TC06199

Appeal number: TC/2014/06570

INCOME TAX – Sch 24 FA 2007 penalty – (1) whether SA return inaccurate by inclusion of share loss relief claims under s 131 ITA 2007 – (a) time-bar issue, whether condition precedent met with an effective claim under s 24 TCGA – (b) formality issue, whether s 42(2) of TMA prevails – Sch 1A and Sch 1B to TMA –* Rouse, Cotter, Derry and De Silva *considered – (2) whether inaccuracy 'deliberate' or 'careless' on the taxpayer's part – (3) whether reasonable care taken to avoid inaccuracy – para 18 Sch 24 on 'agency' – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROY STANLEY **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE HEIDI POON
MR LESLIE BROWN

Sitting in public at Immigration Appellate Authority, Earl Grey Way, North Shields, on 11 April 2017

Mr Paul Fava of Hindsight Tax Consultants Ltd, for the Appellant

Mr Aidan Boal, Officer of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. The appellant, Mr Roy Stanley, appeals against HMRC's decision dated 3 December 2014 to impose a penalty of £46,818.80 under Schedule 24 to the Finance Act 2007 ('Sch 24') in respect of inaccuracy in the self-assessment return ('SA return') submitted for the year 2009-10.

2. The inaccuracy relates to two 'share loss relief' claims under ss131-132 of the Income Tax Act 2007 ('ITA').

Evidence

3. Mr Stanley gave evidence and was cross-examined. It was clear that in relation to his tax affairs, he deferred to his accountant, Mr Fava. On invitation by the Tribunal, Mr Fava also gave evidence. We find both witnesses credible, and accept their evidence without qualification.

Legislative framework

4. The statutory provisions referred to in this decision are set out in the Appendix under the following headings:

(1) Schedule 24 to FA 2007 for the penalty regime governing inaccuracy in a document submitted to HMRC;

(2) Section 24 of the Taxation of Chargeable Gains Act 1992 ('TCGA') in relation to a claim of capital loss of negligible value;

(3) Sections 131-133 of ITA in respect of a claim for share loss relief against taxable income;

(4) Section 42 of the Taxes Management Act 1970 ('TMA') on the procedure for making claims;

(5) Schedule 1A to TMA on 'Claims etc not included in returns'; ie the making of 'stand-alone' claims;

(6) Schedule 1B to TMA on 'Claims for relief involving two or more years'.

Factual background

The submission of 2009-10 SA return

5. By notice dated 6 April 2010, the appellant was required to file an SA return for 2009-10, with the due date for filing being 31 January 2011.

6. On 2 February 2012, the 2009-10 return was filed. It contained the following entries on the summary page for capital gains and losses:

(1) Box 4: Total losses of the year at £315,012.

(2) Box 12: Losses used against income (2009-10) at £127,500.

(3) Box 13: Losses used against income (2008-09) at £135,000.

7. The schedule of capital gains computation listed the share disposals of which some of the details for the total losses of £315,012 accrued are as follows:

5 (1) 1,275,000 Data SMS Holdings plc shares 30/6/09 – loss of £127,500;

(2) 2,791,805 Obus Plc shares 10/4/09 – loss of £135,000;

(3) 1,000,000 Optare plc shares 11/2/10 – loss of £52,512.

Enquiry into 2009-10 return

10 8. On 4 April 2013, HMRC Officer Shanks opened an enquiry into the 2009-10 SA return under s 9A TMA 1970. Since the return was delivered after the filing due date, the s 9A enquiry period was extended to the next quarter day following the first anniversary of the day the return was submitted on 2 February 2012. The anniversary date of filing was 2 February 2013, and the next quarter date was 30 April 2013. The 15 s 9A enquiry was therefore opened within the statutory time limit.

9. On 4 May 2013, a Schedule 36 Information Notice was issued to Mr Stanley, requesting confirmation as regards the validity of the loss relief claims and full details of the losses in terms of what the assets were, the dates of purchase and disposal.

10. The Schedule 36 request was not complied with by the time limit, and a 20 Schedule 36 penalty was imposed. On 8 July 2013, Mr Fava was sent a notification of the Schedule 36 notice that had been sent to Mr Stanley for response.

11. On 12 July 2013, Mr Fava responded to the request as follows:

> '1. I do not agree that the claim to set the loss of £127,500 against Mr Stanley's 2009-10 income is invalid. All of the information relating to 25 the claim was previously forwarded to your office, including the EIS certificates that supported the initial investment. EIS relief was not claimed on the original shareholding because the company did not trade for three years. The original claim under Section 132(1) ITA 2007 was made in correspondence to HMRC in January 2011. It was 30 then added to the amended 2009/10 tax return to claim the tax repayment.
>
> 2. I confirm that the claim to set the loss of £135,000 against Mr Stanley's income was out of time and therefore, invalid.'

12. Mr Fava's July 2013 reply therefore conceded that the claim of £135,000 35 against income taxable in 2008-09 was out of time; hence invalid. However, he highlighted that the capital loss relating to Obus plc shares still stands and should be made available to carry forward against future capital gains. Mr Fava contended that the claim of £127,000 in respect of Data SMS against income taxable in 2009-10 remained valid due to the original claim being made in writing in January 2011.

13. On 29 July 2013, Officer Shanks wrote to Mr Stanley regarding the inaccuracy in relation to the Obus plc loss relief claim of £135,000. She stated:

> 'You made a claim to carry the loss back to 2009 and set against your general income however you were out of time to make this claim. You can make the loss of £135,000 available to be carried forward against future capital gains instead.'

14. On 29 July 2013, Officer Shanks also wrote to Mr Fava to request a copy of the claim in respect of Data SMS:

> 'You mention in your letter that your client made a valid claim under Section 132(1) ITA 2007 for the loss of £127,500 in Data SMS. You state this was in the form of correspondence to HMRC in January 2011. Please provide a copy of the correspondence.'

Mr Fava did not reply by the required date of 19 August 2013.

15. On 27 August 2013, Officer Shanks issued a second Schedule 36 notice to Mr Stanley, and a notification of the issue to Mr Fava. The notice requested the same information as by letter to Mr Fava of 29 July 2013.

16. On 9 October 2013, Officer Shanks wrote to Mr Fava again, noting the fact that no response had been received for the two letters of 29 July and 27 August 2013. She also informed Mr Fava that she had managed to locate the enquiry papers for previous years, and her comment was:

> 'In these papers I see your "claim" to relief under Section 132(2) ITA 2007 for the shares held in Data SMS. Unfortunately, I cannot accept this as a valid claim because this does not meet *the correct procedure to claim under Section 42(2) TMA 1970 whereby the claim must be made in the return where possible*. It would be possible for your client to make the claim in the return however your client submitted his original return on 2 February 2012 when the notice to file was issued 6 April 2010. I am unable to accept the loss of £127,500 for shares in Data SMS.' (emphasis added)

17. The conclusion reached by HMRC in the letter of 9 October 2013 meant that both s 132 ITA claims in respect of Obus plc and Data SMS were invalid, though the capital losses would be available against future gains.

The quantification of potential lost revenue ('PLR')

18. For 2009-10, the loss relief claim of £127,500 for Data SMS was processed and resulted in a tax repayment of £17,832.62, which was credited to Mr Stanley's SA account on 3 February 2012.

19. The SA return for 2009-10 was then amended by removing the loss relief claim of £127,500, which gave rise to an additional tax liability of £27,263.84.

20. The PLR for 2009-10 is therefore £45,096.46, being the total of the tax repayment of £17,832.62 and the additional tax liability of £27,263.84 on correction of the inaccuracy.

21. For the year 2008-09, the loss relief claim of £135,000 for Obus plc was not processed. The PLR is calculated at £135,000 at 40%, being Mr Stanley's marginal tax rate to give £54,000 as the amount of tax that would have been potentially lost had the claim been processed.

22. The combined total of PLR for the two years 2008-09 and 2009-10 is therefore the sum of £45,096.46 and £54,000, namely £99,096.46.

The quantification of penalty

23. On 12 December 2013, Officer Shanks wrote to Mr Stanley with the view of raising a Sch 24 assessment in respect of the inaccuracies in the 2009-10 return, and requested a response by 17 January 2013 to the following questions:

> 'Did you read any HMRC helpsheets or guidance before claiming losses in Data SMS or Obus plc?
>
> Did you seek any professional advice on claiming these losses? If yes, provide details of what advice was given and copies of any written advice.
>
> What information was presented to your advisors to make the claims? And when was this presented to them?
>
> Explain why these loss claims were incorrectly made.'

24. On 20 February 2014, Officer Shanks wrote again for a response to her December 2013 letter by 7 March 2014.

25. Neither Mr Stanley nor Mr Fava responded to the repeated request.

26. On 23 April 2014, Officer Shanks issued a 'Penalty Explanation' to Mr Stanley detailing the basis of HMRC's intention to raise a Sch 24 penalty for £46,822.86. The penalty was to be assessed at 47.25% on a PLR of £99,096, being the total additional tax payable on the invalidation of both claims.

27. The penalty percentage of 47.25% was arrived at by categorising the behaviour as 'deliberate' for the following reasons:

(1) The two particular losses were discussed during a previous compliance check and HMRC had already advised that the claims were out of time;

(2) In the letter dated 16 September 2010 to HMRC, Mr Fava acknowledged that the capital loss in Obus was out of time; yet these were included in the 2009-10 return submitted late;

(3) As for the loss in Data SMS, HMRC had advised several times on the time limits for making a s 132 ITA claim after Mr Fava had asked for this to be clarified; and yet an out-of-time claim was included for 2009-10;

(4) Based on the previous compliance check, HMRC's position is that the appellant or his representative was aware of the inaccuracies when the 2009-10 return was submitted.

28. In relation to the assessment on 'disclosure' for the purpose of setting the penalty percentage, it was considered to be 'prompted' because HMRC were not informed of the inaccuracy before the appellant had reason to believe HMRC had discovered it, or were about to discover it.

29. For this 'deliberate' inaccuracy, with prompted disclosure, the penalty range is 35% to 70%, subject to reduction for the quality of disclosure, which was assessed as:

> '**Telling**: You have admitted the loss in Obus Plc is out of time however you are yet to acknowledge the inaccuracy in the loss claim in Data SMS therefore a full reduction cannot be given.
>
> **Helping**: You have given minimal help during the course of compliance check as there has been little in the way of active engagement. I cannot allow a full reduction as there has been little in the way of positive assistance.
>
> **Giving**: 2 formal notices have been issued and 1 initial penalty. I as the caseworker had to obtain some of the details myself as they were not given by you. You have failed to reply to my behaviours questions. I cannot allow a full reduction for these reasons.'

The reduction allowed for each aspect of disclosure was set at 25% for 'telling', 25% for 'helping', and 15% for 'giving us access to records'; a total of 65%.

30. Given the penalty range is set at 35% to 70%, the maximum reduction that can be allowed is therefore 35%, being the difference of the maximum 70% and the minimum 35%. The overall reduction allowed by Officer Shanks was 65%, and this was applied to the maximum reduction that could have been given of 35% to arrive at and overall reduction of 22.75%.

31. The penalty percentage was therefore set at 47.25%, being the difference of the maximum penalty of 70% and the overall reduction given of 22.75%.

32. The amount of penalty was calculated at 47.25% of the potential lost revenue of £99,096 to arrive at £46,822.86.

The closure notice for the 2009-10 enquiry

33. On 13 May 2015, a closure notice was issued under s 28A(1) and (2) TMA in relation to the enquiry of the SA return for 2009-10.

34. The closure notice, however, stated the amount of tax repayment before the amendments to the return as £17,823.56, which is £4.06 lower than the actual repayment credited to Mr Stanley's SA account.

35. Due to the discrepancy in the amount of repayment stated in the closure notice, the PLR was reduced accordingly by £4.06 to £99,087.40, and the penalty assessment was revised to £46,818.80.

Review of the penalty

5 36. On 7 May 2014, Mr Fava wrote to Officer Shanks in respect of the 'Penalty Explanation' letter. Two main points were raised in his representations.

37. First, Mr Fava explained that the behaviour leading the inclusion of the s 132 claims was not 'deliberate' in the following terms:

> 'We submitted a claim for the losses in writing back in January 2011
> 10 which was within time and had expected that claim to be valid.
>
> It was only on discussing the technical aspects with yourself at a later date that it was realised that the written claim was not effective. This was not a "deliberate" act, but a mistake and indeed the written claim was believed to be sufficient to claim the losses from the outset. The
> 15 late tax return included the losses because it was believed that the claim had been made in time.'

38. Secondly, Mr Fava contended that the PLR quantification failed to take account of the repayments from earlier years available to offset against the additional tax liability following the withdrawal of s 132 relief claims for 2009-10.

20 39. In a letter dated 14 November 2014, Mr Fava asserted that 'the actual tax loss was £930.22 to HMRC as there were tax repayments due to Mr Stanley from earlier years which resulted in the actual underpayment of tax being £930.22'.

Correspondence from previous enquiry into the 2006-07 return

40. HMRC's assessment of the behaviour leading to the inaccuracy made reference
25 to Mr Fava's letter of 16 September 2010. For completeness, it is necessary to refer to the contents of that letter, which was in relation to the enquiry into Mr Stanley's 2006-07 return. The issue for that enquiry would seem to concern the withdrawal of relief for Enterprise Investment Scheme (EIS) claimed for Obus plc and Data SMS, and the reason for the withdrawal was that both groups of shares had failed to meet
30 the qualifying holding period of three years by dint of the companies being liquidated.

41. The letter of 16 September 2010 is of significance in this appeal, not least since Mr Fava had stated in the letter that '*the Obus plc loss claim is out of date*', and on this admission HMRC have placed reliance that the inaccuracy in the 2009-10 return was therefore deliberate.

35 42. On 11 October 2010, Officer Keelty (who was in charge of the enquiry into the 2006-07 return) wrote in relation to Fava's letter of 16 September and HMRC's letter of 29 September (not included in the bundle) and advised Mr Fava as follows:

> 'I refer to your query regarding the loss relief. A claim under S132(1) ITA 2007 must be made on or before the first anniversary of the

> normal filing date for the year of the loss. Therefore it would appear that any claims for 2007-08 and earlier are out of date.'

43. On 25 January 2011, Mr Fava wrote to Officer Keelty; he referred to the 'several conversations which [had] followed' (presumably) HMRC's letter of 11 October 2010, and apologised for the considerable delay in putting the required information together.

44. The letter of 25 January 2011 is central to the appellant in this appeal, and its detailed contents are referred to later in the discussion part of the decision. The letter has been asserted by Mr Fava as the making of the s 132 claims and the timing of the letter was his reference for reckoning whether the claims were in time.

45. On 14 April 2011, Officer Keelty wrote in response to Mr Fava's January 2011 letter and HMRC's letter of 15 March 2011 (not included), stating the following:

> 'Given that your client is making a fresh claim that his shares became of negligible value I will need evidence to support of the amounts and dates invested, such as bank statements showing the withdrawals of money to invest in the companies, share purchase certificates and so on. …
>
> Please also provide any documentation you [sic] client received in respect of the shares having no value such as correspondence from the Liquidator including any Statement of Affairs and so on.
>
> I will then consider his claims under Section 24 TCGA 1992. If the conditions are met I will then review his claim to have the capital losses set against other income under Section 131 ITA 2007.'

46. Officer Keelty requested the information by 20 May 2011. It is not clear whether or when the requested information was provided.

47. The next record of communication on file is a letter dated 10 January 2012 by Officer Keelty, which referred to HMRC's letter of 26 October 2011 (not included) and 'the numerous telephone calls which have taken place over the course of the enquiry'.

48. Officer Keelty stated: 'In the absence of a reply from you my papers have been reviewed' and gave the conclusion that the EIS claims for Obus plc, Data SMS, and LB Holdings were disqualified for the three years from 2005-06 to 2007-08. The letter continued by advising that:

> '… the claims under S132(1) ITA 2007 are time barred as they were not made on or before the first anniversary of the normal Self Assessment filing date for the year of the loss.'

In the context of the letter, Officer Keelty would be referring to the claims under s 132(1) for all three groups of shares being time barred.

49. On 8 February 2012 Mr Fava returned Officer Keelty's call, and the log of the conversation stated the following:

> 'In respect of the claims under S132 being time-barred, his response was that because the enquiry window is still open does that not extend the time limit. I said I didn't think so but would confirm either way in writing.'

5 50. On 15 February 2012, Officer Keelty replied to Mr Fava's query in respect of whether the enquiry window extended the time limit. Having referred the query to a technical inspector, she was able to confirm: 'the fact that there is an open enquiry does not alter the fact that the claims under S132 are time-barred.'

Evidence at the hearing

10 *Mr Stanley's evidence*

51. Mr Stanley was the former executive director in several companies of the Tynefield Group, which is listed on the Alternative Investment Market ('AIM') and specialises in equipment and vehicles for aerial access, such as the 'cherry picker'. He told the Tribunal that he had built up the business from 1998 with only two employees 15 to the present concern which employs around 1,600 people. He retired from the board in 2013 and is now a full-time student in business research.

52. In respect of his EIS investments, Mr Stanley said he was motivated to support businesses in the Tyneside. By helping local enterprises in the North-East, it would promote economic growth in the region. He commented that he had not been 20 successful in identifying winners in his EIS investments.

53. As to how he dealt with his tax affairs, Mr Stanley advised that he would meet with Mr Fava two or three times a year; that he had a good working relationship with Mr Fava and trusted his advice; that he would update Mr Fava on matters that might be relevant, such as his substantial charitable gift aid donations in the year 2007-08; 25 that documents such as the EIS certificates were passed on to Mr Fava after the investment decisions were made. Mr Stanley referred to Mr Fava's advice as moving on from 'estate building' to 'estate planning' (ie inheritance tax planning).

54. Mr Stanley said he was not aware of the specific details of the loss claims in his 2009-10 SA return; that he first became aware of the issue when he received 'the tax 30 bill of £99,000'; that he had no understanding of how the tax liability or penalty arose.

Mr Fava's evidence

55. Mr Fava is a chartered accountant with ICAEW, and has been in practice since he qualified in 1997. When he was employed by one of the Big-Four accountancy firms, he looked after Mr Stanley's tax affairs as a client. In 2002, Mr Fava set up in 35 practice as Hindsight, and Mr Stanley followed him to become a client of Hindsight. In all, Mr Fava has been looking after Mr Stanley's tax affairs for 17 years.

56. Speaking of the enquiry into the 2007-08 return, Mr Fava said the key issue was the massive gift aid relief claimed, then it moved on to the withdrawal of EIS relief

claims. He said that Mr Stanley's tax affairs could be complex because of the many investments made; that he was 'constantly fact finding'; 'constantly trying to find out information related to past events and of their future significance'. For example, Mr Fava mentioned that he could be receiving the EIS certificates of the companies from Mr Stanley many months after the investments were made, when the companies were in fact no longer trading, or had been struck off.

57. With regard to the s 132 loss relief claims, Mr Fava said: 'We believe we were in time to make the claim because of the actual timing of event, that we were outside the normal event because we were within the enquiry to clear up everything.'

58. In cross-examination, Mr Fava was asked why he should think that an enquiry into 2007-08 would lead to an extension of time limits for 2009-10. Mr Fava replied that 'because the conversation about the enquiry was open', he believed that 'HMRC had a blanket enquiry over all the years' due to the ongoing enquiry into 2007-08.

59. Furthermore, Mr Fava repeatedly maintained that he believed his letter of 25 January 2011 with the tabular schedule attached meant that the claims were made in writing *before* the due date of the 2009-10 return on 31 January 2011, and therefore within the time limit, being the first anniversary of the due date.

60. The Tribunal asked how Mr Fava came to understand that a claim in writing could be effective for time limit purposes as against HMRC's view that s 42(2) TMA prevails following the introduction of the Self-Assessment regime in 1992. Mr Fava's reply was that historically written claims were allowed; that while he was a trainee accountant when Self-Assessment was introduced, he had worked before then under his father who was an accountant, and knew from that experience that claims were routinely made in writing for the purposes of reckoning time limits.

61. The Tribunal asked Mr Fava if his letter of 25 January 2011 was the making of the claims, what in his view was the purpose of including the claims into the 2009-10 SA return. Mr Fava replied that the letter of 25 January 2011was the *making* of the claims, and the inclusion of the claims in the return was to *record* those claims that had been made in writing.

62. Mr Fava also referred to the case of *De Silva* (ie *R (on the application of De Silva and anor) v Revenue and Customs Comrs* [2016] EWCA Civ 40) as authority for the proposition that if HMRC did not make a challenge of the written claims, then it could be taken as an acceptance of the claims. Since HMRC did not challenge the claims made in writing by letter dated 25 January 2011, Mr Fava inferred that the claims were accepted by HMRC for time limit purposes.

63. In relation to the submission process of the 2009-10 return, Mr Fava informed the Tribunal that the return would have been prepared long before January 2011; that the submission was held back awaiting various outstanding information to verify entries in the return; that the claims included in the submitted tax return *would have been input much earlier than the actual date of submission in February 2012*; that having missed the filing due date of 31 January 2011, it would have been submitted as

a batch with other tax returns to catch the cut-off due date of 2 February 2012; that there was some exceptional concession in 2012 whereby HMRC extended the due date for filing to 2 February 2012 due to some IT issues. Mr Fava also explained that the submission date was eventually precipitated by the fact that any further delay in submitting the 2009-10 return would mean the return could no longer be submitted online; that there was only the 12-month window to submit a late return online after its original filing date; that the inclusion of the s 132 claims in the tax return was like a kind of measure to act in the best interests of his client.

64. The Tribunal asked why there had been a lack of co-operation in responding to information requests from HMRC. Mr Fava apologised for the oversight on the numerous occasions and explained that he was operating his consultancy practice with two centres of activity; that the majority of his clients are based in London; that he was working in London for two or three days a week to the extent that he started to rent in London from 2010 as it was cheaper than staying in a hotel. Due to his mode of operation around that time being based in two places, he was unable to respond to HMRC's correspondence with diligence. He informed the Tribunal that in October 2012, he eventually moved to live in London because of his client base, which consists of some 25 families in owner-managed businesses with a total of around 200 individuals. Since his move to London, Mr Fava now 'visits' the office in the north when he would be staying with his son in Hexham.

Appellant's grounds of appeal

65. On the Notice of Appeal, Mr Stanley did not state his grounds of appeal other than to relate the fact that the appeal was made on time but not received by HMRC. For grounds of appeal, the reasons given in Mr Fava's letters to HMRC of 7 May and 14 November of 2014 (related earlier under *Review of the penalty*) are taken as the grounds of appeal.

66. Mr Fava concluded the 14 November 2014 letter by stating the following:

> 'A claim was made with regard to the S132(1) ITA 2007 losses which at the time was believed to have been made correctly, firstly in writing and then through the tax return. We have accepted that the claim was not acceptable and is not to be given, however, to then be given a penalty of £46,822.86 and charged interest of £5,055.68 appears to be out of all proportion with an outstanding tax liability of £930.22.'

67. These grounds, stated in the May and November letters of 2014, and reiterated by Mr Fava as representations at the hearing, can be summarised as:

> (1) The inaccuracy was caused by the mistaken belief that the claims made in writing in January 2011 were effective and made within the time limits.
>
> (2) The quantification of potential lost revenue should be based on the net outstanding liability of £930.22 (after offset of overpayments).
>
> (3) The penalty was disproportionate to the outstanding liability, which has interest charge imposed already.

HMRC's case

68. On behalf of the respondents, Mr Boal submitted that:

(1) An inaccurate return was submitted for 2009-10 due to the invalid loss relief claims included.

(2) The appellant was aware of the inaccurate 'loss' position before submission of the return as he had been issued with a copy of HMRC's letter of 10 January 2012.

(3) HMRC consider it was correct to consider such action as being 'deliberate' for the purposes of Sch 24 penalty charges.

(4) The disclosure of the inaccuracy was prompted.

(5) The correct PLR in accordance with para 5 Sch 24 is £99,087.40.

(6) There are no legislative provisions to use unrelated and unused overpayments to reduce PLR.

(7) There are no special circumstances which warrant a special reduction.

(8) The Sch 24 penalty cannot be suspended.

Issues for determination

69. In an appeal against a penalty, the onus of proof is on HMRC to establish that a penalty may, on the face of it, be imposed. The onus then shifts to the appellant to satisfy the Tribunal that he is entitled to any defence which may be applicable; (*HMRC v Khawaja* [2008] EWHC 1687 (Ch) at [25] and [29]).

70. For a Sch 24 penalty to be imposed, HMRC have to discharge the burden that the two conditions under para 1 of Sch 24 are met. Condition 1 refers to the document containing an inaccuracy which amounts to, or leads to, and in this case, 'a false or inflated statement of a loss'. Condition 2 refers to the inaccuracy being 'careless (within the meaning of paragraph 3) or deliberate on P's part'.

71. Paragraph 3(1)(a) of Sch 24 states that an inaccuracy is 'careless' if it is due to failure by P to take reasonable care.

72. The specific provisions under para 18 of Sch 24 in respect of 'agency' are directly relevant in this case. Paragraph 18(3) provides the taxpayer with a defence if the inaccuracy is found to be *careless*, whereby the taxpayer is not liable to a penalty in respect of anything done or omitted by his agent if he satisfies HMRC, or on an appeal, the Tribunal that he took *reasonable care* to avoid inaccuracy.

73. The issues for determination in this appeal are therefore the following:

Issue 1: Was Mr Stanley's 2009-10 return inaccurate due to the loss relief claims being included?

Issue 2: If so, was the inaccuracy 'deliberate' or 'careless' on Mr Stanley's part?

Issue 3: If the inaccuracy was 'careless', did Mr Stanley take 'reasonable care to avoid inaccuracy' as provided by para 18 Sch 24?

Issue 1: Was the return inaccurate due to the loss relief claims being included?

The two issues concerning the validity of the claims

74. HMRC's position is that the 2009-10 return was inaccurate by the inclusion of the loss relief claims for Obus plc and Data SMS. HMRC's submissions were based on the reasons given by Officer Shanks in her letters of 29 July 2013 and 9 October 2013. Two principal issues were raised why the return was rendered inaccurate by the inclusion of these claims.

(1) **The time-bar issue** – in relation to Obus plc, the date of liquidation given was 21 December 2007 in Mr Fava's letter of 16 September 2010. The year of loss was reckoned to be 2007-08, and the anniversary of the return filing date for 2007-08 for a s 131 ITA claim would have been 31 January 2010. The relief claim was considered time-barred under s 131(4) ITA by the time of the September 2010 letter (§13).

(2) **The formality issue** – in relation to Data SMS, the date of loss as stated in the schedule of loss claim was 30 June 2009. The claim by letter of 25 January 2011 was rejected by Officer Shanks on the basis that the claim did not conform to s 42(2) TMA. HMRC averred that the reckoning of the time limit for the s 131 claim could not be referential to the date of the January 2011 letter, but to the actual date the 2009-10 return was submitted. The 2009-10 return was filed late on 2 February 2012. The time limit for the s 131 claim was 31 January 2012, and had lapsed by two days when the return was received, making the Data SMS claim also out of time, and that gave rise to another inaccuracy in the return. (see§16).

75. The appellant has not sought to argue that the return was accurate. The hearing proceeded on the basis that the return was inaccurate by the inclusion of the claims, and the evidence focussed on establishing whether the behaviour was 'deliberate'. Neither party made any submissions on the law concerning the time-bar issue or the formality issue.

76. As the trier of facts, we need to find whether the 2009-10 return was inaccurate by the very inclusion of these loss relief claims under s 131 ITA. Until and unless we make a finding of fact in this regard, we are unable to determine if condition 1 under para 1 of Sch 24 is met for the imposition of the penalty. Furthermore, in Officer Shanks' assessment of the behaviour leading to the inaccuracy, the manner in which the supposed inaccuracy arose was the basis for categorising the behaviour as 'deliberate' for the purpose of condition 2 in HMRC's penalty assessment.

77. For these reasons, we interpose, by addressing the two issues raised in Officer Shanks' invalidation of the loss relief claims. The two issues are inter-related, and indeed the formality issue directly impinges on the reckoning of the time limit for a particular claim. In this instant case, the time-bar issue ultimately concerns when the

loss element of the claim arose under s 24 TCGA, while the formality issue concerns whether a s 131 ITA share loss relief claim could have been made outside a return. It is on these premises we address the two issues.

The two elements in a loss relief claim

5 78. Any loss relief claim has two principal elements – the *loss* and the *relief* – and each element has its own provisions that govern the time limit and the formality requirement for the claim.

79. A claim of loss under s 24 TCGA is separate and distinct from a claim of relief under ss 131-132 ITA. Not only is the nature of the two elements of claim different, 10 but the tax year in relation to each element can also be different. A claim of loss can be in relation to one tax year, while the claim for relief in relation to the loss can often be sought for an earlier year.

80. In the instant appeal, the capital loss claims were for the loss of value of the shares under s 24 of TCGA, also known as negligible value claims ('NVCs'). Whilst a 15 s 24 TCGA loss can be claimed on types of assets other than shares, it is to be noted that *only* shares in qualifying trading companies or with EIS relief attributable to them are eligible for s 131 ITA relief.

81. The two elements of a claim under s 131 ITA are set out under sub-s 131(1):

> **131(1)** An individual is eligible for relief under this Chapter ("share
> 20 loss relief") if –
>
> (a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year ("**the year of the loss**"), and
>
> (b) the shares are qualifying shares. (emphasis original)

25 The eligibility of a s 131 claim is therefore predicated on two facts: (a) that there is an allowable loss on the *disposal* of the shares; and (b) the shares are qualifying shares.

82. The qualifying conditions for the shares are set out under sub-s 131(2).

> **131(2)** Shares are qualifying shares for the purposes of this Chapter if–
>
> (a) EIS relief is attributable to them, or
>
> 30 (b) if EIS relief is not attributable to them, they are shares in a qualifying trading company which have been subscribed for by the individual.

83. The shares in Obus plc and Data SMS have similar history as regards claims:

(1) The shares initially qualified for EIS income tax relief.

35 (2) Both companies went into liquidation within the requisite qualifying period of 3 years for the EIS relief, and the EIS relief claims were withdrawn. (The withdrawal of these EIS relief claims against income was a subject matter of the enquiry into the year of assessment 2007-08.)

(3) These shares, having failed to qualify for EIS relief, were then claimed for s 131 relief.

84. It is common ground that the shares of Obus plc and Data SMS meet the qualifying conditions under sub-s 131(2).

5 85. Sub-section 131(3) sets out the qualifying conditions for the loss element of the claim as follows:

> **131(3)** Subsection (1) applies *only if* the *disposal* of the shares is –
>
> (a) by way of a bargain made at arm's length,
>
> (b) by way of a distribution in the course of dissolving or winding up
> 10 the company,
>
> (c) a disposal within section 24(1) of TCGA 1992 (entire loss, destruction dissipation or extinction of asset),
>
> (d) ***a deemed disposal under section 24(2)*** of that Act (claim that value of the asset has become negligible). (emphasis added)

15 86. It is also common ground that the loss element of the s 131 claims in Mr Stanley's case was supposed to have been incurred under s 24(2) due to the shares becoming of negligible value. This means for the purposes of establishing whether the loss element of the two s 131 claims meets the qualifying conditions, the specific provision under sub-s 131(3)(d) highlighted above is the only relevant one.

20 87. Section 132 of ITA then provides for *entitlement* to a claim under s 131. Sub-section 132(1) provides for the relief against income: (a) for the year of the loss, (b) for the previous year, or (c) for both years.

88. Subsections 132(2) and 132(3) provide that the claim must specify the year for which a deduction is to be made first; otherwise the claim must specify either the year
25 of the loss or the previous tax year.

89. Subsection 132(4) provides for the time limit of a s 131 claim: 'The claim must be made on or before the first anniversary of the normal self-assessment filing date for the year of loss.'

90. It is obvious that all the provisions under s 132 of ITA are referential to 'the
30 year of loss'. It is for good reasons that '**the year of loss**' is emphasised in bold under sub-s 131(1) in the legislation. Essentially, the time-bar issue can only be addressed after establishing the relevant year of loss as defined under sub-s 131(1).

91. Although the parties have variously referred to the disputed loss relief claims as s 131 or s 132(2) claims, our analysis focuses on the validity of the s 131 aspect of the
35 claim: the eligibility criteria have to be established first before any reckoning of the time limit for the claims under s 132.

<u>The time-bar issue</u>

The reckoning of the year of loss for a s 24 TCGA claim

92. Subsection s 131(1) of ITA states the loss element of a share loss relief claim to be *an allowable loss* for capital gains tax purposes on the *disposal* of any shares in the year of the loss. For there to be an allowable loss, there must be a disposal.

93. The 'year of loss' for the purposes of s 131 of ITA ultimately is a reference to the timing of loss as determined under s 24 TCGA.

94. A valid s 24 TCGA claim is subject to qualifying conditions, one of which is share ownership contemporaneous with the timing of the NVC, as illustrated by the recent decision in *Richard Steven Ward v HMRC* [2017] UKFTT 0456 (TC) ('*Ward*').

95. The central issue in *Ward* is whether the taxpayer had made a valid claim for NVC immediately prior to the disposal of his shares when he was still the owner of the shares. Condition A for a negligible value claim stipulates that 'the asset has become of negligible value *while owned by P*' (s 24(1B) TCGA).

96. The taxpayer in *Ward* sold his shares for negligible value in May 2011 (tax year 2011-12). He purported to have made a s 24 TCGA claim *before* the disposal of the shares by logging into his account on HMRC's portal. He claimed that he provided the figures necessary to submit 'a tax postponement application' (as referred to in the decision); that HMRC must have registered his claim in order to deal with the postponement application; and that the repayment was processed in consequence of his claim being valid.

97. The 'rush' in Mr Ward's case to bring a loss claim under s 24 TCGA was primarily to take advantage of being able to convert the capital loss into an income tax relief under s 131 ITA. The actual disposal of Mr Ward's shares would otherwise have crystallised a capital loss relievable against capital gains and not income.

A deemed disposal created by virtue of a s 24 TCGA claim in a case of liquidation

98. In *Ward*, the taxpayer managed to sell his shares, and HMRC accepted the term 'negligible' to be taken to mean 'worth next to nothing', being practically worthless as distinct from being actually worthless. Unlike the shares in *Ward*, there was no actual disposal of Obus plc or Data SMS for Mr Stanley's s 24 TCGA claims to fall within the meaning of s 131(3)(a) of ITA: 'by way of a bargain made at arm's length'.

99. Obus plc and Data SMS became of negligible value on the liquidation of the companies. How is the year of loss to be reckoned for s 24 TCGA purposes in a case of negligible value due to liquidation or insolvency?

100. In *Marks v McNally (Inspector of Taxes)* [2004] STC (SCD) 503 ('*Marks v McNally*'), the taxpayer claimed share loss relief under s 574(1) of the Income and Corporation Taxes Act 1988 ('ICTA'), which was the predecessor provision of sub-s

131(1) of ITA. The shares were in a company called Gemforce, which went into liquidation on 1 December 1994.

101. Since the shares represented Gemforce's only asset, and there had been no actual disposal of the shares by way of sale or gift during the year to 5 April 1995, the Revenue submitted at [22] that:

> '… the only way there could have been a disposal would have been that a deemed disposal had occurred. This could only have arisen as a result of a s 24(2) claim. There was no dispute that the shares in Gemforce were of negligible value on 1 December 1994 …. If shares became of negligible value, there could be ***no deemed disposal without a claim***… the wording of s 24(2) … required the owner of an asset to make a claim to the effect that the value of that asset had become negligible. In other words, it was a claim which created the deemed disposal.' (emphasis added)

102. The taxpayer in *Marks v McNally* argued that a s 24(2) claim was not required as a condition precedent to the s 574 claim. The Special Commissioners, agreeing with the Revenue and rejecting the taxpayer's argument, concluded at [38] as follows:

> 'The first issue, given the acceptance that there was a proper and timely claim under s 574, is whether on the proper construction of that section, it was necessary as a condition precedent to any claim under the section that a claim had first been made by the claimant under s 24(2) of the 1992 Act. The section [ie s 574 ICTA] refers to "***an allowable loss*** (for capital gains tax purposes)". In order to establish an allowable loss, … there must either be a disposal or a deemed disposal. In the absence of anything amounting to an actual disposal during 1994-95, the Appellant needs to show a deemed disposal in order to crystallise the loss incurred. In the circumstances, the only way of doing so is by virtue of a s 24(2) claim.' (emphasis added)

103. The wording of sub-s 131(1)(a) of ITA similarly refers to 'an allowable loss for capital gains tax purposes', and continues by qualifying this allowable loss as 'on the *disposal* of any shares in any tax year ("the year of loss")'. Where there is no actual disposal, a deemed disposal will have to take place.

104. It is worth reiterating the statutory wording of sub-s 131(3)(d), which refers to '*a deemed disposal under section 24(2) of that Act*'.

105. In our judgment, it was necessary as a condition precedent to any claim under s 131(1) share loss relief that Mr Stanley crystallised an allowable loss by a deemed disposal, since there was no actual disposal of the shares in his case. Given the circumstances, we agree with *Marks v McNally* that the only way of crystallising an allowable loss through a deemed disposal was by way of a s 24(2) TCGA claim.

The reckoning of the timing of a deemed disposal

106. The statutory wording of s 24(2) of TCGA gives clear indication on how the timing of a deemed disposal is to be reckoned.

> ‘**24(2)** Where a negligible value claim is made –
>
> (a) this Act shall apply as if the claimant had sold, and immediately acquired, the asset ***at the time of the claim*** or (subject to paragraphs (b) and (c) below) at any earlier time specified in the claim, for a consideration of an amount equal to the value specified in the claim.’ (emphasis added)

107. The timing of the deemed disposal is therefore to be taken as ‘at the time of the claim’, unless an earlier time has been specified in the claim.

108. If a time earlier than the time of the claim is specified, s 24(2)(b) provides for the conditions to be met for an earlier time to be reckoned as the time of the deemed disposal. These conditions pertain to ownership of the asset, of the asset becoming of negligible value, and of restricting the retrospective dating of the loss arising to a two-year window period, which is slightly different for a corporate and a non-corporate taxpayer. The option of making a s 24 TCGA claim for the loss to be treated as arising earlier than the time of the claim was available to Mr Stanley, but that was not the course of action taken. We limit our discussion to the application of s 24(2)(a) only.

The criteria of specificity in making a s 24 TCGA claim?

109. Turning to the facts of the case, was there a valid claim for Obus plc (and for that matter, Data SMS as well) under s 24(2) TCGA to trigger an allowable loss by way of a deemed disposal to meet the condition precedent to a s 131 claim?

110. The substantive aspect of making a valid NVC was discussed in *Marks v McNally*, wherein the Revenue submitted at [26] that:

> ‘To succeed, [a s 24 TCGA claim] would have to point unambiguously to what it was claiming. If it was a claim, how could the Revenue identify it as such, or investigate or refuse it?’

111. The Special Commissioners determining the appeal expressly agreed with the Revenue’s submission, and concluded at [39] that ‘in order for the inspector to consider this question, it would have been necessary to direct his attention to it, and [the purported claim] to point unambiguously to what the Appellant was claiming’.

112. The claim in *Marks v McNally* arose in 1994-95 before the introduction of the self-assessment regime, when it was necessary for the inspector to be satisfied that the value of the asset had become negligible before the claim would be processed.

113. One aspect of such specificity is that the nature of the claim must be unambiguous; in other words, the precise statutory provision under which the claim is brought. Another aspect is the quantification of the claim. We agree with the observation made in *Michael E Robins v HMRC* [2013] UKFTT 514 (TC) at [9]:

> ‘The legislation is quite specific in requiring claims to be quantified and, as a matter of the normal use of language, we do not see that “quantified” can be read as meaning “capable of being quantified”. In this case, it is true that the calculation needed was easy and obvious, but it may not always be so in the case of taxpayers whose affairs are

> not as straightforward as Mr Robin's are, and the legislation is in terms which require certainty so that it can [be] ascertained without difficulty and debate what the taxpayer's entitlement is.'

114. Certainty is required in the making of a claim, so that both the nature and the quantum of the claim can be readily ascertained. In the case of *Ward*, which was decided in the taxpayer's favour that he had managed to make a valid NVC, and the conclusion to that effect is at [42]:

> '… we accept that immediately prior to that [Mr Ward] made a NVC claim, by way of an online request to reduce payments on account[1] saying that "The Tax Allowances and reliefs have gone up". He did not specifically make reference to a NVC, but it was clear that he was referring to his share loss relief claim and he provided the figures in his postponement application. The NVC was therefore quantified.'

115. It seems to us there is a lack of specificity[2] in Mr Ward's claim, see [6] of the reported facts; he merely stated 'the tax allowances and reliefs have gone up' without specifically referring to making an NVC. Secondly, in terms of quantification, Mr Ward's application to reduce the payments on account is a quantification in tax terms, and does not equate to quantifying the related loss claim that may have given rise to the reduction in tax liability; he did not include 'calculations or supporting evidence to quantify the claim'. With respect, we do not agree that Mr Ward's application for a reduction in his payment on account can be construed as making an effective and valid claim for capital loss under s 24 TCGA.

116. Turning to the facts of the present case, had there been a claim under s 24 TCGA that met the criteria of specificity to be valid?

117. Officer Keelty's reply of 14 April 2011 was to Mr Fava's 25 January 2011 letter, which to some extent would seem to be acknowledging the lodging of a claim under s 24 TCGA: 'Given that your client is making a fresh claim that his shares became of negligible value', and the letter continued by listing the many details required to make a valid NVC.

118. Incidentally, Officer Keelty's letter (quoted at §45) reinforces the conclusion in *Marks v McNally* on the specificity requirements for an NVC under s 24 TCGA to be valid. The criteria for specificity of a claim are not dispensed with under self-assessment therefore, even when it is possible for a similar claim to be made simply

---

[1] 'Payments on account' is referred to at [42] while elsewhere in the decision, the reference is to a 'postponement application lodged on 12 May 2011'. Given that a postponement application for a sum of disputed tax only applies in the context of an appeal having been lodged, we infer that Mr Wad had made (on 12 May 2011) a reduction for his second payment on account for the year 2010-11, which would be due for payment on 31 July 2011.

[2] The formality of a stand-alone claim is governed by the provisions under Sch 1A to TMA (see discussion below). Subparagraph 2(5) of Sch 1A provides for a set of criteria for specificity in relation to a stand-alone claim: (a) a statement of the amount of tax required to be discharged or repaid; (b) such information as reasonably required for determining whether the claim is correct; (c) the delivery of accounts, statements, documents relation to information contained in the claim, etc.

by inclusion in the return, and for such a claim to have been processed before an enquiry is opened (as in *Ward*). Such claims still require to be substantiated by details such as those required by Officer Keelty in her April 2011 letter.

119. From Officer Keelty's letter of 10 January 2012, which referred to 'the absence of a reply from [Mr Fava]', we infer that the request for substantive details for the NVCs had not been responded to. Consequently, we conclude that the NVCs for any of the shares had not been validated by HMRC.

The January 2011 letter in the context of the time-bar issue

120. Given that the NVCs for the relevant shares had not been validated by HMRC, how was the 25 January 2011 to be construed in the context of the time-bar issue?

121. The supposed inaccuracy concerns the reckoning of the time limits for the loss relief claims for Obus and Data SMS under s 132(4) ITA, which provides that the claim must be made on or before the *first anniversary* of the normal self-assessment date for the *year of loss*'.

122. Mr Fava intended to make the s 131 claims for Mr Stanley by his letter of 25 January 2011, which introduced the claims as follows:

> 'Please accept this letter as a claim for losses incurred by Mr Stanley with regard to his investments in Obus Plc, Data SMS Limited and LB Holdings Limited under S 131(1) ITA 2007 as shown on the attached schedule.'

123. The attached schedule was headed '*Losses claimed under S131(1) ITA 2007*' and was in tabular format with five columns as follows:

Company	**Shareholding**	**Amount**	**Date loss claimed**	**Relief claimed in**
Obus plc	2,791,805 ord 1 pence	135,000.00	10.04.09	2008/09
Data SMS Ltd	500,000 ord 1 pence	50,000.00	30.06.09	2009/10
	775,000 ord 1 pence	77,500.00	30.06.09	2009/10

The table also included LB Holdings Ltd for a claim in 2007/08, which does not concern this appeal.

124. The letter of 25 January 2011 referred to the withdrawal of EIS relief claim:

> '… as discussed in our earlier letter of 16 September 2010 we wish to withdraw the claim for EIS on the Obus plc and Data SMS Limited shares on the basis that the shares did not qualify for EIS income tax relief as they did not trade for the required three years after the investments were made.'

125. The 16 September 2010 letter was in respect of the disqualification of the EIS relief, and Mr Fava stated: 'I have now been informed of the following', and

continued by itemising the EIS shares that had been disqualified: Obus Plc, Data SMS and LB Holdings.

126. The details given in the September 2011 letter for each group of the shares pertain to the dates and sums of investment, and the dates the companies went into liquidation or became insolvent:

> (1) That according to Companies House records, Obus plc went into liquidation on *21 December 2007*;
>
> (2) Data SMS went into liquidation in *June* 2009; and
>
> (3) LB Holdings became insolvent in March 2009.

127. In relation to these shares, Mr Fava then stated:

> 'None of these losses have been claimed to date and therefore, the Obus plc *loss claim is out of date*. We will however, issue a claim with regard to the Data SMS Limited and LB Holdings Ltd losses under s 131(1) ITA 2007, and carry these back to 2007/08 with regard to L B Holdings Ltd and 2008/09 with regard to Data SMS Ltd.' (emphasis added)

128. The statement in the September 2010 letter – 'the Obus plc loss claim is out of date' – has been given much significance in Officer Shanks' assessment of the return inaccuracy being deliberate.

129. Given the context, what did Mr Fava mean by 'the Obus plc loss claim is out of date'? From Mr Fava's statement of intention: 'We will … issue a claim' for Data SMS and LB Holdings losses under s 131(1) of ITA, it is reasonable to infer that Mr Fava meant that a s 131(1) ITA claim for Obus plc was out of date. By that statement, we conclude that Mr Fava had therefore ruled out the entitlement of the loss relief claim for Obus by virtue of it being time-barred under s 132(4) of ITA.

130. The letter of 25 January 2011 was then Mr Fava's attempt to make good the intention intimated in his September 2010 letter to issue the s 131(1) loss relief claims for Data SMS, and LB Holdings. However, Obus plc was also included in this written claim by letter, and the tabular schedule attached to the claim listed 'the date of loss' for Obus plc as *10 April 2009*.

131. The date of loss (10 April 2009) for Obus plc in the January 2011 schedule of claim differed from the date of liquidation (27 December 2007) for Obus plc stated in the 16 September 2010 letter.

132. In September 2010, when Mr Fava stated that 'the Obus plc claim is out of date', he was probably using the date of liquidation of 27 December 2007 for reckoning the time limit for Obus plc.

133. For whatever reasons, in the January 2011 letter, Mr Fava had revised the date of loss for Obus plc to 10 April 2009. We infer that due to the date revision, Mr Fava

then reckoned the loss relief claim for Obus plc as falling into the year 2009-10. Consequently, the Obus plc claim was included in the return for 2009-10.

134. The question was not put to Mr Fava on what basis he had revised the date of loss for Obus plc to 10 April 2009 in his letter of claim dated 25 January 2011. In any event, and for reasons stated below, we are able to reach our conclusion on the time-bar issue without ascertaining the basis for the revised date of loss.

Was the condition precedent met for the s 131 claim?

135. The January 2011 letter, as Mr Fava asserted, was a claim for relief under s 131 ITA. On the face of it, the January 2011 letter did not contain any claim under s 24(2) TCGA. The foregoing correspondence, the express wording of the letter, and the accompanying tabular schedule of claims all point towards the claims were in relation to s 131(1) of ITA only.

136. The dates of loss stated in the tabular schedule accompanying the January 2011 letter would seem to be the dates the companies (except for Obus plc) went into liquidation. Applying *Marks v McNally*, the fact that the companies went into liquidation was not sufficient as a condition precedent to the s 131 claims. A claim for negligible value under s 24(2) TCGA should have preceded the corresponding s 131(1) claim for the relevant shares. The s 24(2) claim is necessary as a condition precedent to trigger the deemed disposal that would then give rise to an allowable loss for the purposes of the s 131 ITA claims.

137. The statutory wording does not fix the date of loss to the date of liquidation; instead it fixes the *date of the claim* as the *date of loss* for a deemed disposal triggered by a s 24(2) TCGA claim. The date of liquidation of a company does not translate automatically to be the date of loss for the purposes of a s 24(2) TCGA claim. The date a company goes into liquidation is relevant only insofar as it provides a convenient proof of negligible value, but the legislation does not state the date of liquidation is to be taken as the date of the deemed disposal.

138. For completeness, we have also considered whether Mr Fava's letter of 16 September 2010 constituted a loss claim under s 24(2) TCGA. The letter focused on the withdrawal of EIS relief and specifically stated that: 'None of these losses have been claimed to date'. Nowhere in the September 2010 letter did Mr Fava make any reference to making a claim under s 24(2) of TCGA. For these reasons, the September 2010 letter, while preceding the January 2011 letter, did not remedy the defect in the s 131 claims for failing to meet the condition precedent by triggering a deemed disposal with a valid claim under s 24(2) TCGA.

Conclusion on the time-bar issue

139. We conclude that the claim for relief for Obus plc under s 131 ITA was invalid because it failed to meet the condition precedent required in triggering an allowable loss by deemed disposal in making a negligible value claim under s 24(2) TCGA.

140. The date of a valid s 24 TCGA claim would have been the date of the deemed disposal for the reckoning of the time limit for the purposes of a s 131(1) ITA claim.

141. The date of the deemed disposal would have been the date that would establish 'the year of loss' for reckoning the time limit referential to s 132(4) ITA. Since there was no date of claim that can be established for a s 24 TCGA claim, there was no year of loss to determine the time-bar issue.

142. It follows that the Obus plc claim for s 131 relief could not have been time-barred, since the s 24 TCGA claim simply had not been made in the first place to allow any reckoning of the time limit for the s 131 ITA claim. The same conclusion applies to the Data SMS claim.

143. Both claims for share loss relief under s 131 of ITA in Mr Stanley's 2009-10 return were therefore deficient, not because they were time-barred, but because they failed to meet the condition precedent with a valid loss claim under s 24 of TCGA.

144. We find as a fact that the 2009-10 return was inaccurate by the inclusion of these deficient claims.

The Formality Issue

145. Given our conclusion on the time-bar issue, it is not necessary to address the formality issue to find if the 2009-10 return was inaccurate. However, the formality issue has implications, in our view, on the categorisation of the behaviour causing the inaccuracy. Furthermore, the seeming divergence and inconsistency in the interpretation and application of the law, by practitioners and the tax authority, as respects the formality requirements for loss relief claims such as the present ones, is invidious to the effective administration of the tax system and justice. For these reasons, we have addressed the formality issue in some length, not only for the purpose of assessing the category of behaviour in the instant appeal, but with the hope that this may contribute to a better understanding of this area of law.

The formality requirements for making a negligible value claim

146. A central tenor in HMRC's position as respects the making of a claim would seem to be that s 42(2) of TMA prevails, and a claim needs to (or can only) be made by being included in the return. Whilst this submission is expressed in relation to the s 131 claim for Data SMS in the current appeal, there is a hue of generality in this position which merits some consideration, as the implications of such a proposition extend beyond the context of s 131 claims.

147. Using the situation in *Ward* as an example, the proposition that a claim must be made by inclusion in a return cannot be true. The context in *Ward* is the making of an NVC; HMRC averred that the NVC did not meet the qualifying condition because the claim was made in the taxpayer's SA return for the year 2010-11, submitted on 27 January 2012, when the taxpayer no longer held the shares (see [32] of *Ward*).

148. The fact pattern in *Ward* highlights the necessity to provide for an alternative procedure to make an NVC other than by inclusion in the return for the year in which the loss was incurred. If Mr Ward wanted to secure his NVC, he had to make a stand-alone claim *in advance of* the disposal in May 2011. Otherwise, he would have lost his eligibility as the owner of the shares for s 24 TCGA purposes if he waited until he filed the *2011-12* return[3], which was not due until 31 January 2013. The earliest time he could have filed the 2011-12 return would have been in April 2012, nearly a whole year after the disposal.

The making and the recording of a loss relief claim

149. Mr Fava asserted that he had believed that the s 131 claims were made in writing by his letter dated 25 January 2011, and were within the time limit for the purposes of sub-s 132(4) ITA; that the making of the claim was believed to be in time; that the SA return submitted on 2 February 2012 was merely to record the claim that had been made a year earlier.

150. The Tribunal notes the statutory wording in paras 7(1) and 7(2) of Sch 24 as respects the PLR for 'losses', which refers to an inaccuracy where 'a loss is wrongly *recorded* for purposes of direct tax'. The statutory wording in Sch 24, so far as losses are concerned, seems to distinguish the making of a loss claim from the recording of a loss. Mr Fava's belief that the making and the recording of the loss claims are different processes is not without some statutory basis.

151. Officer Shanks stated that the relief claims could only be made by inclusion in the return by the provision of s 42(2) TMA: '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'.

152. The requirement under s 42(2) TMA, upon which HMRC's case is predicated, has two important exceptions under ss 42(11) and 42(11A). These are 'otherwise' provisions relevant to Mr Stanley's loss relief claims for our consideration.

Section 42 TMA requirements

153. Section 132(1) of ITA provides that a taxpayer 'may make a claim' for a capital loss to be relieved against his net income arising in the year of the loss, or in the previous tax year, or both; ITA does not specify how such a claim is to be made.

[3] In *Ward*, the disposal was on 12 May 2011, which means the loss was incurred in the year 2011-12 (the year of loss). The taxpayer claimed s 131 ITA relief, and to have the loss relief carried back under s 132 ITA against the income in 2010-11. It would seem that the 2010-11 return was amended to include the loss relief claim. The inclusion of the claim in the 2010-11 return is contrary to the provisions under Schedule 1B TMA. The claim for an NVC (and s 131 ITA) should have been included in the return for *the year of loss*, that is in the return for 2011-12, and not to be included in 2010-11 by amending the return for 2010-11. The Schedule 1B provisions specifically prohibit such amendments to the earlier year's return, see discussion below on *Cotter* and *Derry*.

154. The procedure for making such a claim is provided by TMA, and s 42(1) provides that where 'any provision of the Taxes Acts provides for relief to be given' on the making of a claim, this section shall, *unless otherwise provided*, have effect in relation to the claim' (italics added).

5 155. The meaning of 'the Taxes Acts' includes 'the Income Tax Acts' (see s 118 of TMA in conjunction with the Interpretation Act 1978). Section 132 of ITA falls under Chapter 6 of Pt 4 of ITA, which leaves open how a relevant claim is to be made, but do not 'otherwise provide'. [4]

156. Within s 42 of TMA, the exceptions to s 42(2) requirements are contained in ss 10 42(11) and 42(11A). The two exceptions under ss 42(11) and 42(11A) take the formality requirements to Sch 1A and Sch 1B to TMA respectively. We will examine if Mr Stanley's loss relief claims are 'otherwise provided' and are to be governed by the provisions under Sch 1A and 1B.

Section 42(11) exception and Schedule 1A provisions

15 157. The exception under s 42(11) is for any claim or election '*made otherwise than by being included in a return*', and the procedure for making such a claim is then governed by Sch 1A to TMA.

158. Mr Fava had believed that he had made the s 131 claims on Mr Stanley's behalf by his letter of January 2011. The question is whether a s 131 claim can be made as a 20 stand-alone claim under the provisions of Sch 1A. If so, then Mr Fava's belief is well-founded, and HMRC's position that s 42(2) of TMA prevails in this instance has no basis in law.

159. The scheduler title of Sch 1A to TMA is: '*Claims etc not included in returns*' and para 2 of Sch 1A provides for the making of a claim to 'an officer of the Board', 25 and that 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' (para 2(4)).

160. Paragraph 4 of Sch 1A refers to HMRC giving effect to a claim, either by discharge or repayment of tax. Under para 5, an HMRC officer may enquire into a 30 claim made under Sch 1A, and para 7 provides for the service of a closure notice to complete such an enquiry, while para 9 provides a right of appeal against the result of a closure notice made under para 7.

Can Sch 1A be relied upon to make a stand-alone claim for s 131 relief?

161. The possibility of making a stand-alone claim under Sch 1A for loss relief under 35 s 131 ITA is underpinned by HMRC's position in *R (on the application of Rouse) v*

[4] See *R (on the application of Derry) v Revenue and Customs Comrs* [2015] UKUT 416 (TCC) at [33] to [39] for a detailed discussion in this respect.

Revenue and Customs Comrs [2013] UKUT 383 (TCC) ('*Rouse No.* 1') and [2013] UKUT 615 (TCC) ('*Rouse No. 2*').

162. In *Rouse*, the taxpayer claimed relief under s 131 ITA, and argued that the claims were made under s 42(2) TMA. HMRC's actions in *Rouse* depended on the engagement of Sch 1A, and that their enquiry was brought under para 5 of Sch 1A. The taxpayer issued a claim of judicial review contending that HMRC could not have opened an enquiry under Sch 1A, since the claim was made under s 42(2). (There was a second claim of judicial review in respect of carrying back relief to the previous year under s 64 of ITA, which is not directly relevant to our consideration.)

163. One of the critical questions in *Rouse* for the Upper Tribunal (Warren J and Judge Bishopp) was whether HMRC could open an enquiry into a s 131 ITA loss relief claim under Sch 1A to TMA, or whether the enquiry could only come under the provisions of s 9A of TMA.

164. It should be noted that there are two decisions by the Upper Tribunal on *Rouse*. The first decision on the taxpayer's application was reached following the Court of Appeal judgment in *Revenue and Customs Comrs v Cotter* [2012] EWCA Civ 81, which reversed the High Court decision by David Richards J. The second decision involved a review of the earlier decision after the release of the Supreme Court decision in *Revenue and Customs Comrs v Cotter* [2013] UKSC 69 ('*Cotter*'), which reversed the Court of Appeal decision in *Cotter* and confirmed Richards J's decision.

165. *Rouse No. 1* had followed the Court of Appeal decision in *Cotter* and granted the taxpayer's claim of judicial review. Upon review of the original decision, *Rouse No. 2* dismissed the judicial review claim and held that HMRC's enquiry under Sch 1A to TMA had been correctly opened.

166. *Cotter* concerns an analogous situation of a loss relief claim made under s 128 ITA for employment loss.

167. The Supreme Court decision in *Cotter* (by Lord Hodge, and to which other Law Lords agreed) reversed the Court of Appeal decision, and affirmed the High Court decision *Revenue and Customs Comrs v Cotter* [2011] EWHC 896 (Ch) by David Richards J, who had found in HMRC's favour.

168. The legal analysis of *Cotter* in Richards J's decision is extensively cited in Lord Hodge's decision, and Richards J's decision at [25] clearly stated the route for an enquiry into a Sch 1A claim as follows:

> 'Schedule 1A, which by reasons of s 42(11) applies to any claim which is not included in a return, provides in para 2 for the form in which any such claim is to be made. HMRC may either give effect to the claim (para 4(1)) or inquire into it under para 5. An inquiry is brought to completion by the issue of a closure notice under para 7. If the closure notice is adverse to the taxpayer, he may appeal to the tribunal under para 9.'

169. The significance of whether an enquiry into a claim is opened under Sch 1A to, or s 9A of, the TMA is summarised by Richard J at [28]:

> 'There are significant differences to both the liability to pay tax and the time for any inquiry by HMRC, depending on whether the claim is made in the return or in a separate claim to which Sch 1A would apply.'

170. While the claim in *Cotter* is for employment loss under s128 and not under s 131 of ITA, *Cotter* has been applied as an analogous authority in *Rouse*, which concerns directly a claim under s 131 of ITA.

171. Besides *Rouse*, another claim of judicial review involving a loss relief claim under s 131 of ITA can be found in *R (on the application of Derry) v Revenue and Customs Comrs* [2015] UKUT 416 (TCC) ('*Derry*'). In line with the Supreme Court decision in *Cotter* and *Rouse No. 2*, Morgan J dismissed the taxpayer's application in *Derry* and found that the s 131 claim was a claim within s 42(11) of and Sch 1A to TMA; HMRC were consequently entitled to open an enquiry under Sch 1A to TMA.

Conclusion on Sch 1A and s 131 relief claim

172. As a matter of law, s 42(11) clearly provides for an alternative to s 42(2) TMA to enable a claim 'otherwise than by being included in a return', and the case law authorities establish that a claim for share loss relief under s 131 of ITA can be made by a stand-alone claim to be governed by the procedure set out under Sch 1A.

173. In respect of Mr Stanley's loss relief claims, we conclude the following:

(1) HMRC's assertion that a s 131 claim can only be made by inclusion in the relevant return has no basis in law.

(2) What HMRC are entitled to assert is that even if a Sch 1A claim has been made, that claim *must* still be included in the return for the year of loss as a matter of procedure under s 42 of TMA, (and as our discussion on Sch 1B provisions below will show).

(3) Mr Fava's belief that his letter of 25 January 2011 was capable of constituting a 'stand-alone' claim for s 131 ITA relief is supported by *Rouse* and *Cotter* interpreting the application of Sch 1A provisions.

(4) We interpret Mr Fava's letter of 25 January 2011 as the *making* of the loss relief claims, and the subsequent inclusion of the loss relief claims as the *recording* of the claims.

(5) Leaving aside the issue of the s 131 claims being deficient (for failing to meet the condition precedent in effecting corresponding claims under s 24 TCGA), the January 2011 letter could have been effective for the purpose of reckoning the time limit for the s 131 claims.

Section 42(11A) exception and Schedule 1B provisions

174. The exception under s 42(11A) provides that Sch 1B to TMA 'shall have effect as respects certain claims for relief involving two or more years of assessment'.

175. The heading for para 2 of Sch 1B is 'Loss Relief', which is referential to both elements of a loss relief claim. Schedule 1B recognises that the two elements of a claim can fall into different tax years – the loss can be of the 'later' year (year 2), and the *effect* of the relief (in tax terms) being sought against the liability of an earlier year (year 1).

176. The purpose of Sch 1B is to provide for the procedure to give relief by *deeming* so that the relief claim, whilst sought against the tax liability of year 1, does not result in the return and the assessment for year 1 being disturbed.

177. In order to preserve the integrity of the return and assessment in relation to the earlier year (year 1), the formality requirement under 42(2) of TMA is expressly disapplied under sub-para 2(2) of Sch 1B – but *only* in relation to the return for year 1:

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

178. The disapplication of the s 42(2) requirements is in relation to the relief element of the claim against the earlier year, which means that the relief claim for year 1 shall not be included in the return in relation to year 1.

179. Paragraph 2(3) of Sch 1B then states that: 'The claim [for relief for the earlier year] shall relate to the later year.' In other words, the relief claim against the tax liability for year 1 shall be included in the return for year 2.

Does Sch 1B apply to a s 131 ITA relief claim involving two or more years?

180. The loss relief claim under s 131 ITA in relation to Obus plc involved two years of assessment, that of 2009-10 (supposedly the year of loss) and 2008-09 (the year of relief).

181. In deciding whether Sch 1B applies to this appeal, we ask the following:

> (1) Does the term 'certain claims' in s 42(11A) TMA cover a claim made under s 131 ITA to bring in Sch 1B provisions to govern the formality of the claim?
>
> (2) Is *Cotter* an analogous authority on how Sch 1B applies to a loss relief claim brought under s 131 ITA?
>
> (3) If so, how does the deeming provision under Sch 1B apply in the giving of relief in relation to the earlier year in Mr Stanley's claim?

182. To the first question, the conclusion reached by Morgan J in *Derry* at [45] can be readily adopted. Taking the legislative history of s 42 and Sch 1B TMA into account, Morgan J reached the conclusion at [45] that the taxpayer's claim to relief under s 131 of ITA in *Derry* 'is subject to the provisions of s 42 dealing with claims and in particular is subject to para 2 of Sch 1B to TMA'.

183. As to the second question, the authority of *Cotter* is applicable by analogy as respects the application of Sch 1B to a s 131 claim, and the material points made in *Derry* in this regard can be summarised as follows:

(1) The provisions under ss 131 and 132 of ITA are analogous to those under ss128 and 129 of ITA; the decision in *Cotter* that para 2 of Sch 1B to TMA works in conjunction with ss128 and 129 of ITA is therefore applicable by analogy.

(2) That ss 131 and 133 are compatible with para 2 of Sch 1B so that one is not driven to choosing between the two sets of provisions but can operate them in conjunction with each other (at [38]).

(3) That both sets of provisions are specific in character; ss 131 and 133 of ITA are specific as to the entitlement to making a claim to deduct capital losses from income; s 42 and Sch 1B TMA are specific as to the procedure for making claims and as to the effect of the claims (at [39]).

184. In relation to the third question, para 2(4)(a) of Sch 1B stipulates that the amount of the claim is by reference to the amount in which the taxpayer would be so chargeable '*on the assumption* that effect could be, and were, given to the claim in relation to that year'. 'On the assumption' is the statutory wording for a deeming provision. In the context of Sch 1B, the relief sought for year 1 is to be given its *deeming* effect by reducing the tax liability in respect of year 2.

185. In *Derry*, the authority of *Cotter* is applied analogously to a s 131 claim in the context of the Sch 1B provisions. *Cotter* was a 'test case' for a scheme designed to create an employment loss to be relieved against income or capital gains in the year of loss and the previous year. In the tax year 2008-09, Mr Cotter entered the scheme, and sought relief of the loss so created against his income in 2007-08. The year of loss (2008-09) was different from the year of relief (2007-08), and the claim for loss relief therefore fell within Sch 1B provisions as a claim 'for relief involving two or more years of assessment'.

186. It is expedient to quote from Richards J's summary (High Court decision) of Mr Cotter's and HMRC's respective positions in *Cotter*:

> '[4] The defence raised by Mr Cotter … is that he is entitled to set off his claim for loss relief against the tax otherwise payable on 31 January 2009 unless and until it is disallowed under the statutory procedure. He submits that he was entitled to include the claim, by way of amendment, in his return for 2007-08 and because he did so before 31 January 2009 he was and remains entitled to rely on it unless and until disallowed. If the claim is held in due course not to be well-founded, he will then be obliged to pay the tax otherwise due for 2007-08 with statutory interest from 1 February 2009.
>
> [5] It is HMRC's case that Mr Cotter was obliged to pay the assessed tax by 31 January 2009 and, if and when his claim for loss relief is

established in accordance with the statutory procedure, he would be entitled to a repayment of the tax with interest.'[5]

187. The authority of *Cotter* establishes that a loss relief claim for an earlier year is to be given by way of *deeming* as if it had happened in the loss-making year. By way of deeming, the assessment to tax liability for the earlier year shall not be disturbed, nor shall the relief claim be included in return for the earlier year by way of amendment. In the words of Richard J in High Court decision of *Cotter* at [40]:

> 'This [para 2 of Sch 1B] is a deeming provision: ***the claim does not relate to the earlier year*** but it is ***treated as if it did*** for the purpose of ***determining its amount***. The same formula is repeated in para 2(5) [of Sch 1B] as regards "associated claims". Paragraph 2(6) provides that "Effect shall be given to the claim in relation to the later year".' (emphasis added)

188. The deeming effect of para 2 of Sch 1B means that the assessment for 2007-08 in *Cotter* would not be disturbed, and HMRC were entitled to seek the payment of the tax assessed for 2007-08, notwithstanding the loss relief was claimed against the earlier year's liability.

189. Furthermore, the loss relief claim for 2007-08 in *Cotter* was to be included in the return for 2008-09 (the year of loss) and not in the return for 2007-08. The conclusion reached by Richards J and upheld by the Supreme Court, is stated at [47] of the High Court decision of *Cotter*:

> 'HMRC are correct in their submission that Mr Cotter's claim for loss relief related to the 2008-09 year of assessment and so *could not be included in his return for 2007-08*.' (emphasis added).

190. Lord Hodge in the Supreme Court judgment of *Cotter* endorses Richards J's analysis at [16] as follows:

> 'In my view it is clear, in particular from paras 2(3) and (6), that the scheme in Sch 1B allows a taxpayer, who has suffered a loss in a later year ("year 2") and seeks to attribute the loss to an earlier year of assessment ("year 1"), to obtain his relief by reducing his liability to

[5] Like Mr Cotter, Mr Ward had amended his tax return for the year 2010-11, being the year prior to the year of loss (2011-12). Mr Ward had also reduced his tax liability for 2010-11 by making a reduction to his payment on account on 12 May 2011 (the purported NVC). If HMRC were to be consistent and had applied their approach in *Cotter* in the case of *Ward*, then Mr Ward's amendment to his 2010-11 return would have been inaccurate: the exclusion of the s 131 claim by disapplying s 42(2) TMA (para 2(2) of Sch 1B). The claim of relief would not have been given against his tax liability for the year 2010-11. The relevance of Mr Ward's tax position for 2010-11 was only insofar as to *quantify* the relief in tax terms; the provisions of Sch 1B are intended to prevent the acceleration in the timing of the relief. Mr Ward was not entitled to reduce the balance on the payment on account due on 31 July 2011, which was the second instalment of his tax liability for 2010-11. Mr Ward would have been obliged to pay the assessed tax for 2010-11, and to wait till his liability for 2011-12 was due to receive the effect of the relief. After all, the relief arose in the year of loss, and the tax effect of the relief was to be given in the year of loss. The purpose of Sch 1B provisions is essentially to ensure that while the quantification of the tax relief is referential to the prior year, the relief nevertheless is to be given effect in relation to the tax liability in the year of loss.

> pay tax in respect of year 2 or by obtaining a repayment of tax in year 2. It does not countenance by virtue of the relief any alteration of the tax chargeable and payable in respect of year 1. […]'

191. Sub-paragraph 2(2) of Sch 1B in effect stipulates that the claim for the earlier year should not be made in the return for the earlier year, by disapplying s 42(2): the claim for relief for year 1 is *not* to be included in the return for year 1 by the express provision to disapply s 42(2) of TMA.

192. We should note at this juncture that the statement at [53] of *Derry* appears to us to be at variance with the conclusion cited above from *Cotter*:

> 'Assuming that Mr Derry had made capital losses in the year 2010-2011, in relation to which he could claim relief under Ch 6 of Pt 4 of ITA, then it is agreed that it was open to him to make such a claim in his tax return for the year 2009-2010, rather than in some other document.'

193. The year of loss in *Derry* was 2010-11. Applying *Cotter*, it was not open to the taxpayer in *Derry* to make the relief claim in his return for 2009-10: the relief claim should be included in the 2010-11 return for the year of loss. We do not attempt to resolve this anomaly in *Derry* other than to highlight it, and to state that we follow *Cotter* in this respect.

Conclusion on the application of Sch 1B to the relief claim for Obus plc

194. In Mr Stanley's case, the claim for relief for Obus plc was against the tax liability for 2008-09. Purely on the formality issue, and leaving aside the time-bar issue, or that the claim failed to meet the condition precedent, the claim for s 131 relief for Obus plc, though in relation to 2008-09, was correctly included in the return for the year of loss, as (for whatever reasons) reckoned by Mr Fava to be in 2009-10.

195. The disapplication of s 42(2) under para 2(2) of Sch 1B would have to apply to the return for 2008-09, by not including the relief claim for Obus plc in the return for 2008-09. We have not found the fact, one way or the other, as regards whether the 2008-09 return had been left intact without the inclusion of the Obus plc claim. Upon a proper construction of para 2(2) of Sch 1B, to have included the Obus claim in the return for 2008-09 would have rendered the earlier year's return inaccurate.

196. So far as the relief claim for Obus plc was concerned, and in the context of Sch 1B provisions, its inclusion in the 2009-10 return would have been correct.

De Silva – *Sch 1A stand-alone claims in the context of Sch 1B formality*

197. In his evidence, Mr Fava referred to the case of *R (on the application of De Silva and anor) v Revenue and Customs Comrs* [2016] EWCA Civ 40) ('*De Silva*') as giving rise to his belief that the making and the recording of a loss relief claim are separate and distinct procedures.

198. *De Silva* was given as the authority for Mr Fava's proposition that in the absence of a challenge at the time from HMRC of his written claims by letter dated 25 January 2011, he had assumed that the claims had been accepted as validly made.

199. The Court of Appeal decision in *De Silva* concerns the legality of the manner and the time limit of HMRC's power to open an enquiry into a claim for film-related trading losses: whether it should be under s 9A of TMA if the claim has been included in a return, or under Sch 1A, if the claim has been made as a 'stand-alone' claim.

200. *De Silva* stands on the Supreme Court decision in *Cotter* and is another case of a claim of judicial review that centres on the effect of disapplying s 42(2) of TMA, by virtue of s 42(11A) and para 2(2) of Sch 1B, on the procedure and the time-limit for enquiring into the claim.

201. The differing stance of the claimant taxpayers in *De Silva* and *Cotter* should be noted to appreciate the *ratio* in each authority. Mr Cotter asserted his relief claim was brought under s 42(2) of TMA, while the taxpayers in *De Silva* sought to argue that their claims to carry back the losses were stand-alone claims for relief under Sch 1B, and HMRC were time-barred (in 2011) from being able to challenge those claims by specific time limits set under Sch 1A relevant to 'claims not included in returns'.

202. The partnership loss claims in *De Silva* concern the year of loss ('the later year') to be carried back to an earlier year. As the claims involved two or more years of assessment, Sch 1B provisions are directly applicable, and the leading judgment given by Gloster LJ states the following with original italics for emphasis at:

> '[48] First of all, I reject the Appellant's argument that a claim under Sch 1B to the TMA *can only be made* by way of a "stand-alone claim" under Sch 1A of that Act, or *can only be investigated by means of an enquiry under para 5(1) of Sch 1A to the TMA*. All that para 2(2) of Sch 1B does is to disapply the rule in s 42(2) of the TMA that, if a claim can be made in a return, it *must* be so made. The effect of disapplying the s 42(2) restriction is that a Sch 1B claim may be made in a return, or may be made as a stand-alone claim outside a return, whether by way of a separate letter, or otherwise.
>
> [49] Second, … no matter how a claim for relief has initially been "made", the claim for relief is nonetheless *required to be included* in the return of the individual taxpayer for the year in which the losses were actually made by the partnership (ie here the later year – Year 02).' (emphasis original)

203. Given that Sch 1B provides against a relief claim for year 1 to be included in the return for year 1, an ancillary purpose of Sch 1A provisions in this context is to permit a stand-alone claim for relief to be made *before* the submission of the return for year 2 (the year of *loss*).

204. The authority of *De Silva* makes it clear that a taxpayer has the option to make a loss relief claim (involving two or more years) by: (a) making a stand-alone claim under Sch 1A, or (b) by including the claim in the return for the year of loss.

205. *De Silva* also makes clear that if a stand-alone claim is made under Sch 1A for year 1, that relief claim *must* still be included in the return for year 2 (the year of loss) by virtue of sub-para 2(3) of Sch 1B – '*The claim shall relate to the later year*'.

206. We now turn to Mr Fava's assumption that in the absence of a challenge by HMRC to his letter dated 25 January 2011, he had inferred from *De Silva* that the claims were therefore accepted by HMRC. In this respect, the paragraph that Mr Fava might have relied on would seem to be at [52], where Gloster LJ concludes:

> '… I consider that the Revenue would have had a choice as to which enquiry route it took, if indeed there had been a separate stand-alone claim made prior to the Year 02 self-assessment returns. ... normally, the appropriate point of challenge for the carry-back claim in respect of partnership losses incurred in Year 02 has to be at the time when such losses are included in the partnership return and the individual partner's return for that year.
>
> What is clear, however …, is that if the Revenue chooses to challenge, by means of the procedure under Sch 1A, para 5(1), an earlier stand-alone claim for relief, made in advance of the obligation to include such claim for relief in respect of the relevant losses in the self-assessment return in respect of the year in which they are incurred, *then it is not open to the Revenue subsequently to challenge the claim again by means of a s 9A enquiry once the self-assessment return is filed*. But that was not what happened in the present case, where the only enquiries which took place were those conducted pursuant to s 9A of the TMA in relation to the relevant years in which the partnership losses were incurred.' (emphasis and sub-paragraph division added)

207. The conclusion reached by Gloster LJ at [52] means that had HMRC opened an enquiry into a stand-alone claim under para 5(1) of Sch 1A, then HMRC would not have been entitled to challenge the claim under a s 9A enquiry when the claim was subsequently included in the relevant return.

208. This conclusion does not support Mr Fava's assumption that if HMRC had not opened an enquiry under para 5(1) of Sch 1A, then it could be taken that no challenge would have come from HMRC of the claim under s 9A TMA. On the contrary, the fair deduction from the conclusion is that if HMRC have not opened an enquiry into a Sch 1A claim under para 5, then HMRC will be entitled to open an enquiry under s 9A at a later time when the claim is included in the return for the year of loss.

Summary of provisions under Sch 1A and Sch 1B to TMA

209. The provisions of Sch 1A and Sch 1B work in practice as follows:

> (1) A stand-alone claim can be made for both the loss and the relief elements of a claim by provisions under Sch 1A to TMA.
>
> (2) A stand-alone claim is only valid if the criteria of specificity as stipulated under para 2(5) of Sch 1A are met.

(3) The making of a stand-alone claim under Sch 1A does not dispense with the formality requirement of *including* the claim (of loss or relief) under s 42(2) of TMA in the return *for the year of loss*.

(4) The date of a stand-alone claim under Sch 1A has the effect of being the date for the reckoning of a statutory time limit of the claim.

(5) For enquiry purposes, if a stand-alone claim has been made, HMRC are entitled to open enquiry under para 5 of Sch 1A.

(6) If an enquiry has been opened into a claim under Sch 1A, the reckoning of the time limit for making the enquiry and the procedure for its closure are then governed by the provisions under Sch 1A.

(7) If an enquiry has been opened into a claim under Sch 1A, HMRC are precluded from opening an enquiry into the same claim under s 9A of TMA, notwithstanding the fact that the claim is subsequently included in the relevant return.

(8) If HMRC have not opened an enquiry into a Sch 1A claim, HMRC then reserve the right to open an enquiry under s 9A of TMA.

(9) The absence of an enquiry under Sch 1A within the relevant time limit does not give rise to the assumption that HMRC have accepted the stand-alone claim. The claim remains open to be challenged under s 9A of TMA.

(10) Sch 1B to TMA applies 'as respects certain claims for *relief* involving two or more years of assessment' (s 42(11A) of TMA).

(11) Sch 1B is intended to apply to the category of claims where the claim for the *relief* element is to be *quantified* by reference to the tax position in an earlier year of assessment (year 1), but the effect of the relief in tax terms is to be given in relation to the tax liability in the later year of assessment (year 2) – the year of loss.

(12) Sch 1B gives effect to the *relief* element of the claim by way of deeming: (i) the *quantification* of the relief in tax terms is referential to the tax position of the earlier year; (ii) the *effect* in the reduction of the tax liability is given in relation to the later year – the year of loss:

> 'Effect shall be given to the claim in relation to the later year, whether by repayment or set-off' (sub-para 2(6) of Sch 1B).'

(13) Sch 1B sub-para 2(2) disapplies s 42(2) TMA requirements. The disapplication applies *only* in respect of the return for the *earlier* year to which the relief element of the claim relates, which means the relief element of the claim, notwithstanding it being related to year 1, shall not be included in the return for year 1.

(14) Sch 1B sub-para 2(2) does *not* apply in relation to the inclusion of the claim in the return for the year of loss. The claim for loss relief (even if in relation to an earlier year) shall still be included in the return for the year of loss. Furthermore, even if the *making* of the claim has been by a stand-alone claim, s 42(2) TMA still applies to the claim (it prevails in the

absence of any disapplication), and the claim is required to be included in the return to *record* the claim. The measure means that the tax authority can open an enquiry into the return in respect of the claim so included, notwithstanding the fact that the claim has been made under Sch 1A.

(15) The essence of Sch 1B provisions is to preserve the tax position in respect of year 1 as originally assessed, and the return and assessment of year 1 are not to be disturbed by a relief claim for the earlier year through the deeming provisions of Sch 1B. No amendments should be made to the return for year 1 by either including the relief claim or adjusting the tax chargeable.

Conclusion on the formality issue in relation to the current appeal

210. Given the aforesaid, we conclude that a claim for s 131 ITA share loss relief is capable of being made as a stand-alone claim, and then included in the return for the year of loss to record the claim.

211. Mr Fava's letter of 25 January 2011 could have been effective as a stand-alone claim under Sch 1A to TMA in establishing the s 131 claims for time limit purposes.

212. The inclusion of both claims for Obus plc and Data SMS in the 2009-10 return, as reckoned by Mr Fava to be the year of loss, was also in accordance with the provisions as analysed under Sch 1A and Sch 1B to TMA.

213. Our conclusion in respect of the formality issue informs us on aspects in HMRC's assessment concerning the degrees of culpability leading to the inaccuracy, which is the second issue for determination in this appeal.

Issue 2: Was the inaccuracy 'deliberate' or 'careless' on Mr Stanley's part?

The distinct personality of 'P' and 'T' in Schedule 24

214. The enquiry into Mr Stanley's SA return for 2007-08 was firmly in the background in HMRC's assessment of the conduct being deliberate in making the claims in the SA return for 2009-10. The assessment to deliberate conduct was based, to a large extent, on the ongoing discussion and the background knowledge of the capital losses in Obus plc and Data SMS that Mr Fava had as a result of the enquiry.

215. The enquiry was handled by Mr Fava with little or no input from Mr Stanley. Mr Stanley, as the taxpayer, is the person P under Sch 24, and his SA return for 2009-10 is a listed document in the table. The penalty assessment is served on Mr Stanley as the person P in the legislation.

216. Schedule 24 also provides for the personality of the agent as 'T', and a penalty assessment can be raised against T under para 1A, which provides:

> ***'Error in taxpayer's document attributable to another person***
>
> **1A (1)** A penalty is payable by a person (T) where –

(a) another person (P) gives HMRC a document of a kind listed in the Table in paragraph 1,

(b) the document contains a relevant inaccuracy,

5 (c) the inaccuracy was attributable to T deliberately supplying false information to P (whether directly or indirectly), or to T deliberately withholding information from P, with the intention of the document containing the inaccuracy.'

217. For the avoidance of doubt, our consideration is in relation to HMRC's assessment raised against Mr Stanley under para 1 of Sch 24, which provides:

10 '***Error in taxpayer's document***

1(1) A penalty is payable by a person (P) where –

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

15 […]

1(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate ***on P's part***.' (emphasis added)

Involvement of agency and the assessment of culpability

218. Where agency is involved, HMRC should guard against an assessment of
20 culpability that results in the blurring of the personality of the agent and the taxpayer. What can be established as the agent's knowledge cannot be automatically implied as the taxpayer's knowledge.

219. We have related earlier under background facts the contents of the behaviour criteria used by HMRC in the penalty assessment. We quote here the actual wording
25 in 'the Penalty Explanation' which illustrates the tendency in blurring the personality of the agent and the taxpayer in assessing culpability:

'We consider that the behaviour was "deliberate". This is explained below.

30 I consider your behaviour to be deliberate because these particular losses have been discussed during a previous compliance check where you were told you were out of time as the time limits on the claims where [sic] detailed on various occasions.

35 You actually acknowledge in a letter dated 16 September 2010 the losses in Obus are out of time yet these were entered on the late 2010 tax return on 2 Feb 2012.

As for the loss in Data SMS, you were advised several times on the time limits to make the claim after you asked for this to be clarified, yet you made an out of date claim.

40 I believe you were aware of the inaccuracies when you submitted your 2010 tax return as per the previous compliance check therefore a deliberate penalty is applicable.'

220. The penalty explanation was addressed directly to Mr Stanley, but from the evidence we heard, the 'you' in the penalty explanation could only be confined to Mr Fava in terms of the knowledge and actions referred to in 'the penalty explanation'.

221. The criteria involved in determining the degree of culpability in a Sch 24 penalty assessment are referential to the relevant person. Paragraph 3 defines the degrees of culpability as referential to 'P' on which the penalty is assessed:

> '***Degrees of culpability***
>
> **3(1)** For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is –
>
> (a) "careless" if the inaccuracy is due to ***failure by P*** to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate ***on P's part*** but P does not make arrangements to conceal it, …' (emphasis added)

222. A penalty can be imposed on the taxpayer under para 1, or the agent under para 1A, or both (see sub-para 1A(3)), but the behaviour criteria have to be relevant to each of the persons. It is untenable to impose a penalty on the taxpayer based on the behaviour or knowledge of his agent, or *vice versa*.

223. The spectrum of agency engagement is broad, and can involve the mere engagement of a filer for the submission of a return, with all figures being supplied by the taxpayer, to the other end of the spectrum where the agent has to find the relevant facts and figures from the taxpayer for the purpose of making an accurate and complete return.

224. At either end of the spectrum, an inaccuracy can arise attributable to the agent. An agent as a mere filer of a return can omit an entry that has been supplied by the taxpayer either by deliberateness or carelessness, and the possibility is open for the agent to be assessed to a Sch 24 penalty under para 1A if the action is found to be deliberate. The taxpayer in such a case is supposed to have checked the return entries before its submission, and a Sch 24 penalty can also be imposed on the taxpayer for failure to take reasonable care, since he is not relieved of the responsibility for the accuracy of the return by the mere engagement of an agent.

225. The reasoning is no different at the other end of the spectrum, where the agent makes all material decisions as regards the entitlement and eligibility of various relief claims, and the taxpayer merely endorses those decisions. The separate personalities of the agent as T, and the taxpayer as P, need to be observed to establish their respective culpability.

226. In this current appeal, the relevant question for us to determine is whether the inaccuracy is deliberate or careless on Mr Stanley's part.

Was the inaccuracy 'deliberate' or 'careless' on Mr Stanley's part?

227. HMRC have placed considerable reliance on Mr Fava's statement in the September 2010 letter for their assertion that the subsequent inclusion of Obus plc in the SA return was therefore deliberate, since Mr Fava had concluded in that letter that the Obus claim was already 'out of date'.

228. Apart from the statement in his letter of September 2010 that Obus plc claim was out of time, HMRC interpreted Mr Fava's phone call of 8 February 2012 as indicative that he knew of the time-bar issue. HMRC further argued that despite his knowledge, Mr Fava submitted the claim on 2 February 2012.

229. Having considered the evidence in its totality, we are able to find as a fact that these actions were carried out by Mr Fava on his own initiative, in his capacity as Mr Stanley's agent; these were not actions carried out under Mr Stanley's instructions.

230. The term 'deliberate' (as regards action) is to be given its ordinary meaning as stated in the Oxford English dictionary: 'well weighed or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done of set purpose; studied; not hasty or rash.'

231. In *Anthony Clynes v HMRC* [2016] UKFTT 369 (TC) ('*Clynes*'), which concerns inaccuracy in VAT returns, it is found 'for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way' (at [82]).

232. Within Sch 24, the term 'deliberate' is used in the context of an 'inaccuracy' which was 'deliberate' on the relevant person's part. On a purposive interpretation of 'the natural wording and the scheme and context of the overall provisions', Judge Morgan continues at [83] of *Clynes* by stating:

> 'The fact that the deliberate conduct is tied to the inaccuracy, indicates that for this penalty to apply the person must have, in a subjective sense, acted with some level of knowledge or consciousness as regards the inaccuracy.'

233. We find as a fact that this is a case where the agent was fully involved in making the decisions as regards claims. We cannot find that the inaccuracy in the present case involved any level of knowledge or consciousness on Mr Stanley's part.

Conclusion on issue 2

234. The penalty assessment has been raised against Mr Stanley. For the reasons stated, the inaccuracy in the 2009-10 return was not 'deliberate' – as involving some level of knowledge or consciousness – on Mr Stanley's part.

235. We conclude the inaccuracy was 'careless' for the purposes of Sch 24.

Issue 3: Did Mr Stanley take 'reasonable care' to avoid inaccuracy?

The statutory wording under para 18(3) of Sch 24

236. Paragraph 3(1)(a) of Sch 24 defines an inaccuracy as 'careless' if it is due to failure by P to take reasonable care.

5 237. The involvement of agency in this appeal renders para 18 of Sch 24 relevant. Where a document contains a careless inaccuracy is given to HMRC on P's behalf, P is still held liable to a penalty under para 1, unless sub-para 18(3) applies:

> '**18(3)** […] P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P satisfies HMRC that
> 10 P took ***reasonable care to avoid inaccuracy*** (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2) […]' (emphasis added)

238. We note the omission of the definite article in the exact wording of para 18(3). While the inaccuracy in any particular case is specific, and indeed the wording under
15 para 1A(c), for example, refers to '*the* inaccuracy attributable to T', the definite article is noticeably missing in framing the defence available to P under para 18(3). The exact wording of the defence is: 'P took reasonable care to avoid inaccuracy'.

239. The omission of the definite article, in our view, is not a slip in the legislative drafting, but a conscious omission that P can avail himself of the defence under para
20 18(3) without having to prove that he has taken reasonable care to avoid *the* particular inaccuracy in question.

240. Literally interpreted, the omission of the definite article means that the reasonable care to avoid inaccuracy is to be exercised in a generic sense, and is not intended to be specific to the inaccuracy in question that has given rise to a potential
25 penalty assessment.

241. On a purposive interpretation, if reasonable care is to be exercised to avoid *the* inaccuracy, that would have presupposed knowledge of the inaccuracy in the first place. If one had the knowledge of the inaccuracy, one should have taken care to remove the inaccuracy altogether. The formulation of taking 'reasonable care to avoid
30 *the* inaccuracy' simply cannot stand as a defence.

The subjective element in taking reasonable care

242. In *Hanson v HMRC* [2012] UKFTT 314 (TC) ('*Hanson*'), Judge Cannan considered 'carelessness' for Sch 24 penalty purposes with reference to case law on 'negligent conduct' at [19]:

> 35 'In my view carelessness can be equated with "negligent conduct" in the context of discovery assessments under *section 29 Taxes Management Act 1970*. In that context, negligent conduct is to be judged by reference to the reasonable taxpayer.'

243. In *Hanson*, the test adopted for the reasonable taxpayer was as described in *Anderson (deceased) v Revenue and Customs Comrs* [2009] UKFTT 206 ('*Anderson*') by Judge Berner at [22]:

> 'The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.'

244. Nevertheless, in the context of Sch 24 penalty regime, Judge Cannan concluded that there is a subjective element in the test of reasonable care at [21]:

> 'What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent.'

245. In *Catherine Grainne Martin v HMRC* [2014] UKFTT 1021 (TC), Judge Redston similarly recognised that the concept of taking reasonable care in the context of Sch 24 penalty regime incorporates a subjective element, and stated that it is 'similar to the approach taken on "reasonable excuse" … and so differs from the strictly objective meaning of negligence' (at [127]).

246. Comparing the penalty regime under Sch 24 with the predecessor provisions under s 95 of TMA for the error penalty, Judge Redston remarked on the absence of 'reasonable excuse' provisions in Sch 24, and hence the subjective element should be accorded in the test of 'reasonable care' to counter the absence of 'reasonable excuse' provisions in Sch 24. Her conclusion in this respect is at [130]:

> 'If failure to take reasonable care were to be an objective test, Sch 24 would be much harsher than the TMA penalty provisions, because the objective test of negligence at TMA s 95 can be mitigated by the reasonable excuse provisions …'

247. We now turn to Mr Stanley as a taxpayer. From his evidence, we found him to be open and honest. He has a working background in the trade of aerial equipment; he built the business from a humble origin of two employees to a sizeable concern with group companies employing 1,600 people. In our view, Mr Stanley is a practical businessman with acumen specific to his trade, but his understanding of his tax affairs is very rudimentary. He would understand his obligations as a taxpayer, but would not have the grasp of any of the technical aspects in relation to the nature or the entitlement, the quantum or the time limit of a claim. His tax affairs are fairly complex as befitting an entrepreneur with a sizeable owner-managed business, and the relevant entries for his SA return would seem to vary from year to year with no discernible set patterns.

248. Our discussion on the time-bar and formality issues has highlighted some aspects of such complexity. The legislative codes relevant to Mr Stanley's relief claims (be it EIS, NVC, or share loss relief), the conditions for eligibility, the formality requirements to make a valid claim, the disqualifying conditions, the

observance of time limits, are well known for their complexity. It is reasonable for Mr Stanley to appoint a qualified professional to handle his tax affairs.

249. It remains to be answered, however, whether in this instant case, by appointing this particular agent in the person of Mr Fava, it is sufficient for Mr Stanley to establish that he has taken reasonable care to avoid inaccuracy (in the generic sense)?

250. Mr Stanley has relied on Mr Fava to advise him on matters in relation to his tax affairs. The professional relationship has withstood the test of time of 17 years. It seems that Mr Stanley has complete trust of Mr Fava in making decisions for him regarding claims. This trust appears to us to be reasonably founded: Mr Fava is clearly not disreputable; as a professional adviser, Mr Fava has the relevant qualification, experience and expertise which are commensurate with the level and the kind of advice that Mr Stanley needs to deal with his tax affairs.

251. In the light of the complex legislative landscape in which Mr Stanley would have to navigate his tax affairs (if he had not engaged the service of a professional), we are satisfied that he had taken reasonable care over the matter of appointing a suitably qualified adviser with relevant expertise. Our conclusion would have been otherwise if it had been an agent unsuitably qualified, without the requisite level of competence or relevant expertise, to handle his tax affairs.

252. However, in our judgment, having engaged the service of a suitably qualified professional to advise him on the technical aspects of his tax affairs, of itself, is not sufficient to establish that Mr Stanley took reasonable care in avoiding inaccuracy in general. The statutory wording of the defence requires the construction of reasonable care being exercised in a broad sense.

253. We heard in evidence how Mr Fava was ‘constantly fact finding’ to establish the relevant events in relation to any one tax year; that he was ‘constantly trying to find out information related to past events and of their future significance’; that relevant documents were provided to him often after a significant time lapse; that the return for 2009-10 was prepared long before January 2011, but submission was held back awaiting various outstanding information to verify entries in the return.

254. It is plain that the habitual dilatoriness on Mr Stanley’s part in providing Mr Fava with the relevant information and documents in relation to his tax affairs is inimical to the avoidance of inaccuracy in general. For this reason, we are not satisfied that Mr Stanley can avail himself of the defence that he ‘took reasonable care to avoid inaccuracy’.

Conclusion on issue 3

255. We find therefore that Mr Stanley is liable to a penalty under para 1 of Sch 24 in respect of the inclusion of the loss relief claims by his agent, with the inaccuracy being categorised as ‘careless’.

Other issues

256. The basis for determining PLR is with reference to the additional amount of tax due or payable as a result of correcting the inaccuracy. The appellant's contention that the PLR should be based on the net liability owed at the time, by taking into account other adjustments unrelated to the inaccuracy, has no basis in law. The rules in quantifiying PLR are referential only to the tax effect on correcting the inaccuracy to which the penalty assessment relates.

257. We confirm that the amount of PLR assessed at £99,096.46 is correctly determined according to the provisions under para 5 of Sch 24; the determination is set out at §18-22. The revised penalty assessment, however, is to be based on the PLR of £99,087.40 as stated in the closure notice.

258. We also confirm the reduction allowed in the penalty assessment for each aspect of disclosure, namely: 25% for telling, 25% for helping, and 15% for giving access to records. The overall reduction of 65% is to be applied to the new penalty range in respect of the inaccuracy being 'careless'.

259. The appellant has raised the issue of proportionality. In this regard, the Tribunal has no jurisdiction to review or discharge penalties on the ground that their imposition is unfair; this is well established by the case of *HMRC v Hok* [2012] UKUT 363.

260. Mr Fava believed that due to the enquiry being opened into 2007-08, and 'because the conversation about the enquiry was open', HMRC then had 'a blanket enquiry over all the years', which in turn would lead to an extension of time limits in relation to the year of assessment for 2009-10. We are unclear of the premises upon which such a belief is founded, and can find no statutory basis for such a belief.

261. We note a lacuna in the Sch 24 provisions whereby a penalty cannot be imposed on a person T if the inaccuracy attributable to T is found to have been caused by T's carelessness. If a penalty assessment were to be raised against Mr Fava under para 1A, we would have found the inaccuracy attributable to Mr Fava as the person T within Sch 24 to be 'careless' and not 'deliberate' (based on our discussion of the time-bar and formality issues). Schedule 24 does not provide a nexus to impose a penalty on T where the inaccuracy is 'careless' and not 'deliberate'.

262. If a Sch 24 penalty is imposable on an agent for any inaccuracy attributable to the agent out of carelessness, the effect could have been escalating professional indemnity, which would in turn have an impact on the fee levels for engaging the service of an agent. It could have been a policy decision that no provisions exist in the Sch 24 regime to render an agent liable to a penalty for careless inaccuracy. The lacuna is unlikely to be an oversight, but a policy decision to strike a balance between penalising inaccuracy attributable to an agent, and recognising the invaluable role that an agent can play in assisting a taxpayer in staying compliant in the ever-changing landscape of tax law with its unremitting increase in complexity.

Decision

263. The penalty assessment falls to be recalculated with reference to the category of inaccuracy being 'careless'.

264. The appeal is accordingly allowed in part.

265. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 20 OCTOBER 2017

Appendix

Applicable Legislation

Schedule 24 FA 2007 penalty regime

1. Paragraph 1 of Sch 24 concerns 'Error in taxpayer's document' and is the relevant provision under which the penalty assessment is raised.

> ***Error in taxpayer's document***
>
> **1(1)** A penalty is payable by a person (P) where –
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> **1(2)** Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.
>
> **1(3)** Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> **1(4)** Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

2. Paragraph 1A of Sch 24, inserted by FA 2008 (s 122 and Sch 40, para 3), came into force from 1 April 2009, and provides for a penalty imposable on a person (T):

> ***Error in taxpayer's document attributable to another person***
>
> **1A (1)** A penalty is payable by a person (T) where –
>
> (a) another person (P) gives HMRC a document of a kind listed in the Table in paragraph 1,
>
> (b) the document contains a relevant inaccuracy,
>
> (c) the inaccuracy was attributable to T deliberately supplying false information to P (whether directly or indirectly), or to T deliberately withholding information from P, with the intention of the document containing the inaccuracy.
>
> **1A (2)** A "**relevant inaccuracy**" is an inaccuracy which amounts to, or leads to –
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.

> **1A (3)** A penalty is payable under this paragraph in respect of an inaccuracy whether or not P is liable to a penalty under paragraph 1 in respect of the same inaccuracy.

3. Paragraph 2 concerns the failure to notify HMRC of an under-assessment and does not apply to this appeal.

4. Paragraph 3 defines the degrees of culpability, and the relevant descriptions for this appeal are as follows:

> ***Degrees of culpability***
>
> **3(1)** For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is –
>
> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, […].

5. Paragraph 4 provides for the standard amount of penalty imposable as a percentage of the potential lost revenue ('PLR'): (a) 30% of PLR for careless action; (b) 70% of PLR for deliberate and not concealed action; and (c) 100% for deliberate and concealed action.

6. Paragraph 5 defines PLR as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

7. Paragraph 7 provides for the determination of PLR where losses are concerned. Sub-paragraph 7(1) states:

> Where an inaccuracy has the result that a loss is wrongly recorded for purposes of direct tax and the loss has been wholly used to reduce the amount due or payable in respect of tax, the potential lost revenue is calculated in accordance with paragraph 5.

8. Paragraph 18 (under Part 4 for Miscellaneous) provides for the extent P is to be assessed for culpability where agency is involved. The relevant sub-paras are:

> **AGENCY**
>
> **18(1)** P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.
>
> **18(2)** In paragraph 2(1)(b) and 2(a) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.
>
> **18(3)** Despite sub-paragraphs (1) and (2), P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2) […].

Section 24 TCGA: Claim of capital loss of negligible value

9. A claim of capital loss on the basis of negligible value can be made under s 24 of the Taxation of Chargeable Gains Act 1992 ('TCGA'), which provides as follows:

> **24 Disposals where asset lost or destroyed, or become of negligible value**
>
> **24(1)** Subject to the provisions of this Act and, in particular to sections 140A(1D), 140E(7) and 144, the occasion of the entire loss, destruction or extinction of an asset shall, for the purposes of this Act, constitute a **disposal** of the asset whether or not any capital sum by way of compensation or otherwise is received in respect of the destruction, dissipation or extinction of the asset.
>
> **24(1A)** A negligible value claim may be made by the owner of an asset ("P") if condition A or B is met.
>
> **24(1B)** Condition A is that the asset has become of negligible value while owned by P.
>
> **24(1C)** Condition B is that –
>
> (a) the disposal by which P acquired the asset was a no gain/no loss disposal,
>
> (b) at the time of that disposal the asset was of negligible value, and
>
> (c) between the time when the asset became of negligible value and the disposal by which P acquired it, each other disposal (if any) of the asset was no gain/no loss disposal.
>
> **24(2)** Where a negligible value claim is made –
>
> (a) this Act shall apply as if the claimant had sold, and immediately acquired, the asset at the time of the claim or (subject to paragraphs (b) and (c) below) at any earlier time specified in the claim, for a consideration of an amount equal to the value specified in the claim.
>
> (b) An earlier time may be specified in the claim if:
>
> (i) the claimant owned the asset at the earlier time; and
>
> (ii) the asset had become of negligible value at the earlier time; and either
>
> (iii) for capital gains tax purposes the earlier time is not more than two years before the beginning of the year of assessment in which the claim is made; or […].

Sections 131-133 ITA: Share loss relief against income

10. A negligible value loss under s 24 TCGA is a capital loss, but can be relieved against income under s 131 of ITA, which provides as follows:

> **131 Share loss relief**
>
> **131(1)** An individual is eligible for relief under this Chapter ("share loss relief") if –

(a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year ('the year of the loss'), and

(b) the shares are qualifying shares.

5 This is subject to subsections (3) and (4) …

131(2) Shares are qualifying shares for the purposes of this Chapter if–

(a) EIS relief is attributable to them, or

(b) if EIS relief is not attributable to them, they are shares in a qualifying trading company which have been subscribed for by the
10 individual.

131(3) Subsection (1) applies only if the disposal of the shares is–

(a) by way of a bargain at arm's length,

(b) by way of a distribution in the course of dissolving or winding up the company,

15 (c) a disposal within section 24(1) of TCGA 1992 (entire loss, destruction dissipation or extinction of asset), or

(d) a deemed disposal under section 24(2) of that Act (claim that value of the asset has become negligible).

11. Section 132 of TCGA stipulates the conditions for a s131 claim:

20 **132 Entitlement to claim**

132(1) An individual who is eligible for share loss relief may make a claim for the loss to be deducted in calculating the individual's net income –

(a) for the year of the loss,

25 (b) for the previous year, or

(c) for both tax years.

[…]

132(2) If the claim is made in relation to both tax years, the claim must specify the year for which a deduction is to be made first.

30 **132(3)** Otherwise the claim must specify either the year of the loss or the previous tax year.

132(4) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the year of the loss.

12. Section 133 of TCGA explains how the deductions are to be made.

35 **133 How relief works**

133(1) This subsection explains how the different deductions are to be made.

The amount of the loss is 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 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 individual's net income for the other tax year.

133(2) Subsection (1) is subject to sections 136(5) and 147 (which set limits on the amounts of share loss relief that may be obtained in particular cases).

133(3) If an individual--

(a) makes a claim for share loss relief against income ("the first claim") in relation to the year of the loss, and

(b) makes a separate claim for share loss relief against income in respect of a loss made in the following tax year in relation to the same tax year as the first claim,

priority is to be given to making deductions under the first claim.

133(4) Any share loss relief claimed in respect of any income has priority over any relief claimed in respect of that income under section 64 (deduction of losses from general income) or 72 (early trade losses relief).

133(5) A claim for share loss relief does not affect any claim for a deduction under TCGA 1992 for so much of the allowable loss as is not deducted under subsection (1).

Section 42 TMA on the procedure for making claims

13. The formality requirement for making claims is set out in s 42 of TMA, which covers the claims for a relief, an allowance or a repayment:

42 Procedure for making claims etc

42(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.

[…]

42(2) Subject to subsection (3) to (3ZC) 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.

[…]

42(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, 8A, 12ZB or 12AA of this Act.

(b) [repealed]

[…]

42(11A) Schedule 1B to this Act shall have effect as respects certain claims for relief involving two or more years of assessment.

Schedule 1A to TMA: Claims etc not included in returns

14. The significant provisions from Sch 1A for the purposes of this appeal are under paragraph 2, which states as follows:

2 Making of claims

(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.

(5) The form of claim may require--

(a) a statement of the amount of tax which will be required to be discharged or repaid in order to give effect to the claim;

(b) such information as is reasonably required for the purpose of determining whether and, if so, the extent to which the claim is correct; and

(bb) the delivery with the claim of such accounts, statements and documents, relating to information contained in the claim, as are reasonably required for the purpose mentioned in paragraph (b) above; [. . .]

(c) [...]

(6) In the case of a claim made by or on behalf of a person who is not resident or who claims to be not resident . . . or not domiciled, in the United Kingdom, an officer of the Board or the Board may require a statement or declaration in support of the claim to be made by affidavit.

Schedule 1B to TMA: Claims for relief involving two or more years

15. Schedule 1B provides for the procedure for the making of a claim involving two or more years, with paras 1 and 2 being of direct for the purposes of this appeal:

> **1 Preliminary**
>
> 5 (1) In this Schedule--
>
> (a) any reference to a claim includes a reference to an election or notice; and
>
> (b) any reference to the amount in which a person is chargeable to tax is a reference to the amount in which he is so chargeable after 10 taking into account any relief or allowance for which a claim is made.
>
> (2) For the purposes of this Schedule, two or more claims made by the same person are associated with each other if each of them [is a claim to which this Schedule applies and the same] year of assessment is the 15 earlier year in relation to each of those claims.
>
> (3) In sub-paragraph (2) above, any reference to claims includes a reference to amendments and revocations to which paragraph 4 below applies.
>
> **2 Loss relief**
>
> 20 (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.
>
> 25 (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
>
> 30 (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 35 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.
>
> 40 (7) For the purposes of this paragraph, any deduction made under section 62(2) of the 1992 Act (death: general provisions) in respect of an allowable loss shall be deemed to be made in pursuance of a claim requiring relief to be given in respect of that loss.