Neutral Citation: [2026] UKFTT 323 (TC)

Case Number: TC09807

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Appeal reference: TC/2022/13901

*Income tax – whether the appellant is entitled to make claims for relief under s 72 of the Income Tax Act 2007* ("**ITA**") *– whether the extended time limit for doing so in s 43(2) of the Taxes Management Act 1970 applies – yes– appeal allowed*

**Heard on:** 25 and 26 November 2025
**Judgment date:** 2 March 2026

**Before**

**TRIBUNAL JUDGE HARRIET MORGAN**
**TRIBUNAL MEMBER REBECCA NEWNS**

**Between**

**MR HECTOR LESTER**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Afzal KC and Mr Nicholas Macklam, of counsel

For the Respondents: Mr David Yates KC, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs ("**HMRC**")

**DECISION**

## Part A - Overview

1. The appeal is made against HMRC's decision not to allow Mr Lester's claims, as made in a letter from his representative Grant Thornton (NI) LLP ("**Grant Thornton**") dated 21 February 2020 ("**the claims letter**"), to utilise certain trading losses pursuant to s 72 and 73 of the Income Tax Act 2007 ("**ITA**"). These provisions set out when and how an individual may make a claim for "early trade losses relief" if the individual makes a loss in a trade (a) in the tax year in which the trade is first carried on by the individual, or (b) in any of the next 3 tax years. The claims made by Mr Lester are:

(1) to carry back "early trade losses" that arose in the 2009/10 year of assessment (a "**tax year**") to the 2006/07 tax year for set-off against profits of that period ("**the 2009/10 claim**"). The amount of loss relief claimed is £1,598,211 but Mr Lester accepts that the claim ought to be capped at £1,517,342, and

(2) to carry back "early trade losses" that arose in the 2010/11 tax year to the 2009/10 tax year in order to relieve the profits that would be unrelieved by losses if the 2009/10 claim is validly made ("**the 2010/11 claim**"). The amount of loss relief claimed was £632,233.

We refer to the 2009/10 claim and the 2010/11 claim together as "**the carry back claims**" and to the losses to which those claims relate as "**the relevant losses**".

2. HMRC contend that Mr Lester has no statutory right to appeal to the tribunal against their decision to reject the claims. It is common ground that that there is a valid appeal to the tribunal in this case only if (a) an officer of the Board issued a closure notice in respect of the claims made by Mr Lester, within the meaning of para 7 of schedule 1 A of the Taxes Management Act 1970 ("**TMA**" and "**schedule 1A**"), (b) having previously given notice in writing of his intention to enquire into the claims to Mr Lester or his authorised representative by 30 April 2021 (under para 5 of schedule 1A). In summary:

(1) Under para 5 of schedule 1A:

> "(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." (Emphasis added.)

It is common ground that the deadline for an officer of the Board to give notice of his intention to enquire into the claims, pursuant to para 5(2)(a), was 30 April 2021.

(2) Under para 7 of schedule 1A so far as relevant (a) an enquiry under para 5 above is completed when "*an officer of the Board by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions"* (emphasis added) (under sub-para (1)(b), (b) in the case of a claim that is not a claim for discharge or repayment of tax, the closure notice must either - (a) allow the claim, or (b) disallow the claim, wholly or to such extent as appears to the officer appropriate (under sub-para (3)), and (c) a closure notice takes effect when it is issued (under sub-para (4)).

(3) It was common ground that the requirement for notice of intent to enquire and of completion of the enquiry to the person who made the claim is satisfied if notice is given to the claimant himself or to a representative who is authorised by him to receive such communications on his behalf.

(4) An appeal to the tribunal may be brought against any conclusion stated or amendment made by a closure notice under para 9(1) of schedule 1A.

3. The appellant's view is that (1) (a) for the purposes of para 5 of schedule 1A, HMRC enquired into the claims on giving notice in writing of their intention to do so to Grant Thornton, in a letter of 20 October 2020 or, if that is not accepted, in a letter of 21 January 2021, and (b) for the purposes of para 7 of schedule 1A, HMRC subsequently issued a closure notice rejecting the claims in November 2020 to Grant Thornton, or if that is not accepted, at the latest in a letter of August 2021, and (2) accordingly, under para 9 of schedule 1A, Mr Lester has a right to appeal against the decision in the closure notice.

4. HMRC argued that:

(1) The correspondence which Mr Lester relies on does not have the effect he asserts it has. The Court of Appeal decided in *Raftopoulou v HMRC* [2018] EWCA Civ 818, [2019] 1 WLR 1528 ("*Raftopoulou*") in summary that the requirements in paras 5 and 7 of schedule 1A are met only if a reasonable person in the position of the intended recipient (Mr Lester in this case), having that person's knowledge of any relevant context, would consider the relevant correspondence/document as giving notice of an intention to enquire into a claim or close an enquiry (as the case may be). That test is not met in relation to any of the documents Mr Lester refers to.

(2) All of the correspondence which Mr Lester relies on is addressed to his representative, Grant Thornton, but Mr Lester has not established that Grant Thornton had authority to act on his behalf in receiving an enquiry notice and/or a closure notice issued pursuant to schedule 1A.

(3) Therefore, the tribunal has no jurisdiction to consider Mr Lester's grounds for disputing HMRC's rejection of the claims and his appeal must be struck out pursuant to rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

5. For all the reasons set out in Part C, we have decided that HMRC did make a decision to reject the claims against which Mr Lester has a right to appeal to the tribunal and in respect of which he has made a valid appeal. On that basis, the further question is whether or not the carry back claims are validly made.

6. As further explained in Part D, the main dispute centres around (1) whether Mr Lester had made a prior claim to utilise the majority of the relevant losses under s 83 ITA by including them in his self-assessment tax returns for the 2009/10 and 2010/11 tax years in box 22 in the partnership pages of his returns, which states that it relates to losses to be carried forward for use against future profits, (2) if so, (a) whether, he was entitled, in effect, to "undo" those prior claims whether by amending them to zero, revoking, or withdrawing them, and whether he in fact did so, and (3) whether both (a) any such amendment, revocation or withdrawal of any such prior claims, and (b) the carry back claims were made within the applicable statutory time limits.

7. In summary:

(1) Mr Lester argues that the inclusion of a figure in box 22 of his relevant tax returns does not constitute the making of a claim for relief for the relevant losses included in that figure to be carried forward for use against future profits under s 83 ITA:

(a) Section 83 provides that a person may make *a claim* for "carry-forward trade loss relief" if (a) the person has made a loss in a trade in a tax year, and (b) relief for the loss has not been fully given under any other provision in ITA or the Income Tax Acts or under certain capital gains provisions (see s 83(1)). *The claim* is for the part of the loss for which relief has not been given under any such provision to be deducted in calculating the person's net income for subsequent tax years but only from profits of the trade (see ss 83(2) and (3)). We refer to any claims which Mr Lester is asserted to have made under this provision as "**carry forward claims**".

(b) In Mr Lester's view, as he has not made any actual claim for relief under s 83, he is able to utilise the relevant losses under any applicable statutory provisions, and he has done so validly in making the carry back claims pursuant to s 72 ITA.

(2) Mr Lester contends that the carry back claims were made within the applicable statutory time limit on the basis that he is entitled to benefit from an extended time limit within which to make them under ss 43(2) and 43C (2) TMA. In his view, he had until 5 April 2021 to make the carry back claims; they were made in the claims letter on 21 February 2020.

(3) In HMRC's view:

(a) By including the relevant losses in box 22 of his relevant tax returns, Mr Lester made an actual claim for such losses to be subject to s 83 ITA.

(b) That means that, for Mr Lester later to be able to make a claim to use those losses in a different way, namely, by carry back pursuant to s 72 ITA, he would first have to amend to zero his carry forward claims made. He is not entitled under the relevant statutory provisions to "revoke" the carry forward claims; there is a material difference between amending a claim to zero and revoking it.

(c) In any event, Mr Lester has neither made a claim to amend to zero his prior carry forward claims or to revoke them; the claims letter does not address that

(d) Even if, contrary to HMRC's view, Mr Lester is entitled to and has taken all necessary action, in effect, to undo the carry forward claims and make the carry back claims, he did not (i) revoke or amend to zero the carry forward claims within the applicable statutory time limit, and/or (ii) make the carry back claims within the applicable statutory time limit. The extended time limit in s 43(2) and 43C(1) does not apply for a number of reasons. Rather the standard limit set out in s 72(3) TMA applies to the carry back claims. On that basis Mr Lester would have had to make those claims by 31 January 2012.

(4) Mr Lester further contends that:

(a) If the tribunal concurs that Mr Lester made carry forward claims in respect of the relevant losses and that it is necessary for the appellant to take action in effect to undo any such prior carry forward claims, contrary to HMRC's view, (i) he is entitled, under the relevant statutory provisions, to revoke, withdraw and/or amend to zero any such carry forward claims, and (ii) he has impliedly and implicitly done that simply by making the carry back claims in the claims letter.

(b) HMRC's interpretation of s 43(2) and s 43C (2) TMA is incorrect; those provisions plainly apply both to any required "supplementary claim" to amend/revoke any prior carry forward claims and to the carry back claims.

8. It was common ground that Mr Lester had previously made a claim for "sideways loss relief" under s 64 ITA in respect of £632,233 of the relevant losses to which the 2009/10 claim relates ("**the prior s 64 claim**"). As set out in Part D, the parties made a number of the same contentions as those set out above in relation to the relevant losses which HMRC argue were the subject of prior carry forward claims.

9. For the reasons set out in Part D, HMRC argued that the 2010/11 claim is not within the scope of these appeal proceedings.

10. For all the reasons set out in Part D, we have decided that (1) the 2010/11 claim is within the scope of these appeal proceedings (or any required amendment to Mr Lester's grounds of appeal is permitted, and (2) Mr Lester has validly made all of the carry back claims within the applicable statutory time limit under s 43(2) and s 43C(2) TMA.

## Part B Evidence and Facts

**Background to the claims and extent of Grant Thornton's authorisation**

*2019 amendment giving rise to denial of losses in 2006/07*

11. On 5 June 2008, HMRC gave notice of their intention to enquire into the partnership tax return of Clavis Liberty Fund 2 LP in respect of the 2006/07 tax year. The appellant was a partner of this partnership, which was used for the purposes of an unsuccessful structure to obtain a tax advantage. This purported to generate trading losses which Mr Lester used to set against other income and gains in 2006/07 by making a "sideways" loss relief claim under s 64 ITA. By a closure notice dated 25 June 2018 HMRC concluded their enquiry, following the conclusion of litigation in relation to a related partnership (see the decision in *Clavis Liberty Fund 1 LP v HMRC* [2017] UKUT 418 (TCC)). The closure notice made amendments to the partnership tax return to disallow purported trading losses which had been recorded in it.

12. By notice dated 4 October 2019, HMRC amended Mr Lester's self-assessment tax-return for 2006/07 ("**the 2006/07 return**") to give effect to the amendments they had made to partnership return as set in [10]. The amendments to the return were made pursuant to s 28B(4) TMA to reduce the trading losses recorded in the 2006/07 return, and the associated loss relief claim, from £1,518,870 to £1,528 (a reduction of £1,517,342). This resulted in a tax charge of £606,936.80. We refer to this as "**the 2019 amendment**". As set out below, Mr Lester made the carry back claims in order to relieve the profits arising in 2006/07 which the 2019 amendment left unrelieved due to the denial of Mr Lester's prior claim for loss relief in respect of those profits.

13. In letters dated 4 October 2019:

(1) An officer of HMRC wrote to Mr Lester's accountants, McKeague Morgan & Co stating that they had send Mr Lester the 2019 amendment.

(2) An officer of HMRC wrote to Mr Lester enclosing the notice of the 2019 amendment.

(3) Grant Thornton wrote to HMRC about the 2019 amendment and in their first para stated that:

> "Mr Lester has authorised Grant Thornton (NI) LLP to deal with this matter on his behalf. Please confirm whether you need anything from Mr Lester in this regard."

*Mr Lester's evidence on Grant Thornton's authorisation*

14. When taken to these letters at the hearing and questioned about what authorisation he had given to Grant Thornton:

(1) Mr Lester said that that Grant Thornton are authorised in every respect to deal with his tax affairs in this enquiry.

(2) When asked what authority he gave to Grant Thornton to make consequential claims in the claims letter he said he gave Grant Thornton full authority of dealing with the claims. He said that Grant Thornton were always his tax advisers and McKeague Morgan & Co were principally his accountants. He confirmed that when he received the 2019 amendment he passed it on to Grant Thornton.

(3) It was put to him that Grant Thornton's letter of 4 October 2019 refers to the 2019 amendment and does not deal with consequential claims and any enquiry into those claims. He said: "The whole…remit of this, one thing rolled into another, and they again had my full authority to deal with every aspect of it. Every angle that came up, or whatever. So I'm very satisfied…"

(4) It was put to him that it is HMRC's practice to issue enquiry notices and closure notices directly to taxpayers and not their representatives and he was taken to letters to him and his representatives in 2015 illustrating this point. He said that he would have understood that where he had an agent or tax adviser, they would have been copied into everything. He would not have been aware of that practice. When he appoints a tax

adviser and selects them to be copied into everything, he expects them to directly communicate with HMRC. It was put to him that given that practice, his engagement of Grant Thornton would not have included authorising them to receive such documents on his behalf. He said that his adviser would have received the communication also.

15. Mr Lester was questioned about whether there was an engagement letter or client care letter, setting out the terms of his engagement with Grant Thornton regarding their charges and what they were to do for him. He gave the following evidence:

(1) He does not know if there was a formal letter as such. He worked with Mr Gourley when he was at Pricewaterhouse, and when he moved to Grant Thornton (sometime before 2019, he did not recall exactly when), he continued his business with him and a respectful relationship. He cannot clarify whether there is a formal letter of instruction, but Mr Gourley had his full authority. Mr Gourley moved to head of Grant Thornton's tax affairs, so he moved with him.

(2) It was put to him that realistically, if one engages a tax adviser for a period of several years, there will be something in writing setting out the terms of business and that is standard practice. He said: "It might be standard, but because it was an ongoing relationship, it was done on trust". He confirmed that Grant Thornton is still his representative.

(3) He was asked if he had asked them whether there is an engagement letter. He said it was not something that had come up between them; he cannot recall an engagement letter situation because he knew Mr Gourley from Pricewaterhouse and it just rolled into Grant Thornton and he would have known the remit of what he had to do, and the fees he would have had to charge and he accepted those; he would measure what any individual job would cost and he considered the fees to be acceptable.

(4) When asked repeatedly if he had asked Grant Thornton if there is an engagement letter he said (a) there is no formal engagement letter. Grant Thornton are tasked with dealing with his tax affairs from start to finish, (b) he had not asked them because he had never seen any reason to ask them. They have been working on his tax affairs for many, many years, (c) they have full authorisation. He visits them very regularly, talks to them very regularly, and if they had any reservations about a lack of appointment letter they would have raised it, and (d) he had not asked them and has no reason to ask them, because the job is being done, and both parties are in agreement with the level of work, the level of fees and remit under which they have to carry out the work.

(5) It was put to him that he should have asked Grant Thornton about the engagement letter as he knew he was to be cross-examined on what their responsibilities are. He said again he is not aware of an engagement letter and he had not asked Grant Thornton for it because "I don't see in the working relationship that we have extended over the years, any need" and with several solicitors he deals with, he does not have engagement letters that are longstanding. He has paid a lot of fees in relation to this, which:

> "would deem that there is an appointment, a working relationship or whatever, but because of the nature of small community we work in at home, it's quite often just an appointment letter. If there's a longstanding arrangement and they have my full remit, obviously you can see the volume of work that has been done over the years, and they have my full remit to conduct this on my behalf".

(6) It was put to him that it is implausible to think that there is no engagement letter between him and Grant Thornton. He said that he does not accept that. In his view, it is not implausible whatsoever: "The nature of business in Northern Ireland is very much personal based, small community, and an appointment letter would not change or remove the authority I have given to Grant Thornton to carry out on my behalf". He did not accept that it was a fair criticism that he should have asked them about whether there is an

engagement letter prior to giving evidence at the hearing. He said that every relationship is different. Some are enshrined in full, long-winded engagement letters, some are done by a handshake, and that would be in the nature of this. They had his full, implied and given authority to deal with my tax affairs in relation to this and he would like to think the explanations he has given are acceptable to the tribunal and to all parties. Not in every case is there an appointment letter. Again, "I say in Northern Ireland, small community, and things are done on a handshake with professionals that you work with for a long time."

16. In re-examination, Mr Lester said, in effect, that if he had an engagement letter with his advisers in his experience it would not be for every engagement, or every task but rather for a relationship as a whole. They would have "carte blanche to deal with all types of affairs, all types of enquiries, everything." It is totally outside of his remit to deal with any of my own tax affairs so he needs an expert.

*Engagement letter*

17. After Mr Lester had given evidence, his advisers produced an engagement letter between him and Grant Thornton. We admitted this in evidence in these proceedings. The parties referred to the following provisions:

(1) It contains an "an entire agreement clause" and a statement that it is governed by the law of Northern Ireland.

(2) It set out that it covers the engagement of Grant Thornton by Mr Lester and that it continues to apply until either party advises the other that it has ceased to apply or is replaced by a subsequent engagement.

(3) Under a heading, "Scope of work" there is reference to the services that Grant Thornton have agreed to provide and that the scope of work is to advise Mr Lester on and make disclosures to HMRC in respect of the 2019 amendment with various bullet containing particulars of work that Grant Thornton would do.

(4) There was a statement that where the instructions change or expand, that should be referred to Grant Thornton in writing at the time.

(5) Under a heading "Agent", it is stated: "In carrying out our work, the firm will act as your agent if authorised by you".

(6) Under a heading "Correspondence with third parties", it is stated that where Grant Thornton need to correspond with third parties, they will ask Mr Lester for a letter of authority.

(7) Under a heading "Limitations of contract" it is stated that Grant Thornton have no responsibility for work on matters other than those mentioned above.

(8) It was stated that Grant Thornton would provide tax advice in response to specific enquiries and there may be "a separate engagement if the enquiry raised is sufficiently substantial and/or complex to warrant that".

(9) Under a heading "Agreement of retainer" it is stated that once agreed these terms remain effective until amended or replaced.

**Origin of relevant losses**

18. Mr Lester was a partner in a number of property development general partnerships which made significant trading losses due to the global financial crisis and property crash in Northern Ireland. Mr Lester's self-assessment tax returns for the years 2009 to 2013 were enquired into by HMRC. These enquiries concluded in 2015 and Mr Lester received a significant refund of tax by HMRC.

19. The losses which are the subject of the claims arose in respect of four partnerships in which Mr Lester had an interest as follows:

(1) Victoria Estates partnership: £1,338,097

(2) Pacific Wharf Holdings partnership: £198,600

(3) Allistragh Holdings partnership: £38,011

(4) Annesborough Estates partnership: £23,503

20. In each case, these losses are included in the relevant pages of Mr Lester's self-assessment tax return for the relevant tax year in box 22 as part of a larger figure. The relevant page in Mr Lester's tax returns contains four boxes:

(1) Box 19 – Adjusted loss for 2009/10

(2) Box 20 – Loss from this year set-off again other income (or capital gains) for 2009/10

(3) Box 21 – Loss to be carried back to previous years and set-off against income (or capital gains

(4) Box 22 – Total loss to be carried forward after all other set-offs.

21. Mr Mitchell of HMRC who to some extent dealt with the carry back claims attended the hearing to give evidence. He was asked if what goes into box 22 on a person's self-assessment tax return is in some way automated. He said that it is his understanding from speaking to colleagues who deal with the processing of returns that it is not an automated carry forward. The box has to be manually completed by the person completing the return. He was taken to a screenshot of the relevant boxes in the bundles which shows the description of each box as set out in [19] above. He thought that a person filling out his tax return would see the information presented in this manner although it would depend on the software that they used and he is not an expert on that. If they had compatible software it would look like this.

22. It was put to him by reference to Mr Lester's relevant tax return for 2009/10 that the figure to be inserted in box 22 is not the figure required to be put in box 19 less that required to be put into box 20; it is an aggregate figure, which appears to include losses brought forward from prior tax years, and (b) therefore, the return does not specifically identify the losses arising in the tax year the return relates to (2009/10) which are stated to be carried forward in box 22. It has to be assumed that figure is included in box 22. He said he was trusting the agent to have got it right. He confirmed that box 22 contains the total loss to carry forward after all other set offs with the addition of any losses carried forward previously; it is a global figure.

23. As noted above, Mr Lester had previously claimed sideways loss relief under s 64 ITA in respect of £632,233 of the losses to which the 2009/10 claim relates.

**Claims letter**

24. In the claims letter dated 21 February 2020, which was sent by Grant Thornton to HMRC, Grant Thornton said this:

> "We refer to the revised calculation for 2006/07 tax year, sent to Mr Hector Lester on 4 October 2019, to reflect the fact that partnership losses claimed under the Liberty Clavis scheme have been mostly disallowed This has resulted in a large tax liability for Mr Lester. I refer you to our letter of 21 October 2019 which outlined a range of points relevant to this matter.
>
> As outlined in our letter noted above we believe that Mr Lester is now entitled to make further loss relief claims in respect of 2006/07. We have now reviewed Mr Lester's loss position for 2006/07 and all relevant tax years and believe loss claims can now be made to more than compensate for the losses disallowed without triggering liabilities in any other tax year.
>
> Following HMRC's amendment to Mr Lester's 2006/07 return a deficit of losses allowable amounting to £1,517,34 arose. In addition, following a review of the submitted tax return for 2006/07 we identified partnership losses for which loss relief had been claimed in the original return however subsequent to an enquiry into Mr Lester's 2009 to 2013 returns

(settled in 2015), these losses are no longer available for use as it was deemed the partnerships were not trading.

After disallowing these losses, and with the Clavis adjustment the aggregate loss deficit for 2006/07 stands at £1,560,016. Details of our workings can be found in Appendix 1.

*In order to counter this deficit of losses Mr Lester would now like to make a s.72 ITA 2007 carry back loss relief claim for losses that arose in the 2009/10 tax year in the early years of trade. The amount of loss relief claimed is £1,598,211. Details of the claim can be found in appendix 2.*

The claim will reduce Mr Lester's taxable income for the 2006/07 tax year to nil. This will result in a repayment position for Mr Lester for the 2006/07 tax year for income tax previously charged.

We note that Mr Lester has previously received an income tax refund for the 2006/07 tax year in regards to the ITA 2007 s.64 carry back loss relief claim to the preceding tax year made on his 2008 tax return.

*Unless specifically mentioned all partnership losses being used in this letter have not been previously utilised by Mr Lester.*

*We trust you will update the above mentioned tax returns for the loss relief claims detailed in this letter and issue Mr Lester with the repayment due*…." (Emphasis added.)

25. In the appendix to the claims letter, this was stated:

"The table below outlines the partnership losses arising in 2009/10 tax year which Mr Lester would like to utilise under s.72 ITA 2007 carry back loss relief claim for early years of trade. Partnership Losses arising in tax year ended 5 UTR started April 2010 being used in ITA 2007 s.72 claim against general income of 5 April 2007

[There was a table showing the losses relating to each of the specified partnerships as set out in [18] above under a heading "Partnership Losses arising in tax year ended 5 April 2010 being used in ITA 2007 s.72 claim against general income of 5 April 2007" and the date the trade of each partnership started trading was stated to be in April 4 to July 2006. The total loss relief claim under s 72 ITA was stated to be £1,598,211.]

Points to note

• Whilst the available loss for Annesborough Estates was £32,336, only £23,503 is required to reduce taxable income for 2006/07 to nil.

• The balance of £8,833 is wasted as previous loss relief claims have been made for the 2008, 2009 and 2010 tax years against all available income, therefore none of the £8,833 loss can be carried forward and utilised under s.72 ITA 2007.

• £632,233 of Victoria Estates partnership losses used above had previously been utilised against 2010 general income under ITA 2007 s.64 current year claim for sideways relief

In order to replace this £632,233 of Victoria Estates partnership losses the following ITA 2007 s.64 carry back claim from the 2010/11 tax year to the 2009/10 tax year is now being made. Please see the table below for details of the claim. […]"

[In the table referred to above, (a) the partnership losses arising in 2010/11 for the Victoria Estates and Annesborough Partnerships are shown as £771, 837 and £160,000 respectively, (b) the amount of those losses which were unavailable or not required for s 64 carry back relief as £281,424 and £18,736 respectively, and (c) the amount of those losses available for use under s 64 carry back loss relief claim to preceding tax year against general income 2009/10 as £490,41.3 and £141,820.]

Please note a s.64 ITA 2007 current year sideways loss relief claim has been made for £281,424 of Victoria Estate Partnership losses is included on 5 April 2011 tax return.

• *The loss relief claims made in respect of 2009/10 and 2010/11 tax years have not resulted in any change to the tax liability for those years.*

[There was a further appendix setting out the calculation of how much general income before personal allowance is available in 2006/07 tax year against which s 72 ITA 2007 claims can be made.] (Emphasis added.)

**Correspondence following the claims letter**

26. On 16 March 2020 HMRC replied to the claims letter as follows:

> "Thank you for your letter of 21 February 2020 regarding the amendment for year ended 5 April 2007 and the possible carry back of losses from the years following this year.
>
> In point 5 of your letter of 21 October 2019, you state that you believe that your client is "entitled" to make additional loss relief claims even though these are out with the normal time limits. Can you advise me where in the legislation this entitlement arises?
>
> S43A(3)(a) TMA 1970 states that any claim is relevant if it relates to the year of assessment or an event occurring in the year. The claims you are making do not relate to relevant year ended 5 April 2007 and occurred in later years.
>
> If you disagree with me, please direct me to the exact legislation that you believe endorses your clients claim. Please note that without a full reply the outstanding tax will be released for collection."

27. Mr Yates submitted that this letter constitutes a notice of enquiry which satisfies the requirements of para 5 of schedule 1A.

28. Mr Lester was asked how he became aware of HMRC's letter of 16 March 2020 as it is addressed to Grant Thornton. He said he would have had a communication from Grant Thornton in relation to that and: "On several occasions, frequent occasions, I would call in with them in our Irish office, which was 15, 20 minutes from where I live. Because I have a hearing impairment, I find it easier to do, face-to-face meetings". He could not recall the exact day or time. They would have notified him and sent him a copy of whatever had come in and then they would arrange to meet and discuss. He was asked the same question in relation to HMRC's letter of 21 January 2021 (see below). He said Mr Gourley of Grant Thornton would have contacted him either by phone or note and asked him to call in or to arrange to discuss it in some way.

29. On 23 April 2020 Grant Thornton wrote to HMRC thanking them for a call of earlier that day and summarising their understanding of the agreed action points which include:

> "1. On the Clavis Liberty issue, Grant Thornton NI (GTNI) are to reply to HMRC letter dated 16 March 2020 to set out a rationale for why the late loss relief claims should be considered by HMRC. GTNI will also provide a technical analysis of why the claims should be allowed as consequential claims, referencing relevant case law."

30. On 24 April 2020:

(1) HMRC replied to Grant Thornton that they were happy to agree the action points in principle but would add the following:

> "1. You will also provide your reasoning as to why S43A (3)(a) TMA 1970 does not apply and your reasoning as to why HMRC should exercise its discretionary powers under Extra-statutory Concession B41 to allow the Clavis Liberty losses.
>
> 2. You will also provide a provisional timetable…."

(2) Grant Thornton replied that they did not agree with HMRC's understanding in these respects:

> "1. We consider that it might be relevant to look beyond s43A and to perhaps consider s43C also, and other statute, relevant HMRC material and case law.
>
> 2. Again, in relation to the exercise of HMRC's discretionary powers, we might want to reference statute, other relevant HMRC material and case law."

31. On 27 April 2020 HMRC replied to Grant Thornton as follows:

> "It is our understanding that the Clavis Liberty losses claim falls due to S43A, so that issue would have to be addressed before anything else. Once you've addressed that then I'm happy that you provide other support for the claim, whether in statute or case law."

32. On 6 October 2020, Grant Thornton wrote to HMRC and set out in detail their views on why the claims were validly made within time under the provisions of s 43C TMA or, if that

was not accepted, why HMRC should exercise their discretion nevertheless to accept the claims.

33. In a letter dated 6 November 2020, HMRC rejected the claims on the basis that they were made out of time, noting that there was no right of appeal against that decision but it could be challenged by means of judicial review:

> "Thank you for your letter of 6 October 2020 in response to my colleague's, Richard Kane's, letter of 16 March.
>
> I have reviewed the points made with regards to a late claim for the carry back of loss relief to 2006/07 from 2009/10 and also to your case for the use of HMRC's discretionary powers under ESC 841.
>
> I have considered the points made in the order in which you raised them and will first deal with your claim under S43…
>
> …
>
> Having taken all of the above information into account I have concluded that HMRC will not exercise the discretionary powers available under ESC B41 and will not allow the claim out of time to carry losses back from 2009/10 to 2006/07.
>
> There is no right of appeal however, your client does have the right to challenge this decision by means of a Judicial Review."

34. Mr Yates contend that this letter constitutes a closure notice which satisfies the requirements of para 7 of schedule 1A.

35. In a letter dated 4 December 2020, Grant Thornton sought to appeal against HMRC's decision, asserting that HMRC's letter of 6 November 2020 amounted in law to a closure notice.

> "For the avoidance of doubt, we consider that:
>
> 1. Our letter of 21 February 2020 was a valid claim for loss relief under s72 ITA 2007 on behalf of Mr Lester, as detailed in Appendix 2 of that letter;
>
> 2. Your letter of 16 March 2020 was the opening of an enquiry into the claim under TMA 1970 Sch1A Para 5;
>
> 3. Your letter of 6 November was a closure notice under TMA 1970 Sch1A Para 7 to the above enquiry, denying Mr Lester's claim to loss relief.
>
> Please therefore treat this letter as an appeal under TMA 1970 Sch1A Para 9 against HM Revenue and Custom's decision to deny Mr Lester's loss relief claim. The grounds for this appeal are that, in our view:
>
> 1. When read in conjunction with s43C TMA 1970, s43(2) TMA 1970 applied to provide an extended time limit for making a claim. It is irrelevant that the s28B(4) notice reduced trading losses as opposed to including additional amounts of income or gains. All of the other conditions for loss relief were satisfied.
>
> 2. Alternatively, when read in conjunction with s43C TMA 1970, s43A TMA 1970 also provided an extended time limit. It is denied that the amendment made by the s28B(4) notice was for the purpose of making good to the Crown any loss of tax brought about carelessly or deliberately by Mr Lester or a person acting on his behalf."

36. On 22 January 2021, Mr Mitchell of HMRC replied to each of the first three points made by Grant Thornton in their letter of 4 December 2020 and set out that he intended to issue a formal notice under para 5 of schedule 1 A as follows:

> [Point 1]
>
> The extent and source of the claim is not in doubt and in my letter of 6 November I stated that had the claim been made within the S.43 TMA 70 time limit (31 January 2012) then it would have been valid and indeed would have been accepted by HMRC. This is not in dispute. However, given the timing of the claim its validity was unclear.
>
> [Point 2]

Our letter of 16 March asked you to clarify the basis for the claim which simply referred to "entitlement" without clarifying how the machinery provisions were engaged. As such it was merely a request for "such information as is reasonably required for the purpose of determining whether the .... the claim is correct". Sch1A para 5(2)(b ).

Secondly, if your letter of 21 February had been more detailed, as SACM 10035 explains, any claim outside the statutory (i.e. S.43 or 43A-C) time limit has no effect unless HMRC agrees to allow a late claim to be made. At that point there was therefore nothing which could be the subject of a Sch1A enquiry as the timelines had not been agreed.

*Thirdly, in order for there to be an enquiry into a claim my colleague Richard Kane would have had to issue a notice under Sch 1A TMA 1970. He did not do that. At no point did he mention Sch 1A. Nor did he write to the claimant as required in Sch1A para 5(1)(b).*

Fourthly, In the broader context HMRC was in correspondence with your client in relation to a disclosure mads under the Requirement to Correct provisions. Participation in such discussions was on a purely voluntary basis and as such would be informal. My colleague's correspondence was similarly conducted on that basis and he at no time, either explicitly or implicitly, sought to change the basis on which the exchange of information was conducted. *Therefore, the letter of 16 March was in the spirit of those informal discussions and not the opening of a formal enquiry into a claim under Sch1A TMA 1970.*

*[Point 3]*

*It follows item (2) that if there was no enquiry then there could be no closure notice.*

*In any event the claimant was not informed that I had completed my enquiries as required by Sch1A Para 7.*

My response of 6 November referred to your letter of 21 February 2020 and our subsequent discussions but centred on your proposal that the claim was either "in time" or that HMRC use its discretionary powers to allow the claim if it was late: both preliminaries to any enquiry process. I therefore addressed your points and stated the legislation and how it applies to the claim.

*In conclusion I cannot treat your letter of 4 December as an appeal because there has been no enquiry and hence no closure notice within Sch1A TMA 1970.*

*As stated in my letter there is an escalation route should you disagree with my decision on discretion and that is to seek a judicial review.*

*However, in order to escalate the consequential claim, I will now need to issue a formal Sch1A notice to your client. I will then consider the information in your letter of 4 December in conjunction with the further information that you committed to providing in that letter before issuing a formal closure notice to your client*." (Emphasis added.)

37. Grant Thornton responded to Mr Mitchell on 2 February 2021. They said they noted what Mr Mitchell said concerning the procedural position and that they reserved their client's rights. However, "we do not propose to refer our client's existing (and in our view valid) appeal for the time being given that HMRC propose issuing a Sch1A notice…" and then set out detailed points on the substantive issue. Mr Lester agreed that in this letter Grant Thornton did not say there was no need to issue a formal enquiry notice to him as they (Grant Thornton) were authorised to receive it even though Mr Mitchell had commented in his letter of 21 January 2021 that an enquiry notice had to be sent to their client. He did not agree that (a) that is because whatever authority he conferred upon Grant Thornton does not extend to receiving an enquiry notice, and (b) this contemporaneous evidence shows that Grant Thornton did not have that authority.

38. On 6 August 2021 HMRC wrote to Mr Lester stating that they were closing their enquiry, seemingly referring to a "formal" enquiry notice which Mr Mitchell had issued on 24 June 2021. It is common ground between the parties that that formal notice of enquiry was given out of time; as noted the deadline for HMRC to open an enquiry was April 2021. In this letter HMRC said this:

"I am writing to tell you that I have concluded my enquiry into the claim under Section 72 ITA07 contained in your agent's letter of 21 February 2020.

That claim requested that trading losses of £1,598,211 arising in 2009-2010 be relieved against income arising in earlier years.

I have concluded that the claim cannot be allowed on the grounds that it was made out of time and that the out of time provisions do not apply. I have explained the reasons for this to your adviser Grant Thornton (NI) LLP in greater detail.

I am copying this letter to your tax advisers Grant Thornton (NI) LLP."

39. On 14 October 2022 Mr Mitchell wrote to Grant Thornton as follows:

"You state that the enquiry into the s72 ITA 2007 claim made on 21 February 2020 was opened outside of the statutory time limits.

In this you are quite correct, and I must thank you for pointing this out and apologise for the oversight on my part. To put this in context however, I opened the Sch1A Para 5 TMA 1970 enquiry on 24 June 2021 and then closed it on 6 August 2021 in order to provide Mr Lester with a statutory route to the appeals process. Up until that point the claim had been refused and there was no right of appeal, only the right of Judicial Review or a referral direct to the Tribunal.

Since the Sch 1A notice is invalid then we must return to the position on the day before it was issued. Unfortunately, this means that I can no longer offer a statutory review.

The position is that Mr Lester has made a late claim for loss relief for the 2006/07 tax year as a result of that self-assessment being amended in the wake of the Clavis Liberty tax avoidance scheme being defeated. It is HMRC's view that the claim does not meet the criteria to be treated as a consequential claim. This is a point on which neither party can agree. I have also decided not to exercise my discretionary powers to accept the late claim.

There is no right of appeal, however Mr Lester can make an application for a Judicial Review…."

40. Subsequent to this, Mr Lester brought judicial review proceedings against HMRC and, by a notice of appeal signed on 26 October 2022, Mr Lester notified an appeal to the tribunal. He states in his grounds of appeal that "there was a valid enquiry".

**Further evidence of Mr Mitchell**

41. Mr Mitchell said that he was trying to assist Mr Lester in his comments in his letter of 21 January 2022 regarding giving formal notice of an enquiry:

"When we were looking at the claim and it appeared that we were going around in circles, I discussed the best way forward to achieve some sort of resolution for Mr Lester with my line manager, back in early 2021, and we had decided that in order to give Mr Lester an appealable decision to take to a tribunal, we would issue an opening enquiry letter and then close it down so that he had an appealable decision to take to tribunal to try and facilitate some forward motion in the case…there was no thought other than we had laid out our position at the time and we seemed to be going nowhere, and that I had outlined my position that the way forward was through judicial review, but that hadn't been taken up.

….we thought that the best way forward would be to give them an appealable decision. As far as I was concerned, we had laid out our statutory position that there was no valid claim and that there was no need to go any further at that point…

So that was where I was, at that particular point in time. So I hadn't considered whether there was any need to look any further at the actual claims for 2009/2010, at that point."

42. Mr Mitchell confirmed that that prior to this letter being sent he would have discussed with his manager that he going to issue a notice under para 5 of schedule 1A. It was put to him that, as a matter of fact, he had an intention to enquire at that point. He said:

"yes, that's what the letter is saying. But there was a condition that there was other information which had still to be provided: at this point, we had been dealing with Grant Thornton on an informal basis and that had been stated in one of the earlier letter that all correspondence was on an informal basis and we were trying to establish the validity of

> the claim. As I said, at this point, we were trying to facilitate some forward motion for an order that Mr Lester could reach some sort of resolution…and the best way to do that was to give him an appealable decision.

43. He confirmed that by stating they were acting informally he means that, in his view, they were not using HMRC's statutory powers up to that point. He agreed that obviously, if he was not satisfied that Grant Thornton were authorised to act on behalf of Mr Lester, he could not have discussed anything with them

44. He was taken to a spreadsheet he had produced (and appended to his witness statement) which he confirmed is his analysis of Mr Lester's income and losses from the various partnerships in which he had an interest in respect of the tax years 2006/07 to 2012/13 and how the various losses had been utilised as shown in Mr Lester's tax returns. He said he produced this at the time when he was looking at this, and there was an earlier version quite early on, and that Mr Lester's actual loss position was quite confused at the time. There seemed to be contradictory figures in the correspondence itself and his tax returns, so he went back to the tax returns to try and find out what the true position was for the duration of the partnerships. He said he had not thought about the implications of "how the losses were interacting…with each other, other than to check the validity of the claim".

45. He was asked if, at the time, he considered a carry forward claim under s 83 to be automatic. He said that it had not actually occurred to him that it was automatic. It was on the tax return and that was it. It was only when he was asked to check - to be absolutely certain that it was not an automatic population of box 22, that he asked a colleague. He was asked if he ever regarded a s 83 claim to be deemed to be made, regardless of whether a claim is made. He said that he had done so, where it has benefited the individual. It was put to him that must have been where box 22 was not completed. He said "in other situations where there has been no completion on box 22 and it benefited the taxpayer to consider that there had been a claim made, I would do that for their benefit". He added that in this case there was no necessity because box 22 was completed.

## Part C - Does the tribunal have jurisdiction?

### Caselaw

46. The parties both referred to the decision in *Raftopoulou* as the leading authority on the meaning of the relevant provisions in schedule 1A. In that case the taxpayer made a claim for overpayment relief under schedule 1AB TMA in respect of a single tax year. HMRC responded by letter of 9 November 2011, stating that since the claim had been made more than four years after the end of the relevant tax year it was outside the normal time limit for overpayment relief under para 3(1) of schedule 1AB TMA. The tribunal struck out the taxpayer's appeal against that decision on the basis that it had no jurisdiction to hear it. On the taxpayer's appeal the Upper Tribunal ("**UT**") held that: (i) HMRC's letter constituted both a notice of enquiry, under para 5 of schedule 1A, and a closure notice, under para 7 of schedule 1A, with the consequence, that under para 9(1) of schedule 1A the taxpayer had a right of appeal against any conclusion stated in the letter.

47. As set out at [8] of the decision, HMRC's letter dated of 9 November 2011 was, so far as relevant, in the following terms:

> "Thank you for your letter dated 13 October 2011. Please accept my apologies for the delay in replying.
>
> It is now too late to make an amendment to the return for 2006-2007.
>
> From 1 April 2010 error or mistake relief under sections 33/33A of the TMA 1970 was replaced by overpayment relief as introduced by Schedule 1AB to the TMA 1970. The normal time limit for an overpayment relief claim is four years from the end of the relevant tax year. This means that the amendment is out of time and a repayment cannot be made.

> You can find further information about overpayment relief claims through our Self Assessment Claims Manual at SACM 12000 onwards, which can be accessed through our website."

48. Lord Justice Richards gave the leading judgement with which the rest of the panel agreed. He noted, at [8], that it was common ground that the reference to amendment in the last line of the middle paragraph of the letter should have been to the taxpayer's request for repayment.

49. As set out at [20] it was also common ground that there was no prescribed form for an enquiry notice or a closure notice:

> "To be effective, *an enquiry notice or a closure notice must be understood by a reasonable person in the position of the intended recipient (the taxpayer in this case),having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim or close an enquiry (as the case may be):*see the judgment of this court in *Bristol & West plc v Revenue and Customs Comrs* [2017] 1WLR 2792, para 26." (Emphasis added.)

50. He set out, at [21], that the UT started their consideration of this issue by referring to the decision of the UT in *Portland Gas Storage Ltd v Revenue and Customs Comrs* [2014] STC 2589 ("*Portland Gas*"), which concerned very similar provisions relating to a claim for repayment of stamp duty land tax. At para [42], the UT said that it is helpful to consider the ordinary meaning of "enquire" and "enquiring" and, having noted that they were referred to various dictionary definitions:

> "The words are synonymous with "inquire" and "inquiring" and it is clear to us that in the context in which we are considering the term, that is in relation to legislation that gives HMRC power to verify information contained in a return so as to ascertain whether the correct amount of tax has been paid, it must mean "examine", "investigate" or "make an investigation into". Another synonym would be "scrutinise"…"

51. He explained, at [22], that in *Portland Gas*, HMRC had rejected a claim for repayment on the grounds that it was made out of time, and it had done so in a single letter dated 15August 2012. The UT in that case concluded, at [44], that the letter did not amount to an enquiry:

> "We can see the force of [counsel for HMRC's] submission in relation to the letter of 15 August 2012 taken in isolation because it would appear that the only "examination" that took place was to ascertain that the original return in respect of which an amendment was sought was more than 12 months before the claim was made. In other words, HMRC did not have to go beyond the face of the letter that they were sent to respond to it and in our view that is insufficient to amount to an enquiry in the context of paragraph 12 of Schedule 10 to the Finance Act 2003."

52. At [23] Richards LJ set out that, in this case, the UT considered the above comments in *Portland Gas* to be obiter and that they said, at [89], that the conclusion in that case paid insufficient regard to the synonym for the act of enquiry of "scrutinise" and would have "the unfortunate, and counter-intuitive, result of giving rise to different conclusions as to whether there had been an enquiry depending on the level of information provided by the taxpayer". Richards LJ did not agree that the comments in *Portland Ga*s at [44] were obiter (see [24]).

53. He continued, at [25], that the UT considered that it "cannot be right that the more information a taxpayer discloses to HMRC (thereby giving HMRC less need to enquire about it) the less likely that it is that the taxpayer will be able to appeal to the tribunal, but will instead be reliant on other remedies such as judicial review (see [91]) and that whilst judicial review may be an adequate remedy, it is not, in contrast to an appeal to the tribunal, one that is specifically contemplated or provided for by the legislation. In the UT's view, "a construction that recognises the existence of a specific right of appeal in respect of conclusions reached by HMRC on a claim is to be preferred to one that denies such an appeal right, even if other remedies not provided by the statute might be available".

54. He set out at [26] that, at [93] of the UT's decision, the UT drew three conclusions from the *Portland Gas* case:

(1) The opening of enquiries and their closure do not require any particular formality. Richards LJ described this as uncontroversial

(2) The term "enquire" bears "its natural and ordinary meaning" which includes "to scrutinise". He commented on this later.

(3) The enquiry notice must make clear to the taxpayer that HMRC had opened an enquiry. He said that this must be read in the light of what this court said in the *Bristol & West* case [2017] 1 WLR2792, at [26], which was decided after the UT gave their decision.

55. At [27] he continued that, at [94], the UT acknowledged that the enquiry notice and the closure notice perform important functions for the protection of taxpayers:

> "The well-informed or well-advised taxpayer will know that, with the opening of the enquiry, HMRC enjoys statutory powers to call for documents and that the taxpayer will have the right to require the enquiry to be completed within a reasonable time: paragraph 7(5)-(7) of Schedule 1A. The issue of the closure notice starts the time for appealing against the conclusions stated in it or the amendments made by it."

56. He explained that (1) the UT considered that a single document, in this case the letter dated 9 November 2011, could constitute both an enquiry notice and a closure notice and cited their decision at [97] to [99], and (2) the UT held, at [105] of their decision, that the "substance of the letter is to be understood as an amendment to the claim so as to eliminate the excess amount of it by reducing it to zero". In their view, this conclusion could have been arrived at only by an enquiry into the claim and "by notifying Dr Raftopoulou of the result of that enquiry, the officer was at the same time giving notice of the intention formed…prior to that scrutiny of inquiring into the claim".

57. Richards LJ commented, at [33], that, in his judgment, the correct starting point for determining whether an enquiry into a claim has been opened "is a consideration of the terms, context and purpose of the provisions of Schedule 1A" which he set out, at [34] and [35], as follows:

> "34 *Those provisions suggest a procedure with some degree of formality and suggest also a procedure with a beginning, a middle and an end*. Paragraph 5 empowers, but does not oblige, HMRC to "enquire into" a claim for repayment. This may be contrasted with replying to a claim received from a taxpayer, having first read it and considered its contents. An officer may only enquire into the claim if, within the specified time, "he gives notice in writing of his intention to do so". *Although the contents of the notice are not prescribed, it must be clear from the notice that the officer intends to enquire into the claim. As earlier noted, the opening of an enquiry has significant statutory consequences, including the right of HMRC to call for documents for the purpose of its enquiry*.
>
> 35 Likewise, the requirements of paragraph 7 of Schedule 1A as to the issue of a closure notice and as to its contents serve to underline the nature of the enquiry process. The notice must: (i) state that the officer has completed his inquiries, (ii) state his conclusions, and (iii) amend the claim as the officer concludes to be necessary or state that no amendment is required. In *Bristol & West plc v Revenue and Customs Comrs* [2017] 1WLR 2792, para 3 this court said:
>
> > "Closure marks an important stage at which the enquiry (with HMRC's attendant powers and duties) ends, HMRC is required to state its case as to the amounts of tax due, in the closure notice itself, following which its powers to amend the assessment is limited to such amendments as will give effect to those conclusions. These provisions contain requirements of real potential value to the taxpayer, hence its right under paragraph 33 to seek a direction that HMRC issue a closure notice." (Emphasis added.)

58. At [36] he disagreed with the UT's comment at [103] of their decision, that it will always be a question of fact whether HMRC have "enquired into" a claim. He said there can be no enquiry into a claim without HMRC giving the notice required by para 5:

> "*Whether the letter or other communication in question gave the necessary notice depends on whether it would be read by a reasonable recipient in the position of the taxpayer as doing so. The same is true of any document said to be a closure notice. These are questions of law*". (Emphasis added.)

59. He concluded, at [37], that the letter dated 9 November 2011 did not demonstrate that HMRC had conducted an enquiry into the taxpayer's claim under Schedule 1A, or had ever intended to do so:

> " In terms, all that the letter stated was that HMRC had read the claim and decided, simply by reference to its date and the expiry of the applicable four-year period on 5April 2011, that it was out of time. Nowhere does the writer of the letter state or indicate that he intends to enquire into the claim or that he has completed his enquiries nor does he state any conclusions resulting from his enquiry or amend the claim. The UT's view at para 105 that the "substance of the letter is to be understood as an amendment to the claim so as to eliminate the excess amount of it by reducing it to zero" is, with respect, driven by their view that the letter showed that HMRC had conducted an enquiry, rather than by anything on the face of the letter. In my view, a reasonable person in the position of the taxpayer would not read the letter as stating that her claim had been reduced to zero but that, rather than considering the substance of the claim, it had been rejected as out of time."

60. He said, at [38], that he agreed with the approach taken by the UT in the *Portland Gas* case. In that case, a claim for repayment of stamp duty land tax was made in a letter dated 18 July 2012. HMRC replied on 15 August 2012, rejecting the claim on two grounds, one of which was that it was out of time. The taxpayer's solicitors replied, taking issue with the time limit point, to which HMRC replied that they were taking advice from their policy team and would revert once it was received. There was further correspondence and communications in November 2012 which concluded with a letter dated 23 November 2012 from HMRC, confirming their original position.

61. He essentially agreed with the approach taken in *Portland Gas* to the letter dated 15 August 2012 (see [39] and [40]). He noted that he had earlier cited [44] of that decision in which the UT decided that that letter did not give notice of an intention to enquire into the claim or otherwise evidence an enquiry. He then referred to [45] where the UT said that no reference had been made by or on behalf of the taxpayer to the time limit and therefore at that stage "HMRC had no argument before it that would cause it to examine the claim in any further detail beyond establishing that the claim was made more than twelve months before it was submitted". However, the UT concluded that HMRC's subsequent actions demonstrated that it had opened an enquiry, the question being essentially one of degree. In Richards LJ's view, at [40]:

> "…. in common with the view of the UT in *Portland Gas*, a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so."

62. He considered, at [40], that the UT in the present case misdirected themselves by treating "enquire into" as denoting no more than "scrutinise" in the widest sense of that word:

> "I doubt the wisdom of searching for a substitute word for the phrase "enquire into" used in the legislation and then testing the facts by reference to the substitute word. Most words have shades, or a spectrum, of meaning and "scrutinise" is no exception. By concluding that HMRC had "scrutinised" the taxpayer's claim in the sense of reading it carefully and paying attention to its date as against the statutory time limit, the UT has moved away from the phrase "enquire into" and disengaged it from its statutory context."

63. At [42] he endorsed counsel for HMRC's submission that para 3(1)(a) of schedule 1A, which empowers HMRC by notice to the claimant to "amend the claim as to correct any obvious errors or mistakes in the claim (whether errors of principle, arithmetical mistakes or otherwise)", is inconsistent with the UT's approach in this case. Such amendments may be made before an enquiry is opened but not while an enquiry is in progress (see para 3(2) of schedule 1A). At [43], he said that the UT's approach is also at odds with the position explained by Auld LJ in *Langham v Veltema* [2004] STC 544, at [31] and [32]. A distinction was drawn, in the context of self-assessment returns, between "light monitoring" by HMRC and the exercise of its statutory power of enquiry under section 9A TMA. Reference was further made to "an intermediate and possibly time-consuming scrutiny, whether or not in the form of an enquiry under section 9A" (emphasis added): "There is a distinction between informal enquiries and the opening of an enquiry into a claim under paragraph 5 with its attendant statutory powers".

64. As regards the UT's comments on the consequences of their decision on the means of challenge, he said, at [45]:

> "Of course, the consequences of any particular interpretation of a statutory provision is a relevant consideration in determining the proper construction of the provision. But, the starting point should be the language of the provision and its context and purpose, all of which in my viewpoint decisively away from the UT's conclusion. The result, that a challenge to a straightforward rejection of a claim as out of time would be by way of judicial review and not by appeal to the F-tT, is incapable of being described as absurd or as so unlikely as to require a different interpretation of Schedule 1A. There are many decisions taken by HMRC that can be challenged only by judicial review. Contrary to Mr Thomas' submissions, this is not in the present context an inadequate remedy. Addressing his reasons for submitting that it was: first, costs are in the discretion of the court or tribunal hearing the judicial review; second, if any issue of fact should arise, the court or tribunal hearing the challenge has all necessary powers to deal with evidence; third, given the number of decisions made by HMRC from which no appeal to the F-tT lies, it is wrong to say that all tax-related matters should be heard by the specialist tax tribunals, but in any event many of the applications for judicial review of HMRC's decisions are transferred to and heard by the UT."

65. He also rejected, at [46], the UT's suggestion that there was a perverse incentive on the basis that it is "highly improbable that a taxpayer seeking a repayment of tax would deliberately give inadequate information with a view to encouraging HMRC to open a formal enquiry. Most taxpayers will be aiming to obtain a repayment as quickly as possible and will provide the information needed to achieve it."

66. Finally, at [47] and [48] Richards LJ said that he was unable to accept the UT's decision that the letter dated 9 November 2011 could serve as both a notice under para 5 and a closure notice under para 7: "the natural reading of the provisions suggests a process which is opened by a notice to the taxpayer, followed by the enquiry itself and ends with the closure notice containing those matters and statements required by paragraph 7". He gave the following guidance at [48] and [49]

> "48. Paragraph 5 requires an HMRC officer to give "notice in writing of his intention" to enquire into a claim (emphasis added). This language envisages that the notice will precede the enquiry and certainly will precede the closure of the enquiry. An enquiry cannot be completed while the officer is still in the position of intending to carry it out. The UT accepted at para 99 that the terms of paragraph 5 might suggest that the notice must be prospective but they did not consider that "such a literal construction [was] appropriate". The officer may well have considered and scrutinised the available materials before giving the notice, and therefore the notice is more likely to be retrospective than prospective in the sense that the officer may already have engaged in elements of enquiry before the notice is given. The UT continued: "There is no requirement that HMRC must give notice

before scrutinising or otherwise turning their minds to the claim; the only requirement is that the notice itself must be given within a certain period."

49. While I agree with much of what the UT said in the passage just quoted, I draw the opposite conclusion from it. It must be right that HMRC does not open an enquiry without considering, even "scrutinising", available materials. *Clearly an officer of HMRC must turn his mind to the claim in hand before opening an enquiry. This shows that there can and will be consideration before the decision is taken to open an enquiry, not that the enquiry starts with such consideration. The statute is clear: once a decision is taken to open an enquiry, the HMRC officer must give notice to the taxpayer of his intention to enquire into the claim. Under the scheme of these provisions, the notice precedes the enquiry under paragraph 5 and alerts the taxpayer to the start of a formal process with its attendant statutory powers available to HMRC*." (Emphasis added.)

**Submissions**

67. Mr Yates submitted that:

(1) The letter of 16 March 2020 is to be taken as opening an enquiry. This is not like the letter considered in the *Raftopoulou* case which it was argued both gave notice of the opening and of the closing of an enquiry. Whilst there is a reference to normal time limits, HMRC proceeded to ask for an explanation as to why Mr Lester was contending that he is nonetheless entitled to make a claim. It is not an "open and shut" letter. There is no rejection of the claim at this stage. There was then a discussion following this letter in April, meetings and further correspondence, setting out the position culminating in a clear conclusion separately set out the letter of 6 November 2020. There is a beginning, middle and an end to the enquiry. A reasonable person in the position of the recipient would understand this letter to mean that HMRC were giving notice of an intention to inquire into the claims.

(2) In any event, if that is not found to be correct, on any view the letter of 22 January 2021 is to be taken to be a notice of enquiry as Mr Mitchell of HMRC clearly communicates his intention to enquire. The terminology he uses of a formal schedule 1A notice is not a concept the statute recognises. All that the statute requires is the giving notice of an intention to enquire (and there is no prescribed form), and that is obviously what Mr Mitchell was communicating in this letter. Any reasonable recipient would understand this in that way.

(3) It is plain from the evidence that Grant Thornton were authorised agents of Mr Lester:

(a) It is clear from the decisions of the UTin *Tinkler v The Commissioners for HM Revenue and Customs* [2018] UKUT 73 (TCC) and of the Court of Appeal in *Tinkler v Revenue & Customs* [2019] EWCA Civ 1392, [2019] STC 1685 ("*Tinkler*") that notice given to an agent for the purposes of an enquiry satisfies the relevant requirement. The engagement letter includes provision about agency and Mr Lester plainly engaged with that clause by authorising Grant Thornton to act for him in relation to this matter. Mr Lester stated in his witness statement that Grant Thornton acted as his agent and at the hearing gave consistent evidence that he authorised them on this specific matter to deal with everything.

(b) That Grant Thornton were authorised to act for Mr Lester as his agent is set out in their letters. Unlike in the *Tinkler* case, there is no evidence and no reason to assume that the general authority of Grant Thornton to act for Mr Lester and to receive documents from HMRC on his behalf was limited. Grant Thornton evidently felt comfortable to act for and correspond with HMRC throughout as the correspondence amply demonstrates. At no point did HMRC question that or suggest that Grant Thornton were acting under form 64-8 or some limited authority.

Mr Mitchell's evidence is that he fully intended to enquire, and he communicated that to Grant Thornton

(c) It is unrealistic to suggest that in their letter of October 2019 Grant Thornton were describing themselves as authorised only to deal with the immediate fallout from the 2019 amendment. That is so particularly in light of what follows and, as noted, that HMRC never queried or challenged Grant Thornton's ability to deal with them, in particular, in making the carry back claims on behalf of Mr Lester. It is not relevant that in their response to the letter of 21 January 2021 Grant Thornton did not immediately assert that there was already an enquiry underway and they were an authorised agent. From their perspective they had no need to state that; in any event they were expecting Mr Mitchell to send the formal notice of enquiry he (erroneously) considered to be necessary. Nor is it relevant that Mr Lester did not know what HMRC's practice was specifically on this point.

(4) In relation to the terms and conditions in the engagement letter which HMRC highlighted: (a) Northern Irish law is not foreign law in this tribunal (because this is a UK tribunal) but in any event the tribunal is perfectly able to read this agreement as if it were an English law agreement, and (b) the entire agreement specifically leaves open the point that Grant Thornton "will act as your agent if authorised by you"; it directly anticipates some further agreement being made in that respect.

(5) On Mr Mitchell's evidence, it is apparent that the concern about the relevant losses had been subject to a claim under s 83 was not part of his reasoning in issuing the closure notice. The only point which was pursued in the inquiry was the relationship between ss 43A and 43(2) TMA.

68. HMRC made the following main submissions:

(1) The exercise required in determining if a document gives a taxpayer notice of enquiry is an objective one; the tribunal must ascertain the intention of the party who made the document by interpreting the words used, in their documentary, factual and commercial context (see *Marley v Rawlings*, at [19] and [20], and *Raftopoulou* at [36]).

(2) It is clear from *Raftopoulou* at [20] that (a) what the actual taxpayer subjectively understood or believed is irrelevant, (b) a document said to be an enquiry notice must be understood by the reasonable recipient as giving notice of an intention to enquire into the claim. It is not enough that a reasonable recipient might infer from the document that the officer *intended to enquire* into the claim. The reasonable recipient must understand the relevant document actually to be giving notice of his enquiry, and (c) the reasonable recipient's understanding of the document must take into account the relevant context.

(3) The decision in *Portland Ga*s emphasises that "... the enquiry notice must make clear to the taxpayer that HMRC had opened an enquiry." Hence, the requirement is not merely that it is clear that HMRC would or might do so in the future or had opened an enquiry. Richards LJ said of this comment simply that it must be read in the light of what the Court of Appeal said in the *Bristol West* case. Hence the test is whether the reasonable recipient would understand from the relevant communication that HMRC have opened or begun an enquiry; it does not suffice if there is simply an understanding or an assumption that HMRC may or will begin to enquire into something in the future. The question is whether the document conveys to the reasonable recipient that an enquiry has been opened and is open now, as at the time of this communication.

(4) In the *Bristol & West* case referred to in *Raftopoulou* at [24], the court explains that it is essential to the validity of a closure notice that the document (or documents) relied upon should both state that HMRC has completed their inquiry, and state their conclusions as that "flows naturally from the language of" the relevant statutory provision. Precisely the same point applies in relation to the giving of notice of an

enquiry under para 5 of schedule 1A. The document relied upon as being an enquiry notice should expressly state that the officer of the board intends to enquire into the claim. That case, at [38], demonstrates the need for clarity as does Richard LJ's comments at [20] of *Raftopoulou*. If a reasonable taxpayer would be left in doubt as to whether a document is an enquiry notice or not, then it is not one.

(5) The case law makes it plain that there is a distinction between informal enquiries and the opening of a statutory enquiry. The fact that HMRC may look at a claim or ask questions about it does not mean an enquiry has been opened (see *Raftopoulou* at [37], [40] and [43] and *Credit Suisse* case at [174(8)] and [(10)]. The statutory provisions encompass a procedure with a degree of formality and a beginning, middle and end (see R*aftopoulou* at [34]). A rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute an intention to do so (see *Raftopoulou* at [40]). The remedy to challenge such a rejection is by way of judicial review (see *Raftopoulou* at [19]).

69. The parties referred to other case law including the decision of the tribunal in *Credit Suisse (UK) Ltd v HMRC* [2020] UKFTT 86 (TC) but we do not consider it necessary to refer to these decisions as they do not add to the principles to be considered as set out in *Raftopoulou* and the decisions referred to in that case.

70. Mr Macklam submitted that HMRC's letter of 16 March 2020 would not be understood by a reasonable recipient as an enquiry notice and HMRC's letter of 6 November 2020 would not be understood by a reasonable recipient as a closure notice:

(1) The appellant's arguments in this case are disconnected from the purpose of para 5 of schedule 1 A and the real world. This makes provision for how an officer of HMRC gives notice of the start of a formal process the taxpayer; it does not require a technical exercise/analysis. The question is how the relevant documents would be understood in the real world by a reasonable recipient in the position of the taxpayer. It is the same analysis as one would undertake if construing a will or a notice to quit in a landlord and tenant context.

(2) Any reasonable recipient in the position of the taxpayer would understand the letter of 16 March 2020 to convey a request by HMRC for an essential piece of information, without which the claims could not be considered. The officer was saying, in short, "I don't understand what you have sent me". The authorities establish that looking at a claim and asking a question does not amount to opening an enquiry. Moreover, it (like the other letters relied on by Mr Lester) was not sent to Mr Lester or to an authorised agent as required by para 5(1) of schedule 1A:

(a) Mr Lester's evidence in this regard is unreliable:

(i) It is clear that he saw his task as being to give evidence that Grant Thornton had the relevant authority; hence, questions had to be repeated. He was obviously affected by sitting in court and knowing the evidence that he needs to give in order to make good his case.

(ii) That he was happy for Grant Thornton to get on with things and as he put it, to deal with his tax affairs, is not the same thing as conferring authority on them to receive, as his agent, a formal document like an enquiry notice.

(iii) The terms of the engagement letter produced at the hearing support the view that Mr Lester's recollections in relation to these events are not reliable. He suggested that Grant Thornton were tasked with dealing generally with his tax affairs from start to finish or had some sort of general authority.

However, the engagement letter sets out that Grant Thornton's role and responsibilities are carefully circumscribed.

(b) The documents in the bundles do not establish that Grant Thornton had authority to act for Mr Lester as regards enquiries: (i) Grant Thornton's letter of 21 October 2019 does not relate to the claims, (ii) it is telling that in their letter of 2 February 2021 Grant Thornton do not state that they were authorised to receive an enquiry notice. If they had such authority, they would have said so, and (ii) when an enquiry notice was sent out of time it was sent in the usual way to Mr Lester and copied to Grant Thornton.

(c) The engagement letter produced at the hearing does not confer authority on Grant Thornton to receive an enquiry notice on behalf of Mr Lester. The *Tinkler* case which Mr Yates refers to shows that one looks to the engagement letter to ascertain the terms on which the agent has been engaged, including the scope of the agent's authority. There is nothing in that letter which confers authority on Grant Thornton to receive an enquiry notice from HMRC as his agent, and/or which amounts to a general grant of authority to Grant Thornton to accept communications from third parties as his agent. It simply states that Grant Thornton will act as Mr Lester's agent if authorised by him.

(3) It follows that HMRC's letter of 6 November 2020 necessarily was not a closure notice. In any event, a reasonable person in the position of the taxpayer would read this letter as stating that the carry back claims "had been rejected as out of time" (see *Raftopoulou* at [37] and [48] to [50]). It does not pass the test set out in the *Bristol and West* case at [24]: it does not state HMRC have completed their enquiry or their conclusions and it does not amend the claim to zero; it simply rejects the claims as being out of time. Moreover, it was not sent to Mr Lester or an authorised agent.

(4) For similar reasons the letter of 22 January 2021 also does not satisfy the requirements of para 5(1) of schedule 1 A:

(a) This letter explains, by reference to two features, why an earlier document was not an enquiry notice and itself contains those very same two features. Therefore, plainly no reasonable recipient of this letter would understand it as being an enquiry notice.

(b) Regardless of what happened as a matter of fact, or what Mr Mitchell's subjective beliefs or intentions were, this letter conveys that HMRC have not, at this stage, opened an enquiry, because Mr Mitchell states he will now need to issue a formal schedule 1A notice to Mr Lester. In effect he states that he has not done that yet. A reasonable recipient may well have a pretty good sense that HMRC will begin an enquiry in the future, when HMRC give them notice in the future, but until then, the reasonable recipient would not consider that an enquiry had been opened.

(c) As is required, on the authority of *Bristol & West,* Mr Mitchell does not state or use words to the effect of: "I intend to enquire into your claim". There is simply an implication that he intends to issue a formal schedule 1A notice, and that he intends to enquire into the carry back claims. However, there is a clear difference between implying an expectation of doing something in the future and doing that thing now. Clearly, if a tenant says to his landlord, "I intend to give you a notice to quit expiring at the end of the next period of my tenancy", the tenant has not given notice until he actually gives it. Until the relevant thing is done, other acts can intervene (such as a change of mind, or, on advice, taking a different course of action, and/or forgetting to do the thing envisaged). An implication that a person

intends to open an enquiry in the future does not convey an understanding that an enquiry has been opened when the recipient is reading the letter

(5) It follows that no subsequent document can amount to a closure notice. It is obvious from Grant Thornton's response to this letter that HMRC were not understood as having already opened an enquiry, because it refers to HMRC proposing to issue a schedule 1A notice. Moreover, again the letter was not sent to Mr Lester or an authorised agent.

71. Mr Yates responded as follows as regards the letter of 22 January 2021:

(1) The fact that Mr Mitchell refers erroneously to requirements of para 5 cannot possibly be used as a means of its interpretation in this context. In any event, these were points plainly made in relation to a previous letter.

(2) In the final sections of the letter, Mr Mitchell does not anticipate any future delay in giving notice of an enquiry and para 5 of schedule 1A does not recognise that concept. If an officer gives notice that he intends to enquire albeit that he states that he intends to send a formal notice later, that suffices for para 5 to bite. Nothing in the caselaw contradicts that. This is a fairly unusual set of facts. It is clear, however, that the officer does not need to state: "I am opening an enquiry". The test is whether he has given written notice of his intention to enquire (see [49] of *Raftopoulou*). It is accepted that for the relevant requirements to me met it must be apparent to the reasonable reader that a formal process has begun. However, standing back and objectively assessing this letter there is no doubt that Mr Mitchell was intending to open an enquiry under para 5 of schedule 1A; that is what he says.

(3) Where it is accepted that there is a valid enquiry notice, the documents which it is asserted are closure notices in respect of that enquiry have to be assessed in that context. In each of the relevant letters of November 2020 and August 2021, the officer deals fully, from HMRC's stance, with the merits or otherwise of the claim, and rejects it. That is entirely what a closure notice dealing with a claim must do.

**Decision**

72. In our view, in light of the caselaw referred to above, HMRC's letter of 16 March 2020 does not give notice of the relevant officer's intention to enquire into the claims for the purposes of para 5 of schedule 1A. As HMRC, submitted, a reasonable recipient in the position of Mr Lester having his knowledge of any relevant context ("**a reasonable recipient**"), would not regard this letter as giving notice of an intention to enquire into the carry back claims. In a similar way to the situation as regards the single letters considered in *Portland Gas* and *Raftopoulou*, in effect, HMRC set out in this letter that they considered the claim was out of time, by reference only to the claims themselves and what they took to be the applicable time limit. A reasonable reader would not consider that HMRC were giving the required notice simply because HMRC also noted that Grant Thornton had said in the claims letter that they believed that their client was entitled to make the carry back claims even though they are out with the normal time limits and asked to be advised what legislation Grant Thornton were relying on which they believed endorsed their client's claims. In our view, a reasonable recipient could regard it as no more than a possibility that, once a response was received, depending on the answer given Grant Thornton, HMRC may have more questions and may wish to give notice of an enquiry. When this letter was sent and received, it could be no more that speculation as to what Grant Thornton's response to this query would lead to. A reasonable recipient had no means of knowing from this letter whether HMRC would in fact simply accept the information provided by Grant Thornton or seek to raise further questions whether by using their formal enquiry powers or otherwise. On the way in which Mr Lester argues his case, it follows that the letter of November 2020 cannot be taken to be a closure notice.

73. However, our view is that a reasonable recipient of the letter of 22 January 2021 would regard it as giving notice of Mr Mitchell's intention to enquire into the carry back claims. The

fact that Mr Mitchell wrongly thought that he needed to issue a further document referring specifically to schedule 1A and that he needed to issue it to Mr Lester, does not detract from the fact that on any objective construction of the wording of this letter, he intended to enquire into the carry back claims and was giving notice of that fact. He expressly said that he "will then consider the information in your letter of 4 December in conjunction with the further information that you committed to providing in that letter before issuing a formal closure notice to your client". Although he did not issue the formal document he mistakenly thought he needed to issue, he plainly did take the action he set out as it culminated in him issuing a formal closure notice in August 2021. There can be no doubt that a reasonable recipient would regard that letter as giving notice of the closure of the enquiry which, in our view, Mr Mitchell gave notice he was opening on 22 January 2021.

74. We accept Mr Lester's evidence that Grant Thornton had full authority to act for him in relation to the carry back claims. He described Grant Thornton as his agent in his witness statement was consistent in what he said at the hearing. Given what he said about his long association with Mr Gourley and the nature of his relationship with Mr Gourley/Grant Thornton (as one of dialogue and personal contact), it is unsurprising that he was not focussed on whether there was a written engagement letter and what its terms were. There is no reason to suppose that the authority he evidently conferred on Mr Gourley/Grant Thornton was in any limited such that they did not have authority to receive an enquiry notice or a closure notice on his behalf. We do not think any assumption to that effect can be drawn from the fact that Grant Thornton did not state that they were authorised to receive such notices on receipt of the letter of 22 January 2021. As Mr Mitchell stated he was going to issue the formal notice he considered was required, it was reasonable to expect that he would do so and reasonable not to take issue with that at that stage.

## Part D - Are the claims valid?

### Operation of ss 72 and 73 ITA

75. The claims are made under ss 72 and 73 ITA which enables an individual to claim for losses arising in the first four years of the individual's trade to be utilised as follows:

> "**72 Relief for individuals for losses in first 4 years of trade**
>
> (1) An individual may make a claim for early trade losses relief if the individual makes a loss in a trade –
>
> (a) in the tax year in which the trade is first carried on by the individual, or
>
> (b) in any of the next 3 tax years.
>
> (2) The claim is for the loss to be deducted in calculating the individual's net income for the 3 tax years before the one in which the loss is made (see Step 2 of the calculation in section 23).
>
> (3) *The claim must be made on or before the first anniversary of the normal self-assessment filing date for the tax year in which the loss is made.*
>
> (4) This section applies to professions and vocations as it applies to trades.
>
> (5) This section needs to be read with - section 73 (how relief works),…"
>
> **73 How relief works**
>
> This section explains how the deductions are made for the 3 tax years mentioned in section 72(2). The amount of the loss to be deducted at any step is limited in accordance with sections 24A and 25(4) and (5).
>
> Step 1
>
> Deduct the loss in calculating the individual's net income for the earliest of the 3 tax years.
>
> Step 2
>
> Deduct any part of the loss not deducted at Step 1 in calculating the individual's net income for the next tax year.
>
> Step 3

Deduct any part of the loss not deducted at Step 1 or 2 in calculating the individual's net income for the latest of the 3 tax years.

*Other claims*

*If the loss has not been deducted in full at Steps 1 to 3, the individual may use the part not so deducted in giving effect to any other relief under this Chapter (depending on the terms of the relief)*." (Emphasis added.)

76. 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, section 42 TMA governs how the claim is to be made "unless otherwise provided". In this case, the procedure for making a "carry back" claim under s 72 is governed by schedule 1B TMA which, in para 2, provides as follows:

"(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*.

(4) Subject to sub-paragraph (5) below, the claim shall be for an amount equal to the difference between—

(a) the amount in which the person is chargeable to tax for the earlier year ("amount A"); and

(b) the amount in which he would be so chargeable on the assumption that effect could be, and were, given to the claim in relation to that year ("amount B").

(5) Where effect has been given to one or more associated claims, amounts A and B above shall each be determined on the assumption that effect could have been, and had been, given to the associated claim or claims in relation to the earlier 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." (Emphasis added.)

77. This provision has been the subject of much judicial comment, particularly in *R (de Silva) v HMRC* [2016] STC 1333 and *R (Derry) v HMRC* [2017] STC 1723. In *R (de Silva*), Lord Hodge JSC explained the provision as follows at [19]:

"Paragraph 2 of Schedule 1B thus is concerned with relief sought for a loss incurred in the later year (which I will call 'Year 2') by carrying it back to the earlier year ('Year 1'). Significantly, paragraph 2(3) makes it clear that the claim relates to Year 2. The quantification of the claim is governed by paragraph 2(4): the claim is the difference between amount A and amount B on the counterfactual assumption that effect could have been and was given to the claim in Year 1. That assumption is counterfactual because paragraph 2(3) and paragraph 2(6) relate the claim and the giving effect to the claim to Year 2."

**Time limits for the making of "carry back claims" under s 72 ITA**

78. Section 43(1) TMA provides that:

"*Subject to any provision of the Taxes Acts prescribing a longer or shorter period*, no claim for relief in respect of income tax or capital gains tax may be made more than 4 years after the end of the year of assessment to which it relates". (Emphasis added.)

79. In this case, as highlighted above, s 72(3) governs the position by providing that claims made under s 72 ITA must be made on the first anniversary of the normal self-assessment filing date for the tax year in which the loss was made. If that provision applies, therefore, the appellant would have had to make the claims by 31 January 2012. The appellant's stance is that, under ss 43(2) and 43C (2) TMA he had an extended period in which to make the claims and, he in fact made the claims within that period. These provide as follows:

"**43 Time limit for making claims**

…

(2) *A claim (including a supplementary claim) which could not have been allowed but for the making of an assessment to income tax or capital gains tax after the year of assessment to which the claim relates may be made at any time before the end of the year of assessment following that in which the assessment was made*."

"**43C Consequential claims etc**

(1) Where -

(a) a return is amended under section 28A(2)(b), 28B(2)(b) or 28B(4), and

(b) the amendment is made for the purpose of making good to the Crown any loss of tax [brought about carelessly or deliberately by] the taxpayer or a person acting on his behalf,

sections 36(3) and 43(2) apply in relation to the amendment as they apply in relation to any assessment under section 29.

(2) Where -

(a) *a return is amended under section 28A(2)(b), 28B(2)(b) or 28B(4), and*

*(b) the amendment is not made for the purpose mentioned in subsection (1)(b) above,*

*sections 43(2), 43A and 43B apply in relation to the amendment as they apply in relation to any assessment under section 29.*

(3) References to an assessment in sections 36(3), 43(2), 43A and 43B, as they apply by virtue of subsection (1) or (2) above, shall accordingly be read as references to the amendment of the return.

(4) Where it is necessary to make any adjustment by way of an assessment on any person –

(a) in order to give effect to a consequential claim, or

(b) as a result of allowing a consequential claim,

the assessment is not out of time if it is made within one year of the final determination of the claim. For this purpose a claim is not taken to be finally determined until it, or the amount to which it relates, can no longer be varied, on appeal or otherwise.

(5) In subsection (4) above "consequential claim" means any claim, supplementary claim, election, application or notice that may be made or given under section 36(3), 43(2), 43A or 43D(6) (as it applies by virtue of subsection (1) or (2) above or otherwise)."

80. Mr Yates submitted that:

(1) s 43(2) TMA applies by virtue of s 43C(2) TMA as the 2019 amendment was made under s 28(2)(b) TMA. In such circumstances s 43(2) must be adapted to read as follows:

> "A claim (including a supplementary claim) which could not have been allowed but for the amendment of a return under s 28B(4) after the year of assessment to which the claim relates [2009/10] may be made at any time before the end of the year of assessment following that in which the amendment was made [by 5 April 2021]."

(2) The claims were made on 21 February 2020, well within the applicable time limit time of 5 April 2021 by virtue of s 43(2) as applied by s 43C(2).

(a) The 2009/10 claim that Mr Lester made in February 2020 "could not have been allowed but for the making of" the 2019 amendment. Until the notice made pursuant to s 28(2)(b) TMA amended Mr Lester's self-assessment for 2006/07 (by disallowing losses previously claimed under the failed Clavis Liberty scheme), there was no amount for which Mr Lester was chargeable to tax for 2006/07 (within the meaning of para 2(4)(a) of schedule 1B TMA).

(b) The 2019 amendment was made in 2019, after the year of assessment, the 2009/10 tax year, to which the 2009/10 claim relates.

(c) Therefore, Mr Lester could make the 2009/10 claim at any time before the end of the year of assessment following what in which the amendment was made: the 2020/21 tax year. The 2009/10 claim was made in the 2019/20 tax year.

81. HMRC dispute that these provisions apply for all the reasons set out below.

**Did the appellant make a claim to carry forward the relevant losses under ss 83/84 ITA?**

*Relevant provisions*

82. Sections 83 and 84 ITA provide as follows:

"83 **Carry forward against subsequent trade profits**

(1) A person may make a claim for carry-forward trade loss relief if -

(a) the person has made a loss in a trade in a tax year, and

(b) relief for the loss has not been fully given under this Chapter or any other provision of the Income Tax Acts or under section 261B of TCGA 1992 (use of trading loss as a CGT loss).

(2) The claim is for the part of the loss for which relief has not been given under any such provision ("the unrelieved loss") to be deducted in calculating the person's net income for subsequent tax years (see Step 2 of the calculation in section 23).

(3) But a deduction for that purpose is to be made only from profits of the trade.

(4) In calculating a person's net income for a tax year, deductions under this section from the profits of a trade are to be made before deductions of any other reliefs from those profits.

(5) This section applies to professions and vocations as it applies to trades (and section 84 is to be read accordingly).

(6) This section needs to be read with section 84 (how relief works),…"

"84 **How relief works**

This section explains how the deductions are to be made.

The amount of the unrelieved loss to be deducted at any step is limited in accordance with section 25(4) and (5).

Step 1 Deduct the unrelieved loss from the profits of the trade of the next tax year.

Step 2 Deduct from the profits of the trade of the following tax year the amount of the unrelieved loss not previously deducted.

Step 3 Continue to apply Step 2 in relation to the profits of the trade of subsequent tax years until all the unrelieved loss is deducted."

83. It appeared to be common ground that as otherwise there are no rules in ITA or elsewhere as to how a claim under s 83 ITA is to be made the general rules in s 42 TMA apply. So far as relevant this provides as follows:

"(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.

…

(5) The reference 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.

…

(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*." (Emphasis added.)

…"

*Submissions*

84. Mr Afzal stated that the burden of proof is on Mr Lester but, in any event, the point is proven (1) by virtue of the relevant self-assessment tax returns in the bundle: as Mr Lester rightly accepts, the relevant figures were entered in box 22 on the partnership pages of the tax returns, (2) Mr Mitchell confirmed that a figure is not inserted into this box automatically, it has to be filled in by the taxpayer. In HMRC's view entry of the figure in that box amounts to a claim.

85. Mr Yates submitted that the entry of relevant losses in box 22 does not amount to the making of a claim for them to be carried forward under s 83 TMA:

(1) Box 22 does not refer to any claim and, in a sense, the existence of losses to carry forward does not affect the relevant tax return at all. The completion of that box does not affect the amount of tax to pay in the tax year to which the return relates because necessarily relevant losses shown in that box, as losses to carry forward will, if anything, reduce tax in the future if they are set-off against profits in future tax years.

(2) Under s 42(1A) TMA for there to be a claim of this kind the claim must be quantified at the time when the claim is made. In this case, in each relevant tax return the relevant losses are simply included in a larger aggregate figure which it appears includes losses brought forward from previous tax years. It is not possible, therefore, to determine from the figure in box 22 the specific amount of losses arising in the tax year to which the return relates; the amount cannot be quantified from box 22.

(3) In practice, as Mr Mitchell indicated in his evidence, HMRC may allow the insertion of current year losses in box 22 as the making of a carry forward claim as a matter of course but that concessionary practice necessarily does not bind the taxpayer.

86. Mr Afzal submitted that:

(1) It is unsurprising that box 22 needs to be filled out by the taxpayer. As Mr Yates noted, the figure which is required to be inserted is a cumulative figure in that it comprises both (a) the amount of any losses arising in the tax year to which the return relates, after any set-off in that year, and (b) any brought forward losses from previous tax years. The fact that the figure is a cumulative one does not somehow mean that by inserting that total figure a taxpayer has not made a claim for relief under s 83 in respect of losses arising in the tax year to which the return relates.

(2) Box 22 does not need to refer to the requirement for the taxpayer to make a claim under s 83 ITA. The important point is that the legislation requires a claim to be made for the carry forward of losses under that provision. It is notable that box 20 states simply: "Loss from this tax year set-off against other income (or capital gains) ..." A taxpayer has to make a claim to set-off losses in the specified way under the relevant legislation but there is no reference to that requirement in box 20.

(3) Mr Yates has not explained how a claim is to be made pursuant to s 83 ITA if not in box 22.

*Decision*

87. We have concluded that Mr Lester made carry forward claims in respect of the relevant losses in so far as he/Grant Thornton, as his representative, inserted the amount of those losses in box 22 in the partnership pages of his tax returns for 2009/10 and 2010/11:

(1) We accept Mr Mitchell's evidence, in effect, that a figure will not appear in box 22 unless the taxpayer/his representative has inserted a figure in it; in other words, box 22

is not populated automatically by the online system using other information provided by the taxpayer.

(2) In our view, the fact that box 22 in a return for a particular tax year may include other losses brought forward from prior tax years does not mean that the amount of the loss for which carry forward relief is claimed is not quantified for the purposes of s 42(1A). The amount is a known sum in that the taxpayer will have had to calculate the relevant figure for inclusion in box 22. It is reasonable to suppose that HMRC can easily ascertain that figure from information readily available to them in the taxpayer's tax returns for prior years.

(3) We cannot see that Mr Yates' analysis is supported by the fact that current year losses inserted in box 22 do not affect the taxpayer's tax position in respect of the tax year to which the return relates. Section 83 clearly states that a person "may make a claim for carried forward trade loss relief" if the person has made a loss in a trade in a tax year which has not been relieved in any of the ways specified and "*the claim is for the part of the loss for which relief has not been given*" under the specified provision "to be deducted in calculating the person's net income for subsequent tax years". This plainly suggests that the claim relates to the tax year in which the loss arises – as a claim for that loss to be carried forward albeit that relief may not be obtained until as and when there are profits in future period against which the loss can be used.

**Can Mr Lester revoke or amend any claims made under s 83 ITA, has he done so and does the extended time limit apply?**

*Submissions*

88. On the basis that, as we have decided, the majority of the relevant losses were subject to a carry forward claim, the next question is whether, as a result, the appellant is precluded from making carry back claims in respect of them. In this context, HMRC considered that the following differences between ss 72 and 73 ITA and the provisions in ss 83 and 84 ITA are highly material:

(1) Section 73 ITA contains the proviso, under "Other claims",

(2) Section 83(1)(b) ITA provides that a carry-forward claim can be made if:

> "relief for the loss has not been fully given under this Chapter or any other provision of the Income Tax Acts or under section 261B of TCGA 1992 (use of trading loss as a CGT loss)".

(3) Section 84 ITA contains no equivalent proviso to that headed "Other claims" in s 73 ITA.

(4) Section 72 ITA 2007 does not contain an equivalent to s 83(1)(b) ITA.

89. In HMRC's view:

(1) It follows from these differences that (a) a taxpayer may make claims under s 72 ITA in respect of losses, and to the extent that the losses are not deducted under s 73 ITA, the taxpayer may also make a carry forward claim under s 83 ITA in respect of any remaining balance of the losses, (b) by contrast, a taxpayer may not make a carry forward claim under s 83 ITA in respect of losses, and then make a claim under s 72 ITA in respect of those same losses to the extent that they are not deducted under s 84 ITA. In the absence of a specific provision enabling a person to utilise any unused losses, which it has claimed to carry forward under s 83, in a different way, any unused losses are simply carried forward indefinitely.

(2) It follows that, in order to make a claim under s 72 ITA in respect of losses which have been the subject of a carry forward claim under s 83 ITA, the carry forward claim must first be revoked or amended to nil. However, as set out below, (a) Mr Lester has not

done either of those things, and (b) in any event, as a matter of law he is not entitled to revoke his claims to carry forward the relevant losses under ss 83 and 84 ITA.

90. Mr Yates submitted that HMRC's approach is inconsistent with s 63 ITA which provides as follows:

> "Prohibition against double counting
>
> If relief is given under any provision of this Chapter for a loss or part of a loss, relief is not to be given for -
>
> (a) the same loss, or
>
> (b) the same part of the loss, under any other provision of this Chapter or of the Income Tax Acts."

91. Mr Yates further submitted that (1), none of the relevant losses which are included in box 22 in Mr Lester's tax return for 2009/10 (or for 2010/11) have been relieved against any profits in future years. There has been no "double counting", (2) s 63 is obviously concerned with double utilisation and in this context would prevent relief being given for a loss under s 72 ITA if a deduction had in fact occurred for that loss under s 84, (3) no utilisation occurred and there is no possibility of any utilisation because the relevant trades have ceased and so there will never be profits for the losses to relieve; they would simply be carried forward indefinitely. HMRC's argument is, presumably, that these losses are permanently stranded and that, despite not being used, they cannot be carried back under s 72 ITA.

92. HMRC responded that their stance is not inconsistent with s 63 ITA:

(1) That provision applies generally and not just to relief involving carry forward claims under s 83 ITA. That provision simply provides that there can be no double counting in respect of relief. Thus, to the extent that there can be two claims in respect of a loss, s 63 ensures that the same element of the loss cannot be relieved twice.

(2) However, the logically prior question is whether two claims can be made in relation to a loss; as explained above, if a carry forward claim is made under s 83 ITA in respect of a loss, then a carry back claim under s 72 ITA cannot subsequently be made (without the carry forward claim being revoked or amended), even if as matters stand the entire loss has not been relieved pursuant to s 83 and 84 ITA. Unlike in ss 72 and 73 ITA there is no provision in the legislation which enables a person to do so.

93. Mr Yates added that his view of s 63 is also consistent with the earlier legislation, namely s 385 of the Income and Corporation Taxes Act 1988 ("**ICTA**") which is the equivalent to s 83 ITA. Section 385 provided as follows in sub-ss (3) and (7)

> "(3) Any relief under this section shall be given as far as possible from the first subsequent assessment, and so far as it cannot be so given, then from the next assessment, and so on.
>
> …
>
> (7) *In so far as relief in respect of any loss has been given to any person under this section, that person shall not be entitled to claim relief in respect of that loss under any other provision of the Income Tax Acts*." (Emphasis added.)

94. Mr Yates submitted that:

(1) It is quite clear in the above wording that s 385(7) only prevented double utilisation (where relief has actually been given) as opposed to relief being prohibited where a claim under s 385 had been made but the losses had not been utilised.

(2) This is also consistent with the wording of s 381(3) ICTA (the equivalent to s 72 ITA).

(3) There is no suggestion that the "rewrite project" under which ITA was introduced was intended to change the law. The explanatory notes simply state the following:

"This section ensures relief is only given once for a particular loss or part of a loss. It is based on sections 380(1), 381(3), 385(7), 388(2), 504A(5) of ICTA and section 72(2) of FA 1991."

(4) Section 63 ITA is not mentioned in any of the listed intentional changes in the law in the explanatory notes, and in light of this, it is permissible for the tribunal to have regard to this legislative history given the ambiguity in s 63 ITA (see *Eclipse Film Partners (No.35) LLP v HMRC* [2014] STC 114 at [97]). When one does so, it is quite clear that there is no prohibition on using losses under the carry back provisions in s 72 ITA even if they have been the subject of a carry forward claim under s 83 ITA but have not in fact been used.

95. Mr Afzal submitted that, it is inappropriate to rely on s 385 ICTA in this context for the following main reasons:

(1) ITA is not simply a consolidation of ICTA. The fact that it was introduced as part of the "rewrite project" (means it may contain new provisions and changes and is not simply a reflection of the old provisions in ICTA.

(2) So far as s 385 ICTA is a reference to predecessor legislation, in any event there is no ambiguity in the consolidated legislation and it is possible to discern the purpose of that legislation using orthodox principles of interpretation. The correct construction of the provisions is plain for the reasons set out above.

96. Mr Afzal continued that, in any event, s 385(7) ICTA does not assist Mr Lester in his analysis. This provision makes explicit that a taxpayer had to make a claim to carry forward losses, and if he had actually received relief for those losses in a future year by set-off against profits, he could not make another claim for that loss. It performs the function which is now performed by s 63 ITA. It does not state, however, that if relief has not been given for any part of that loss in the future, the taxpayer is entitled to make another claim. If that is what was intended, the provision would have explicitly said that and that would have carried over into ss 83 and 84 ITA under a similar heading to that in s 73 ITA ("other claims").

97. He added that even if Mr Yates construction of s 385(7) ICTA is correct, the introduction of s 83 ITA would simply have made a change in the law. That is clearly permitted under the "rewrite project" and, indeed in other areas, some changes were introduced in ITA. It is notable that the explanatory Mr Yates referred to state that s 63 ITA is based on, amongst other things, s 385(7) ICTA. It does not say that s 63 ITA is identical in effect to 385(7) ICTA thereby indicating that there could be some intended change.

98. Mr Yates responded that there is no basis for HMRC's view. To make a claim under ss 72 and 73 ITA (or s 64 ITA) a taxpayer has to utilise all of the losses arising in the relevant tax year (see HMRC's manual BIM85080). That could lead to inefficiencies such as the loss of the taxpayer's personal allowance. That is the reason for the "other claims" provision in s 73 ITA (and the similar provision in s 65 ITA); the taxpayer has to use the losses arising in the year for which the claim is made under the steps set out, and only once the losses have been fully utilised under those steps can the taxpayer utilise any remaining unused portion in any other way. The provision does not say, as HMRC suggest, that a taxpayer is permitted to make "other claims" because otherwise, impliedly, they are not permitted. There is no need for that. This is not an "anti-double-use" provision; that is already contained in s 63 ITA. Section 84 ITA does not contain the same words because it is no part of a claim under ss 83 and 84 ITA for there to be such an exhaustive mechanism.

*Decision*

99. We have concluded that the better view is that, in principle, there is nothing to prevent a taxpayer such as Mr Lester, who has made a claim under s 83 ITA to carry forward losses but has not utilised those losses as set out in ss 83 and 84 ITA, to the extent permitted by statute

and within applicable time limits, to make a claim to use the losses under a different set of provisions such as ss 72 and 73 ITA:

(1) We cannot see that it is necessarily the case that a person cannot make a different claim for relief for any losses, which are the subject of a claim for carry forward under s 83 ITA, but which have not in fact been used, because a related set of provisions dealing with a different relief (in s 72 ITA) specifically addresses how an individual may deal with any losses which are not fully used for the purposes of claiming that relief. It seems to us that to make such a conclusion from that alone is something of a leap.

(2) That is particularly so given that (a) the relevant provisions are simply silent on how ss 83 and 84 are intended to interact with other statutory reliefs for trading losses as regards unused losses, (b) there is no discernible policy reason why a person cannot make a different claim in respect of losses which are not in fact relieved under ss 83 and 84 ITA (in this case due to lack of profits), and (c) s 63 ITA prevents a person obtaining relief for the same loss twice.

(3) In our view, essentially due to the lack of clarity, the tribunal, is able to have regard to the previous rules relating to the carry forward of trading losses in s 385 ICTA. The provision in sub-s (7) implicitly recognises that a person may be able to claim relief in respect of a loss for which relief is claimed under s 385 also under other provisions of the Income Tax Acts. On its plain terms, to prevent relief being given for the same loss twice it states that a person is not so entitled *in so far as* "relief" in respect of the relevant loss "*has been given*…under this section". The plain implication is that "in so far as" relief in respect of that loss has not been given to the relevant person under s 385, the person is entitled to claim relief in respect of the loss under any other provision of the Income Tax Acts. That is the natural corollary of what is expressly stated in sub-s (7). We do not accept that any change in the law was intended when ss 83 and 84 ITA were introduced; as Mr Yates pointed out it appears that material changes in the law were identified in the explanatory notes and, as noted above, there is no discernible policy reason for any such change.

**Was Mr Lester entitled to and did he revoke or amend the claims made under s 83 ITA**

*Submissions*

100. We have in any event proceeded to consider the other issues in case our conclusion above is incorrect. Mr Yates further submitted that:

(1) In any event, in making the claims, Mr Lester, in effect, withdrew or revoked any previous claim for the carry forward of the relevant losses under s 83. This is permitted under s 43(2) TMA, as this applies to both claims and "supplementary claims". In this context s 42(9) TMA is highly relevant (see above). This means that, in effect, "supplementary claims" are defined to encompass amendments to claims which plainly may include an amendment made by way of revocation or by withdrawal of the claim. Although s 42 TMA is not in point here, it is reasonable to suppose that when used in s 43(2) TMA the term "supplementary claims" has the meaning ascribed by s 42(9).

(2) The 2009/10 claim could not have been made by reference to profits in 2006/07 until the 2019 amendment was made. Until then Mr Lester was operating under the assumption that he had no other profits which he could seek to relieve by claiming to off-set losses arising in the tax year 2009/10. Section 43(2) TMA permits Mr Lester (a) to withdraw (to the extent necessary) any claim made under s 83 ITA, (b) in conjunction with making a new claim under s 72 for the relevant losses instead since, until the 2019 amendment, there was no basis on which Mr Lester could have used the relevant losses other than for carry forward under s 83 ITA. Put another way, but for the 2019 amendment, the combined "carry back" claim under s 72 ITA and revocation of the

"carry forward" claim under s 83 (to facilitate it) would not have been allowed – the only use to which losses could have been put was to carry them forward.

(3) This is also consistent with the broad purpose of s 43(2) TMA which is to permit taxpayers to make consequential claims in response to assessments/amendments. It is no part of the purpose of s 43(2) to impose rigid formality on how this is done. For the same reason, HMRC are also permitted to raise assessments out of time insofar as the consequential claims cause tax to be payable in other years (see 43C(4)). The broad intent of s 43 to s 43C is to permit taxpayers to make or vary claims which are otherwise out of time in response to increased liability to tax in a year but without HMRC being at a disadvantage in terms of the time limits for consequential assessments.

101. Mr Afzal disputed all of the points made by Mr Yates. In his view, the relevant part of the claims letter cannot be construed as an attempt to make a "supplementary claim" to amend or (if possible) to revoke the prior claims. Clearly, in order to make a "claim" or a "supplementary claim", the claimant must use appropriate language to convey that that is what the claimant is doing. The claimant must (at the very least) identify the earlier claims which he or she is seeking to amend or revoke. The claims letter does not do that. Indeed, the claims letter does not refer to the prior carry forward of losses under s 83 ITA at all.

102. Mr Afzal further submitted that, in any event, s 43(2) TMA is inapplicable on the basis that, whilst, in principle, it can be used to amend an existing claim to carry forward losses under s 83 ITA to nil, it does not permit the revocation of claims. Revocations and amendments to nil, are substantively different; thus, if a taxpayer purports to revoke (which is not permitted), that cannot simply be treated as an attempt to amend to nil (which in principle is permitted):

(1) A prior claim cannot be revoked through a supplementary claim: a supplementary claim only (relevantly) permits a prior claim to be amended. On its proper construction, s 43(2) does not contain a power to revoke a previous claim, in contrast to s 43A TMA. This provides as follows:

"**43A Further assessments: claims etc.**

(1) This section applies where—

(a) ... by virtue of section 29 of this Act an assessment to income tax or capital gains tax is made on any person for a year of assessment, and

(b) the assessment is not made for the purpose of making good to the Crown any loss of tax brought about carelessly or deliberately by that person or by someone acting on behalf of that person.

(2) Without prejudice to section 43(2) above but subject to section 43B below, where this section applies –

(a) *any relevant claim, election, application or notice* which could have been made or given within the time allowed by the Taxes Acts may be made or given at any time within one year from the end of the year of assessment in which the assessment is made, and

(b) any relevant claim, election, application or notice previously made or given may at any such time be revoked or varied –

(i) in the same manner as it was made or given, and

(ii) by or with the consent of the same person or persons who made, gave or consented to it (or, in the case of any such person who has died, by or with the consent of his personal representatives),

except where by virtue of any enactment it is irrevocable.

[The remaining provisions set out:

(1) That the reference to "claim, election, application or notice" does not include certain specified elections.

(2) Detailed rules on when a claim, election, application or notice is *relevant* in relation to an assessment for a year of assessment broadly (a) for claims under schedule 1 AB TMA, *if it relates to that year of assessment*, or (b) in all other cases, (i) *it relates to that year of assessment or is made or given by reference to an event occurring in that year of assessment*, and (ii) its revocation or variation has or could have the effect of reducing any of the specified liabilities: the increased liability to tax resulting from the assessment, and any other liability to tax of the person concerned for the year of assessment to which the assessment relates, or any year of assessment which follows that year of assessment and ends not later than one year after the end of the year of assessment in which the assessment was made.

(3) Consequential provisions to allow all relevant adjustments to be made.]" (Emphasis added.)

(2) It is clear that when Parliament wishes to confer upon a taxpayer a right to revoke a previously made claim, it does so expressly: compare s 43(2) TMA (no power of revocation) with s 43A(2)(b) TMA (a power of revocation which is limited to a "relevant claim"). This is reinforced by commentary on the introduction of s 43A which on the authority of the decision of the Supreme Court in *R (o) v the Home Secretary* the tribunal may have regard to as an external aid to interpretation (see [2] to [30]) of that decision. The commentary shows that the revocation provisions in s 43A provision was considered to be something new and distinct from what already existed in 43(2). The report of the Committee on the Enforcement Powers of the Revenue Departments chaired by the Right Honourable Lord Keith and produced in March 1983 states this (at 3.5.13. 3.5.14 and 3.5.18):

"…The Inland Revenue said that they interpreted this subsection [s 43] as being restricted in its application to cases where a claim becomes possible only because of the making of an assessment after the end of the year of claim. In such a case a claim may be made at any time up to the end of the extended period, even if that is after the expiry of the normal time limit for claiming relief. For example, if an assessment for 1975-76 was made on 15 March 1982, any reliefs for 1975-76 which could not have been allowed otherwise may be claimed at any time up to 5 April 1983. The relief cannot exceed the relevant assessment and the lateness of the assessment does not entitle the taxpayer to claim the excess against any earlier assessment."

"…Where a further assessment to recover "culpable tax" is made under the extended time limit provisions relating to neglect, S37(8) TMA provides that the taxpayer may claim any relief or allowances as if the claim had been made within the relevant time limit. The relief can be applied against only the assessment in question. Any excess cannot be carried back to an earlier assessment. S39(8) is the equivalent corporation tax provision….

The difference between S43(2) and S37(8) is that the latter Section, but not the former allows relief even where the taxpayer had previously had available to him not only an opportunity to make a timeous claim for the year in question but also other income against which it might have been set. The Department were unable to establish why S43(2) had not been extended to cover corporation tax."

"The final matter which we address here is the question of time limits for claiming relief where further assessments are made (3.5.12 to 3.5.14 above). As regards further assessments made within the normal six year time limit we note that the Inland Revenue support in principle the extension to corporation tax of section 43(2). As we understand the position, where there are newly discovered taxable profits, such an extension would enable company taxpayers to have a free hand to determine what relief claim they wish to make in respect of those new profits. However, it seems to us arguable that where the taxpayer has had his expectations of finality so abruptly upset, an appropriate relieving provision ought to enable him

> to go beyond that and reopen choice of route decisions made in respect of the original profits and losses as well. This could be justified on the basis that the effect of the 'discovery' is to create a new and different profit level as at the date of the original assessment. Had the company been confronted with that profit level originally, their decision about choice of route claims might have been different. The Inland Revenue argued to us that to extend the effect of S43(2) in this way would go too far and would unfairly favour a company in a discovery situation as compared to another company which happened on reflection to come to regret its decision on a choice of route claim, 'but did not have a convenient discovery". We reject the Inland Revenue's analysis in this instance as academic and unrealistic…. in our view considerations of fairness point towards the taxpayer having the opportunity to rethink his total strategy for claiming allowances whenever the Inland Revenue disturb finality by making a "discovery" further assessment. *We recommend* that
>
> 1. S43(2) should be extended to cover corporation tax, and
>
> 2. in relation to income tax, capital gains tax and corporation tax, the taxpayer should be able to revise or revoke any claim or elections previously made in the light of the new situation created by the making of the further assessment."

(3) In a consultative paper published by HMRC in December 1986 in response to the Keith Report they set out provisions designed to address the above points. They commented as regards to what became s 43A:

> "New subsection (3) provides the new relief. It states that, if a discovery assessment has been made on any person for a chargeable period other than in a case of fraud or negligence, the person concerned may at any time before the end of the chargeable period ... "a. make a 'relevant' claim, election ... b. revoke or vary a 'relevant' claim, ..."

(4) In a further consultative paper published by HMRC in in response to the Keith Report they said this:

> "….subsection (2) responds to another Keith recommendation by making provision for a taxpayer who has received a discovery assessment to make or vary etc any claims, elections etc if as a result he will reduce the liability to tax resulting from the discovery assessment itself, or any other tax liability he has for the period to which the assessment relates, [et cetera]. But any such reduction in total is not to exceed the amount of the additional tax payable ... This proposal has been widely welcomed."

(5) HMRC accept that the wording of s 42(9) TMA means that a "supplementary claim" can include an amended claim even where the claim is amended to zero but it does not include revocation, because, in revoking a claim, a person is not making a claim at all. Moreover, as set out above, Mr Lester's view is completely inconsistent with the legislative history of s 43A. One must construe the wording in the legislation. The concept of making a supplementary claim simply cannot encompass revoking a claim. There is no oddity in 42 TMA and the concept of a supplementary claim not including the revocation of a claim but s 43A including revocation. It is apparent from the documents referred to above that s 43A was intended to be broader than s 43(2) and equally, s 42 TMA. In many cases it may not ultimately matter, because HMRC accept that a person can amend a claim to nil and, practically speaking, in most cases that will probably be sufficient, provided of course the person actually set out to do that, which Mr Lester did not.

103. Mr Yates responded as follows:

(1) As already set out, the claims letter impliedly removes any asserted obstacle, in the form of the carry forward claims, as part and parcel of the exercise of making the claims to carry back the relevant losses under s 72 ITA:

(a) It does not matter what label is put upon this; both the amendment of a claim to nil and revocation of a claim are within the scope of s 43(2) TMA. There is no magical difference between amending a claim to nil and revoking it. The concept of amending a claim to nil exists elsewhere in the context of claims, particularly in relation to corporation tax but it has no meaningful significance within ss 42, 43 and 43A TMA. It does not matter whether Mr Lester is taken impliedly to have reduced his previous claim to carry forward losses to nil or impliedly revoked that claim. This is not a distinction which the statute recognises.

(b) It is implicit and implied in the claims letter that any previous carry forward claim is to be disapplied or revoked to the extent necessary for the relevant losses to be subject to the carry back claims; that is necessary in order for the carry back claims to be made.

(c) In effect, one can read in an implied claim for any carry forward claims to be reduced to zero or revoked simply as part and parcel of the making of the carry back claims. Given HMRC's stance on the little required to make valid carry forward claims (by including a sum in an undifferentiated box in a return which does not even purport to make a claim) any revocation or amendment to such a claim cannot require the onerous detailed formal process which Mr Afzal argues it involves.

(2) It cannot be the case, as is the effect of HMRC's stance on the revocation point, that a taxpayer has a narrower set of options if a claim falls to be dealt with under s 42 TMA (as it may of made in time within the usual four-year period) than if it is made in reliance on s 43A. Moreover, their stance on this directly contradicts their own guidance in relation to a claim to benefit from the remittance basis of taxation. In their manual on the remittance basis at RDRM 32020, HMRC state that a person can revoke such a claim within two years. That can only be a reference to the making and amending of claims under s 42 TMA. It is absurd to say a person cannot revoke such a claim unless and until HMRC issue an assessment so that s 43A TMA is in point. There is clearly scope to revoke a claim under s 42 TMA and it follows that there must be scope to do so within s 43 TMA. The mere fact that s 43A TMA mirrors the language in the consultations which Mr Afzal referred to does not automatically mean that s 43A contains a wider power than that provided for within s 42. It is completely counterintuitive to say a taxpayer, in effect has got wider powers as regards revoking claim made outside the normal time limit, albeit in special circumstances, than if they seek to do so within the usual time limit (even within the one year period in which a taxpayer can amend his tax return).

(3) HMRC's interpretation of s 43(2) TMA is unsustainable. In effect, they seek to apply the test set out in s 43A. That defines a relevant claim in relation to an assessment, for a year of assessment, if it relates to that year of assessment, or is made or given by reference to an event. If that is what Parliament had intended, it would have included such wording in s 43(2) TMA when it was first introduced or amended it to include such wording when s 43A was introduced at a later date. Moreover, if that is the effect of s 43(2) TMA it is very difficult to identify what separate function it has given how s 43A operates. Textually, s 43(2) simply does not say anything comparable to the interpretation which HMRC seek to put on it which involves implying a lot.

104. Mr Afzal further submitted that, in any event the prior claims made by Mr Lester under s 83 ITA claims do not, on the facts, fall within the scope of s 43(2) TMA:

(1) On its proper construction, that provision poses a counterfactual scenario in which the relevant amendment has not been made and asks whether, in that counterfactual scenario, the claim/supplementary claim could have been allowed; and only allows

claims/supplementary claims to be made which relate to the year of assessment to which the relevant amendment relates.

(2) The passages from the Keith report cited above make clear that the question in the counter factual world is whether the taxpayer had the opportunity or was allowed to make the relevant supplementary claim (see in particular 3.5.14 and the start of 3.5.18). The Inland Revenue accepted in principle the case for extending S43(2) to cover corporation tax. However, they considered that the relief should be limited to that appropriate to the further profits assessed, with the minimum consequential adjustments:

> "... any extension, especially for choice of route claims, ought not to allow a comparatively trivial further assessment to trigger a much larger late claim relief ... It ought not to allow the reallocation of reliefs already given. This is, we think, the intention of the wording of S43(2) which allows only those claims which could not have been allowed but for the assessment."

(3) Mr Lester could have amended his previous claims under s 83 ITA to nil within the normal time limit to amend a claim (or he could have revoked those claims) regardless of whether the 2019 amendment was made by HMRC or – it is not the case that a claim to do so could not have been allowed but for the making of the 2019 amendment.

105. Mr Yates said that for the purposes of ss 43(2) and 43C (2) TMA, clearly the combined claim for the carry back of the relevant losses and the implied amendment/revocation of any previous claim carry forward claim for those loss would not have been possible but for the 2019 amendment. HMRC, in effect, seek to look at each part of this combined claim in isolation such that, in their view, even if the extended time limit applies to the claim back claims it does not apply to enable Mr Lester to amend/revoke any prior carry forward claim. However, in interpreting these provisions, even viewing each limb of the combined claim in isolation, one has to bear in mind that Parliament clearly intends in s 43(2) and s 43C to allow taxpayers to make consequential or reactive claims in response to either an assessment or an amendment which may be made late by HMRC. In particular, given that "supplementary claim" is not defined as such either in s 43 or s 42 TMA, s 43(2) TMA is amenable to a sensible purposive interpretation. This provision must impliedly have a test of realism involved; in effect, it must recognise that a taxpayer could not, in practical terms, have done anything with carry forward losses unless and until there were profits or income in an earlier year, which would then permit a carry back claim A taxpayer in Mr Lester's circumstances simply would not amend or revoke a claim to carry forward losses under s 83 ITA at an earlier point in time as that would be an entirely pointless exercise given at that time there was no other use for the losses. HMRC's interpretation cannot be what Parliament intended in light of reality and what in practical terms a taxpayer could actually do. Hence, viewed realistically, the test is satisfied under s 43(2) and s 43C(2) even if one must look at the s 83 claim in isolation.

106. Mr Afzal further submitted that, in any event, on its proper construction, s 43(2) TMA only allows claims or supplementary claims to be made which relate to the year of assessment to which the relevant amendment relates. In this case, the 2019 amendment relates to the 2006/2007 year of assessment. However, both (a) any (purported) claim to amend (or revoke) the prior claim made under s 83 TMA, and (b) the claims made under s 72 ITA, which Mr Lester seeks to make under s 43(2) TMA, relate to the 2009/10 year of assessment. It is not possible, therefore, for Mr Lester either to revoke or amend his claim made under s 83 in respect of losses arising in the 2009/10 tax year or to claim for those to be carried back to the 2006/07 tax year pursuant to s 43(2) TMA and s 72 ITA.

107. We raised with Mr Afzal that this interpretation appears to be contrary to the plain meaning of s 43(2) TMA as read in conjunction with s 43C(2) TMA. He said that HMRC's reasoning is as follows:

(1) A taxpayer can only make a supplementary claim if it could not have been allowed but for the amendment. It follows that it is the making of the amendment that must allow the supplementary claim to be made; that is the trigger, condition or event which gives rise to the ability to make a supplementary claim. Given that it is the amendment that has allowed the supplementary claim to be made, it follows that the supplementary claim must relate to the same year as the amendment. The provisions do not state in terms, "and the amendment and the claim must relate to the same year" but it is implicit or naturally follows from the way the provision operates.

(2) When asked why this must naturally follow, Mr Afzal said that HMRC's concern is that if that is not the case and the amendment and the supplementary claim can relate to completely different years, it would render this provision unduly broad and wide. We noted that the provision contains its own time limit. Mr Afzal said that, in fairness, he thought this is not as clear as the primary argument set out above. This is the position which HMRC has adopted thus far in practice. He said that it is not necessary to HMRC's case for the tribunal to accept this point as their other arguments suffice for them to succeed in this case. In their view, Mr Lester's contrary interpretation would make something of a mockery of the time limits; the 2019 amendment relates to 2006/07 but on the appellant's interpretation, the taxpayer can use losses from a completely different tax year.

*Decision*

108. We have concluded that, to the extent that there is any requirement for Mr Lester to take action to "undo", take back, cancel or withdraw the carry forward claims, he did so by making the carry back claims in the claims letter. We were not referred to the case law in which the operation of the general provisions in s 42 TMA has been considered albeit in a different context. We consider the approach in the cases to be instructive, in particular, the decisions of the House of Lords in *Gallic Leasing Ltd. v Coburn (Inspector of Taxes)* [1991] 1 WLR 1399 and of the Court of Appeal in *R v Inland Revenue Commissioners ex parte Unilever* [1996] STC 681 and *The Commissioners for His Majesty's Revenue and Customs v Applicants in the Post Prudential Closure Notice Applications Group Litigation & Anor* [l [2025] EWCA Civ 166 ("*Post-Prudential*").

109. We can see no basis in the statutory requirements or in the case law for HMRC's view that, in order to amend a carry forward claim for relief to nil, the claimant must amend the claim in some technical sense with a clear distinction in mind between revoking the claim and amending it to nil. In the context of making a relevant claim in each of these cases, in the absence of specific requirements/formalities, the focus was on whether the taxpayer had brought to the attention of HMRC or clearly articulated to HMRC, as Falk LJ put it in *Post Prudential*, that it wished to obtain the benefit of a specific relief. We can see no reason why the same approach does not apply in in the context of assessing whether a person has done what is required to amend a relevant claim as that taken to whether the claim is made in the first place. It would be very odd if a person is subject to more onerous requirements in order to amend a prior claim than he is in relation to making the claim initially.

110. The relevant losses which Mr Lester sought to make carry back claims for are clearly identified in the claims letter as unused losses referable to the 2009/10 and 2010/11 tax year letter relating to the specified partnerships. Grant Thornton specified what portion of the relevant losses had been subject to a claim under ss 64 ITA but not specifically those which were included in box 22 on the relevant partnership pages as carried forward losses. However, they did state that the other relevant losses were unused and that they had not affected the tax position in the relevant tax year in which they arose. It would be apparent, therefore, to any reasonable officer of HMRC on reading that letter that (1) the relevant losses fell in the essentially residual category of losses for carry forward under s 83 ITA, and (2) the carry back

claims would necessarily involve the relevant losses no longer being available for carry forward under s 83 ITA or, at any rate, that that is what Mr Lester/Grant Thornton intended to achieve. In our view, this suffices for Mr Lester to be taken to have made a supplemental claim to amend any prior carry forward claims to the extent necessary to give effect to the carry back claims, in effect, as part and parcel of those carry back claims.

111. On that basis we consider that it is not necessary for the purposes of this decision to consider whether Mr Lester was entitled to "revoke" any prior carry forward claims. We have included the arguments on this point in case of any appeal in which this may be considered further.

112. In our view, in assessing whether and how s 43(2) and s 43C(2) TMA apply in these circumstances, it is artificial and unrealistic to view the amendment of any prior carry forward claims and the making of the carry back claims as two distinct separate matters to be viewed in isolation from each other. The lack of availability of the relevant losses to carry forward under s 83 ITA is the necessary corollary of the making of the carry back claims; the carry back claims cannot be made validly without the relevant losses becoming unavailable to be utilised in later tax years. On any view, that is the plain effect of s 63 ITA; a person cannot obtain relief for the same loss twice.

113. With that general comment in mind, we consider that ss 43(2) and 43C(2) TMA apply on the basis that (1) the carry back claims (and related and necessary effective withdrawal/amendment of any prior carry forward claims) could not have been allowed but for the making of the 2019 amendment after the 2009/10 tax year to which the carry back claims (and related amendment/withdrawal relate), and (2) the carry back claims (and related and necessary effective withdrawal/amendment of any prior carry forward claims) could be made at any time before the end of the tax year following that in which the 2019 amendment was made (being the 2019/20 tax year) – so Mr Lester had until the end of the 2020/21 tax year to make the carry back claims (and the related amendments/withdrawal of the prior carry forward claims).

114. In our view, HMRC's alternative interpretation is wholly out of kilter with the evident intended purpose of these provisions. On the natural, plain meaning of the provisions the purpose is to allow taxpayers to make amended or new claims to utilise reliefs arising in a tax year due to HMRC's ability to make an assessment or relevant amendment sometime (possibly years) after the end of that tax year. That in turn may mean that:

(1) It transpires that there are ways in which reliefs can be utilised/allowed which would not exist but for the making of the assessment/amendment. Here, HMRC do not dispute that, in principle, this requirement is met as regards the carry back claims due to the 2019 amendment in effect creating unrelieved profits in the 2006/07 tax year.

(2) However, the usual time limit for making any such new or amended claim may well have expired by the time the assessment/amendment is made – hence these sections provide an extended time limit for the making of the new/amended claim to the end of the tax year following that in which the assessment/amendment is made.

115. In circumstances such as these, it would frustrate that purpose to interpret these provisions as not applying, as regards the prior carry forward claims, on the basis that Mr Lester was able, in theory, to have taken action to cancel or withdraw the claims at any prior time. It is wholly unrealistic to think that he would have done so at an earlier stage; he had no reason to. On a sensible, purposive approach the better interpretation is that the withdrawal and/or amendment to nil of the prior carry forward claims could not have been "allowed" but for the 2019 amendment because any earlier amendment of those claims would have had no material effect or impact on Mr Lester's actual tax position in any period. In other words, any such amended claim could "bite" and be "allowed" in any meaningful way only as and when, due

to the 2019 amendment, it could have meaningful effect in enabling carry back claims then made to take effect.

116. We do not accept HMRC's argument that ss 43(2) and 43C(2) are to be interpreted as not applying on the basis that any new or amended claim must relate to the same tax year as that to which the 2019 amendment relates; here the 2019 amendment relates to the 2006/07 tax year but any claim to amend (or revoke) any prior carry forward claims and the carry back claims relate to the 2009/10 tax year. We can see no basis for this interpretation of these provisions on their plain, natural meaning or on a purposive approach.

**2009/10 claim in respect of losses for which relief was claimed under s 64 ITA**

117. As regards the 2009/10 claim relating to losses which were previously subject to a prior s 64 claim in 2009/2010 for sideways loss relief Mr Afzal and the appellant essentially made many of the same submissions as they made above. Sections 64 and 65 ITA, so far as relevant, provide as follows:

> "64 **Deduction of losses from general income**
>
> (1) A person may make a claim for trade loss relief against general income if the person -
>
> (a) carries on a trade in a tax year, and
>
> (b) makes a loss in the trade in the tax year ("the loss-making year").
>
> (2) The claim is for the loss to be deducted in calculating the person's net income -
>
> (a) for the loss-making year,
>
> (b) for the previous tax year, or
>
> (c) for both tax years.
>
> (See Step 2 of the calculation in section 23.)
>
> (3) If the claim is made in relation to both tax years, the claim must specify the tax year for which a deduction is to be made first.
>
> (4) Otherwise the claim must specify either the loss-making year or the previous tax year.
>
> (5) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the loss-making year.
>
> (6) Nothing in this section prevents a person who makes a claim specifying a particular tax year in respect of a loss from making a further claim specifying the other tax year in respect of the unused part of the loss.
>
> (7) This section applies to professions and vocations as it applies to trades.
>
> (8) This section needs to be read with -
>
> (a) section 65 (how relief works)…"
>
> **"**65 **How relief works**
>
> (1) This subsection explains how the deductions are to be made.
>
> The amount of the loss to be deducted at any step is limited in accordance with sections 24A and 25(4) and (5)].
>
> Step 1
>
> Deduct the loss in calculating the person's net income for the specified tax year.
>
> Step 2
>
> This step applies only if the claim is made in relation to both tax years.
>
> Deduct the part of the loss not deducted at Step 1 in calculating the person's net income for the other tax year.
>
> *Other claims*
>
> *If the loss has not been deducted in full at Steps 1 and 2, the person may use the part not so deducted in giving effect to any other relief under this Chapter (depending on the terms of the relief)*…"

118. Given the wording of s 65 ITA, Mr Afzal did not raise the same arguments as set out above at [89], [90], [93] and [96] to [98]. In summary he submitted that:

(1) It is necessary for Mr Lester to take action to withdraw the prior s 64 claim. However, the claims letter simply assumes that the prior s 64 claim has been undone, revoked or amended; it does not itself purport to effect any such action. A reasonable recipient would not read the claims letter as meaning that Mr Lester thereby intended to amend to nil or revoke the prior s 64 claim.

(2) In any event, for the same reasons as set out above, Mr Lester was not entitled to revoke the prior s 64 claim and, even if that is not correct, s 43(2) and s 43C TMA do not apply to provide an extended time limit for the taking of the required action. In the counterfactual world where there is no 2019 amendment, Mr Lester could have taken action to revoke or amend his prior s 64 claim at any time. Moreover, as set out above, on its proper construction, s 43(2) TMA only allows claims or supplementary claims to be made which relate to the year of assessment to which the relevant amendment relates. Both (a) any (purported) claim to amend (or revoke) the prior s 64 claim, and (b) the relevant carry back claim, relate to the 2009/10 tax year and not to the 2006/07 tax year to which the 2019 amendment relates.

119. Our view is that, essentially for the same reasons as set out in our conclusions above, (1) it is plain from the claims letter that Mr Lester wished to amend to zero, cancel, withdraw or revoke the prior s 64 claim to the extent necessary for him to make the relevant carry back claim. Any reasonable reader cannot have been in any doubt about that. On the authority of the relevant case law on the making of claims under the general provisions in s 42 TMA, it is irrelevant that Mr Lester/Grant Thornton may not have considered that they needed to take any specific formal action in order in effect to undo the prior claim, (2) in the claims letter Mr Lester took the necessary action to amend the prior s 64 claim and to make the relevant carry back claim within the applicable time limit, being that set out in ss 43(2) and 43C(2) TMA.

**2010/11 claim**

120. Mr Afzal submitted that the 2010/11 claim is not within the scope of the appeal:

(1) The notice of appeal to the tribunal references losses totalling £1,517,342 which is (a) an amount equal to the profits which became taxable in 2006/2007 because of the 2019 amendment, and (b) the amount of losses to which the 2009/10 claim relates. If the 2010/2011 claim were in issue in this appeal, then the amount of losses stated to be in dispute would be greater to encompass losses subject to that claim.

(2) Moreover there is nothing in the grounds of appeal about carrying back losses from 2010/2011to 2009/2010. The grounds of appeal are framed in terms of the 2009/2010 losses being carried back to 2006/2007 because of the amendments in 2006/2007; it is stated that Mr Lester made a consequential claim under s 72 ITA to carry back losses arising in 2009/10 to 2006/07 following receipt of a revised tax calculation from HMRC which was issued after the closure of an enquiry in a partnership of which he was a partner and:

> "HMRC disallowed the claim on the basis that it was out of time whereas I consider my claim to have been permissible...There has been various correspondence between HMRC and my agent in respect of the claim ...I consider my loss claim was made in time, is a valid loss claim, there was a valid enquiry and that I now have grounds for appeal to tribunal. I have attached [copies of the] correspondence ..."

(3) In any event the relevant losses which are the subject of the 2010/2011 claim were also the subject of carry forward claims under s 83 ITA by their inclusion in box 22 in the relevant tax return. Hence all the same points arise as set out above in relation to the 2009/10 claim.

121. Mr Yates does not accept that the 2010/11 claim is part of these appeal proceedings. He said that Mr Lester's grounds of appeal obviously incorporate all of the correspondence referring to all of the carry claims including those relating to the 2010/11 tax year. The overall

losses claimed do not exceed those stated given the combined nature of the claims. Mr Lester is not seeking to shift or change his overall tax liability for the 2009/10 and 2010/11 tax years; he is seeking to change it only for the 2006/07 tax year by making the combined claims. He added that if the tribunal does not accept that, he wishes to make an application to amend the grounds of appeal and submitted that the tribunal should accept that as HMRC has not identified any real prejudice as a result.

122. Essentially, we accept Mr Yates's submissions on this point. If any amendment to the grounds of appeal is required, we grant permission for that. Our decision in relation to the 2010/11 claim is the same as that set out in relation to the 2009/10 claim.

## Conclusion and right to apply for permission to appeal

123. For all the reasons set out above, this appeal is allowed.

124. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**RELEASE DATE**: **02nd MARCH 2026**