.

51. Mr Firth's next point was really to counter a point that Mr Bradley had made in his written submissions, which was that CES had already had the benefit of the rest of the 2008 loss that had not been set against the 2007 profits in that this sum of £302,708 had been carried forward and set against profits of later years. Mr Firth pointed out that if the 2008 loss were all set against the 2007 profits as increased by the FTT, then HMRC could adjust the later years under paragraph 34(2A) of schedule 18 FA 1998 (see paragraph 21(3) above). Indeed he would welcome such an adjustment as it would enable CES to argue that at the same time HMRC should remove the £255,000 that had been taken into account in its 2009 accounts but which the FTT had now held should be brought into the 2007 period (see paragraph 7 above), thereby enabling CES to avoid being taxed twice on the same amount.

52. I agree that Mr Firth is right about this, and that if his argument were otherwise correct, HMRC could avoid the £302,708 being carried forward and CES having the benefit of it twice. But since the analysis I have adopted is not based on preventing CES having such a windfall, I do not think this point affects the view I prefer.

53. Finally, Mr Firth said that the practical difficulties identified by the UT in his case did not in fact exist. What the UT said (at [89(3)]) was as follows:

> "Paragraph 4 contains specific provisions that require (i) HMRC to act as soon as practicable and (ii) to "give effect" to the claim by making a discharge or repayment of tax which must necessarily be of a specific amount. It is not clear how HMRC could comply with the obligations imposed by paragraph 4 if the true obligation was that imposed by s393A, namely to wait and see what the profits of the earlier period finally turned out to be following the determination of any statutory appeals to the FTT."

Mr Firth said there was no such problem on his interpretation. He suggested that it would not be necessary to "wait and see"; HMRC could direct a repayment of the tax already paid (or discharge of the tax already assessed). If the profits for year 1 were later increased in a closure notice or on appeal, there would be no need for any further repayment – one could just take account of the losses not already utilised against the increased profits.

54. Again I can see the force of what Mr Firth says, and in this respect the UT may have gone too far. But I do not think that this means that his interpretation is to be preferred. The view that I prefer is not based on the need to avoid the consequences that the UT here suggested, but, as the UT's own analysis is, on the distinction between a claim which is given effect to by an amendment of the return and a claim

which is given effect to under the provisions of schedule 1A.

55. Having considered each of the points made by Mr Firth, I am not persuaded that they are such as to cause me to accept his submissions.

56. I add that both Mr Firth and Mr Bradley produced calculations designed to show the difficulties involved in each other's interpretation. I do not however think it is necessary to set them out or consider them in any detail. Mr Firth's was designed to suggest that, on Mr Bradley's interpretation, it was difficult to see how the repayment directed under paragraph 4 of schedule 1A fitted into the calculation of what was now due from CES.

57. I do not myself see that there is any such difficulty. The FTT's decision, as summarised by them in their decision at [197], was as follows:

> "The corporation tax payable in respect of the accounting period of [CES] ending on 30 April 2007 should be increased to reflect an additional £540,000 of taxable trading income. In addition, no losses may be caried back from [CES's] accounting period ending 30 April 2008 to set off against the additional corporation tax so chargeable."

As this makes clear, all that needs to be done to give effect to the FTT's decision is to calculate the additional corporation tax payable on the additional £540,000 trading income. The tax on the original £142,309 of trading income has already been adequately dealt with (by being assessed, paid and repaid) and does not need reopening.

Conclusion

58. For the reasons I have given, I would dismiss the appeal.

Lady Justice Simler:

59. I agree.

Lady Justice Asplin:

60. I also agree.