TC07691

INCOME TAX – claims for trade loss relief against general income – claims not made in tax returns – claims refused by HMRC – application by HMRC to strike out appeals for lack of jurisdiction – did HMRC enquire into the claims? – Raftopoulou *applied – held: no closure notices and so Tribunal has no jurisdiction*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2014/06336 & TC/2015/04062

BETWEEN

SALMAN IBNI TUFAIL
ASMA SHAHEEN TUFAIL **Appellants**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON

Sitting in public at Leeds Magistrates Court on 4 February 2020

Mr S Tufail, the first Appellant, for both Appellants

Ms R Oliver, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an application by HMRC to strike out appeals against their refusals of the appellants' claims (made outside of tax returns) for trade loss relief against general income, for lack of jurisdiction.

SUMMARY OF THE CLAIMS, THEIR REFUSAL, AND THE APPEALS

2. A letter to HMRC dated 27 June 2014 from Mr Tufail's accountants was treated as claiming trade loss relief against general income (under s64 Income Tax Act ("ITA") 2007) in respect of the 2010-11, 2011-12 and 2012-13 tax years on behalf of Mr Tufail; and a letter to HMRC dated 4 May 2015 from Mrs Tufail was treated as claiming such relief in respect of the 2010-11 tax year (we refer to these letters as the "Claims")).

3. HMRC refused Mr Tufail's Claims in a letter to Mr Tufail's accountants dated 28 October 2014; they refused Mrs Tufail's Claim in a letter to her dated 18 June 2015 (we refer to these letters as the "Refusals").

4. Mr Tufail notified an appeal to the Tribunal against the Refusals of his Claims by notice of appeal dated 24 November 2014; Mrs Tufail notified an appeal to the Tribunal against the Refusal of her Claim by notice of appeal dated 23 June 2015.

5. As the Claims all related to losses from a property in Spain jointly owned by Mr and Mrs Tufail, the two appeals were joined on 15 July 2015.

6. A case management hearing on 3 November 2015 on the question of whether the Tribunal had jurisdiction was adjourned so the parties could consider the relevance of the Raftopoulou litigation; on 6 June 2016, the appeals were stayed behind the Raftopoulou case. The Court of Appeal's judgement in *HMRC v Raftopoulou* [2018] STC 988 was released on 18 April 2018.

EVIDENCE

7. In addition to copies of the Tribunal's correspondence for both appellants, I had a "tribunal bundle" for each appellant prepared for an earlier hearing, and a "supplementary tribunal bundle" prepared for this hearing. These contained tax returns, correspondence and other documents.

FINDINGS OF FACT

8. The tax returns for the tax years relevant to Mr Tufail's Claims were all filed prior to the making of the Claims. Further details of those tax returns were as follows:

(1) 2010-11: tax return filed on 18 March 2014 (over two years after the filing date, 31 January 2012). It showed profit from self-employment (as a locum chemist). In the "white space" box it was stated: "client has foreign property losses that are not included due to lack of time and pressure to file main tax return, will do an amendment by letter to final income."

(2) 2011-12: tax return filed on 30 April 2013 (three months after the filing date, 31 January 2013). It showed profit from self-employment and income from UK property. In the "white space" box it was stated: "figures not available for rental property which is jointly let as would have losses brought forward on overseas property waiting for interest details from overseas institution and then amend return".

(3) 2012-13: tax return filed on 18 March 2014 (over a month after the filing date, 31 January 2014). It showed profit from self-employment. In the "white space" box it was stated: "the client has included his main income but due to time constraints the foreign

holiday let income losses have not been included these will be addressed by way of letter to offset against any DI income."

9. HMRC had commenced bankruptcy proceedings against Mr Tufail towards the end of 2013 in connection with his falling behind with his tax affairs. The hearing of those proceedings was adjourned on several occasions in the first half of 2014. During this time, there was ongoing correspondence between Mr Tufail's accountants and Miss Stanhope, a debt manager in HMRC's Debt Management Enforcement & Insolvency department in Worthing.

10. On 3 April 2014, Mr Tufail's accountants wrote to Miss Stanhope with "information [in] relation to his foreign holiday lettings which he can offset against his income". Miss Stanhope responded on 24 April 2014 noting that tax returns had been submitted for the tax years in question (those mentioned above) and so the figures would have to be provided either online or to the "processing office" of HMRC dealing with Mr Tufail's tax returns. Mr Tufail's accountants emailed Miss Stanhope on 19 May 2014 with further calculations relating to Mr Tufail's losses from his property in Spain.

11. Miss Stanhope wrote to Mr Tufail's accountants on 4 June 2014: referring to her earlier letter of 24 April, she said she had been incorrect to say that Mr Tufail's tax returns for the three years in question could be amended, as he was out of time to amend the tax returns for 2010-11 and 2011-12. She said that, with regard to the losses made in 2010-11, the only claim that may be considered was a carry forward claim – this would have to be taken up with the local office that dealt with Mr Tufail's tax returns.

12. Mr Tufail's accountants wrote to Miss Stanhope on 6 June 2014 saying that their tax return amendment would be covered by a "error or mistake" claim, which they said was known as "special relief". They stated that, as regards any losses, they had four years from the submission of the tax return to claim any losses; and that HMRC were aware of the losses, through correspondence.

13. Mr Tufail's Claims were a letter from his accountants to HMRC's Self assessment department in Leeds dated 27 June 2014. Under the heading "Clam for overpayment relief, 'error or mistake' claim or special relief", the letter enclosed "self employment schedules amended to reflect the new self employment losses" for Mr Tufail, and set out the figures for the losses claimed (which they asked to be processed). The accountants separately wrote to Miss Stanhope of HMRC on the same day enclosing "11 pages of overpayment relief", copying her on "the claim made to the local office."

14. Miss Stanhope wrote to Mr Tufail's accountants on 25 July 2014, referring to their letters of 27 June 2014, as follows:

> "Today, Mr Elliott at my solicitors office contacted your client and advised him that for the hearing on 5 August 2014, HMRC instructions would be to seek a 12 week adjournment, in order that the disputed amount for the years 2010/11, 2011/12 and 2012/13 can be looked at with regards to the losses to be claimed. Your client has agreed to this adjournment being sought.
>
> I have been advised by my Special Relief team at this office that Special Relief is not appropriate in your client's case … Special Relief can also not be applied for if the time limits for Overpayment Relief or Loss Relief have elapsed …
>
> You have referred to overpayment relief/Error or Mistake Relief in your letter dated 27 June 2014, and this applies where returns are submitted, processed and then revised returns are submitted outside the time limits for amendment. Time limits apply to make these claims i.e. 4 years from 5 April 2010 for Overpayment relief and there are similar time limits applied to Loss Relief claims. I have forwarded your letter to the department that deals with losses and they will advise you and your client once this matter has been looked into further ..."

15. On the same day, Mr Elliott of HMRC Solicitor's Office in London wrote to the Chief Clerk County Court in Bankruptcy regarding Mr Tufail as follows:

> "Pursuant to the Order of District Judge Lambert this matter is listed for hearing on 5 August 2014 at … Since that Order, the Debtor has submitted further returns for consideration by HMRC which may potentially reduce the petition debt. Whilst these returns have been given priority, their complexity has meant that HMRC has not yet reached a final conclusion regarding the relief sought and consideration of the returns is ongoing.
>
> Considering the circumstances, HMRC believe that it would be appropriate to adjourn the hearing listed for 5 August 2014 until the recently submitted returns have been processed. We propose that a 12 week adjournment would be of assistance … I personally phoned Mr Tufail this morning … and he agreed to the adjournment."

16. On 23 September 2014, Mr Ruhrmund of HMRC's Local Compliance department in Glasgow wrote to Mr Tufail's accountants as follows:

> "Thank you for your letter of 27 June 2014 which has just been passed to me for my attention and I apologise for the delay in dealing with the matter.
>
> The income returned applies to foreign lettings income and the rules changed from the tax year 2011/12 onwards. From April 2011 loss relief may only be set against the same furnished holiday lettings business. You appear to be attempting to circumvent these changes by treating the lettings as a trade which I am not prepared to accept. Please explain the reasons why your client did not return this income in his original self assessment tax returns.
>
> The loss relief claims for the years 2010/11 and 2011/12, are in any case out of time and are refused, along with the claim for the tax year 2012/13 for the reason stated above. There is no right of appeal against my refusal to accept the late loss relief claims …"

17. Miss Stanhope wrote to Mr Tufail on 13 October 2014 saying: "I am writing with reference to my colleague's letter dated 23 September 2014, in which you were informed that the losses to be claimed for 2010/11-2012/13 are not acceptable, and that you have no right of appeal against the refusal to accept the late loss claim"

18. Mr Tufail's accountants wrote to Mr Ruhrmund on 14 October 2014, responding to Mr Ruhrmund's question about Mr Tufail's income from lettings.

19. The Refusals of Mr Tufail's Claims were a letter from Mr Ruhrmund responding to Mr Tufail's accountants on 28 October 2014 as follows:

> "I am aware of your client's source of income from foreign holiday lettings and the tax treatment of same but the lettings rules changed from April 2011 and loss relief may only be set against income from the same Furnished Holiday Lettings business. You are attempting to set losses incurred in a holiday lettings business against other income and this is no longer possible as the rules changed from April 2011. I attach a copy of the guidance to furnished holiday lettings rule for your perusal.
>
> The loss relief claims are formally refused. You do not have the right of appeal against my decision but you may take your claim direct to the Tax Tribunal."

20. In their "skeleton argument for petitioning creditors" dated 29 October 2014 (as part of the bankruptcy proceedings), HMRC stated as follows under the heading "Mr Tufail's disputes with HMRC": "Since the adjournment [of the 5 August 2014 hearing], HMRC have considered Mr Tufail's claims for loss relief and have rejected them." In the following paragraph, HMRC said: "The reasons for Mr Ruhrmund's rejection of these claims are clearly stated in his letters dated 28 October 2014 and 23 September 2014". HMRC filed a supplemental skeleton argument in the bankruptcy proceedings on 30 October 2014, responding to arguments made by Mr Tufail's accountants against Mr Ruhrmund's decision.

21. Mrs Tufail's Claim was her letter to HMRC dated 4 May 2015 enclosing an amended tax return for the 2010-11 tax year. The Refusal of Mrs Tufail's Claim was a letter from Mrs Dicken of HMRC to Mrs Tufail dated 18 June 2015 stating that Mrs Tufail was out of time to amend her tax return for that year; Mrs Dicken considered treating the set-off of losses against Mrs Tufail's self-employed trade (as shown in the amended return) as a claim under s64 ITA 2007, but refused this on grounds that it, too, was out of time.

RELEVANT LAW

22. Section 64 ITA 2007 is within the Part of that Act dealing with loss relief; and is within the chapter of that Part dealing with trade losses. The sub-heading to sections 64-65 is "Trade loss relief from general income". Sub-section 64(1) provides that a person may make a claim for trade loss relief against general income if the person – (a) carries on a trade in a tax year, and (b) makes a loss in the trade in the tax year ("the loss-making year"). Sub-section 64(5) provides that the claim must be made on or before the first anniversary of the normal self-assessment filing date for the loss-making year.

23. Section 42 Taxes Management Act ("TMA") 1970 (Procedure for making claims etc) includes the following (summarised for relevance to the facts of this case):

(1) Sub-section (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.

(2) Sub-section (1A): a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made

(3) Sub-section (2): where notice has been given under s8 TMA 1970, 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

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

(5) Sub-section (11): Schedule 1A TMA 1970 shall apply as respects any claim or election which is made otherwise than by being included in a return under s8 TMA 1970.

24. Section 8 TMA 1970 provides for personal tax returns. Under sub-section 8(1D), such returns for a year of assessment (Year 1) must be delivered, in the case of an electronic return, on or before 31 January in Year 2 (subject to exceptions that are not relevant here). Amendments may be made to such returns not more than 12 months after this filing date: s9ZA.

25. Schedule 1A TMA 1970 deals with claims not included in returns – its more relevant paragraphs, in summary, are:

(1) Sub-paragraph 2(3) provides that a claim shall be made in such form as HMRC may determine

(2) Paragraph 4 deals with giving effect to claims and amendments; however, it does not apply if a claim is not one for discharge or repayment of tax (sub-paragraph 4(4))

(3) Paragraph 5 provides that an officer of HMRC may enquire into a claim if, before the end of the period mentioned in sub-paragraph 5(2), he gives notice in writing of his intention to do so to the person making the claim.

(4) Paragraph 7 provides that an enquiry under paragraph 5 is completed when an officer of HMRC by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions. In the case of a claim that is not a claim for discharge or repayment of tax, the closure notice must either

(a) allow the claim, or

(b) disallow the claim, wholly or to such extent as appears to the officer appropriate.

(5) Under paragraph 9, an appeal may be brought against any decision in a closure notice as described immediately above.

26. Sub-section 31(1) TMA 1970 provides that an appeal may be brought against

(a) any amendment of a self-assessment under s9C TMA 1970 (amendment by Revenue during enquiry to prevent loss of tax)

(b) any conclusion stated or amendment made by a closure notice under s28A or s28B TMA 1970 (amendment by Revenue on completion of enquiry into return)

(c) [not relevant to this case], or

(d) any assessment to tax which is not a self-assessment.

27. Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal must strike out the whole or part of the proceedings if the Tribunal –

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another tribunal with jurisdiction in relation to the proceedings) in relation to the proceedings or that part of them.

Court of Appeal decision in Raftopoulou

28. In *Raftopoulou*, HMRC had rejected the taxpayer's claim for overpayment relief on grounds that it was out of time. One of the issues that arose for determination by the Court of Appeal was whether this gave rise to a right of appeal to the Tribunal under paragraph 9 Schedule 1A TMA 1970, and, in particular, whether HMRC's decision letter constituted a closure notice under paragraph 7 Schedule 1A. The court decided that HMRC's decision letter did not demonstrate that HMRC had conducted an enquiry into the taxpayer's claim under Schedule 1A or had ever intended to have done so. All that the decision letter stated was that HMRC had read the claim and decided, simply by reference to its date and the expiry of the applicable four-year period, that it was out of time. Nowhere did the writer of the decision letter state or indicate that he intended to enquire into the claim or that he had completed his enquiries, nor did he state any conclusions resulting from his enquiry or amend the claim. A rejection by HMRC of a claim on the grounds that it was out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, did not involve any use by HMRC of their statutory powers to enquire into the claim, nor did it constitute notice of an intention to do so. In the circumstances, there was no enquiry and no closure notice, with the result that no appeal to the Tribunal lay against the rejection of the claim. Amongst the observations made by the court were:

(1) that the provisions of Schedule 1A suggested a procedure with some degree of formality and suggested also a procedure with a beginning, a middle and an end. That might be contrasted with replying to a claim received from a taxpayer, having first read it and considered its contents.

(2) An officer might enquire into the claim if, within the specified time, he gave notice in writing of his intention to do so. Although the contents of the notice were not prescribed, it had to be clear from the notice that the officer intended to enquire into the

claim. The opening of an enquiry had significant statutory consequences, including the right of HMRC to call for documents for the purpose of its enquiry.

(3) Likewise, the requirements of paragraph 7 Schedule 1A as to the issue of a closure notice and as to its contents served to underlie the nature of the enquiry process. The notice had to, first, state that the officer had completed his enquiries, secondly, state his conclusions, and thirdly, amend the claim as the officer concluded to be necessary or state that no amendment was necessary.

(4) There could be no enquiry into a claim without HMRC giving the notice required by paragraph 5 Schedule 1A. Whether the letter or other communication in question gave the necessary notice depended on whether it would have been read by a reasonable recipient in the position of the taxpayer as doing so. The same was true of any document said to have been a closure notice.

Upper Tribunal decision in Portland Gas Storage v HMRC *[2014] STC 2590*

29. *Portland Gas* – a decision approved in *Raftopoulou* - was about the stamp duty land tax (SDLT) due on the grant of a lease: the taxpayer had paid SDLT on the basis of certain agreed lease terms; those terms were then varied, and so the taxpayer's solicitors wrote to HMRC, in July 2012, seeking to amend the taxpayer's return and to reclaim a proportion of the SDLT previously paid. HMRC wrote to the taxpayer's solicitors on 15 August 2012 rejecting the claim on grounds of its being out of time, as well as technical grounds based on SDLT legislation. The taxpayer's solicitors wrote to HMRC on 23 August with technical arguments, based on SDLT legislation, as to why their client's clam was not out of time. HMRC acknowledged this letter on 6 September 2012 and said they were seeking advice from their policy team regarding the time limit for making a claim under the legislation. HMRC wrote back to the taxpayer's solicitor in November 2012, having taken legal advice, and stated their view that the claim was out of time.

30. The question for determination in the case was whether HMRC had issued a closure notice, so giving rise to an appealable decision. The Upper Tribunal held that HMRC's letter of 6 September 2012 had opened an enquiry into the return: the taxpayer could clearly have ascertained from this letter that there was an intention to enquire further into the return. Moreover, the subsequent correspondence was capable of amounting to a closure notice. It followed that the taxpayer had a right of appeal against the conclusion reached by HMRC.

COMMON GROUND

31. It was common ground between the parties that:

(1) The Claims were claims for trade losses to be set against general income under s64 ITA 2007 for the tax years in question

(2) The sole matter for determination was whether the Refusals were matters which could be appealed to the Tribunal.

HMRC'S SUBMISSIONS

32. Ms Oliver submitted that there was no right of appeal to the Tribunal against the Refusals because, as in *Raftopoulou*, HMRC never enquired into the Claims under Schedule 1A TMA 1970.

33. Although not strictly relevant to the matter before the Tribunal at the hearing (see [31(2)] above), Ms Oliver also mentioned:

(1) that HMRC had changed their mind as regards the Refusal of Mr Tufail's Claim for the 2012-13 tax year: she said that HMRC had now decided to accept that Claim because (i) it was made within the time limit in sub-section 64(5) ITA 2007; and (ii)

HMRC had failed to open an enquiry into it within the time limit set out in paragraph 5 Schedule 1A TMA 1970;

(2) that HMRC had made discovery assessments in August 2015 as regards omitted employment income in Mr Tufail's tax returns for the tax years in question – which re-opened the possibility of making loss claims (see sub-section 43(2) TMA 1970). However, no further claims were made by Mr Tufail following those assessments.

APPELLANTS' SUBMISSIONS

34. Mr Tufail submitted that the issues for determination were:

(1) Did HMRC's response to the Claims show that it had opened an enquiry into them?

(2) If so, did any of HMRC's letters amount to a closure notice – so giving rise to a right of appeal under paragraph 9 Schedule 1A TMA 1970?

35. In Mr Tufail's submissions:

(1) HMRC gave valid notice of intention to enquire, enquired, and thereafter issued a valid closure notice, particularly as regards Mr Tufail's Claims.

(2) HMRC did not refuse Mr Tufail's Claims by simply saying the appellant was out of time.

(3) HMRC's actions subsequent to the making of Mr Tufail's Claims indicate that they were in effect seeking advice on the matter (see Miss Stanhope's letter of 25 July 2014) – this constituted an enquiry, and the letters from HMRC constituted notice of an intention to enquire into Mr Tufail's Claims.

36. Citing *Portland Gas*, Mr Tufail submitted that the letters from Miss Stanhope and Mr Elliott of HMRC, both of 25 July 2014, were notice of an enquiry into the claims. He also cited *Portland Gas* at [35]:

> "We accept that these authorities show that the relevant statute conferring jurisdiction on the tribunal cannot be construed so widely that the tribunal is regarded as having jurisdiction to hear appeals against decisions by HMRC that do not fall within the words of the statute in question. Nevertheless, in our view there is nothing in the authorities to preclude us construing the words in question so as to give them a broad rather than narrow construction where to do so will result in the whole of the dispute between the parties relating to the correct amount of tax to be charged being resolved by the body on whom the prime responsibility for determining such disputes has been conferred."

37. In particular, Mr Tufail argued that:

(1) HMRC's letters of 25 July 2014 here were akin to HMRC's letter of 6 September 2012 in *Portland Gas*, in that they indicated that HMRC were seeking further advice and would respond on receipt of that advice. On receipt of those letters, the appellant could not reasonably have understood it to mean that HMRC had no wish to enquire into Mr Tufail's Claims; rather, they wanted to enquire and indeed did so. There is no prescribed form for an enquiry notice or a closure notice – this was confirmed in *Raftopoulou* at [20].

(2) HMRC had notice that there was a disagreement on the issue of whether Mr Tufail's Claims had been made in a timeous manner – they had arguments that would cause them to examine the claim in detail.

(3) Mr Ruhrmund's letter of 28 October 2014 and communications from the HMRC solicitor dealing with the bankruptcy petition around the same time may be regarded as a closure notice in relation to the enquiry into Mr Tufail's Claims. It was clear from the

involvement of HMRC Solicitor's office that advice was being sought from HMRC's legal team.

(4) This case is materially different from *Raftopoulou*, particularly as regards Mr Tufail's Claims, in that:

(a) here, HMRC did not reject the claim on the grounds that it was out of time by reference to no more than the claim itself; and

(b) HMRC's subsequent actions show that they opened an enquiry on 25 July 2014

(5) There was formality to the enquiry with regard to Mr Tufail's Claims: this is shown in part by the involvement of HMRC Solicitor's office; and Mr Ruhrmund's letter of 28 October 2014 stated that the claim were formally refused.

(6) The enquiry took a considerable amount of time – as shown by the 12-week adjournment to the bankruptcy proceedings. Mr Elliott's letter of 25 July 2014 said that the issues were complex. HMRC could have written back soon after receiving Mr Tufail's Claims, stating that the claims were out of time (as they had done in their 4 June 2014 letter concerning amendments to tax returns) – but they took a different course, to open an enquiry.

(7) When viewed objectively, a reasonable taxpayer reading HMRC's letters of 25 July 2014 would have conclude that HMRC were intending to enquire into Mr Tufail's Claims.

DISCUSSION

38. The appellants seek to appeal the Refusal decisions made by HMRC; the question for determination here is whether the Tribunal has jurisdiction to hear such an appeal. If it does not, the appeals must be struck out (there are no grounds here for the Tribunal to exercise its power to transfer the appeals to another tribunal). Questions relating to the validity of the Claims (for example, whether they were made within the time limits of s64 ITA 2007) are not considered here – such questions would be for a substantive hearing of these appeals, if it is determined that the Tribunal has jurisdiction and the strike-out application is refused.

39. The Tribunal, unlike the High Court, has no general jurisdiction to review decisions of public bodies like HMRC. Rather, the Tribunal's jurisdiction is restricted to powers given to it under statute.

40. Section 31 TMA 1970, the "general" right of appeal (ultimately to the Tribunal) for income tax, confers rights to appeal against amendments made to self-assessments and tax returns by HMRC under their statutory powers, and other assessments to tax. Here, because the Claims were not made in any tax returns, the Refusals did not entail any amendment to tax returns by HMRC; hence, the appeal rights in s31 are not engaged.

41. Schedule 1A TMA 1970 applies as respects a claim made otherwise than by being included in a tax return (see sub-section 42(11) TMA 1970) – it therefore applies to the Claims. Paragraph 9 Schedule 1A confers a right of appeal against a decision to disallow a claim contained in a closure notice.

42. Here, the Refusals were clearly decisions to disallow the Claims – the question is whether those decisions were contained in a closure notice.

43. A closure notice is a notice by an officer of HMRC informing the claimant that he has completed his enquiries and stating his conclusions. It must complete an enquiry into a claim

that was permitted by paragraph 5 Schedule 1A, which requires the officer of HMRC to give notice in writing of his intention to enquire into the claim.

44. The questions here include whether any officer of HMRC (i) gave written notice of his or her intention to enquire into the Claims, and/or (ii) in fact enquired into the Claims prior to the Refusals.

45. *Raftopoulou* provides binding guidance on the meaning of certain statutory terms considered here. It makes clear a distinction between reviewing a claim on its face to decide whether it is in time, as opposed to "enquiring into" a return, which is a more in-depth exercise (see at [40]). It also establishes a distinction between informal enquiries and the opening of an enquiry with its attendant powers (see at [43]). These distinctions will often be ones of degree, depending on the facts. I am mindful of the Upper Tribunal's statement in *Portland Gas* at [35] (quoted at [36] above) to the effect that a broad construction of terms should be adopted, to the extent consistent with the statutory language, to recognise the Tribunal's role as the body with prime responsibility for determining tax disputes; but I regard this as subject to guidance as to the meaning of statutory terms given in *Raftopoulou*, a later decision of a superior court.

46. I first consider whether Miss Stanhope's letter to Mr Tufail's accountants of 25 July 2014 (read with Mr Elliot's letter to the court of the same date) was notice in writing of an officer of HMRC's intention to enquire into Mr Tufail's Claims.

(1) A written notice of intention to enquire into claims requires no particular formality – what matters is whether it would be understood by a reasonable person in the position of the intended recipient, having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim (see *Raftopoulou* at [20]).

(2) By way of context here, Mr Tufail's accountants, as the recipients of Miss Stanhope's letter, knew that Miss Stanhope was a debt manager in the Debt Management Enforcement & Insolvency department of HMRC. They had been corresponding with her about Mr Tufail's losses connected with his property in Spain. As part of this Miss Stanhope had first advised that they provide figures to the HMRC local office dealing with Mr Tuffail's tax returns (to amend his tax returns), and then corrected herself to say that they were out of time to do this for this first two of the three years in question. Mr Tufail's accountants had made the Claims on their client's behalf to this "local office" of HMRC in Leeds (sending Miss Stanhope a copy). Mr Tufail's accountants were also aware that Mr Elliott worked in HMRC Solicitor's Office and was dealing with the bankruptcy proceedings in the court.

(3) In her letter, Miss Stanhope first referred to the 12-week adjournment of the bankruptcy proceedings "in order that the disputed amount for the years [in question] can be looked at with regards to the losses to be claimed". Later, she referred to time limits for claims, including loss relief claims, and ended off saying: "I have forwarded your letter to the department that deals with losses and they will advise you and your client once this matter has been looked into further".

(4) Mr Elliot's letter to the court proposed a 12-week adjournment so that further "returns" submitted by Mr Tufail could be "processed", and so that HMRC could reach a "final conclusion on the relief sought". He said that the complexity of the returns was such that HMRC had not yet reached such a conclusion, despite giving "priority" to the returns.

(5) In my view, a reasonable person in the position of Mr Tufail's accountants would have understood Miss Stanhope's letter to be the debt management department of HMRC referring a question of tax law to the right department within HMRC to consider it:

namely, "the department that deals with losses". The letter would be understood by such a person as a "holding" response, deferring the decision as to whether or not to "enquire into" Mr Tuffail's Claims, rather than making that decision.

(6) I acknowledge that in this letter, as well as her earlier letters of April and June 2014, Miss Stanhope gave views on some aspects of the tax law surrounding Mr Tufail's accountants' proposals (and indeed she had made an error about the rules for amending tax returns, which she subsequently corrected). However, it would have been clear to a reasonable person receiving her 25 July letter that, on the matter of the time limits governing Mr Tufail's Claims, she was not competent to give a view and was entirely deferring to the appropriate department.

(7) I acknowledge Mr Tufail's argument that the period of time proposed by Mr Elliott for the adjournment of the bankruptcy proceedings (nearly three months), as well as his description of the "returns" as "complex", could be seen as indicating that HMRC had already made an initial assessment and decided to conduct a more in-depth review (allocating a significant period of time to do so). However, in my view, a reasonable person in the position of Mr Tufail's accountants, with their knowledge of the context, would have appreciated that

(a) Mr Elliott was not involved with reviewing the validity of Mr Tufail's Claims;

(b) it was Miss Stanhope who was co-ordinating such a review;

(c) it was therefore Miss Stanhope's letter that best expressed HMRC's intentions as regards reviewing Mr Tufail's Claims; and so

(d) Mr Elliott's proposal of a 12-week adjournment reflected nothing more than a reasonable "breathing space" for HMRC to prepare for the bankruptcy hearing.

(8) For similar reasons, I do not accept Mr Tufail's argument that the involvement of HMRC Solicitor's Office here (i) was analogous to the legal expertise sought by HMRC in *Portland Gas* subsequent to their initial rejection of the taxpayer's claim, and (ii) indicated "formality" as to the process of enquiring into Mr Tufail's Claims. Here, HMRC Solicitor's Office was involved solely due to the bankruptcy proceedings being pursued in parallel to consideration of Mr Tufail's Claims – there was no indication of Mr Elliott or his Solicitor's Office colleagues being engaged in the review of Mr Tufail's Claims.

(9) I acknowledge Mr Tufail's further argument that Miss Stanhope's referring the matter to "the department that deals with losses" was analogous to HMRC's 6 September 2012 letter in *Portland Gas* telling the taxpayer that they now wished to take expert advice – a step seen by the Upper Tribunal as the opening of an enquiry (see at [46]). The difference in my view is that in *Portland Gas*, the recipients of that letter were dealing with HMRC officials with whom they had, prior to that point, a detailed exchange of views on the tax law involved; whereas here, there had been no substantive discussion between Mr Tufail's accountants and Miss Stanhope of the tax law governing Mr Tufail's Claims; and this was because Miss Stanhope was not the right person in HMRC to conduct such a discussion. It is precisely this that Miss Stanhope was conveying to Mr Tufail's accountants by saying she had forwarded Mr Tufail's Claims to "the department that deals with losses".

47. Mr Ruhrmund's letter of 23 September 2014 supports my view of Miss Stanhope's 25 July letter as a "holding" response: his letter does not come across as the outcome of a process of Mr Ruhrmund (or any other HMRC officer) "enquiring into" Mr Tufail's claims during the

intervening two months; rather, it conveys the impression that the matter had only recently been brought to Mr Ruhrmund's attention; and that he was able to make his decision relatively quickly and without further reference to Mr Tufail or his accountants.

48. I conclude that neither Miss Stanhope's letter of 25 July, nor Mr Elliot's letter of the same date, nor a combination of the two, was written notice to Mr Tufail or his accountants that HMRC intended to enquire into Mr Tufail's Claims.

49. Turning back to Mr Ruhrmund's letter of 23 September 2014: as regards Mr Tufail's 2010-11 and 2011-12 Claims, the letter answers to the description in *Raftopoulou* at [40]: "a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit" - and so, in the words of that judgement, "does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so."

50. As regards Mr Tufail's 2012-13 Claim, the letter rejected this on different grounds (the restriction of furnished holiday lettings losses to such businesses) – but also requested an explanation as to why Mr Tufail did not return this income (as trading income) in his original tax returns. I considered whether Mr Ruhrmund's request for this explanation would have indicated to a reasonable person in Mr Tufail's accountants' position, with their knowledge of the background, an intention to "enquire into" Mr Tufail's 2012-13 Claim (it was clear that Mr Ruhrmund regarded this request as relevant only to that year's Claim, since the Claims for the earlier years were "in any case" out of time). I find that it would not have done: it was clear from the letter that Mr Ruhrmund had made up his mind about the treatment, and his request for an explanation was made somewhat rhetorically, to point up the inconsistency (as he saw it) between Mr Tufail's earlier treatment of the letting income and the treatment Mr Tufail's accountants were now proposing. My view is supported by the brevity and tone of the subsequent exchanges: a short letter back from Mr Tufail's accountants (14 October), denying the inconsistency with earlier tax returns, followed in short order by the Refusal letter from Mr Ruhrmund on 28 October, effectively reiterating his earlier view.

51. I therefore conclude, in addition to my conclusion at [48] above, that:

(1) Mr Ruhrmund's 23 September 2014 letter was not written notice of the intention of an HMRC officer to enquire into any of Mr Tufail's Claims;

(2) no officer of HMRC did in fact enquire into Mr Tufail's Claim prior to the Refusals of those Claims;

(3) the Refusals of Mr Tufail's Claims were not, due to the foregoing conclusions, decisions contained in a closure notice for the purposes paragraph 7 Schedule 1A; and accordingly

(4) there is no right of appeal under paragraph 9 Schedule 1A in respect of the Refusals of Mr Tufail's Claims.

52. The Refusal of Mrs Tufail's Claim answers to the description in *Raftopoulou* at [40] (see [49] above). It was therefore not a decision contained in a closure notice for the purposes of paragraph 7 Schedule 1A; and so there is no right of appeal under paragraph 9 Schedule 1A in respect of it.

53. It follows that there is no right of appeal to the Tribunal in respect of these appeals; they are accordingly STRUCK OUT.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

54. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 29 April 2020