TC04204

Appeal number: TC/2013/07828

Income tax – loss relief under s.64 ITA – restriction of relief under s.66 ITA – appellant purchased half share of racehorse and paid half the costs of training with a view to selling it later at a profit – whether this activity amounted to a trade – no – whether restriction on relief in s.66 would have applied in any event – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EWAN LESLIE JAMES McMORRIS **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MR JULIAN SIMS FCA CTA

Sitting in public at 45 Bedford Square, London on 20 August 2014

Mr Hennessy Thompson of HAS Thompson & Co for the Appellant

Gill Carwardine, presenting officer of HMRC, for the Respondents

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DECISION

Introduction

1. This appeal concerns a dispute about whether the appellant should be permitted to set losses incurred in a racehorse related activity in the tax year 2010-11 against his other income for that year.

2. Essentially there were two specific points of dispute. The first concerned whether the appellant was carrying on a trade and the second concerned whether section 66 Income Tax Act 2007 ("ITA") was satisfied in relation to the proposed setting off of the relevant losses against other income (only losses from "commercial" trades may be so set off).

The facts

3. The appellant gave oral evidence to supplement a short witness statement. We also received a bundle of documents. We find the following facts.

4. The appellant had a reasonable knowledge of racing and racehorses dating back to his time as an undergraduate (when he became what he described as a "professional gambler" on horses, achieving a reasonable level of profit). As he became busier after graduating, the time he was able to devote to the necessary research reduced and his profits from it decreased. He therefore ceased his gambling activity altogether.

5. Much later, by chance discussions at work, he became aware of a colleague who, with her husband, owned a number of horses. There was one particular horse they owned, called "Hermes", which they thought was particularly promising. However, they did not have the necessary funds to put him in proper training as a racehorse. The appellant's colleague approached him and asked if he was interested in buying a share in the horse and funding half of its costs. After much research into the horse's pedigree and half siblings, and taking advice from the horse's prospective trainer, he agreed to become involved. The agreed plan was that they would put Hermes into proper professional training, hopefully win some races with him so as to enhance his value, and then sell him on at a profit. The races were therefore simply a necessary part of the process of bringing the horse on.

6. The appellant therefore agreed to buy a half share, for which he paid around £5,000 to £8,000 (he could not remember the precise amount). He also agreed to meet half the training, livery and racing costs. He could not recall whether there had been any written agreement with the co-owners. In February 2010, the appellant applied to the British Horseracing Association to be registered as the half owner of Hermes and, following this registration taking effect in June 2010, he applied to be registered for VAT in respect of his activities in relation to the horse. VAT Registration was duly granted.

7. Things initially went well. Hermes ran his first race on 4 October 2010. He was something of a revelation. In a reasonably strong field, he gained a creditable

second place. His performance caused a minor stir in the racing world, according to the reports reaching the appellant from his co-owners. A few weeks after the race, he was informed that an unsolicited offer had been received, via a bloodstock agent, from an unnamed prospective buyer in Switzerland who wished to buy Hermes for £50,000 on the strength of his performance in this one race.

8. The appellant discussed the offer at some length with his co-owners and the professional trainer. The co-owners were keen to accept the offer and bank the profit. The trainer however considered that there was much as yet untapped potential in Hermes and therefore it should be possible to improve him further before selling for an even greater price. The appellant was persuaded and managed to persuade his co-owners that the offer should be rejected, with a view to realising a much higher sale price after some further improvement. At the outset, there had been some speculative discussions between the owners to the effect that if the horse turned out as good as he seemed, it might be possible to secure some kind of lucrative arrangement with the luxury brand company whose name he carried. This discussion was at the back of the appellant's mind when he persuaded his co-owners not to sell.

9. Unfortunately, this was the high point of Hermes' fortunes. His performance at his next race on 15 February 2011 was decidedly average. There followed two further races in June and July 2011, in which the trainer experimented with various tactics to try and recapture the initial promise. But Hermes appeared ultimately to have become bored with racing and his performances deteriorated instead of improving.

10. At that point (in the summer of 2011), the trainer advised that he saw no way of realising the early potential and therefore the best thing was to stop any further spending on training and livery and cut their losses by selling Hermes for the best price they could get. The appellant and the co-owners readily agreed. Initially they put him into a bloodstock sale but ultimately they took the view that the costs of transporting him to it were unlikely to be worthwhile, given the expected sale price. They therefore sold him as a polo pony to a contact of the trainer, who specialised in buying "failed racehorses" for such purposes. The appellant only received about £500 for his half share of the sale proceeds.

11. The appellant submitted his tax return for the year 2010-11 on 28 November 2011 and in it he claimed loss relief in respect of £12,316 of losses accrued during the year 6 April 2010 to 5 April 2011 in respect of a self-employed activity described on the return as "Race Horse". On 18 July 2012 HMRC wrote to the appellant, advising him that they intended to carry out a check of his 2010-11 return, covering two issues (one of which was the loss claimed on the race horse business). In that letter, they stated:

> "It is the view of HMRC that racehorse ownership does not amount to a commercial activity – it is simply a hobby. If you have any information to suggest that your racehorse ownership amounts to a business please let me see this along with details of the income tax act under which the loss claim has been made."

12. A response was requested by 9 August 2012. In the absence of any response on this point (though correspondence continued on other outstanding issues), HMRC wrote again on 16 August 2012, stating that the loss relief claim had been disallowed.

13. The appellant's accountant maintained in a letter dated 30 August 2012 that the race horse activity "was never intended as a hobby nor was it carried out as a hobby. At all times Dr McMorris intended to make a profit and was run as a business". In their reply dated 4 September 2012, HMRC said:

> "**Racehorse**
>
> In order for an activity to be treated as a taxable trade, it must be managed on a commercial basis with a view to the realisation of profits.
>
> As far as racing is concerned, the majority of horses are not profitable as only a relatively small number win enough to cover the cost of their training. It is therefore HMRCs view that the racing of horses by itself is not a commercially run trade in the UK."

14. In their reply dated 3 October 2012, the appellant's accountants referred to *Sharkey v Wernher* [1956] 36 TC 275, and speculated whether this was the basis of HMRC's contention. They argued that case only decided that private horse racing and training was not normally trading, but contrasted that with the appellant's situation – they said he was carrying out a business activity, not a private one. They referred to the fact that he had registered for VAT "and at all times during trading expected to make a profit", it being "purely accidental that our client's business made a loss".

15. In reply HMRC requested copies of the business accounts, the VAT registration and completed declaration form D1 sent to Weatherbys.

16. The accounts were provided by the appellant's accountants with a letter dated 21 November 2012. They were not complex (indeed they included only 5 items). They showed total income of £362 ("prize money received"). The bulk of the expenses were "Training fees" of £9,170 and there were also "racing expenses" of £611, "auction fees" of £97 and accountancy fees of £2,800. These figures added up to the net loss of £12,316 claimed in the return. They covered the period 6 April 2010 to 5 April 2011.

17. In their letter dated 6 December 2012, HMRC referred to *Lord Glanely v Wightman* [1931] 17 TC 634, in which the Special Commissioners had, they said, held that "racing itself is not an enterprise of a commercial nature" and the House of Lords had not disagreed.

18. The correspondence continued, in the course of which HMRC referred also to *Earl of Jersey's executors v Bassom* [1926] 10 TC 357, which they cited as authority that "owning and racing horses was held to be a hobby and not trading". But neither side was persuaded by the arguments of the other, though for the first time HMRC were supplied (in a letter dated 16 April 2013) with a more detailed written account

by the appellant of his activities. Ultimately, therefore, HMRC issued a closure notice dated 9 August 2013 in which they confirmed that the race horse losses were disallowed "as it is considered that a business based on racehorse ownership is not a trade that satisfies the tests in Section 66(2) Income Tax Act 2007". The appellant's accountants appealed and following a formal "view of the matter" letter dated 15 August 2013, HMRC issued their statutory review letter dated 8 October 2013. That letter upheld the earlier decision. The appellant appealed to the Tribunal on 6 November 2013.

The law

Introduction

19. Section 64 Income Tax Act 2007 ("ITA") provides, so far as relevant, as follows:

> "**64 Deduction of losses from general income**
>
> (1) A person may make a claim for trade loss relief against general income if the person –
>
> (a) carries on a trade in a tax year, and
>
> (b) makes a loss in the trade in the tax year ("the loss-making year").
>
> (2) The claim is for the loss to be deducted in calculating the person's net income –
>
> (a) for the loss making year,
>
> (b) for the previous year, or
>
> (c) for both tax years."

20. Section 66 ITA contains the restriction on this relief which is relevant in this appeal. So far as relevant, section 66 provides as follows:

> "**66 Restriction on relief unless trade is commercial**
>
> (1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.
>
> (2) The trade is commercial if it is carried on throughout the basis period for the tax year –
>
> (a) on a commercial basis, and
>
> (b) with a view to the realisation of profits of the trade.

> (3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits."

21. Finally, in section 989 ITA, "trade" is defined as including "any venture in the nature of trade".

22. In order to succeed in his appeal, therefore, the appellant must satisfy us that (a) the activities summarised above amounted to a trade in the year from 6 April 2010 to 5 April 2011, and (b) that the trade was "commercial" (within the meaning of that word set out in subsections 66(2) and 66(3) ITA) throughout that period.

Submissions of the parties

Appellant's submissions

23. Mr Thompson submitted that the evidence made it clear the appellant never intended this activity as a hobby, it was always a serious money-making venture. He had embarked upon it after detailed research into the pedigree of the horse, and had employed the services of a nationally-known racehorse trainer to bring the horse on. He was not a rich man with money to waste on such activities for his own entertainment, this was a serious commercial venture.

24. Mr Thompson referred to the First-tier Tribunal decision in *Atkinson v HMRC* [2013] UKFTT 191 (TC). That case involved an individual who carried on a yacht chartering business, who claimed to offset losses of that activity against his other income. The argument in that case was about whether the trade was "commercial" for the purposes of section 66(2) ITA. Whilst the facts were not comparable to the facts of this case, it contained some useful analysis of the application of the restriction in section 66(2) ITA.

25. He also referred to another First-tier Tribunal decision in *Kerr/Grantham House v HMRC* [2011] UKFTT 40 (TC). That case concerned an individual who had taken a lease of a National Trust property, with a view to opening the house and gardens to the public and also holding events there. The venture had not been successful, and HMRC had argued that its extent was so limited that it did not amount to a trade at all, and even if it did, it was not "commercial" (so that the losses incurred could not be relieved). The Tribunal found that a trade existed and that it was commercial and with a view to profit.

26. Mr Thompson also referred to the fact that HMRC appeared to have reached their decision before properly investigating the facts. Their mind appeared to be made up before even obtaining any information, and in particular they had not followed their own guidance (in BIM 20080) which stated that before reaching a decision on whether a trade existed or not, officers should interview the taxpayer to discover all the necessary factual detail.

HMRC's submissions

27. Mrs Carwardine's essential submission was that HMRC regarded the appellant's activities, as they regarded all racehorse ownership, as a hobby and not a trade.

28. First, she referred to *The Earl of Jersey's Executors v Bassom*. The headnote in that case reads as follows:

> "The Appellant in each of these cases bred, owned, and raced thoroughbred horses, but he bred no horses for sale (though a few were in fact sold), or for the purpose of earning stallion fees. He owned a stallion or stallions which served not only his own mares, but also, and in much greater numbers, mares belonging to other owners.
>
> He appealed against assessments to Income Tax in respect of the fees received for the service of outside mares, contending that no trade was carried on, that the enterprise of breeding, owning and racing thoroughbred horses must be taken as a whole, and that assessments could only be made, if at all, on that basis and no other.
>
> The Special Commissioners decided, by a majority, in each case, that the lucrative employment of stallions for the service of outside mares, though arising incidentally from a non-commercial enterprise, was separable from the rest of the enterprise and the profit therefrom was assessable to income tax.
>
> Held, that the question was one of fact and degree, and that there was ample evidence upon which the Special Commissioners could come to their decision."

29. Second, she referred us to *Customs & Excise v Lord Fisher* [1981] STC 238, a decision of the High Court. The headnote in that case reads as follows:

> "The taxpayer's main hobby was shooting. He sought substantial contributions from those invited to join the shoot on his estate. The persons invited to join the shoot were invariably the taxpayer's friends and relations. The taxpayer neither sought nor made any profit from the contributions. His purpose was to cover the cost of the shoot while making at least an equal contribution from his own pocket. The Customs and Excise Commissioners assessed the taxpayer to value added tax in respect of the contributions on the basis that they constituted consideration for the supply of services 'in the course of a business' carried on by the taxpayer within s 2(2)(b) of the Finance Act 1972. A value added tax tribunal allowed an appeal by the taxpayer against the assessment on the ground that the supply of services by the taxpayer for which contributions were received was in the course of arranging a shoot for pleasure and social enjoyment and accordingly the supplies made by the taxpayer were not made in the course of a business within s 2(2)(b) of the Act. The commissioners appealed contending that on the facts the tribunal could not reasonably conclude that the supplies made by the taxpayer were not made in the course of a

business carried on by him. The taxpayer contended that the shooting arrangements were such as might be expected to be made among friends for the sharing of the cost of an activity in which they all wished to take part and accordingly did not constitute a supply of services in the course of a business carried on by him within s 2(2)(b) of the Act.

Held – On its true construction the word 'business' in s 2(2)(b) of the 1972 Act excluded any activity which was no more than an activity for pleasure and social enjoyment, and the sharing of the costs of a sporting or other pleasure activity did not by itself turn that activity into a business. Since the taking of contributions from those who joined the shoot was not the predominant concern or purpose of the taxpayer in organising it, there was no supply of services in the course of carrying on a business by the taxpayer. The appeal would therefore be dismissed."

30. She also mentioned by name *Lord Glanely v Wightman* (another case, in the House of Lords, concerning profits from stallion fees) and included a copy of it in the authorities bundle, but did not refer us to any particular part of that decision. This case had been previously referred to in HMRC correspondence.

31. Also included in HMRC's authorities bundle (but not referred to at the hearing) were copies of *Sharkey v Wernher* (a case concerned with the value to be credited to the accounts of a taxable stud farm business in respect of horses transferred to the taxpayer's non-taxable horse racing activities, and previously referred to by Mr Thompson in correspondence) and *Customs & Excise v Morrison's Academy Boarding Houses Association* [1978] STC 1 (another VAT case, concerning the question of whether the provision of accommodation by a charity to boarders at Morrison's Academy, where the activity was not carried on with the object of making a profit, amounted to services supplied in the course of a business).

32. She submitted that neither the evidence forwarded to HMRC during the course of the enquiry nor the evidence of the appellant at the hearing showed that his activity was anything more than the "speculative venture" or hobby activity which HMRC generally considered racehorses to be. She also pointed out that there was no evidence before the Tribunal to support the expenses claimed in the accounts (though that was not a point that previously been raised by HMRC).

Discussion

What constitutes a trade?

33. The first hurdle to be overcome by the Appellant was to establish that his loss was incurred in the course of a trade, bearing in mind the detailed facts of how it arose. HMRC's position was that the Appellant was simply indulging a hobby, albeit one that he hoped to make some money out of – perhaps akin to gambling.

34. The case law on what constitutes a trade is extensive, but somewhat diffuse.

35. We do not consider it to be helpful to consider the VAT cases to which we were referred, as the underlying concepts of "trade" (income tax) and "business" (VAT) are different in material respects. The concept of what makes up a trade is elusive, and this is evident from the way the cases tend to approach any particular situation. In the absence of a clear definition, the courts have effectively adopted a "look and feel" approach, in which a general overview of the activities concerned is considered in the light of what have become known as the "badges of trade". The underlying rationale behind this approach is that there are certain particular features of some types of activity which tend to suggest that they amount (or do not amount) to a trade.

36. There have been a number of different attempts to assemble a comprehensive list of the badges of trade which have been (or should be) considered when attempting to determine whether a particular activity amounts to a trade (including "any venture in the nature of trade" or, under the legislation previously in force, "every trade, manufacture, adventure or concern in the nature of trade").

37. The problem with all such attempts is that they are necessarily coloured by the context in which they are being assembled. A very helpful overall summary of the position is to be found in the judgment of Sir Nicolas Browne-Wilkinson V-C in *Marson v Morton* [1986] STC 463 (a case concerned with whether a one-off transaction in land amounted to a trade):

> "… one turns to consider what the position is so far as the law on this matter is concerned. Like the commissioners I have been treated to an extensive survey of the authorities. But as far as I can see there is only one point which as a matter of law is clear, namely that a single, one-off transaction can be an adventure in the nature of trade. Beyond that I found it impossible to find any single statement of law which is applicable to all cases in all circumstances. I have been taken through the cases and invited to compare the facts in some cases with the facts in the case here before me. I fear that the General Commissioners may have become as confused by that process as I did. The purpose of authority is to find principle, not to seek analogies on the facts.
>
> It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another. In relation to transactions such as this, that is to say a one-off deal with a view to making a capital profit, there do seem to be certain things which the authorities show have been looked at. For convenience I will refer to them in a moment. But I would emphasise that the factors I am going to refer to are in no sense a comprehensive list of all relevant matters, nor is any one of them so far as I can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate.

The matters which are apparently treated as a badge of trading are as follows:

(1) That the transaction in question was a one-off transaction. Although a one off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.

(2) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.

(3) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman quoted from Reinhold? For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.

(4) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?

(5) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade.

(6) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.

(7) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.

(8) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

> (9) Did the item purchased either provide enjoyment for the purchaser (for example, a picture) or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment.
>
> I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question—and for this purpose it is no bad thing to go back to the words of the statute—was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?"

38. In that case, the suggestion being put was that the activity in question was more in the nature of an investment than trade. In the present case, the suggestion is that the activity was more in the nature of a hobby than trade, and the Vice-Chancellor's "homely language" test should be adjusted accordingly.

Did the appellant's activities amount to a trade?

39. Whilst every case must be decided on its own facts, it seems clear that there is at the very least a strong presumption that an activity of simply owning and running racehorses will not amount to a trade but will rather be considered a hobby.

40. The appellant in this case however has attempted to engage in a somewhat different activity, that of buying, bringing on and selling at a profit a half share in a single racehorse.

41. As a one-off transaction, unrelated to the appellant's other activities, a consideration of badges (1) and (2) referred to above would tend to point away from trading.

42. Whilst racehorses (and shares in them) are obviously commonly bought and sold, there was no evidence before us of the existence of any traders who carry out an established trade involving buying, bringing on and selling racehorses for profit. Accordingly a consideration of badges (3) and (4) above would also tend to point away from trade.

43. There was no evidence before us that the appellant had borrowed any money to embark on the venture, and we infer he was simply using his own available resources; the amounts involved were not such as to preclude that possibility (there was other evidence before us of a property investment business which the appellant was also involved in). A consideration of badge (5) above would therefore also point away from trade.

44. The essence of the appellant's shared project was to spend some money on "bringing on" the horse with a view to sale at a profit, thus a consideration of badge (6) above would point towards trade.

45. The appellant bought and sold his share in the horse as a single lot, but had done something in relation to the object bought (trained and raced it) so a consideration of badge (7) above does not provide much assistance.

46. Whilst the appellant undoubtedly intended to sell his share in the horse at, hopefully, a profit, there was no clarity about when he intended this to happen, or even what the criteria were which would drive the decision. It all depended on how matters developed and, crucially, it depended upon discussions and agreement with his co-owners. Despite the initial intention, the informality and uncertainty has the feel of "indulging a hobby" rather than a trading venture and accordingly a consideration of badge (8) above points marginally away from trade.

47. Clearly the horse could not be expected to generate an income pending resale (indeed, the opposite was almost certain). However the appellant clearly derived pleasure from his involvement in the project, and there was certainly some "pride of possession" involved in his part ownership of the horse. In the light of this, we do not consider that a consideration of badge (9) above provides much assistance.

48. Having, as the Vice-Chanellor said in *Marson*, looked at these matters, we look at the whole picture in the round and ask ourselves the question: "did these activities amount to a trade (or to a venture in the nature of trade)?" The alternative analysis, as we see it, is that the appellant was instead indulging in his hobby of racehorse gambling, though now (no longer constrained by undergraduate finances) by gambling over the long term on one particular horse at rather greater expense than before.

49. It is true that the appellant hoped to make a profit, and used his knowledge and skill to identify this as an opportunity worth pursuing to that end. But these characteristics are shared by nearly every gambler, and they do not transform a gambling hobby into a trade.

50. Viewed in the round, we have no hesitation in reaching the conclusion that the appellant's activities did not amount to a trade (including a "venture in the nature of trade"), and therefore the appeal must fail on that ground.

If the appellant's activities amounted to a trade, was it "commercial"?

51. If we are wrong on the first question, then the question arises as to whether section 66 ITA denies relief for the loss in any event.

52. As we read it, section 66(2) ITA would require the appellant to establish both of its limbs, i.e. he would need to establish that, throughout the period 6 April 2010 to 5 April 2011, he had carried on the trade both "on a commercial basis" and "with a view to the realisation of profits of the trade".

53. Addressing the second requirement first, we consider that the appellant certainly wished to make a profit rather than a loss, and we also accept that his subjective intention was to do so, if possible. Thus, if his activity did in law amount to a trade, we consider that he carried it on throughout the relevant period "with a view to the realisation of profits of the trade".

54. Turning to the first requirement ("on a commercial basis"), we consider this to be more problematic.

55. In *Wannell v Rothwell* [1996] 68 TC 719 (a case in which a commodities dealer claimed relief for losses on what he argued was a personal commodity dealing trade), Walker J (in the High Court) said this:

> "I was not shown any authority in which the Court has considered the expression "on a commercial basis", but it was suggested that the best guide is to view "commercial" as the antithesis of "uncommercial", and I do find that a useful approach. A trade may be conducted in an uncommercial way either because the terms of trade are uncommercial (for instance, the hobby market-gardening enterprise where the prices of fruit and vegetables do not realistically reflect the overheads and variable costs of the enterprise) or because the way in which the trade is conducted is uncommercial in other respects (for instance, the hobby art gallery or antique shop where the opening hours are unpredictable and depend simply on the owner's convenience). The distinction is between the serious trader who, whatever his shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante."

56. Turning to the present case, there was no clear agreement with the co-owners as to the detailed terms of their agreement, or even as to the level of available profit at which they agreed to sell the horse (as could be seen from the disagreement that arose when the £50,000 offer was received). The organisation of the activity was very informal and there was no evidence before us of any degree of systematic organisation or structure to the activity – indeed, the appellant could not even tell us the price he had paid for his half-share, and it was apparent that the co-owners' agreement was required to every significant action. The whole project was, on the evidence before us, based on a series of informal and undocumented conversations. Whilst we accept that the appellant carried out research into the horse's pedigree, that is little different from a normal gambler studying "form" and is not sufficient to persuade us that he acted "on a commercial basis". In short, we consider his approach to the whole project to have been uncommercial rather than commercial.

57. It follows that, even though the second limb of section 66(2) ITA is satisfied, the first limb is not and therefore the restriction in section 66 ITA would apply to deny relief in any event, even if the appellant's activities were considered to amount to trading.

Summary and conclusion

58. We find that the appellant was not carrying on a trade at the material time – see [50].

59. Even if we are wrong on that point, we find that he would not have been carrying on a trade "on a commercial basis" – see [57].

60. It follows that the appeal must be dismissed.

61. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 29 December 2014