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Case Number: TC09318

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal Reference: TC/2020/03466
TC/2020/03467
TC/2020/02099
TC/2020/02101
TC/2020/02103

CAPITAL GAINS TAX – whether limited liability partnership carried on "a trade or business with a view to profit" for the purposes of s 59A(1) TCGA 1992, discovery assessments – whether "discovery" made for the purpose of s 29 TMA 1970. Appeal allowed.

Heard on: 19-22 September 2023
Judgment date: 17 October 2024

Before

JUDGE VIMAL TILAKAPALA
MEMBER JO NEILL

Between

GCH CORPORATION LTD (1)
GCH ACTIVE LLP (IN LIQUIDATION) BY GREGORY HUTCHINGS (2)
G F HUTCHINGS CHILDRENS SETTLEMENT (3)
G F HUTCHINGS NO 1 SETTLEMENT (4)
G F HUTCHINGS NO 3 SETTLEMENT (5)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Oliver Marre of counsel, instructed by PB Associates

For the Respondents: Harry Dixon litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellants are:

   (1) GCH Corporation Limited (the Company)

   (2) GCH Active LLP (the LLP)

   Three settlements created by Gregory Hutchings for the benefit of his family. These are:

   (3) The GF Hutchings No.1 Family Settlement (the "No.1 Trust")

   (4) The GF Hutchings No. 3 Family Settlement (the "No.3 Trust")

   (5) The GF Hutchings Children's Settlement (the "Children's Trust" and collectively with the No.1 and No.3 Trusts, the "Trusts")

2. The Appellants appeal against the following decisions:

   (1) A closure notice issued to the LLP on 11 May 2020 under ss.28B(1) and 2 of the Taxes Management Act 1970 ("**TMA**") amending the LLP's tax return to reflect the fact that it was opaque and so should have submitted a corporation tax return and not a self-assessment return, but reducing the tax returned to nil (the "**LLP Closure Notice**").

   (2) A closure notice issued to the Company on 11 May 2020 under para. 32, Sched. 18 Finance Act 1998 ("**FA 98**") amending the Company's tax return to reflect the fact that a transfer by the Company to the LLP of loan notes (the "**Loan Notes**") was, in consequence of the LLP's tax opacity, a disposal, and amending the Company's return to reflect tax due of £399,114.82 (the "**Company Closure Notice**").

   (3) Assessments issued to each of the Trusts on 3 July 2020 under s.29 TMA assessing them to tax in respect of their transfers of Loan Notes to the opaque LLP amounting to disposals of those Loan Notes (the **Trust Discovery Assessments**). The tax assessed under each of these assessments was as follows:

      (a) Childrens' Trust - £414, 873.48

      (b) No.1 Trust - £557,413.08

      (c) No. 3 Trust -£1,652.294.30

STRUCTURE OF THIS DECISION

3. The structure of this Decision is as follows:

   (1) Preliminary issues.

   (2) The grounds of appeal – we set out the grounds of appeal and the two issues to be determined, together with the burden of proof for each.

   (3) The relevant facts – we set out the relevant facts together with additional findings made on the basis of the evidence before us.

   (4) The procedural history of the appeals.

   (5) The relevant law – we set out the statutory provisions relevant to each of the issues before us and the burden of proof.

(6) Discussion – we set out in respect of each issue the parties' submissions and our discussion in which we consider the authorities and apply the law to the facts as found.

(7) Disposal – our decision.

PRELIMINARY ISSUES

4. The hearing took place over four days. We were provided with skeleton arguments from each party, a statement of agreed facts, a hearing bundle of 1599 pages and an authorities bundle.

5. Further written submissions, together with an additional authorities bundle were provided by the parties on 6 October 2023. These related to the Tribunal's ability to enquire into aspects of the tax treatment of the transactions underlying the Appeals which aspects were not addressed in the Grounds of Appeal or statements of case. Due to administrative errors these submissions were received only in December 2023.

6. The Appellants' further submissions focused on the statutory jurisdiction of the first tier tribunal (the "Tribunal") as set out in the Tribunal, Courts and Enforcement Act 2007 ("TCEA"). They focused also on the fact that their rights of appeal derive from s.49G TMA (and so follow through to s.31 TMA) as HMRC offered and they accepted an internal statutory review of the original assessments to tax. S.49G(4) TMA provides that "if the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question". S.49(1)(a) TMA provides that the "matter in question" means "the matter to which an appeal relates".

7. The Appellants went on to set out the principles derived from *HMRC v Tower MCashback* [2011] UK SC 19 as applied in *B&K Lavery Property Trading Partnership v HMRC* [2016] UKUT 525. In essence, as per the dictum of Moses LJ in the Court of Appeal in *Tower MCashback,* "the subject-matter of [a Tribunal] appeal is defined by the subject matter of the enquiry and the subject-matter of the conclusions which close that enquiry".

8. The Appellants also emphasised the significance of being able to rely on HMRC's statement of case as setting out the case which they were required to answer, highlighting this as an essential component of a fair trial. In this regard they cited *Burns v FCA* [2017] EWCA Civ 2140 in support.

9. HMRC submitted that it was open for the Tribunal to consider wider issues directly relevant to the tax treatment of the transactions under consideration in circumstances where they had not been raised and there was no material before the Tribunal to show that they had been considered. This was subject to the requirement that the Tribunal provided the parties with an opportunity to make submissions on those points that the Tribunal wished to consider – in other words subject to the requirements of fairness and proper case management.

10. In support of their submission HMRC also cited *Tower MCashback*, in this case Lord Walker's approval at [15] of the High Court's conclusion that:

> "… if the Commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the Commissioners on their own initiative."

11. The background to our request for further submissions was the lack of information available to us on what we regarded as certain threshold issues potentially relevant to the tax treatment of the underlying transactions. These included questions as to whether the Loan Notes were non-qualifying corporate bonds and, on the assumption that they were, questions as to how their base cost had been computed.

12. Having considered the parties' further submissions, we concluded that we should not enquire into matters not within the Grounds of Appeal or the statements of case provided to us.

13. In reaching our decision we have taken into account the following facts: that our questions were of a general, background nature – there were no specific indicators that the analysis *had not* been carried out; the issues were not raised by HMRC, the parties had agreed in advance that there were only two issues to be considered; and (as per *Volkswagen Financial Services (UK) v HMRC* [217] UKSC 26 at [7]) the parties are "substantial litigants" represented by experienced counsel and so we are entitled to "assume that [they] will have identified with some care what they regard as relevant issues for decision". Accordingly we have limited ourselves to considering the issues raised in the appeal only.

THE GROUNDS OF APPEAL AND THE ISSUES FOR DETERMINATION

14. The Appellants Grounds of Appeal are as follows:

    (1) That the Company and LLP Closure Notices and the Trust Discovery Assessments are invalid as the LLP satisfied the conditions of s.59A(1) Taxation of Chargeable Gains Act 1992 ("TCGA").

    (2) That the requirements of s.29 TMA were not satisfied in respect of the Trust Discovery Assessments.

15. There are two issues for determination, the second being contingent on the first.

16. The first is whether the LLP met the requirements of s.59A(1) TCGA.

17. It is common ground that if the requirements of s.59A(1) TCGA were satisfied by the LLP so that it was tax transparent at the time the Loan Notes were transferred to it, no additional tax would be due from the Appellants. This is because the transfers of the Loan Notes to it would have been contributions of capital by its members rather than disposals of the Loan Notes. We refer to this as the "Substantive Ground".

18. If the Appellants succeed on the Substantive Ground, there will be no tax to assess and the assessments against all of the Appellants will fall away.

19. If the LLP did not satisfy the requirements of s.59A(1) TCGA and so was opaque for tax purposes at the time the Loan Notes were transferred to it, it is common ground that there would have been a disposal of the Loan Notes by the Trusts and the Company. In this case, to determine the liability to tax of the Trusts, it is necessary to consider when the Trust Discovery Assessments were validly made under s 29 TMA. This is the second issue, and we refer to this as the "Procedural Ground".

20. If the Appellants succeed on the Procedural Ground, the Trust Discovery Assessments will not be valid and only the assessments against the Company and the LLP will be valid.

21. The quantum of the assessments has not been challenged.

THE RELEVANT FACTS

The background facts

22. The facts set out below include facts contained in an "Agreed Statement of Facts" provided by the parties together with additional facts found on the basis of the evidence before us.

23. Gregory Hutchings is the trustee of the GF Hutchings No.1 Family Settlement, the GF Hutchings No.4 Family Settlement and the GF Hutchings Children's Settlement (together the "**Trusts**"). He is a director and shareholder of GCH Corporation Limited (the "**Company**").

24. Cassandra Hutchings is the daughter of Gregory Hutchings and also a director and shareholder of the Company.

25. As of June 2010, the Company and the Trusts held the following shares in Tomkins PLC ("**Tomkins**")

The Company	5,364,223
The No. 1 Trust	637,925
The No. 3 Trust	1,853,180
The Childrens' Trust	530,984

26. On 27 July 2010 a press release announced that Pinafore Acquisitions Ltd ("**Pinafore**"), a subsidiary of the Healthcare of Ontario Pension Plan, was in discussions with Tomkins about a possible takeover at 325 p per share.

27. On 18 August 2010 Mr Hutchings' solicitors instructed Counsel to advise on the sale of the shares held by the Company and the Trusts and on 25 August 2010 Counsel gave his opinion. The instructions to Counsel and the advice received are not available as they are privileged.

28. On 25 August Mr Hutchings also enquired with a broker, Marshall Securities Limited ("**Marshall Securities**") about the latest yield figures and current prices for a range of shares and was provided with a schedule containing that information. Mr Hutchings was also sent a client agreement letter in order for the LLP to be taken on as a retail client of Marshall Securities (only the first page of this letter was included in the hearing bundle).

29. On 26 August 2010, the LLP was incorporated under the LLP Act 2000 (LLPA 2000). The two initial members were Mr Hutchings and GCH Corporation. Mr Hutchings was acting as nominee for the No.1 Trust and the No.3 Trust.

30. Also on **26 August 2010**, the LLP purchased five holdings of the following ordinary shares at the following prices:

National Grid	7,400 shares	£39,825.28
RSA Insurance Group	32,000 shares	£39,760.59
Royal Dutch Shell	2,400 shares	£39,728.96
Scottish & Southern Energy	3,550 shares	£39,992.85
United Utilities	7,000 shares	£39,757.36

31. On **1 September 2010** the LLP disposed of the following two shareholdings for the following prices:

Royal Dutch Shell	2,400 shares	£40,637.76
Scottish & Southern Energy	3,550 shares	£40,990.35

32. On 24 September 2010 the takeover of Tomkins by Pinafore was completed.

33. Under the takeover terms GCH Corporation exchanged 1,000,000 of its shares in Tomkins for Floating Rate Cash Secured Notes 2015 (the "**Loan Notes**") issued by Pinafore in the amount of 325p per share and its remaining 4,364,222 shares were sold to Pinafore for cash (again 325p per share). The Trusts exchanged all of their Tomkins shares for Loan Notes (also at 325 p per share).

34. The Loan Notes provided for interest to be paid at a rate per annum being "the higher of 0.8% below LIBOR and 0%. As LIBOR was below 0.8 for the period during which the Loan Notes were in issue the interest rate would have been zero.

35. Following the takeover, the face values of the Loan Notes held by GCH Corp and the Trusts were as follows:

GCH Corporation Ltd	£3,250,000
The No.1 Trust	£2,073,256
The No 3 Trust	£6,022,256
The Children's Trust	£1,725,698

36. On **18 May 2011** the following transactions took place:

(1) A partnership agreement was drawn up under which the "initial and designated members" of the LLP (the Company and Mr Hutching as nominee for Trust 1 and 3) admitted as a member Mr Hutchings in his capacity as nominee for the Children's Trust to the partnership.

The profit sharing ratio (which corresponded to the Members' Loan Note entitlements) was set out Schedule 3. The Business of the LLP was defined as follows: "acquiring, holding and selling shares, securities and other assets with a view to profit, which commenced on 26th August 2010 and which is to be continued in accordance with this deed" (clause 1.1).

(2) The Members sold their Loan Notes to the LLP for a price equal to a 2% discount to their face value, the consideration for the purchase being by way of interest free indebtedness.

(3) The LLP signed a deed of variation agreeing at the request of the Company to enter into a charge over the Loan Notes to secure the payment obligations of the Company as buyer of shares in HK Timbers (Holdings) Ltd. The charge would be in favour of the seller of the shares (Peter Holmes). This was one of the conditions under which the Loan Notes were sold to the LLP.

(4) A Facility Agreement for £200,000 was drawn up under which Mr Hutchings agreed to provide the LLP with an unsecured demand loan facility of £200,000. The agreement stated that the facility had been made available to the LLP on 25 August 2010 and, at clause 4, that the loan had been advanced in a single amount on that day. The purpose of the facility was stated to be the provision to the LLP of finance for it to "commence and carry on its business pending contributions of capital by the members of the [Borrower]"

37. On **21 May 2011**, the LLP entered into a deed of variation (to a charge dated 2010) under which it agreed to become the substituted chargor of 1,100,000 Loan Notes in respect of a charge of the Loan Notes in favour of the seller of HK Timbers.

38. On **7 June 2011** Mr Hutchings signed a declaration of solvency for the LLP.

39. On **10 June 2011**, the LLP signed a determination pursuant to s.288 of the Companies Act 2006 and s.81(4) of the Insolvency Act 1986 and entered into a members' voluntary liquidation.

40. On 13 June 2011 the LLP (in liquidation) redeemed the Loan Notes by providing notices of redemption as per the Loan Note terms and conditions.

41. On 21 June 2011, the LLP (in liquidation) disposed of its remaining shareholdings as follows:

National Grid	7,400 shares sold	£43,354.70
RSA Insurance Group	32,000 shares sold	£41,841.68
United Utilities	7,000 shares sold	£41,495.84

42. The share disposals were at a profit. The LLP also received dividends on some of its shareholdings during the period for which they were held.

43. The LLP did not have a bank account, Mr Hutchings used his personal bank account for LLP transactions.

44. The following is a summary of the facts found from the witness evidence (written and oral) of Mr Hutchings, Cassandra Hutchings, Francesca Marks and Andrew Young.

Mr Hutchings' evidence

45. Mr Hutchings is a successful businessman.

46. After gaining experience at Hanson Trust in buying and selling companies and dealing with City corporate financiers, he used his acquired expertise to borrow money and purchase a 30% stake in Tomkins, a publicly listed company.

47. He joined Tomkins initially as Chief Executive Officer, subsequently becoming Executive Chairman.

48. During his involvement with Tomkins it grew from a GBP 6 million business to one worth GBP 5 billion, with GBP 500 million profits, 70,000 employees and over 60 different manufacturing companies globally. During his time with Tomkins its earnings and dividends per share grew every year.

49. Mr Hutchings left Tomkins in 2000. He described himself as having been "hounded out". After spending almost three years during which he was, in his own words "lost", "depressed" and with "nothing to do", he returned to the business world, acquiring for GBP 2.137 million, 12.5% of Lupus Capital plc, a GBP 17 million quoted company. This business grew into a GBP 300 million business over the following 4/5 years.

50. In the 2008 financial crisis disagreements arose with Lupus Capital's bankers which led to Mr Hutchings' departure in 2009 in what he termed "difficult circumstances".

51. During his time at Tomkins and Lupus Mr Hutching's family trusts had built up substantial shareholdings. These had been acquired using his personal income and share options acquired whilst at Tomkins.

The business plan and setting up GCH CAPITAL

52. After becoming unemployed he began to investigate ways in which he could use his capital "to generate income substantially in excess of the poor risky returns generally available".

53. It was against this background that he set the Company up in March 2010. His aim was to use it to acquire a number of small cash generating industrial businesses to hand down to

future generations and to generate an income and build up a substantial business for the family's future security and benefit.

54. He planned to have a mentoring and strategic role in the Company, with day-to-day management being left to Cassandra Hutchings who, having recently completed an MBA, was interested in running a business.

55. The Company made its first acquisition in April 2010 (HK Timbers Ltd) and a second (Unitruck Ltd) in February 2011. It went on to acquire further businesses (as at the hearing date it owned 9 companies). As at the hearing date it was reported by Mr Hutchings to be financially profitable and stable.

56. The Company also acquired from Mr Hutchings the shares that he held in Tomkins.

The Tomkins takeover and incorporation of the LLP

57. Within a few months of the Company being established, Pinafore made its takeover bid for Tomkins.

58. Pinafore was an acquisition vehicle owned by a Canadian pension fund – an entity unconnected to Mr Hutchings. At that time of the bid, Mr Hutchings was no longer in contact with Tomkins.

59. The takeover offered a cash or loan note alternative.

60. The Trusts opted to take the Loan Notes. The Company opted to take Loan Notes for GBP 1 million of shares and cash for the remainder.

61. Mr Hutchings believed that taking the Loan Notes rather than cash would help the shareholders defer cash payments over a number of years. He also thought that it would help the shareholders manage their taxable receipts through realising the notes in particular tax years.

62. Mr Hutchings decided to use "his share" of the money to establish a limited liability partnership – with the intention to make a profit by trading public company stocks in a manner similar to hedge funds/family offices asset management businesses. Given his background with Tomkins and Lupus he was confident that he could make a success of trading stock market stocks and shares "like hedge funds and assets managers".

63. The LLP was formed within a month of the Tomkins takeover announcement.

64. The Loan Notes were issued to the Company and Trusts on 24 September 2010. They were sold in May 2011 to the LLP at a 2% discount to their face value (the sale proceeds being left on loan account) enabling the LLP to make a profit when the Loan Notes were subsequently redeemed.

65. The LLP used some of the Loan Notes to guarantee the deferred consideration payable by the Company on its earlier purchase of HK Timbers. The discounted sale price was described as, in part, consideration for that guarantee.

Reason for establishing the LLP

66. Mr Hutchings said that he had been advised by lawyers that using an LLP could help mitigate tax on the gains on the Tomkin shares and that his lawyers had come up with an arrangement that used the LLP.

67. Mr Hutchings was not present at the consultation with Counsel at which the mitigation structure was discussed nor did he see the instructions to Counsel or the note of consultation,

68. Mr Hutchings had some understanding of how the tax mitigation was intended to work and was able to describe it in his written witness statement. In essence:

i. As the LLP was carrying on a trade or business it would be transparent and so transfer of the Loan Notes to it by its members (in proportion to their LLP interests) would not result in a chargeable gain as it would be a capital contribution.
ii. On subsequent appointment of a liquidator the LLP would become opaque and be treated as always having been so and subject to corporation tax.
iii. As the liquidator would be treated as having acquired the Loan Notes at the price paid by the LLP – any gain pre-disposal to the LLP would be eliminated (and so there would in effect be a step-up of the base cost).

69. The scheme was disclosed to HMRC under the disclosure of tax avoidance scheme rules (contained in Part 7 Finance Act 2004 and related statutory instruments – the "DOTAS rules")

70. Mr Hutchings was aware that the LLP needed to be "carrying on a trade or business with a view to profit" at the time it acquired the Loan Notes – but believed that this was to be "its mission anyway". This was because it had always been his intention to start an "investment family office/hedge fund/asset management type business" as he would have substantial personal financial resources and it was obvious to him that an LLP could be a useful entity to carry it out. By ensuring that the LLP was up and running (26 August 2010) in good time before the sale (24 Sept 2010) of the shares he thought he could secure beneficial tax treatment and at the same time develop his new business venture.

The LLP's activities

71. Shortly after its incorporation, the LLP acquired five shareholdings.

72. It sold two of those holdings at a profit. It also received dividends on the remaining shareholdings. Shortly prior to liquidation it acquired the Loan Notes at a discount to their face value It also entered into a pledge of Loan Notes in respect of the Company's obligations under the HK Timbers acquisition arrangements.

73. When asked whether the business had ceased to be active after making its first disposals Mr Hutchings was adamant that it had not. It was, he said, receiving dividends and he was looking for opportunities for further transactions.

The decision to liquidate the LLP

74. Mr Hutchings found himself unable to develop the LLP's business in the way that he had intended to. This was mainly because his time was taken up with the Company's business.

75. He had underestimated the amount of hands-on time needed for acquiring and managing the two small businesses purchased at that time by the Company. He was used to working in large companies with teams of people at his disposal and his daughter was inexperienced in business.

76. It also became apparent to him from late 2010 that there were many good opportunities involving unquoted shares and if these were held for the long term the returns would "comfortably exceed" those from quoted shares. He decided to realign his efforts and to

concentrate on the Company and he took the decision to liquidate the LLP "while it was still carrying out its profitable business."

77. In May 2011 he approached Gareth Morris to liquidate the LLP – having had conversations about liquidating prior to 24 May 2011.

78. This was around the time at which the DOTAS notification was made.

79. He stressed that the liquidation was not to save tax– it merely coincided with his decision to stop running the LLP business. He maintained that the tax advantage that would result from liquidation was not considered by him when he made his decision to liquidate the LLP.

80. He was, however, aware of the potential tax saving and the size of it - the saving being estimated at over GBP 2.7 million.

81. He made the point that the Loan Notes were "available until 2015" and so there was no need to have liquidated the LLP in 2011to crystallise the benefit, and that he would have run the business for longer if it was not for his other commitments.

Mr Hutchings' involvement with the LLP's business

82. Mr Hutchings was sole decision maker for the LLP. No one else helped him. In his view he was more than adequately qualified for this role because of what he referred to as his "25 years' experience dealing in the city in shares and stocks."

83. Prior to setting up the LLP he approached Marshall Securities. He did not ask them for advice on what stocks to purchase. This was because before contacting them he had carried out a significant amount of research into what stocks the LLP should buy. Marshall Securities were therefore simply asked for further details on a number of shares that he had already selected. The list of shares and their yield returns was provided on 25 August 2011.

84. Within a day of receiving the Marshall Securities note he had selected 5 shares to buy, the speed of that decision reflecting his previous research.

85. His research had started about a month prior to the LLP's actual acquisition of shares, He had looked at "a lot of companies" and had "analysed and dismissed" several. He later said that he spent; "probably a couple of months dare I say messing around and looking at statistics of all sorts of private companies and deciding the strategy I was going to have and the strategy being to buy high yield shares that were very solid, that I could trade as appropriate or I could keep running , like Warren Buffet does, for some considerable time, paying a good profitable dividend".

86. No copies of Mr Hutchings' research were available (other than a one page sheet showing details including yield, acquisition prices and sale profits of the LLP's holdings). Mr Hutchings also had no written business plan.

87. He explained the decision to sell two of the LLP's holdings shortly after their acquisition was simply "good trading", pointing out that a profit had been made and that the early profit encouraged him to believe that his plan for the LLP was viable.

88. After the LLP's initial sale of shares, Mr Hutchings said that he continued to spend approximately 3-4 hours per day studying the market even though nothing was bought or sold over a 9 month period. He said that he looked at "lots of stuff" but found nothing suitable and so decided to "rely on dividends" whilst waiting for opportunities to arise.

89. He also said that there "was a lot going on" – and he "progressively got drawn away from the LLP into the corporation's business". There were, specifically, issues with Cassandra Hutchings (she had broken her leg), with the Company and its acquisitions and with the Tomkins takeover and so he was very busy – although still spending 3-4 hours each day studying stocks.

90. He described his stock studying activity as: "studying analyses of companies, asset values, prospects, PE's, all the things you would expect me to be concentrating on"

The LLP's funding

91. Funding was provided by Mr Hutchings under an arrangement subsequently documented as a loan (under a facility agreement). Mr Hutchings said that the money came "*ostensibly*" from him – but was unsure whether it was taken from one of the Trusts, his personal bank account or from money held by the Company. The subsequent facility agreement was drafted on the basis that the funds were loaned to the LLP by Mr Hutchings.

92. The LLP did not have its own bank account.

93. Mr Hutchings said that he was excited to be able to bolster funds for his new business by the contribution of the Loan Notes to the LLP. He though that this would significantly boost the funds in his new business, enabling him to "buy larger, maybe strategic, blocks of shares".

94. The Loan Notes were available to be put into the LLP on 24 September 2010. They were however transferred to the LLP on 18 May 2011 shortly before the LLP was liquidated. They did not therefore provide funds for the LLP's business in the manner Mr Hutchings said was intended.

95. Mr Hutchings explained that the delay in transferring the Loan Notes to the LLP arose as he was considering a lot of different options and did not want to "rush into transferring" them, adding that he was also "pretty busy".

The economics

96. At the time the Loan Notes were contributed to the LLP it had made a profit of approximately £1900.

97. The potential CGT saving resulting from the arrangement is estimated to be around £2.7 million.

Cassandra Hutchings' evidence

The Company

98. Mr Hutchings was intended to be, and operated as, Ms Hutchings' mentor. She saw him as an ideal mentor given his extensive experience of business and deal structuring.

99. Mr Hutchings was not initially involved with the day-to-day operation of the Company's business. This was Ms Hutching's responsibility.

100. Ms Hutchings did not make decisions on the Company's capitalisation, funding or similar matters. This was Mr Hutchings responsibility. Ms Hutchings said that this was because the funds being used were "ultimately his".

101. Mr Hutchings became more involved in the Company's business in the later part of 2010 when Ms Hutchings began to need more help.

The Trusts

102. Although aware of the Trusts, Ms Hutchings had no involvement with them.

103. Ms Hutchings was not party to the tax mitigation discussions and had not seen the tax advice received from Counsel or from Mr Hutching's solicitors.

The LLP

104. Ms Hutchings explained that Mr Hutchings had set the LLP up to be a "private investment fund" to "trade stocks and shares", his intention being to "to have a basket of public company stock that would yield dividends and which he could trade to make a profit".

105. She described Mr Hutching's research in the following terms:

> "Greg analysed FTSE 100 companies and narrowed down which would be considered lowest risk and highest yielding. The share portfolio originally consisted of companies such as National Grid, United Utilities, Scottish & Southern – always industrial, boring businesses – no fast moving, tech or fashion companies. He used a company called Marshall Securities to carry out the trades, As you would expect he documented all the yields, the dates he bought the prices, the dividends, the capital appreciation etc. He followed the market news and when he judged the time to be appropriate, he sold – the decision was always based on the capital profit or the dividend yield."

106. Ms Hutchings had no role in the LLP's business although she helped with some of the administration. She said that she had: "put together a sort of template for him to track things like yields and the share price and things like that" (this is a reference to the sheet referred to in [88] above). This was, she said, an example of what Mr Hutchings completed on a daily basis.

107. Ms Hutchings added that as they shared an office, she knew how dedicated Mr Hutchings was to the LLP's business whilst it was in existence.

Our conclusions from Mr Hutchings and Ms Hutchings' evidence

108. We drew the following conclusions from Mr Hutchings and Ms Hutchings evidence:

(1) The LLP was likely to have been established primarily for the purpose of the implementing the tax mitigation scheme, however we find that it was also established as a vehicle for Mr Hutchings' intended "hedge fund" type business.

(2) We accept that Mr Hutchings spent some time researching the markets before the LLP acquired its shares and some time researching the markets in the period after those shares were acquired up to a time before the LLP was liquidated.

(3) We find Mr Hutchings' claim to have spent an average of 3-4 hours per day on LLP business as improbable. Our conclusion here is based in part on (a) the lack of evidence as to his research, (b) the lack of any apparent written business plan – formal or informal, and (c) the limited number of transactions entered into by the LLP over the duration of its existence.

(4) We accept that Mr Hutchings' involvement in the LLP's business reduced in the period leading up to its liquidation as he became more involved with the Company's business and issues relating to Ms Hutchings' health.

(5) It is likely that the LLP was liquidated primarily to give effect to the tax mitigation scheme, although the timing of the liquidation was likely to have been

driven by the fact that Mr Hutchings was too busy with the Company to dedicate sufficient time to the LLP's business.

(6) The Loan Notes were likely to have been transferred to the LLP in anticipation of its subsequent liquidation rather than to provide capital for the LLP's business. We note here in particular the significant amount of time between issue of the Loan Notes and their transfer to the LLP, the short amount of time between that transfer and the LLP being put into liquidation and the timing of the instructions to place the LLP into liquidation.

Francesca Marks' evidence

109. Ms Marks was the HMRC Officer responsible for dealing with the matters relating to the Company, the LLP and the Trusts. She took over responsibility for these matters in October 2018 from Carolyn McVicar.

110. Ms Marks confirmed that in reaching in reaching her decision to issue the Discovery Assessments and Closure Notices she had considered all the evidence available to her. The information reviewed included the conclusions of the HMRC independent reviews that had been requested by the Appellants as well as the decisions of her predecessor which were within the case file.

111. Ms Marks had also consulted with a senior colleague (Mr Young) before making her decision to issue her assessments.

112. In Ms Marks' opinion, the LLP was not carrying on a trade or business with a view to profit and because of this a taxable gain had arisen on the transfer to it of the Loan Notes. From her review of the case file it was evident to her that this gain had not been assessed.

113. Ms Mark's view on the position of the LLP corresponded to those of the previous officer responsible for the matter (Ms McVicar).

114. Ms Marks said that she had no reason to believe that the previous decisions were made centrally within HMRC and not by Ms McVicar as the named HMRC officer.

115. Ms Marks explained that she had come to the view that discovery assessments were appropriate as the Trust tax returns had been submitted on a voluntary basis rather than pursuant to a requirement to file returns.

116. When Ms Marks stated in each of her letters accompanying the Trust Discovery Assessments that she was "making the assessment because HMRC's view remains the same as stated in the previous closure notice which was issued on 11 May 2017" her reference to "HMRC's view" reflected the fact that as an officer of HMRC "her view was HMRC's view". In other words she was "speaking for HMRC" but the view expressed was one which she had come to personally. That view was also the same as the view stated in the previous closure notices.

117. Ms Marks acknowledged that her letters to the Trusts used the same wording as the previous assessment letters/Closure Notices. This was not, however, a consequence or her not having made an independent determination of the issues. It was instead a consequence of Ms Marks deciding that it was unnecessary to re-word the relevant content of the previous correspondence which was clear and remained correct. To do so would not, she said, have achieved anything.

118. A central anti-avoidance group within HMRC had reviewed details of the particular DOTAS scheme implemented by the Appellants and had come to a view on its technical merits. The determination of the avoidance group was available to the HMRC officers

involved in the matter. Ms Marks stated that there was, however, no obligation on her to accept the views of the HMRC technical group and the ultimate decision in relation to the matter had to be made by her as the HMRC officer responsible.

Andrew Young's evidence

119. Mr Young is a senior HMRC officer responsible for the overall management and responsibility for "Wealthy and Midsize Business Compliance, Assets". His role also includes the provision of technical and procedural advice on more complex enquiries.

120. Mr Young was not involved in the original Closure Notice process nor was he involved in the review process – as that was an independent statutory review process.

121. Ms Marks' manager contacted Mr Young about Ms Marks' proposed discovery assessments, notifying him that Ms Marks was unlikely to uphold the decisions of the previous case worker on the ground that the underlying enquiry was unsound procedurally.

122. Although responsible for "a few thousand" enquiries at any one time, Mr Young recalled this case specifically as it was particularly unusual. He had not previously come across a case where a closure notice had been cancelled because the original enquiry was considered invalid because no notice to file a self-assessment return had been sent. It was he said "a fairly unique set of circumstances" which gave rise to what he regarded as a novel point of law.

123. Mr Young did not usually have direct contact with the people over which he had oversight. This added to the memorable nature of the case.

124. Mr Young's discussion with Ms Marks was not limited to the procedural aspects of the case. As well as covering s 29 TMA 1970, the consequences of *Patel v HMRC* and the law on voluntary returns and enquiries, ss.7 and 36 TMA on discovery assessments it also covered the operation of s.59A TCGA. He could not recall whether the s.59A issue was unusual or unique although he could not remember another enquiry he had seen where that was the issue.

125. Mr Young had spent between a few hours and half a day preparing for his meeting with Ms Marks. His preparation included reviewing the electronic file and a paper which Ms Marks had prepared in advance for their discussion (no copy of this paper had been provided to the Tribunal). The file included advice from the HMRC technical experts.

126. Mr Young and Ms Marks' meeting was by telephone and lasted for over an hour. Mr Young said that there had been a lot to get through but it was made easier by the fact that he was prepared and had been given information in advance.

127. Mr Young's role was to provide a higher-level review of Ms Marks' decision. In performing that review he had to review the information available and form his own view as to whether it was reasonable to proceed on the basis that Ms Marks intended to.

128. He was required to give, in his words, an "over-arching view" rather than one which required him to go into the full detail in all of the documents – although if in his higher-level review there was something that "leapt out" or was clearly conflicting he would have examined that in more detail. He was not performing the same task as that required to be performed by Ms Marks.

129. Mr Young said that it was not for him to question the technical analysis particularly where that analysis had been considered by several technical experts within HMRC, although

he would have questioned it if, in his view, there was something that he saw as clearly wrong or a fact that he disagreed with.

THE PROCEDURAL HISTORY

130. The Company's CT return (the "**Company Return**") for its accounting periods 1 May 2011 to 31 December 2011 was submitted on 31 December 2012.

131. The LLP's partnership return (the "**LLP Return**") for the tax year ended 5 April 2012 was submitted by Mr Hutchings as nominated partner on 29 April 2013.

132. On 29 August 2013 HMRC gave notice of intention to enquire into:

(1) the LLP Return; and

(2) the Company Return.

133. The Appellants and HMRC subsequently exchanged correspondence, with further information and documentation relating to the scheme being provided by the Appellants.

134. On 11 May 2017 HMRC issued:

(1) the LLP with a Closure Notice (the "**LLP Closure Notice**") for the tax year ended 5 April 2012 – under s 28B (1) and (2) TMA; and

(2) the Company with a Closure Notice (The "**Company Closure Notice**") for the accounting period 1 May 2011 to 31 December 2011 under paragraphs 32 and 34 Sched 18 FA 1988

135. On 2 June 2017 the Appellants appealed against the LLP and Company Closure Notices.

136. On 18 September 2017 HMRC sent their view of the matter letter to the LLP and the Company, offering a statutory review. This offer was accepted on 6 October 2017.

137. On 21 August 2020 HMRC issued review conclusion letters which upheld the LLP Closure Notice. The Company Closure Notice was amended to take into account:

(1) the acquisition cost of the Loan Notes – reflecting the indexation allowance figures provided by the Appellants;

(2) the correct CT rate applicable to the accounting period in question; and

(3) management expenses.

138. On 18 September 2020 the Company and LLP appealed the decisions. The appeals were stayed pending the outcome of the statutory review into the Trusts.

The Trusts

139. On 29 April 2013 the Trusts submitted voluntary tax returns for the tax year ending 5 April 2012 (the "**Trust Returns**").

140. On 6 September 2013 HMRC gave notice of intention to enquire into the Trust Returns.

141. Following correspondence between HMRC and the Appellants, HMRC issued the Trusts with Closure Notices (the "**Trust Closure Notices**") for the tax year ended 5 April under ss. 28A(1) and (2) TMA.

142. On 2 June 2017 the Trusts appealed against the Trust Closure Notices.

143. On 15 September 2017 HMRC sent their view of the matter letter to the Trusts and offered a statutory review which was accepted on 6 October 2017.

144. On 16 May 2018 the Trusts introduced a new ground of appeal. This ground was that the Trust Closure Notices were invalid as voluntary tax returns could not be enquired into. This was based on the decision in *Patel v HMRC* [2018] UKFTT 185 (TC).

145. On 21 May 2020 HMRC issued review conclusion letters to the Trusts. The Trust Closure Notices were cancelled, HMRC accepting the Appellants' arguments as to validity based on *Patel*.

146. On 3 July 2020 HMRC issued new assessments to tax (the "Trust Discovery Assessments") to the Trusts for the tax year ended 5 April 2012, this time under s.29 TMA.

147. On 27 July 2020 the Trusts appealed the Trust Discovery Assessments.

148. On 4 December 2020 HMRC sent their view of the matter to the Trusts and offered a statutory review which was accepted by the Appellants on 21 December 2020.

149. On 30 April 2021 HMRC issued their review conclusion letter which:

(1) upheld the assessment made on the Children's Trust; and

(2) varied the assessments made on the No.1 and No.3 Trusts to include capital gains included on the voluntary tax returns.

150. On 25 May 2021 the Trusts appealed the Trust Discovery Assessments to the Tribunal.

151. The following decisions (in respect of the following amounts) are now under appeal:

(1) 11 May 2020 - LLP Closure Notice (s.28B(1)&(2) TMA) £0

(2) 11 May 2020 - Company Closure Notice (paras. 32&34 Sch 18 FA 1998) £95,665.44

(3) 3 July 2020 - Children's Trust Assessment (s.29 TMA) - £414, 873.48

(4) 3 July 2020 - No.1 Trust (s.29 TMA) = £557,413.08

(5) 3 July 2020 - No. 3 Trust (s.29 TMA) - £1,652.294.30

THE GROUNDS OF APPEAL AND THE ISSUES FOR DETERMINATION

152. The Appellants' Grounds of Appeal are as follows:

(1) That the Company and LLP Closure Notices and the Trust Discovery Assessments are invalid as the LLP satisfied the conditions of s.59A(1) TCGA.

(2) That the requirements of s.29 TMA were not satisfied in respect of the Trust Discovery Assessments.

Ground 1 – s.59A(1) TCGA

153. It is common ground that if the requirements of s.59A(1) TCGA were satisfied by the LLP so that it was tax transparent at the time the Loan Notes were transferred to it, no additional tax would be due from the Appellants. This is because the transfers of the Loan Notes to it would have been contributions of capital by its members rather than a disposal of their Loan Notes. We refer to this ground of appeal as the "Substantive Ground".

154. If the Appellants succeed on the Substantive Ground, there will be no tax to assess and the assessments against all of them will fall away.

Ground 2 – s.20 TMA

155. If the LLP did not satisfy the requirements of s.59A(1) TCGA and so was opaque for tax purposes at the time the Loan Notes were transferred to it, it is common ground that there would have been a disposal of the Loan Notes by the Trusts and the Company.

156. In this case, to determine the liability to tax of the Trusts, it becomes necessary to consider when the Trust Discovery Assessments were validly made under s.29 TMA. We refer to this ground of appeal as the "Procedural Ground".

157. If the Appellants succeed on the Procedural Ground the Trusts assessments will not be valid and only the assessments against the Company and the LLP will be valid.

158. The quantum of the assessments has not been challenged.

BURDEN OF PROOF

159. HMRC bear the burden of proof in proving that the Discovery Assessments were validly made.

160. The burden of proof in establishing that the provisions of s.59A(1) TCGA are satisfied is with the Appellants.

161. The standard of proof is the usual civil standard which is the balance of probabilities.

THE RELEVANT LAW

The Substantive Ground

S.59A TCGA 1992

162. S.59A provides, so far as relevant, as follows:

> Limited liability partnerships.
>
> (1) Where a limited liability partnership carries on a trade or business with a view to profit—
>
> (a) assets held by the limited liability partnership are treated for the purposes of tax in respect of chargeable gains as held by its members as partners, and
>
> (b) any dealings by the limited liability partnership are treated for those purposes as dealings by its members in partnership (and not by the limited liability partnership as such);
>
> and tax in respect of chargeable gains accruing to the members of the limited liability partnership on the disposal of any of its assets shall be assessed and charged on them separately.
>
> (2) For all purposes, except as otherwise provided, in the enactments relating to tax in respect of chargeable gains—
>
> (a) references to a partnership include a limited liability partnership in relation to which subsection (1) above applies,
>
> (b) references to members of a partnership include members of such a limited liability partnership,

(c) references to a company do not include such a limited liability partnership, and

(d) references to members of a company do not include members of such a limited liability partnership.

(3) Subsection (1) above continues to apply in relation to a limited liability partnership which no longer carries on any trade or business with a view to profit—

(a) …

(b) during a period of winding up following a permanent cessation, provided—

(i) the winding up is not for reasons connected in whole or in part with the avoidance of tax, and

(ii) the period of winding up is not unreasonably prolonged, but subject to subsection (4) below.

(4) Subsection (1) above ceases to apply in relation to a limited liability partnership—

(a) on the appointment of a liquidator or (if earlier) the making of a winding-up order by the court, or

(b) ….

(5) Where subsection (1) above ceases to apply in relation to a limited liability partnership with the effect that tax is assessed and charged—

(a) on the limited liability partnership (as a company) in respect of chargeable gains accruing on the disposal of any of its assets, and

(b) on the members in respect of chargeable gains accruing on the disposal of any of their capital interests in the limited liability partnership,

it shall be assessed and charged on the limited liability partnership as if subsection (1) above had never applied in relation to it.

(6) Neither the commencement of the application of subsection (1) above nor the cessation of its application in relation to a limited liability partnership shall be taken as giving rise to the disposal of any assets by it or any of its members.

The Procedural Ground

S.29 Taxes Management Act 1970

163. S.29 provides:

29 Assessment where loss of tax discovered

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

(a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed,

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

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

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

Ground 1 - the Substantive Ground

164. For the transfer of the Loan Notes to the LLP not to give rise to a disposal for CGT purposes, the LLP must have satisfied the requirements of s.59A(1) TCGA at the time of that transfer, in other words the LLP needed to be transparent for CGT purposes at that time.

165. It is common ground that at the time the Loan Notes were redeemed, a liquidator had been appointed and so pursuant to ss.59A(4) and (5) the LLP was opaque at that time.

166. It is necessary to determine therefore whether, at the time the Loan Notes were transferred to it, the LLP was "carrying on a trade or business with a view to profit".

167. We deal in turn with:

(1) whether the LLP was carrying on a trade;

(2) whether the LLP was carrying on a business; and

(3) whether, if the LLP was carrying on a trade or business, it was carried on with a view to profit?

168. Mr Marre submitted that the LLP was carrying on a financial trade at the time the Loan Notes were sold to it, and that if it was not trading then it would at the least be carrying on a business. He further submitted that in either case it would be doing so with a view to profit, noting that HMRC had not made any serious challenge on this point.

169. Mr Dixon submitted the opposite – that the LLP was not trading nor was it carrying on a business.

170. Both Mr Marre and Mr Dixon took us through the applicable case law in some detail and we refer to their arguments where appropriate in our discussion which follows.

Was the LLP carrying on a trade?

171. There is no useful statutory definition of "trade" and it is instead a concept that must be determined by reference to case law (*Ransom v Higgs* [1974] 1 WLR 1594).

172. The Court of Appeal's decision in *Ingenious Games LLP and others v HMRC* [2021] EWCA Civ 1180 is a useful starting point as it considers some of the key authorities in the context of their application to an LLP that was party to a tax advantaged scheme (in this case the provision in question was s 863(1) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") – an income tax provision broadly similar to s.59A TCGA).

173. At the outset of the Court's discussion on trading it cited Lord Wilberforce's statement in *Ransom v Higgs*:

> "We have rather to apply to the facts the legal concept of "trade." … his may be called a concept of common law. Trade has for centuries been, and still is part of the national way of life; everyone is supposed to know what "trade" means: so Parliament, which write it into the Law of Income Tax in 1799, has wisely abstained from defining it and has left it to the Courts to say what it does or does not include." [9].

174. It then made the observation that:

> "It is therefore important that, in considering these two issues of principles, we should bear in mind the wider contexts in which they are relevant, and resist any temptation to give them an unduly narrow meaning because of the tax avoidance context in which the questions arise." [9]

175. The two issues referred to by the Court were the concept of "trade" and the question of whether the LLP was carrying on business "with a view to profit" (which we consider later in this judgment). We consider the Court's view in relation to s 863(1) ITTOIA to be equally relevant to s 59A TCGA.

176. The Court went on to cite at [51] Lord Wilberforce's statement in *Ransom v Higgs* that:

> "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 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. The present is not such a case; it involves the question as one of recognition whether the characteristics of trade are sufficiently present."

and also the statement of Lord Morris in the same case (at [1606D]) that:

> "In considering whether a person "carried on" a trade it seems to me to be essential to discover and to examine exactly was that the person did" [51]

177. The Court then endorsed the recognition by the FTT in *Ingenious*:

> "That means what the LLPs did, not their members and not what was done by Ingenious for itself or other persons It will involve a weighing of a number of factors, the relevance and importance of which will depend on the circumstances. There is no complete list of those factors and no rule that any one or more of them are decisive …"

178. It is clear therefore that a multi-factorial approach, starting with an examination of what precisely the LLP did is necessary.

179. In terms of the factors to take into account, the Court of Appeal in *Ingenious* also acknowledged *Marson v Morton* [1986] 1 WLR 1343 and the factors set out by Sir Nicolas Browne-Wilkinson VC and described by him as "factors which experience has shown to be useful in performing this exercise [which] have come to be known as the 'badges of trade' ".

180. With the qualification that they are no more than "common sense guidance to the conclusion which is appropriate" the badges of trade include, the following (summarised for brevity and excluding those irrelevant in this case):

(1) the frequency of transactions – although a one-off transaction can be an adventure in the nature of trade, the lack of repetition is a pointer which indicates that there might not be a trade;

(2) the subject matter – is the subject matter of the transaction a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation?;

(3) the way in which the transaction was carried out – was it carried out in a way typical of the trade in a commodity of the nature involved?;

(4) the source of finance for the transaction – a transaction funded with borrowed money is more likely to be a trading as borrowing is a pointer towards an intention to buy with an intention to resell in the short term;

(5) the purchaser's intentions as to resale at the time of purchase - an intention to hold indefinitely albeit with an intention to make a capital profit at the end of the end of the day "is a pointer towards a pure investment as opposed to a trading deal";

(6) the nature of the item purchased – did it provide enjoyment for the purchaser, pride of possession or produce income pending resale? If so it might "indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn" [p 1348B].

181. The badges of trade are neither comprehensive nor in any way decisive. This was emphasised several times by Sir Nicolas Browne-Wilkinson VC. They are, however, a good starting point for the necessary evaluation.

182. Ultimately our role is to step back and look at the circumstances holistically and to form a view based on all of the facts found. This was confirmed by Sir Terence Etherton in *Eclipse Film Partners No. 35 LLP v HMRC* [2015] EWCA Civ 95 when summarising the position, concluding that:

> "Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal" [112]

183. With these principles in mind we turn to examine the LLP's activities and start by considering the "badges of trade".

The frequency of transactions:

184. The LLP acquired five shareholdings, sold two of them shortly after acquisition and received dividends on its remaining holdings and then, shortly before being put into liquidation acquired the Loan Notes (and used some of them to guarantee deferred consideration payable on the acquisition of HK Timbers).

185. Its' activities at the time of acquisition of the Loan Notes were limited. The limited nature of those activities is particularly stark when considered in the context of a financial trading business which Mr Marre submitted was being carried on.

186. Mr Dixon focused on the fact that the LLP only bought and sold shares once prior to being placed into liquidation. This was he said evidently incomparable to the many cases which had highlighted the volume of activity necessary.

187. We agree with Mr Dixon. One of the characteristics of a financial trading business that has been identified in several cases is a high degree of frequency and volume of transactions. For example in *Manzur v HMRC* TC 2010/174, the tribunal observed at [30] that share trading businesses typically involved frequent trading and in large volumes (numbering in the thousands). In *Henderson v HMRC* [2023] UKFTT 00281 (TC) the tribunal found that an average of one transaction per week (which in that case amounted to 194 transactions in total) was also not regarded as clearly indicative of trading. Also in *Cooper v Clark* 54 TC 670, the Nourse J concluded (at 677) that thirteen transactions over a period of nine months was not sufficient to amount to a trade.

The subject matter of the transactions

188. The LLP's primary transactions involved dividend paying listed equities.

189. There is what might be seen as a presumption that purchasing and selling marketable securities is an investment rather than a trading activity. We note in this regard Nourse J's statement in *Cooper v Clark* when considering whether dealings by a company in gilts amounted to trading, that:

> "marketable securities, being income-yielding assets usually capable of appreciating in value, are prima facie purchased and sold by way of investment and not by way of trade".

The way in which the transactions were carried out

190. Here it is necessary to consider whether the transactions were carried out in a way typical of the trade in a commodity of the nature involved. In other words, it is appropriate to compare the LLP's approach to its transactions with that of a financial trader.

191. Here we note that a key characteristic of a financial trading operation, as recognised by previous tribunals, is the existence of a degree of organisation together with a suitably articulated trading methodology.

192. In *Henderson* the tribunal thought that a trading operation would have a more "considered and systemic approach" in contrast to the taxpayer's simplistic business plan of buying shares which he thought would appreciate in value in the short term so that they could be sold at a profit [46]. It went on to say that although it did not doubt the taxpayer's belief that he could generate returns by buying and selling shares, there was in its view no "particularly organised or effective approach to the activity". It concluded that the taxpayer's approach was more akin to managing a portfolio of personal investments. In *Manzur* the tribunal considered that a characteristic of a share trading business might include (amongst other things) rules on risk exposure and regulation by a financial regulatory authority – seeking to draw a distinction between an individual speculating on shares and a financial trading business.

193. Although these cases concern individuals (it being noted that the same activities carried out by a company might in some circumstances be more likely to amount to trading) we consider the facts here to be such that that the distinction does make a material difference.

194. We note also that the LLP was taken on by Marshall Securities as a "retail client" and that it also had no bank account of is own – both of which we see as indicative of a non-trading operation.

The source of finance for the transactions

195. A transaction funded with borrowed money is more likely to be a trading transaction as borrowing is a pointer towards an intention to buy with an intention to resell in the short term.

196. Here the evidence shows that LLP was funded either by Mr Hutchings or by one of the Trusts – the ultimate source not being clear. That initial funding arrangement was documented subsequently as a loan facility with Mr Hutchings as the lender. The nature of the financing arrangement, looked at realistically, does not seem to us to be an indicator that points towards trading. It is essentially a "soft arrangement" that can be contrasted with externally provided arm's length finance, the cost of which is taken into account in a commercial business plan. Mr Dixon highlighted in this regard the uncommerciality of a loan facility being formally recognised some nine months after funds were advanced and only at the point when the LLP was expected to go into liquidation. We agree with him.

The purchaser's intentions as to resale at the time of purchase

197. The evidence shows that Mr Hutchings intended to acquire the shares and to either hold them and receive dividends or to sell them "as appropriate". He also said that he wanted to create a business akin to a hedge fund. Given the actual activities of the LLP and the lack of any detailed business plan this seems to us to be more similar to management of an investment portfolio as in *Henderson*.

Conclusion on trading

198. The badges of trade are, as we have acknowledged, simply indicators to assist our determination.

199. Taking that analysis as a starting point and looking holistically at the circumstances we have little hesitation in concluding that the LLP's activities were not sufficient to amount to a trade.

200. Our conclusion is based primarily on our assessment of the LLP's activities and the way in which they were implemented. Our view is irrespective of the fact that the LLP was, as we have found, set up partly as a vehicle for the tax mitigation scheme that Mr Hutchings intended to effect.

Was the LLP carrying on a business?

201. The term "business" is not defined for the purpose of s 59A(1) TCGA although it is clear that it is not the same as "trade".

202. As with "trade" it must be determined by reference to case law.

203. It is also clear from case law that in determining its meaning, account must be taken of its statutory context.

204. Both Mr Marre and Mr Dixon directed us to several cases which considered the term and its interpretation.

205. Our starting point is the UT decision in *GE Financial Investments v HMRC* [2023] UKUT 00146 which examined, in some depth, the case law relating to the meaning of "business". It was necessary in that case for the UT to determine its meaning for the purpose of the UK/USA double tax convention (Article 3(1)), the UT having found that it should bear the meaning it has under UK domestic law [162].

206. We do not repeat the entirety of the relevant parts of the judgment but refer to the particular cases considered by the UT and the key principles extracted from them.

207. The first cases considered by the UT were *Town Investments Ltd v Department of the Environment* [1978] and *American Leaf Blending Co Sdn Bhd v Director- General of Inland Revenue* [179] AC 67.

208. *Town Investments* concerned the meaning of the term "business tenancy" in the Counter-Inflation (Business Rents) Order 1972 and considered whether premises occupied by a Government department for governmental purposes were occupied for the purposes of a business. The House of Lords held (by a majority) that in view of the mischief at which the Counter-Inflation act was directed, a broad construction should be given to the meaning of "business" and so the term was capable of applying to the "business of government".

209. In *American Leaf* the Privy Council considered an appeal from the Federal Court of Malaysia. The case involved a company which had ceased its tobacco related business after incurring losses and which then began to actively let its premises. On being assessed to income tax on its rental income the company claimed that it was entitled to set off its tobacco

business losses against the rent, on the basis that the rent was derived from a "business". The Privy Council agreed with the company.

210. From these cases the UT identified at [180] the following principles:

(1) The expression "business" is an "etymological chameleon" and the expression "imperatively" demands a consideration of the object of the legislation;
(2) Any gainful use to which a company puts any of its assets *prima facie* amounts to the carrying on of a business;
(3) However not every isolated act of a kind authorised by a company's memorandum if done by a company necessarily constitutes the carrying on of a business by it; and
(4) The carrying on of a business usually calls for some activity on the part of the person carrying it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between.

211. The UT went on to review a selection of cases considering the term the term "business" in the context of repealed UK taxes.

212. These cases included *Inland Revenue Commissioners v The Korean Syndicate Ltd* [1921] 3 KB 258 and *Commissioners of Inland Revenue v The Tyre Investment Trust Ltd* [1924] 12 TC 646 – where in each case the court considered ss 38 and 39 of Finance(No.2) Act 1915 in relation to a charge to "excess profits duty" which applied, so far as relevant, to companies carrying on a "trade" or "business".

213. They also included *Westleigh Estates Company Ltd* and *South Behar Railway Company Ltd* [1925] AC 476 – where in each case the court considered the "corporation profits tax" under s.52 Finance Act 1920 which applied, so far as relevant to "the profits of a British company carrying on any trade or business or any undertaking of a similar character, including the holding of investments".

214. From this selection of cases the UT identified at [197] the following three principles:

(1) Context is critically important in construing references to a "business" (and, indeed there is not "much help to be got from the authorities" where the expression "has generally been discussed in totally different contexts": see Lord Sumner in *South Behar*);
(2) An activity can still be a business even if it is carried on in a less direct or passive way by, for example, participating in the profits of a business by a lease or other profit share or by holding shares in an operating company; and
(3) There can be times when a company is doing nothing more than receiving income with long periods of inactivity but it does not necessarily follow that, at those times, it is not carrying on a business; the surrounding facts might be such as to lead to the conclusion that it is still carrying on a business activity, for example where it is accomplishing its principal purpose in a different way.

215. The UT then considered authorities relating to UK taxes in force at the relevant time. The first two cases concerned the small profits rate of corporation tax under s.13 ICTA 1988. In each case the court was required to considered whether a company "carried on a trade or business" for the purpose of s.13(4) ICTA 1988. If so, claims by their group companies for small profits relief would be reduced. The provision in question was essentially an anti-avoidance one.

216. The cases were *Jowett v O'Neill and Brennan Construction* [1988] STC 482 and *Revenue and Customs Commissioners v Salaried Person Postal Loans* [2006] EWHC 763 (Ch). In *Jowett*, HMRC (or as it then was the IR) argued for "business" to be given a broad meaning given the anti-avoidance aim of the provision. Here, the company had discontinued its trade and its only activities for the following year (the relevant period) were transfers of money from its current account to its capital reserve account, allowing bank charges to be deducted, receiving interest and paying tax. It also sought no work for the period, although it was ready to trade if the opportunity arose. It was held that the company wasn't carrying on an investment business merely by having money on deposit and its business for the relevant period was described as "the business of gainfully employing its assets while keeping itself in existence pending any trading opportunity which might arise" (p.489) which Park J considered was not a business.

217. The UT saw this case as (i) affirming the importance of statutory context and (ii) illustrating the principle (as per *American Leaf*) that;

> "prima facie, gainful use of assets by a company will constitute the carrying on of a business but that is not inevitably so as a matter of law" [203].

218. In *Salaried Person Postal Loans* a company which had ceased to trade continued, as its sole activity, the letting of premises it had once used and which it had retained ownership of. The same tenant had been in place for the entire period of around 30 years. Three-yearly rent reviews had been carried out and the premises were insured and rent collected. All of these activities were carried out *via* letting agents, the company's involvement was minimal. Here Lawrence Collins J, agreed with the Special Commissioner that the company was not carrying on a "business". It was simply a company which had been left with former trading premises which it "let out without any active participation or management". The lack of any material activity was in contrast to the far greater level of activity in *American Leaf*.

219. Lawrence Collins J noted at [69] that there were no special rules of construction that would affect the result, the respondents having argued (see [52]) that the provision should be given a purposive construction (in the way described in *Barclays Mercantile v Mawson* [2004] UKHL 51).

220. The UT found no new principles in this case but noted that in determining whether a business was being carried on the court considered it relevant that the premises were let out "without active participation or management" and that the mere receipt of income was not, on the facts of the case, sufficient to constitute the carrying on of a business. [207]

221. The UT then considered two further cases. The first was *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238 relating to VAT and the definition of "business" in s.2 of the Finance Act 1972. As this was decided before the courts began to focus on the concept of "economic activity" as used in the European VAT directive, the focus was instead on the terms used in the Act itself. On this basis the UT thought that the reasoning in the case was relevant in considering the meaning of "business" (see [208]).

222. In *Lord Fisher* the court had to consider whether sharing costs of a "shoot" for pleasure and social enjoyment was sufficient to amount to the carrying on of a business. Of more significance than the facts of the case was the recognition by Gibson J of several indicia for determining whether an activity is a business. These were contained in the Crown's submissions and were based on an earlier Scottish case (*Customs and Excise Commissioners v Morrisons Academy Boarding Houses Association* [1978] STC1). The relevant passage of Gibson J's decision was cited by the UT (at [211]) and the indicia (so far as relevant) are as follows:

(1) Whether the activity is a "serious undertaking earnestly pursued";

(2) Whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity;

(3) Whether the activity has a certain measure of substance as measured by the quarterly or annual value of taxable supplies made;

(4) Whether the activity was conducted in a regular manner and on sound and recognised business principles;

(5) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration; and

(6) whether the tax supplies are of a kind which, subject to differences of detail , are commonly made by those who seek to profit by them.

223. Some of these are relevant specifically in the context of the VAT question raised in that case and must be seen in that context – but it is illustrative that Gibson J thought that they helped in establishing whether a business existed. His conclusion, as cited by the UT at [212] was that:

> "As I understand their judgments, the learned judges in the Court of Session did not thereafter set out to lay down principles which if satisfied would in all cases demonstrate that an activity must be regarded as a "business" within those provisions. Those aspects of an activity to which their Lordships drew attention and on which counsel for the Crown had relied in formulating the indicia listed above, plainly describe the main attributes of any activity which will be regarded as falling within the concepts of "business" and "trade, profession or vocation' and clearly they are useful tools, some perhaps more useful than others, for the analysis of any activity and for the comparing of it with other activities which are unarguably "businesses". The courts, however, cannot by the formulation of tests and by the expounding of indicia, substitute any test of phrase different from that set out in the statutory provision and I am sure that their Lordships had no intention of doing so."

224. In short Gibson J saw the indicia as useful although not determinative. The answer in each case depending on its particular facts and the requirement of the statutory provision in question.

225. The last case considered by the UT, was the UT decision in *Elisabeth Moyne Ramsay v HMRC* [2013] UKUT 0226 (TCC). Here the UT had to consider whether an activity was a 'business' in the context of s.162 TCGA, which provided for roll-over relief on the transfer to a company of a business as a going concern.

226. Here Judge Berner noted that there was nothing in the wording of s.162 TCGA that could colour the meaning of business - unlike in *Rashid* where it was "aligned as a concept" in its statutory definition with trades and professions (for the purpose of the national insurance issue considered in that case). There was also no exclusion of businesses which comprised wholly or mainly of the holding of investments as there was in the inheritance tax business property relief legislation. Here he saw the legislation as simply looking at business in the context of something that might be carried on by an individual and a company and thought that the proper approach was to construe it "broadly, according to its unvarnished ordinary meaning" [48]. He went on to say that as well as given the term a broad meaning in the particular context:

> "regard should be had to the factors referred to in *Lord Fisher*, which in my view (with the exception of the specific references to taxable *supplies*, which are relevant to VAT) are of general application to the question whether the circumstances describe a business."

Application to this case

227. Taking the principles identified by the UT in *GE Financial* as a guide, we have adopted the following approach to determining the question of whether the LLP was carrying on a business at the time the Loan Notes were transferred to it:

(1) To first determine the requirement of the statute and find whether additional colour is to be given to the meaning of "business" by its statutory context.

(2) To then apply to the facts those principles which we consider relevant and to consider whether the activities carried out by the LLP meet the statutory requirement.

The purpose of the statutory provision

228. S.59A(1) TCGA seeks to establish whether an LLP is carrying on a trade or a business with a view to profit. This is to determine whether the LLP should be treated as transparent or opaque for tax purposes, i.e. whether it should be put on the same footing for tax purposes, notwithstanding its corporate status, as a general partnership.

229. This is made clear in para. 18 of the explanatory notes to the Limited Liability Partnerships Act 2000 ("LLPA") which states that:

> "The profits of the business of an LLP will be taxed as if the business were carried on by partners in partnership, rather than by a body corporate. This ensures that the commercial choice between using an LLP or a partnership is a tax neutral one."

230. The commentary on the new s.59A(1) introduced by the LLPA states that:

> "New section 59A(1) provides that the assets of the LLP shall be treated as assets held by the members as partners for the purpose of taxing chargeable gains. This ensures that the members of the LLP, rather than the LLP itself, will be liable to tax for chargeable gains on the disposal of LLP assets. The section brings LLPs in line with the approach adopted for partnership in section 59 TCGA, which similarly treats assets held by the partners rather than by the partnership entity."

231. This does not seem to us to be an anti-avoidance purpose.

Is the interpretation of the term coloured by its statutory context

232. In s.59A(1) TCGA the term "business" is used in the same context as the term "trade" – as the statutory enquiry is whether an LLP carries on "a trade or business".

233. Given the intention of the legislation we consider that the definition of "business" in s. 18 LLPA has relevance. This provides that:

> " 'business' includes every trade, profession and occupation"

234. Additionally, given the legislative intention and similarity in wording, we consider that definition of "business" in PA 1890 also has relevance, s.45 of that Act providing that:

> "The expression 'business' includes every trade, occupation or profession"

235. We consider it clear therefore that "business" in the context of s.59A TCGA is broader than "trade".

236. Mr Dixon submitted that *Elizabeth Moyne Ramsay* indicates a distinction between a wider general use of the term "business" and a narrower one, in which the term is "coloured" by the term "trade". He saw "business" in s.59A(1) TCGA as coloured in this way.

237. He cited in support of his submission Judge Berner's view at [57] that "business" was not in the statutory context he was considering (s.162 TCGA) "associated" with "trade, profession or vocation" or similar whereas it had been so associated in *Rashid*, with such association giving colour to its meaning in that case.

238. Mr Dixon sought to identify in Judge Berner's comments a principle that where "business" is associated in a statutory definition with "trade", the approach taken in *Rashid* should be followed and "business" given a narrower meaning which requires a degree of activity so excluding passively held investments. His submission appears to rely on the fact that s.59A(1) TCGA refers to "business" together with "trade" as did the statutory definition in *Rashid*.

239. We do not agree with Mr Dixon. As Mr Marre pointed out, *Rashid* must be seen in the context of the legislation considered in that case and this was acknowledged specifically by Judge Berner.

240. First, *Rashid* was concerned with the interpretation of "business" within a definition of "employment" – specifically the definition in s.122(1) of the Social Security Contributions and Benefits Act 1992 which provided that:

> " 'employment' includes any trade, business, profession, office or vocation' "

241. The judge in *Rashid* approached this in the following terms:

> "The context here is that business is included along with trade, profession, office or vocation in the definition of employment, implying activity in contrast to mere investment, although of course there can be a business of investment, as in the definition of "investment company" for corporation tax; 'any company whose business consists wholly or mainly in the making of investments'. [12]

242. He also recognised, earlier in the same paragraph, that:

> "…. one must be careful about applying the meaning of 'business' in other contexts"

243. Second, Judge Berner stated in *Elizabeth Moyne Ramsay* that the approach adopted in *Rashid* was not of general application, noting at [57]:

> "Whilst that might have been applicable to the particular statutory provision concerning national insurance at issue in that case, it is not appropriate to the analysis under s 162 TCGA:

244. Accordingly, *Rashid* is not in our view, guidance on the meaning of "business" in the context of s.59A(1) TCGA. We consider that "business" should instead be given its ordinary commercial meaning and that it should not, as in *Rashid*, exclude "investment" business.

245. From a practical perspective we note also that a logical consequence of Mr Dixon's submission would be that LLP's established to hold investments on a non-active basis would inevitably be opaque for tax purposes. This cannot be the intention of the legislation.

Application of the principle in WT Ramsay Ltd v IRC [1981] STC 174

246. Mr Dixon also submitted that it was necessary to take a purposive approach to s.59A TCGA together with a realistic view of the facts in accordance with the principle established

in Ramsay and related cases, summarised as follows by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 at [468]:

> "The driving principles in the Ramsay line of cases continue to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate questions is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

247. He submitted that if the principle was applied to the facts of this case and we took a realistic view of the whole arrangement we should determine that the LLP was not carrying on a trade or a business with a view to profit.

248. Mr Marre reminded us that *Ramsay* is a principle of statutory construction which in this case involves first ascertaining, on a purposive construction, what transaction answers to the statutory description and second, deciding whether the transaction in question does so. He submitted that following this approach, s.59A(1) TCGA asks simply whether there is an LLP, if so is it carrying on a trade or a business and is that trade or business carried on with a view to profit. These are the only questions asked by the statute.

249. We agree with Mr Marre.

250. Given the clarity of the legislation and the fact that there is no dispute as to the transactions carried out by the LLP – there has not, for example, been any accusation of sham – it is difficult to see how there can be scope for the *Ramsay* principle to apply either to allow any additional requirements to be read into the statute or to require any element of the transactions carried out to be disregarded or viewed differently in order to be assessed realistically.

Do the activities actually carried out by the LLP meet the statutory requirement

251. We begin with a consideration of those principles we regard as relevant.

252. We start first with the recognition, following our analysis above, that the term "business" should in the context of s.59A(1) TCGA be construed in accordance with its ordinary commercial usage and not excluding from its scope investment business.

253. Second, it is material that we are assessing activities carried out by an LLP rather than by an individual. Specifically, we consider it relevant that the LLP is pursuing the very purpose for which it has been established.

254. We note here the observation of Lord Sterndale MR in *Korean Syndicate* (at p.202) that although as a general matter if an individual and a company did the same thing there should be no difference between them:

> "…the fact that a limited company comes into existence for the particular purpose of carrying out a transaction by getting possession of concessions and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not."

255. We also note Pollock MR's comments in *Westleigh Estates* in relation to *Korean Syndicate* (as cited by the UT in *GE Financial Investments* at [189]) that;

> "every British company which is fulfilling the objects of its memorandum of association is not thereby ipso facto, and of necessity brought within [s.52(2)(a)], yet if its objects are business objects and are in fact carried out, it follows that the company carries on business, and consequently comes within the sub-section. […] [In the Korean Syndicate case Rowlatt J made] a reservation with which I agree. "It does not follow," he says, "that whenever at some particular moment a company is doing nothing but receiving an

> income from its investments, it is not carrying on a business"; and he indicates that in a certain class of cases, although a company is not actively doing anything, the right conclusion would be that the company was nevertheless carrying on a business."

256. We consider, therefore, that a corporate entity established for a particular business purpose, should prima facie be regarded as carrying on a business to the extent that it is carrying on activities in pursuance of that purpose. We see no reason why this assumption should not extend to LLPs. If anything it may, as Mr Marre submitted, be stronger given that LLPs and partnership are expressly contemplated by statute to be formed for the basis of carrying on a trade or business.

257. Third, an investment business is likely to be more passive than a non-investment business.

258. This was recognised in *Rashid* but not relevant in that case given the exclusion in the context of investment business.

259. It was also recognised by Rowlatt J in *The Tyre Investment Trust*. In that case the appellant company contended that as a holding company it was not carrying on a trade or "business" and that it stood in the same position as an individual who acquired and held investments. The Crown contended that it was carrying on a business which was "the making of investments" – a category of business referred to specifically in Finance (No.2) Act 1915. The Special Commissioners agreed (see [8]) that a holding company was not carrying on any trade or business. Overruling that decision, Rowlatt J made clear in the following terms that a holding company was carrying on a business [p. 655]:

> "Now I am bound to say I think that, even in the darkest days of my error as to the necessity of an active carrying on of business, I should have held that this Company carried on business, because the whole of its existence seems to be directed to the fact that it should have shares in other companies as to which it should busy itself in the most active ways and occupy itself as an alert and astute shareholder looking after its holding in those companies, and the companies themselves; and that was its activity and it pursued it zealously, so I should always have held that this Company was carrying on business"

260. He went on to confirm that he regarded holding companies as companies with a principal purpose of making investments. This was on the basis that he did not see there being a need for the business to involve "the turning over of investments and making profits by the purchase and re-sale of investments".

261. Although his comments were made in the context of a (now repealed) statutory reference to "businesses where the principal business consists of the making of investments" (para. 8, Schedule 4, Finance (No.2) Act 1915) it is we consider a useful demonstration of the breadth of the concept of "business" - in particular investment business, and the low threshold of activity needed.

Conclusion on whether the LLP was carrying on a "business"

262. Taking these principles into account and applying them to the facts that we have found, we find that the LLP was carrying on a business for the purpose of s 59A TCGA.

263. We note in particular the following:

(1) The LLP was established (albeit partly) for the purpose of making a return from dealings in high yielding public company shares – whether by buying, selling or receiving dividend income or a combination thereof. This was Mr Hutching's

business plan and the LLP's "business" was accordingly defined in the LLP Deed as: "acquiring, holding and selling shares, securities and other assets with a view to profit, which commenced on 26th August 2010 and which is to be continued in accordance with this deed".

(2) The LLP's activities, although limited, were consistent with that business purpose. It acquired listed shares, sold some of them at a profit and also received dividend income.

(3) Although we are not convinced that the time spent by Mr Hutchings on LLP business amounted to 4-5 hours per day, we have found that he did spend some time researching and evaluating the equities market prior to and after acquisition by the LLP of the equities. As we have outlined above, in the context of s.59A(1) TCGA, the meaning of "business" should not exclude investment business which by its nature can be relatively passive.

(4) The fact that the LLP was in part set up to facilitate the Loan Note tax mitigation scheme is not sufficient to alter the fact that the LLP it was carrying on a business.

Was the LLP carrying on business with a view to profit?

264. Having determined that a business was being carried on it is then necessary to consider whether it was carried on for a profit.

265. This requirement was the subject of detailed consideration by the Court of Appeal in *Ingenious*. In essence the Court found that there must be a genuine purpose to earn a profit although that need not be the main purpose, and the test to be applied is a subjective one (see [119] of *Ingenious*) although "profit" has an objective meaning [123].

266. There is no specific requirement for the quantum of profit, and in determining whether there is a view of profit no purely quantitative test is applied, the amount of profit being one of several factors to consider.

267. Here the business purpose of the LLP included, as we have found, the intention to make a profit and it did in fact make a profit, the existence or level of which has not been challenged. This requirement is, therefore, satisfied.

Conclusion on Ground 1 – the Substantive Ground

268. For the reasons given above we find that the requirements of s.59A(1) TCGA were satisfied by the LLP at the time the Loan Notes were transferred to it. The transfers were therefore capital contributions rather than disposals of the Loan Notes.

269. On this basis (and in accordance with the position as agreed between the parties) the tax assessed does not arise.

Ground 2 – The Procedural Issue

270. Given our conclusion on Issue 1 it is not necessary for us to consider Issue 2 as there is no tax liability to assess.

271. However for completeness, we nevertheless deal with it as (i) we heard extensive evidence on the issue, and (ii) we believe that it can be addressed succinctly.

272. The Appellants' case relies on the assertion that there was no actual "discovery" by "an officer" that "an amount of income tax or capital gains tax ought to have been assessed but

has not been assessed" or that "an assessment to tax is or has become insufficient" as required by ss.29(1)(a) and (b) TMA.

273. Specifically, Mr Marre submitted that the requirement for a discovery to have been made by a particular officer within HMRC was not satisfied as Ms Marks, the officer with responsibility for issuing the Trust Discovery Assessments, did not reach her own conclusion as to the tax liability that she sought to assess. In his submission she had simply adopted HMRC's internal view of the technical position of the DOTAS scheme that had been implemented.

274. Mr Marre focused in this regard on specific aspects of the wording of the Trust Discovery Assessment correspondence – including (i) Ms Marks' reference to "HMRC's view" not having changed, rather than a reference to her having formed her own view and (ii) the fact that the wording that she used to describe HMRC's position was identical to that contained in the earlier Closure Notices. He submitted that this was evidence of HMRC having formed an internal view following consideration of the underlying avoidance scheme by HMRC's technical experts which view had then simply been followed by Ms Marks and her predecessor.

275. We do not agree with Mr Marre.

276. We found Ms Marks to be a credible and reliable witness who was able to clearly explain both how she had arrived at her conclusions and why she did not see the need to amend the precise wording used by her predecessor to set out the technical position. Mr Marre's submission also requires us to disbelieve the evidence provided by Mr Young as to the content of his supervisory meeting with Ms Marks. We also found Mr Young to be a reliable and credible witness who was able to explain clearly the approach he had taken, the steps taken to prepare for his meeting with Ms Marks and the content of what was discussed.

277. We find accordingly, on the balance of probabilities, that the "discovery" requirement under s.29 TMA was duly satisfied by HMRC.

DISPOSAL

278. For the reasons given above we find that the LLP was carrying on a "business" with a view to profit and so satisfied s.59A(1) TCGA at the relevant time and there is therefore no tax to assess.

279. Accordingly we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

280. 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.

JUDGE VIMAL TILAKAPALA
TRIBUNAL JUDGE

Release date: 17th OCOTBER 2024