



TC04779

Appeal number: TC/2014/04978

INCOME TAX – Exemptions and reliefs – Trade loss relief for loss made in the trade of farming – Whether a “loss in the trade in each of the previous 5 tax years” (Income Tax Act 2007 s 67(2)) – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM DONALDSON

Appellant

- and -

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

Respondent

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR DAVID MOORE**

Sitting in public at Belfast on 30 October 2015

Mr J Ruddell for the Appellant

Mr M Chapman for the Respondents

DECISION

Introduction

1. On 7 April 2014 HMRC opened an enquiry into the Appellant's 2012-13 self-assessment tax return. On 19 June 2014, on the conclusion of that enquiry, HMRC issued a closure notice amending the tax return by disallowing trade loss relief claimed by the Appellant in respect of his trade of farming. On the same date, HMRC also issued notices of assessment in relation to the 2010-11 and 2011-12 tax years on the basis that the Appellant had in those years similarly claimed trade loss relief when he was not entitled to do so.
2. The Appellant appeals against that closure notice and those assessments.

The facts

3. The following facts are common ground between the parties. In his self-assessment tax returns for all years from 2003-04 to 2012-13 the Appellant has shown losses in respect of his farming business. With the exception of 2007-08, the Appellant has in each of those tax returns set off the amount of the loss in the year in question against his other income in that year.

4. His 2007-08 tax return was different. It indicated that his loss for that year was £5,789. However, in that tax return he did not set off that loss against his other income. Rather, he entered the amount of that loss in the box "Total loss to carry forward after all other set-offs – including unused losses brought forward". In his subsequent 2008-09 tax return, he left blank the box "Loss brought forward from earlier years set-off against this years profits". In subsequent tax returns, this box was also left blank. The result is that the Appellant never claimed trade loss relief for his farming losses in 2007-08.

Applicable legislation

5. Section 64 of the Income Tax Act 2007 ("ITA") relevantly provides:
- (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 tax year, or
 - (c) for both tax years.
6. Section 67 ITA relevantly provides:

- (1) This section applies if a loss is made in a trade of farming or market gardening in a tax year (“the current tax year”).
- (2) Trade loss relief against general income is not available for the loss if a loss, calculated without regard to capital allowances, was made in the trade in each of the previous 5 tax years ...

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The parties’ arguments

7. There was no witness evidence at the hearing, and the parties’ arguments turned solely on questions of law, in particular the interpretation of s 67(2) ITA.

10 8. The position of the Appellant is as follows. The effect of s 67(2) ITA is that trade loss relief for farming losses is not available if a loss has been “calculated” for tax purposes in each of the previous 5 years. In 2007-08, which was the fifth successive year in which the Appellant had made farming losses, he would have been entitled to claim the amount of the loss against his other income for that year. He did not do so. He was alternatively entitled to carry that loss forward to the next tax year.
15 However, although his 2007-08 tax return included the amount of the loss in the “loss to carry forward” box, his subsequent 2008-09 tax return did not include that amount in the “loss brought forward from earlier years” box. Thus, ultimately, the loss in 2007-08 was neither offset against other income for that year, nor carried forward to future years. By not including the amount of the 2007-08 loss in the “loss brought forward from earlier years” box in his 2008-09 tax return, the Appellant lost the right to claim loss relief in respect of the 2007-08 losses. He thereby voluntarily adjusted the amount of the loss to zero, which he was entitled to do since s 64(1) ITA says that trade loss relief “may” be claimed, not that it must. Thus, the “calculation” for income tax purposes of his loss in 2007-08 became zero, which is not a loss at all.
20 The result is that in each of the tax years 2010-11, 2011-12 and 2012-13, it was not the case that the Appellant had a loss “calculated” for income tax purposes in “each of the previous 5 tax years”.

9. The position of HMRC is as follows. For purposes of s 67(2) ITA, a loss need only be *made* in each of the previous 5 tax years. It is not necessary that the tax loss has been *claimed* in each of the previous 5 tax years. The “loss” referred to in s 67(2) ITA is the loss referred to in s 67(1), which expressly applies where a loss is “*made* in a trade of farming”. Tax year 2007-08 was the fifth year in succession in which losses were *made*. Therefore, in every tax year thereafter, it was the case that the Appellant had *made* a loss in each of the previous 5 tax years. In any event, the Appellant’s 2007-08 tax return included a figure of £5,789 in the “Total loss to carry forward” box. That is a calculation of a loss for income tax purposes, whether or not the loss was ultimately claimed in the subsequent tax return.
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The Tribunal’s findings

40 10. Both parties cited certain other provisions of the ITA which they claimed lent some support to their respective arguments, although the Tribunal finds that these references do not advance matters.

11. Neither party cited any judicial authorities.

12. In the absence of any guidance in judicial authority, the Tribunal considers the plain meaning of the wording of the legislation. The main clause in s 67(2) ITA reads “Trade loss relief against general income is not available for the loss if a loss ... was made in the trade in each of the previous 5 tax years”. This provision clearly is expressed to apply where trade losses have been *made* in each of the previous 5 years. This provision is not expressed as depending in any way on whether or not trade loss relief is *claimed* in respect of the loss in question. The word “calculated” in s 67(2) is part of the subordinate phrase “calculated without regard to capital allowances”. This phrase deals with how to determine whether or not a loss has been made for purposes of s 67(2). It does not make the whole of the operation of s 67(2) dependent on whether or not a loss has been “calculated”.

13. In any event, the word “calculated” does not have the same meaning as the word “claimed”. In the present case, the amount of the loss in 2007-08 was expressly stated in the 2007-08 tax return. The amount could not have been stated in the 2007-08 tax return unless it had first been calculated. If the amount of that loss was not mentioned in any subsequent tax returns, this may mean that loss relief was never claimed in respect of the amount of that loss. It does not mean that the loss was never made, or that the amount of the loss was “recalculated” for tax purposes to zero.

14. The Tribunal cannot therefore accept the Appellant’s interpretation. The Tribunal finds that according to the Appellant’s tax returns, in each of the three tax years relevant to this appeal, the Appellant made a loss in his trade of farming in each of the previous 5 tax years.

Conclusion

15. For these reasons, the appeal is dismissed.

16. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE
RELEASE DATE: 14 December 2015