Neutral Citation: **[2022] UKUT 233 (TCC)**

UT (Tax & Chancery) Case Number: UT-2021-000040

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Video hearing
Heard on: 14 June 2022

Judgment date: 24 August 2022

Before

UPPER TRIBUNAL JUDGE THOMAS SCOTT
DEPUTY UPPER TRIBUNAL JUDGE ANNE REDSTON

Between

EDWARD CUMMING-BRUCE

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Sherry of Counsel, instructed by Edwards Greene, Chartered Accountants

For the Respondents: Mr Imran Afzal of Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant, Mr Cumming-Bruce, appeals against the decision ("the Decision") of the First-tier Tribunal ("the FTT"). Mr Cumming-Bruce had claimed capital losses in 2000-01 and 2001-02 totalling almost £3m on the basis of the Court of Appeal's judgment in *Mansworth v Jelley* [2002] EWCA Civ 1829 ("MvJ"). These were set off against capital gains in 2004-05, 2006-07, 2009-10, 2011-12 and 2012-13.

2. HMRC opened enquiries into all relevant years other than 2009-10 under s 9A of the Taxes Management Act 1970 ("TMA"). In 2015, HMRC closed their enquiries on the basis that the MvJ losses claimed in 2000-01 and 2001-02 were not allowable, and so were not available to be carried forward into the later years. HMRC issued a discovery assessment[1] in relation to 2009-10.

3. There were two issues in dispute before the FTT:

   (1) whether Mr Cumming-Bruce's notifications of the MvJ losses were stand-alone claims or whether they formed part of his tax return. If the former, HMRC were required to open enquiries under TMA Schedule 1A ("Sch 1A"), and not under TMA s 9A; and

   (2) whether the discovery assessment was "stale".

4. HMRC succeeded on both issues before the FTT (Judge Rupert Jones and Mr Ian Menzies-Conacher), and Mr Cumming-Bruce asked for permission to appeal. On 14 April 2021, Judge Raghavan gave permission on both grounds, but Mr Cumming-Bruce withdrew his appeal on the staleness issue after the Supreme Court's judgment in *Tooth v HMRC* [2021] UKSC 17 ("*Tooth*")[2].

5. Therefore, the only issue before us was whether the FTT made an error of law in deciding that HMRC had correctly enquired into Mr Cumming-Bruce's MvJ losses under TMA s 9A rather than under Sch 1A.

THE FACTS

6. The facts were not in dispute and are set out in the Decision, from which the following summary is largely taken.

7. References below to paragraphs in the form [x] are to paragraphs in the Decision unless indicated otherwise.

The returns as filed

8. On 10 January 2002, Mr Cumming-Bruce's self-assessment ("SA") return for 2000-01 was filed by his accountant Richard Hallas and Partners ("the Representative"). The return included a disposal of 1,500 shares in Oakdene Ltd for £1.5m for a nil gain. These shares had been obtained pursuant to an adjustable share option scheme operated by Mr Cumming-Bruce's employer. The return also included other capital gains and losses. The Representative completed the pages CG1 to CG8 by inserting details of each disposal, and setting off the gains and the losses. The final result was a capital loss carried forwards of £59.

9. On 11 October 2002, the Representative filed Mr Cumming-Bruce's 2001-02 SA return. This included a further disposal of Oakdene shares for £1.5m with a nil gain, as well

[1] Under the powers contained in TMA s29.

[2] At paragraph 76 of *Tooth*, the Supreme Court decided that, if HMRC have made a "discovery" which qualifies as such, the discovery cannot cease to qualify by mere passage of time.

as other capital gains and losses. The Representative again completed the pages CG1 to CG8 by inserting details of each disposal and setting off the gains and the losses. The final result was a capital loss carried forwards of £3,293, which included the £59 capital loss brought forward from the previous year.

10. At one point during the hearing Mr Sherry suggested that the Representative had not "calculated" Mr Cumming-Bruce's tax position for those two years. However, the FTT had found at [219] that Mr Cumming-Bruce had "calculated his liability to income and capital gains tax with his returns for 2000-2001 and 2001-02 by completing the tax calculation summary pages of each return". There was no appeal against that finding, and it was not open to Mr Sherry to raise it for the first time in oral submissions before this Tribunal. Moreover, the Representative explicitly stated that it had calculated Mr Cumming-Bruce's tax in the correspondence which followed: see paragraph 13 below.

The enquiry and the Representative's correspondence

11. On 12 December 2002, HMRC opened an enquiry into Mr Cumming-Bruce's 2000-01 return under TMA s 9A.

12. On 8 January 2003, HMRC issued a press release relating to the MvJ judgment ("the 2003 Guidance"), which stated that the gain/loss on disposal of shares acquired pursuant to share options should be calculated by deducting from the disposal proceeds both (a) the market value of the shares at the time the option was exercised and (b) any amount chargeable to income tax on the exercise of the option.

13. On 24 January 2003, the Representative wrote to HMRC, saying:

> "We refer to the recent Tax Case of *Mansworth v Jelley* and the Inland Revenue press release issued on 8th January, 2003.
>
> We enclose revised calculations of the capital losses realised on the disposal of the Oakdene Limited shares acquired by way of exercise of options under an unapproved share option scheme in 2000/2001 and 2001/2002. We also enclose details of the amendments to be made to the appropriate boxes of the 2000/2001 and 2001/2002 Capital Gains Pages 3 and 8."

14. The letter attached a list of detailed amendments to the capital gains tax ("CGT") calculation pages of both returns. The FTT found as a fact that "the intention and purpose of the letter and schedule was to amend the 2000-01 return as submitted rather than to make a fresh or independent claim to standalone losses", although the FTT rightly went on to recognise that the *effect* of the letter and schedule, as opposed to their purpose, was a question of law.

15. It was common ground that the Representative had amended both returns within the time permitted under TMA s 9ZA (set out at paragraph 27 below). As Mr Cumming-Bruce already had more than sufficient losses to cover his capital gains in both years, the amendments did not change the outcome: no CGT was payable either before or after the amendments were made.

16. On 26 March 2003, HMRC acknowledged receipt of the amendments to the 2000-01 and 2001-02 return, and noted that the former was still under enquiry and that any amendment to that return could only be made at the end of the enquiry. HMRC added[3]:

> "I would, however, confirm that the capital gain losses of £1,499,985 are agreed and may be carried forward. I will be processing the 2002 amendment shortly."

[3] Clerical errors in the original have been corrected.

17. On 8 August 2003, HMRC opened an enquiry into Mr Cumming-Bruce's 2001-02 return under TMA s 9A.

HMRC's change of position

18. On 9 October 2003, HMRC wrote again to the Representative, saying that as the result of further advice, they now considered that MvJ losses could not be claimed on shares from an adjustable share option scheme, and as a result, HMRC were "no longer able to agree" the losses set out in the Representative's letter of 24 January 2003.

19. In 2008, HMRC received legal advice that the 2003 Guidance was wrong, and that the correct position was that where shares were treated as having been acquired at market value, that value was the full measure of the deemed acquisition cost. In other words, the amount chargeable to income tax on the exercise of the option was not deductible in the calculation of a gain/loss. In 2009 HMRC published new guidance setting out their understanding, and stated that this revised view of the law would be applied in cases where there was an open enquiry or appeal.

Application to Mr Cumming-Bruce

20. On 4 December 2013, HMRC issued a discovery assessment in relation to the 2009-10 tax year, assessing additional tax on the basis that Mr Cumming-Bruce had incorrectly brought forward and used MvJ losses against the gains of that year. On 9 December 2013, HMRC opened an enquiry into his 2011-12 SA return under TMA s 9A. This was followed on 6 August 2014 by an enquiry into his 2012-13 tax return.

21. On 3 March 2015, HMRC closed the enquiries into the 2000-01 and 2001-02 SA returns on the basis that the MvJ losses were not allowable. On the same date, HMRC closed the enquiries into the SA returns for 2004-05, 2006-07, 2011-12 and 2012-13. In each of those years, additional tax was due because brought forward losses had been disallowed.

THE LEGISLATION

22. The legislation set out below is that which applied at the time of the years in question, and is cited only so far as relevant to the issue in dispute.

TCGA

23. Section 2 of the Taxation of Chargeable Gains Act 1992 ("TCGA") is headed "Persons and gains chargeable to capital gains tax, and allowable losses" and reads:

> "(1) Subject to any exceptions provided by this Act…a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment…
>
> (2) Capital gains tax shall be charged on the total amount of chargeable gains accruing to the person chargeable in the year of assessment, after deducting—
>
> (a) any allowable losses accruing to that person in that year of assessment, and
>
> (b) so far as they have not been allowed as a deduction from chargeable gains accruing in any previous year of assessment, any allowable losses accruing to that person in any previous year of assessment."

24. TCGA s 16 is headed "Computation of losses", and it includes the following provisions:

> "(1) Subject to section 72 of the Finance Act 1991 and except as otherwise expressly provided, the amount of a loss accruing on a disposal of an asset

shall be computed in the same way as the amount of a gain accruing on a disposal is computed.

(2) Except as otherwise expressly provided, all the provisions of this Act which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain, and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss, and part not; and references in this Act to an allowable loss shall be construed accordingly.

(2A) A loss accruing to a person in a year of assessment shall not be an allowable loss for the purposes of this Act unless, in relation to that year, he gives a notice to an officer of the Board quantifying the amount of that loss; and sections 42 and 43 of the Management Act shall apply in relation to such a notice as if it were a claim for relief."

TMA

25. TMA s 8 is headed "Personal return" and begins:

"(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board

(a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1AA) For the purposes of subsection (1) above −

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return;.."

26. TMA s 9 is headed "Returns to include self-assessment" and reads:

"(1)…every return under section 8…of this Act shall include a self-assessment, that is to say—

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

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

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

(a) on or before the 31st October next following the year, or…

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

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

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

27. TMA s 9ZA is headed "Amendment of personal or trustee return by taxpayer" and it reads:

"(1) A person may amend his return under section 8…of this Act by notice to an officer of the Board.

(2) An amendment may not be made more than twelve months after the filing date.

(3) In this section "the filing date" means the day mentioned in section 8(1A)…of this Act."

28. TMA s 9A is headed "Notice of enquiry" and reads:

(1) An officer of the Board may enquire into a return under section 8…of this Act if he gives notice of his intention to do so ('notice of enquiry')—

(a) to the person whose return it is ('the taxpayer'),

(b) within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date;

(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;

(c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.

(3) …

(4) An enquiry extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return..."

29. TMA s 9B is headed "Amendment of return by taxpayer during enquiry" and reads:

"(1) This section applies if a return is amended under section 9ZA of this Act…at a time when an enquiry is in progress into the return.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3) So far as the amendment affects the amount stated in the self-assessment included in the return as the amount of tax payable, it does not take effect while the enquiry is in progress and—

(a) if the officer states in the closure notice that he has taken the amendment into account and that—

(i) the amendment has been taken into account in formulating the amendments contained in the notice, or

(ii) his conclusion is that the amendment is incorrect, the amendment shall not take effect;

(b) otherwise, the amendment takes effect when the closure notice is issued."

30. TMA s 42 is headed "Procedure for making claims etc" and reads:

"(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) 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) …where notice has been given under section 8…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 references in this section to a claim being included in a return include references to a claim being so included by virtue of an amendment of the return;…

…

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

(a) is made otherwise than by being included in a return under section 8…of this Act.

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

31. Schedule 1A is headed "Claims etc not included in returns". Paragraph 1 says that a "claim" means "a claim or election as respects which this Schedule applies". Paragraph 2 reads:

"(1) Subject to any provision in the Taxes Acts for a claim to be made to the Board, every claim shall be made to an officer of the Board.

(2) No claim requiring the repayment of tax shall be made unless the claimant has documentary proof that the tax has been paid by deduction or otherwise.

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

(4) The form of claim shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim."

32. Paragraph 5 is headed "Power to enquire into claims" and reads:

"(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...

> (2) The period referred to in sub-paragraph (1) above is whichever of the following ends the latest, namely—
>
> > (a) the period ending with the quarter day next following the first anniversary of the day on which the claim or amendment was made;
> >
> > (b) where the claim or amendment relates to a year of assessment, the period ending with the first anniversary of the 31st January next following that year; …
>
> and the quarter days for the purposes of this sub-paragraph are 31st January, 30th April, 31st July and 31st October."

33. Schedule 1B is headed "Claims for relief involving two or more years", and para 2 reads:

> "(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)…"

PRIMARY SUBMISSION: CAPITAL LOSSES MUST BE ENQUIRED INTO UNDER SCHEDULE 1A

34. The grounds of appeal lodged by Mr Cumming-Bruce, and Mr Sherry's skeleton argument, largely set out various arguments that on the facts the relevant loss claims were stand-alone claims which HMRC had to enquire into under Schedule 1A. However, in his oral submissions Mr Sherry made clear that in fact his "primary submission" was as set out below.

35. Mr Sherry submitted that there were two distinct stages to making a capital loss claim:

(1) First, the loss had to be "notified" to HMRC, who "determine" the loss;

(2) Second, when the loss has been "determined" it is "allowable" and may then be included in a CGT computation for the year in which the loss arises, and to the extent not so utilised, may be carried forwards.

36. Mr Sherry's skeleton argument expanded on these propositions as follows:

> "…the very nature of the system means that a notification/claim, to have losses treated as allowable losses, is logically *a priori* their inclusion in the self assessment of the tax due, as understood in the light of *Cotter*. Only allowable losses may be offset against gains in any particular year. To be included in a given year's computation, the losses must first be notified/claimed as being allowable losses. Is such notification within the scope of the s9A enquiry *being an enquiry into the self-assessment* as explained by Lord Hodge. It is submitted the answer must be "no". This is because all the notification seeks to do is to establish whether the losses in question are "allowable". If so claimed and not enquired into under Schedule 1A then they are treated as allowable, as explained by Lord Hodge, by virtue

> of Schedule 1A para 4. If the Revenue wish to dispute the losses i.e. they wish to enquire as to whether they are allowable losses or not, they can do so under Sched.1A para 4(3) and 5. In that event until the claim is determined, the claim is not given effect. That means that *pro tem* the claim is not given effect and the losses are not allowable losses unless and until the enquiry is concluded and the claim allowed.
>
> If the losses are allowable then maybe some or all or none of them will fall to be included in the computation or self-assessment of the tax on gains for the year in question. Those amounts feed in to the self-assessment and may properly be the subject of a s9A enquiry…
>
> But a notification which is treated as a claim in respect of losses, to have them treated as allowable losses, it is submitted, is a stand-alone claim and my be enquired into only under Sched. 1A…"

37. In making this submission, Mr Sherry relied heavily on the wording in TCGA s 16(2A), set out above, stating that a loss "shall not be an allowable loss…unless…[the taxpayer] gives notice to an officer of the Board quantifying the loss". In Mr Sherry's submission, this means that at this notification stage, the loss is not included in the return. As a result, any enquiry into the loss must be under Sch 1A.

38. Mr Afzal said Mr Sherry's primary submission was plainly wrong, because TCGA s 16(2A) does not set out a two-stage process. It says that the person must "give a notice to [HMRC] quantifying the amount of the loss" and that TMA s 42 "shall apply in relation to such a notice as if it were a claim for relief". The effect of this is that:

(1) TCGA s 16(2A) requires a person to *quantify* the loss; and

(2) if a person has been issued with an SA return, or a notice to file such a return, s 42(2) provides that a claim "shall not be made" otherwise than by being included in the SA return, and subsection (5) extends this to amendments to the return.

39. Mr Afzal said that since the quantified loss must be included in an SA return, the correct enquiry power is TMA s 9A, because Sch 1A only applies to claims "made otherwise than by being included in a [SA] return".

Discussion

40. The FTT dealt with this issue at [200] as follows:

> "As Mr Sherry noted under s16(2)(A) TCGA a loss does not become an allowable loss unless notice is filed, however the inclusion in the return is treated by HMRC as being notice and this is specifically stated in the notes accompanying the tax return. Whilst of course a separate claim could be made later, the clear intent is as far as possible to encompass capital gains within the annual self-assessment regime; including any previously notified directly. The structure being to aggregate all gains and losses within the tax year and either have a chargeable gain or a loss to carry forward."

41. We agree with the FTT and with Mr Afzal. The legislation does not mandate a two-stage process, there is no requirement for HMRC to "determine" the notified loss, and an enquiry need not in every case be opened under Sch 1A.

42. The wording relied on by Mr Sherry is not to be construed in a vacuum. Mr Sherry submitted in oral argument that if the purpose of s16(2A) was not to introduce a two-stage process, then it was difficult to discern what its purpose might be. We have no hesitation in rejecting that submission. The purpose of s16(2A) was to incorporate the disciplines of the claim procedure in s42 TMA, including the requirement to quantify a claim and the

applicable time limits, into the process of claiming a capital loss. This is consistent with the history of s42, as noted by Lord Hodge in *R (oao de Silva and another) v HMRC* [2017] UKSC 74 ("*de Silva*") at paragraph 14 ,where he first set out s 42(2), and then said:

> "This requirement that a claim be included in a tax return was an innovation in the Finance Act 1994, which amended the TMA extensively to provide for the introduction of self-assessment. Section 42 as initially enacted had provided as a general rule that claims should be made to an inspector of taxes within time limits specified in section 43, also as initially enacted."

43. In other words, the effect and purpose of the code is that claims are now included as part of the taxpayer's SA return *instead of* the earlier process which required making a claim to HMRC.

44. Mr Sherry could provide no authority for his novel interpretation of the legislation. While his skeleton argument referred to *Cotter v HMRC* [2013] UKSC 69 ("*Cotter*"), he stated in response to questioning that his primary submission did not seek to rely on *Cotter* or indeed any other authority.

45. Mr Sherry confirmed that the effect of his primary submission was that a claim for a capital loss could not be categorised as being included in the self-assessment return in any circumstances. It did not matter whether the result of the claim was to affect the amount of CGT payable in the year of claim, or whether the taxpayer had calculated their tax liability, or indeed whether the claim was included in the return itself. In every case, he said, the claim was a stand-alone claim requiring any enquiry to be under Sch 1A.

46. Such a result would in our view fly in the face of the legislative scheme. It would largely render nugatory the requirement in section 42(2) TMA that a claim must be included in a return if possible, and would run contrary to the underlying aims of the self-assessment regime. There is no warrant for it in the legislation construed as a whole and no authority to support it.

Conclusion

47. We reject Mr Sherry's primary submission.

SECONDARY SUBMISSION: LOSSES NOT "IN THE RETURN" IN THIS CASE

48. Mr Sherry's secondary submission turned on the particular facts of Mr Cumming-Bruce's case in the light of TMA s 8(1) and the related case law.

49. Mr Sherry made the following submissions:

(1) It was clear from TMA s 8(1) that an SA return is "for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment".

(2) On the facts of this case, none of the MvJ losses changed Mr Cumming-Bruce's overall tax payable for the years in question, because he already had more than sufficient capital losses to offset against his gains before the return was amended. In Mr Sherry's words, the losses "did not enter into the computation because Mr Cumming-Bruce had already made a return and knew that there were already enough [losses in that return]".

(3) As a result, none of the MvJ losses were "information…for the purpose of establishing" the amount of Mr Cumming-Bruce's CGT liability or the tax payable by

him for that year and they were therefore not "in the return". As a consequence, HMRC had to enquire into the losses under Sch 1A and had failed to do so.

50. Mr Afzal responded as follows:

(1) It was clear from TCGA s 2(2) that CGT is chargeable on "the total amount of chargeable gains…after deducting…any allowable losses". The framework of the legislation provides that *all* the gains and losses for the year are relevant to "establishing the amounts by which a person is chargeable to…capital gains tax", and it is the net position, having taken all gains and losses into account, which determines the CGT payable. Once included in the SA return, losses and gains lose their identity. The FTT had therefore been right to say at [200] that the legislation is structured so as to "aggregate all gains and losses within the tax year and either have a chargeable gain or a loss to carry forward…at that stage, any losses lose all trace of any individual components and are simply a balancing figure carried forward".

(2) The effect of Mr Sherry's submission would be that the losses originally included in the SA return were used in priority over those included by reason of an amendment, but there was no legislative basis for that differential. Instead, an amendment made under TMA s 9ZA was an amendment *to the return*, and any such amendment took effect as if it had been part of the original return. Any losses notified by amendment therefore form part of the same "pool" as the original losses.

Discussion

51. In analysing the statutory provisions, we have only considered the position of a taxpayer, such as Mr Cumming-Bruce, who has been issued with an SA return (or a notice to file such a return), and who was not too late to amend the return under TMA s 9ZA.

52. TCGA s 16(1) and (2) provide that capital losses are calculated in the same way as capital gains. TCGA s 16(2A) read with TMA s 42 requires that a person who wishes to claim that a capital loss is allowable for tax purposes must quantify the loss and include it in the SA return for that year. We agree with Mr Afzal that the natural reading of these provisions is that *all* capital losses arising in a tax year must be included in the return for that year.

53. That this is the correct construction can also be seen when considering the position of carried forward losses:

(1) For a loss to be "allowable", it has first to be included in the SA return for the year in which the loss arose: TCGA s 16(2A) read with TMA s 42.

(2) TCGA s 2(2)(b) provides that "allowable losses" not used in an earlier year are deductible from subsequent gains.

(3) Thus, if a loss is not included in the return, it will not be an allowable loss, and so cannot be carried forwards.

(4) It follows that the return must therefore include all allowable losses, not simply those which happen to be less than, or equal to, the capital gains for the year in which the loss arose. If a taxpayer only included sufficient losses to offset the gains, any balance would not be allowable either in that year or in future years.

54. In making his secondary submission, Mr Sherry placed significant reliance on TMA s 8(1), which states that SA returns are "for the purpose of establishing the amounts in which a person is chargeable to…capital gains tax for a year of assessment". However, as with Mr Sherry's primary submission, this ignores other relevant provisions and the code as a whole. Section 8(1) is governed by TMA s 8(1AA), which reads:

> "For the purposes of subsection (1) above −
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return;.."

55. Thus, in order to "establish" the tax payable it is necessary to "take into account any relief or allowance a claim for which is included in the return". Allowable losses can only be claimed by being included in the return, see TCGA s 16(2) read with TMA s 42, discussed above. Once they have been so claimed, the CGT chargeable is established by offsetting the total of those allowable losses against the gains, to produce a net figure.

56. It is, as Mr Afzal said, implicit in Mr Sherry's submission that there is a difference between an amendment and the figures in the original return. TMA s 9ZA allows a taxpayer to "amend" an SA return, and the primary meaning of the word "amend" given by the Oxford English Dictionary is to "correct or alter in respect of wording, argument etc". It follows from the natural reading of TMA s 9ZA that the amendment becomes part of the return and, as Mr Afzal said, is not separable or distinguishable.

57. We therefore reject the construction of the legislation which forms the central premise of Mr Sherry's second submission.

58. Since both parties also referred to and relied on *Cotter*, *de Silva*, *Tooth* and *R (oao Derry) v HMRC* [2019] UKSC 19 ("*Derry*"), we now turn to those cases. We then consider the practical consequences of Mr Sherry's second submission before reaching our conclusion.

Cotter

59. The background to the case was as follows:

(1) Mr Cotter had filed his 2007-08 SA return on 31 October 2008, and did not calculate the tax payable. Instead, as he was entitled to do under TMA s 9(2), he left it to HMRC to calculate the tax.

(2) On 29 January 2009, Mr Cotter's accountants wrote to HMRC enclosing "a provisional 2007-08 loss relief claim" which had arisen from an employment-related loss in 2008-09. Section 128 of the Income Tax Act 2007 ("ITA") allows employment-related losses to be claimed in the year and/or carried back to the previous year.

(3) HMRC enquired into the amendment to Mr Cotter's return under Sch 1A, and, having done so, confirmed Mr Cotter's original liability and did not deduct the employment loss.

(4) It was Mr Cotter's case that, since the claim had been made by amending the 2007-08 SA return, HMRC were required to open the enquiry under TMA s 9A, and not under Sch 1A.

(5) HMRC's counsel, Ms Simler QC (as she then was), submitted that a claim was only included in an SA return if it could "feed into" the calculation of tax payable in respect of the particular year of assessment. That was not Mr Cotter's position and the claim therefore did not form part of his SA return. It followed that the enquiry had been correctly opened under Sch 1A.

60. Lord Hodge gave the only judgment, with which the rest of the Court agreed. He first considered the statutory framework. TMA Sch 1B ("Sch 1B") applied because employment-related losses can relate to two tax years, and paragraph 2 of that Schedule provides that "the claim shall relate to the later year". In consequence, a claim to an employment loss *did not and could not* change the tax liability for the earlier year. Applying those principles to Mr

Cotter, Lord Hodge said at [17] of *Cotter* that "the claim did not affect the amount of tax which was chargeable or payable in relation to 2007/08".

61. Lord Hodge then noted that Mr Cotter had not carried out a calculation of the tax payable, but left that task to HMRC, and that when his accountants had written to HMRC on 19 January 2009, they did not amend the calculation. Instead, their letter "was confined to the intimation of the claim". He then said:

> "[24] Where, as in this case, the taxpayer has included information in his tax return but has left it to the Revenue to calculate the tax which he is due to pay, I think that the Revenue is entitled to treat as irrelevant to that calculation information and claims, which clearly do not as a matter of law affect the tax chargeable and payable in the relevant year of assessment. It is clear from sections 8(1) and 8(1AA) of TMA that the purpose of a tax return is to establish the amounts of income tax and capital gains tax chargeable for a year of assessment and the amount of income tax payable for that year. The Revenue's calculation of the tax due is made on behalf of the taxpayer and is treated as the taxpayer's self assessment (section 9(3) and (3A) of TMA).
>
> [25] The tax return form contains other requests, such as information about student loan repayments (page TR2), the transfer of the unused part of a taxpayer's blind person's allowance (page TR3) or claims for losses in the following tax year (box 3 on page Ai3) which do not affect the income tax chargeable in the tax year which the return form addresses. The word "return" may have a wider meaning in other contexts within TMA. But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the TMA, a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year" (section 8(1) TMA).
>
> [26] In this case, the figures in box 14 on page CG1 and in box 3 on page Ai3 were supplemented by the explanations which Mr Cotter gave of his claim in the boxes requesting "any other information" and "additional information" in the tax return. Those explanations alerted the Revenue to the nature of the claim for relief. It concluded, correctly, that the claim under section 128 of ITA in respect of losses incurred in 2008/09 did not alter the tax chargeable or payable in relation to 2007/08. The Revenue was accordingly entitled and indeed obliged to use Schedule 1A of TMA as the vehicle for its enquiry into the claim (section 42(11)(a)).
>
> [27] Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/08. Such information and self assessment would in my view fall within a "return" under section 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer's self assessment without either amending the tax return (section 9ZB of TMA) or instituting an enquiry under section 9A of TMA."

62. Under the heading "how the system works" Lord Hodge said at [34] of *Cotter* that "where the taxpayer chooses under section 9(1) of TMA to calculate the amount of tax that

he is due to pay, and allows for the relief in his calculation…the Revenue may give notice of an enquiry under section 9A". The following paragraph begins:

> "Where the taxpayer chooses to let the Revenue calculate the tax due but includes a claim for relief in a tax return form (whether from the outset or by amendment) which is clearly not relevant to the calculation of tax for the particular year of assessment, the Revenue may ignore the claim in its calculation of the tax under section 9(3) of TMA. It treats it as a claim made otherwise than in a return and Schedule 1A to TMA applies."

63. Lord Hodge concluded that as Mr Cotter had not calculated his tax, and as his accountant's letter therefore did not amend the calculation, HMRC were entitled to ignore the claim, and had correctly opened the enquiry under Sch 1A.

Mr Sherry's submissions

64. Mr Sherry submitted that in *Cotter* the Supreme Court had endorsed Ms Simler's submission that it is only matters which "feed into" the "calculation of tax payable" which form part of an SA return. He said that on the facts of this case, the MvJ losses did not "feed into" the calculation of Mr Cumming-Bruce's tax payable, because the tax had been zero before the Representative's letter of 23 January 2003 notifying the MvJ losses, and it was zero afterwards.

65. Mr Sherry also relied on Lord Hodge's statement at [25] of *Cotter* that a "return" means information submitted for 'the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for the relevant year of assessment". Mr Sherry said that the MvJ losses did not have that purpose, because the CGT position for both tax years was already known before the losses were notified.

Mr Afzal's submissions

66. In Mr Afzal's submission, *Cotter* was of no assistance to Mr Cumming-Bruce, for the following reasons:

(1) Mr Cotter's employment losses did not "feed into" the earlier year's return because:

(a) Sch 1A provided that the employment loss claim "s*hall* relate to the later year".

(b) The loss therefore had no effect on Mr Cotter's liability for the earlier year (Year 1), which had already been quantified and established.

(c) In other words, Mr Cotter's loss stood outside and apart from the liability for Year 1, and *did not and could not* affect it.

(2) In contrast, Mr Cumming-Bruce's MvJ losses formed part of an indivisible pool of losses within his SA return for the two years in question, so the MvJ losses therefore clearly fed into those returns.

(3) Even if this were wrong, the MvJ losses were clearly *capable* of feeding into the returns. For example, had HMRC determined on enquiry that one of the declared gains had been miscalculated, some or all of the MvJ losses might have been needed in order to offset the gain.

(4) Mr Cotter did not calculate his own tax liability, but left it up to HMRC. Since his employment loss did not feed into the calculation of his tax position for 2007-08, HMRC were entitled to ignore it. Therefore the claim did not form part of the return and the enquiry was properly made under Sch 1A. However, if Mr Cotter *had* calculated his own liability, and *had* included the employment loss claim, as Lord

Hodge had stated at [27] of the judgment, "matters would have been different". In that scenario, the loss would have been included in the return, and HMRC would have been required to use their TMA s 9A enquiry powers. That was exactly Mr Cumming-Bruce's position: his SA returns included a calculation of the tax due; unlike Mr Cotter, he did not leave it to HMRC. As a result, paragraph [27] of Lord Hodge's judgment applied, and Mr Sherry was wrong to rely on paragraph [25].

The Tribunal's view

67. We find as follows:

(1) Mr Cotter's appeal was about a carry-back claim, whereas Mr Cumming-Bruce's concerned losses arising in two sequential tax years, 2000-01 and 2001-02.

(2) Because Mr Cotter's claim was a carry-back claim, Sch 1B provided that it "related to" Year 2. As a matter of law it therefore *did not and could not* change the assessment for Year 1. In contrast, Mr Cumming-Bruce's MvJ losses "relate" to each of those two sequential tax years.

(3) Mr Sherry relied in particular on his submission that the *ratio* of *Cotter* was that a claim was only included in an SA return if it could "feed into" the calculation of tax payable in respect of the particular year of assessment. He said that Mr Cumming-Bruce's MvJ losses did not "feed into" the calculation of his CGT. However, the phrase "feed into" does not come from the words of Lord Hodge's judgment, but from Ms Simler's submission as counsel for HMRC in the appeal. What Lord Hodge actually said was as follows (our emphasis): "the Revenue is entitled to treat as irrelevant to that calculation information and claims, which *clearly do not as a matter of law* affect the tax chargeable and payable in the relevant year of assessment": see [24] of *Cotter*.

(4) That was the position in *Cotter*, because the carried back loss related to Year 2. Mr Cumming-Bruce's position was different: the MvJ losses were not excluded from consideration "as a matter of law". Instead, as we have already found, as a matter of law all allowable losses are taken into account in determining the CGT payable for the year of assessment.

68. There is, as Mr Afzal said, a further critical difference between Mr Cotter's position and that of Mr Cumming-Bruce. Mr Cotter did not calculate the tax due, but left it to HMRC, who ignored the carry-back claim when carrying out the calculation. The Supreme Court decided that HMRC were entitled to take this approach, because the carried back loss related to Year 2 and not to Year 1. It followed that the claim did not form part of the return, and Sch 1A was therefore the correct enquiry power. Although *obiter*, Lord Hodge said (at [27] of *Cotter*) that had Mr Cotter completed "the tax calculation summary pages of the tax return", that would have constituted his self-assessment of his liability and formed part of his SA return, with the result that the correct enquiry power would have been TMA s 9A. Since the Representative had calculated the tax due in Mr Cumming-Bruce's case, it follows from Lord Hodge's *dicta* that HMRC were correct to use TMA s 9A to open an enquiry.

69. We thus agree with Mr Afzal, essentially for the reasons he gave, that *Cotter* does not provide Mr Cumming-Bruce with any assistance, but instead provides support, albeit *obiter*, for HMRC's position.

De Silva

70. In *de Silva*, the taxpayers had made claims to carry back partnership losses said to have arisen in particular tax years ("Year 2") against their general income in a previous year ("Year 1"). HMRC opened enquiries into the partnership returns for Year 2 under TMA s 12AC, which by subsection (6)(a) is deemed to include TMA s 9A enquiries into the SA

returns of the individual partners. HMRC subsequently closed their enquiries and issued amendments reducing the losses. The taxpayers appealed on the basis that the carried-back losses were stand-alone claims which could only be enquired into under Sch 1A. HMRC had not opened a Sch 1A enquiry and were now out of time to do so.

71. Lord Hodge gave the only judgment, with which the rest of the Court agreed. In relation to TMA s 8, he said at [24] of *de Silva* that:

> "It is noteworthy that under subsection (1)(a) the information which is required is not simply the amounts in which the person is chargeable to income tax and the amounts payable by him for the year of assessment but information 'for the purpose of establishing' those amounts."

72. He found (at [26] of *de Silva*) that a loss claim had to be included in a taxpayer's SA return in the year of the loss (Year 2), in order to establish the proportion, if any, which was to be offset against the profits for that year and the proportion which was to be carried back to Year 1. As a result, HMRC had the power to make a (deemed) enquiry into the Year 2 return under TMA s 9A, and the taxpayers' appeals therefore failed. He ended by referring to *Cotter,* saying at [37] of *de Silva*:

> "*Cotter* was concerned with a claim made by an amendment of a tax return form relating to Year 1 which intimated a claim for a loss that would occur in Year 2. That claim had, and could have, no bearing on the amount of tax chargeable and payable by Mr Cotter in respect of Year 1: paras 16 and 17 of *Cotter*. At that stage it was a stand-alone claim to which Schedule 1A applied. The case did not address the possibility of a section 9A enquiry into the tax return in Year 2. HMRC commenced their Schedule 1A enquiry into the claim before the end of Year 2, thereby precluding any enquiry into the claim under section 9A if it were (as it ought to have been) contained in the Year 2 tax return at a later date: Schedule 1A, paragraph 5(3)(b). By contrast, in this case the taxpayers' claims were made in their tax returns for Year 2 (paras 5 and 6 above). *Cotter* gives no support to the taxpayers in this appeal."

The parties' submissions

73. Mr Afzal relied on the following points:

(1) Lord Hodge had emphasised that TMA s 8(1)(a) referred to amounts being included "for the purpose of establishing" the tax payable – in other words, all amounts which need to be considered as a preliminary to calculating that tax. In Mr Cumming-Bruce's case, this was all the capital losses for the year.

(2) Lord Hodge had also said that Sch 1A applies where (as in *Cotter*), the claim "had, and could have, no bearing on the amount of tax chargeable and payable" for the year in question. That was not the position of the taxpayers in *de Silva,* and it was not Mr Cumming-Bruce's position. Instead, the MvJ losses had a bearing on the tax chargeable because they formed part of an indivisible pool of losses. He added that even were he to be wrong in that submission, it was clear that the losses "could have" had a bearing on Mr Cumming-Bruce's tax payable.

74. Mr Sherry submitted that *de Silva* was not relevant because it concerned different legal provisions. We understood him to mean that it concerned partnership trading losses rather than the capital losses which were in issue here.

Discussion

75. In *de Silva,* Lord Hodge confirmed that Sch 1A applies where the claim "had, and could have, no bearing on the amount of tax chargeable and payable" for the year in question. That

was the position in *Cotter*, because Sch 1B provided that the claim "related to" Year 2, and as a matter of law, did not change the assessment for Year 1. This is not Mr Cumming-Bruce's position. Instead, all allowable losses in each of the two tax years had a bearing on the tax chargeable because they formed part of an indivisible pool of losses to be offset against chargeable gains. As Mr Afzal said, even if that were to be wrong, the MvJ losses "could have" had a bearing on the tax chargeable and payable for those years. It follows that *de Silva* also supports HMRC's case.

Derry

76. In *Derry* the taxpayer sold shares at a loss in 2010-11 ("Year 2"). The loss was quantified before Mr Derry filed his SA return for 2009-10 ("Year 1"), and he included a claim for share loss relief in the calculation pages of that return.

77. HMRC opened an enquiry into that claim under Sch 1A. Mr Derry's case was that ITA s 132 entitled him to include the loss in his return for Year 1, and the enquiry therefore had to be opened under TMA s 9A. HMRC's case was that as the result of Sch 1B para 1(3), the claim "related to" Year 2, and Sch 1A was therefore the correct enquiry power.

78. In the Supreme Court, Lord Carnwath held that the wording of ITA s 132 entitled Mr Derry to include his share loss relief claim in his 2009-10 return; that he had done so, and that HMRC were therefore required to open the enquiry under TMA s 9A. All the other members of the Court agreed, and this was sufficient to decide the case in Mr Derry's favour.

79. Lord Carnwath also considered what the position would have been if he was wrong in that conclusion, so that the share loss relief claim related to year 2, but had been included in Mr Derry's calculation of his Year 1 tax position. In considering that issue, Lord Carnwath referred to *Cotter*, saying at [50] of *Derry*:

> "It was held that by virtue of Sch 1B [Mr Cotter's] claim, though referred to in his amended 2007/08 tax return, must be treated as relating to the following tax year, and not therefore as part of the "return" in the relevant sense, that being limited to the information required to establish his liability for the year in question. More directly relevant to the present case, however, is a passage in Lord Hodge's judgment commenting (*obiter*) on the position if Mr Cotter had made the calculation of liability himself, rather than leaving it to HMRC to do so."

80. On this second issue, Lady Arden dissented from the majority, and said at [81] of *Derry*, referring to *Cotter*:

> "This court there held that, if an item does not fall to be taken into account for the purpose of calculating the tax payable by the taxpayer submitting the form, it is to be left out of account and does not constitute part of the "return" for the purposes mentioned."

81. Neither party relied on the substance of Lord Carnwath's views on the second issue, or on Lady Arden's different approach, but only on the references to *Cotter* set out above, and it is therefore not necessary to set out those different views in this judgment.

The parties' submissions

82. Mr Sherry relied on Lord Carnwath's description of the *ratio* of *Cotter* as being that "the return" was "limited to the information required to establish [the taxpayer's] liability for the year in question". He reiterated that the MvJ losses were not so required: Mr Cumming-Bruce's nil CGT liability had been established before the return had been amended to include those losses. He also relied on Lady Arden's summary of *Cotter* at [81] of *Derry*, saying that in Mr Cumming-Bruce's case, the MvJ losses similarly did not "fall to be taken into account

for the purpose of calculating the tax payable", because the tax position had already been established at the time the amendment was made.

83. Mr Afzal said that both of the passages on which Mr Sherry relied were only summaries of the Supreme Court's judgment in *Cotter* and should not be preferred over the words used by Lord Hodge. He added that Lady Arden's *dicta* also formed part of her dissenting judgment.

Discussion

84. We agree with Mr Afzal that Lord Carnwath's *obiter* statement that a return was "limited to the information required to establish his liability for the year in question" was a summary of the Court's earlier judgment in *Cotter*. It did not and was not intended to reformulate the actual words used by Lord Hodge, which were that a return does not include amounts (our emphasis) "which clearly do not *as a matter of law* affect the tax chargeable and payable in the relevant year of assessment". As we have also described, that is entirely consistent with the approach in *de Silva* set out above. We have also set out why *Cotter* does not support Mr Sherry's position.

85. Similarly, Lady Arden's summary description of the decision in *Cotter* cannot displace the words used by Lord Hodge; and as Mr Afzal said, the passage relied on by Mr Sherry was not only *obiter* but also formed part of Lady Arden's minority dissenting judgment on the second issue. We agree with him that *Derry* does not assist Mr Cumming-Bruce.

Tooth

86. The judgment in *Tooth* was given by Lord Briggs and Lord Sales, with whom the rest of the Court agreed. Mr Tooth's advisers had completed his 2007-08 return by including in the calculation of his liability an employment-related loss carried back from 2008-09. As part of the factual background and statutory framework, the judgment sets out the following points:

> (1) In 2010, HMRC opened an enquiry into the loss claim under Sch 1A. At that time "due to obscurity in the drafting of the TMA, it was not appreciated that a Schedule 1A enquiry was not available as a means to challenge a claim to tax relief set out in the calculation in a self-assessment return and that the appropriate route for this was by an enquiry under section 9A": see [15] of *Tooth*.
>
> (2) In 2014, after *Cotter*, Mr Tooth's advisers and HMRC agreed that Lord Hodge's observation at [27] of *Cotter* applied to Mr Tooth, because he had included a deduction for the loss in his self-assessment calculation for 2007-08 and the loss therefore formed part of his return for that year. It was therefore common ground that HMRC had incorrectly opened the enquiry using Sch 1A, and were out of time to use TMA s 9A: see [18] of *Tooth*.
>
> (3) HMRC then decided to issue a "discovery" assessment under TMA s 29 on the basis that Mr Tooth had acted deliberately in utilising the incorrect box when claiming the loss in his tax return.

87. The substantive issue in dispute was thus whether Mr Tooth had acted "deliberately", and not whether the original enquiry had been incorrectly opened under Sch 1A: the parties had already agreed that this was the case.

The parties' submissions

88. Mr Sherry's position was that the references to *Cotter* were not part of the *ratio* of *Tooth* but only part of the factual background. Mr Afzal said that if the Court had considered the parties had gone wrong in their understanding of when a TMA s 9A enquiry should be

used, they would have said so. Instead, the relegation of this issue to the factual part of the case shows that the Court agreed with Lord Hodge that where a taxpayer calculates the tax due, and includes a carried back loss, HMRC have to enquire into that return under TMA s 9A. In Mr Afzal's submission, the judgment in *Tooth* therefore provided an endorsement of Lord Hodge's analysis at [27] of *Cotter*. On the facts of Mr Cumming-Bruce's case, the position was the same: the Representative had carried out a calculation of Mr Cumming-Bruce's tax for each of the two years, and TMA s 9A was the correct enquiry power.

89. The parties in *Tooth* were in agreement that Lord Hodge had been correct when he said at [27] of *Cotter* that had Mr Cotter completed "the tax calculation summary pages of the tax return", that would have constituted his self-assessment; the loss would have formed part of his return, and as a result TMA s 9A would have been the correct enquiry power. As a result of that agreement, neither party made submissions on whether Lord Hodge's *dicta* were correct, and the issue likewise formed no part of the *ratio*. However, we agree with Mr Afzal that had the Supreme Court considered the parties had begun from the wrong starting point, it is likely that they would have said so. Further, having noted that HMRC had been successful in *Cotter*, the Supreme Court observed:

> "Critical to [HMRC's] success was the fact that Mr Cotter had not (unlike Mr Tooth) done his own self-assessment of the 2007-8 tax due".

90. We therefore consider that *Tooth* provides further support for HMRC's case.

The practical consequences

91. While we reject Mr Sherry's secondary submission as a matter of statutory construction, we also heard submissions as to how that construction might operate in practice. As will be seen, these reinforce our conclusion.

92. Mr Afzal emphasised the practical consequences. On Mr Sherry's analysis, when a loss was offset against a gain, it fed into the return and so had to be enquired into under TMA s 9A, but any losses not so utilised did not feed into the return and so had to be enquired into under Sch 1A. Mr Afzal invited the Tribunal to consider a number of hypothetical situations, including the following:

(1) The taxpayer has a gain of £100 and two losses, both of £100. On Mr Sherry's analysis, only one of these is in the return (and can be enquired into under TMA s 9A). The other must be a stand-alone claim, which can only be enquired into under Sch 1A. As the two losses are identical in amount, how are the taxpayer and HMRC to know which one is within the return and which one outside the return?

(2) The return is filed showing gains of £100 and a loss of £20. The taxpayer then identifies a second loss of £50 and amends the return. HMRC open an enquiry under TMA s 9A. During the enquiry further allowable deductions are identified which relate to the original gain, reducing it to £20 which is offset by losses. If Mr Sherry is correct, the £50 loss is no longer part of the return, and HMRC are required to open an enquiry under Sch 1A, but may well be out of time to do so.

(3) An asset is disposed of giving rise to no gain and no loss. On Mr Sherry's case, this does not feed into the return because it does not affect the tax payable, and so no enquiry can be opened under TMA s 9A. But since there is no loss, the taxpayer does not make a claim, and HMRC cannot use Sch 1A. HMRC would therefore be precluded from enquiring into the transaction.

93. Mr Afzal also referred to the following paragraphs of the Decision:

> "[212] On the Appellant's interpretation of *Cotter*, how would HMRC know whether to make enquiries under section 9A TMA 1970 or schedule 1A until the enquiry was concluded and a determination made as to how much, if any, of the losses were to be allowed?
>
> [213] Only in coming to conclusions at the end of the enquiry as to what losses would be allowed, could HMRC know whether any part of any losses claimed affected the tax to be paid in the specific year of assessment (ie. whether the amendment was part of a return). If the tax to be paid was affected, HMRC would only know that the claim should have been enquired into under section 9A after it had concluded the enquiry. Conversely, only once they had decided whether to allow losses which would not affect the amount of capital gains tax to be paid for that year (but might only affect the tax payable for later years) could HMRC know that the claims should have been enquired into under schedule 1A as standalone claims. That would be a perverse interpretation of the legislation."

94. Mr Sherry's response to these concerns was that HMRC could always open enquiries under both Sch 1A and TMA s 9A, and/or utilise one enquiry power and then the other if the situation changed.

95. We decided it would be of assistance to understand in greater detail what similarities and differences there are between the two enquiry powers, and asked both Counsel to co-operate in agreeing a schedule setting out the position. Their helpful "Schedule of Differences" was provided a week after the conclusion of the hearing, and (with minor typographical amendments) is attached as an Appendix to this judgment.

Discussion

96. We agree with Mr Afzal that the practical consequences of Mr Sherry's secondary submission are illustrated by his hypothetical cases and by the observations of the FTT cited above.

97. Mr Sherry suggested that these difficulties would be avoided were HMRC to open enquiries under both Sch 1A and TMA s 9A. We do not accept that submission for the following reasons:

(1) TMA s 9A only gives HMRC the power to open an enquiry into the *return*: if a loss is not included in the return, they have no power to enquire into the loss using TMA s 9A. Likewise, HMRC only have the power to open an enquiry under Sch 1A when the taxpayer has made a stand-alone claim. Parliament cannot have intended a situation in which HMRC open two parallel enquiries, one of which they are entitled to open, and one of which is *ultra vires*, but neither HMRC nor the taxpayer knows, until the conclusion of the enquiry, which is *ultra vires* and which is not.

(2) It is implicit in Mr Sherry's assumptions that when the claim is made, neither the taxpayer nor HMRC know whether it is a stand-alone claim under Sch 1A; whether it forms part of the SA return, or whether it is partly one and partly the other. The position will only be known at the end of the enquiry, or, if no enquiry is opened, at the end of the enquiry period. However. as the Appendix makes clear, a claim made as part of a return takes effect immediately, so a taxpayer has less tax to pay. In contrast, a claim made under Sch 1A does not have immediate effect: instead, para 4 of that Schedule requires HMRC to give effect to the claim by discharge or repayment of tax "as soon as practicable". Again, Parliament must have intended that both the taxpayer and HMRC know, when a claim is made, whether it is to be given effect immediately.

(3) The Appendix also identifies a further difficulty. If an enquiry is opened under TMA s 9A, the taxpayer can amend the return while the enquiry is in progress: TMA s 9ZA. However, if the enquiry is opened under Sch 1A, para 3(2) of that Schedule prevents a taxpayer from amending the claim while the enquiry is in progress. If neither HMRC nor the taxpayer know which of the two enquiries has been validly opened, they also will not know whether the claim can be amended before the conclusion of the enquiry. By that time, of course, it will be too late for a taxpayer to make an amendment. Plainly, this cannot be correct.

98. That leaves Mr Sherry's alternative solution, namely that HMRC use the enquiry powers in sequence, as required. As is again clear from the Appendix, the time limits within which an enquiry can be opened under the two provisions are not necessarily coterminous: they instead depend on the date the taxpayer files his self-assessment return or the date on which the claim is made. By the time HMRC close an enquiry which has been opened under TMA s 9A, they may be out of time to open an enquiry under Sch 1A, and *vice versa*. Again, we consider that this cannot have been what Parliament intended.

99. We also observe that the Supreme Court have now considered whether HMRC had used the incorrect enquiry power in three cases – *Cotter*, *de Silva* and *Derry*. In each the Court began from the position that the correct enquiry power was established before the enquiry was opened, as the result of the relevant legislative provisions and the facts of the case. There is thus no support in the authorities for Mr Sherry's submission that the parties would not know the correct enquiry power until the conclusion of an enquiry.

Conclusion on the secondary submission

100. We reject Mr Sherry's secondary submission for the following reasons:

(1) The statutory provisions require that all allowable losses are included in a return, not simply those which are equal to, or less than, the chargeable gains.

(2) The *ratio* of *Cotter* is that HMRC are entitled to treat as irrelevant to the calculation of tax information and claims which *do not and cannot as a matter of law* affect the tax chargeable and payable in the relevant year of assessment. That happened in *Cotter*, because as a matter of law, the loss in question related to the following year. In Mr Cumming-Bruce's case, as a matter of law, all losses had to be included in the return for the year. In any event, the claimed losses could have affected the tax chargeable for the relevant years.

(3) In *Cotter*, Lord Hodge went on to say that the position would have been different had Mr Cotter calculated the tax payable and so carried out his self-assessment: in such a case, HMRC would have had to use TMA s 9A. The Representative had calculated Mr Cumming-Bruce's tax payable and HMRC therefore correctly opened the enquiry under TMA s 9A.

(4) Although that passage in *Cotter* was *obiter*, it was taken to be correct by the Supreme Court in *Tooth.*

(5) If Mr Sherry's submission were to be correct, many problems and anomalies would arise in practice. The parties would not know until the end of the enquiry (or the enquiry period) whether the taxpayer had made a stand-alone claim under Sch 1A or had included the claim as part of his SA return (or partly one and partly the other) and thus would not know the correct enquiry power. That outcome would not only be inconsistent with the statutory provisions and unsupported by the case law, but would also produce an impractical and incoherent code, which cannot be what Parliament intended.

CONCLUSION AND DISPOSITION

101. For the reasons we have given, we reject Mr Sherry's secondary submission, and Mr Cumming-Bruce's appeal is dismissed.

Signed on Original

JUDGE THOMAS SCOTT AND JUDGE ANNE REDSTON
UPPER TRIBUNAL JUDGES

Release date: 25 August 2022

APPENDIX: SCHEDULE OF DIFFERENCES PROVIDED BY THE PARTIES

	Section 9A	Schedule 1A
Requirement for a tax return[4]	Only applies if a return has been made under s.8 or s.8A.	Does not require that there be a tax return. Indeed the heading to Sch 1A is "Claims etc not included in returns".
Time limits for opening an enquiry	Section 9A(2) provides that the time allowed is: (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date[5]; (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered; (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.	Paragraph 5(2) provides that the deadline is the latest of the following: (a) the period ending with the quarter day next following the first anniversary of the day on which the claim or amendment was made; (b) where the claim or amendment relates to a year of assessment, the period ending with the first anniversary of the 31st January next following that year; and (c) where the claim or amendment relates to a period other than a year of assessment, the period ending with the first anniversary of the end of that period.
Scope of enquiry	Pursuant to s.9A(4) an enquiry extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return. In certain circumstances, e.g. if an enquiry into a return has been completed, s.9A(5) restricts the scope of an enquiry to matters to which an amendment under s.9ZA relates or which are affected by the amendment.	Pursuant to para 5(1) the enquiry is into the claim (or any amendment of a claim).

[4] There are time limits for the submission of returns. Section 8 as it stood in 2002/3 provides for the filing date to be 31st January following the year of assessment, or if the notice under s.8 is given after 31st October next following the year of assessment the last day of the period of 3 months beginning with the day upon which the notice is given. The current version of s.8 provides that a non-electronic return must be filed by 31 October after the year of assessment and an electronic return by 31 January after the year of assessment: the foregoing is subject to two exceptions, one of which applies if notice under s.8 is given after 31 July but on or before 31 October, and the second of which applies if the notice is given after 31 October. By contrast there are no time limits for making claims in Sch 1A itself (both in the 2002/3 and current versions of the legislation): however s.43(1) provides, subject to alternative provision, a general time limit for making claims which in 2002/3 was five years after the 31st January next following the year of assessment to which the claim relates, and in the current version of the legislation is four years after the end of the year of assessment to which the claim relates.

[5] In the current version of the legislation paragraph (a) refers to 12 months after the return was delivered (as opposed to 12 months after the filing date).

	Section 9A	Schedule 1A
Making an amendment during an enquiry	As noted in s.9B a return can be amended under s.9ZA whilst an enquiry is in progress. The amendment can be taken into account in the enquiry (s.9B(2)).	Para 3(2) provides that no amendment can be made to a claim whilst an enquiry is in progress.
Giving effect to claims / postponement	Where a claim is made in a return, if the effect is to reduce the amount of the taxpayer's liability without resulting in a repayment situation, then the claim takes effect automatically (i.e. it will automatically follow from the making of the claim that the taxpayer has to pay less tax). If the claim results in a repayment situation, then s59B(4) provides that a repayment must be made on or before 31st January following the end of a year of assessment. The latter is subject to an exception in s.59B(3) which provides that if a person gave notice under s.7 within 6 months from the end of a year of assessment, but was not given notice under s.8 until after 31 October, then a repayment shall be repayable at the end of the 3 month period beginning when the s.8 notice was given. Section 59B(4A) provides that if an enquiry under s9A is opened then nothing in s.59B(3)-(4) shall require the repayment to be made before the enquiry is completed, but prior to then HMRC may make repayment on a provisional basis. Under the current legislation s.59B(4A) provides that repayment is not required until the time when the enquiry is completed by way of final closure notice (as distinct from the time of any partial closure notices). If an amendment affects the amount of tax payable then it does not take effect while the enquiry is in progress (s.9B(3)).	Pursuant to para 4, if a claim (or amendment of a claim) is for discharge or repayment of tax, then the general position is that HMRC should give effect to the claim as soon as practicable by discharge or repayment of tax. However, the claim does not take effect automatically / immediately. If the claim or amendment is enquired into then the requirement to give effect to the claim as soon as practicable does not apply until the enquiry is completed (i.e. there is postponement of the claim), although prior to that time HMRC may give effect to the claim or amendment on a provisional basis.
Closure of enquiry	Pursuant to s.28A an enquiry is closed when a closure notice is given stating that the enquiry has been completed. The scope of an enquiry under s.9A is broader than that under Sch 1A so it may take longer for a s.9A enquiry to be completed).	Pursuant to para 7 an enquiry is closed when a closure notice is given stating that the enquiry has been completed. The scope of an enquiry under Sch 1A is narrower than that under s.9A (see above) which may impact on the time when HMRC is in a position to issue a closure notice.

	Section 9A	Schedule 1A
	Under the current version of the legislation partial closure notices can be issued in relation to specific matters to which an enquiry relates. There have been consequential amendments to other provisions (not all of which are noted above). This (i.e. the provision for partial closure notices) did not apply in relation to the enquiries in the present case because the amendments made by Schedule 15 Finance (No 2) Act 2017 applied in relation to s.9A enquiries where notice of enquiry was given on or after the day on which the Act was passed, or the enquiry was in progress immediately before that day.	The current version of the legislation does not provide for partial closure notices. This has not changed since the years in respect of which the losses have been claimed.