



TC01278

Appeal number: TC/2010/05250

*Income Tax –Set off of losses against general income –Section 380 ICTA 1988 –
Restriction on set off under Section 384 (6)ICTA of “plant and machinery for
leasing in the course of a trade” –Whether losses so restricted ? –Partly – Whether
discovery assessment under Section 29 TMA 1970 out of time –NO –Appealed
allowed in part.*

FIRST-TIER TRIBUNAL

TAX

MR G B FORBES

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: DR K KHAN (Judge)
MICHAEL BELL, ACA, CTA**

Sitting in public in London on 27 May 2011

Thomas Woolven, Accountant, for the Appellant

**Nicola Parslow, Senior Officer, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

© CROWN COPYRIGHT 2011

DECISION

5 Introduction

1. This is an appeal by the Appellant against:

10 1. The amendment to his Self-Assessment, under Section 28A Taxes Management Act 1970 (“TMA”) for the year ended 5 April 2006.

15 2. Assessments under Section 29 TMA 1970 for the years ended 5 April 2003, 5 April 2004 and 5 April 2005.

20 2. In his returns for the years ended 5 April 2003, 5 April 2004, 5 April 2005 and 5 April 2006 (the ‘Returns’), the Appellant declared self-employment income from a boat chartering business and employment income from Bovis Lend Lease (the ‘PAYE Income’).

25 3. The key point arising in this Appeal is whether the boat chartering constituted a provision “of plant or machinery for leasing in the course of a trade”. Under section 384(6) Income and Corporation Taxes Act (“ICTA”) 1988, the setting-off losses arising from Capital Allowances on leasing of asset (boat) is not allowed unless certain conditions are met. The Respondents say those conditions are not being met.

The simple facts

30 4. The Appellant started a boat chartering business in 2001. He conducted an initial feasibility study and started with a 37ft power boat subsequently replacing this with a 43ft power boat. The boats cost in the range of £200,000 to £250,000. Under Section 380 ICTA 1988, trading losses can be set-off against general income of the same year.

35 5. The business was initially started in the UK but business was difficult and so a decision was made to move the business (and the boat) in the summer of 2002 to Spain. Spain offered better opportunities for charter and boat rental. This coincided with the sale of the first boat and the acquisition of the second which was a Fairline Targa 43. The Appellant decided that boat charters in Spain required larger boats
40 which are more attractive and had more features. He advertised charters on his website and also engaged the services of an agent in Spain to conduct charters on his behalf. He satisfied all the legal and documentary requirements in Spain for conducting a charter business.

45 6. He used the services of Vitesse Yacht Charters SL (“Vitesse”) who, on a commission basis, would conduct charters on his behalf. The business was conducted in part via the telephone since he lived in the UK. He had a good working

relationship with Vitesse and the business prospered through their agency relationship.

5 7. Vitesse were instrumental in assisting in obtaining various local legal documents and insurance from brokers, required to cover the boat charter business.

10 8. The boat charter in the Balearics was done on the basis of “bare boat” charter (unskipped), if a person had the right level of competence, as well as skippered boat hire, where a skipper and ancillary services were provided for shorter term rentals.

15 9. The charter insurance documents required that “only properly qualified skippers were allowed to drive the vessel”. This meant that the skipper or hirer of the boat had to have a commercial qualification which was the International Certificate of Competence for Operators of Pleasure Craft (“ICC”).

20 10. The Spanish agents, Vitesse, ensured that catering was available if the customer required. The agents would also arrange “food, restaurant bookings, and generally promote the experience with of course a meet and greet, clean down, etc. at the start and finish of the charter”. They provided some other customer services required on the ground.

25 11. The invoicing for services was done by Vitesse who deducted all costs plus their commission fee (20%) and paid the remainder to the Appellant. Invoices were prepared by the Appellant.

30 12. In terms of the insurance, which was taken under the Private Pleasure Craft Schedule, the UK insurance covered both bare boat and skippered hire. The Spanish insurance covered both bare boat and skippered insurance. The agreement with Vitesse covered all charters, which is to say bare boat and skippered charters. The Appellant decided to cease the business and sell the boat once there was a change of ownership at Vitesse towards the end of 2007.

35 13. The Appellant claimed Capital Allowances on the vessel used in the boat chartering business for the years ending 5 April 2003, 2004, 2005 and 2006. The Capital Allowances claimed were included in losses claimed in the Returns. The claim was to offset losses against any other income, pursuant to section 380 ICTA 1988, which had been made in each of the Returns for the respective years. It is important therefore to lay out the Capital Allowances claimed, the loss set-off and the PAYE Income arising for the respective years. These are set out below:

40

Mr Forbes has claimed Capital Allowances on the vessel used in the boat chartering business as follows:

45	5 April 2003	£30,549
	5 April 2004	£58,605
	5 April 2005	£46,336
	5 April 2006	£34,751

5 The Capital Allowances claimed are included in losses claimed in the Returns. A claim to set the losses arising against other income under Section 380 ICTA 1988 has been made in each return. The losses claimed for each year are as follows:

	5 April 2003	£39,429
	5 April 2004	£96,952
	5 April 2005	£57,138
10	5 April 2006	£17,333

Mr Forbes declared gross PAYE Income from Bovis Lend Lease for each of the 4 years ended as follows:

15	5 April 2003	£113,720.01
	5 April 2004	£123,567.56
	5 April 2005	£117,237.72
	5 April 2006	£173,195.83

20 14. The Respondents concluded that the majority of the leasing was bare boat leasing, which is a lease of the vessel where the lessee pays a rent for the use of the boat taking responsibility for providing their own crew and navigation. They also concluded that the boat chartering business was not the main occupation of Mr Forbes, the Appellant. Consequently the losses would not be available under Section 25 384 ICTA 1988.

15. Further, on 28 May 2008, the Inspector received a copy of the contractual agreement between the Appellant and Vitesse (“Vitesse Contract”). He concluded that the terms of this agreement were such the boat had been hired direct to hirers who 30 piloted it themselves. It was concluded that this was bare boat leasing. He concluded that based on the information provided by virtue of that Vitesse Contract, the losses claimed should be restricted by the amount of Capital Allowances claimed by virtue of section 384(6) ICTA.

35 The legislation and cases

16. The legislation to set-off losses against general income of the same year is found at section 380 ICTA 1988:

40 **380 Set-off against general income**

(1) 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 45 from the 31 January next following that year, make a claim for relief from income tax on –

- 5 (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;

10 But relief shall not be given for the loss or the same part of the loss both under paragraph 9(a) and under paragraph (b) above.

- (2) Any relief claimed under paragraph (a) of subsection (1) above in respect of any income shall be given in priority to any relief claimed in respect of that income under paragraph (b) of that subsection.

15 17. Section 384(6) ICTA 1988 debars the setting-off of Capital Allowances on assets (boat) provided for leasing in the course of a trade against other income under certain circumstances:

20 **384 Restrictions on right of set-off**

(6) There shall be disregarded for the purposes of sections 380 and 381 so much of any loss as derives from any allowances made to an individual under Part 2 of the Capital Allowances Act in respect of expenditure incurred on the provision of plant or machinery for leasing in the course of a trade unless –

- 30 (a) the trade is carried on by him (alone or in partnership) for a continuous period of at least six months in, or beginning or ending in, the year of assessment in which the loss was sustained; and
(b) he devotes substantially the whole of his time to carrying it on (alone or in partnership) throughout that year ...
.”

35 18. Section 29 TMA 1970 allows an assessment under the discovery provision to be issued. This is relevant for the years ended 5 April 2003, 2004, and 2005:

40 **Taxes management Act 1970**

PART IV

“29. Assessment where loss of tax discovered

- 45 (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

5 (b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

10 the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

15

(2) Where –

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

20

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

25

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

30

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above –

35

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return,

40

Unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

45

(5) The second condition is that at the time when an officer of the Board –

5

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

10

(b) informed the taxpayer that he had completed his enquiries into that return,

The officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

15

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if –

20

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

25

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

30

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the board, are produced or furnished by the taxpayer to the officer ...; or

35

(d) it is information the existence of which and the relevance of which as regards the situation mentioned in subsection (1) above –

(i) could reasonably be expected to be inferred by an officer of the Board from

40

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above –

45

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes –

5 (i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and
(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to [any partnership return with respect to the partnership] for the relevant year of assessment or either of those periods; and

10 (b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

15 (7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section
20 804ZA of the principal Act.

(8A) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

25 (9) Any reference in this section to the relevant year of assessment is a reference to –

30 (a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.”

35 19. Reference is also made to HMRC Capital Allowances Manual Reference CA23115 – **FYA: Leasing and provision of services:**

40 **Assets used for leasing and those used in the course of providing a service**

“There is a distinction between the leasing or hiring of an asset and the provision of services that involve the use of an asset. Each case must be decided on its own facts.

45 In the construction industry, you should accept that plant provided predominantly with an operative is more than mere hire and an article was

issued in TB66 on 28 August 2003 to this effect. This means that such plant is not excluded from FYA by the leasing exclusion CA23110.

5 We changed our view after the judgment in the case of Baldwins Industrial Services PLC and Barr Ltd. That case considered whether the hire of a crane with an operative constituted a construction operation, and as such amounted to more than mere hire. Baldwins hired a 50 tonne crane to Barr to be used in the building of the ne Southampton football stadium. An incident arose which led to a dispute as to which party was responsible for repairs to the crane. An
10 essential element of the claim was whether the provision of the crane and driver was part of a construction contract within the ambit of Housing Grants, Construction and Regeneration Act 1996. A construction contract is one under which construction operations are carried out and it was accepted that a contract for mere plant hire is not a construction contract. The labour element was held to be crucial.
15

The hire of the crane plus driver was held to be a contract for supply of plant and labour to be used as part of the operation to build the stadium. The contract for supply of the crane and driver was for an operation that formed an
20 integral part of, was preparatory to, or was for rendering complete a work of construction. Following the judgment we accept that the supply of plant or machinery with an operator, by a business, is the provision of la service and not mere hire.

25 The supply of plant or machinery with an operator means that the operator remains with the equipment during its use and that he or she will operate it alone save for exceptional circumstances. It is not sufficient for the plant or machinery to be delivered or installed by the hire company. For example, the delivery and installation of a generator would not be regarded as the provision
30 of a service but the supply of a digger with driver would be so regarded.

Plant or machinery may be provide with an operator on some occasions and without on others. Where, at the time the expenditure is incurred, it is intended that the asset will be predominantly provided with an operator, the
35 precise facts and use of the asset will have to be considered, but generally we accept that FYAs are due.

We also accept that the provision of building access services by the scaffolding industry amounts to a construction operation and is therefore more
40 than mere hire. This does not apply to businesses that simply supply scaffolding poles etc for use by others.

Each case must be considered on its own facts. Before this change, the main test was who had control of the asset, the owner or the person hiring the asset.
45

20. The parties also draw reference to the case of *Heath House Charter Ltd*(Case No. TC00249, First-tier Tribunal (Tax) (30/11/2009) (“Heath House Charter”))

The Appellant's submissions

21. The Appellant's core submission regarding the appeals for the years ended 5
5 April 2003, 2004, and 2005 is that:

- (a) The amount of allowable losses should include the Capital Allowances claimed on the boat chartering business; and
- (b) The assessment has been made out of time.

10

22. The grounds for the appeal for the year ended 5 April 2006 was that the amount of allowable losses should include the Capital Allowances claimed on the boat chartering business. The Appellant makes several other points. These can be summarised as follows:

15

1. It is accepted that for the purposes of section 384(6) ICTA 1988, the Appellant had full-time employment and so could not have devoted substantially all of his time to the leasing trade.

20

2. The Appellant intended to operate a boat hiring business as a service with an operator or skipper and therefore it is not simply a leasing business. The Appellant draws reference to the Capital Allowances manual paragraph CA 23115 which state:

25

“... We accept that the supply of plant and machinery with an operator, by a business, is the provision of a service and not mere hire”.

30

3. Figures were provided to show that over a period of four years 49% (evidence suggests that this figure is nearer 42) of charters were skippered charter which is to say, that there was an operator, provided by the Appellant, on board. Therefore a significant part of the business comprised skippered charters and therefore the losses should be allowed.

35

23. The Appellant draws reference to section 205 Capital Allowances Act 2001 which allows a just and reasonable apportionment and as such has been used for more than one purpose. The Appellant accepts that this Act may not be relevant but draws reference to that section and its apportionment for guidance and suggested the reasoning could be applied in this case.

40

24. The Appellant also submits that there can be a fair apportionment between the losses attributable to the skippered business and that attributable to the non-skippered business. While accepting that they are not two trades and there is no distinction in the way the business has been run or operated or accounted for, an apportionment may allow a satisfactory result.

45

25. A reference is drawn to the case of *Heath House Charter Ltd*. This is a VAT case but there is an obiter statement as to what constitutes a leasing trade and the role of an agent who conducts bookings on behalf of the principal. The Tribunal in that case said that where an agent arranged bookings on behalf of a principal “those
5 contracts bound the Appellant (principal) to make the yacht available to the charterer for the period of the contract; and the yacht supplied under the contract was the Appellant’s and the moneys payable, although paid by the charterer to LYC (agent), were received by LYC in a fiduciary capacity for the Appellant”. The Appellant is of the view that his relationship is similar to the relationship which existed between the
10 Appellant and Vitesse.

26. Further, at paragraph 83 of the same case, the Tribunal explained that each charter of the boat constitutes the conduct of “an economic activity (on a continuing basis)”. The Appellant says it is also possible to look at the charter on a charter-by-
15 charter basis in establishing the losses.

27. With regard to the discovery assessments, the Appellant says that they are out of time. The Respondents say that the Vitesse Contract provided new evidence which allowed the Inspector to conclude that the boat had been hired direct to the hirers who
20 piloted it themselves. This was therefore bare boat leasing and allowed the Inspector to restrict the amount of losses claimed and to make assessments under section 29 TMA 1970. The Appellant says that the discovery assessments were out of time since the Respondents had the necessary information from the returns and did not need the Vitesse Contract to make an assessment and there was no negligence on the part of
25 the Appellant such as to allow the discovery assessment to be made.

28. The Appellant says that the trading activity was conducted on a commercial basis and the hire was both skippered and non-skippered with an option given to the customer to choose. The activity was not only bare boat leasing and for this reason
30 the losses should be allowed.

The Respondents’ argument

29. The Respondent’s main submission is that the business is predominantly that of bare boat leasing and there is a clear lease of the boat as the lessee pays a rent for
35 use of the boat and takes responsibility for providing a crew. They say that the intention was for the leasing arrangements to be bare boat in nature. They draw reference that the agency agreement with Vitesse which states in Condition 5 that:

40 “they (*Vitesse*) would only introduce potential Charterers deemed capable to charter the above-mentioned boat in accordance with the appropriate local regulations for the operation of pleasure crafts in the Balearics”.

45 This was taken by the Respondents to mean that charters would be provided only under bare boat arrangement.

30. Section 384 ICTA 1988 restricts the set off of a loss against other income in certain circumstances. Section 384(6) ICTA 1988 states that any loss can be disregarded to the extent that it derives from Capital Allowances, in respect of expenditure on plant and machinery for leasing in the course of a trade, unless the trade has been carried on continuously for the period of at least six months, beginning or ending in the year of assessment when the loss arose and the taxpayer devotes substantially the whole of his time to the carrying on (alone or in partnership) throughout that year. On this they make two points. The first is that the business was that of hiring out of an asset, which is the provision of plant or machinery for leasing, where section 384(6) ICTA 1988 applies, and not the provision of a service which involves the use of an asset which is not caught by section 384(6) ICTA 1988. Further, they say that the taxpayer has not spent substantially most of his time on the trading activity and since the boat charging business is not the main occupation of the Appellant it is not within section 384(6)(b) ICTA 1988.

31. The Appellant provided copies of correspondence with HMRC and a chart showing the percentage of skippered charters in 2001 and 2006. This was as follows for the years ended

20	5 April 2001	80%
	5 April 2002	36%
	5 April 2003	54%
	5 April 2004	60%
	5 April 2005	42%
25	5 April 2006	43% (subsequent discussion revealed this to be in region of 32%)

The Respondents concluded that the evidence provided (together with various letters in 2008 and 2009) clearly shows that the proportion of bare boat charters was significant and on the basis of that information the Respondents, on review, upheld the decision to disregard the loss from Capital Allowances for the years ended 5 April 2003, 2004, 2005 and 2006. They concluded that the losses can only be offset against profits of the same trade. The Appellant agreed to review those figures and provide an accurate schedule after the hearing (nothing has been received but the Tribunal will leave the parties to agree the figures in accordance with the points highlighted in the decision).

32. With regard to the discovery assessments for the years ended 5 April 2003, 2004 and 2005 the Respondents maintained that the receipt of the Vitesse Contract showed that the boat had been hired directly to the hirers who piloted it themselves and this constituted bare boat leasing. For this reason, the amount of Capital Allowances claimed in the three years ending 5 April 2003, 5 April 2004 and 5 April 2005 should be restricted. They say that the bare boat charters carried out were not known until the agreement was received on 28 May 2008.

33. The Respondents say that the assessments are competent within section 29 TMA 1970 as neither subsection (2) or (3) bar the making of these assessments. The

condition at subsection (5) is fulfilled given the timing of the information provided regarding the earlier years – 28 May 2008 – and the Inspector could not reasonably be expected to be aware of the situation based on the information made available to him before that date.

5

34. The Respondents say that onus rests, under section 50(6) TMA 1970, upon the Appellant to show that the Self Assessment as amended and the assessment are excessive. The standard of proof is on a balance of probabilities.

10 35. The Respondents conclude that the appeal should be dismissed.

Discussion

15 36. Section 384 ICTA 1988 restricts the set-off of a loss against other income in certain circumstances. It provides that where a claim to loss relief is made, and part of that loss arise from Capital Allowances in respect of expenditure on the provision of plant or machinery for leasing in the course of a trade, that part of the loss cannot be set-off against other income unless:

- 20 (i) The trade is carried on by the claimant (alone or in partnership) for a continuous period of at least six months in, or beginning or ending in the year that the loss is sustained, and
- 25 (ii) The taxpayer devotes substantially the whole of their time to the carrying on of the trade (alone or in partnership) throughout the year or, if it is set up or permanently discontinued (or both) in that year, for a continuous period of at least six months beginning or ending in that year.

30 37. The idea being this provision is to deny the benefit of trading treatment for what, in substance, is made merely as a form of investment.

35 38. The first question which arises from section 384 ICTA 1988 concerns the nature of the trade being carried on by the Appellant. The Tribunal believes that the trade being carried on was that of boat chartering. The second question concerns whether the losses which arose out of expenditure incurred on the ‘provision of plant or machinery for leasing in the course of a trade’ or whether the losses arose in the normal course of trading. The Tribunal believes that while there is one trade, the losses have arisen from two different activities. The activities from which they arose are, a non-leasing activity, through the provision of services where the boat was hired

40 out with a skipper, and also a leasing activity (‘bare boat’). It is important to note that there is one trade only and Section 384 thus refers to “a trade” but draws a distinction between losses arising with regard to expenditure on plant and machinery where there is a leasing activity and other expenditure. Where the loss results from expenditure relating to a leasing activity then the loss set off would be restricted. It will not be so

45 restricted where the expenditure relates to a ‘non-leasing activity’.

39. Let us look at the nature of the boat chartering trade.

40. The Tribunal finds that the Appellant was carrying on a trade and not merely the passive recipient of income. If one looks at the nature of the contractual relationship between the Vitesse and the Appellant, it is stated in the agreement
5 between the parties (“Vitesse Contract”), (the Tribunal received an undated/unsigned copy) that Vitesse “will act as an agent” for the Appellant in the hiring out of the boat. It is also stated that Vitesse will receive 20% of the gross income obtained from charters and that Vitesse would also “arrange launches, skippers, airport transport etc. but we would make the arrangements ourselves when it proves relevant to do so”.
10 Vitesse undertook to advertise charters of the boat. The Appellant also advertised charters through their own website and marketing materials and by “selective advertising and word of mouth”. In correspondence between the Appellant’s accountants and HMRC on 7 September 2007, they explained that the Appellant conducted a trade on a commercial basis and with a view to profit. They said:

15
“Our client operates a business, he keeps books of accounts, he is VAT registered, owns plant and equipment, advertises for business, makes sales and has all the hallmarks of a business organisation. He went
20 into this business venture with every expectation of making a profit, basing his own business model on other successful charter businesses.”

41. It is clear to the Tribunal that the Appellant saw himself at the start as conducting a business. He was involved in decisions relating to the charter of the boat and conducted telephone discussions with Vitesse about potential charters. The core
25 business activity comprised the hiring out of a boat and included ancillary services (catering and bookings) if charterers requested such services. These were normally requested with short-term rental. All services provided were made with a view to making profit. The trading activities initially were not profitable but there was the expectation that profit would be made once the business was built up. The business
30 was conducted on a commercial basis. The boat was let on an arm’s length basis on commercial terms. Transactions conducted by the Appellant and through the agent, Vitesse, were undertaken after all licenses, permits and indemnity insurance were obtained. The legal requirements for conducting a boat hire business in the UK and Spain, were all satisfied. The business was operated legally and in accordance with
35 the industry and safety practice. The correspondence which the tribunal has seen, suggests that efforts were made to satisfy all national and business requirements for operating a boat charter business where members of the public would be safe and insured in the event of any accidents. The Appellant knew the sector and had devised a business plan based on his understanding of the boat business and from others who
40 supported him. In his oral evidence Mr Forbes said that he advertised the boat and services on different websites and a substantial part of his income arose from repeat business from satisfied customers. He kept his own business records and invoiced his customers directly for fees arising from charters. The boat was not hired out all year and the Respondents accepted, in correspondence, the length of time when it was
45 available for charter. It was available between April and September, approximately six months, which was the main period for charters in Spain given the sunny weather and the boating season in the Balearics. The Tribunal notes that the Appellant and

the Respondents have already agreed an apportionment of expenditure between business and personal expenditure on the use of the boat.

5 42. The Tribunal does not agree that the charter company, Vitesse, had exclusive use of and possession of the boat and did not have a final say as regards charters and their cancellation. Vitesse acted after consultation with the taxpayer which suggests that there was not a leasing of the boat to Vitesse to be part of their fleet of boats for letting. Further the Tribunal does not agree that Condition 5 of the Vitesse Contract can be so narrowly construed to exclude the intention of operating skippered charters.

10 43. It is clear that the taxpayer was fully employed and the question arises as to whether or not he was actively involved in the boat hire business. On balance, the Tribunal accepts that he was actively involved in the business. It is also clear that Vitesse played an active part in the business and would have undertaken several
15 aspects of the business which the Appellant was unable to do simply because he was not in Spain. For example, they would have made arrangements for pre-charter briefings, customer questions and complaints, booking of flights, hotels, restaurants etc. and providing necessary amenities such as fuel, water, waste disposal and cleaning facilities. These however were provided on an agency basis. The tribunal
20 does not believe that one single indicator is determinative of whether the taxpayer conducted leasing of plant and machinery or an actual trade. However, the arrangements between the taxpayer and Vitesse suggest that the boat hiring can be characterised as the conduct of a trade rather than a leasing agreement between the parties. The overall impression which the Tribunal was left with from the facts and
25 correspondence which was presented at the hearing is that the activities amounted to a trade. The taxpayer clearly intended to carry on such a trade on a commercial basis and with a view to profit. The tribunal believes that if one looks at the hire activity and the fact that the business was started after a researched feasibility study, there was a commercially realistic anticipation of profit. The figures indicated that overall costs
30 would not exceed the income derived from the letting of the boat over the life of the boat and therefore it was realistic to assume that there would be a profit. The terms and conditions of the Vitesse Contract suggest that the boat was not provided simply to Vitesse to be run as part of their fleet. The agreement made the taxpayer the recipient of the income, he incurred expenditures relating to the charter and
35 maintained sufficient control of the operation of the boat to suggest he was directly involved in the boat charter business and not simply a passive recipient of income.

40 44. In summary, the Tribunal from the facts objectively assessed, has come to the conclusion that the taxpayer did carry on a boat charter trade and the arrangements with Vitesse did not amount to the leasing of the boat but rather an agreement for them to manage the operation of the boat owner's boat hire activity.

45 45. The next question which arises from an interpretation of section 384 ICTA 1988 is whether there is a restriction arising on the use of the losses attributable to capital allowances. The section restricts the set off of losses which are derived from capital allowances in respect of any expenditure incurred on the provision of plant or machinery for leasing in the course of a trade. The provision does not require there to

be a leasing trade but simply the provision of plant or machinery for leasing in the course of a trade. The question for the Tribunal therefore is whether some of the losses arising for set off can be restricted because there is a provision of plant and machinery for leasing in the course of a boat chartering trade. The short answer is yes. The Tribunal believes that when the boat was provided to customers without a skipper (bare boat) it fell within the restricting provisions of section 384. The section does not provide for an apportionment of losses but does restrict the use or setoff of losses, if those losses arise in a particular way. In this case the restriction would arise where the losses arise from bare boat chartering since this arrangement is tantamount to a lease. A bare boat charter is an arrangement whereby the boat is chartered with no crew or master and those hiring the boat assume the management and navigation functions required for the vessel. In other words, the boat is under the complete control of the charterers and they become the de facto owners for the agreed period. In this situation, the taxpayer is not operating the asset (the boat) and has relinquished control to the charterer. It is this loss of control, which makes the contract one which is more in the nature of a lease. The person chartering the boat will pay a fixed rental fee but will assume overall responsibility for the boat, crew, passenger safety and safe return to port. The taxpayer is simply hiring out an asset which, under the legislation, amounts to the provision of plant and machinery for leasing. Where the arrangements give a right of exclusive use and possession then this is more akin to a lease. Where, however, the hire is with a skipper provided whereby control of the vessel has not been relinquished, as described above, so that it is more akin to the provision of a service, this cannot be described as the leasing of plant and machinery and in this situation the taxpayer can set off his losses arising from such activity.

46. We have looked at the arrangements between the customer and the taxpayer; let us look briefly at the relationship between the taxpayer and Vitesse as evidenced by the contract. Vitesse acts as the agent of the taxpayer. It is stated in paragraph 2 of the Vitesse Contract that “Mark Furness will inform Graeme Forbes of any potential charterers within 48 hours of dates being agreed to avoid double booking with Charters obtained by any other means by Graeme Forbes”. This allows the taxpayer to retain control of bookings and gives him the right to cancel bookings made by the agent where he has a booking for the same period. By retaining control of the bookings and consequently the vessel, it supports the view that Vitesse is the agent of the taxpayer and must seek his permission before finalising the booking. It does not support the view that Vitesse is the lessee of the boat since if this was the case there will be no need for them to consult the taxpayer before finalising bookings. Secondly, the terms of payment in paragraph 3 of the Vitesse Contract is by commission from “gross income” rather than a set fee for the use of the asset. The gross income is, by its nature, a variable amount. If Vitesse was leasing the boat, the contract would provide for an agreed price for an agreed period. The contract contemplates that the taxpayer will remain the owner and make decision which the owner would make.

47. In support of his argument that capital allowances should be available the Appellant draws reference to section 23115, HMRC Capital Allowances Manual, where it is stated that where an asset is provided with an operator, then capital

allowances would be available. The paragraph states that allowances (although it noted that this is a reference to a claim for first year allowances) will be available if “it is intended that the asset will be predominantly provided with an operator”. The taxpayer says that it was his intention to provide “skipped charters and ...80% of those charters were skipped in the first year”. The Tribunal notes the point about the provision of a skipper and the operation of a trade. However, the provision of a skipper and crew is not, on its own, conclusive in deciding on the operation of a trade.

In an extract from a letter better the Appellant and his accountant dated 1 March 2010 and for the period 03/07 it is stated:

“HMRC suggest that the boat was only skippered for 15% of the total charter time when in reality from the schedule I provided I calculated this to be 14 days out of a total of 63 days charter i.e. 22% of the time. This is not an insignificant period but it also fails to recognise that as a business we made the service of a skipper and ancillary services available to all charterers. However, in the effort to maximise our business returns if they were suitably qualified and wish to provide their own provisions and ancillaries then there was nothing to stop them chartering the boat without a skipper. In the case of longer charters this was the more likely route forward but the short period charters more often than not had a skipper to help control the use of the boat and equipment”.

48. It would seem sensible, when starting a boat hire business, that to maximise returns the boat should be available for hire both with and without a skipper. It would be unwise to turn away business from people who wanted to provide their own skipper, if suitably qualified and approved. The Tribunal does not dispute that this was the intention of the taxpayer from the start of the business and the taking out of insurance to cover both types of charters supports this view. Indeed, this seem to have been part of the rationale for the moving of the boat business from the UK to Spain since there was a prospect of short term as well as longer term charter for the entire summer period.

49. The Appellant also draws reference to the *Heath House Charter* case which, although a VAT case, observed that the letting out of a yacht was tantamount to a proper business or economic activity, not just a hire of an asset. The case is of interest but the core point in that case was whether or not a business was conducted and not whether the business was the leasing of an asset for the provision of services.

50. Given the Tribunal’s finding that there is only one trade, which is the trade of boat hire, then the question really which the Tribunal has to address is a simple one. Which is, for section 384(6) ICTA 1988, whether the capital allowances derived from expenditure was incurred on the provision of plant and machinery for leasing in the course of a trade. The answer to that question is that some losses were derived in this way and they arose when the hiring out of the boat was done without a skipper. In this situation, the boat was provided “for leasing in the course of a trade”. Therefore, only

those losses derived otherwise than from capital allowances are available for offset under Section 380. However, when the boat was hired out with a skipper and ancillary services then the boat was not hired out under a bare boat charter but the boat was provided otherwise than “for leasing in the course of a trade” and therefore all of the losses incurred (including the capital allowances) from that proportion of the business would not fall to be dealt with by the restrictions imposed by Section 384(6). In simple terms, and subject to agreement of all the figures between the parties, if one uses the figures of the taxpayer which states that 32% (for the year ended 5 April 2006) of all charters were skippered then the losses should be allocated on a 68:32 ratio, where the 32% of the losses would be allowed and the 78% not allowed. The Tribunal does not have conclusive figures with which to make a definitive finding. The Parties will have to agree a fair and reasonable apportionment based on the fact that there is one trade but the losses are derived from two sources, which is to say leasing and non-leasing activities. The legislation provides a natural split, an apportionment if you like, between that amount of losses which result from capital allowances from a leasing activity and those which do not so arise.

51. The Tribunal has agreed that the Appellant would provide information on the percentage of skippered and non-skippered charters and the Respondents will be able to comment on those figures. The way forward would be for the parties to agree a fair and reasonable division of the losses for set off based on those figures provided by the Appellant.

Discovery Assessment

52. The Tribunal believes that the discovery assessments are good and validly raised. These relate to the years ended 5 April 2003, 2004 and 2005. The Respondents say that the taxpayer was negligent in not making full disclosure. They say that the disclosure in the tax return in Box 3.2 “Boat Chartering”, Box 3.16 relating to capital allowances giving a figure of “£34751.00” and Box 3.22 giving capital allowances/balancing charges of “£34751.00” did not explain that the business of boat chartering included both bare boat leasing and skippered leasing. They say it was important to obtain the Vitesse Contract and in particular look at Clause 5 which stated.

“That Vitesse Yacht Charter SL will only introduce potential Charterers being capable to charter the above-mentioned boat in accordance with the appropriate local regulations for the operation of pleasure craft in the Balearics”.

They say that the Vitesse Agreement suggests that the boat is provided directly to the hirer and that they actually pilot the boat themselves and that the provision of the “bare boat” charter is that of hiring out an asset (to boat), rather than the provision of a service. These circumstances relating to the boat charter were not known until a copy of the agreement was received by the Respondents on 28 May 2008. The Tribunal believes that the Respondents correctly raised an assessment under section 29 TMA 1970 since they came to the conclusion that there was an insufficiency of

information provided by the Appellant with regard to his self-assessment returns and given that these assessments were raised in 2010, within the four year time limit, for such an assessment to be made given the negligence of the taxpayer and the fact that full details had not been provided to the Respondents regarding the business.
5 However, the quantum of the assessments needs to be amended to reflect the fair and reasonable apportionment of capital allowances referred to above.

Conclusion

10 53. The Tribunal finds as follows:

15 1. For the year ended 5 April 2006, the amount of allowable losses should include capital allowances claimed on the boat chartering business which are referable to that percentage of the business relating to hiring out of the boat with the skipper. The Tribunal understands this to be 32% subject to the parties agreeing another percentage figure (the taxpayer was asked at the hearing to provide accurate figures)

20 2. With regard to the appeal for the years ended 5 April 2003, 2004 and 2005 that the assessments were not made out of time and similarly the amount of allowable losses should include capital allowances claimed on the boat chartering business which are referable to that percentage of the business relating to hiring out of the boat with the skipper and the Tribunal understand these to be 42%, 60% and
25 54% respectively, subject to any agreed figures provided by the Appellant.

30 54. It is the understanding of the Tribunal that there would be no penalty in this matter.

55. Any matters regarding costs would be raised at a separate hearing on application, if applicable.

35 56. The appeal is therefore partly allowed.

40

DR K KHAN
TRIBUNAL JUDGE
RELEASE DATE: 29 June 2011