Blackburn (Inspector of Taxes) v Keeling

[2003] EWCA Civ 1221

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, WALLER AND CARNWATH LJJ

30, 31 JULY, 21 AUGUST 2003

Pay as you earn – Coding – Determination of appropriate code by inspector – Taxpayer Lloyd's Name incurring losses in respect of underwriting year ended 31 December 2000 – Losses not to be declared until May 2003 – Whether taxpayer's PAYE coding for year 2002–03 to be adjusted by amount of losses – Income Tax (Employments) Regulations 1993, SI 1993/744, reg 7(2)(a), (f).

The taxpayer was a Lloyd's Name involved in several Lloyd's syndicates. The syndicates traded from 1 January to 31 December each year (the underwriting year). The syndicates did not close their accounts at the end of the underwriting year but kept them open for a further two years. The result of the underwriting year was then disclosed at some point in the year following the one in which the accounts closed. A taxpayer was allowed relief from income taxes under s 380[a] of the Income and Corporation Taxes Act 1988 when he 'sustains a loss' from any trade, profession, vocation or employment in any assessment year. In the case of a Lloyd's underwriting business, s 172(1)[b] of the Finance Act 1993 provided, inter alia, that losses in any year of assessment were taken to be losses declared in the corresponding underwriting year and other losses derived from payments made up to the end of the corresponding underwriting year. Section 184(2)(a)[c] further stated that an underwriting year and a year of assessment were deemed to correspond to each other if the underwriting year ended in the year of assessment. It was anticipated that for the underwriting year ended 31 December 2000 the taxpayer would sustain losses of £425,390, which would be declared in May 2003. The taxpayer received a pension income and, by a letter dated 14 February 2002, he asked the Revenue to amend his PAYE coding for the year 2002–03 to take account of his Lloyd's losses. The Revenue refused to make the amendment on the grounds that under reg 7(2)(a)[d] of the Income Tax (Employments) Regulations 1993, the inspector, in determining the appropriate PAYE code, could only have regard to the reliefs from income tax to which the taxpayer was entitled for the year in which the code was determined, namely the 2002–03 tax year. As the taxpayer's entitlement to relief in respect of his Lloyd's losses did not arise until after the results of the underwriting year ending 31 December 2000 had been declared in May 2003, his PAYE coding for the 2002–03 tax year could not be amended to take account of those losses. The General Commissioners allowed the taxpayer's appeal on the ground that, under s 203(7)[e] of the 1988 Act, the taxpayer was entitled to claim 'provisional' relief relating to losses which were reasonably established to have been incurred. Peter Smith J dismissed the Revenue's appeal relying principally on para 7(2)(f) of the 1993 regulations which provided that, in determining the appropriate code, the inspector might have regard to 'such other adjustments as may be necessary'. The Revenue appealed.

[a] Section 380, so far as material, is set out at [11], post
[b] Section 172, so far as material, is set out at [8], post
[c] Section 184, so far as material, is set out at [8], post
[d] Regulation 7, so far as material, is set out at [23], post
[e] Section 203, so far as material, is set out at [20], post

Held – Whether a taxpayer's 'title' to a relief from income tax had been established at the time his PAYE code was determined could only be determined by looking at the statutory provisions which conferred the rights to the relief. Section 380 was triggered where the taxpayer 'sustains a loss' in any year of assessment. Having regard to ss 172(1) and 184(2)(a) of the 1993 Act, in the case of a Lloyd's underwriting business it was clear that losses declared in May 2003, along with other profits or losses in the underwriting year 2003, were 'sustained' in the year of assessment 2003–04. It was therefore quite clear that, when the taxpayer made the claim in February 2002 and when the commissioners considered the matter in July 2002, there was no right to relief since the losses had not yet been 'sustained'. Moreover, as there would be no purpose in a specific provision, restricting reliefs to those to which title had been established, if it could be overridden by a general discretion to make a provisional deduction at an earlier time, the effect of reg 7(2)(a) could not be nullified by s 203(7) or para 7(2)(f) or by any other residual discretion under reg 7. The Revenue's appeal would therefore be allowed and the inspector's determination of the PAYE code restored.

Notes

For calculation of the PAYE code, see Simon's Direct Tax Service, E4.912.

For the Income Tax (Employments) Regulations 1993, SI 1993/744, reg 7(2)(a), (f), see Simon's Direct Tax Service, Part H2.

Case referred to in judgments

Jones (Inspector of taxes) v O'Brien [1988] STC 615, 60 TC 706.

Cases referred to in skeleton arguments

IRC v Herd [1993] STC 436, [1993] 1 WLR 1090, 66 TC 29, HL.

R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 1 WLR 2956, [2002] 4 All ER 654.

R v Walton General Comrs, ex p Wilson [1983] STC 464, CA.

Whitney v IRC [1926] AC 37, 10 TC 88, HL.

Appeal

The Commissioners of Inland Revenue appealed against a decision of Peter Smith J of 9 April 2003 ([2003] STC 639) dismissing the Revenue's appeal against a decision of the General Commissioners given in August 2002 allowing Mr Christopher Keeling's appeal against the Revenue's refusal to adjust his PAYE coding for the year 2003–04 to reflect an underwriting loss of £425,390 for the underwriting year 1 January 2000 to 31 December 2000 that was not expected to be declared until May 2003. The Revenue had refused to make the adjustment on the grounds that under reg 7(2)(a) of the Income Tax (Employments) Regulations 1993, SI 1993/744, the inspector of taxes, in determining the appropriate PAYE code, could only have regard to the reliefs from income tax to which the taxpayer was entitled for the year in which the code was determined, namely the 2002–03 tax year. The facts and grounds of the appeal are set out in the judgment of Carnwath LJ.

David Ewart (instructed by the *Solicitor for the Inland Revenue*) for the Revenue.

Giles Goodfellow QC (instructed by *Gregory Rowcliffe Milners*) for the taxpayer.

Cur adv vult

21 August. The following judgments were delivered.

CARNWATH LJ (delivering the first judgment at the invitation of Lord Phillips of Worth Matravers MR).

Introduction

[1] This appeal concerns a decision of the General Commissioners given in August 2002 that the taxpayer's PAYE coding in the year 2002–03 should have reflected an underwriting loss of £425,390, expected to be declared in May 2003. The relevant facts appear from the case stated by the commissioners. The main points are as follows.

[2] The taxpayer is a Name in various Lloyd's Syndicates. A syndicate is an 'annual joint venture'. Each individual Name is entitled to a predetermined share of any profits or losses. Although a syndicate writes business for one year, it normally reinsures itself with a successor syndicate, and each member of the reinsured syndicate has the right to participate in the business of the successor syndicate. The resulting right to participate in a chain of syndicates is known as 'syndicate capacity'. Profits and losses of the syndicate are attributed to Names in accordance with their share of syndicate capacity.

[3] Syndicates trade from 1 January to 31 December in each year (the underwriting year) and each such year is regarded as a single venture for the year. To enable liabilities to be quantified more accurately, the business accounts remain open for a further two years, although forecasts are provided at regular intervals. Thus, the accounts for the underwriting year 2000 were left open until 31 December 2002, and the profit or loss for that year was declared in May 2003.

[4] In February 2002 the taxpayer claimed loss relief under s 380(1)(b) of the Income and Corporation Taxes Act 1988 (the 1988 Act), based on the loss expected to be declared in May 2003; and he requested that it be set against his pension income for 2002–03 (taxable under Sch E), by amendment of his PAYE code for that year. The inspector disallowed the claim to relief, and refused to amend the PAYE code.

[5] The commissioners allowed the taxpayer's appeal in respect of the PAYE code, on the ground that, under s 203(7) of the 1988 Act he was entitled to claim 'provisional relief relating to losses which are reasonably established to have been incurred'. (His appeal against refusal of the claim to relief under s 380 had been withdrawn, the Revenue having indicated that they would not treat this as prejudicing his case in respect of the PAYE code.) The judge dismissed the Revenue's appeal (see [2003] STC 639), principally relying on para 7(2)(f) of the Income Tax (Employments) Regulations 1993, SI 1993/744 (the PAYE regulations).

[6] There is no dispute that the amount of the trading loss greatly exceeded the taxpayer's pension income for 2002–03. It is also common ground that s 380(1)(b) would in due course allow a claim for relief for that trading loss. The issue is whether this can be set against his income for 2002–03 through his PAYE code for that year.

[7] The Revenue's contentions before us (as helpfully summarised by Mr Goodfellow QC for the taxpayer) are as follows: (i) He cannot be treated as sustaining any loss in his underwriting trade until the end of 2003 and so no account could be taken of such trading losses in setting his PAYE coding for 2002–03 (the no trading loss point). (ii) Even if he could be treated as having sustained or as sufficiently likely to sustain some trading loss so as to be entitled to relief under s 380, his actual or prospective entitlement to such relief was not relevant to setting his PAYE code for 2002–03 because by virtue of Sch 1B to the Taxes Management Act 1970 (the 1970 Act) such relief did not alter his liability to

income tax for 2002–03 (Sch 1B). The latter was a new point before the judge, which he permitted to be raised on terms as to costs.

The law

[8] Special provision is made, by Pt II, Ch III of the Finance Act 1993 (the 1993 Act), for taxation of Lloyd's underwriters. Income tax on profits arising from a member's underwriting business is charged on the profits of the year of assessment (s 171). Section 172(1) provides that 'for ... all other purposes of the Income Taxes Acts' the profits or losses in any year of assessment are 'taken to be'—

> '(a) in the case of profits or losses arising directly from his membership of one or more syndicates, those of any previous year or years which are declared in the corresponding underwriting year; ...
> (c) in the case of other profits or losses, those derived from payments received or made in the corresponding underwriting year.'

By s 184(1) 'underwriting year' means the calendar year; and, by sub–s (2)(a)—

> 'an underwriting year and a year of assessment shall be deemed to correspond to each other if the underwriting year ends in the year of assessment.'

[9] Thus, the underwriting year 2003 ends in the year of assessment 2003–04, and therefore 'corresponds' to that year of assessment. Accordingly, losses declared in May 2003, and other losses derived from payments made up to the end of the underwriting year 2003, regardless of their derivation, are 'taken to be' losses 'in' the year of assessment 2003–04.

[10] Under the general law, the relevant provisions are in the 1988 Act, and regulations made under it, and the 1970 Act. Of the 1988 Act, it is necessary only to refer to the provisions governing relief for losses, and those relating to PAYE.

[11] As to the 1988 Act, s 380(1) provides:

> 'Where in any year of assessment any person sustains a loss in any trade, profession, vocation or employment carried on by him either solely or in partnership, he may, by notice given within twelve months from the 31st January next following that year, make a claim for relief from income tax on—
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> > (a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or
> > (b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income;
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> but relief shall not be given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above.'

Losses for this purpose are computed in the same manner as profits under Sch D (s 382(3)).

[12] Taken with s 172 of the 1993 Act, s 380(1)(b) of the 1988 Act has the effect that losses declared in May 2003, being losses in the tax year 2003–04, may be subject to a claim for relief, which (subject to the Sch 1B point) may be used in respect of income for 2003–04 or 2002–03.

[13] Read literally it might be thought that the section does not allow such a claim to be made before the end of January 2005 (that is, January 'next following' the end of the tax year 2003–04). However, the Revenue does not take that position. In effect, it reads 'within twelve months', in s 380(1), as meaning 'before the end of twelve months'. (Not surprisingly, the taxpayer does not quarrel with that interpretation, and we see no reason to question it.) On the Revenue's interpretation, however, the claim for the losses declared in May 2003 cannot be

made before the end of the underwriting year, that is December 2003, which is when the losses for that year are crystallised.

[14] Turning to the 1970 Act, s 42 provides for the making of claims for relief. By sub-s (1A) the claim must be for a quantified amount; and, by sub-s (2) it must be made by inclusion in a tax return, if it could be so included. However, by sub-s (3), neither sub–ss (1A) or (2) applies to a claim which falls to be taken into account by deduction or repayment under the PAYE system. Subsection (11A) provides for 'claims ... involving two or more years of assessment' (which includes claims under the 1988 Act, s 380); Sch 1B has effect as respects such claims.

[15] Paragraph 2 of Sch 1B deals with loss relief. It provides:

> '(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of assessment ("the later year") to be given in an earlier year of assessment ("the earlier year").
> (2) Section 42(2) of this Act shall not apply in relation to the claim.
> (3)The claim shall relate to the later year.
> (4) Subject to sub-paragraph below, the claim shall be for an amount equal to the difference between—
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> > (a) the amount in which the person is chargeable to tax for the earlier year ("amount A"); and
> > (b) the amount in which he would be so chargeable on the assumption that effect could be, and were, given to the claim in relation to that year ("amount B").
>
> (5) Where effect has been given to one or more associated claims, amounts A and B above shall each be determined on the assumption that effect could have been, and had been, given to the associated claim or claims in relation to the earlier year.
> (6) Effect shall be given to the claim in relation to the later year, whether by repayment or set-off, or by an increase in the aggregate amount given by section 59B(1)(b) of this Act [*relating to payments made on account of tax*], or otherwise ...'

[16] This elaborate deeming provision has the effect (so far as it applies) that, where under s 380(1)(b) loss relief is claimed on income in the preceding year, the claim none the less 'relates' to the later year (para 2(3)). The amount of the claim is computed using the formula in para 2(4), based on the income in the previous year; but it does not affect the tax position in the earlier year (para 2(3)). It gives rise to a 'free-standing credit' (in the Revenue's language) which can be used in any of the ways set out in para 2(6).

[17] Turning to the PAYE scheme, the statutory basis for the regulations is in s 203 of the 1988 Act. Subsection (1) provides:

> 'On the making of any payment of, or on account of, any income assessable to income tax under Schedule E, income tax shall, subject to and in accordance with regulations made by the Board under this section, be deducted or repaid by the person making the payment, notwithstanding that when the payment is made no assessment has been made in respect of the income and notwithstanding that the income is in whole or in part income for some year of assessment other than the year during which the payment is made.'

[18] Two familiar and important features of the PAYE machinery are the 'Tax tables' and the 'PAYE code'. Tax tables are prepared by the Revenue and issued to employers, showing the amount to be deducted on each pay day to achieve the correct overall deduction of tax over the year, by reference to the PAYE code for

the particular employee. (In this context, 'employer' is defined so as to include anyone paying income taxable under Sch E, such as the taxpayer's pension in this case.) The tax tables are largely mechanistic. The individual circumstances of the taxpayer, including the allowances and reliefs to which he is entitled, are reflected in his PAYE code, determined by the inspector, and subject to appeal by the employee. In considering the statutory provisions, it is important to keep in mind that the PAYE code is itself part of the tax tables (see the PAYE regulations, reg 2(1) below).

[19] Section 203(2) requires the Board to make regulations with respect to the assessment, charge, collection and recovery of tax under Sch E; the regulations 'have effect notwithstanding anything in the Income Tax Acts' (defined by s 831(1)(b) to mean 'the enactments relating to income tax'). They are to include provision for payment of Sch E income to be made subject to deduction of tax 'calculated by reference to tax tables …' (s 203(2)(a)).

[20] By sub-s (6) of s 203, the tax tables are to be constructed so as to ensure as far as possible that the 'total income tax' payable for the year is deducted from income paid in that year. By sub-s (7):

> 'In subsection (6) above references to the total income tax payable for the year shall be construed as references to the total income tax estimated to be payable for the year in respect of the income in question, subject to a provisional deduction for allowances and reliefs, and subject also, if necessary, to an adjustment for amounts overpaid or remaining unpaid on account of income tax in respect of income assessable under Schedule E for any previous year.'

[21] The relevant regulations are the Income Tax (Employments) Regulations 1993, SI 1993/744 (the PAYE regulations).

[22] The employer is required on any payment to deduct tax calculated by reference to the employee's 'cumulative emoluments' and 'cumulative free emoluments' (reg 14). 'Emoluments' are the full amount of income to be taken into account in assessing liability under Sch E; 'free emoluments' are 'the appropriate amount of any emoluments of the employee which qualify for relief from income tax' (reg 2(1)). Under reg 6, every employer upon making any payment of emoluments to any employee is obliged to deduct or repay tax in accordance with the appropriate code. The concept of the 'code' is explained by reg 2(1), which defines it as 'any part of the tax tables in which all the amounts of free emoluments … for any period have been calculated on the basis of the same total amount for the whole year …'.

[23] Regulation 7 is central to the argument in this case. It provides:

> '(1) The appropriate code shall be determined by the inspector, who for that purpose may have regard to any of the matters specified in paragraph (2).
> (2) The matters specified in this paragraph are–
>
> (a) subject to paragraph (3), the reliefs from income tax to which the employee is entitled for the year in which the code is determined, so far as his title to those reliefs has been established at the time of the determination.
> (aa) where the code is determined before the beginning of the year for which it is to have effect, any proposed alteration or alterations in the rates for that year of any of the reliefs referred to in sub-paragraph (a); …
> (f) such other adjustments as may be necessary to secure that; so far as possible; the tax in respect of the employee's emoluments for the year for which the code is to have effect shall be deducted from the emoluments paid during that year.

(3) Where the code is determined before the beginning of the year for which it is to have effect, the inspector shall disregard any relief such as is referred to in paragraph (2)(a) if he is not satisfied that the employee will be entitled to it for that year.'

[24] Regulation 9 provides for two circumstances where there need be no actual code. The first is where the inspector determines that tax is to be deducted at the higher rate from the whole of any emoluments (reg 9(1)). The second, conversely, is where he determines that no tax is to be deducted from any emoluments, for example because the emoluments will be taken into account in a Sch D assessment. In either case the appeal and other provisions apply as though a code had been determined (reg 9(3)).

[25] Regulation 11 allows the taxpayer to appeal to the General Commissioners against the inspector's determination of the code. On such an appeal, the commissioners—

'shall determine the appropriate code, having regard to the same matters as the inspector may have regard to when the appropriate code is determined by him.' (See reg 11(5).)

The judgment below

[26] Peter Smith J summarised the respective contentions before him, as follows ([2003] STC 639 at [19] and [23]):

'Mr Ewart contends that the reference to the reliefs under reg 7(2)(a) shows that the inspector can only give effect to reliefs when they properly arise in the relevant tax year. That he says effectively referred back to the procedure in this case for the loss relief claim. A loss relief claim he submits can only be made in accordance with s 380 and will fall to be considered in the second year as specified by para 2(3) of Sch 1B to the 1970 Act, as set out above. As this cannot arise until after the accounts for the underwriting year have been declared ie May next, no claim can be submitted and the inspector cannot take into account any claim of a future loss which is not yet presently claimable ... Mr Goodfellow submits that the PAYE regime is a provisional assessment procedure. It would be quite wrong for the inspector to ignore the obvious facts in this case. The obvious facts are that ultimately the respondent will not have any tax liability when all reliefs are ultimately taken into account ...'

[27] He concluded in favour of the taxpayer ([2003] STC 639 at [23]):

'I see no objection in principle to the code being determined on a provisional basis in the light of the information available to the inspector when he determines the code. Although sub-para (a) refers to a relief to which the employee is entitled for the year, I do not see that as meaning that the inspector does not have the ability to take into account a future entitlement which will ultimately affect the relevant tax year and to my mind he can do that under sub-para (f). That is a sweeper clause entitling the inspector to take into account all matters known to him at the time he prepares the code to arrive at the fairest and most realistic code that is likely to be the nearest to the true tax position of the taxpayer when the taxpayer's affairs for that tax year are finally worked out. It seems to me that the PAYE code should operate both ways. Primarily of course it operates in favour of the government in that the government is enabled to collect in advance tax which otherwise it could not claim until the year end. I do not see why the government should not also submit to the counter-position namely that if the reality in any given case is that there is likely to be no tax paid the code should be amended accordingly.'

[28] Mr Ewart complains that he did not in terms deal with the Revenue's alternative argument. However, I understand that this was intended to be covered by the last part of his judgment where he said ([2003] STC 639 at [24]–[25])—

> '... It does seem to me that the regime under the regulations is self-contained. That is why in s 203 it is stated that it applies notwithstanding any provision in the Income Tax Acts. Therefore although I accept that the method of recovery of loss relief is as set out in the provisions helpfully referred to above by Mr Ewart that does not have any impact on an ability to treat the loss differently under the PAYE regime if it is appropriate so to do.'

Thus, in the judge's view, the provisions of the 1970 Act, directed to recovery of loss relief, could not be relied on to alter the PAYE rules.

No trading loss

[29] Dealing with the Revenue's first submission, it is necessary to begin by considering the nature of the right to the relief claimed; and then to see how it is applied in the PAYE system.

[30] The starting-point is s 380, which confers the right to relief. That is triggered where the taxpayer 'sustains a loss' in any year of assessment. To find out what that entails, in the case of a Lloyd's underwriting business, one has to look to the 1993 Act. From that it is clear that losses declared in May 2003, along with other profits or losses in the underwriting year 2003, are 'sustained' in the year of assessment 2003–04. That loss may be used (subject to the Sch 1B point), on a claim made for that purpose, to give relief from income tax in either 2003–04 itself, or in the preceding year 2002–03.

[31] From this analysis, it seems to me quite clear that in February 2002, when the claim was made, and in July 2002, when the commissioners considered the matter, there was as yet no right to the relief, since the losses had not yet been 'sustained'. For this purpose, it is unnecessary to decide whether the right arose in May 2003, when the losses were declared, or at the end of the underwriting year, as the Revenue argues (although the latter view is consistent with the general approach, explained in *Jones (Inspector of Taxes) v O'Brien* [1988] STC 615 at 621–622). On any view they were not 'sustained' before May 2003. It is also clear that the right to make a claim for relief from income tax, on so much of his income as is equal to the loss sustained in 2003–04, has nothing to do with the fact that those losses were derived from events before the tax year 2003–04. It is simply a statutory right given by s 380, on the basis of losses sustained in 2003–04.

[32] Turning to the PAYE scheme, the obvious reference-point is reg 7(2)(a) of the PAYE regulations, which deals specifically with the treatment of reliefs from income tax. Under this paragraph attention is directed to reliefs to which the employee is 'entitled for the year', so far as 'his title' has been 'established' at the time of the determination. Whether title has been established, can only be decided by looking at the provisions which confer the right to relief. As I have said, it seems clear to me, from these provisions, that the right or title was not established at the time of the determination, because the losses had not then been 'sustained'. It is clear, therefore, in my view, that para (a) does not assist the taxpayer.

[33] Accordingly, if the relief is to be taken into account, it must be by virtue of some other provision of the PAYE scheme. There are three possibilities: (i) Section 203(6) and (7) of the 1988 Act, which impose the general requirement for the tax tables (which include the code) to be designed to secure that 'the total income tax' payable for the year is deducted under PAYE for the year; and which define 'total income tax' in this context as the estimated income tax for the year, subject to 'a provisional deduction for allowances and reliefs...'; (ii) para 7(2)(f) of the PAYE regulations, which the judge described as a 'sweeper clause' (see [2003] STC 639 at [23]), allowing adjustments necessary to secure that the tax in respect of

emoluments for the year is deducted from emoluments paid during the year; (iii) a residual discretion under reg 7, implied by the use of the word 'may' in reg 7(1). As has been seen, the commissioners found in favour of the taxpayer under the first; the judge favoured the second.

[34] Like the commissioners and the judge, I have some sympathy with the taxpayer's contention. Certainly, it seems arguably contrary to the spirit of the PAYE system that tax should be deducted from his pension in 2002–03, when everyone knows that he will in due course be entitled to claim loss relief for that year far greater than the tax liability. On the other hand, it has to be borne in mind that, if a profit rather than a loss had been declared in May 2003, there would have been no question of any tax being paid on it before the end of that year.

[35] In any event, these considerations do not permit us to depart from the statutory provisions. The insuperable difficulty with any of the three possibilities is that they nullify the effect of para (a). There would be no purpose in a specific provision, restricting reliefs to those to which title has been established, if it can be overridden by a general discretion to make a provisional deduction at an earlier time.

[36] It is also easy to understand why para (a) was limited in this way. Although the likely scale of the losses was clear in this case, one can envisage many cases, not confined to Lloyd's underwriters, where a similar argument could be advanced, in circumstances where the likely amount of the losses is far less certain. If in all such cases the inspector and the commissioners were given a free hand to make provisional allowances for prospective losses, it would add a further layer of complication and uncertainty to the already complex task of preparing PAYE codes.

[37] Mr Goodfellow relies on the analogy with interest relief. It is common ground that, where a qualifying loan is taken out during the year, with interest payable monthly, the code will in practice be adjusted for the whole year, as soon as the first payment is made, even though technically the 'entitlement' to relief on the later instalments only arises when they are paid. Whether or not this procedure is strictly correct, it makes obvious sense, in order to avoid multiple adjustments. The important distinction, however, is that, assuming payments continue, the entitlement will arise in the relevant year of assessment. It provides no assistance for a case, such as the present, where the right will not arise until after that year.

[38] Accordingly, in my view, the Revenue is entitled to succeed on the first point.

No effect under Sch 1B to the 1970 Act

[39] This conclusion makes it unnecessary to reach a final view on the alternative point. The Revenue's contention, in summary, is that even if there were a power to make provisional adjustments, it could only be in respect of reliefs relating to the year in question. Schedule 1B makes clear that this relief, even if used in respect of the tax for the earlier year, does not 'relate' to that year, and does not affect the tax position in that year. Paragraph 2(6) of the Schedule provides in terms that it 'shall' be given effect in relation to the later year.

[40] Mr Goodfellow submits that Sch 1B is no more than part of the machinery for assessing and collecting tax; and that it cannot detract from his rights under the PAYE system, which is to have effect 'notwithstanding anything in the Income Taxes Acts'. He further submits that, on analysis, Sch 1B is part of provisions made necessary by the self-assessment system, and it has no relevance to the separate PAYE code. For example, he notes that para 2(2) (which disapplies s 42(2)) can have no relevance to PAYE, since that provision has already been excluded by s 42(3). He also seeks to explain the deeming provision in Sch 1B, by reference to the special time-limits applicable to self-assessment. For example, s 9ZA of the 1970 Act prohibits amendment of a return more than 12 months after the filing

date. Where relief under s 380(1)(b) is applied to an earlier year, it is treated as 'relating' to the later year, so that the claim can still be made up to 12 months from the January following that year (as permitted by s 380(1)).

a **[41]** I see some force in these arguments. However, it is unnecessary to decide the question, and I prefer to rest my conclusion on the first point.

Conclusion

[42] I would allow the appeal and restore the inspector's determination of the code.

b

WALLER LJ.

[43] I agree.

LORD PHILLIPS OF WORTH MATRAVERS MR.

[44] I also agree that the appeal should be allowed for the reasons given by

c Carnwath LJ.

Appeal allowed.

Stephen Hetherington Barrister.