Neutral Citation: [2024] UKFTT 00543 (TC)

Case Number: TC09213

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2023/08497

Capital gains tax - Entrepreneurs' Relief (later titled Business Asset Disposal Relief)– whether commenced trading – yes - appeal allowed

Heard on: 28 February (reading day), 29 February & 1 March 2024
Judgment date: 19 June 2024

Before

TRIBUNAL JUDGE NEWSTEAD TAYLOR
MR IAN SHEARER

Between

MR JOHN DOUGLAS WARDLE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr John Douglas Wardle

For the Respondents: Mr William Scott, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. A face-to-face hearing was not held because it was expedient not to do so.

2. We were provided with the following documents:

   (1) The Appellant's amended[1] skeleton argument.

   (2) The Respondents' skeleton argument.

   (3) The amended Document Bundle, 1,881 pages.

   (4) The Supplementary Bundle, 82 pages.

   (5) The amended Authorities Bundle, 907 pages.

   (6) The Appellant's case authority extracts, 35 pages.

   (7) The Appellant's proposed Generic Party Names, 1 page.

   (8) The Appellant's email, dated 29 February 2024, attaching a corrected version of the Appellant's case authority extracts and a copy of the Construction Timetable, albeit the Appellant did not pursue his application to rely on the Construction Timetable.

3. At the outset of the hearing, we identified the documents that we had pre-read, namely the Skeleton Arguments, the Appeal Notice and Grounds of Appeal, the Respondents' Statement of Case, the witness statements and, briefly, the authorities. We informed the parties that we had not read the extensive exhibits, comprising approximately 1,615 pages. We invited the parties, during the course of the hearing, to take us specifically to those documents, in particular any contracts, on which they relied. For the avoidance of doubt, we explained that our decision would consider only those documents to which we had been taken, consequently if we were not taken to a document then it would not be considered.

4. 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.

BACKGROUND

5. The Appellant (Mr Wardle) appeals against the Respondents' decision ("the Decision"), dated 9 March 2023, to issue a closure notice denying his claim to Entrepreneurs' Relief ("ER")[2] on disposal of part of his interest in Biomass UK No. 1 LLP ("the LLP") resulting in an additional tax liability of £87,171.80.

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[1] For the avoidance of doubt, the Respondents took issue with §63 of the Appellant's original Skeleton Argument on the grounds that it raised a new and unpleaded legitimate expectation argument. The parties corresponded on the issue, with the Tribunal copied into at least some of that correspondence. Ultimately, the Appellant agreed to amend §63 to remove the reference to legitimate expectation on the basis that he would be able to argue that the Respondents' position on *Birmingham & District Cattle By-Products Co. Ltd v IR Commrs* (1919) 12 TC 921 *("Birmingham DC")* was wrong in law at the hearing. At the commencement of the hearing, the Appellant confirmed that he was not applying to amend his Grounds of Appeal to include a legitimate expectation argument.

[2] Section 169H(1) TGCA 1992 sets out the name of the relief in the relevant period as Entrepreneurs' Relief ("ER"). Section 169H(1) was amended by paragraph 7 of schedule 3 to the Finance Act 2020 amending the name of the relief from ER to Business Asset Disposal Relief.

6. The Appellant's Grounds of Appeal are set out in full in a letter dated 14 March 2023, attached to the Notice of Appeal. In brief, the Appellant appeals the Decision on the following grounds:

> *"The dispute concerns whether Biomass UK No.1 LLP was a business for the purposes of ER TCGA1992/S169S(1) at the time of my relevant disposal. The issues in dispute are the following:*
>
> *5.1 Whether the relevant authorities for interpretation of TCGA1992/S169S(1) are Mansell v R & C Commrs [2006] Sp C 551 and Michael Hunt v HMRC [2019] UKFTT 0515, as argued by [the Appellant] during the Appeal Hearing for TC/2020/01434 or Birmingham & District Cattle By-Products Co. Ltd v IR Commrs (1919) 12 TC 921 as argued by HMRC during that hearing.*
>
> *5.2 In TC/2020/01434, Judge Hyde confirmed that the relevant authorities are Mansell and Hunt:*
>
> *"88. Whether or not a trade has commenced will depend on a consideration of all the individual facts and it is in my view inappropriate to apply the short reasoning in Birmingham & District Cattle to all circumstances. I do not accept HMRC's argument that because it is a simpler the test Birmingham & District Cattle is necessarily to be preferred. In my view the well-articulated and clear summary of the issues as set out in Mansell at [88] to [95] represents a better summary of the factors to take into account, at least in the current appeal. Henderson J in Tower MCashback found the "operational activities" test in Mansell "useful" and in Hunt both HMRC and the appellant agreed that the relevant test was as set out in Mansell."*
>
> *However, during the course of the 2019/20 enquiry and in the Closure Notice HMRC have chosen to ignore such finding and continue to claim that the relevant authority is Birmingham & District Cattle.*
>
> *...*
>
> *In conclusion, I therefore wish to appeal the Closure Notice on the grounds that HMRC have applied an incorrect authority and in doing so, have misinterpreted the evidence provided to them in support of my claim that the business of Biomass UK No.1 LLP had been set up and commenced operations more than 2 years prior to the relevant date of disposal on 28 February 2020)."*

7. For the avoidance of doubt, whilst the Appellant's Grounds of Appeal are summarised at paragraphs 5 – 6 of this Decision, we referred to and considered the Grounds of Appeal in full, as per the 14 March 2023 letter.

PRELIMINARY APPLICATIONS

8. We considered four preliminary applications.

I. THE RECORDING APPLICATION:

9. First, the Appellant made an oral application for permission to record the hearing in accordance with s.9 (1) (a) of the Contempt of Court Act 1981 ("the Recording Application.") The basis of his application was that as a litigant in person he would have difficulty taking notes. He contrasted himself with Mr Scott (the Respondents' representative) who was assisted by Mr Simpson. Specifically, the Appellant wanted to record his own voice. He informed us that if he used his iPad this would pick up his voice, but not the voices of others in the hearing. He also submitted that it would cost him £2,000.00 to obtain a transcript of the hearing. The Respondents adopted a neutral position on this application.

10. We fully considered the Recording Application. Specifically, we considered the Appellant's position as a litigant in person. We noted that if this reason alone sufficed for the grant of permission then a very large number of litigants in hearings before the Tribunal would be able to make their own recordings. We noted that no reasons related to disability were advanced to support the Recording Application. We considered that the hearing was being recorded[3], via the Tribunal video service, and that the Appellant would be able to request a transcript of the hearing, if necessary. In all the circumstances and having considered Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), we refused the Recording Application. We explained to the Appellant that the hearing would be conducted at a pace (including pauses) that enabled him to take full notes. During the hearing, we checked with the Appellant that the pace was appropriate. He confirmed that it was. Also, we reminded the Appellant that he could request a transcript.

II. THE ANONYMITY APPLICATION:

11. Second, by an email dated 18 January 2024, the Appellant applied to anonymise references to third parties in our written decision on the ground that inclusion of the names had no bearing on the Appeal and could cause anxiety to media-sensitive third parties ("the Anonymity Application"). We understood this application to be made in accordance with Rules 5 and/or 14 (b) of the Rules. On 22 January 2024, we directed that the Anonymity Application would be considered and decided at the hearing. At the start of the hearing, the Appellant confirmed that the Anonymity Application was not an application for a private hearing or for anonymisation during the hearing itself. Notably the hearing bundles and associated documents were not anonymised. The Appellant briefly suggested re-submitting all of the documents on a deemed redacted basis but did not pursue this suggestion. Instead, he sought to persuade us to decide the original Anonymity Application at the outset of the hearing. He contended that the identity of the third parties had no bearing on the decision and that anonymity would not impede a reader's understanding of the decision. Accordingly, he argued that the interests of justice would not be adversely impacted by anonymisation.

12. The Respondents took a neutral position but referred us to *HMRC v Banerjee* (No 2) [2009] STC 1930 *("Banerjee")* and *The Commissioners for His Majesty's Revenue & Customs v The Taxpayer* [2024] UKUT12 (TCC) *("The Taxpayer")*. We refused to decide the Anonymity Application at the outset as we wished to hear the evidence in order to understand the extent to which, if at all, the identity of the third parties had been disclosed in publicly available documents. We invited both parties to make such further submissions as they wished on the Anonymity Application during closing submissions. No further submissions were made, with both parties maintaining their original positions.

13. We considered the parties' respective submissions and the relevant authorities.

14. At §§21-25 of *The Taxpayer*, the Upper Tribunal confirmed that the principle of open justice is paramount. At §24, the Upper Tribunal noted that this principle inevitably results in some intrusion into a taxpayer's privacy and cited the decision of *Banerjee*.

15. In *Banerjee*, the Appellant initially sought anonymisation for herself and the senior medical colleagues who had written letters appended to the case stated. However, by the time of the hearing she only sought anonymisation for herself in order to protect her private life. At §§34-35, Henderson J stated that:

[3] At the outset of the hearing, we notified the parties that Judge Newstead Taylor was receiving messages stating that the recording had been stopped. On each such occasion, Judge Newstead Taylor restarted the recording. During the morning of Day 1, Judge Newstead Taylor made enquiries with the video hearing team and was informed that the messages were a glitch and, in fact, the hearing was being recorded.

"34 … any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.

35 It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

16. In *A v HMRC* [2012] UKFTT 541 at §6, the taxpayer applied for a private hearing and an anonymised decision. He was a well-known broadcaster who had used a tax avoidance scheme. He was concerned that media comment might damage his media career and negatively impact his earning capacity. He argued that this breached his Article 8 rights under the European Convention for Human Rights ("ECHR"), namely his right to respect for his private and family life. HMRC opposed the application. Judge Bishopp agreed with *Banerjee* and refused the application stating:

"The usual practice in this tribunal is not only to hold its hearings in public, but also to make no attempt to conceal, either during the course of the hearing or in its published decisions, the details of a taxpayer's income and other financial circumstances relevant to the appeal. Redaction of such details … was exceptional."

17. Further, in *Clunes v HMRC* [2017] UKFTT Judge Bishopp dismissed an application for anonymity stating:

"10 … Any taxpayer who was not in the public eye but who, for example, would prefer his friends or neighbours not to know of his financial affairs, would find it impossible to persuade the tribunal to grant him anonymity; as Henderson J said, the public interest in the outcome of tax litigation, whether in the High Court or in this tribunal, outweighs the desire of the taxpayer for anonymity, and the inevitable resultant intrusion into matters which might otherwise remain confidential is the price which must be paid for open justice, however unpalatable the individual taxpayer might find it to be."

18. It is clear from the above authorities that the principle of open justice is of pre-eminent importance and that exceptional circumstances are required to redact a taxpayer's details including details of their income and other relevant financial circumstances. However, these authorities are not on all fours with the application before us. The Anonymity Application is made not in relation to the Appellant, but in relation to third parties. In fact, in *Mr A v*

HMRC [2015] UKFTT 189 (TC) the Tribunal (Judge Raghavan and Ms O'Neill) considered it unfair to name the appellant and his employer, because the latter was not a party to the hearing and could suffer damage. A similar decision was made in *A Partnership v HMRC* [2015] UKFTT 161 (Judge Mosedale).

19. The third parties are not parties to this appeal. Save for the Project Manager, whose managing director Mr Frearson provided a witness statement and gave evidence before us, none of the third parties have appeared before us. Reference to these third parties is incidental to the appeal in that their names are included in a number of the exhibits. We have carefully considered the extent to which the identity of the third parties has already been disclosed in publicly available documents. We are not satisfied that they have, with one exception in respect of the Project Manager who was named in *Wardle v HMRC* [2022] UKFTT 00158 (TC) ("*Wardle 2*") at §6. In particular, we accept the Appellant and Mr Frearson's evidence that confidentiality agreements were signed before Financial Close, albeit we have not seen these agreements. We also accept the Appellant's submission that the identity of the third parties has no bearing on our decision, that anonymity of the third parties would not impede a reader's understanding of the decision and, consequently, that the interests of open justice would not be adversely impacted by anonymisation. We also considered the overriding objective, Rule 2 of the Rules. In all of the circumstances, we allow the Anonymity Application and the third parties will be referred to by the agreed Generic Party Names (as proposed in the document provided by the Appellant) in this decision, including (for consistency) the Project Manager.

III. THE STRIKE OUT APPLICATION:

20. Third, with our permission, the Appellant made an oral application to strike out the Respondents' reference to and reliance on the *Birmingham DC* authority on the ground that it had no reasonable prospect of success, in accordance with Rule 8 (3) of the Rules ("the Strike Out Application"). In short, the Appellant contended that in *Wardle* 2 Judge Hyde had determined that the correct authority was *Mansell v the Commissioners for Her Majesty's Revenue & Customs* [2006] STC (SCD) 605 *("Mansell")* not *Birmingham DC*, that Judge Hyde must have reached this conclusion in light of the comments of Lord Millett in *Miah & Ors v. Khan* [2000] UKHL 55 and, accordingly, that the Respondents should not be able to go behind *Wardle 2*. The Respondents opposed the Strike Out Application on the grounds that they were not, in fact, contending that *Birmingham DC* was the relevant authority. The Respondents accepted that *Mansell* applied but argued that *Birmingham DC* was useful in interpreting the *Mansell* test, noting that, in fact, *Mansell* refers to *Birmingham DC.* We dismissed the Strike Out Application. In reaching this decision, we referred to and relied on the following principal points having considered all points made by the parties. First, it appeared that the Appellant had misunderstood the Respondents' position. The Respondents do not take the same position in this appeal as they did in *Wardle 2*, specifically they accept that *Mansell* (in the light of *Birmingham DC*) applies. Secondly, with all due respect to Judge Hyde, *Wardle 2* is not binding on us. It is a First-tier Tribunal decision concerning a different tax year and, in any event, we must decide this appeal on the basis of the evidence before us and it is clear that the evidence we have is far more extensive than that before Judge Hyde in *Wardle 2.*Thirdly, identification and application of the relevant legal test to the facts is the crux of the Appellant's appeal. We determined that we needed to hear full submissions from both parties on the authorities. Fourthly, the extent to which higher courts have doubted *Birmingham DC*, is a point that the Appellant could (and no doubt would) address in submissions.

IV. THE SUPPLEMENTARY BUNDLE APPLICATION:

21. Fourth, on 26 February 2024, being two days before we started our pre-reading, the parties jointly applied for permission to submit a supplementary bundle ("the Supplementary Bundle Application"). Specifically, the parties wanted permission to submit two appendices to a contract already included in the Document Bundle. We noted that whilst these appendices had been disclosed by the Appellant to the Respondents during a compliance check, they had not been included in the Appellant's List of Documents. However, the Respondents, in the interests of fairness, wished to facilitate the provision of these appendices. The Directions released on 2 November 2023 required the bundle of documents to be prepared by 12 January 2024 for the benefit of the parties and the Tribunal. On 18 January 2024 the parties made a joint application to submit an amended Document Bundle, that application was granted on 24 January 2024. Accordingly, this was, effectively, the parties' second application to amend the Document Bundle. Nonetheless, having considered the overriding objective under Rule 2 of the Rules, the fact that it was a joint application and that the documents were appendices to an existing document in the Document Bundle, we granted the Supplementary Bundle Application.

EVIDENCE

22. In addition to the documents detailed at paragraph 2 above, we heard oral evidence from the Appellant and from Mr Frearson, Managing Director of the Project Manager which acted as agent for the LLP in relation to the suite of related contracts. Both the Appellant and Mr Frearson were cross-examined and answered our questions. We are entirely satisfied that both witnesses were doing their best to assist the Tribunal. We found the Appellant to be credible and honest, and it was clear from Mr Frearson's evidence that he is a competent and experienced Managing Director in the field of project management. It is notable, although the point was not explored before us, that Mr Frearson was a designated member of the LLP with membership units. Nonetheless, we found his evidence to be honest, transparent and helpful. We accept it without hesitation.

FINDINGS OF FACT

23. On the basis of all of the evidence and the submissions, we make the following findings of fact on the balance of probabilities.

24. Between 2008 and 2014, third parties obtained entry-level project rights for a waste-to-energy power plant at the Port of Hull (the "Hull Project"). The Hull Project aimed to divert biomass waste from landfill and use it to produce electricity which would be exported into the wholesale market. At this stage, the third parties had obtained:

(1) An option over a site in Hull Docks ("the Site Option");

(2) An offer to connect the prospective power plant to the Grid Company's high-voltage network ("the Grid Option"); and

(3) A planning consent to build a wood-fired power plant using gas engine technology.

25. In early 2014, the Appellant's involvement with the Hull Project commenced. The Appellant, as part of the development team, purchased the Hull Project, including all associated rights, from the third parties. However, it was the development team's view that the technology underpinning the planning consent and associated plant layout was neither technically nor economically feasible and that a complete re-design was required. In consequence, an application for an amended planning consent was also required, which was subject to time pressures as both the Site Option and the Grid Option were time limited.

26. Additionally, prior to any active engagement with funders, the Hull Project had to be 'financeable' as only at this stage would potential funders invest time and resources in carrying out due diligence. In short, funders needed to see that the Hull Project had everything it required to proceed to Financial Close and funding draw-down. Therefore, all the key project counterparties needed to be assembled. A fundamental element was the 'financial model' which took the form of an Excel Spreadsheet. In brief, the financial model was a projected set of detailed company accounts for each year from Financial Close until project decommissioning some 27+ years later. It comprised profit and loss accounts, balance sheets and cashflows, quarter by quarter, year by year. The financial model contained hundreds of independently validated input assumptions. The commercial terms contained within the project contracts for the prospective business were key to such validation. A very significant volume of documentation was assembled by the developers for the funders, as evidenced by the index to the Project Data Rooms which runs to 11 pages covering in excess of 500 documents, most of which had gone through many iterations.

27. By late 2014, the Hull Project was ready and in a credible position to seek financing. A Project Information Memorandum accompanied by the financial model, assumptions and sources were issued. Proposals of interest were sought from a number of funders specialising in this sector who signed confidentiality agreements before receiving the Information Memorandum and associated documents.

28. By the end of January 2015, the Funder had been selected. In early February 2015, exclusive Heads of Terms were entered into with the Funder for the financing of the Hull Project.

29. From February 2015 onwards, the Funder engaged a full team of legal, financial, tax, accounting, market, environmental and fuel advisers to carry out their due diligence. An iterative process followed, often resulting in requests for amendment to the proposed project contracts so that risks identified by the due diligence could be accommodated to the Funder's satisfaction. This process lasted until August 2015 when final approval to proceed was given by the Funder's Investment Committee.

30. On 12 June 2015, the LLP was established as the special purchase vehicle ("SPV") for the Hull Project. We were not shown any partnership agreement existing at this point in time.

31. On 24 June 2015, the LLP entered into the Connection Agreement with the Grid Company to connect the LLP to the Grid Company's distribution system.

32. On 18 August 2015:

(1) a new partnership agreement was signed, pursuant to which the Appellant became the owner of 14.65% of partnership equity, and the development rights to the Hull Project were transferred to the LLP ("the Partnership Agreement"). The Partnership Agreement established a substantial organisational and management structure and mapped out how the LLP would proceed with the Hull Project. Pursuant to the Partnership Agreement:

(a) Clause 1.1 defined 'Project Documents' as *"…the Boiler Supply Contract, the O&M Contract, the Power Purchase Agreement, the Balance of Plant Contract, the Technical & Commercial Services Agreement and the Lease together with any ancillary documents required for the implementation of the Project as contemplated by the Business."*

(b) Clause 3 defined the business of the partnership as *"…the construction and operation of Plant for the production of electricity at the Site pursuant to the*

Project Documents with a view to profit and to do things and enter into transactions in furtherance of the Business and for no other purpose."

(2) The Funder applied to HMRC to form a VAT Group with the LLP.

33. On 18 August 2015, the LLP entered into an unsecured loan agreement with the Funder.

34. On 21 August 2015, prior to construction commencing, the LLP entered into approximately 56 contracts with various parties relating to the construction, operation and financing of the Hull plant ("Financial Close"). This included the Technical and Commercial Services Agreement under which the Project Manager operated. These contracts were integrated, notably cross-referring to Related Obligations and Related Provisions within the suite of contracts. The Appellant referred us, in detail, to the four contracts considered in paragraphs352 - 37 and 40 below. He chose these contracts because he considered them to have a direct and immediate link to output ("the Output Contracts") as opposed to those contracts he considered to relate to fixed assets and/or overheads[4] which he did not refer us to. Despite the Supplementary Bundle Application, neither side referred us to any documents within the Supplementary Bundle. The Appellant concluded that there was nothing in the Supplementary Bundle which he wanted to draw to our attention, other than to show that the specifications appended to the Balance of Plant contract further illustrated the detailed extent and scope of planning and design work already undertaken as part of that contract. Nonetheless, he contended that definitions were consistent across the suite of contracts and that the suite of contracts were similar or subject to identical terms. In the absence of any reference to or consideration of any contracts other than the Output Contracts, it is not possible to verify whether this assertion is correct.

35. Pursuant to the Feedstock Management Agreement ("FMA"), the LLP entered into a contract to purchase feedstock from the Feedstock Supplier and for the Feedstock Supplier to dispose of ash produced by the gasification of the feedstock. So far as relevant, we were taken to the following terms of the FMA:

(1) Clause 2.1: provides that on issuance of the Notice to Proceed, the parties, subject to the terms of the FMA, will perform all their respective obligations under the FMA.

(2) Clauses 2.5-2.5.9: set out the Feedstock Supplier's obligations which, in brief, comprise the setting up of a wholly owned subsidiary to enter into a lease of an Off-Site Fuel Preparation & Storage Site.

(3) Clause 3: details the quantities, estimates and ordering of waste wood required both during and after the commissioning period. Notably, under Clause 3.1.1, the LLP was required to take and the Supplier was required to deliver specified minimum levels of feedstock each year. Further, under Clause 3.3.1, the Feedstock Supplier had, during the term of the FMA, priority rights to supply feedstock to the LLP.

(4) Clauses 5 & 6: require the Feedstock Supplier to deliver the waste wood to the Plant and to dispose of the ash produced as a result of the gasification of feedstock at the Plant.

(5) Clause 8: provides for a pricing review.

[4] In summary, the Appellant listed the following as fixed asset and/or overhead contracts: (i) Insurance, (ii) Lease Payments, (iii) the cost of finance, (iv) the Technical & Commercial Services Agreement, (v) the Boiler Supply Agreement, (vi) the Connection Agreement and (vii) the Balance of Plant Contract.

(6) Clause 15: provided for the FMA to commence on the date of the agreement (being 21 August 2015) and continue for a period of 20 years from the Commencement Date (being the start of the Commissioning Period) unless terminated earlier.

(7) Clause 16: sets out the termination provisions. Pursuant to Clause 16.2.11, the Feedstock Supplier was entitled to terminate the FMA with immediate effect giving written notice if *"...the Construction Contract and/or the Boiler Supply Contract is terminated whatsoever and such termination results in the Facility not being constructed."* For the avoidance of doubt, the Construction Contract and the Boiler Supply Contract were not terminated and the Feedstock Supplier never terminated the FMA.

36. Pursuant to the Power Purchase Agreement ("the PPA"), the LLP entered into a contract with the Grid Company relating to the sale of electricity. So far as relevant, we were taken to the following terms of the PPA:

(1) Clause 2.1 (a-b): (a) The PPA began on 21 August 2015. (b) The LLP was to cooperate with the Power Purchaser to enable the latter to secure third party customer(s) as an end consumer of some or all of the electricity thereby enabling the Power Purchaser to support the PPA.

(2) Clause 2.2: The PPA was subject to the following conditions precedent all of which needed to be satisfied before the Plant could generate electricity commercially:

"The obligations of the Parties under this Agreement (other than those arising under this Clause 2(Conditions precedent), Clause 3(Construction and Commissioning), Clause 4.1 (Registration), Clause 11 (Confidentiality and Announcements), Clause 12 (Dispute Resolution Procedure), Clause 13 (Miscellaneous Provisions) and Schedule 5 (Output Forecasts and Maintenance programmes) which are binding on the Parties as from the date of this Agreement) are conditional upon:

(a) the Seller having obtained Preliminary Accreditation and confirming to the Buyer that it has applied to Ofgem for RO Accreditation, the CCL Exemption Accreditation and the REGO Accreditation before 31 March 2018;

(b) the Seller having entered into the Connection Agreement;

(c) the Seller having a generation Licence or exemption (as applicable);

(d) the Seller having provided the Buyer with all such information, as it has available, as is required to complete the Facility details at paragraph 8 of Schedule 1;

(e) the Seller having provided the Buyer with all the information reasonably required by the Buyer to allow the Buyer (or a member of the Buyer's Group) to become the body credited as having ownership of the Metered Output;

(f) the Registration Date having occurred (and each Party shall take all use all Reasonable Endeavours to ensure that the Registration Date occurs prior to the Longstop Date);

(g) the Seller holding all the consents, licences and property rights required to construct and operate the Facility for the duration of the Contract Term; and

(h) the Seller having entered into a meter operator agreement with a Meter Operator;"

(3) Clause 4.2 stated that the LLP agreed to sell and the Power Purchaser agreed to buy *"...all Metered Output produced by the Facility that is delivered to the Delivery*

Point from the later of (i) the CP Satisfaction Date and (ii) the Commissioning Start Time until the end of the Contract Term." The Commissioning Start Time was defined as the date on which the G59 certificate was issued.

(4) Clauses 7 and 8 prescribed the Charges and the Payment Terms respectively.

(5) Clause 9 detailed the Term and termination. *"The Agreement will continue in full force and effect for the Contract Term and thereafter until all benefits have been transferred, and all amounts paid, under and in accordance with this Agreement, unless terminated earlier in accordance with Schedule 7."* Schedule 7 detailed Events of Default.

37. Pursuant to the Operations & Maintenance Contract ("the O&M Contract"), the LLP entered into a contract with the O&M Contractor for operations and maintenance for the Hull Project which was separate from the Construction Agreement. So far as relevant, we were taken to the following terms of the O&M Contract:

(1) Clause 2: details the scope of work and the O&M Contractor's responsibilities. Whilst the scope of work is primarily focused on services, corrective maintenance and site services once the Plant was fully operational, it also included site services during the commissioning phase, as follows:

(a) Clause 2.3 (i): *"supporting the Contractor in commissioning the Plant and equipment supplied under the Boiler Supply Contract and coordinating with the Contractor and the Boiler Supplier as necessary for the purposes of such activities. For avoidance of doubt, the overall total responsibility for the commissioning of the Plant and any part of it shall remain with the Contractor;"*

(b) Clause 2.3 (j): *"provide the operational staff for participation in the commissioning of the Plant as a whole, including training provided by the Owner (through the Construction Agreement), in order to familiarise itself with matters relating to the normal operation and maintenance of the Plant. Such provision of operational staff shall be in accordance with the Commissioning and Training Plan and within the limits of the Allowable Resources."*

(2) Clause 9: details the payment terms. In short, the O&M Contractor invoiced the Partnership on a monthly basis starting within 14 days of the issue of the Commencement Notice (which was given in May 2016 – see §52 below). Payments to the O&M Contractor would include any performance bonus element, calculated in accordance with Schedule 1 to the contract, which was linked to the level of the electricity generation in respect of which the plant earned ROCs.

38. On 24 August 2015, the Partnership drew down funds under the loan and issued notices to proceed under:

(1) The FMA.

(2) The Boiler Supply Agreement, being a contract with the Boiler Supplier for the design and supply of a biomass boiler at King George Docks in Hull.

(3) The Balance of Plant contract, being a contract with the Installation Contractor for the construction of the plant.

39. On 8 September 2015, the LLP entered into a lease of land at the North West side of King George Dock, Port of Hull, for a term of 25 years at a rent of £91,000.00 per annum exclusive of VAT and subject to increase and review ("the Lease").

40. Further and pursuant to the Lease, on 8 September 2015 the LLP and the Site Owner entered into the Commercial Handling Agreement ("CHA") relating to the movement of freight through the Port of Hull. So far as relevant, we were taken to the following terms of the CHA, the Appellant stated that the remainder of the CHA was 'standard boiler plate':

(1) Clause 1.1: defined 'Commissioning Date' as the earlier of the date the Plant is fully operational or 3 years from 8 September 2015, being 7 September 2018.

(2) Clause 2: detailed the cargo dues payable by the LLP to the Site Owner for Sea Borne Cargo and Road Borne Cargo.

(3) Clause 3: provided for a Guaranteed Minimum Payment payable from the LLP to the Site Owner per annum.

41. On 18 September 2015, a multi-party kick-off meeting took place in Derby that allowed all the key players to meet and to identify initial actions required by the relevant contracts.

42. The Project Manager's monthly report for October 2015 recorded:

"Feedstock: JML has had preliminary discussions with land owner regarding potential for another site locally. JML has started collecting wood waste from the area and diverting to their sites in the Midlands (approximately 300 tonnes per week in September with steadily increasing tonnages).

Offtake: Contact with [the Power Purchaser] who confirmed that they will host a visit by [the Funder] ... before Christmas. Arrangements will be followed up directly between [the Power Purchaser] and [the Funder]. [The Power Purchaser] also confirmed [that they] are including Hull on their list of potential available capacity for their corporate clients. Expectation is that such discussions will move forward in earnest in Ql 2016.

Project Payments: Initial rent payment to ABP (landlord), due on 1st October 2015 was made against the first invoice from ABP."

43. Following an initial payment to the Grid Company to progress work on the grid connection, on 21 October 2015 the Project Manager had a kick-off meeting with the Grid Company at the latter's offices.

44. The LLP's Annual Report and Financial Statement for the period from 12 June 2015 to 31 December 2015 ("the 2015 Accounts") record no turnover and a total loss of £2,809,347. The 2015 Accounts record that by 31 December 2015, the LLP had drawn down £14,622,967 under the loan. We find that much of this was used by the LLP to defray financial obligations during the first month(s) following Financial Close.

45. In or around May 2016, the LLP issued the Commencement Notice under the O&M Contract. At this time, the Plant was due to be constructed in 2017 but this was delayed. Clause 1.1 of the O&M Contract provided for the Commencement notice to be issued not less than 3 months prior to the Construction Completion Certificate, as the O&M Contractor required a sufficient lead time in order to mobilise the team, recruit employees, prepare management guidebooks, undertake relevant training and assist with commissioning.

46. On 14 September 2016, the LLP applied to the Environment Agency for a permit to operate the power plant. On 10 May 2017, the Environment Agency issued the permit.

47. The LLP's Annual Report and Financial Statement for the period to 31 December 2016 ("the 2016 Accounts") recorded a total loss of £5,550,064. The 2016 Accounts record that by 31 December 2016, the LLP had drawn down £36,503,650 under the loan.

48. By December 2017, the plant could import electricity under the Power Purchase Agreement.

49. The LLP's Annual Report and Financial Statement for the period to 31 December 2017 ("the 2017 Accounts") record no turnover and a total loss of £7,017,901. The 2017 Accounts record that by 31 December 2017, the LLP had drawn down £53,263,869 under the loan.

50. As conceded by the Appellant, at 28 February 2018, Condition precedent 2.1 (a) of the PPA was not satisfied and the plant was neither generating electricity nor receiving feedstock commercially.

51. In March 2018, testing of the power plant took place. This testing was vital as, once connected to the grid, any faults could have major repercussions across the network. During the commissioning phase, the following tests and trial runs were carried out:

(1) Start-up and shutdown of equipment;

(2) Shut down of the equipment under emergency conditions;

(3) Stable operation under operator control;

(4) The G59 test was witnessed by the DNO.

52. On 31 March 2018, the commissioning tests and trial runs were passed and the commissioning was certified as complete by the Installation Contractor. During the commissioning tests and trial runs the power plant generated electricity for the first time, specifically 3.204 MWH was exported to the Grid Company. On 31 March 2018 (backdated from December 2018), ROC[5] accreditation from Ofgem was received.

53. Between April 2018 and May 2019, an extended period of optimisation, commissioning and final construction of minor residual elements, such as landscaping, took place. No electricity was generated in this period.

54. The LLP's Annual Report and Financial Statement for the period to 31 December 2018 ("the 2018 Accounts") record no turnover and a total loss of £14,849,411.00. The 2018 Accounts record that by 31 December 2018, the LLP had drawn down £64,977,605 under the loan.

55. In June 2019, electricity was generated commercially for the first time. Specifically, 808.409 MWH were exported to the Grid Company, representing revenue of £36,290.18.

56. The LLP's Annual Report and Financial Statement for the period to 31 December 2019 ("the 2019 Accounts") record turnover of £173,528 and a total loss of £11,177,548). The 2019 Accounts record that by 31 December 2019, the LLP had drawn down £89,240,773 under the loan.

57. On 28 February 2020[6], the Appellant disposed of his remaining interest in the LLP ("the Disposal").

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[5] As per §25 of *Wardle 2, "ROCs are certificates issued by Ofgem under the Electricity Act 1989 to accredited renewable power generators in respect of net renewable electricity produced. The ROCs are transferable and can be sold to third parties who can use them to satisfy their renewables obligations."*

[6] Notably, notice of the Disposal was given on 28 February 2020 but completion was set for 6 March 2020. The parties agreed that the relevant date for consideration in the appeal was 28 February 2018, being 2 years prior to 28 February 2020. Neither party suggested that 6 March 2018, being 2 years prior to 6 March 2020, was the relevant date. *In any event, for the reasons given in this decision our conclusions would not be affected if the relevant date was, in fact, 6 March 2018.*

58. On 21 September 2020, the Appellant's Self-Assessment Return ("SAR 20") for the tax year ending 5 April 2020 was received in which the Appellant made a claim for ER on the Disposal.

59. On 27 April 2021, *Wardle v HMRC* [2021] UKFTT 124 (TC) ("*Wardle 1")* was decided.

60. On 14 September 2021, the Respondents opened an enquiry into the Appellant's SAR 20 by way of a notice under s.9A of the Taxes Management Act 1970 ("TMA"). Between (approximately) July to October 2022, the parties entered into correspondence and the Appellant provided documentation.

61. On 23 December 2022, the Appellant applied to the Tribunal seeking an order that the Respondents issue a Closure Notice for the 2019/20 tax year.

62. On 9 March 2023, the Respondents closed the enquiry by way of a notice under Ss.28A (1B) & (2) TMA. The Respondents applied *Birmingham DC* and determined that the LLP did not trade at the date of the Disposal, albeit for the purpose of these proceedings it is agreed that the relevant trading period is the 2 years preceding 28 February 2020. Accordingly, the Respondents denied the Appellant's claim to ER.

63. On 14 March 2023, the Appellant appealed the Closure Notice.

64. On 19 May 2023, the Tribunal decided *Wardle 2*.

THE LAW

65. In 2008, ER was introduced as part of a wide-ranging reform of capital gains tax. At §§ 68-97 of *Wardle 1*, Judge Zaman considered, in some detail, the legislative background to ER, albeit ultimately concluding that it did not assist in determining the issue in dispute in *Wardle 1.*

66. ER provides for a lower rate (being 10%) of capital gains tax ("CGT") on qualifying business disposals ("QBD"). The relevant legislation is set out in Chapter 3 of Part V, Ss. 169H-169SA of TCGA:

67. Section 169H:

> *"169H(1) This Chapter provides for a lower rate of capital gains tax in respect of qualifying business disposals (to be known as "entrepreneurs' relief").*
> *169H(2) The following are qualifying business disposals–*
> *(a) a material disposal of business assets: see section 169I,*
> *(b) a disposal of trust business assets: see section 169J, and*
> *(c) a disposal associated with a relevant material disposal: see section 169K.*
> *169H(3) But in the case of certain qualifying business disposals, entrepreneurs' relief is given only in respect of disposals of relevant business assets comprised in the qualifying business disposal: see sections 169L and 169LA.*
> *169H(4) Section 169M makes provision requiring the making of a claim for entrepreneurs' relief.*
> *169H(5) Sections 169N to 169P make provision as to the amount of entrepreneurs' relief.*
> *169H(6) Section 169Q and 169R make provision about reorganisations.*
> *169H(7) Sections 169S and 169SA contain interpretative provisions for the purposes of this Chapter."*

68. Section 169I provides insofar as relevant:

"169I(1) There is a material disposal of business assets where–
(a) an individual makes a disposal of business assets (see subsection (2)), and
(b) the disposal of business assets is a material disposal (see subsections (3) to (7)).
(2) For the purposes of this Chapter a disposal of business assets is–
(a) a disposal of the whole or part of a business,…
(3) A disposal within paragraph (a) of subsection (2) is a material disposal if the business is owned by the individual throughout the period of 2 years ending with the date of the disposal.…
169I(8) For the purposes of this section–
(a) an individual who disposes of (or of interests in) assets used for the purposes of a business carried on by the individual on entering into a partnership which is to carry on the business is to be treated as disposing of a part of the business,
(b) the disposal by an individual of the whole or part of the individual's interest in the assets of a partnership is to be treated as a disposal by the individual of the whole or part of the business carried on by the partnership, and
(c) at any time when a business is carried on by a partnership, the business is to be treated as owned by each individual who is at that time a member of the partnership."

69. Section 169S provides:

"169S(1) For the purposes of this Chapter "a business" means anything which –

(a) is a trade, profession or vocation, and

(b) is conducted on a commercial basis and with a view to the realisation of profits.

169S(5) In this Chapter 'trade' has the same meaning as in the Income Tax Acts (see section 989 of ITA 2007)"

70. Following §98 of *Wardle 1*, it was agreed between the parties that the definition of the term "business" in s.169S (1) *"…is that it requires that an individual or partnership making the disposal is disposing of something (or anything) that is, at that time, a trade and is conducted, at that time, on a commercial basis. The trade must exist at that time – it does not extend to activities which are capable of being conducted as a trade at a point in the future."* Further, s.169l (3) TCGA provides that a business is a material disposal *"…if the business is owned by the individual throughout the period of 2 years ending with the date of the disposal…"* In short, the parties were agreed that to succeed in this appeal the Appellant needed to establish that the LLP was trading for the period of 2 years ending with the date of disposal (28 February 2020).

71. Section 989 Income Taxes Act 2007 ("ITA") provides that *"'trade' includes any venture in the nature of trade,"*

72. In the case of *Ransom v Higgs* [1974] 50TC1, an avoidance case in which HMRC sought to argue that the taxpayer was trading, the House of Lords considered the meaning of "trade" as follows:

(1) Lord Reid at page 78I said *"As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage, it is sometimes used to denote any mercantile operation, but it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services. The contexts in which the word "trade" has been used in the Income Tax Acts appear to me to indicate that operations of that kind are what the legislature had primarily in mind."*

(2) Lord Morris at page 84H said *"To be engaged in trade or in an adventure in the nature of trade surely a person must do something, and if trading he must trade with some one"*.

(3) Lord Wilberforce at page 88E said *"'Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed… Trade involves, normally, the exchange of goods or of services for reward-not of all services, since some qualify as a profession or employment or vocation, but there must be something which the trade offers to provide by way of business. Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm), or, as it may be expressed, trade must be bilateral-you must trade with someone. … Then there are elements or characteristics which prevent a trade being found even though a profit has been made-the realisation of a capital asset, the isolated transaction (which may yet be a trade)"*

73. In reliance on *Ransom v Higgs,* it is the Respondents' position that a trade is carried on where the trader is in a position to provide those goods or services which it is, or will be, his or her trade to provide, and does so or offers to do so by way of trade.

THE AUTHORITIES

74. The Authorities Bundle comprised 907 pages. Ultimately, we were referred to only a relatively small selection of authorities within that bundle, with the parties concentrating on:

(1) *Birmingham District Cattle*
(2) *Mansell*
(3) *Tower MCashback* [2008] EWHC 2387 (Ch) ("*Tower MCashback*")
(4) *Micro Fusion v HMRC* [2008] UKSPC Spc00695 ("*Micro Fusion*")
(5) *Halcyon Films LLP v Revenue & Customs* [2008] UKSPC Spc00696 ("*Halcyon*")
(6) *Hunt v HMRC* [2019] UKFTT 515 (TC) ("*Hunt*")

75. Whilst we only refer to those parts of these authorities which we consider to be relevant to the issues in dispute in this appeal, we can confirm that we have fully considered all of the parties' oral and written submissions on these authorities, including the Appellant's helpful document titled 'Case Authority Extracts[7].'

(i) *Birmingham District Cattle* :

76. In *Birmingham District Cattle*, the appellant (Birmingham District Cattle) appealed against assessments to Excess Profits Duty for accounting periods ending 5 October 1914 and 31 December 1914 in respect of the trade or business of sausage skin manufacture. The appellant argued that the trade or business had commenced prior to the start of World War 1 and that the profits during the pre-war trade year should be the basis for the pre-war standard in computing the liability to Excess Profits Duty. The Respondents argued that the appellant commenced carrying on their trade or business on 6 October 1913 and, accordingly, there was not a pre-war trade year such that the assessments were correctly based on a statutory percentage on the capital employed in the business. The question for the Commissioners was when the trade or business commenced.

[7] During the hearing, the Appellant did not refer to or rely on the following authorities listed in his 'Case Authority Extracts': (i) *Tower MCashback LLP1 v Revenue & Customs* [2007] UKSPC SPC00619, (ii) *Johnson v HMRC* [2016] UKFTT 010 (TC), (iii*) Eoghan Flanaghan and Related Parties v HMRC* [2014] UKFTT 175 (TC) or (iv) *Foundation Partners (GP) (a firm) v HMRC* [2021] UKFTT 0018 (TC).

77. The Commissioners determined that the appellant company commenced its trade or business on 6 October 1913. In reaching this conclusion, the Commissioners found as fact that prior to 6 October 2013, the appellant had viewed, at the expense of the Company, other places of business of a similar character in various parts of the country. It had entered into a contract in June 1913 for the erection of the works, which works were duly erected in July 1913. It had purchased machinery and plant for carrying on the business. It had entered into agreements for the purchase of products to be used in the business and the sale of finished products. In August 1913, the Company had engaged and thereafter employed a man as foreman of the works, who prior to October 1913, superintended the manufacture of utensils.

78. On appeal, the High Court was required to determine whether or not the Commissioners' decision was correct. Rowlatt J upheld the Commissioners' decision as follows:

> *"It seems to me that it is really very clear. The question is when the company commenced its trade or business. It has been treated as commencing its trade or business in October, 1913, when, according to its Minutes, it said it did, but I do not in the least hold it bound by those Minutes for this purpose; I want to look at the substance of the matter. It is set forth that they really commenced in June, or, at any rate, some time before August, 1913, to carry on the trade or business. Now apparently the company was incorporated on the 20th June to carry on the business of making some use of the by-products of the butcher's trade. It arose out of a combination of a number of butchers who entered into a contract with the trustee of the company to be formed that they would supply, and the company to be formed would take, these by-products. There was a combination among those butchers for that purpose. Now the company took over those agreements, and having taken over those agreements the directors, at the expense of the company, as was very proper, went about and looked at places of business of a similar character in various parts of the country. That was an admirable thing to do preparatory to commencing business, but it certainly was not commencing business. If you go and look at other businesses to see how you will conduct your business when you set it up, you are preparing to commence business, but you are not commencing business.*
>
> *Then they entered into a contract for the erection of works, which works were duly erected in July, 1913. That again is preparatory. The company were occupying themselves with activities within their powers, of course; they were living their life; but they had not yet begun to conduct their trade or business. Then they purchased machinery and plant for carrying on the business. That was getting ready. Then they entered into agreements for the purchase of products. Those are the agreements which I have already referred to which formed the substratum of the company, but no materials came in nor were any sausage skins made from the 20th June. They waited, and I suppose in October, the date they refer to in their Minutes, having looked round, and having got their machinery and plant, and having also employed their foreman, and having got their works erected and generally got everything ready, then they began to take the raw materials and to turn out their product.*
>
> *I am bound to say that I think the case is extremely clear, and the Commissioners have taken the view that they had not commenced business till then, and I do not see the slightest sign of any error in law in the Commissioners having taken that view. It seems to me it is the only view, both in law and in fact, if I may say so, that they could take, and, therefore, I must dismiss this appeal with costs.*"

79. Notably, Rowlatt J did not consider that the steps set out at paragraph 77 above amounted to the commencement of trade or business and referred to the Commissioners' decision as *"... the only view, both in law and in fact, if I may say so, that they could take…"*.

(ii) *Kirk & Randall v Dunn*:

80. In *Kirk and Randall Limited v Dunn (HM Inspector of Taxes)* 8 TC 663, a decision 5 years after *Birmingham District Cattle*, Rowlatt J considered whether and when the appellant in that case had 'set up and commenced a trade.' Notably, at the start of his decision he stated:

> *"In this case the question is whether this Company was carrying on a trade, manufacture, adventure or concern during the few years which preceded 1920. There have been several cases recently upon the Corporation Profits Tax and the Excess Profits Duty in which the companies liable are defined as companies carrying on any trade or business. I think it is practically the same definition in both Acts.* ***Now several cases came before me, and I took rather a narrow view of those words which define the sort of company. I did not pay much attention to the internal activities of the company– its functional activities as carrying on its own life, and I laid some stress on 'carrying on' and on 'business', but the Court of Appeal have taken a freer view of the words than I did, and they have certainly taken into consideration the circumstances that the company was performing its internal functions, that is to say, holding its meetings and so on, as indicative, if not alone sufficient, to establish the fact that it was carrying on a business.*** *If I might perhaps paraphrase it without any disrespect, they have treated it as a business company carrying on. And, of course, that is putting a more liberal interpretation on the words.*
>
> ***So that I confess I approach this case with the feeling that perhaps I have been inclined to take a too narrow view of the word 'business'****..."* (Emphasis added)

(iii) *Khan v Miah:*

81. In *Khan and another v Miah* 2001 1 All ER 282, the House of Lords considered whether or not a partnership existed between persons who had entered into a joint venture to open and run an Indian restaurant. Whilst we agree with Judge Zaman's comments at §53 of *Wardle 1* as to the relevance of *Khan v Miah* to the determination of a 'business' in accordance with s.169S (1) of TCGA, this case is pertinent because in it Lord Millett considers the applicability of *Birmingham District Cattle* as follows:

> *"The respondents relied on a number of tax cases to support their arguments, chiefly Birmingham & District Cattle By-Products Co. Ltd. v. Inland Revenue Commissioners (1919) 12 T.C. 92 and Slater v. Commissioner of Inland Revenue [1996] 1 N.Z.L.R. 759. Such cases are of limited assistance. In the former case Rowlatt J. found that a company had not completed a full trade year before the outbreak of the First World War as required to obtain tax relief.* ***Even if Rowlatt J.'s decision was right on the facts (which is doubtful) it was in an entirely different statutory context. It is worthy of note that in a later case (Kirk and Randall Ltd. v. Dunn (1924) 8 T.C. 663) Rowlatt J., acknowledging that the Court of Appeal had taken a different view, said, at p. 669 that he was inclined to think that he might have taken to narrow a view of the word 'business****.'"* (Emphasis added)

(iv) *Mansell*:

82. In *Mansell,* Special Commissioner Hellier had to answer the question 'When was Mr Mansell's trade set up and commenced?' In short, if Mr Mansell's trade was set up and

commenced before 6 April 1994 he would be taxed more favourably than if it was set up and commenced on or after that date.

83. In summary, in 1992 Mr Mansell became interested in becoming a lessee / franchisee of a trunk road petrol station and developing a catering facility on site. He had discussions with major oil companies. He attended seminars. Over time, Mr Mansell's interest evolved to an interest in motorway service areas ("MSAs"), specifically in promoting the possibility of additional MSAs or introducing such possibilities to third parties and receiving an introduction fee. During 1992-1993, he familiarised himself with the numerous constraints applicable to MSAs. In 1993, he researched possible sites, eventually settling on Tipshelf, Bolsover. In December 1993 / January 1994, Mr Mansell had a number of meetings with Mr John Ball and Mr Franklin who farmed land on the side of the motorway close to Tipshelf, and Mr Copeland, a surveyor representing them. On 23 January 1994, a deal was agreed and Heads of Terms were drawn up. On 15 April 1994, option agreements were signed between Texas Oil Company ("TOC"), Mr Mansell's nominee, and Mr Ball and Mrs Franklin, who was the owner of the farm, granting TOC the right to purchase the land if the option was exercised within the option period. The option agreements were largely, although not completely, in the same terms as the Heads of Terms. By this stage, Mr Mansell's intention was to sell the interest in the land he had acquired for a profit, rather than simply effect an introduction. In 1994, Mr Mansell instructed and paid for a feasibility study on the site, which was favourable. At this stage, Mr Mansell contacted operators and oil companies in order to, effectively, hand over the proposal to others who had the backing of a major company to bring the proposal to fruition. In December 1994, an agreement was made between The South East Oil Company, acting on Mr Mansell's behalf, and Kuwait Petroleum (GB) Ltd ("Kuwait") pursuant to which Mr Mansell's company granted site exclusivity for 3 months in return for £50,000 and the parties agreed to negotiate a sale of the site to Kuwait. An agreement[8] was made between Kuwait and The South East Oil Company for the former's purchase of the site for £7.6 million subject to the receipt of planning permission for an MSA and signage confirmation from the Secretary of State, both to be obtained by Mr Mansell. Thereafter, with financial support, Mr Mansell set about obtaining planning permission. However, ultimately another MSA proposal succeeded in place of Mr Mansell's.

84. In answering the question 'When Mr Mansell's trade was set up and commenced', Special Commissioner Hellier identified the following principles (Emphasis added):

> *"88. Section 218 speaks of a trade 'set up and commenced' before, or on or after, 6 April 1994. The words 'set up' suggest that a trade can be set up without being commenced. This echoes the distinction drawn in Slater (see paragraph 72 above), the distinction between getting ready and commencing in Birmingham Cattle, Lord Millett's observation that 'the work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customer walks through the door', and the assembly of a 'sufficient organisational structure' to undertake the essential preliminaries noted in Gartry.* ***I conclude that a trade cannot commence until it has been set up (to the extent it needs to be set up), and that acts of setting up are not commencing or carrying on the trade. Setting up trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up.***

[8] See §32 of *Mansell*, where Special Commissioner Hellier states that *"It appears likely that an agreement in this form was made."*

89. Although none of the cases cited to me dealt directly with the question of when a trade commences, those cases suggest to me the following principles. ***First before the trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on.***

90. ***Second: an activity which consists merely of a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind is not the carrying on of a trade.***

91. ***Third: is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced. It is tempting to say that a trade commences only when the first sale is made. In normal everyday usage one would say that a person starts trading when he becomes entitled to money from his first customer. But, for the following reasons, it does not seem to me that making the first sale is necessarily the earliest time when a 'trade is … commenced' for the purposes of section 218:***

(a) there is a small but fine distinction between 'trading starting' and a trade being commenced, which may make everyday usage a pilot slightly out of its home waters;

(b) the comments made by Lord Millett in Khan v Miah tend to suggest that selling the first meal is not the earliest time when trading starts; and

(c) for these purposes the extended definition of trade affects the question. The question becomes: when did the trade, manufacture, adventure or concern in the nature of trade start? In normal usage an adventure in trade might start before the 'trading' started. An adventure normally starts when the adventurer leaves home, or the merchant first charters his ship rather than when the first monster is killed or the cargo is brought back home and sold.

92. I note that it is possible that for the linguistic reasons noted in paragraph (c) above, there may be somewhat different considerations relevant to when a trade such as buying and selling flowers commences from those relevant to when an adventure or concern in the nature of a trade may commence.

93. ***It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise.*** *The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade.*

94. It does not seem to me that carrying on negotiations to enter into the contracts which, when formed, will constitute operational activity is sufficient. At that stage no operational risk has been undertaken: no obligation has been assumed which directly relates to the supplies to be made. Not until those negotiations culminate in such obligations or assets, and give rise to a real possibility of loss or gain has an operational activity taken place. Until then, those negotiations may be part of setting up the trade but they do not to my mind betoken its commencement.

Conclusions

95. It seems to me that Lord Millet's statement that 'it is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it' is equally applicable to the question as to whether a person has commenced a trade. But it is necessary that there be a fairly specific concept of the type of activity in the mind of the putative trader which is to be carried on, although it does not have to be given, or be capable of being given a simple name."

85. In conclusion, Special Commissioner Hellier held that Mr Mansell's trade or business did not commence before 6 April 1994. In reaching this conclusion, he was not satisfied that Mr Mansell had *"…a fairly specific concept of the type of activity to be carried on…",* noting the evolution of Mr Mansell's thinking from effecting an introduction to selling an interest in land. However, he considered both in turn. As to effecting an introduction, he held that such a trade was never fully set up and was abandoned pre-commencement. As to the acquisition and turning to account of an interest in land, no enforceable agreement was made until the options were signed on 15 April 1994, post-dating the cut-off of 6 April 1994. The Heads of Terms did not amount to the acquisition of anything, nothing was expended, risked or ventured until the signing of the option agreements. As to expenditure incurred by Mr Mansell prior to December 1993, Special Commissioner Hellier did not consider this to be sufficiently directly linked to the supply. He characterised this expenditure as, in the main, overhead costs and preparing to trade. Notably, however, he did pay particular attention to the feasibility study noting that if Mr Mansell had instructed the preparation of a detailed scheme with drawings and specifications that could be put to the Highways Authority or if he had instructed architects to produce plans for the MSA for submission to the planning authority then it would have been possible that Mr Mansell commenced trade whether or not he had acquired a right to the options because both (being the options and/or well-considered plans) were capable of being turned to account and neither were merely preparatory or the setting up of the trade. However, on the facts Mr Mansell did neither of these things.

86. Finally, it is worth noting that at §63 of *Mansell* Special Commissioner Hellier refers to Lord Millett's judgment in *Khan v Miah* noting that Lord Millett cast doubt on *Birmingham District Cattle.* He speculates that the reason for this might be that *Birmingham District Cattle* dealt with the commencement of a 'trade or business' and, to the extent it decided that a business did not commence until 6 October 1913, Lord Millett considered that *Birmingham District Cattle* was wrongly decided.

(v) *Tower MCashback:*

87. In *Tower MCashback*, Mr Justice Henderson, sitting in the High Court, heard an appeal against a decision of Special Commissioner Nowlan. The appeal involved a number of points, but the one of interest to this appeal concerned whether the first appellant ("LLP1") had begun to trade on or before 5 April 2004 ("the Trading Issue[9]").

88. The Special Commissioner held that LLP1 had not begun trading by the relevant date. LLP1 appealed and argued that (i) entry into a Software Licence Agreement ("SLA") with

[9] At §§87-97, Mr Justice Henderson considered the Trading Issue. At §88, he noted that the statutory language of s.11(1) of Capital Allowances Act 2001 ("CAA") says that allowances are available under Part 2 of the Act *"if a person carries on a qualifying activity and incurs qualifying expenditure".* Qualifying activities are defined in section 15 and include "a trade": section 15(1)(a). Also, the end of s.15 (1) CAA sets out the following proviso *"but to the extent only that the profits or gains from the activity are, or (if there were any) would be, chargeable to tax."*

MCashback on 31 March 2004 and (ii) some preliminary marketing or promotional activities in February and March 2004 amounted to the carrying on of trade. Under the SLA, LLP1 agreed to purchase a licence of the code generation software from MCashback for £7,334,000 payable on completion. In return, LLP1 would become entitled from the date of completion to 0.66% of the gross clearing fees generated from the exploitation of the MRewards technology.

89. Mr Justice Henderson held that LLP1 had not begun to carry on a trade because the marketing / promotional activities were very preliminary and pre-dated the formation of LLP1 and because:

> *"…All it had done was to enter into a contract to acquire an asset which it intended to use in due course for the purposes of a trade of exploiting the licensed software, on terms still to be agreed with MCashback and its fellow LLPs. The entry into the SLA was a step preparatory to the carrying on of a trade. It was not a step taken in the course of a trade which had already begun, nor was it a step which itself marked the commencement of trading. Until terms had been agreed, it could not in my view be said that LLP1 was in a position to start turning the licensed software to account, or that it had in any meaningful sense started to trade."*

90. At §§93-95, Mr Justice Henderson referred to *Mansell*, which had been considered at first instance, and applied a similar approach confirming that LLP1's activities were not the carrying on of a trade but pre-trading activities:

> *"95…in broad terms I find [Special Commissioner Hellier's] test of the beginning of operational activities a useful one.* ***Every case will turn on its own facts, but in general the test presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin****. Mr Hellier gave as examples of setting up a trade such matters as the purchase of plant, and organisation of the decision making structures, the management and the financing (see paragraph 88)****. In my judgment a similar approach is helpful in answering the question whether a trade is being carried on for the purposes of CAA 2001 section 11, and the present case falls clearly on the pre-trading side of the line because the SLA amounted to no more than a contract for the acquisition of plant at a time before any decision-making, financial or management structure for the intended trade had been put in place."* (Emphasis added)

(vi) ***Micro Fusion*****:**

91. In *Micro Fusion*, the appellant ("Micro Fusion") was a limited liability partnership carrying on a trade or business which consisted of or included the exploitation of films. Specifically, Micro Fusion was involved with two films, *Manson Girls* and *Mrs Henderson Presents*. Micro Fusion had, in relation to that trade, claimed a loss in its tax return for the year to 5 April 2005 of £12,413,398, comprising a claim for relief under the special provisions relating to expenditure incurred on films and a loss in computing profits arising by reason of the payment of fees for film consultancy services. HMRC, in a closure notice, disallowed the claim for relief in full and the majority of the trading loss. Of the six issues considered by Special Commissioners Sadler and Clark, only the third, being when Micro Fusion commenced its trade or business consisting of or including the exploitation of films ("the Commencement Issue") is pertinent to this appeal.

92. At §§98-112 of *Micro Fusion*, the Special Commissioners, having concluded that Micro Fusion was carrying on *"a trade or business which consists of or includes the exploitation of films"*, considered the Commencement Issue. Micro Fusion argued that it commenced its trade on 6 April 2004 relying on (i) a Film Consultancy Agreement (the

"FCA") with Future Films Limited ("Future") pursuant to which Future was retained to act as film consultants to Micro Fusion and (ii) an Exclusive Acquisition Financing Agreement (the "EAFA") with International Motion Picture Development and Consultancy Limited ("IMPDC"). Pursuant to which, Micro Fusion acquired certain rights in connection with a screenplay in development (*Manson Girls*) for the purpose of financing and distributing the film to which the rights related, which HMRC argued was a sham. HMRC argued that Micro Fusion commenced its trade on 28 January 2005, being the date on which Micro Fusion funded the production expenditure on the film *Mrs Henderson Presents*.

93. The Special Commissioners recognised that the Commencement Issue is largely a question of fact and turns on the nature and extent of the activities of Micro Fusion in the period before it became involved in the production of the film *Mrs Henderson Presents*. They considered the terms of the FCA and the EAFA. They did not accept HMRC's argument that the EAFA was a sham. They considered that Micro Fusion commenced its trade on 20 September 2004, the date on which shooting of principal photography of *Mrs Henderson Presents* began.

94. In reaching this decision, the Special Commissioners referred to and relied on *Mansell*. They accepted that the first *Mansell* requirement was satisfied in that Micro Fusion had had the intention, prior to entering into the EAFA and the FCA on 6 April 2004, of carrying on the trade of exploiting films. At §101, they referred to, but did not spend much time on, the second *Mansell* requirement. As to the third *Mansell* requirement, at §102 the Special Commissioners noted that whilst it was not always necessary that a sale was made or a service supplied, there must be *"...a commencement of operational activities, that is, "dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk"*. Micro Fusion's position was that it commenced operational activity on 6 April 2004 when it entered into the FCA and EAFA. In contrast, HMRC argued that Micro Fusion commenced operational activity on 28 January 2005 when the documentation relating to the film *Mrs Henderson Presents* was finally concluded and it entered into financial close, since, so HMRC said, until that time Micro Fusion and the other parties could resile from the interim agreements entered into on 1 October 2004, and until that time Micro Fusion had not committed its funds to the project.

> (1) As to the *Manson Girls,* at § 108 the Special Commissioners held that *"Applying the principles set out in Mansell, although at first sight it may appear that by entering into the EAFA and the FCA Micro Fusion engaged in "operational activities", it is clear that for a trade to be regarded as commenced in advance of any sales or equivalent earning of income, any activities must in fact be "operational" in the sense of undertaken and actively and single-mindedly pursued in a way which is intended to result in a profit earned. Micro Fusion did not convince us that this was the case in relation to the Manson Girls screenplay."*
>
> (2) As to *Mrs Henderson Presents*, at §109 the Special Commissioners noted a clear contrast in that *"...there are intensive negotiations extending, in one form or another, until late January 2005 with the various stages evidenced by a plethora of emails and other communications and documented by interim and then final documents of commercial, financial and legal complexity and sophistication. Matters were finally concluded by what was termed "financial closing" on 28 January 2005."*

95. At §110 the Special Commissioners considered it too strict a view to regard financial close as the commencement of operational activity preferring the earlier date of 20 September 2004 given that commencement of shooting of principal photography of the film seemed firm

evidence of a commercial commitment to the arrangements documented on 1 October 2004. Notably, 20 September 2004 pre-dated DCMS issuing Certificates, in accordance with Schedule 1 to the Films Act 1985, in relation to each of these films, certifying, in each instance, that the master negative, master tape or master disc of each film is a qualifying British Film:

> *"…The active negotiations through July and August resulted in a position where the principal parties, Micro Fusion, Pathé and MHP (the production services company which carried out physical production of the film) felt sufficiently committed, as a commercial manner, to permit shooting of the principal photography of the film to begin on 20 September 2004. By that point Future had put to the prospective investors and members in Micro Fusion a Specific Film Offer in relation to Mrs Henderson Presents which it is presumed was acceptable to them, at least in principle (a revised Specific Film Offer was made to them shortly before their actual investment at the time of "financial closing"). That commercial commitment was followed by the legal commitment made by the various documents entered into by Micro Fusion and the other parties on 1 October 2004 …Those documents conferred on Micro Fusion the licence to produce the film, provided for the physical production of the film, provided for the means of financing the film beyond bridging finance, and provided for the distribution of the film and the earning of income from its exploitation by Micro Fusion. At that point Micro Fusion can certainly be regarded as having set up its business by completing the matters preparatory to commencing trade, and to have begun operational activities. It is true that the agreements made on 1 October 2004 could possibly have been terminated before the point of "financial closing" was reached, but commercially, with production of the film underway, and with all the parties having a common interest in ensuring that matters proceeded to such a closing, that was unlikely."*

(vii) *Halcyon*:

96. In *Halcyon*, the appellant ("Halcyon") was a limited liability partnership carrying on a trade or business which consisted of or included the exploitation of films. Halcyon had, in relation to that trade, claimed a loss in its tax return for the year to 5 April 2004 of £14,021,371, comprising a claim for relief under the special provisions relating to expenditure incurred on films and a loss in computing profits arising by reason of the payment of fees for film consultancy services. HMRC, in a closure notice, disallowed the claim for relief in full and the majority of the trading loss. Of the four issues considered by Special Commissioners Sadler and Clark, only the second, being, in summary, when Halcyon commenced its trade or business consisting of or including the exploitation of film ("the Commencement Issue"), is pertinent to this appeal.

97. The facts of *Halcyon* were very similar to *Micro Fusion.*

98. At §§85 -108 of *Halcyon*, the Special Commissioners considered the Commencement Issue. As in *Micro Fusion*, Halcyon argued that it commenced its trade on 31 March 2003, relying on (i) the FCA between Halcyon and LM Investments Ltd ("LMI") and (ii) the EAFA between Halcyon and IMPDC, which HMRC argued was a sham. The Commissioners noted that Halcyon was relying upon the rights and obligations arising under the FCA and EAFA as evidence of the commencement of trade. HMRC argued that Halcyon commenced its trade on 9 December 2003 when it acquired its interest in the master negatives of the films. The Commissioners again noted that the Commencement Issue was largely a question of fact, dependent on the nature and extent of the activities of Halcyon in the period before it purchased the master negatives of the films. They considered the terms of the FCA and the

EAFA. They did not accept HMRC's argument that the EAFA was a sham. However, they concluded that Halcyon commenced its trade on 9 December 2003, when it entered into sale and leaseback transactions in relation to the films *Method*, *Asylum* and *Samantha's Child,* once again regardless of the fact that this date pre-dated DCMS issuing Certificates, in accordance with Schedule 1 to the Films Act 1985, in relation to each of these films certifying, in each instance, that the master negative, master tape or master disc of each film is a qualifying British Film. In reaching this decision, the Commissioners adopted and applied the *Mansell* principles. Whilst the Commissioners accepted that Halcyon acquired rights and incurred obligations under the EAFA and presumably under the FCA, the Commissioners did not accept that Halcyon commenced its trade by reason of entering into the EAFA and the FCA. At §106 - 107, the Commissioners stated:

> *"106 ...As with Micro Fusion, by entering into those arrangements Halcyon put itself into the position whereby it could commence its trade of exploiting films, but it did not establish to our satisfaction that it took action to pursue in any realistic way the exploitation of the rights it had acquired… No documentary evidence of any activity of this kind was available to us. We also note that Halcyon was established (and promoted in its prospectus) as a partnership with a business intended for exploiting completed films by sale and leaseback transactions …, and that reinforces the view that there was no realistic pursuit of any trading activity in relation to those rights it had acquired. In terms of the principles set out in the Mansell case, Halcyon did not in truth engage in "operational activities" by entering into the EAFA and the FCA.*
>
> *107. Instead, Halcyon's trade began when it acquired the master negatives of the films Method, Asylum and Samantha's Child: that is the point at which Halcyon first engaged in the "operational activities" which resulted in or comprised its profitmaking business."*

(viii) *Hunt*:

99. In *Hunt*, the First-tier Tax Tribunal heard Mr Hunt's appeal against HMRC's decision denying his claim for relief under s 253(4) TCGA for capital losses of £4,905,896 incurred as a result of being called upon to make a payment of £17,602,601 under a personal guarantee given to Barclays Bank Ltd ("Barclays") in respect of a loan to Altala Group Limited ("Altala"). The sole issue in the appeal was whether or not Altala commenced trading. If it did, Mr Hunt was entitled to the relief claimed.

100. As to the facts[10], NHS Lotteries Limited had developed the concept of an alternative to 'The National Lottery' with fixed payouts and where the National Health Service was the beneficiary. Altala was incorporated on 17 May 2007. It undertook a share exchange agreement with NHS Lotteries Ltd, which had no funding, and continued the development of 'The Health Lottery' concept. The Health Lottery was a 'Society Lottery', as such, it was able to employ an External Lottery Manager ("ELM") to manage all or part of the lottery. An ELM must hold a Gambling Commission lottery manager operating licence and be able to demonstrate its independence from the Society Lottery. The ELM and the Society Lottery also needed to hold a remote gambling licence if they intend to sell tickets remotely i.e. by internet or telephone. On 6 June 2008, Altala made an application to the Gambling Commission for a licence to operate the lottery.

101. Altala was funded by a 2-year unsecured loan facility from Barclays for £17.5m, which was drawn down in its entirety by 2 October 2008. Mr Hunt, via his nominee ABC Corporation, personally guaranteed the loan. Companies were formed that entered into supply

[10] These facts were adopted by Judge Brooks from the brief history in the Administrator's Report, dated 29 January 2010.

contracts in preparation for the anticipated launch of the lottery. Using the loan facility, Altala undertook a 16-month planned development phase creating a 'lottery in a box'. Substantial investment was made developing IT software, systems and websites for the business. Altala commissioned market research studies with 1,700 subjects, instructed a marketing agency and an advertising agency to prepare marketing materials and advertising campaigns and recruited an expert team to ensure the required operational infrastructures and processes were in place. Specialist assets were purchased and rigorously tested whilst prize insurance was put in place at a cost of £285,000. Specifically, 2 lottery ball machines with balls at a cost of €145,000 were purchased and 4 million 'Play Cards' were designed, procured and manufactured: due to the lead time involved (12 weeks) this had to be completed in advance of the Gambling Commission decision so as to meet the launch date. A field solutions team were engaged to train the retailers and to ensure there was a strong point-of-sale reference when the lottery launched. By August 2008, 21,000 retailers had agreed in principle to support the Health Lottery including well-known names such as Esso, SPAR and Morrisons. A customer contact centre was established with approximately 20 people being recruited and trained in advance of the launch. Altala entered into agreements with 52 Community Interest Companies ("CICs"), and these Agreements were conditional upon both Altala and the CICs obtaining the necessary licences. Agreements were also in place with counter payment terminal providers, that were subject to significant set-up fees payable in advance by Altala, and transaction network providers.

102. Ultimately, the Gambling Commission were minded to refuse the licence application whilst Mr Hunt had any interest in the licensed activities due to his previous criminal conviction for serious fraud, about which he had been entirely candid. Altala was unable to secure fresh finance. On 1 September 2009, Barclays called in the loan. Mr Hunt, via his nominee, paid the sums due under the guarantee. On 24 November 2009, Altala withdrew its application to the Gambling Commission and, on 4 December 2009, Altala entered into administration.

103. In the circumstances, Mr Hunt argued that Altala had commenced operational activities. In contrast, HMRC argued that, notwithstanding the very significant preparatory work and the sums expended, Altala had not commenced operational activities, primarily because it had not obtained a licence form the Gambling Commission.[11] At §§7-8, Judge Brooks cited *Mansell* and *Tower MCashback.* It was common ground that he should apply the *Mansell* test, which he did. First, he held that there was a fairly specific concept of the activity to be carried on. Second, he accepted that Altala had established a framework or structure for the trade, even in the absence of a licence from the Gambling Commission. Third and again in the absence of a licence, Judge Brooks found that Altala had commenced operational activities stating:

> *"80. Although, because it did not hold an Operating Licences from the Gambling Commission, the condition precedent in the contracts with the CICs was not met, Altala nevertheless not only entered into agreements with the CICs to provide services but, as described above, created the infrastructure for a lottery and entered into dealings with third parties as required by that agreement, eg by making arrangements for the sale of tickets, procuring the equipment required to make the draw and making agreements with "an appropriate broadcaster and production company". In doing so Altala incurred substantial expenditure and clearly put its money at risk in the hope that it would give rise to profits."*

[11] Notably, HMRC accepted that if the Gambling Commission had granted Altala a licence it would have been trading, see § 74.

104. Accordingly, Judge Brooks decided that Altala had commenced trading and, consequently, Mr Hunt was entitled to relief under s.253(4) TCGA.

DECISION

105. We have considered all of the submissions (written and oral) which have been made to us and taken them all into account in reaching our decision. Whilst we have outlined some of them below, we have not found it necessary to refer to all of them. That does not mean that they were not considered.

106. This appeal concerns the availability of ER to reduce the rate of capital gains tax payable by the Appellant in respect of the Disposal.

107. The burden of proof is on the Appellant to establish that he has been overcharged by the amendments made by the closure notice, otherwise the assessment shall stand good. The standard of proof is the balance of probabilities. The issue in this appeal is whether the Disposal constituted a material disposal of business assets under section 169I(1) TCGA. Specifically, Mr Wardle must establish that as at 28 February 2018 the LLP was a business within the meaning of S.169S (1) (a-b) TCGA.

108. The Appellant contends that the Disposal is a qualifying business disposal within s.169H (1) TCGA. Specifically, he contends that it is a material disposal of business assets within s.169I TCGA.

109. S.169I, as detailed at paragraph 75 above, provides that there is a material disposal of business assets where (a) an individual makes a disposal of business assets(s.169I(1)(a)) which is defined as *"a disposal of the whole or part of a business"* (s.169I(2)(a)); and (b) that disposal is a material disposal, meaning if *"the business is owned by the individual throughout the period of 2 years ending with the date of the disposal"* (s.169I(1)(b) & 3). For this purpose, each member of an LLP is deemed to own the business of the LLP (s169I(8)(c)). For the avoidance of doubt, it is agreed between the parties that as at the date of the Disposal the appellant had owned the units sold throughout the period of two years ending with the date of the Disposal (s169I(3) TCGA).

110. S.169S(1) defines the term *"business"* in TCGA as (a) anything which is a trade, profession or vocation and (b) is conducted on a commercial basis with a view to the realisation of profit. Accordingly, there are 3 components. First, the business must be a trade, profession or vocation. Second, it must be conducted on a commercial basis. Third, it must be so conducted with a view to the realisation of profit. As to the first component, s.169S(5) TCGA provides that *"trade"* bears the same meaning as in s.989 ITA 2007. It is agreed between the parties that the sale of electricity and/or ROCs is a trade within the meaning of s.989 ITA 2007. However, the Respondents do not accept that the LLP was trading for the period of 2-years ending on 28 February 2020 ("the Relevant Time"). In accordance with the meaning of trade in *Ransom v Higgs*, the Respondents contend that the LLP was not in a position to provide the goods (electricity and ROCs) which it was its trade to provide and did not do so at the Relevant Time.

111. Accordingly, the central issue in this appeal is when, if at all, the LLP commenced trade. The Appellant argued that the LLP was a trading on a commercial basis with a view to a profit from Financial Close, being 21 August 2015, up to the Disposal, so satisfying the definition of a business in section 169S(1)TCGA. The Respondents did not accept that the LLP had commenced trade at 28 February 2018 or at all prior to the date of the Disposal, being 28 February 2020. Specifically, the Respondents contended that as at 28 February 2018 the LLP had not set up the business because construction was incomplete, commissioning was outstanding, ROC Accreditation had not been obtained, electricity had not been produced

and, accordingly, the LLP was not in a position to trade with anyone[12] . Notably, however, the Respondents did not argue for an alternate date for either set up or the commencement of trade.

112. The parties were not, completely, agreed as to the authorities to apply to the question of when the LLP commenced trade. The Appellant, relying on *Wardle 2*, argued for *Mansell*. The Respondents argued for *Mansell*, but through the lens of *Birmingham District Cattle.* We consider that we should apply *Mansell.* In reaching this conclusion we have considered the following points:

(1) First, *Mansell*, being a decision of the Special Commissioners, is not in itself binding on us. However, the *Mansell* test was approved and applied by Mr Justice Henderson in *Tower MCashback* in the context of s.11 CAA 2001, which, as a decision of the High Court, is binding upon us.

(2) Second, whilst *Birmingham District Cattle* is a High Court decision of Rowlatt J, in *Kirk & Randall v Dunn* Rowlatt J appears to resile from his earlier decision, see above. Whilst Rowlatt J does not refer to *Birmingham District Cattle* by name in his judgment, he expressed doubt about his conclusions in earlier cases concerning Excess Profits Duty (*Birmingham District Cattle* being such a case) and concluded that he had taken too narrow a view in those earlier cases and not paid much attention to internal, functional activities of the companies. Additionally, in *Khan v Miah* the House of Lords, specifically Lord Millett, expressly doubted that *Birmingham District Cattle* had been correctly decided and noted that Rowlatt J had, apparently, expressed his own reservations about the decision in *Kirk & Randall v Dunn*, see above. Finally, in *Mansell,* Special Commissioner Hellier referenced *Birmingham District Cattle* but noted that Lord Millett in *Khan v Miah* had cast doubt on the decision. Accordingly, in all the circumstances, especially noting that Rowlatt J himself expressed reservations about the decision, that other Court of Appeal decisions took a freer view considering internal functions as indicative of the commencement of trade and that the House of Lords have expressed doubt as to the correctness of the decision, we do not consider it correct to apply *Birmingham District Cattle*.

(3) Third, we do not consider it possible to apply *Mansell* through the lens of *Birmingham District Cattle*. Whilst we note that *Birmingham District Cattle* was cited in *Mansell*, we consider that the two authorities are inconsistent. *Birmingham District Cattle* pinpoints the commencement of trade on the taking in of raw materials and the turning out of product whereas *Khan v Miah* and *Mansell* expressly acknowledge that trade can commence at an earlier time, being before the first sale

(4) Finally, we wish to note that *Mansell* was a case concerning when trade was 'set up' and 'commenced' whereas this appeal concerns whether a trade is conducted on a commercial basis with a view to the realisation of profits, as per s.169S (1) (a-b) TCGA. In short, the statutory tests are not precisely the same. We have debated whether or not the terms 'commenced' and 'conducted on a commercial basis with a view to the realisation of profits' are different ways of saying the same thing. Giving due deference to the legislators, we are not sure that they are. However, both parties contend for the application of the *Mansell* test and we acknowledge that *Hunt* applied Mansell to s.253 (1) (a) TCGA and *MCashback* applied *Mansell* to s.11 CAA 2001 concerning the carrying on of a qualifying activity.

113. We turn now to the application of the *Mansell* test to the facts of this appeal.

[12] Paragraph 71 of the Respondent's Skeleton Argument.

114. As to the first step, the parties are agreed (and we agree) that the LLP had a specific concept of the type of activity to be carried on, namely generating profit from the construction and operation of a power plant burning wood waste where the revenue would be derived 1/3 from production and sale of electricity and 2/3 from the sale of ROCs. Accordingly, the first step in the *Mansell* test is satisfied.

115. As to the second step, in light of the parties' ultimate agreement on the first and third steps, the appeal turns on whether or not the second step in the *Mansell* test is satisfied. Step 2 provides *"...that a trade cannot commence until it has been set up (to the extent it needs to be set up), and that acts of setting up are not commencing or carrying on the trade. Setting up trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision-making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up."* We have considered whether or not 'set-up' needs to be fully completed before Step 3, Operational Activity. We have considered *MCashback* where the court stated that the *Mansell* test *"...presupposes that the framework or structure for the trade will have to be set up or established before any operational activity can begin ."* We have also considered *Microfusion,* §110 where set-up was referred to as completing matters preparatory to trade. We have concluded that 'set-up' does not require full, 100% completion. In reaching this decision, we refer to and rely on the wording of *Mansell* which qualifies 'set-up' with the words *"to the extent it needs to be set up"*, which suggest to us that there is a threshold level at which 'set-up' can be achieved although incomplete. We consider that this view is supported by *Microfusion* where the *Mansell* test was satisfied in the absence of the DCMS certification and *Hunt* where the Mansell test was satisfied in the absence of the Gambling Licence. Accordingly, Step 2 requires the setting up of the business, to the extent it needs to be set up which is a fact-sensitive analysis and what is required to set up one business to the requisite level will vary (potentially greatly) from what is required to set up another. Further to Judge Hyde's comment in *Wardle 2,* §101, we also consider that, perhaps depending on the trade in question, set-up can co-exist with operational activity in that there is not necessarily a bright line moving between the two, but that, in reality, the two could proceed hand-in-hand.

116. We are satisfied that the second step in the *Mansell* test is satisfied. In reaching this decision, we refer to and rely on the following points. First, the Partnership Agreement organised the decision-making structure and management, as detailed at paragraph 32. Second, the finance was fully organised with funds being drawn down from 24 August 2015 and continually thereafter, as detailed at paragraphs 26-29, 33 and 38. Third, Financial Close was reached , as detailed at paragraph 34 above. Whilst it is true that the suite of agreements could possibly have been terminated, we consider this unlikely as very significant work had been undertaken, the counterparties had a common goal and, from at least Financial Close all parties were committed. Fourth, on 24 August 2015 notices to proceed were issued, as detailed at paragraph 38 above. In summary, the train was on the tracks travelling to its destination. Its journey appears to us rather like a continuum, and having a genuine and very substantial commercial underpinning and purpose. It was being conducted under the integrated suite of agreements determining many aspects of its activity, including operational activities as described below. These were inter-related and had been drawn up to a high degree of complex legal, financial and technical detail. For the avoidance of doubt, we have given anxious scrutiny to the fact that as at 28 February 2018 the G59 certificate was not obtained and Clause 2.2 of the PPA was not satisfied, as not all of the pre-conditions were met. However, for the reasons given in paragraph 115 above, we are satisfied that this does not preclude Step 2 from being satisfied. We note that the level of 'set up' in this case is

commensurate with the level of set up in *Hunt*, albeit we have taken into account that these are different businesses and, therefore, that the decision in *Hunt* is not determinative.

117. As to the third step, during closing submissions and in response to our question, the Respondents conceded that if the second step was satisfied then the PPA would satisfy the third step as the PPA was operational activity, being dealings with a third party that were immediately and directly related to the supplies to be made which it is hoped will give rise to expected profit and which involved the LLP putting money at risk. For the avoidance of doubt, we agree that the PPA constitutes operational activity. Pursuant to Clause 4.2 of the PPA, the LLP agreed to sell and the Power Purchaser agreed to buy all metered output produced by the Plant and delivered to the delivery point. The entering into the PPA, being a contract to provide goods / services, expressly comes within the examples given at *Mansell* §93 of operational activity. It is not necessary for there to have been a sale. Further or alternatively, we consider the LLP's position under the PPA is analogous to another example of operational activity given in *Mansell* at §93, being the speculator who contracts to sell what he has not bought. We have again taken into consideration the fact that, as at 28 February 2018 the LLP had not received the G59, nor had it satisfied the Condition Precedent at Clause 2.2 (a) of the PPA. However, again in reliance on *Microfusion* and *Hunt,* we do not think that this precludes the PPA from satisfying the third step. For the avoidance of doubt, we are also satisfied that the FMA and/or the O&M Contract constitute operational activity. As to the FMA, in line with *Mansell* it is the acquisition of goods (wood) to be turned into items to be sold (electricity), see *Mansell* §93. As to the O&M Contract, it is the provision of services namely the hire and training of staff who were no doubt paid, again see *Mansell,* §93. Accordingly, for each of these reasons, both individually and cumulatively, we are satisfied that the third step in *Mansell* is satisfied.

118. In conclusion, we are satisfied that the LLP traded in the Relevant Period and, consequently, we are satisfied that the Appellant is entitled to ER and we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

119. 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.

JENNIFER NEWSTEAD TAYLOR
TRIBUNAL JUDGE

Release date: 19th JUNE 2024