



TC08172

INCOME TAX – Trading Losses – Sideways loss relief – Carry back of losses – Sections 66, 72 & 74 Income Tax Act 2007 – Was the Appellant carrying on a trade on a commercial basis and with a reasonable expectation of profit – were closure notices issued outside any statutory time limit – Section 34 & Section 34A Taxes Management Act 1970 – Did HMRC delay unreasonably in issuing the closure notices

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/00443

BETWEEN

ROBERT POLL

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ROBIN VOS
MRS NORAH CLARKE**

The hearing took place on 12-14 April 2021 using the Tribunal video platform.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The Appellant appeared in person

Mr Steve Goulding, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, Mr Poll is a keen photographer. After his employment with Morgan Stanley came to an end in 2007, he set up a photography business as a sole trader.
2. In late 2007, Mr Poll was introduced to an organisation called Premiere Picture which promoted an arrangement called "Premiere Picture Sovereign". The proposed business involved buying film distribution rights and then selling them in return for a share of any income generated by the film.
3. Mr Poll decided to set up a film business using Premiere Picture Sovereign. He committed £650,000 to the business although only £125,000 of this was his own money. The remainder was provided by way of loan from GBF Capital Limited, a company connected with Premiere Picture.
4. As a result of the way film distribution rights are valued for accounting purposes, the accounts of the business for the first accounting period showed a loss of £583,881. In his tax return for the year 5 April 2008, Mr Poll made a claim to carry back those losses and set them against other income he had received in the previous three tax years.
5. The film business generated some further (but much smaller) losses in the following two tax years. The figure for the tax year ended 5 April 2009 was £22,149 and for the tax year ended 5 April 2010 was £9,798.
6. HMRC opened enquiries in relation to Mr Poll's tax returns for each of these three years. They have issued closure notices disallowing the loss claims, principally on the basis that the film business was not a trade or that, even if it was, it was not commercial.
7. Mr Poll appeals against the closure notices on the basis that he was carrying on a trade on a commercial basis. He also says that the closure notices are invalid as they have been issued too late.

EVIDENCE

8. Shortly before the hearing, both parties submitted a small number of additional documents. The documents were relevant to the matters which the tribunal had to decide and neither party objected to the introduction of the new evidence by the other. We were satisfied that it was in accordance with the overriding objective to admit the documents as part of the evidence and gave permission for each party to do so.
9. The evidence before us consisted of a number of bundles of documents and correspondence produced by HMRC, the additional documents which we have just referred to and the evidence of Mr Poll which was principally contained in a witness statement but which was supplemented by further oral evidence given at the hearing itself. Mr Goulding cross examined Mr Poll both on the contents of his witness statement and the additional evidence which he gave at the hearing.
10. For the most part, we found Mr Poll to be a straightforward witness and we accept much of what he told us. However, there were parts of his evidence, mainly in relation to his motivations and expectations in connection with the business which, in the light of the other evidence available to us, we have found implausible or unrealistic. Where relevant, we have explained why this is the case.

THE VALIDITY OF THE CLOSURE NOTICES

11. We will deal first with the validity of the closure notices given that, if Mr Poll is right that the closure notices are invalid, we will not need to examine the question of trading.

12. Mr Poll challenges the validity of the closure notices on a number of grounds:
 - (1) There is a statutory time limit and the closure notices were issued outside the time limit.
 - (2) The closure notices were “stale” in the sense that HMRC had all the information they needed in order to issue the closure notices several years before the closure notices were in fact issued.
 - (3) HMRC acted unreasonably and/or unfairly in relation to the enquiry.

Background Facts

13. Mr Poll filed his self-assessment tax return for the year ended 5 April 2008 on 7 August 2008. HMRC opened an enquiry under s 9A Taxes Management Act 1970 (“TMA”) on 20 January 2009.

14. A self-assessment tax return for the year ended 5 April 2009 was submitted by Mr Poll on 17 December 2009. HMRC’s enquiry was opened on 7 December 2010.

15. Mr Poll filed his self-assessment tax return for the tax year ended 5 April 2010 on 27 January 2011. The enquiry was opened on 9 January 2012.

16. On the basis of the evidence before us, we accept that the enquiries into the self-assessment tax returns for each of these years were validly opened. There is no suggestion they were not.

17. Between the opening of the first enquiry in January 2009 and December 2010, there followed a series of correspondence between HMRC and Mr Poll’s advisers in which Mr Poll provided comprehensive information about the Sovereign arrangements and which debated whether or not Mr Poll was carrying on a trade.

18. The final letter in this series was a letter from HMRC dated 7 December 2010 which referred to the fact that HMRC were investigating similar arrangements entered into by other taxpayers and that there was a case which was on its way to the tribunal. There was no response to this letter from Mr Poll or his advisers.

19. There were some further communications between HMRC and Mr Poll’s advisers in 2012 and 2013 but, with the exception of one letter from HMRC in 2013 which provided an update on the proposed tribunal case and mentioned a possible settlement opportunity, this dealt with other aspects of HMRC’s enquiry relating to losses in respect of Mr Poll’s photography business and income from Morgan Stanley.

20. There was sporadic correspondence between HMRC and Mr Poll’s advisers in 2014 but, aside from administrative matters, this simply referred to the ongoing litigation and possible settlement opportunities.

21. Between 2015-2017, HMRC wrote to Mr Poll and to his advisers a number of times about the possibility of settlement and their wish to take a further case to the tribunal. Neither Mr Poll nor his advisers responded to these letters.

22. The litigation referred to by HMRC was the case of *Degorce v HMRC*. The decision of the First-tier Tribunal ([2013] UKFTT 178 (TC)) was released on 4 March 2013. The Upper Tribunal decision ([2015] UKUT 447 (TCC)) was released on 24 August 2015. The judgment of the Court of Appeal ([2017] EWCA Civ 1427) was issued on 6 October 2017.

23. Having received no response to their correspondence in 2017, HMRC issued closure notices in respect of all three tax years on 19 September 2018.

24. Mr Poll's advisers appealed on his behalf against each of the closure notices on 17 October 2018. HMRC reaffirmed their view of the matter on 24 October 2018 and offered a review which was accepted by Mr Poll on 18 November 2018. The review was concluded on 21 December 2018 and upheld HMRC's original decision. Mr Poll's notice of appeal to the Tribunal was filed on 20 January 2019.

Time limit for closure notices

25. Mr Poll submits that the time limit for self-assessments in s 34 TMA applies to any amendment to a self-assessment resulting from a closure notice or, failing that, that the time limit for making an assessment in s 34 TMA applies. The relevant parts of those sections are as follows:

“34 Ordinary time limit of four years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than four years after the end of the year of assessment to which it relates.

...

(3) In this section ‘assessment’ does not include a self-assessment.”

“34A Ordinary time limit for self-assessments

(1) Subject to sub-sections (2) and (3), a self-assessment contained in a return under Section 8 or 8A may be made or delivered at any time not more than four years after the end of the year of assessment to which it relates.

...

(3) Subsection (1) has effect subject to the following provisions of this Act and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case.

(4) This section has effect in relation to self-assessments for a year of assessment earlier than 2012-2013 as if –

(a) in sub-section (1) for the words from ‘not more’ to the end there were substituted ‘on or before 5 April 2017’ ...”

26. In Mr Poll's case, the closure notices were of course issued well after the four year time limit and also after the extended deadline of 5 April 2017 which applied to tax years prior to 2012-2013.

27. Closure notices are dealt with in s 28A TMA. The relevant parts provide as follows:

“28A Completion of enquiry into personal or trustee return

(1) This section applies in relation to an enquiry under Section 9A(1) of this Act.

...

(1B) The enquiry is completed when an officer of Revenue & Customs informs the taxpayer by notice (a ‘final closure notice’) –

(a) in a case where no partial no closure notice has been given, that the officer has completed his enquiries ...

(2) A partial or final closure notice must state the officer's conclusions and –

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendment of the return required to give effect to his conclusions.

...

(4) The taxpayer may apply to the tribunal for direction requiring an officer of the Board to issue a partial or final closure notice within a specified period.”

28. Mr Poll referred first of all to the decision of the High Court (Patten J) in *Morris v HMRC* 79 TC 184. At that time s 34A TMA did not exist (it was introduced in 2016). The taxpayer argued that HMRC could not issue a closure notice after the expiry of the four year time limit in s 34 TMA. The court decided that s 34 TMA had no application to self-assessments and so, on that basis alone, could not apply to any amendment to a self-assessment resulting from the issue of a closure notice.

29. Against this background, Mr Poll noted that s 34A TMA was introduced in 2016 and applies specifically to self-assessments. He submits that the time limit in s 34A TMA applies not only to a taxpayer's self-assessment but also to any amendment to that self-assessment made by HMRC. He points out that, if the time limit was only intended to apply to the taxpayer, it could have been included in s 8 TMA which is the section imposing the requirement on a taxpayer to file a tax return and setting out the time limits within which they must do so. He suggests that the fact that s 34A is a stand-alone provision indicates that it was intended to apply to HMRC as well as to taxpayers.

30. Mr Poll also drew support from s 34A(3) which provides that the four year time limit is subject to any other provision which provides for a longer time limit. He submits that this is a clear reference to s 36 TMA which provides for a longer time limit where the taxpayer has been careless or deliberate and which, self-evidently, could only be relevant to an assessment (or, in his view, an amendment to a self-assessment) made by HMRC and not by the taxpayer.

31. Mr Poll accepts that the result of his argument is to treat an amendment by HMRC to a taxpayer's self-assessment following a closure notice as if it were itself a self-assessment for the purposes of s 34A TMA but suggests there is no difficulty with this. In his view, an amendment to a self-assessment made by HMRC is itself a form of assessment.

32. Assuming Mr Poll is right that an amendment by HMRC to a self-assessment should itself be treated as an assessment, Mr Poll's position is that the four year time limit must apply as, even if it is not a self-assessment and so does not fall within s 34A TMA, it will still be an assessment within s 34 TMA.

33. Mr Goulding's response is that an amendment to a self-assessment as a result of a closure notice is not itself an “assessment” and so the time limits, whether in s 34 TMA or s 34A TMA, are irrelevant. In support of this, he refers to the comment of Patten J in *Morris* at [45] that:

“The draftsman has been careful in his choice of terminology and Section 28A does not involve an assessment within the meaning of Section 34. On Mr Baker's argument the time limit would have expired in this case solely due to the delaying tactics of his clients and the Revenue, in order to serve the closure notices, would have to rely on allegations of negligence and fraud. This seems to me to be an unlikely

structure for Parliament to have adopted. Much more likely is that any possible delay in achieving finality following an audit enquiry could be dealt with by the inclusion of a right to apply for a direction for closure which was granted by Section 28A(4). In my judgement this was the solution adopted”.

34. Mr Goulding also referred us to the decision of the Upper Tribunal in *HMRC v Tooth* [2018] UKUT 0038 (TCC) where the Upper Tribunal observed at [14(2) – footnote 4] that:

“Once an enquiry has been notified, there is no time limit within which it must be concluded.”

35. *Morris* was of course decided before the introduction of s 34A TMA. However, it seems to us that the principle that an amendment to a self-assessment is not itself an assessment applies equally to s 34A TMA as it does to s 34 TMA. Whilst the conclusion in *Morris* is not binding on us as it was not part of the court’s main reason for dismissing the appeal, it is a conclusion which the judge reached after an extensive review of the legislation and full argument. It should therefore in our view be given significant weight.

36. This conclusion is also reinforced by the decision of the Court of Appeal in *R (Archer) v HMRC* [2017] EWCA (civ) 1962 where Lewison LJ stated at [26] that:

“It is also true that for some purposes, **including time limits**, an amendment to a self-assessment is not an ‘assessment’”. (our emphasis)

37. As Patten J explained in *Morris*, Parliament has been careful to draw a distinction between a self-assessment on the one hand and an amendment to a self-assessment on the other. For example, s 31 TMA confers a right of appeal against an amendment to a self-assessment but not against a self-assessment itself. Had Parliament intended that an amendment to a self-assessment should be treated as an assessment, it might have been expected that this would be clearly stated in the legislation.

38. The fact that there is no time limit within which HMRC is required to issue a closure notice is not surprising. It would be arbitrary if HMRC were prevented from issuing a closure notice as a result of delays on the part of the taxpayer during the course of an enquiry. Whilst one of the purposes of imposing time limits for assessments is to achieve certainty, the taxpayer has the ability to bring an end to an enquiry if it is appropriate to do so by applying to the Tribunal for a direction that HMRC must issue a closure notice within a specified period.

39. We do not find Mr Poll’s suggestion that, if the four year time limit in s 34A TMA was only intended to apply to the taxpayer, it would have been included in s 8 TMA persuasive. This is because s 34A applies not only to returns made under s 8 TMA but also to returns made under s 8A TMA (which applies to trustees). In addition, the requirement to include a self-assessment is contained in s 9 TMA. It is in our view much more logical and consistent with the structure of the Taxes Management Act to include the self-assessment time limit with the other time limits for assessments in ss 34-40 TMA.

40. We do accept that, if the reference in s 34A(3) TMA to other provisions allowing a longer period for the making of a self-assessment were a reference to s 36 TMA, this would provide a strong indication that the time limit in s 34A TMA was intended to apply to HMRC. However, s 34A(4) itself provides a longer time limit for tax returns relating to years before 2012-2013. In addition, s 34A(3) refers not only to other provisions of the Taxes Management Act but also to other provisions of the “Taxes Acts” which indicates that there are provisions in other tax legislation which may allow a self-assessment to be made outside the normal four year time limit. We do not therefore accept that s 34A(3) has the significance which Mr Poll

suggests. We do also doubt, in the light of the decision in *Morris* whether s 36 is in any event capable of applying to a self-assessment as there is no reference in s 36 TMA to self-assessments as opposed to assessments.

41. Although the point was not argued in *Tooth* but was simply stated by the Upper Tribunal as a fact, their observation that there is no time limit within which HMRC must complete an enquiry supports the conclusion which we have come to.

42. Mr Poll suggested that, even if there was no time limit for completing an enquiry, there was still a time limit for amending a taxpayer's self-assessment. This would in our view in substance amount to a deadline by which HMRC must conclude their enquiries. Had Parliament intended there to be such a deadline, we would have expected this to have been made clear in s 28A. It would make no sense for Parliament to allow an enquiry to continue indefinitely if, at the end of it, HMRC were unable to take any action to amend the taxpayer's return.

43. For these reasons, our conclusion is that there is no time limit within which HMRC must issue a closure notice and state their amendments to the taxpayer's return and, if appropriate, their self-assessment. The ability for the taxpayer to apply to the Tribunal for direction requiring HMRC to issue a closure notice provides an adequate safeguard against HMRC continuing their enquiries indefinitely.

Closure notices and staleness

44. Mr Poll submits that, if HMRC delay in issuing a closure notice once they have all the information needed to do so, by analogy with the cases relating to discovery assessments, the information can become stale with the result that any closure notice is invalid. In substance, what he is saying is that the closure notice (and therefore the amendment to the self-assessment) must be made within a reasonable period of HMRC having all the information enabling them to do so.

45. Mr Poll referred in particular to the decision of the Upper Tribunal in *Beagles v HMRC* [2018] UKUT 380 (TCC) at [36] and the decision of the Court of Appeal in *Tooth* at [78-79]. In *Tooth*, the Court of Appeal made the following comments at [79]:

“(3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment.

...

(7) ...

(a) the taxpayer, as we have found, should be protected from stale assessments.”

46. Mr Goulding's response was short. HMRC do not accept that there is a concept of staleness, even in relation to discovery assessments (a decision from the Supreme Court in *Tooth* is expected later this year, the appeal having been heard in March). In any event, Mr Goulding submits that any concept of staleness applies only to discovery assessments and not to closure notices.

47. In our view, Mr Goulding is right that there is no concept of staleness in relation to an HMRC enquiry and the subsequent issue of a closure notice. It is clear that, if staleness applies in relation to a discovery assessment, it is based on the requirement in s 29(1) TMA that an HMRC officer must “discover” something. The question is whether the use of the word “discover” implies a requirement that HMRC must act while the discovery is still new. As the Court of Appeal says at [79(3)] in *Tooth*:

“If, to use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued while the discovery is ‘new’.”

48. In the case of an enquiry under s 9(A) TMA, there is no requirement for HMRC to make a discovery. They may open an enquiry whether or not they suspect that there is any further tax due. As we have already established, there is no time limit within which HMRC must complete their enquiries. If a taxpayer believes that HMRC have everything they need to conclude the enquiry, they may apply to the Tribunal for a direction requiring HMRC to issue a closure notice. Given that the taxpayer has this safeguard, there is no reason to infer a further requirement on HMRC that they must act expeditiously once they have all the information needed to issue a closure notice.

49. In any event, in this particular case, we do not believe that there has been any unreasonable delay on the part of HMRC in issuing the closure notices, despite the fact that they were only issued some eight or nine years after HMRC had all the information they needed to issue the closure notices.

50. The reason for this is that it is clear to us from the correspondence that, at the end of the first chain of correspondence in December 2010, Mr Poll and his advisers were content to let matters rest pending the resolution of litigation which HMRC had indicated they were taking forward in relation to a similar arrangement. That litigation was referred to in the correspondence between the parties between 2013-2017 and there is no indication that Mr Poll or his advisers were expecting anything to happen until that litigation had been resolved.

51. The decision of the Court of Appeal in *Degorce* became final towards the end of 2017. Although there was some delay between then and the issue of the closure notices in September 2018, given the time which had already passed and the lack of any communication from Mr Poll or his advisers, we do not think that this delay was unreasonable.

52. We should however make it clear that our primary reason for rejecting this ground of appeal is that there is no requirement on HMRC to issue a closure notice within a reasonable period after they have all the information enabling them to do so. The only remedy for the taxpayer in these circumstances is to apply to the Tribunal for a direction requiring HMRC to issue a closure notice.

Unfairness and unreasonableness

53. Mr Poll highlights two points relating to the conduct of HMRC’s enquiry which he submits evidence unfairness or unreasonableness on the part of HMRC.

54. The first is that Mr Poll was told in a conversation with an HMRC officer in June 2009 that HMRC’s view had been coloured by their previous dealings with Premiere Picture and other taxpayers who had entered into similar arrangements with Premiere in previous tax years. This was at a time when the officer said that he had only “glanced through” the information provided by Mr Poll in relation to his own position. Mr Poll submits that this shows that HMRC had pre-judged his case without taking into account his own particular circumstances.

55. The second area of complaint is that HMRC had wanted to change the nature of their enquiry into one which was conducted under Code of Practice 8 (Tax Avoidance). This would have meant that Mr Poll’s tax enquiry insurance would not have covered the costs of the enquiry and, following discussions with Mr Poll’s adviser, HMRC initially agreed to continue their enquiry under the normal Code of Practice 11.

56. However, in subsequent correspondence, Mr Poll’s adviser requested HMRC to issue a closure notice, failing which he said Mr Poll would apply to the Tribunal for a direction requiring them to issue one. In their response, HMRC suggested that, if Mr Poll wanted a closure notice, they would need to pass the matter to their specialist investigation colleagues

which would have resulted in the enquiry being moved to Code of Practice 8 and the insurance no longer being effective.

57. Mr Poll took this as a threat and agreed to postpone his request for a closure notice as long as the enquiry was not passed over to specialist investigations. Mr Poll submits that this threat, coupled with the subsequent delay in issuing the closure notices, was an unfair exercise by HMRC of their statutory powers.

58. Mr Goulding submits that the Tribunal has no jurisdiction to consider unfairness or unreasonableness in the context of HMRC's conduct at the enquiry. In support of this, he referred to the decision of the Upper Tribunal in *Hok Limited v HMRC* [2012] UKUT 363 (TCC).

59. That case involved an appeal against penalties and an allegation that HMRC had deliberately delayed issuing a penalty notice with the result that the taxpayer had incurred further penalties. The context is therefore very different to this case although, in our view, the principles apply more generally. The Upper Tribunal's conclusion at [56] in that case was that:

“Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction... It is impossible to read the legislation in a way which extends its jurisdiction to include – whatever one chooses to call it – a power to override a statute or supervise HMRC's conduct.”

60. It follows from this that the Tribunal cannot quash a closure notice on the basis that HMRC's conduct has somehow been unfair or unreasonable as there is no statutory power for it to do so. This ground of appeal must therefore be rejected. Mr Poll's remedy in relation to this sort of issue is either to make a complaint to HMRC (and, if necessary, to follow it up with the Adjudicator's Office) or to bring an action for judicial review.

61. Having said that, we should comment briefly on the points made by Mr Poll.

62. As far as HMRC's view being coloured by their previous dealing with Premiere Picture is concerned, Mr Goulding accepted that this was unfortunate language but insists that, in any event, HMRC have dealt with his case based on its own merits. We have no reason to doubt this having seen the correspondence which subsequently passed between the parties. We do of course also reassure Mr Poll that this Tribunal is independent of HMRC and will decide his appeal based on the evidence which had been put forward.

63. As far as the involvement of specialist investigations is concerned, Mr Goulding says that HMRC were in no way trying to restrict Mr Poll's right to apply for a closure notice.

64. Although Mr Poll may have taken the suggestion that the case would be passed over to specialist investigations as a threat, that is not how we read the correspondence. Indeed, HMRC have, it appears, been accommodating in initially agreeing that the enquiry could continue under Code of Practice 11 under the control of the local office but with advice from specialist investigations. The suggestion by HMRC that framing a closure notice should properly be done by specialist investigations rather than by the local office is not a surprising one given that it is relatively clear from the correspondence that, although the enquiry had been retained in the local office, it was to a large extent being driven by the relevant individual at the specialist investigations team.

65. As far as the subsequent delay is concerned, we have already explained why we consider that the gap between 2010 and 2018 can be justified.

Conclusion on closure notices

66. Our conclusion is that the closure notices were validly issued and so we turn now to consider Mr Poll's appeal against the conclusions in those closure notices and the resulting amendments to his tax returns.

THE CLAIM FOR LOSS RELIEF

Legislative framework

67. Trade losses may be set against an individual's other income (s 64 Income Tax Act 2007 ("ITA")). The trade must however be commercial. Section 66 ITA provides:

"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."

68. Losses made in the first four tax years of a trade may be carried back and set against other income in the previous three years (s 72 ITA). Again, the trade must be commercial. Section 74 ITA provides as follows:

"74 Restrictions on relief unless trade is commercial etc

- (1) Early trade losses relief for a loss made by an individual 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) in such a way that profits of the trade could reasonably be expected to be made in the basis period or within a reasonable time afterwards."

69. Although the wording of s 66 ITA and s 74 ITA are slightly different, the differences are, in our view, not material. The three requirements are:

- (1) The individual must be carrying on a trade.
- (2) The trade must be carried on during the relevant period on a commercial basis.
- (3) There must be a reasonable expectation that profits will be made within a reasonable time.

70. HMRC submit that none of these requirements are satisfied. Mr Poll says that they are.

71. We should record that, at the start of the hearing, it appeared that Mr Goulding also wished to make submissions about whether, if the three conditions were satisfied, any expenditure incurred by Mr Poll was wholly and exclusively for the purposes of the trade (see

s 34 Income Tax (Trading and other Income) Act 2005) and whether the expenditure was capital rather than revenue in nature. Whilst the wholly and exclusively point was referred to in HMRC's "view of the matter" letter, neither point was referred to in Mr Goulding's statement of case or skeleton argument (although s 34 ITTOIA was mentioned as a relevant legislative provision and an extract from a case was referred to which mentioned the capital/revenue point). On this basis, we informed Mr Goulding that he would need to apply for permission to deploy these arguments if he wished to do so. In the event, HMRC decided not to pursue these points.

72. Finance Act 2008 introduced s 74A-74D ITA with effect from the tax year ended 5 April 2008. The effect of these sections is to impose a restriction on the amount of any losses which can be set against other income unless the relevant individual devotes at least ten hours a week of their time to the trade. Whilst Mr Goulding referred in his statement of case and skeleton argument to the extent of Mr Poll's activities in relation to the business, he clarified that, if the Tribunal were to find that Mr Poll was carrying on a trade on a commercial basis and with a reasonable expectation of profit, he did not rely on these provisions to deny relief. The relevance of Mr Poll's activities is, on his case, limited to their relevance to the question as to whether or not he was in fact carrying on a trade on a commercial basis.

73. The issues we need to consider are therefore the three which we have listed in paragraph [69] above. However, before we do so, we need to describe the arrangements which Mr Poll entered into.

The Premiere Picture Sovereign arrangements

74. We are conscious that Mr Poll's case is that his business must be analysed in the context of its own facts and that what he did went beyond the basic structure of the Sovereign arrangements. However, it is convenient to briefly describe those arrangements here. We will deal with the other aspects of Mr Poll's business after setting out the legal principles which we should apply in determining whether an activity amounts to a trade.

75. The Sovereign arrangement was marketed by Premiere Picture Services Limited ("PPSL"). The information pack describes the arrangements as "a ready-made business structure allowing high net worth individuals acting as sole traders to trade film rights for profit". The information pack goes on to describe the benefits of the proposal as sharing in positive returns generated from the acquisition and exploitation of film rights as well as tax mitigation due to the fact that the accounts for the first trading period were expected to reflect a loss which can be set against the individual's other income.

76. As we have explained, the reason for this loss is that the way in which the distribution rights are valued for accounting purposes results in a figure which is significantly lower than the amount paid to acquire the film rights. In the case of Mr Poll for example he acquired the rights to three films for approximately £650,000 on 11 March 2008. These rights were valued for accounting purposes on 5 April 2008 at about £66,000, resulting in a loss of approximately £584,000.

77. Only part of the purchase price of the film rights is provided personally by the participants. The balance is provided by way of loan. In Mr Poll's case, he provided £125,000 personally and borrowed the remaining £525,000. The loan was therefore just over 80% of the purchase price of the film rights.

78. The result of this is that the benefit of the loss relief exceeds the amount paid by the individual out of their personal resources. As mentioned above, Mr Poll put in £125,000 of his own money but the losses of £583,000 (if they are available to set against other income) would entitle him to a tax credit (at 40%) of about £233,000.

79. Although the initial loan was made on a full recourse basis, participants were offered a second loan facility which could be drawn down in order to repay the first loan. The second loan facility was limited recourse in that it was only repayable out of the profits of the film business (if any).

80. Given that there is no risk of a participant having to repay the loan financing, it can immediately be seen that, in cash terms, they will make a profit even if the film provides no income at all. Of course, if the film does produce income this will, subject to paying off the loan, provide an additional return to the participant.

81. In order to illustrate in more detail how the Sovereign arrangements were structured we now set out the steps taken by Mr Poll in relation to his initial participation.

82. On 18 February 2008, Mr Poll made an application to participate in the Sovereign arrangements stating that he wished to commit £650,000 of which he would provide £125,000 of his own money and would borrow £525,000.

83. On the same day, Mr Poll applied for two loan facilities from a company called GBF Capital Limited. We infer that GBF Capital Limited is connected in some way with PPSL as they share the same address.

84. The first loan facility carried interest at 0.5% above LIBOR, had a five year term and was full recourse. The second loan facility carried interest at 3% above LIBOR, could be drawn down only to repay the first loan facility, had a ten year term but was repayable only out of income from the films purchased using the facility. Mr Poll's evidence, which we accept, is that he has not yet drawn down the second loan facility. However, he has the right to do so.

85. It was a requirement of the first loan facility that 50% of all income from the films should be paid into a separate account which would be used by the lender towards repayment of the loan facility. The remaining 50% of the income from the films to which Mr Poll was entitled would be paid to Mr Poll himself. The second loan facility required that all of the film income had to be paid into the account and used to repay the loan.

86. Mr Poll paid his £125,000 share of the £650,000 commitment on 19 February 2008. This went to an account in the name of PPSL.

87. On 20 February 2021, Mr Poll entered into a services agreement with PPSL. This appointed PPSL to provide certain business services on his behalf including identifying and advising on the acquisition of film rights, negotiating agreements and acting as Mr Poll's agent in respect of the sale of film rights which he would acquire. PPSL also agreed to provide certain administrative support services.

88. In return, PPSL was entitled to a one-off fee of £18,750 for providing the business services and an annual fee of £6,250 for providing the support services. PPSL was also entitled to a bonus of 25% of any tax relief available to Mr Poll to the extent that such tax relief exceeded the amounts shown in the illustrations in the information pack. In addition, PPSL was entitled by way of bonus to a percentage of Mr Poll's share of any income from the film rights which he acquired. The percentage was 5% until the income from the films reached 150% of the amount paid by Mr Poll to acquire the film rights. After that, the percentage increased to 25%.

89. The services agreement also included a power of attorney given by Mr Poll to PPSL enabling it to enter into and execute agreements on his behalf.

90. On 4 March 2008, PPSL provided a recommendation for Mr Poll to purchase distribution rights in respect of three films in relation to particular territories. The three films were "Welcome to the Rileys", "Cracks" and "Burden of Desire".

91. On 11 March 2008, Mr Poll entered into three acquisition agreements under which he acquired exploitation rights in relation to each of the three films in certain territories for a total of approximately £650,000. The agreements were signed by PPSL on behalf of Mr Poll but were later ratified by Mr Poll.

92. One of the requirements of the acquisition agreements was that part of the purchase price would be held in a specified account and charged in favour of Mr Poll as security for the seller's obligations under the acquisition agreement. The total amount charged in favour of Mr Poll in this way was approximately £75,000.

93. In each case, the seller of the rights was Future Films (Production Funding) Limited ("Future"). We were not given any information about Future but it is described in the marketing materials for the films as "a specialist production company that provides international financing and hands on production expertise for feature films with international appeal... Future Films also advises on investment subsidies or tax incentives for filmmakers, securing talent, co-ordinating legal and accounting work, and handling a production's financial and administrative needs".

94. On 31 March 2008, Mr Poll entered into a distribution agreement in respect of *Welcome to the Rileys*. The distributor was Future Films (Co-Productions) Limited. This took the form of an outright assignment of the rights which Mr Poll had recently acquired from Future. The consideration for the transfer of the rights was a share of the income from the film. However, it appears that, at that stage, the allocation of receipts had not been agreed as the agreement simply provides that the income from the film "shall be applied and accounted for in such manner as will be agreed between the parties, such agreement not to be unreasonably withheld."

95. Draft distribution agreements were also prepared for the other two films (*Cracks* and *Burden of Desire*). These agreements were in substantially the same form as the agreement relating to *Welcome to the Rileys*. However, although these agreements were signed by PPSL on behalf of Mr Poll, Mr Poll's evidence (supported by the correspondence between his advisers and HMRC in 2009) is that these agreements were never completed. We accept that this is the case.

Trading – Legal Principles

96. The principles to be applied in determining whether an activity amounts to a trade have been considered by the Court of Appeal on four occasions in recent years and, more recently in the Upper Tribunal. In the circumstances, there is little benefit in us conducting an extensive review of the cases from which those principles are derived.

97. The first in time of the Court of Appeal cases is *Eclipse Film Partners No.35 LLP v HMRC* [2015] EWCA Civ. 95. The main judgment was given by the then Chancellor, Sir Terence Etherton who started off by referring at [110] to the requirement to interpret tax legislation purposively in the same way as any other legislation. Having referred to the *Ramsay* line of cases, he observed at [111] that:

"The concept of an 'unblinkered approach to the analysis of the facts' and a 'realistic approach to the transaction' derive at least in part from the speeches in *Ransom v Higgs*. There, Lord Morris said [1974] STC 539 at [550], [1974] 1 WLR 1594 at [1606]) that '[i]n considering whether a person 'carried on' a trade it seems to me to be essential to discover and examine what exactly it was that the person did', and Lord Reid [1974] STC 539 at [545], [1974] 1 WLR 1594 at [1601]) specifically examined what Mr Higgs had himself done. It is necessary

to stand back and look at the whole picture and, having particular regard to what the taxpayer actually did, ask whether it constituted a trade.”

98. The Chancellor then referred to the lack of any real definition of “trade” in the tax legislation. The current definition is contained in s 989 Income Tax Act 2007 and simply defines “trade” as including “any venture in the nature of trade”. He went on to explain at [112] that:

“As an ordinary word in the English language ‘trade’ has had a variety of meanings or shades of meaning. Its meaning in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the Tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles.”

99. No discussion of the principles to be applied in determining whether a particular activity amounts to a trade would be complete without mention of the badges of trade referred to by Sir Nicholas Browne-Wilkinson V-C in *Marson v Morton* [1986] STC 463 at [470-471]. In *Eclipse*, neither party had argued their case by reference to this list and the Chancellor concluded that the cases by reference to which the list was compiled were not sufficiently analogous to the fact of the case he was dealing with to make the list of value in those proceedings. He also cautioned at [114] that the Vice-Chancellor in *Marson* had:

“emphasised, however, that the list was not a comprehensive statement of all the relevant matters nor was any one of them decisive in all cases. He said that the most they can do is to provide common sense guidance to the conclusion which is appropriate; and that in each case it is necessary to stand back and look at the whole picture and, having regard to the words of the statute, ask whether this was an adventure in the nature of trade.”

100. In this case, Mr Poll did frame his submissions by reference to a list of badges of trade. However, the list was that contained in HMRC’s business income manual which, although very similar to the list in *Marson*, is not identical. We need however say nothing more about the list at this stage but will consider the points made by Mr Poll below.

101. The final observation at [117] made by the Chancellor was that:

“It is elementary that the mere fact that a taxpayer enters into a transaction or conducts some other activity with a view to obtaining a tax advantage is not of itself determinative of whether the taxpayer is carrying on a trade: *Ensign Tankers (Leasing) Limited v Stokes (Inspector of Taxes)* [1992] STC 226 at [241], [1992] 1 AC 655 at 677 (Lord Templeman).”

102. The approach described by the chancellor in *Eclipse* was approved by Henderson LJ in *Samarkand Film Partnership No.3*. *HMRC* [2017] EWCA Civ. 77 at [43].

103. Referring to the requirement to stand back and look at the whole picture, Henderson LJ observes at [59] that:

“...it can never be appropriate to extract certain elements from the overall picture and treat them, viewed in isolation, as determinative of the issue. But that, in essence, is what Mr Furness is inviting us to do, when he says that the purchase and leaseback (or onward lease) of a film are inherently trading activities. There is no dispute that such activities are capable of forming part of a trade, and in many contexts the only reasonable conclusion would be that they did form part of a trade. But when the whole picture is examined, the conclusion will not necessarily be the same.”

104. Henderson LJ also warned at [61] that:

“...it is important to distinguish between the evaluative exercise which the FTT has to perform, on the one hand, and the proposition that a taxpayer cannot be taxed by re-characterising what he has actually done as something else, on the other hand.”

105. The third decision of the Court of Appeal is that in *Degorce*, which, as mentioned above, is the litigation which HMRC considered to involve similar transactions to the arrangements undertaken by Mr Poll and which HMRC had been waiting to conclude before they issued their closure notices. Again, the main decision was given by Henderson LJ who confirmed his approval of the principles set out in *Eclipse* and *Samarkand*.

106. The Upper Tribunal reviewed the position after these three decisions of the Court of Appeal in *Ingenious Games LLP v HMRC* [2019] UKUT 226 (TCC). As well as reviewing the three decisions of the Court of Appeal to which we were referred, the Upper Tribunal in *Ingenious* also considered the decision of the Court of Appeal in *Brain Disorders Research Limited Partnership v HMRC* [2018] EWCA Civ. 2348. In our view however, in terms of the principles, this does not add anything of substance to the three previous Court of Appeal decisions which we have already mentioned.

107. Although the Upper Tribunal in *Ingenious* quite rightly focussed on the relatively recent decisions of the Court of Appeal, it spent a significant amount of time reviewing the *Ensign Tankers* case and, in particular, some of the comments made by Millett J in the High Court (*Ensign Tankers (Leasing) Limited v Stokes (Inspector of Taxes)* [1989] WLR 1222), noting that his comments were not disputed in the subsequent appeals to the Court of Appeal and then to the House of Lords. Millett J’s comments at [1232D-1234C] dealt in particular with the situation where a transaction had been entered into with the intention of obtaining a tax benefit. Mr Goulding also referred to these comments in his submissions. Given the circumstances of this appeal, we find those comments helpful and set out the most relevant extracts here:

“(1) In order to constitute a transaction in the nature of trade, the transaction in question must possess not only the outward badges of trade but also a genuine commercial purpose.

(2) ...

(3) Where commercial and fiscal purposes are both present, questions of fact and degree may arise, and these are for the Commissioners. Nevertheless, the question is not which purpose was predominant, but whether the transaction can fairly be described as being in the nature of trade.

(4) The purpose or object of the transaction must not be confused with the motive of the taxpayer in entering into it. The question is not why he was trading, but whether he was trading...

(5) The test is an objective one...

(6) In considering the purpose of a transaction its component parts must not be regarded separately but the transaction must be viewed as a whole.....”

108. Although it is clear that an intention to obtain a tax benefit will not prevent what would otherwise be a trading transaction from being a trade, it was said in *Lupton v F.A. & A.B. Ltd.* [1972] A.C. 634, 647, by Lord Morris of Borth-y-Gest that:

“It is manifest that some transactions may be so affected or inspired by fiscal considerations that the shape and character of the transaction is no longer that of a trading transaction. The result will be not that a trading transaction with unusual features is revealed but that there is an arrangement or scheme which cannot fairly be regarded as being a transaction [in the nature of trade].”

109. Whilst this might be seen as a separate principle, in our view it is entirely consistent with looking at the whole picture in order to determine whether particular transactions amount to a trade. If transactions are entered into which are designed only to obtain a tax benefit and have no commercial purpose, they may well, looking at the whole picture, not amount to a trade, even if (as was the case in *Lupton*) they are carried out by a trader.

110. Taking all of this into account, the principles we should apply in determining whether Mr Poll’s business amounted to a trade are as follows:

(1) As the Chancellor said in *Eclipse*, we must stand back and look at the whole picture in determining (objectively) whether what Mr Poll did (and not why he did it) amounts to a trade. In doing so, we must evaluate all of the relevant facts against the background of the applicable legal principles. This may include the matters listed as "badges of trade" by the Vice-Chancellor in *Marson* but may include other matters as well.

(2) We must also remember that the fact that a transaction is entered into with the intention of obtaining a tax benefit is not, of itself, determinative of whether the taxpayer is (or is not) carrying on a trade. However, it is possible that a transaction may be so infected by tax considerations that the transaction cannot be said to be a trading transaction even if it has some of the appearances of a trade.

(3) Finally, it is important to bear in mind that, even though we must look at the picture as a whole, the purpose of this is to determine the true nature of the transactions undertaken. We cannot re-characterise the transactions as something which they were not.

Trading – background facts

111. We set out below the facts relating to Mr Poll’s business which are clear from the evidence we have seen and heard and in respect of which there is no real dispute.

112. Following the termination of his employment with Morgan Stanley in 2007, Mr Poll was introduced by his accountant to a financial adviser, First Action Finance Limited. First Action Finance in turn put Mr Poll in touch with Premiere Picture in December 2007. Mr Poll completed and signed an application form in respect of the Sovereign arrangement in December 2007 although this was superseded by the new application referred to above in February 2008.

113. Mr Poll was provided with the promotional brochure and information pack for the Sovereign arrangements as well as draft documentation. He reviewed this documentation himself as well as arranging for it to be reviewed by his lawyers. Prior to signing the documents, there was a certain amount of discussion between Mr Poll and Premiere Picture

(both directly and through his financial adviser) in relation to some of the terms. Mr Poll was also provided with copies of accounting and legal advice obtained by Premiere Picture from Moores Rowland and Jonathan Peacock QC/DLA Piper.

114. Before agreeing to purchase the film rights to *Welcome to the Rileys*, *Cracks and Burden of Desire*, Mr Poll reviewed the sales estimates and the details of the films including the director, cast synopsis and budget. Having done this, Mr Poll agreed to go ahead with the acquisitions. The transactions which took place between 18 February 2008 and 31 March 2008 are set out in paragraphs [82-95] above.

115. Following the acquisition of the three films, Mr Poll continued to be actively involved in his business, spending on average of approximately 18 hours a week in relation to the business between February 2008-2009. Most of this time was spent reviewing film packs sent to him by Premiere Picture, researching directors and cast, reviewing trade press, reading scripts and carrying out various business administration activities.

116. During this time, Mr Poll developed a strategy to focus on two particular types of film – non-CGI animation aimed at children and period costume dramas.

117. In late 2008, Mr Poll was notified by Premiere about an opportunity to acquire rights in a film called *The Tempest*. Mr Poll came close to acquiring rights to this film but due to issues on the producer's side, the deal fell through.

118. In March 2009, Mr Poll signed a collection account management agreement in relation to *Welcome to the Rileys*. This agreement sets out the allocation of the income from the film in respect of the territories for which Mr Poll had acquired rights. Mr Poll's entitlement was as follows:

- (1) 5% of the first \$413,998 of income.
- (2) 60% of any further income until the total received by Mr Poll (including the amount mentioned in point (1) above) amounted to £212,714.
- (3) 2.5% of any further income until the part of the purchase price provided by way of loan from GBF Capital Limited had been repaid.
- (4) 1.25% of any remaining income.

119. In June 2009, Mr Poll was provided with information about a film called *The Joneses*. Mr Poll acquired rights in the film for £13,045 at the end of August 2009 from Pavilion Acquisitions Limited. He entered into a distribution agreement in respect of his rights in relation to this film with Frontier Sales LLC on 11 September 2009.

120. The purchase price for *The Joneses* was paid out of a refund of the deposits held for *Cracks and Burden of Desire* and so did not involve Mr Poll putting any further money into the business.

The parties' submissions

121. Against this background and bearing in mind the legal principles set out above, we will now consider the parties' submissions.

122. As we have previously mentioned, Mr Poll framed his submissions by reference to various badges of trade. As we have mentioned, these were not however the badges listed in *Marson* but instead were based on a list contained in HMRC's business income manual (BIM20205).

123. The first point is whether Mr Poll had a profit-seeking motive. Mr Poll's evidence is that he did intend to make a profit and that, indeed, his purpose in entering into the arrangements

was to build up a portfolio of films over time which would provide an income stream in his retirement.

124. In his evidence, Mr Poll confirmed that his assessment of the likelihood of a film making a profit was based on his overall evaluation of the film (including the cast, director and story) as well as budgets, sales figures and contracts. In relation to *Welcome to the Rileys* he had reviewed the sale estimates provided by PPSL and had calculated that the film would need to produce income of about £810,000 in order to pay off the part of the purchase price provided by way of loan and to leave himself with a profit of approximately £33,000. He was however unable to remember whether this profit was before or after recouping the amount which he had personally provided towards the purchase price of the film.

125. Mr Poll also noted that the sales estimates may well be conservative. He referred a number of times to the film, *Four Weddings and a Funeral* which he told us had a budget of £2.8m and yet had box office takings of over \$200m.

126. Mr Poll next made the point that the transactions in March 2008 were not isolated transactions. In total, there were four purchases of film rights and two sales. He also came close to entering into another purchase and sale (*The Tempest* – mentioned above). He submits that this repetition is indicative of a trading business.

127. Looking at the nature of the asset – distribution rights in relation to films – Mr Poll submits that this is the type of asset which is regularly the subject of trading transactions and therefore supports the conclusions that his activities amounted to a trade.

128. Although Mr Poll does not suggest that the film business was part of his photography business, he does make the point that there are some similarities between the two businesses, in particular the fact that, in relation to both businesses, any income derives from the sale of rights in relation to the work in question (either a photograph or a film). This, he says, provides further evidence that the film business is a trade as, at the very least, it is related to his wider trading activities.

129. As far as the sale of the film rights is concerned, Mr Poll submits that it is standard practice in the film industry to sell film rights to a distributor, again indicating that his activities amount to a trade.

130. Mr Poll also draws attention to the fact that borrowing to finance the relevant activities is an indication of a trade. The fact that, in this case, the loans were to be repaid out of the film income does not, he suggests, have any bearing on whether the activities amount to trading activities.

131. Although Mr Poll acknowledges that HMRC seek to rely on the short period between acquiring the film rights and selling them to support their own case, he notes that this is, in itself, an indication of trading rather than investment activities. In relation to this, he rejects the suggestion that these steps were preordained and that (as was found to be the case in *Degorce*) "once the start button was pressed, all the transactions fell into place automatically, with only one possible result" (Henderson LJ at [77] quoting the Upper Tribunal at [96]).

132. Mr Poll is clear in his mind that he was free either to sell some or all of the rights or to keep them as he wished. In support of this, he draws attention to the fact that he still owns the rights to *Cracks* and *Burden of Desire* and that, if he wished to do so, he could, even now, seek to exploit those rights.

133. Mr Poll accepts that he was aware of the anticipated tax losses and that he expected to be able to use all or most of the losses against the income he had received from Morgan Stanley in the previous three years. However, he submits that the ability to carry back losses is not a

loophole; it is a benefit provided by Parliament to assist with cashflow in the early years of a business. He told us that he had been able to take advantage of precisely the same provisions in relation to the losses from his photography business which had not been challenged by HMRC.

134. Mr Poll also stressed his hands-on approach to the film business. He notes that he did not simply sign a series of contracts and leave everything to PPSL. He went through the contracts himself line by line and had them reviewed by his own solicitors. He undertook a detailed review of the films which were recommended to him and made his own assessment as to their commercial prospects before agreeing to go ahead. On an ongoing basis, he spent significant amounts of time researching new opportunities and discussing these with PPSL. He developed a strategy for the types of films in respect of which he was interested in buying and selling distribution rights. This, he says, demonstrates the serious, organised and commercial way in which he conducted his business.

135. In the light of all of this, Mr Poll submits that these transactions were real, commercial transactions intended to produce a profit. It is not a case of transactions being entered into with the sole purpose of sheltering income from tax.

136. Mr Poll does accept that the marketing materials for the Sovereign arrangement and the opinion of Jonathan Peacock QC both focus very much on the tax aspects of the transactions. As far as Mr Peacock's opinion is concerned, he submits that this is not surprising given that the purpose of the opinion was to obtain advice on the tax treatment of the transactions.

137. As far as the marketing materials are concerned, Mr Poll points out that these materials make it clear that the purpose of the arrangements is to trade film rights for a profit. In any event, he submits that the Tribunal must assess what he actually did rather than what is said in the marketing materials. He notes that he took his own advice from his accountant and financial adviser and his evidence is that his decision to set up the business was not based on the marketing materials but on his review of the draft agreements.

138. Although the facts in *Degorce* were superficially similar to the Sovereign arrangements, Mr Poll sought to distinguish that case on a number of grounds:

(1) The timescale for entering into the transactions was much shorter in *Degorce*. The application and transfer of funds took place on 2 April. All of the relevant agreements were signed on the same day, 5 April.

(2) As already mentioned, unlike in *Degorce*, there was not in this case only one possible outcome once the process had been started as the purchase of the rights and the sale of the rights were separate and Mr Poll had control over the sale of the rights.

(3) Mr Poll had a greater understanding of, and involvement in, the trade.

(4) The sole purpose of Mr Poll's transactions was not to generate losses to shelter his income.

(5) In *Degorce*, it was found that there was no real possibility of the loans being repaid. Mr Poll submits that, in his case, there was a real possibility of the loans being repaid.

139. Mr Goulding, on behalf of HMRC, however submits that Mr Poll's transactions were materially similar to those undertaken by Mr Degorce and that, standing back and looking at the whole picture, all that Mr Poll did was acquire the right to a future income stream which, he says, is a transaction in the nature of an investment rather than a trade.

140. Mr Goulding refers in particular to three paragraphs of the decision of the Upper Tribunal in *Degorce* [96-98] which were expressly approved at [102] by the Court of Appeal:

“[96] The core question is whether there was material before the F-tT from which they could properly conclude that Mr Degorce was not trading in film rights, but that he merely acquired a contingent, or potential, income stream. The F-tT's approach, when shorn of detail, was to undertake the task they had set themselves, namely examine what Mr Degorce did, in entering into a set of pre-arranged contracts which were designed to, and did, follow one another in a very quick sequence. It was, in particular, clear before he entered into the first of the transactions that at the end of them, minutes later, he would be left only with the income stream. No other outcome was possible: the whole set of contracts assumed (simplifying a little) that a Paramount company would sell rights to a Goldcrest company, which would sell them to the user, in this case Mr Degorce, who would do nothing with them but assign them to another Goldcrest company which would in turn assign them back to a different Paramount company. Once the start button was pressed, all the transactions fell into place automatically, with only one possible result.

[97] It was not an arrangement which left Mr Degorce with the freedom to retain the rights, assign them elsewhere for cash, or assign part of the rights while retaining the remainder. Not only he but all of the other participants in the Goldcrest scheme - that is, the Goldcrest and Paramount companies - entered into the series of transactions knowing that they could have only one outcome, which in Mr Degorce's case was the right to a potential income stream... It does not matter, in answering the core question, whether Mr Degorce did or did not take advice, or did or did not negotiate, since advice and negotiation do not transform the purchase of an asset, as an income stream is, into a trading activity. They were not included by the Vice-Chancellor in his list of the badges of trade and in our view rightly so. They are as likely, perhaps even more likely, to feature in a person's decision to buy an asset as they are in his decision whether or not to trade in a particular commodity.

[98] It is true that the overall exercise was speculative, in the sense that it was unknown whether, and if so to what extent, Mr Degorce would receive income from the exploitation of the rights; but there was no element of speculation in the transactions themselves, which were undertaken on a predetermined basis with, as we have said, a predetermined outcome.”

141. Although, in Mr Poll's case, the gap between signing the Acquisition Agreement and signing the Distribution Agreement for Welcome to the Rileys was 20 days, Mr Goulding submits that this makes no difference. The fact is that there was still a "pre-arranged set of contracts".

142. Mr Goulding places significant reliance on three documents, being the Promotional Brochure and Information Pack for the Sovereign arrangements and the Opinion from Mr Peacock. He submits that these documents make it clear that the only conclusion which can be drawn is that participants entered into the arrangements knowing that they can only have one outcome, being the right to a potential income stream. The information pack for example states that:

"Working with Premiere Picture, Premiere Picture Services will identify a Distributor to which you can assign or licence your Film Rights and provide assistance as your designated sales agent to agree terms with such Distributor. It is intended that you will dispose of your Film Rights to such Distributor, and, in return, you will retain the right to receive from the Distributor a significant share of ongoing Distribution Income."

143. Similarly, Mr Peacock's opinion describes the arrangements as follows:

"It was proposed that when the film was delivered to the Participants, the Participants would sell the Rights to a separate company of the Rights Holder for a share of the income....."

144. That this was Mr Poll's understanding of the arrangements is, says Mr Goulding, reflected by his own evidence that his purpose in entering into the arrangements was to build up an income stream for his retirement.

145. Mr Goulding also made much of the fact that Mr Poll did not have significant involvement in the transactions which took place in March 2008. He points out that Mr Poll appointed PPSL to act as his agent under the terms of the Services Agreement with authority to enter into the Distribution Agreements and a Power of Attorney enabling it to sign all of the relevant documents on Mr Poll's behalf. The reality he says is that Mr Poll had no real choice as to what films or what territories he acquired rights in respect of and had no direct involvement in any negotiations with either the seller or the purchase of the rights.

146. Mr Goulding went on to submit that there was no real expectation of making a profit in relation to the film rights. He accepts that the information pack states that there is an intention to make a profit. However, he points out, that the focus of the information pack is very much on the tax aspects of the transactions. For example, the financial illustration contained in the information pack showing the potential return to a participant suggests that, if a participant invests £300,000 of their own money (and borrows £700,000), they might receive income from the film of £60,000 (i.e. far less than the amount they have laid out) but have an entitlement to tax relief with a value of £356,000.

147. Mr Goulding submits that it is clear from this illustration that a participant will make a positive return as a result of the tax relief even if there is no income from the film at all and also that there was never any real expectation that a profit would be produced as a result of the sale of the film rights. Whilst Mr Goulding acknowledges that Mr Poll dismissed the information pack as just being marketing materials, Mr Goulding suggests that it was on the basis of these materials that Mr Poll signed up to the arrangements.

148. Mr Goulding also drew attention to a number of features of the transaction documents which, he argues, indicate that the transactions were not commercial.

149. Looking first at the loan agreements, he notes that one unusual feature is that the principal of the loan is to be repaid before any interest is paid. Instead, interest is to be rolled up. The second unusual feature of the loan facilities is that the initial loan is full recourse but there is then a secondary loan facility which can be drawn down in order to repay the full recourse loan. The second loan facility is limited recourse and can only be repaid out of the income from the films.

150. Turning to the Services Agreement, Mr Goulding focused in particular on PPSL's right to a bonus if the tax relief achieved for Mr Poll was worth more than that shown in the illustration in the information pack. This, suggests Mr Goulding, indicates that the real purpose of the transactions was to obtain tax relief and not to generate any profits. This, he says, is

supported by the fact that the Services Agreement contains a clause excluding any liability of PPSL in respect of the arrangements.

151. As far as the Distribution Agreement for Welcome to the Rileys is concerned, the two points which Mr Goulding drew attention to were the fact that the purchaser was a company associated with the seller of the rights (both being companies within the Future Films group of companies) and that, when the agreement was entered into, the allocation of the income from the film had not yet been agreed.

152. Although no distribution agreements were entered into in respect of Cracks or Burden of Desire, Mr Goulding submits that this does not affect the overall analysis given that it appears that the reasons these transactions fell through were outside the control of the parties.

153. Mr Goulding acknowledged that Mr Poll devoted a significant amount of time to his business between February 2008 and February 2009. However, he suggests that these were not meaningful activities in terms of the business or its outcomes. Mr Goulding referred to the decision of the First-tier Tribunal in *Hawksbridge LLP v HMRC* [2014] UK FTT 416 (TC) where, in the context of a statutory requirement for an individual to be personally involved in the activities of a trade, it concluded that:

"The activity in question must, in our view, be aimed at advancing the trade, that is by increasing income or reducing costs in order to make it more profitable, by expanding the business, by enhancing the security of the income stream, for example by attracting more reliable suppliers or customers, or in some similar way; and it must in addition be possible to achieve that aim, in the sense that the activity could lead to the intended result even if, in the event, it does not. Merely doing something which has some connection with the trading activity is not enough; there must at least be a realistic prospect that the activity will result in an enhancement to the trade."

154. Mr Goulding submits that the nature of the activities carried out by Mr Poll (principally reviewing and researching new film opportunities) could not have increased the potential for profit.

155. Mr Goulding's final submission related to the principle in *Lupton* that a transaction may be so affected by tax considerations that its structure or character is not that of a trading transaction. Mr Goulding principally relies on the evidence from the marketing materials and Mr Peacock's opinion which, he says, show that the overriding, if not sole, purpose of the transactions was to obtain a tax benefit through the creation of losses which could be set against other income. He submits that this "de-natures" the transactions so that they cannot amount to a trade.

156. In summary, Mr Goulding submits that, taken as a whole, the evidence does not suggest that Mr Poll entered into the transactions as a commercial person embarking on a commercial trading venture. Rather, he says, it suggests him buying into a ready-made loss structure for the purposes of obtaining a tax benefit.

Looking at the whole picture

157. We have carefully considered all of the relevant factors surrounding Mr Poll's business and have reached the clear conclusion that this business did not amount to a trade. The reason for this is that, looking at the picture as a whole, the transactions essentially involved laying out a capital sum in return for a possible future income stream.

158. In principle, acquiring film distribution rights and exploiting them in some way which is designed to yield a profit is capable of being a trade. That much was recognised by the Upper

Tribunal in *Ingenious* at [276] in their analysis of the decision in *Degorce* which, of course, involved very similar transactions to those undertaken by Mr Poll. However, as Henderson LJ explained at [59] in *Samarkand*, it is necessary to look at the whole picture as the same activity may in some circumstances amount to a trade and, in others, may not constitute a trade.

159. Contrary to the submission made by Mr Goulding, it does not in our view matter that Mr Poll appointed PPSL to carry out some of the activities of his business. There is no obligation on a person who is carrying on a business to do so personally. As Millett J said in *Ensign Tankers* at [1236A]:

"It is open to a partnership, like any other trader, to act through agents or independent contractors."

160. The activities which PPSL carried out on behalf of Mr Poll as his agent must therefore be attributed to him and taken into account as part of his business.

161. We turn now to look at what Mr Poll actually did both as far as the Sovereign arrangements are concerned and in his business more widely. Did he purchase film rights with a view to exploiting them as part of a trade or did he pay a capital sum in order to acquire a potential future income stream? Our conclusion is that he acquired an income stream.

162. It is absolutely clear from the marketing materials that this was the essence of the Sovereign arrangements. The information pack states that:

"As a Participant, you will appoint Premiere Picture Services to act as your agent in managing your day to day trade, including sourcing suitable film rights from film producers and purchasing them on your behalf. You will commit financially 100% of the purchase price of those rights. Premiere Picture Services will then arrange the onward sale of the purchased film rights for you to a distributor in return for a significant share of the future income generated from the exploitation of those rights."

163. The intention therefore was that PPSL would both source the film rights and arrange for their subsequent sale, acting on behalf on Mr Poll.

164. It is equally clear that this was all part of a pre-arranged plan where the rights would be acquired from one company and then sold to another company which was associated with the seller. This is confirmed by Mr Peacock's Opinion which we have already mentioned.

165. It is also apparent that this is what actually happened in the case of *Welcome to the Rileys* and what was intended to happen in the case of *Cracks and Burden of Desire* based on the draft Distribution Agreements prepared in respect of those films.

166. We therefore find as a fact that there was a pre-arranged series of steps. We accept Mr Goulding's submission that the fact that there was a gap of approximately three weeks between the acquisition of *Welcome to the Rileys* and the execution of the Distribution Agreement makes no difference to this. It was always intended that the rights would be sold back to another company in the Future Films group and this is what happened.

167. Of course, the rights to *Cracks and Burden of Desire* were not ultimately sold. It was therefore possible for the plan to go awry. However, in our view, this does not affect the pre-planned nature of the arrangements. Whilst it may not be possible to say that, once the start button was pressed, there was only one possible outcome, an alternative outcome would only occur as a result of an event outside the control of Future, Premiere and Mr Poll.

168. On the basis of Mr Poll's evidence, it appears that, in this case, the ultimate producer unexpectedly sold the rights to those two films to someone other than Future. This explanation is consistent with the consequences of the failure of those transactions (which we discuss further below). In the absence of any evidence to the contrary, we conclude that it is more likely than not that this is what happened.

169. Even in those circumstances, it is clear to us that there was only one alternative outcome which is that the transaction would be abandoned and Mr Poll would have refunded to him the funds which he had contributed personally less the fees which had already been paid to PPSL (or one of their associated companies) – i.e. the funds remaining in the account in respect of which Mr Poll had the benefit of a charge.

170. As far as the parties were concerned, there was no need to refund to Mr Poll the money which he had borrowed as, in reality, he would never have to repay that money. As we describe below, our conclusion is that the loan funds simply went round in a circle so that the failure of the transaction did not adversely impact any of Premiere, GBF Capital, Future or Mr Poll in relation to the loan funds.

171. Although Mr Poll insists that he was free to keep the rights which he had purchased or to sell them to somebody else, we do not accept this. There is no evidence that he ever took any steps to try and exploit those rights himself, nor that he was in a position to do so (even though, from a legal perspective, there was nothing to prevent him from doing so). Indeed, Mr Poll accepted in cross-examination that, as a practical matter, he was wholly reliant on PPSL to find a distributor and to negotiate a sale of the rights.

172. In any event, it is difficult to see how Mr Poll could really believe that he owned the rights given his evidence that the reason for the failure of the transaction was that the producer had sold the rights to someone else. The fact that he had entered into an agreement to purchase the rights from Future would not result in him owning the rights if Future had never acquired them.

173. Based on our findings, there were therefore two possible outcomes: either Mr Poll committed a sum of money and in return received a potential income stream or, if the income stream was not available, he would get his money back less the fees charged by PPSL and its associates.

174. Mr Poll has said that his purpose in setting up the business was to secure an income stream for his retirement. Whilst it is what he did which is relevant rather than the reasons why he did it, we note that, if this were indeed the real reason why he entered into the transactions, this is consistent with our conclusion that what he did was to lay out money in order to acquire a potential income stream. However, based on the evidence, we do not find this explanation plausible. Had Mr Poll been concerned about securing an income for his retirement, there are many less speculative ways in which he could have done so.

175. If the figures for Welcome to the Rileys (which we review below) are indicative of the returns which Mr Poll might have expected to receive in respect of the rights for any other film which he purchased, there would have been little reason for him to believe that this would have generated any income for his retirement at all. Whilst he may have hoped for a return on his investment, our conclusion is that Mr Poll's main reason for entering into the transactions was to secure tax relief against his income from Morgan Stanley in the previous three years. That is the only basis on which the transactions made any financial sense.

176. As we have said, the fact that a transaction is entered into with the intention of obtaining a tax benefit does not prevent something which would otherwise be a trade from being one.

However, in this case, we are firmly of the view that the transactions entered into by Mr Poll did not amount to a trade, irrespective of his motive.

177. We have considered the other circumstances highlighted by Mr Poll which might be seen as badges of trade. For example, Mr Poll did enter into another transaction based on the Sovereign arrangements in 2009 and had almost entered into a further transaction in late 2008. There is therefore some element of repetition. However, all of the transactions or potential transactions were based on the Sovereign arrangements and so would share the same characteristics. There is no evidence of any attempt by Mr Poll to pursue his business in any other way. In these circumstances, the mere act of repetition cannot turn a non-trading activity into a trade.

178. We accept that Mr Poll devoted a significant amount of his time to the business. He was, as he said, very much "hands-on". He was no doubt much more involved in the business on an ongoing basis than many other participants in the Sovereign arrangements may have been in reviewing and debating the terms of potential transactions as well as considering possible further films in which to acquire rights. PPSL also carried out activities on his behalf such as negotiating agreements and sourcing films and distributors.

179. We also accept that there was a degree of organisation and strategy in the way in which Mr Poll approached the business both in terms of identifying particular genres of film in which he was interested as well as the way in which he reviewed the proposals put to him.

180. However, strategy, organisation and activity, whilst no doubt often present in relation to a trading activity, cannot change something which is not a trade into a trade. The Upper Tribunal in *Ingenious* observed at [251] that:

"Focus on organisation and repetition as indicators of trading, plus the amount of work involved, can lead to error: building a portfolio of investments can involve repetition and significant organisation, but is still investment."

181. The Upper Tribunal in *Degorce* made a similar comment at [97], saying:

"It does not matter, in answering the core question, whether Mr Degorce did or did not take advice, or did or did not negotiate, since advice and negotiation do not transform the purchase of an asset, as an income stream is, into a trading activity. They were not included by the Vice-Chancellor in his list of the badges of trade and in our view rightly so. They are as likely, perhaps even more likely, to feature in a person's decision to buy an asset as they are in his decision whether or not to trade in a particular commodity."

182. Similar comments can be made about strategy. Whilst a trader will normally have a strategy, so will an investor. It is interesting that Mr Poll drew an analogy with acquiring a portfolio of rental properties. An individual wishing to do so will no doubt have a strategy as to what sort of property to buy (for example flats or houses) and in what area. However, that will not convert his property investment business into a trading business.

183. In short, whilst Mr Poll's involvement in the business and his approach to it are relevant factors to take into account, they cannot be determinative as to whether or not the business is a trading business.

184. We also accept that borrowing money to finance an activity may be an indication of trade. However, borrowing is equally consistent with making an investment.

185. Similarly, the fact that any return to Mr Poll is speculative and depends on the success of the film is consistent both with a trading activity and with a speculative investment.

186. Looking at the picture as a whole, despite the way in which the business was carried on and Mr Poll's involvement in the business, our conclusion is that the nature of the business was the purchase of potential income streams rather than trading in film rights and that, in the circumstances of this case, the purchase of the income streams did not amount to a trade.

187. Given our conclusions, we do not need to determine whether, based on the principles explained by the House of Lords in *Lupton*, the transactions are so affected by tax considerations that they do not have the character of trading transactions. Our only observation would be that there may be very little difference in practice between standing back and looking at the whole picture and considering whether as a result of tax considerations, the transactions in question do not have the character of trading transactions. In many cases, the answer may well be the same.

Commerciality and expectation of profit

188. Even if we had concluded that Mr Poll's activities amounted to a trade, we do not consider that those activities were carried out on a commercial basis and with a reasonable expectation of profits within the meaning of ss 66 and 74 ITA. We will explain our reasons for this.

189. Leaving on one side the likelihood of any profit arising from the transactions (which we will deal with later but which is also potentially relevant to the issue of commerciality – see the comments of Henderson LJ in *Samarkand* at [90]) we have two significant concerns in relation to the commerciality of the arrangements. The first relates to the terms of the Distribution Agreement. The second relates to the issues which arose in relation to Cracks and Burden of Desire, in respect of which no distribution agreements were entered into.

190. As we have recorded, the terms of the Distribution Agreement for Welcome to the Rileys (and of the draft Distribution Agreements for Cracks and Burden of Desire) was entered into without any agreement having been reached as to how the income from the film should be allocated. This was of course the most important feature of the agreement as far as Mr Poll was concerned as, without knowing what proportion of the income he would be entitled to, he could have no idea whether or not the transaction might be profitable. Indeed, Mr Poll told us in his evidence that the eventual deal which was done was not as good as he would have liked, that it was different from the assumptions which he had made when evaluating the film and that he had tried to get PPSL to improve the deal.

191. It is one thing to sell an asset knowing that it will give rise to a loss, but perhaps accepting that it is the best thing to do in order to avoid a greater loss; it is quite another to sell an asset without having reached any agreement as to what the purchase price will be and therefore without knowing whether the transaction will give rise to a profit or a loss. That it not in our view a commercial basis on which to carry on a business.

192. The fact that Mr Poll was willing to enter into the agreement without knowing how much of the income from the film he would be entitled to evidences to us that this was not an important consideration for him. No doubt he would have liked to have received as large a share of the income as possible; but the reality was that it was not important as he would make an acceptable financial return (as demonstrated by the financial illustrations in the information pack) purely from the existence of the tax relief to which he would be entitled.

193. Turning to the arrangements in relation to Cracks and Burden of Desire, Mr Poll acquired distribution rights in relation to certain territories. Draft Distribution Agreements were

prepared but were never completed. We have found that the reason for this is that the producers had sold the rights to somebody else.

194. What Mr Poll was also able to tell us is that, once it became clear that the transactions would not proceed, the deposits held in the accounts which were charged in his favour were returned to him. However, the balance of the purchase price for the rights in respect of those films was not.

195. On the basis of the evidence given by Mr Poll, there was little, if any, attempt to try and recover the balance of the purchase price. Mr Poll said that PPSL had told him that it was not feasible to obtain a refund. We have no information about the seller, Future Films (Production Funding) Limited. However, it is clear from the marketing materials for the films that the Future Films group has been in existence for a significant period of time. It is said to have been involved in over 120 films and to have completed transactions worth in excess of US\$2.5bn.

196. Future Films (Production Funding) Limited was the seller for all three films and so was not a special purpose company incorporated for this specific transaction. Taking all of this into account, in our view the only realistic explanation for the fact that the purchase price was not refunded is that, looked at from the perspective of Mr Poll's business, the transactions were not entered into on a commercial basis.

197. It is apparent from the collection account management agreement relating to Welcome to the Rileys that Future (the seller of the rights) had made a loan to GBF Capital Limited (the lender) and had then assigned the benefit of that loan to the ultimate producer of the film, identified as a company called WTTR LLC.

198. Based on this and the other documentation we have seen, we infer that, out of the total purchase price of approximately £650,000 paid by Mr Poll to Future:

- (1) £525,000 was immediately lent by Future to GBF Capital Limited (thus funding the loan from GBF Capital to Mr Poll);
- (2) £25,000 was paid to PPSL, being the initial fee of £18,750 and the first annual fee of £6,250 under the services agreement;
- (3) a further £25,000 was paid to PPSL (or an associated company) as a fee in respect of its involvement in the acquisition of the films (the possibility of PPSL or associated companies acting in other capacities in relation to a film (and presumably being paid for doing so) is referred to in the Services Agreement); and
- (4) the balance of about £75,000 remained in the nominated accounts in the name of Premiere relating to each of the three films in respect of which Mr Poll had purchased rights and which were charged in his favour as security for the performance of the seller's obligations under the acquisition agreements.

199. In reality, what Mr Poll received back in respect of Cracks and Burden of Desire was the amount which he had contributed to those films out of his personal funds less the fees which had been paid out of those funds. What he did not receive back was that part of the purchase price of those films which had been advanced to him by way of loan which he knew he would never have to pay back out of his own resources in any event. That was because those funds had simply gone round in a circle and so nobody would lose out as a result of no action being taken to recover that part of the purchase price.

200. However, the result of this part of the purchase price not being refunded is that Mr Poll still has a liability to GBF Capital. That is not, in our view, a commercial arrangement in relation to Mr Poll's business. Had Mr Poll been carrying on his business on a commercial

basis, he would have endeavoured to recover the purchase price so that the liability to GBF Capital could be repaid.

201. Both of the points we have relied on as evidence that Mr Poll did not carry on the business on a commercial basis relate to the terms of the particular transactions which he entered into. However, there is no suggestion that took any steps to identify or to enter into any transactions other than in accordance with the Sovereign arrangements.

202. The fact that there were commercial aspects to the way in which the business was carried on (for example the points we have mentioned about the time spent in the business and the organisation and strategy for the business) do not therefore in our judgment outweigh these two factors when taken together with the lack of any realistic likelihood of profit which we discuss below. There may be commercial aspects to the way in which a business is carried on but if terms on which the business is carried on are uncommercial, it cannot be said to be undertaken on a commercial basis.

Reasonable expectation of profit

203. Turning to look at the potential for Mr Poll to make a profit from the transactions, we need to look in some detail at the figures. The only transaction for which we have reasonably complete information is Welcome to the Rileys given that no distribution agreements were entered into in respect of Cracks and Burden of Desire and so we do not know what part of any income from those films Mr Poll would have been entitled to. Whilst we do have the income allocations for The Joneses, the film in respect of which Mr Poll acquired rights in 2009, we do not have the sales estimates for that film.

204. The rights in respect of Welcome to the Rileys were purchased for £193,376. Assuming the purchase price was funded by way of loan and personal contribution in the same proportions as the total funding of £650,000 (£125,000 from Mr Poll personally and £525,00 by way of loan), this would mean that the purchase price was funded as to £156,190 by way of loan and £37,186 from Mr Poll's own resources.

205. The sales projections provide two figures for each territory: the first is a "target" figure; the second is a "low" figure. We infer that these two figures provide a range of the most likely outcomes in the opinion of whoever provided the estimates. We also infer from the fact that there was no "high" figure in the sales estimates that the target figure was top end of the likely range of outcomes.

206. The total of the estimates for the territories in respect of which Mr Poll acquired rights for Welcome to the Rileys is a low of \$405,000 and a target figure of \$600,000 (at the time, the exchange rate was approximately £1 = US\$2).

207. As we have already seen, the income allocation which was agreed for Welcome to the Rileys provided that Mr Poll would only receive 5% of the first \$414,000 of income from the film in respect of his territories. This amounts to approximately £10,350, of which 50% would go to GBF Capital towards repayment of the loan and 50% would go to Mr Poll.

208. If the target sales were achieved, Mr Poll would receive 60% of a further \$186,000 (\$600,000 - \$414,000). This is approximately a further £55,800 of which, again, 50% would go to GBF Capital and 50% would go to Mr Poll.

209. The result of this is that, if the film achieved target sales (i.e. the top end of the likely outcomes), Mr Poll would receive a total of approximately £66,150 – approximately one-third of the amount which he had laid out to purchase the film rights.

210. On Mr Poll's own calculations, the film would have had to have generated approximately \$1.62m in sales in order to repay the loan in full which is over two and a half times the target

sales estimate. Mr Poll told us that sales at this level would leave him with a profit of approximately £33,000 but, as we have recorded, he was not able to tell us whether this was before or after recouping the £37,186 which he had contributed to the purchase price out of his own funds.

211. Whilst we accept that some films, like *Four Weddings and a Funeral*, will perform spectacularly well, such films are no doubt few and far between. Based on the figures we have seen, whilst the possibility of a profit cannot be excluded, we have concluded that there was no realistic possibility of Mr Poll making a profit in relation to this transaction and no realistic possibility of his loan being repaid in full.

212. We appreciate that, in reality, Mr Poll would never have to repay the loan from GBF Capital as he would be able to draw down on the second loan facility in order to repay the first in the knowledge that the second loan facility was only repayable out of the income from the film. However, even if the repayment of the loan facility is ignored, Welcome to the Rileys would still have had to produce a higher level of income than the target estimate before Mr Poll would have recouped the amount which he had contributed personally to the purchase price for the film rights.

213. We note in passing that these figures do not include various expenses and commissions referred to in the collection agreement which have to be paid out of the film income and which would therefore reduce all of the figures mentioned above. These include the collection agents' fees, sales agents' fees and the 5% bonus payable to PPSL under the terms of the Service Agreement.

214. Our conclusion therefore is that, even if Mr Poll were trading, he would not have been entitled to set any losses off against other income (s 66 ITA) or to carry back losses to set against income of previous years (s 74 ITA) as he did not carry on the business on a commercial basis nor with a reasonable expectation of profit.

CONCLUSION

215. The closure notices for each of the relevant tax years were validly issued.

216. The activities carried on by Mr Poll did not amount to a trade and so his appeal fails. The closure notices and the amendments to his self-assessment tax returns made by those closure notices are therefore confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

217. 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.

**ROBIN VOS
TRIBUNAL JUDGE**

Release date: 7 May 2021