[2019] UKFTT 0434 (TC)

TC07248

Appeal number: TC/2017/02079

Income tax - Section 28A(1) & (2) Taxes Management Act 1970 - appeal against Closure Notice and Revenue Amendment - whether appellant 'trading' and whether entitled to deduct payments made to family members to fund property dealings which ultimately proved abortive were an allowable business expense - no - profits correctly assessed by HMRC - appeal dismissed
Appeal against penalty assessments imposed under Schedule 24 FA 2007 for inaccuracies in tax returns based on deliberate behaviour - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GORDON LIM **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ANN CHRISTIAN

Sitting in public at Leeds ET, City Exchange, 11 Albion Street, Leeds on 13 November 2018

Mr Gary Brothers for the Appellant

Ms Rosalind Oliver, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Gordon Lim ("the appellant") against HMRC's decision to issue a closure notice and amendment in respect of his self-assessment tax return for the year ended 5 April 2011, and to raise an assessment of £24,823.57.

2. The appellant also appeals a penalty determination of £14,770.02 imposed under paragraph 1 of Schedule 24 to the Finance Act 2007 ("Schedule 24") in respect of inaccuracies in his return for the year in question.

Points at issue

3. Whether:

i. the appellant was carrying on commercial property trading; and if so,

ii. whether expenditure in respect of forfeited deposits arising in relation to aborted purchases in 2009 of two residential building plots in Leeds were wholly and exclusively for the purposes of that trade, and if not

iii. whether inaccuracies in the appellant's tax return were deliberate or careless.

Evidence

3. The evidence consisted of two bundles of documents containing copy correspondence between the appellant's agents and HMRC from 2013 to 2017, copy tax returns, copy notice of assessment and closure notice, the notice of appeal, statements of case by both parties, copy relevant authorities and legislation. The appellant and his son Dr Philip Lim, who was involved in the property dealings, provided witness statements. Dr Lim also gave oral evidence to the Tribunal.

Background

4. The appellant filed his 2010-11 self-assessment tax return on 31 January 2012. The self-employment pages gave a commencement date for property trading of 5 April 2011. No income from the source was shown and losses of £122,213 were claimed.

5. £62,997 of the losses was set against income for 2010-11 and £53,366 carried back to 2009-10.

6. On 7 January 2013 HMRC opened an enquiry into the return under s 9A TMA 1970.

7. Dr Lim and Ms Tzemin Wah, the appellant's son and daughter in law had contracted to purchase the plots paying 10% deposit monies of £31,957. They had exchanged contracts without having the security of a mortgage offer. When on physical completion of the dwellings they could not obtain mortgage facilities, they were unable to legally complete the purchases and their deposits were forfeited.

8. Manor Mills LLP also pursued a County Court action against Dr Lim and his wife for losses arising from breach of contract totalling £122,213 to include legal costs.

9. Baines Jewitt Solutions Ltd, Chartered tax advisers ('BJ'), acting for the appellant, replied to HMRC on 14 February 2013 and provided a letter dated 19 January 2012, from Metis Law LLP, solicitors for Manor Mills LLP, the developers of Manor Mills, Holbeck Leeds, which confirmed the amount of £122,213 had been received from the appellant, stating it was:

> "…in full settlement for the non-purchase of plot 189 and plot 274 at Manor Mills, Holbeck, Leeds for which deposits were paid in September 2006 but these units were not purchased on building completion."

10. BJ also provided a schedule showing payments received by Leeds County Court from the appellant in respect of the claim by Manor Mills LLP against Dr Lim and Tzemin Wah as below:

04/02/10	£20,000.00
27/04/10	£15,000.00
05/05/10	£25,000.00
01/07/10	£60,000.00
07/07/10	£ 2,213.20
Total	£122,213,20

11. Redacted Barclays bank statements show that the above payments came out of a joint account in the name of the appellant and his wife, except the £60,000 which was stated to have been withdrawn from the appellant's pension fund.

12. BJ said that the beneficial interest in the properties was held by Dr Lim and his wife in bare trust for the appellant.

13. BJ asserted that the appellant had been trading in property since 2005 and was entitled to set off the losses as a business expense. They advised that the appellant had previously entered into transactions in respect of eight other 'off plan' properties. Two purchases were aborted in 2010/11 and another in 2012. It was stated there had been significant delays in the construction and completion of three plots in Florida and two in Spain so the appellant had not been able to make any sales.

14. In November 2013, Independent Tax and Forensic Services LLP ('ITFS') was appointed to act for the appellant in connection with the enquiry.

15. In a letter dated 30 January 2014 ITFS informed HMRC:

- The three Florida properties had not been built and the appellant was seeking return of the deposits paid.

- The two Spanish properties were not complete and the appellant was seeking return of the deposits paid.

- There was no documentation evidencing a bare trust in respect of the Manor Mills plots.

16. Manor Mills LLP had gone into liquidation by 2011. Under mandates dated 27 March 2015, HMRC sought information and documents from KPMG as administrators for Manor Mills LLP; from Metis Law LLP and also from Dr Lim and Tzemin Wah. No replies were received from either KPMG or Metis Law LLP.

17. A letter dated 20 May 2015 from Dr Lim and Tzemin Wah stated:

> "We were involved in the abortive purchase of plots 274 and 189, Manor Mills, Unfortunately at the time Philip Lim was diagnosed with a severe chronic illness that affected his ability to work and this led to us having significant debts with a young family. As a result of this we were unable to obtain the mortgages and secure funding necessary to purchase the properties. The purchase was a number of years ago and we do not have the original contracts having lost a large amount of paperwork after suffering a flood in 2010."

18. A letter from Dr Lim dated 30 May 2015 to HMRC stated:

> "I wish to confirm that my father, Mr G B Lim is the beneficial owner of the two Manor Mills units for which deposits were paid. As the units were in Leeds where I live, it was much easier and more practical for me to handle negotiations on his behalf. As such, the units were initially put in our name. However, it was always my intention to set up a Bare Trust making my father the beneficial owner. This was exactly what I carried out for a property Unit 403, No 1 Addington Street, London, SE1 in London, where I was residing at the time. That Bare Trust is available for viewing. Owing to difficulties in securing a mortgage at the height of the economic recession, my father was unable to proceed with the purchase and he has had to pay all the costs needed to settle the claim. In addition, he has refunded me the original deposits for the Manor Mills Units."

19. In a letter dated 27 July 2015 from Dr Lim and Tzemin Wah it was stated:

> "I have received your request for information regarding the purchase of two units of Manor Mills. The purchases were made for my father, Mr Gordon B Lim to extend his property portfolio. My involvement being logistical as I live in the Leeds area and therefore it was more practical for me to negotiate and purchase these in my name on behalf of my father. My father's involvement was not limited to the payment of the £122,213.20 costs. He has also paid me for the 10% deposit of the Manor Mills units necessary to proceed with the purchase."

20. On 19 August 2015, HMRC wrote to the agent and confirmed HMRC did not accept the payment of £122,213 was a business expense and the claim would be disallowed.

21. HMRC issued a closure notice for the 2010-11 enquiry on 2 October 2015 and amended the return. A penalty of £14,770.02, representing 59.5% of the potential lost revenue on the basis of a deliberate inaccuracy and prompted disclosure, was imposed under paragraph 1 of Schedule 24 to the Finance Act 2007 on 4 November 2015.

22. A statutory review request was received by HMRC on 5 November 2015. Correspondence between the parties continued through 2016. On 26 January 2017 HMRC confirmed that their view of the matter remained unchanged and the closure

notice was upheld. The reviewing officer Mrs Newman said that she had conducted her review on the assumption that HMRC accepted the appellant was trading in property and that his business was commercial, which meant that any losses he made could be off-set against general income in accordance with s 64 ITA 2007. She concluded however that the property purchases in Leeds had not contractually involved the appellant and he had not incurred any losses when the purchases were aborted. There was no evidence of any bare trust in favour of the appellant or any evidence of any binding liability to pay the losses incurred by his son and daughter in law.

23. The appellant referred his appeal to the Tribunal on 2 March 2017.

Burden of Proof

24. The onus lies with the appellant to adduce evidence to displace the amendment to the self-assessment.

25. In the matter of the penalties, the onus lies with HMRC to show that the appellant deliberately made an inaccurate return.

26. The standard of proof is the ordinary civil standard of the balance of probability.

Relevant legislation

27. The relevant legislation is contained in:

Taxes Management Act 1970

Section 9A - enquiry into self-assessment tax return
Section 28A (1) & (2) - closure notice and amendment to self-assessment
Section 50(6) - procedure on appeal to Tribunal

Income Tax (Trading and Other Income) Act 2005

Section 34 - expenses not wholly and exclusively for trade and unconnected losses

"In calculating the profits of a trade, profession or vocation, no deduction is allowed for-
(a) expenses not incurred wholly and exclusively for the purposes of the trade, or
(b) losses not connected with or arising out of the trade.
If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

Income Tax Act 2007

Section 64 - deduction of losses from general income Section 66- restriction of relief for uncommercial trades.
Section 989 – definition of trade.

Finance Act 2007

Schedule 24 - penalties for inaccurate tax return - provided at the relevant time, in pertinent parts, as follows:

Paragraph 1 - Error in taxpayer's document

(1) A penalty is payable by a person (P) where-
(a) P gives HMRC a document of a kind listed in the Table below, and
(b) Conditions 1 and 2 are satisfied.
(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to-
(a) an understatement of a liability to tax,
(b) a false or inflated statement of a loss ..., or
(c) a false or inflated claim to repayment of tax.
(3) Condition 2 is that the inaccuracy was careless or deliberate on P's part.
(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.
A penalty is payable by a person (P) where P fails to comply with all obligation specified in the Table below (a 'relevant obligation').
[Table A includes Income tax and the obligation to make a return under s8 of TMA 1970 personal return]

Paragraph 4 - Standard amount

(1) This paragraph sets out the penalty payable under paragraph 1.
(2) If the inaccuracy is in category 1, the penalty is-
(a) for careless action, 30% of the potential lost revenue,
(b) for deliberate but not concealed action, 70% of the potential lost revenue, and
(c) for deliberate and concealed action, 100% of the potential lost revenue.

Paragraph 9 – reductions for disclosure

(A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.
(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment by-
(a) telling HMRC about it,
(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and
(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.
(2) Disclosure-
(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and
(b) otherwise, is "prompted".
(3) In relation to disclosure "quality" includes timing, nature and extent.

Paragraph 10

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.
(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it-
(a) in the case of a prompted disclosure, in column 2 of the Table, and

(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted*
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%.

Appellant's case

28. In their review decision HMRC did not challenge the appellant's assertion that he was trading in property. The closure notice was issued on the basis of HMRC's assertion that the costs were not expended by the appellant as part of his trade. The expenditure had been incurred by the appellant's son and daughter in law rather than the appellant. HMRC maintained that there was no evidence that the contracts to purchase the properties at Manor Mills were held in trust for the appellant.

29. The appellant began trading as a property developer during the 2010-11 tax year and one of his projects involved him funding the purchase of the properties at Manor Mills.

30. The expenditure on the two Manor Mills properties were incurred wholly and exclusively for the property trade of the appellant. The expenses claimed under s 34 ITTOIA 2005 should therefore stand, as there are legitimate reasons why the expenses should not be disallowed.

31. The appellant also claims the forfeited deposits totalling £31,957 as an allowable business expense. The losses arising from the forfeited deposits had not been included in his original 2010-11 return.

32. At the relevant time the appellant was retired from paid employment, but had, over time, built a property portfolio and so was experienced in acquiring property either in a trading (developer) capacity or as an investor (landlord) capacity.

33. By the time of the enquiry into his 2011 tax return, the appellant had acquired four rental investment properties and had, since 2005, been committing to purchases "off plan", that is uncompleted properties in the process of being built, with a view to their early disposal on completion, hopefully, at a profit.

34. Three of these off-plan properties were in Florida, two were in Spain and the rest were in the UK, including the two Manor Mills properties; they tended to be discounted multiple purchases on one development, to maximise the chances of their early re-sale, on completion, at a profit.

35. The two Manor Mills properties were acquired in the name of Dr Lim and his wife for administrative ease. They acted for the appellant as his agent for acquisitions. Philip, a practicing doctor, and his wife both lived in Leeds, near the Manor Mills properties and so could monitor the building of the properties and deal with any decisions that were needed. At all times, Philip took the appellant's instructions. In addition, in respect of all financial commitments, the appellant was wholly liable for, and went on to make, all payments.

36. Deposits totalling £31,957 had been paid by the appellant's son and daughter in law for the two Manor Mills properties when committing to their purchase in 2005. The appellant says that he always proposed to refund these deposits. However, he needed mortgage funding to complete. The plan was for a bare trust to be eventually established between Philip and the appellant to confirm the beneficial interest of the appellant in the properties. This approach had been undertaken previously with a rental investment property the appellant had secured through a similar process of Philip being agent for his father - in that case a property in London where Philip had then lived at the time.

37. When the Manor Mills development was completed in 2009, due to the global economic recession and more restricted lending criteria, the appellant was unable to secure mortgage funding to complete his purchase of the two properties. As a result, the purchases had to be allowed to lapse. The lawyers for the property developer forfeited the deposits and sued for losses for breach of contract.

38. As the contract to purchase had been in the names of Philip and his wife, the developer sued Philip and his wife for non-completion. However, the appellant paid all costs involved, recognising, as he did, that he was the beneficial owner of the contracts to purchase the properties and thus was wholly responsible for the costs and losses arising on the purchases being aborted.

39. The loss claimed in the appellant's 2010-11 return was £122,363 made up of the damages claimed by the developer of £122,213 plus the accountancy costs for completion of the return of £150, making the total of £122,363.

40. Metis Law LLP acted as solicitors for both sides - that is for Manor Mills LLP and for the buyers. They confirmed that the appellant also paid the losses arising on the aborted acquisitions. It is inconceivable that the appellant would have paid those costs if he had not been the person liable.

41. HMRC have based their review decision on the fact that the litigation by Manor Mills LLP was against Dr Lim and Tzemin Wah rather than the appellant personally, which HMRC assert is indicative of the costs not being those of the appellant, and, as such, not wholly and exclusively incurred in the property trading business of the appellant.

42. In *Vodafone Cellular Ltd & Ors v Shaw (HMIT)* [1997] BTC247, the Court of Appeal derived the following propositions from the House of Lords decisions in *Mallelieu v Drummond* [1983] BTC 380 *and McKinley (HMIT) v Arthur Young McClelland Moores & Co* [1989] BTC 587:

- The words "for the purposes of the trade" in s 34 ITTOIA 2005 did not mean "for the benefit of the taxpayer".

- The taxpayer's object in making the payment was to be discovered; that is the taxpayer's subjective intention at the time of the payment.

- The object of the taxpayer was to be distinguished from its effect. A payment might be made exclusively for the purposes of the taxpayer's trade, even if some other consequential and incidental benefit was secured.

- The taxpayer's subjective intentions were not limited to conscious motives. Some consequences would be so inevitably and inextricably involved in the payment that, unless merely incidental, they would have to be taken to be a purpose for which payment was made.

- The question did not involve an inquiry of the taxpayer whether a business or a personal advantage was intended. The primary inquiry was to ascertain the particular object of the taxpayer in making the payment. Once that was ascertained, its characterisation as a trade or private purpose was a matter for commissioners.

43. In the *Vodafone* case the Court of Appeal held that a payment of $30m by a company for the cancellation of an agreement to pay a percentage of profits for 15 years for technical knowhow in operating mobile telephone network was a revenue payment wholly and exclusively made for the company's trade.

44. There is direct analogy here. The payments made by the appellant reflected the trading commitments he had made when his son exchanged contracts on the properties in Leeds. The appellant personally made the payments necessary to extinguish legal obligations that had arisen when aborting the acquisition of properties. His family's involvement was entirely incidental and academic. The appellant had a proven track record of property acquisitions for both investment and trading, whereas Philip and Tzemin did not. The appellant had used his son as a locally based property agent previously.

45. Case law has established that when considering the "purpose" of expenditure, it is necessary to look at the underlying aims or objectives of that expenditure. In the case of *Bentley Stokes & Lawless v Beeson* [1952] 33 TC 491 Romer L J said that:

> "The sole question is whether the expenditure in question was 'exclusively' laid out for business purposes, that is; what is the motive or object in the mind of the two individuals responsible for the activities in question?"

This principle was reiterated and expanded in the case of *Robinson v Scott Bader Co. Ltd* [1981] 54 TC 757 when Walton J said:

> "It follows from all of this that the test is subjective, and not an objective one - i.e. the relevant question is 'What was the object of the person making the disbursement in making it?' not 'What was the effect of the disbursement when made?'"

46. An existing property, 32 Evelyn Street, London that the appellant let out was mortgaged to provide funds for his property development business. He also needed to access his pension fund to meet further expenditure. This shows that the appellant was dependent on the resale of the properties to repay his creditors. It is evidence of his trading intentions.

47. Legal ownership may have remained with Manor Mills LLP, but there was the intent and expectation that the properties would be beneficially owned by the appellant upon completion. Circumstances wholly beyond the appellant's control resulted in the proposed acquisitions being aborted.

48. The development of the two properties at Manor Mills was not completed until December 2010. The breach of contract fell into the 2010-11 year, by which time lenders had implemented far stricter lending criteria. Furthermore, the value of the properties had significantly declined. The combination of these factors meant that the appellant could not obtain funds to complete the purchase of the properties.

49. The appellant does not agree with HMRC's contention that the payment made to settle the aborted losses was to financially assist his son and daughter in law.

50. The trade losses stated in the 2010-11 self-assessment return were, in fact, understated, and the appellant applies to amend the losses figure to include the lost deposits totalling £31,957. The appellant asks that the figures he returned for the tax year 2010-11 are varied, to include the forfeited deposits resulting in an increased total claim for losses of £154,320.

HMRC's case

51. For expenditure to be allowed under s 34 ITTOIA 2005, it is necessary for the appellant to establish that the losses were incurred wholly and exclusively for the purposes of his trade.

52. The question of whether there was in fact a trade must be addressed first. It would be artificial to consider the purpose of the expenditure if in fact there is no commercial trade for the expenses to relate to.

53. Trade is defined in s 989 of the Income Tax Act 2007 as including any venture in the nature of trade.

54. Until ownership of a property is transferred by sale it is not possible to establish whether the sale was a venture in the nature of trade or the disposal of an asset giving rise to a capital gain or loss.

55. In this case there is no source of income to which the provisions of the Income Tax Trading and Other Income Act 2005 can be applied (or consideration received to which the Taxation of Capital Gains Act 1992 can be applied).

56. There is no statutory definition of 'trade'. The Taxes Acts give very little guidance on the meaning of the word 'trade'. Section 989 ITA 2007 and s 1119 CTA 2010 say that 'trade' includes any 'venture in the nature of trade'. Before the enactment of ITA 2007 and CTA 2010, the equivalent definition was in s 832 (1) Income and Corporation Taxes Act 1988. It said that 'trade includes every trade, manufacture, adventure or concern in the nature of trade'. The decided cases on the meaning of trade deal with this earlier definition, but the principles established by them remain relevant to the new wording.

57. An unfulfilled intention to sell a property which will not be acquired until construction is complete when legal or beneficial ownership is transferred, does not constitute trading activity.

58. The appellant neither acquired nor sold any of the properties in Florida, Spain and the UK. The plot reservations were at best indicative only and did not amount to trading.

59. The appellant was therefore not engaged in property dealing as a trade, commercial or otherwise.

60. The courts have established what amounts to a 'trade' taking a holistic view of trading as a bilateral relationship whereby the trader supplies goods or services to a customer for reward. If the activity looks like something that is commonly accepted to be trading, then it constitutes trading.

61. Earlier cases focused on examining the facts to look for the presence or absence of common features or characteristics of trade. These are the so-called 'badges of trade'.

62. Broadly, 'trade' can be taken to refer to operations of a commercial kind by which the trader provides to customers for reward some kind of goods or services. The profit/loss has to be of an income nature and requires examination of all the surrounding facts and circumstances.

63. The courts have often used the phrase 'adventure in the nature of trade' to describe the test which brings activities within trading income. In *Edwards v Bairstow and Harrison* [1955] 36TC at page 225 Lord Simonds said:

> "To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure."

64. In *Ransom v Higgs* [1974] 50TC1 Lord Reid said at page 781:

> "As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage, it is sometimes used to denote any mercantile operation, but it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services. The contexts in which the word "trade" has been used in the Income Tax Acts appear to me to indicate that operations of that kind are what the legislature had primarily in mind."

65. Lord Morris at page 84H said:

> "To be engaged in trade or in an adventure in the nature of trade surely a person must do something, and if trading he must trade with someone."

66. He then quoted with approval the comments of Lord Clyde in *CIR v Livingston* [1926] 11TC at page 542:

> "I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade", is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made."

67. Lord Wilberforce at page 88E said:

> "Trade cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed... Trade involves, normally, the exchange of goods or of services for reward - not of all services, since some qualify as a profession or employment or vocation, but there must be something which the trade offers to provide by way of business. Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm), or, as it may be expressed, trade must be bilateral-you must trade with someone. ... Then there are elements or characteristics which prevent a trade being found even though a profit has been made-the realisation of a capital asset, the isolated transaction (which may yet be a trade)."

68. Thus a trade is where the purchase and sale of goods or the performance of services is carried on habitually and with a view to profit. This is particularly so where the goods or services are dealt with or provided in the same commercial way as a trader or professional in that line of business would adopt.

69. The decision as to whether there is a trade in any particular case will depend on an evaluation of all the facts and circumstances, including the weight to be given to each of those facts and circumstances.

70. An acquisition of a property occurs when contracts complete. For tax purposes the date of acquisition is deemed to be the date contracts were exchanged. There is no acquisition at exchange of contracts if the contract does not complete.

71. In *Hardy v HMRC* - [2016] UKUT 332(TCC) the Upper Tribunal at paragraphs 38 and 39 quoted from the House of Lords decision in *Jerome v Kelly:*

> "... what happens if the contract goes off. In such a case, there will be no disposal and nothing to deem to have happened at the time of the contract. It would be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust or (or assignment of beneficial interest) in the land."

72. In deciding on the date of commencement of a trade, the courts have distinguished between preparing to commence business and actually commencing business. As a general rule a trade cannot commence until the trader is in a position to provide those

goods or services which are his, or will be his to trade or provide, and does so, or offers to do so, by way of trade.

73. The trade commences when operational activities begin. The acquisition of goods, the provision of services and entering into contracts for sale of goods and services are examples of operational activities.

74. The scope of a trade is essentially a question of fact. As Atkin L.J. noted in *Collins v The Firth-Brearley Stainless Steel Syndicate Ltd* [1925] 9TC520 at page 573:

> "The question arises as to what was the trade of that Syndicate, because that it indeed carried on a trade I think cannot be disputed. But the question is what was the scope of the trade. For that purpose I think in order to examine the facts you must look at what the company purported to do, and also what it did in fact."

75. The stated intention of a person is therefore not conclusive. In *CIR v The Hyndland Investment Co Ltd* [1929] 14TC694, a case that concerned whether or not a property company was carrying on a trade, Lord President Clyde noted, at page 699:

> "the question is not what business does the taxpayer profess to carry on, but what business does he actually carry on."

76. In this case there were no sales of property. There was no property to sell. There were no trading transactions as there were no property disposals giving rise to either a profit or loss for income tax purposes. There were no transactions to which a badge of trade can be pinned.

77. The appellant paid a debt incurred by his son and daughter in law in 2010-11 and and has contrived a property trading scenario, based on failed intentions to acquire properties abroad and in the UK. He is claiming a deduction which does not meet the requirements of the legislation.

78. The properties at Manor Mills were never in the legal or beneficial ownership of the appellant's son and daughter in law. The properties were never in the beneficial ownership of the appellant. There was no bare trust which bestowed beneficial ownership to the appellant.

79. The properties were therefore not part of any trade carried on by the appellant.

80. The appellant was not party to the uncompleted contract. His son and daughter in law failed to complete the purchase and were pursued for breach of contract by the vendor. No property was acquired and the debt incurred was not an expense of a property dealing trade carried on by the appellant.

81. The appellant's son and daughter in law incurred the costs relating to the aborted purchase. The appellant paid a debt incurred by his son and daughter in law which was their liability and not the liability of the appellant.

82. The payment of £122,213 was therefore not wholly and exclusively for the purposes of any trade carried on by the appellant.

83. The appellant pursues the contention that the forfeited deposit should be added to the expenses claimed in tax year 2010-11 under s 34 ITTOIA 2005.

84. The deposit payments were not incurred wholly and exclusively for a property dealing trade (or indeed any trade) carried on by the appellant. He was not a party to the uncompleted contract: the persons liable to forfeit the deposit were his son and daughter in law.

85. It is stated the appellant refunded the deposits paid by his son and his wife, although no date or documentary evidence has been provided.

86. Metis Law LLP said that the deposits were paid by Dr Lim and his wife on exchange of contracts on 12 September 2006, which fell within tax year 2006-07.

87. Completion was to take place on notice of the seller and this was served in January 2009 (which fell within the tax year 2008-09) but because of lack of funding Dr Lim and his wife failed to complete the transactions and were in breach of contract. Litigation ensued later in 2009 (which fell within tax year 2009-10).

88. It is assumed that the deposits were forfeited on breach of contract and although no documentary evidence has been provided to verify the date, it is clear it would not fall within 2010-11, as claimed.

89. If the contention is that the loss of the deposits was incurred in the earlier years, then any claim under s 34 ITTOIA 2005 is out of date under s 43(1) of the Taxes Management Act 1970.

Penalty

90. The appellant made an inaccurate return by claiming expenditure of £122,213. But the expenditure claimed was a debt of his son Philip Lim and his son's wife and thus not wholly and exclusively incurred for the purposes of any trade carried on by the appellant. There was no property dealing trade in any event.

91. This is considered to be deliberate, as the appellant knew the return was incorrect. He knew that neither he, nor his son and his son's wife had acquired then sold any property and the appellant knew the debt was that of his son and his son's wife.

92. The disclosure was prompted as the appellant did not tell HMRC about the inaccuracy before he had reason to believe HMRC had discovered it, or were about to discover it.

93. This means that the penalty range is 35% - 70%. HMRC allowed the following for quality of disclosure:

> *Telling*: 10% - because there had been delay in providing information and documents which necessitated the service of information notices.
>
> *Helping*: 10% - little help had been provided and mandates had been required to approach third parties.

Giving – 10% because documents providing evidence of the claim had not been provided.

94. The difference between the maximum and minimum penalty is 35% which is multiplied by the total reduction 30% = 10.5%, therefore the maximum penalty of 70% is reduced by 10.5% to 59.5%. The potential lost revenue was £24,823.57 and therefore the penalty is £14,770.02.

95. The penalty percentage is correct and calculated given the reduction for the quality of disclosure applied for telling, helping and access to records.

Conclusion

Assessment

96. Mrs N Newham, in her review conclusion letter, said that HMRC accepted that the appellant was trading as a property developer and that any commercial losses could be offset against his general income in accordance with s 64 ITA 2007.

97. HMRC, in their statement of case and at the hearing, asserted that in fact the appellant had not been trading in property, saying that there was no trade at all, and therefore the appellant's claim must fail. Essentially HMRC say that an acquisition does not occur on exchange of contracts and that acquisition occurs on completion. HMRC say that in this case there were no sales of property. There was no property to sell. There were no trading transactions giving rise to either a profit or loss for income tax purposes and therefore the appellant was not trading.

98. We have to disagree with HMRC's reasoning and conclusions in their statement of case and at the hearing. A contract is a chose in action. It is capable of being assigned. It is also capable of being held in trust. Contracts are sometimes traded and very often the beneficial interest is assigned or otherwise alienated before legal title to the contract is formally transferred. The fact that a contract is not eventually completed whether because of breach of contract, repudiation or frustration is not relevant to whether or not an individual is trading. If the contract is not completed it does not necessarily mean that because legal title to the property did not transfer from one entity to another the parties cannot have been trading.

99. However, we agree Officer Newham's interpretation of the legal position in her review letter. The starting point is that the legal owner is presumed to be the beneficial owner unless there is evidence to the contrary. In the case of *Stack v Dowden* [2007] 2 All ER 929, Baroness Hale of Richmond, who gave the leading judgment, commented on the general principle that:

> "The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership" and "The burden will be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon."

100. In our view the appellant's trading intention was to purchase (usually off plan properties) at a discount and eventually make a profit on their sale. There is really no reason why he would contract to purchase numerous unbuilt properties, unless he

intended to resell them on completion at a profit or rent them so as to derive an income. He intended to trade in property.

101. However, the difficulty for the appellant is that there is no clear evidence that the Leeds properties were part of his property dealings.

102. Dr Lim and his wife entered into formal legal relations with Manor Mills LLP. They agreed a binding completion date. They paid the deposits from their own resources. There is no evidence, at the point of exchange of contracts, that the obligation to complete the purchase was the appellant's.

103. We acknowledge that very often a Declaration of Trust evidencing a third party's beneficial interest in a property is not drawn up and executed until completion. However, where there is an intention to hold the property on trust for another, possibly because that other person has or will for example provide the purchase monies, there is usually at the very least correspondence or documentation which evidences that fact. Here, there is no correspondence or documentation to support the appellant's contention that the two plots were intended to be held by his son and daughter-in-law on trust for him.

104. Under s 53 (1)(b) Law of Property Act 1925, where land or property is involved the declaration must be in writing. You cannot have an oral declaration:

> "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such a trust or by his will."

105. The declaration itself could be oral, provided there is evidence in writing signed by the settlor that the declaration is made. As HMRC say, in this case there is no evidence in writing signed by the settlor that the declaration was made.

106. The letter from the appellant's son dated 20 May 2015 indicates on the one hand that because of his illness and the fall in property values he was unable to obtain a mortgage; but in his letter of 30 May 2015 he says that in fact it was his father who would ultimately have raised mortgage facilities and purchased the properties whether in his name legally or otherwise.

107. The payment of the damages claim by the appellant may have been to help out his son and daughter-in-law who were in financial difficulties. The question is whether the appellant genuinely believed that he could take over the losses and legitimately claim any tax relief arising.

108. No paperwork was retained by the appellant's son and daughter in law in respect of the contract to purchase plots 274 and 189 Manor Mills. The only document provided to HMRC is the schedule from Leeds County Court which shows that Dr Lim and his wife had contracted to purchase plots 274 and 189 Manor Mills. The only evidence of the appellant's involvement is the letter from Metis LLP, which confirmed that they had received the sum of £122,213.00 from the appellant.

109. The first letter from Dr Lim, dated 20 May 2015, acknowledges that he and his wife purchased the two plots and explains why he and his wife were unable to proceed

with the purchase. There is no mention in that letter of beneficial interest in the contracts to purchase having vested in his father, by means of a bare trust or otherwise.

110. The second letter from Dr Lim of 30 May 2015 states that the appellant was the beneficial owner of the two properties and raises for the first time the assertion that Dr Lim and his wife intended to enter into a bare trust in favour of the appellant.

111. The onus to prove that he was the beneficial owner of plots 274 and 189 Manor Mills is on the appellant. It should have been within his power to contact his solicitors and/or his accountants, to obtain the evidence to show that he was the beneficial owner at the time that it was decided not to go ahead with the purchase of the plots.

112. The appellant states that he had placed plot reservations on eight properties, three of which were aborted in 2011-12, three of which were in Florida and about to be aborted and two of which were in Spain, which it appears were also to be aborted.

113. There has been no explanation by Dr Lim and Tzemin Wah as to why they were unable to provide any copy documentation relating to the purchase of the Leeds plots, save that the paperwork was lost in a flood in 2010. We have not been provided with any copy mortgage application to show any intention on the part of the appellant, nor any correspondence from the appellant or his son and daughter in law or from their solicitors with regard to their intention to set up a bare trust.

114. Any losses in our view would have been in the tax year 2009-10 and not 2006-07, as stated by HMRC, or in 2010-11 as stated by the appellant.

115. We have to conclude that the appellant has not discharged the onus upon him to show that he was the beneficial owner of the contracts to purchase the Leeds properties.

116. We therefore agree with HMRC that the expenses claimed by the appellant in his 2010-11 tax return relating to the losses arising on the non-purchase of plots 274 and 189 Manor Mills is not allowable.

117. We conclude that the Closure Notice and amendment in respect of the year ended 5 April 2011 should be upheld and that the tax arising is £24,823.57.

Penalty

118. The issues for the Tribunal to decide are whether penalty has been correctly imposed and whether the inaccuracy in the appellant's 2010-11 return arose as a result of deliberate behaviour on his part or otherwise. We must also decide whether the penalty has been correctly calculated.

119. The penalty has been assessed as 59.5% of the PLR which is within the penalty range for deliberate behaviour and a prompted disclosure.

120. The appellant would have known from a legal perspective that the losses incurred by his son and daughter in law were theirs and not his. He may have mistakenly assumed that he could retrospectively take over those losses to set off against his own

income, but that would have been an unreasonable presumption and if he had sought professional advice that should have been immediately dispelled. It is not clear why the appellant's accountants took the view that following the 2010-11 return that he could take over his son and daughter in law's losses, when on a true analysis of the facts, to do so could not form part of expenditure incurred wholly and exclusively for the purposes of the appellant's trade.

121. We have to conclude that the inaccuracy was deliberate and not careless.

122. We therefore confirm the penalty of £14,770.02.

123. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 02 JULY 2019