Neutral Citation Number: [2024] EWHC 651 (Ch)

Case No: RL-2023-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 22 March 2024

Before :

MR JUSTICE FANCOURT

- -

Between :

NIGEL BARKLEM	**Claimant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

- -
- -

Andrew Thornhill KC, Richard Clayton KC and Suleman Ahmed (instructed by **Myers, Fletcher & Gordon**) for the **Claimant**
Nicholas Macklam (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Defendants**

Hearing date: 5 March 2024

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APPROVED JUDGMENT

This judgment was handed down via remotely at 10.00 am on 22 March 2024 by circulation to the parties or their representatives and by release to the National Archives.

Mr Justice Fancourt:

Introduction

1. The Claimant became a member of a film partnership tax scheme called Film 2K Partnership ("Film 2K") on 9 September 1999. He invested capital of £200,000 in Film 2K.

2. Film 2K filed partnership tax returns for 2000 and 2001, identifying large taxable losses and apportioning them between its partners, in accordance with ss. 12AA, 12AB Taxes Management Act 1970 ("TMA") (All references in this judgment to statutory provisions are to those that applied at the relevant times.)

3. The Claimant filed self-assessment tax returns for the tax years ending in 2000 and 2001, claiming tax relief for his share of partnership losses on the "partnership income" pages of those returns. Those losses, in aggregate £994,995, were to be set against other profits and taxable income in previous years, giving the Claimant significant immediate relief against tax otherwise payable.

4. After opening enquires into Film 2K's partnership tax returns on 28 August 2001 and 13 January 2003 (respectively) under s.12AC TMA, and following many years of tax appeals and further appeals relating to other such schemes culminating in the decision of the Court of Appeal in Samarkand Film Partnership No.3 v HMRC [2017] STC 926, HMRC decided that the tax relief was invalidly claimed.

5. Pursuant to closure notices issued on 25 November 2019 under s.28B TMA, HMRC amended the partnership's tax returns to exclude the claimed trading losses.

6. The Claimant, on behalf of Film 2K, appealed the closure notices. The appeal to the First-tier Tribunal ("FTT") was compromised by an agreement made in writing under s.54 TMA, by which it was stated that the closure notices were upheld without variation ("the s.54 Agreement").

7. HMRC then amended the Claimant's tax returns under s.28B(4) TMA to exclude his share of the losses, leaving him with a substantial unpaid tax bill and liability for interest.

8. The Claimant, on his own behalf and as representative pursuant to CPR r.19.8 of six other identified investors in Film 2K, Noel Farrey, Michael Kipnis, David Mossop, Mike Murphy, Kevin Ronaldson and Mark Thornton, now claims various forms of declaratory relief. The substance of this relief, as clarified in argument, is a declaration that Film 2K never was a partnership and so, although the closure notices were validly served on Film 2K, HMRC's s.24B(4) notices served on the Claimant were invalid and of no effect, and that accordingly the Claimant is not liable to pay HMRC the unpaid tax and interest that it asserts is due, or any sum related to the disputed tax relief arising from Film 2K's tax returns.

9. In effect, therefore, the Claimant's case is that HMRC had no power to make the amendments to his tax returns under s.28B(4) of TMA because it had been determined by the s.54 Agreement that there was no partnership, and therefore the statutory jurisdiction to amend partners' tax returns in accordance with the closure notice did not apply. The effect of that, if the Claimant is right, is that the tax relief previously given to

him (and those whom he represents) on the basis of a share of legitimate partnership trading losses remains in place, notwithstanding that it is his case that there was no partnership capable of generating deductible losses.

10. This improbable result is justified by the Claimant on the basis that HMRC had power to enquire generally into his tax return, under s.9A TMA, and could and should have done so within the time allowed on the basis of documents relating to Film 2K with which it was provided at an early stage; but that it did not do so and is now out of time.

11. HMRC responded to the claim by issuing an application to strike it out as an abuse of process, pursuant to CPR rule 3.4(2), and alternatively for reverse summary judgment under rule 24.2. The grounds of its application are that:

    i) The claim is an abuse of process because any challenge to the s.28B(4) notices served on the Claimant can only properly be made by a claim for judicial review, not by a freestanding Part 7 claim for declaratory relief; alternatively

    ii) It is an abuse of process because the validity of the closure notices on the partnership was conclusively upheld by the s.54 Agreement, on its true interpretation. This has the same effect for all purposes as a judicial determination. The Claimant cannot effectively challenge the s.28B(4) notices without also challenging the validity of the closure notices, which he cannot do by a Part 7 claim, or at all in view of the s.54 Agreement; alternatively

    iii) The claim has no real prospect of success because the argument on which it is based, namely that HMRC had no power under s.12AC and s.28B TMA to amend the tax returns of persons who were determined not to be partners, has already been considered and rejected by the Upper Tribunal (Tax and Chancery Chamber) and by the Administrative Court of the High Court, and accordingly, unless I am persuaded that both those decisions were clearly wrong, I should follow them.

12. At a relatively late stage, the Claimant issued his own application for summary judgment on his claim, on the basis that HMRC's reliance on the s.28B(4) notices to take away the tax relief previously granted leaving a liability to tax had no real prospect of being upheld at a trial and that accordingly he was entitled to the declaratory relief that he claimed.

13. During the course of argument, Mr Andrew Thornhill KC, who appeared on behalf of the Claimant with Mr Richard Clayton KC and Mr Suleman Ahmed, agreed with my observation that there was no relevant factual dispute and that the court was now in as good a position to decide the issue as it would be at a trial, and that accordingly I should do so rather than merely ask myself whether there was a real prospect of either claim or defence succeeding. Mr Nicholas Macklam, who appeared on behalf of HMRC, agreed that there was no relevant dispute of fact and did not dissent on the question of suitability for final determination.

14. I will refer later to the relevant content of the claim form and particulars of the Part 7 claim that the Claimant served.

Film partnership tax schemes

It is unnecessary to go into much detail about film partnership schemes, save to restate that 'sideways' tax relief (i.e. relief that can be applied against other income) is only available to partners (or members of an LLP) under sections 380 and 381 of the Income and Corporation Taxes Act ("ICTA 1988") where the partnership structure is transparent (i.e. the tax liability or relief is passed through to the partners or members), where the partnership is carrying on a trade and not just a business, and where the trade was being carried on for the realisation of profit: ss. 381(4), 384(1) ICTA 1988.

15. Film 2K was set up as a Scottish partnership (with separate legal personality) but nothing turns on that. It was considered to be a valid partnership by its founders and promoters and by those who subsequently invested capital in it and became partners. The intention was that the investors would be partners, not just investors, and they would be able to make use of the tax breaks for partners in such schemes.

16. As with other such schemes, the partnership was held not to fulfil the statutory criteria for tax relief because inter alia it was not carrying on a trade in the relevant tax years. (The Claimant now goes further and argues, probably correctly, that it was never realistically going to make a profit.) The reason why no profit would be made is that the scheme was structured with 80% of capital funded by bank loans to the partnership, not loans to the individual partners. As such, the interest on the loan was deductible from the rental income for the film rights and the partnership itself did not make a profit, given its initial capital expenditure; whereas if, as was more common with other schemes, the loans had been taken by the partners, neither the interest payable nor the distributed profit shares would be deductible from the partnership's income, leaving it (but not necessarily the partners) with a profit.

17. However, the structural defect was apparently not appreciated at the time and, when served with a notice to file, the partnership filed a partnership tax return under s.12AA and s.12AB TMA, and the partners in their personal self-assessment tax returns included their identified shares of the losses as partnership losses. HMRC was therefore being told by Film 2K and by its partners that there was a partnership. If it was to enquire into the partnership, the only appropriate vehicle for an enquiry was a notice of enquiry under the partnership provisions of TMA (s.12AC).

18. That is what HMRC did on 28 August 2001 and 13 January 2003. It then waited for the courts to work out in other appeals whether schemes such as Film 2K qualified for tax relief.

The relevant statutory provisions

19. The relevant provisions of s.12AC TMA at that time are the following:

> "(1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry") –
>
> (a) to the partner who made and delivered the return, or his successor,
>
> (b) within the time allowed.

……

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

(6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry –

(a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return, or

(b) under paragraph 24 of Schedule 18 to the Finance Act 1998 to each partner who at that time has made a company tax return or at any subsequent time makes such a return."

Thus, a notice of enquiry given in respect of a partnership return has the consequence that there is treated as having been given a notice of enquiry under section 9A TMA into each partner's personal tax return.

20. Section 9A TMA relevantly provides:

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

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

(b) within the time allowed.

…….

(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.

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

Thus, a further notice of enquiry under s.9A TMA cannot be given except in particular circumstances once the tax return in question is the subject of a notice of enquiry. That would on the face of it include a notice of enquiry deemed to have been given under s.12AC(6).

21. Section 28B provides:

"(1) This section applies in relation to an enquiry under section 12AC of this Act.

……

(2) A partial or final closure notice must state the officer's conclusions and –

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return …. required to give effect to his conclusions.

> (3) A partial or final closure notice takes effect when it is issued.
>
> (4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend –
>
> (a) the partner's return under section 8 or 8A of this Act, or
> (b) the partner's company tax return
>
> so as to give effect to the amendments of the partnership return.
>
> ……"

Accordingly, where a closure notice is issued following an enquiry under s.12AC TMA, other than one stating that no amendment is required, the notice must amend the partnership tax return to give effect to the officer's conclusions and the officer must, by further notices to the partners, amend their personal tax returns to give effect to the amendments to the partnership return.

22. None of these provisions deal expressly with what is to be done if the result of the enquiry is that HMRC concludes that there was in law no partnership.

23. Section 54 TMA contains provisions for settling tax appeals, including :

> "(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be.
>
> …….
>
> (5) The references in this section to an agreement being come to with an appellant and the giving of notice or notification to or by an appellant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the appellant in relation to the appeal."

What may be agreed under s.54 TMA with the specified consequences is therefore: to uphold the assessment or decision that was appealed without variation; to uphold it subject to variations that are agreed; or to treat the assessment or decision as discharged or cancelled.

The agreed facts

24. The essential facts of this case are not in dispute.

25. Film 2K filed partnership tax returns for 2000 and 2001, claiming losses for tax purposes of £12,207,810 and £1,015,669 respectively and identifying all partners' shares of the losses. The Claimant filed self-assessment tax returns for the same years, claiming his share of the partnership losses in the partnership pages of his return. HMRC issued timely notices enquiring into Film 2K's tax returns for each of those years, and notified the Claimant that the enquiries gave rise to deemed enquiries into his tax return.

26. Many years passed, as did the deadlines for an enquiry into the Claimant's tax return (if one could have been raised while the deemed enquiry was still running) and for a discovery assessment.

27. In 2019, further contact was made by HMRC with the Claimant, as the representative of Film 2K, followed about a month later by the closure notices (one for each relevant tax year), served on the Claimant on behalf of Film 2K.

28. Both closure notices state that the Officer concluded that the tax returns did not correctly reflect the tax consequences of the arrangements by which Film 2K acquired and leased films. Under the heading "My amendments", the notices read:

> "I remove all of the entries you showed on the "Trading and Professional Income" pages of your return and include them as results for a non-trade film business on the pages for "Partnership Savings, Investments and Other Income."
>
> On your partnership return I remove £12,207,809.00 [*£1,015,669.00 for the 2001 return*] from Box 12 "Loss from a trade or profession" and include the same figure in Box 16, which picks up Box 7.45 of the pages for "Partnership Savings, Investments and Other Income."

29. Under the heading "My reasons", the closure notices stated:

> "1. The partnership was not trading during the year ended 5 April 2000 [*5 April 2001*]. I have taken into account all of the circumstances, and noted in particular the similarities between the Partnerships purported trade and that of the partnerships in *Samarkand Film partnership No 3 and others [20172] EWCA CIV 77.* [*sic*]
>
> 2. If the partnership was trading, it was not trading on a commercial basis with a view to profit and is not treated as a partnership."

30. The closure notices warned the Claimant that notices pursuant to s.28B(4) might follow.

By letter dated 19 December 2019, Film 2K appealed the closure notices, giving some sketchy grounds of appeal. HMRC asked for clarification, which Film 2K's representatives explained they struggled to provide, but they reiterated that they disagreed that Film 2K was comparable to *Samarkand* and that they disagreed that the partnership was not trading.

31. HMRC wrote to Film 2K's representatives on 11 May 2021 giving expanded reasons for their conclusions about Film 2K's status. These effectively said that the facts of the Film 2K partnership were indistinguishable from those in *Samarkand*, which was held to be

non-trading, and explained that there did not appear to be a realistic expectation of any profit.

32. This was followed by an internal review conducted by HMRC, and the Claimant was notified of its outcome on 23 September 2021. The review upheld the closure notices on the basis that, as in *Samarkand*, there was just an investment, not "an adventure in the nature of a trade", and further a "big question as to the commerciality of the business and in turn the likelihood of a profit".

33. Film 2K then appealed to the FTT. The details of the appeal included grounds that Film 2K did carry out a trade during the years of loss and was trading commercially with a view to profit, as well as grounds based on legitimate expectation and estoppel. There was a further ground that the closure notices were invalid as Film 2K no longer existed when they were served, with the consequence that they should be declared void *ab initio*.

34. Two days later, after an independent review conducted on behalf of Film 2K's investors, the Claimant's solicitors notified the FTT that there was an additional ground on which Film 2K wished to rely, in the alternative to its other grounds:

> "…if the Film 2K Partnership was not trading with a view to profit in the Years of Loss then it must be concluded that it would never trade with a view to profit. That being so, there was never a partnership created under Section 1(1) of the Partnership Act 1890 and the enquiry notices issued under Section 12AC(1) Taxes Management Act 1970 in relation to the Years of Loss are invalid and void ab initio".

35. There followed correspondence, including an email from the Claimant on 29 July 2022 in which he said that the investors "now agree with the reasons given for HMRC's conclusions in the Closure Notices" and were willing to settle the appeal on the basis that Film 2K was not trading, would never have made a profit and was not carrying on business for profit and in consequence was not a partnership. Any reply of HMRC to that email was not in evidence.

36. The s.54 Agreement provides as follows:

> "1. The appellant, which claimed to be a Partnership Act 1890 partnership governed by Scottish law, appealed to the tribunal against the conclusions stated and amendments made by two closure notices issued by an officer of the respondents under s 28B of the Taxes Management Act 1970 ("**TMA 1970**") on 25 November 2019. The closure notices were issued at the conclusion of enquiries into partnership returns submitted by the appellant for the years ended 5 April 2000 and 5 April 2001 ("**closure notices**")
>
> 2. The closure notices concluded that (1) there was no partnership because no business was being carried on with a view to profit and (2) if that was wrong and the partnership was trading it was not trading on a commercial basis with a view to profit and is not treated as a partnership.
>
> 3. The appellant has indicated that it is in agreement with those conclusions.

> 4. The parties hereby agree to settle the appeal under s 54 of TMA 1970 and, in particular, that:
> (1) *The closure notices are upheld without variation*.
> (2) The appellant shall write to the tribunal to withdraw the appeal within fourteen days of the last date of execution of this settlement agreement." (*emphasis added*)

It was signed for and on behalf of Film 2K by the Claimant.

37. Following the settlement of the appeal, HMRC issued s.28B(4) notices to the investors, including the Claimant. These made adjustments to their tax returns for 2000 and 2001 consequential on the amendments made in the closure notices, removing the losses relating to Film 2K from the partnership pages of their returns.

Discussion

38. What is said in the closure notices is of importance. It is clear from the amendments made that the Officer concluded that Film 2K was a partnership with a business, but that it was not trading. The relevant income, expenses and claimed losses were put into the partnership savings, investments and other income section of the partnership tax return.

39. The primary reason given for the amendments, in para 1 of "My reasons", was that, like *Samarkand*, Film 2K's business was not a trade. The reason in para 2 is an alternative reason, in the event (but only in the event) that the analogy with *Samarkand* was wrong (or, perhaps, if the decision in *Samarkand* was subsequently overturned or distinguished on different facts). Even so, the final clause of para 2 of "My reasons" is curious – or as Mr Thornhill said, "peculiar" – because it does not relate to the criteria in ss. 381, 384 ICTA 1988 but appears to be a conclusion that there was in law no partnership.

40. However, reading the closure notices as a whole, it is indisputable that the amendments made were on the basis that there was a partnership with an investment business but that it was not trading in the tax years ending 5 April 2000 and 5 April 2001.

41. The grounds of appeal were inconsistent. The additional ground, added after the notice of appeal was filed, was an argument that the enquiry notices were void because there never was a partnership. This was an argument that Mr Thornhill accepted in his submissions was not sustainable: he accepted that the enquiry notices and closure notices were valid, even if in law there never was a partnership, but argued that the s.28B(4) notices were invalid because there was no partner on whom to serve them.

42. The argument as to the validity of the s.28B(4) notices was not a ground of appeal and could not have been, given that the appeal was against the closure notices served on Film 2K. The Claimant had said before the settlement was concluded that he was willing to settle on the basis that there was no partnership; but for the reasons ultimately acknowledged by Mr Thornhill and forming the basis of the decision of the Upper Tribunal (Tax and Chancery Chamber) in Revenue and Customs Commissioners v Inverclyde Property Renovation LLP [2020] UKUT 161 (TCC); [2020] STC 1348 ("*Inverclyde*") (notices of enquiry and closure notices nonetheless valid), that would not have invalidated the enquiry or the closure notices.

43. As to the s.54 Agreement, the operative part is clearly para 4(1). The appeal was settled on the basis that the closure notices were upheld without variation. That means that the closure notices were valid and had the effect that they were stated to have. The Claimant therefore cannot argue in this claim that the closure notices were invalid or ineffective according to their terms.

44. Mr Thornhill sought to extract from the s.54 Agreement the further proposition that the parties agreed that there never was a partnership, and that that was a basis for the settlement of the appeal, which is now binding on HMRC. The argument is based on the terms of para 2, which asserts that the closure notices concluded that there was no partnership because no business was carried on by Film 2K with a view to profit, and if that was wrong the partnership was not trading on a commercial basis and is not treated as a partnership.

45. As a statement of fact, this is however incorrect: the closure notices did not state that. They stated that the partnership was not trading, and that if that was wrong, it was not trading on a commercial basis and is not treated as a partnership. By para 3 of the s.54 Agreement, Film 2K is said to agree with "those conclusions" – which might be a reference to the actual reasons in the closure notices or to what is said in para 2 – but HMRC is not stated to agree. What HMRC and Film 2K agree is set out in para 4.

46. In my judgment, the s.54 Agreement must be read as an agreement to settle the appeal on the basis stated in para 4. The function performed by paras 1, 2 and 3 is in reality a recital of the essential facts leading to the agreement. There is no recited agreement by HMRC that the closure notices were to be varied to state a different conclusion about the partnership. On the contrary, the parties agreed that the closure notices were upheld <u>without variation</u>.

47. In this context, the erroneous description in para 2(1) should be treated as a *falsa demonstratio.* The closure notices are admissible as an aid to interpretation and show that the words of para 2(1) of the s.54 Agreement are in error but that the words of para 2(2) are correct. What the Claimant subjectively intended is irrelevant. Further, an agreement to uphold the notices on the basis that there was no partnership would be inconsistent with the amendments made by the closure notices, which assume a valid partnership return (because they reallocate the income as expenses within a partnership return), but no different amendments are specified in the s.54 Agreement.

48. The effect of the s.54 Agreement was therefore that the appeal was withdrawn and the closure notices and the amendments to Film 2K's partnership tax returns were left in place. In consequence, on the face of s.28B(4), HMRC was required to give effect to those amendments by also amending the partners' returns.

49. My interpretation of the s.54 Agreement means that it was not agreed that there was no partnership, and that, on the contrary, the settlement agreement was made on the basis that there was a non-trading partnership. That being so, the Claimant cannot argue that the s.28B(4) notices were invalid because the Claimant and his fellow investors were not partners. His claim therefore must fail, as it depends on a conclusion that the Claimant was not a partner. In case I am wrong in my interpretation, I now address the arguments presented to me as to why the claim should be struck out instead of dismissed.

The Claim

50. The claim is described in the claim form as seeking "declaratory relief as to the validity of an enquiry". Para 1 of the Particulars of Claim ("PoC") elaborates and refines that, by specifying that relief is also sought as to the validity of consequential amendment notices given to investors under s.28B(4).

51. Para 8 PoC states that HMRC has communicated an intention to petition for the bankruptcy of the Claimant in relation to a debt of £702,937.96. The PoC assert that there was never a partnership and that HMRC should have been aware of that shortly after the enquiry commenced, owing to the way that the scheme was structured.

52. Para 18 PoC pleads that HMRC served notices of deemed enquiry pursuant to s.12AC(6) TMA on the Claimant and that, if there was no partnership then there were no partners and so these notices had no effect. At para 22, the s.28B(4) notices are pleaded and para 23 pleads that they are ineffective because the Claimant was not a partner.

53. A raft of declarations is sought, including that:

    i) the Claimant was never a partner;

    ii) no valid enquiry was ever opened and no valid notice of deemed enquiry issued in relation to the Claimant's tax returns;

    iii) HMRC had no basis to bring a claim relying on the s.28B(4) notices (though it had not in fact done so, apart from asserting that the Claimant had an unpaid tax liability);

    iv) No further enquiry could be opened;

    v) HMRC is precluded from taking any other action to recover the disputed tax;

    vi) The Claimant is not liable to pay the sum claimed or any sum as tax arising from Film 2K's amended returns.

54. This relief is calculated to leave the tax relief where it has fallen, namely in the Claimant's and fellow investors' hands, without HMRC being able to pursue by any means its recovery. The declarations sought are various, and number ii) has been overtaken by the development of the Claimant's argument, which now accepts that the notices of enquiry and the closure notices were valid and effective.

55. The remaining issue is accordingly whether HMRC could (or should) do what the language of s.28B(4) apparently mandates following amendments made by a closure notice given under s.28B(2), namely make consequential amendments to the partners' tax returns. Mr Thornhill argued that that could not be done because it can only be done if the partners are partners, not if they are investors who stand as tenants in common (his preferred analysis) or if they are members of an unincorporated association (HMRC's preferred analysis if there was no partnership).

HMRC's abuse of process argument: Part 7 claim inappropriate

56. Mr Thornhill's argument is accordingly, in substance, that HMRC had no power to do what s.28B(4) apparently mandates, notwithstanding the validity of the closure notices served under s.28B(2), or that it was a wrong exercise of the power in the circumstances.

57. HMRC's first abuse of process argument is that a challenge of that kind to the validity of a s.28B(4) notice can only be made by judicial review, not by issuing a Part 7 claim.

58. It is now established that, since a s.28B(4) notice is not a closure notice, there is no right to appeal such a notice to the FTT: see per Henderson LJ in R (Amrolia) v Revenue and Customs Commissioners [2020] EWCA Civ 488; [2020] 1 WLR 4058 at [48]-[61] ("*Amrolia*"). Where an appeal does not lie, a judicial review claim is the right way to challenge such a notice: Knibbs v Revenue and Customs Commissioners [2019] EWCA Civ 1719; [2020] 1 WLR 731 ("*Knibbs*") at [21]-[25].

59. *Knibbs* concerned (among other things) the power of HMRC to amend previous tax year returns as a consequence of enquiries opened under s.9A and s.12AC TMA into carry-back claims. The judge had struck out one of the claims on the basis that it was an abuse of process to issue a Part 7 claim rather than appeal to the FTT. In another claim, an application for permission to pursue judicial review had been refused. The Court of Appeal said:

> "A lack of power to issue a closure notice is as much a ground of appeal against [HMRC's] conclusions or amendments as any other ground of challenge. Even if that were wrong, civil proceedings issued to determine this issue would remain an abuse because, for the same reasons as given below as regards a notice under section 28B, the appropriate mode of challenge would be by way of judicial review.
>
> …..
>
> We are satisfied that, in the present case, the correct procedure for individual partners to challenge the amendments made to their returns was by judicial review, and not by ordinary civil proceedings. There are a number of reasons for this. First, there are no private law rights involved. This is not, for example, a case where a claimant is seeking to enforce a contractual right. Second, the time limits are a strong factor in favour of judicial review being the correct procedure. Both appeals to the FTT and applications for permission to pursue judicial review are subject to short time limits. It makes no sense at all that an individual taxpayer or a partnership has a period of 30 days in which to appeal to the FTT against a closure notice, but an individual partner should have six years in which to make what is, in effect, the same challenge to a notice given under section 28B(4). Third, the challenges in these cases affect a large number of people and raise no issues of fact that might be unsuitable for determination in judicial review proceedings. Fourth, the requirement for permission to pursue judicial review does not make it an unsuitable procedure in the circumstances of this case, any more than in the many other cases (tax and non-tax) to which it applies. It is no more than a filter to weed out groundless cases."

60. Mr Thornhill and Mr Clayton said nothing about *Knibbs* but argued that the instant claim is one in which the Claimant is seeking to negate a liability asserted by HMRC and that that made it suitable for a Part 7 claim. They relied on dicta of Lewison LJ in R (Archer) v Revenue and Customs Commissioners [2017] EWCA Civ 1962; [2018] STC 38 ("*Archer*").

61. The issues in *Archer*, which was an appeal against the dismissal of a judicial review claim , were: whether amendments made to an individual taxpayer's tax return by a closure notice given under s.28A TMA, following an enquiry into that return, sufficiently complied with the statutory requirements or were invalid for non-compliance; and whether, alternatively, the defect or omissions could be cured under s.114 TMA. It was held that the closure notice did not comply with s.28A because it did not expressly state the resultant amount of tax liability, but that the defect was one of form rather than substance. The closure notice was therefore validated under s.114 and the taxpayer was indebted to HMRC, as HMRC had asserted in threatening to bankrupt him.

62. A further issue that had been raised was whether Mr Archer had been entitled to proceed by way of judicial review rather than by way of appeal against the closure notice. It was concluded that he had been entitled to do so because he was not seeking to contest the conclusions reached by HMRC but only to challenge the "technical" validity of the notice in the terms in which it had been served on him. As Lewison LJ put it:

> "It does not depend on whether HMRC are right or wrong in their conclusions. Nor does it depend on whether the purported closure notices are or are not valid. It is not a question of what the closure notices should have contained: it is a question of what they did contain. The answer depends simply on whether as a matter of fact (taking into account s 114) there was an amendment of Mr Archer's self-assessment. Proceedings to recover an amount of tax said to be due are collection proceedings. The mere fact that some tax issue arises in collection proceedings does not without more mean that the FTT is the only place that the dispute can be determined. If a dispute does not concern the correctness of HMRC's view about how the tax code applies to the taxpayer's case I do not see that the civil courts are barred from dealing with that dispute."

63. A further consideration was that an appeal to the FTT would have provided the tribunal, contrary to Mr Archer's interests, with an opportunity under s.50 TMA to reduce or increase the self-assessment, and thereby to plug the gap that Mr Archer was asserting to exist.

64. In my judgment, these (*obiter*) observations about the appropriateness of a judicial review claim on the facts of that case do not lend any support to the argument that a claim that is properly the subject of a judicial review, in accordance with *Knibbs*, can be brought instead as a Part 7 claim. On the contrary, *Archer* supports the argument that a challenge to the validity of a notice should be brought by judicial review if an appeal is unavailable or inappropriate for other reasons. Neither is a Part 7 claim seeking to establish that HMRC could not or could not properly give a s.28B(4) notice to the claimant justified because HMRC threatened bankruptcy proceedings: the Administrative Court or the bankruptcy court can grant a temporary injunction, if required, to restrain presentation of a bankruptcy petition.

65. The real issue raised in the claim before the court is whether HMRC has power to give a s.28B(4) notice to a partner, following a closure notice served on the partnership, if in law there was no partnership. That is, in the first instance, a general question of statutory interpretation as to the scope of the duty/power conferred on HMRC by the TMA, as amended; and secondly a question of whether in the light of the s.54 Agreement it was proper for HMRC to exercise it. All the relief claimed – so far as it is still pursued – flows from a decision on these issues.

66. Stating the issues in this way demonstrates that this is a claim that should have been brought by judicial review. The matter in issue is the validity of the s.28B(4) notices, which depends on general issues of law. There is no overlap with private law rights, as there was in a case like Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988, which prevented the bringing of a private claim for breach of contract in a public law context from being an abuse of process.

67. In my judgment, HMRC is right that to bring this claim for declaratory relief as a Part 7 claim, well out of time for bringing a judicial review claim, is an abuse of process. The issues are ones of general significance, raising no factual dispute. In substance the relief sought is the quashing of the s.28B(4) notices, or a declaration of their invalidity, and the other relief sought is purely consequential. Had I concluded that the s.54 Agreement means that it was agreed that there was never a partnership, the question would still remain whether on that basis the duty in s.28B(4) was subject to an implied limitation (or was wrongly exercised) when (as conceded on behalf of the Claimant) the duty in s.28B(2) to amend the partnership return had to be complied with.

68. These are public law questions, not matters of private right.

HMRC's abuse of process argument: no challenge to the closure notices

69. As previously stated, the Claimant now accepts that the notices of enquiry into the partnership's tax returns, the deemed notices of enquiry into the partners' tax returns and the closure notices were all valid.

70. The effect of the s.54 Agreement is that the closure notices were upheld without variation. That gives rise to an issue estoppel on at least the question of the validity of the closure notices. HMRC argues that if the closure notices are valid, there can be no challenge to the s.28B(4) notices because HMRC are required to serve them by the terms of that subsection whenever closure notices make amendments to the partnership's tax return. It is mandatory, they submit, for s.28B(4) notices to follow because it is not the partnership that pays tax based on its tax return, it is the partners who pay.

71. HMRC submits that the challenge to the validity of the s.28B(4) notices involves or requires a challenge the closure notices. Film 2K (acting by the Claimant) did in fact challenge the closure notices but its appeal was withdrawn on the basis that the closure notices were valid.

72. This argument in substance raises the same issue as that identified previously, namely whether HMRC has an unqualified duty to serve s.28B(4) notices or whether there are circumstances where it cannot or should not do so.

73. As to that, HMRC contend that the issue has been decided in *Inverclyde.*

In that case, LLPs filed partnership tax returns on the basis that they were transparent for tax purposes and they claimed various allowances. HMRC opened an enquiry into the partnership returns and determined that the LLPs were not carrying on a business with a view to profit and so partnership tax returns should not have been filed. The LLPs appealed on the basis that HMRC had accordingly had no power to open an enquiry under s.12AC TMA and so the closure notices were invalid. The FTT agreed and struck out the appeals on the basis that there was nothing to appeal.

74. The Upper Tribunal allowed HMRC's appeal. The LLPs had been required to file partnership returns and had done so, and the appropriate basis of an enquiry was therefore s.12AC TMA, and notices of enquiry and closure notices under s.28B were validly given. That did not change because HMRC concluded that the LLPs were not entitled to treat themselves as partnerships for tax purposes and could be required to file company tax returns instead.

75. The Upper Tribunal considered and addressed what the position would be if an enquiry were opened into a partnership tax return and in the course of that enquiry it was determined that there was no sufficient profit motive:

> "48. …we accept that HMRC's submission that a finding that a limited liability partnership which has submitted a return under the TMA provisions is not carrying on business with a view to profit does not retrospectively invalidate the notice to submit a return, the submission of the return, the opening of an enquiry, or the issuing of a closure notice, so as to render the whole procedure a nullity and preclude any further action by HMRC to secure payment of tax. We see nothing untoward in the concept of an enquiry process that can accommodate an issue as to whether the correct process has been initiated and followed. The potential scope of an inquiry, in terms of S12AC(4) is wide, extending inter alia to anything contained in the return. That, in our opinion, was capable of encompassing a conclusion that the wrong return has been submitted. In practical terms, the HMRC officer responsible for completing the inquiry can give effect to his or her conclusion by amending all of the sums in the inquiry to nil, thereby negating any claims in the return for losses or allowances. If it appears, despite the officer's conclusion that the limited liability partnership is not carrying on business with a view to profit, that there is income or gains chargeable to tax, the officer may then begin what he or she, *ex hypothesi*, regards as the correct process by issuing a notice under para 3 of Sch 18 [to the Finance Act 1998] requiring delivery of a company tax return."

76. On that basis, the Tribunal held that the notices of enquiry and the closure notices were valid. The decision did not have to address the consequential issue that arises in this case, but it would be consistent with the reasoning in *Inverclyde* that HMRC should follow through with consequential amendments of partners' tax returns to give effect to the closure notices.

77. The issue of s.28B(4) notices did arise in R (Mitchell) v Revenue and Customs Commissioners [2020] EWHC 3489 (Admin); [2021] 1 WLR 1427 ("*Mitchell*"), a reasoned decision of Sir Ross Cranston refusing permission to proceed with a judicial review of HMRC's decision to serve a s.28B(4) notice on a member of an LLP. This

followed a closure notice issued under s.28B(2), which concluded an enquiry into the LLP's partnership tax return. HMRC found that there was no trade or business being carried on with a view to profit. The basis of challenge by the applicant was that if the LLP was not carrying on a business with a view to profit he was not deemed to be a partner carrying on the business (or if, on the contrary, it was carrying on business with a view to profit then the situation was governed by Sched. 18 to the Finance Act 1998, not s.28B TMA). In other words, in either case the notice of enquiry and closure notice were all invalid, because served on a false basis, and the s.28B(4) notice was therefore *ultra vires*.

78. Sir Ross Cranston considered that the decision in *Inverclyde* was indistinguishable in principle, that he should follow it as a matter of judicial comity but that in any event he considered it to be correct. He addressed specifically an argument that the reference in s.28B(4) to "partner" could not include a person who, on the basis of the closure notice, was not to be treated as a partner because (in that case) the deeming provisions of s.863(2) Income Tax (Trading and Other Income) Act 2005 did not apply, and said at [36]:

> "There are two reasons that this is a bad point. First, although the Upper Tribunal in *Inverclyde* did not consider the matter expressly it is clear that it contemplated the revenue making consequential amendments to partnership returns when it went on to find that the enquiry was not invalidated if it transpired that the LLP was not carrying on a business with a view to profit. More importantly, I accept the revenue's submission as it would be an absurd interpretation that a closure notice properly issued in respect of a partnership return as defined did not also empower it to issue a section 28B(4) notice in respect of the individuals or corporate bodies named as 'partners' in that return.

79. Sir Ross did not explain why he considered it to be an absurd interpretation, but one reason would be that the tax due is not collected from the partnership but from the partners. It is therefore necessary (and s.28B so provides) that the conclusions reached about the profits or allowable losses made by the partnership are followed through to the partners' own tax returns. That must apply where HMRC has decided that losses that have been claimed are not deductible by the partners. As explained in *Inverclyde*, in a case where there is a finding that there is no partnership, the appropriate amendment to the partnership return (which otherwise stands unamended) would be to insert a zero into the boxes where taxable profits or allowable losses were claimed. It would be entirely logical, in those circumstances, for the amendment to the partnership return to "flow through" to the partners' returns, which would otherwise stand and record allowable losses.

80. It is difficult to see the logic for the Claimant's suggestion that, despite a finding of no partnership, the TMA provides power to amend a partnership return in those circumstances but no power to amend the partners' returns. It is also extremely difficult to find any language in s.28B that supports that interpretation. It would involve treating the amendments to the partners' returns as a nullity but not the amendment to the partnership's return. HMRC then being out of time to open any other enquiry or make a discovery assessment, the benefit to the taxpayer and loss to the Exchequer would lie where it fell. I would be disinclined to reach that conclusion unless compelled to do so.

81. Mr Thornhill advanced an argument of equal and opposite injustice in the event that HMRC was entitled to amend the Claimant's tax return under s.28B(4), by removing the allowable partnership losses, thereby leaving a liability to tax, without considering whether tax relief could be claimed by the 'partner' on a different basis. He suggested that some of the losses might be able to be set against tax if the investors in Film 2K were treated as co-venturers with an equal share of liabilities and profits. If nothing further could be done to "follow through" in full the tax consequences of the closure notice, it is possible that unfairness to the taxpayer would result.

82. However, it seems to me that the answer to this is that the s.28B(4) notice served on the 'partner' is not a closure notice and the deemed enquiry into the partner's tax return remains open (per Henderson LJ in *Amrolia* at [58]). There might also be a consequential claim open to the partner, under s.43C TMA, as a result of the s.28B(4) notice: s.43C(1)(a) and (2)(a) expressly provide for this. Even if there was none, or the taxpayer was out of time for such a claim, any closure notice closing the deemed enquiry could itself be appealed by the taxpayer, or, if no appeal was possible, a judicial review challenge to the closure notice could be made if HMRC wrongly failed to follow through the consequences of the s.28B(4) notice.

83. I therefore reject the argument that there was no power to amend the Claimant's tax return under s.28B(4) even if the appeal against the closure notice had been compromised on the basis of a finding that there was in law no partnership. There is a statutory requirement to do so and, in principle, it would be illogical and wrong to fail to do so. I agree with the logic expressed by the Upper Tribunal in *Inverclyde* and with the result in *Mitchell*, rejecting the argument that HMRC had no power to serve a s.28B(4) notice if its enquiry had concluded that no partnership losses were available to the putative partners. It may be (I do not need to decide) that in certain circumstances it could be regarded as unfair to serve a s.28B(4) notice if the deemed enquiry were closed without making other consequential amendments to the partner's tax return that were clearly warranted. That challenge would have to be brought by an appeal or on the basis of *Wednesbury* unreasonableness, but could not be made on the basis that the s.28B(4) notice was *ultra vires*.

84. No such basis of any claim appears from the evidence in this case.

Disposal

85. For the reasons that I have given, I consider that the relief sought in this Part 7 claim is an abuse of process. If there were any proper basis for the claim, it should have been brought as a claim for judicial review. However, I consider that, on the evidence filed, there is no proper basis in any event. The s.54 Agreement upheld the closure notice without amendment, and the closure notices were clearly issued on the primary basis that a partnership existed but was non-trading. In those circumstances, the argument that the s.28B(4) notices were invalid because they were served on a non-partner could not have succeeded in any event.

86. I therefore strike out the Claimant's claim and dismiss his application for summary judgment. Had I not struck out the claim, I would have entered judgment for HMRC dismissing the claim.