[2016] UKFTT 0085 (TC)

TC04878

Appeal number: TC/2014/05048

TYPE OF TAX – trade loss relief – whether the Appellant was trading on a commercial basis in the relevant years so as to establish an entitlement to claim trade loss relief against general income – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHRISTOPHER LUCY **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR TOBY SIMON

Sitting in public at Fox Court, London on 25 January 2016

The Appellant appeared in person, and Mrs Rees, presenting officer, appeared on behalf of the Respondents

DECISION

Introduction

1. On 10 September 2014 the Appellant appealed to this Tribunal against the Respondents' decision, dated 6 August 2014, to uphold their earlier decision to disallow the Appellant's claim under Section 64 Income Tax Act 2007 to trade loss relief against general income in each of the tax years 2009/10, 2010/11 and 2011/12.

Procedural housekeeping

2. The Respondents' conclusion that the Appellant was not entitled to trade loss relief arose following an enquiry into the Appellant's tax return for the tax year 2011/12. As a result of reaching that conclusion, on 30 November 2012, the Respondents had issued the Appellant with a closure notice, closing the enquiry into the Appellant's tax return for 2011/12 and amending that return. On the same date the Respondents had also issued the Appellant with notices of assessment for each of the tax years 2009/10 and 2010/11.

3. Following the Appellant's appeal to this Tribunal, the Respondents became aware of procedural errors in their assessments for 2009/10 and 2010/11. On 29 October 2014, the Respondents issued a discovery assessment for the tax year 2010/11. By that date the Respondents were outside the four year time limit to issue the Appellant with a discovery assessment for the year 2009/10.

4. It was clear at the beginning of the hearing before us that the Appellant had not appreciated the effect of a discovery assessment having been raised in place of the original assessment. Consequently the Appellant had not appealed against the discovery assessment. We invited the Appellant to make a late appeal against the discovery assessment for 2010/11, which was accepted. We treat the Appellant's written statement, prepared for this hearing, as his notice of appeal.

5. The Appellant's appeal to us against the discovery assessment for 2010/11 and his appeal to us against the Revenue amendment for 2011/12 were both made outside the 30 day limit for submitting appeals to this Tribunal. Mrs Rees, for the Respondents, made no objection to the Appellant being granted an extension of time to submit either appeal. We considered that it would be fair and just in the circumstances of each case to grant the Appellant an extension of time under Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Therefore we admitted both of the Appellant's appeals.

Burden and standard of proof

6. In relation to the discovery assessment raised for 2010/11, the burden of proof lies first upon the Respondents to establish that a discovery was made so as to justify raising the discovery assessment. If the Respondents can establish that there was a

discovery then the burden shifts and the onus is upon the Appellant to satisfy us that he was entitled to the trade loss relief claimed.

7. In relation to the Revenue amendment to the Appellant's tax return for 2011/12, the onus is upon the Appellant to satisfy us that he was entitled to the trade loss relief claimed.

8. The standard of proof is the civil standard of the balance of probabilities.

Issues to be determined

9. In claiming trade loss relief for 2010/11 and 2011/12, the Appellant had claimed in each year to be trading (i) in car hire and (ii) as a trader in foreign exchange, commodities and options (which we will describe as a "foreign exchange trader"). The Respondents disputed that the Appellant was trading in relation to either activity. Therefore the issues to be determined were:

(a) Whether the Respondents had fulfilled the conditions necessary to enable them to raise the discovery assessment for 2010/11?

(b) Whether the Appellant was trading in car hire in 2010/11 and/or 2011/12?

(c) Whether the Appellant was trading as a foreign exchange trader in 2010/11 and/or 2011/12?

(d) In respect of either the car hire or the foreign exchange trading, if the Appellant was trading in either or both years, was that trade on a commercial basis so as to entitle the Appellant to trade loss relief?

Evidence heard

10. The Respondents prepared a bundle of documents for the hearing and this was supplemented by a folio of papers prepared by the Appellant. The Appellant also gave evidence during his submissions and was cross examined by Mrs Rees.

Car hire

11. The Appellant's evidence concerning his car hire activities centred around three vehicles: a VW Beach Buggy which was acquired by the Appellant in 1992, a Karman Beetle which was acquired by the Appellant in 1999 and a Mercedes which was acquired by the Appellant in 2006.

12. The Appellant told us that over the last 25 years he had predominantly worked for advertising and marketing agencies. However, this industry required people to work long and anti-social hours, and the Appellant told us that since his late twenties he had been looking at ways to move into other activities.

13. The Appellant stated that his car hire trade commenced in around 2000 when his newly acquired Beetle was hired to be used at a wedding. The Beetle was then used as a prop in films and television shows recorded at Pinewood Studios where the Beetle was stored. The Appellant told us that Pinewood Studios took care of the on-

going maintenance of the Beetle in return for being able to use it. The Appellant's timeline (dated 20 January 2014 but apparently prepared for the hearing) stated that the majority of the costs of repair to the Beetle were covered by the use of it at Pinewood Studios. This arrangement continued until the Beetle was stolen in 2001.

14. The Appellant's timeline explained that he was abroad, working and travelling, until 2006. The Appellant had prepared a written statement, dated 25 January 2016, which he read out to us at the hearing. According to his statement, the Appellant began freelance work in 2006 in order to avoid working the long hours expected in the advertising and marketing industry. The Appellant's freelance work was conducted through his employment by a limited company, Chris Lucy Limited, of which the Appellant was a director. The tax affairs of Chris Lucy Limited were managed by an organisation called First Contact. The Appellant's evidence was that he submitted all receipts to First Contact which then managed the accounting and tax affairs of Chris Lucy Limited. First Contact would issue invoices on behalf of Chris Lucy Limited in respect of work undertaken.

15. The Appellant informed us that upon his return to the UK in 2006 he had purchased a Mercedes. The Mercedes had initially required some minor renovation but it had then been used in an experiential marketing campaign for Nesquik run by an agency called iD. The person running that campaign for iD was called Cathy Henderson and the Appellant stated that he worked with Ms Henderson for three years (2006, 2007 and 2008) on similar experiential marketing campaigns. In the Appellant's folio of papers was a letter from Ms Henderson stating that hiring a vehicle plus driver made financial sense for iD, and that she had worked with the Appellant while she was at iD and then at a subsequent agency, Mash Marketing.

16. In relation to car hire activities undertaken for iD, the Appellant explained that Chris Lucy Limited had agreed each engagement with iD. The Appellant showed us copies of his bank statements in his folio which indicated payments to him by Ms Henderson in 2007 and 2008. The Appellant explained that Ms Henderson would give him cash for petrol and other expenses, and then reclaim that expenditure on her expenses claim to iD, or sometimes Ms Henderson would pay directly for petrol. The Appellant would send all his paperwork to First Contact (which managed Chris Lucy Limited) and Chris Lucy Limited would invoice iD for the work undertaken. The Appellant told us that First Contact would tell him how much he could draw as a salary each month.

17. In relation to car hire activities undertaken for Mash Marketing, the Appellant explained that his relationship with Mash Marketing had been that of employer and employee. The Appellant pointed to an unusual amount which had been paid into his bank account by Mash Marketing and explained that this was not a round sum because of Mash Marketing's deduction of tax and National Insurance contributions from the payment. The Appellant said he understood that the Respondents had no record of any additional National Insurance contributions being made but he had been told that not all the Respondents' files could be accessed as far back as 2008; the Appellant suggested that could explain the omission.

18. The Appellant stated that Mash Marketing preferred to employ him for each engagement, and that none of the agencies would enter a services contract with an individual directly, for fear that at a later date it would be found that tax should have been deducted from the amount paid. Therefore, the Appellant stated, all of his car hire work at this time had been either as an employee of an agency (as with his relationship with Mash Marketing) or as an employee of Chris Lucy Limited which contracted with the agency (as with his relationship with iD).

19. The Appellant also stated that in 2008 the Mercedes was used at a wedding. The price paid for the hire of the Mercedes was to cover expenses and the Appellant said that no profit was made from the car being used in this way.

20. The Appellant told us that around 2008 or 2009 the legislation relating to umbrella companies changed and First Contact informed him that it would no longer be able to manage the accounting and tax affairs of Chris Lucy Limited. The Appellant said he had then declared Chris Lucy Limited to be dormant.

21. This change coincided with the Appellant taking up full time permanent employment again, this time with News International. The Appellant stated that there was a six month probation period so he had kept other business matters running in the background in case he decided against staying in full time employment. The Appellant passed his probation period and told us that he had enjoyed his employment for the first year but it became more stressful as time had passed, especially as redundancies were made and the remaining employees, including the Appellant, were expected to work much longer hours.

22. The Appellant informed us that around 2011 he had spoken to his accountant about how to resume his previous business affairs (which he said he had been "put on hold"). However, the enquiry into his tax return had been opened in 2012 and the Appellant told us that he then felt unable to leave his employment until his tax position was resolved. This meant that he was unable to devote as much time and energy as he would have liked to other activities.

23. The Appellant explained that there had also been a series of unfortunate events which had prevented him from hiring out cars from 2009. The Beach Buggy (which had been in storage from 2001 to 2006) had required extensive restoration after suffering damage while being stored. This restoration was carried out during 2010-2012. A dispute with the DVLA had meant that it was not possible for the Beach Buggy to be put on the road until May 2012. The Appellant showed us three emails, one from April 2011 (prior to the restoration being completed), one from March 2013 and one from January 2015, which the Appellant said showed he was making enquiries about making the Beach Buggy available for hire. In the March 2013 email the Appellant stated "I've recently rebuilt a classic from the 60's that I've owned for 20 years and I'm now looking for ways to make it pay for itself."

24. The Appellant told us that the Mercedes had also suffered damage. The Appellant's timeline of 20 January 2014 stated that the Mercedes suffered damage once in 2006, three times in 2007, once in 2008, once in 2009 (with repairs not

complete until 2010) and twice in 2011. The repairs in 2009 and 2011 had been major.

25. The Appellant showed us an undated screenshot of an advert from StarCar.hire.co.uk which showed the Mercedes available for hire. In the Appellant's folio of papers were three emails from StarCar to the Appellant, dated April, July and September 2015, where StarCar enquired about the Appellant's availability and price for hire of the Mercedes on certain dates.

26. In the Appellant's folio of papers was also a page said to be a screenshot from the Appellant's own website, "Bring me Sunshine", which the Appellant said he had had since 2006. The page showed photographs of four vehicles, including the Beach Buggy, the Beetle and the Mercedes. The blog entries on the page shown were dated from January and March 2013.

27. Although neither party took us to these documents we also note that at the back of volume 3 of the bundles prepared by the Respondents were 27 pages (including some duplicates), each of which is described as an "expense claim sheet". These appear to have been completed by the Appellant and apparently show details of the expenses the Appellant has reclaimed from Chris Lucy Limited. These sheets are described as being for August 2010 to March 2011, August 2011, September 2011 to December 2011 (but with 2010 also inscribed), another January 2011 but dated as completed in 2012, another February 2011 but dated as completed in 2000, March 2010 but dated as completed in 2012, and another March 2011 but dated as completed in May 2011. The expenses listed include: Mercedes repairs, fuel for the Mercedes, rental use of business premises, "repairs car", garage costs, parts for the Mercedes, and costs for the Beach Buggy.

Foreign Exchange trading

28. In relation to the Appellant's activities as a foreign exchange trader, the Appellant's evidence was that in around 2010 he had begun a course in order to learn how to become a foreign exchange trader. In an email to the Respondents dated 18 June 2012 the Appellant described this course as intensive and "easily the equivalent of taking a Master's degree". The course lasted approximately 18 months and had coincided with the period when he was working longer hours for News International. The Appellant stated that at the end of the course he was in a position where he could trade. The Appellant told us that from about 2011 he had traded using his own funds, and he explained to us that the next stage would have been for him to work for or with a trading company. Although the Appellant had had an opportunity in July 2012 to join an organisation which would provide him with funds so as to enable him to trade for others, the Appellant was required to contribute a certain amount of his own capital in order to take up this opportunity, and at that time he lacked the necessary capital.

29. The Appellant told us that the losses he was claiming in relation to his activity as a foreign exchange trader related to the fees of the course he had undertaken, office

rental, various items of computer software and fees, and the travel he had undertaken to and from the trading office (where he had had the opportunity to work).

30. The expenses listed in the Chris Lucy Limited expense sheets we have noted at the back of Respondents' bundles appear to show the Appellant seeking reimbursement of amounts spent on K2A Trading University, trading software and various items of travel.

Cross examination

31. Mrs Rees identified certain payments in the Appellant's bank statements for 2011 which appeared to be from Ms Henderson (with whom the Appellant had worked in 2006 to 2008). In response to questions the Appellant stated that Ms Henderson had been his tenant in 2011 and the sums paid to him by Ms Henderson in 2011 were not related to car hire activities. The Appellant reaffirmed that the payments from Ms Henderson in 2007 related to car hire.

32. In cross examination of the Appellant, Mrs Rees took us briefly to the Appellant's tax returns. The Appellant's tax return for the year 1999/00 showed the Appellant's description of his trade as "digital graphic design". There was no entry for a car hire trade in the Appellant's tax return for either 1999/00 or 2000/01. The Appellant explained that he had given all his papers to his then accountant and he could not understand why there was no mention of car hire in this period. The Appellant had attempted to contact his book-keeper from this period but he had no response from his enquiries.

33. When asked why there was no entry for his car hire trade in tax returns from 2006, the Appellant stated that all the car hire activity he had undertaken up to 2009 was conducted either as an employee of Mash Marketing or through Chris Lucy Limited, and this explained why there was no mention of car hire trade on his tax returns prior to the 2009/10 return. The Appellant added that in the period 2006 to 2008 the car hire had been more of a weekend job, and if he could earn better money through graphic design work then he would do that instead; from 2009 the Appellant had been looking at weddings and other events as well but then he had been too busy with other issues, including his employment and then the tax enquiry.

34. Mrs Rees put it to the Appellant that car restoration was a hobby he enjoyed rather than a trade. The Appellant denied this was the case.

35. In relation to his activity as a foreign exchange trader, the Appellant denied that he was simply gambling with his own money. The Appellant accepted that at no point during the tax years 2010/11 or 2011/12 was he registered as an authorised trader with the Financial Services Authority, and at no point had he ever traded on behalf of anyone else.

36. Under cross examination the Appellant was shown an email he had written to the Respondents in 2012 stating that he had declared Chris Lucy Limited to be dormant in 2009 while he decided what to do with it. In that email the Appellant stated "I had shown good profits, built a relationship with my bank and had a clean set

of accounts over a number of years which I believed would be a benefit if I needed to be self employed again." Mrs Rees suggested to the Appellant that this indicated that his intention in 2009 was not to trade at all for the time being. The Appellant said that was not the case.

Appellant's submissions

37. The Appellant's submissions were that he had been trading in car hire in the tax years 2010/11 and 2011/12 but that a series of unfortunate events had prevented him from making a profit in those years. Those events included the damage which had been sustained by the Beach Buggy and the Mercedes, poor weather in the summer of 2011 and 2012, and also globalisation and trends in business which had resulted in more limited use of experiential marketing campaigns between around 2010 and 2015.

38. In support of his submission that he had been trading in car hire in the tax years 2010/11 and 2011/12, the Appellant pointed to the car hire activities which had taken place in 2000, and in 2006 to 2008, and to the enquiries about car hire he had made and received in 2013 and 2015.

39. The Appellant said that he had been unable to locate as much material as he had wanted because of the passage of time and because people were less inclined to help when they understood it concerned a tax dispute. The Appellant had also found the period from the opening of the enquiry into his return in 2012 to be very stressful (due to the enquiry itself and to other events in his life at that time). This had affected his ability to progress his businesses and his ability to prepare for the hearing. However, the Appellant submitted, he had found bank statements showing payments in 2007, and he believed he had shown a consistent timeline demonstrating car hire.

40. In relation to the foreign exchange trading the Appellant stated that he had not appreciated that was still in dispute. However, again he believed he had shown a clear timeline: he had begun to train to be a trader in 2010 and he understood that the expenses he had incurred were legitimate expenses of his trade.

41. In reply the Appellant stated that he considered the authorities referred to by Mrs Rees related to a different era and had little bearing on today's world. The Appellant said he had kept track of his expenses from 2009, demonstrating his mind was settled in his intention to trade. The Appellant stated that being self-employed had been his goal from 2006 and although the 2009 opportunity to work for News International had taken him away from that, from February 2015 he was no longer employed by News International and so he was now in a much better position to continue with his businesses.

Respondents' submissions

42. On behalf of the Respondents, Mrs Rees submitted that for the Appellant to be entitled to trade loss relief he must demonstrate that he was trading on a commercial basis in the tax year in which he claimed the losses. Losses for both activities were

claimed in the tax years 2009/10, 2010/11 and 2011/12. No income was declared from either activity in any of these years.

43. Mrs Rees referred us to *CIR v Livingston* 11 TC 538 at page 542 where the Lord President stated:

> "I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade" is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made."

44. Mrs Rees suggested that the Appellant's operations were not characteristic of ordinary car hire businesses as the Appellant had none of relevant records which would be expected, the insurance material which the Appellant had provided in his folio did not show business use and the Appellant did not hold public liability insurance. Mrs Rees suggested that an ordinary trader would have ensured that the damaged vehicles were repaired and available in a much quicker timeframe than the Appellant had managed. The Respondents' submission was that these pointers, including the lack of a business plan, indicated that the Appellant's activity was a hobby and not a trade.

45. The Respondents also submitted that, if we were to find that the Appellant was engaging in trade, that we should find that the trade was not carried out on a commercial basis. Mrs Rees referred us to a passage in *Wannell v Rothwell* [1996] BTC 214 at page 224 where Walker J stated:

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

46. In relation to the Appellant's timeline, the Respondents' submission was that even if the Appellant was trading in 2000 then that trade ceased when the Beetle was stolen. Any car hire activity undertaken in the period from 2006 to 2009 was carried on by other entities, not the Appellant, and so could not have been a continuation of a previous trade.

47. In respect of the period from 2009, the Respondents' submission was that there was no indication that the Appellant had the intention to trade from 2009 when he

made Chris Lucy Limited dormant and took up a full time employment which left him insufficient time to seriously focus upon making a profit from car hire. Mrs Rees pointed to the Appellant's email to the Respondents in 2012 as demonstrating that the Appellant had no intention to trade from 2009.

48. Mrs Rees also referred to the Appellant's vehicles having largely been off the road between 2009 and 2012. While there was no timeframe within which a trade must commence, the Respondents submitted that there should be a realistic possibility of trade within a reasonable time. The Respondents' submission was that there was no realistic prospect of the Appellant making a profit from car hire when his vehicles were damaged and unable to be hired.

49. The Respondents submitted that at no period between 2000 and 2011 had the Appellant earned sufficient income to cover the costs of repairing and maintaining the vehicles. If the Appellant had been trading on a commercial basis then he would have taken steps over that 11 year period to change his operations in order to make a profit.

50. In relation to the trade of foreign exchange trading, the Respondents' submission was that the expenditure on course fees either put the Appellant in the position to trade or alternatively that it was expenditure of a capital nature. In neither case was it a loss from a trade. In relation to the other foreign exchange trading expenses, the Respondents' submission was that these could not be trade losses as the Appellant had not commenced trading by either 2010/11 or 2011/12. The Respondents submitted that there could be no trade without the possibility of customers, and the Appellant was unable to trade on behalf of others as he was not authorised by the Financial Services Authority to do so.

51. In relation to the raising of the discovery assessment, the Respondents' submission was that no new information was required for a discovery to be made, and all that was required was for it to newly appear to an officer that there was an insufficiency of tax charged. Mrs Rees relied on *Hankinson v HMRC* [2011] EWCA Civ 1566 in support of this submission.

52. In applying the principles in *Hankinson* to the present facts, the Respondents submission was that on 30 November 2012 it had become clear to the officer enquiring into the Appellant's return for 2011/12 that there was an error in the return for 2011/12, and also that the Appellant's self-assessment for 2010/11 was inaccurate. The Respondents submitted that there was nothing in the Appellant's return for 2010/11 which could have alerted them to the insufficiency of tax. Therefore, on 29 October 2014, a discovery assessment was raised, relying on the provisions in Section 29(5) Taxes Management Act 1970.

Facts found

53. From the evidence before us, we found the following primary facts:

Discovery assessment

54. From the documents before us we find that in his tax return for the tax year 2011/12 the Appellant claimed trade loss relief of £18,912 in respect of his car restoration business and trade loss relief of £10,549 in respect of his investment business. It was common ground that on 8 June 2012 an officer of the Respondents opened an enquiry into the Appellant's tax return for 2011/12, and on 30 November 2012 an officer of the Respondents issued a closure notice, closing the enquiry into the Appellant's 2011/12 tax return and amending the Appellant's return for 2011/12. The result of the amendment was to disallow all of the trade loss relief claimed.

55. From the correspondence before us we find that an assessment for the tax year 2010/11 was raised upon the Appellant at the end of 2010. We accept that this was vacated due to a procedural error. We find that on 29 October 2014 the Respondents raised a discovery assessment under Section 29(1)(c) Taxes Management Act 1970 ("TMA 1970").

Car hire

56. We find that the Appellant purchased a white VW Beach Buggy in 1992, a white Karman Beetle in 1999 and a yellow Mercedes in 2006.

57. We accept the Appellant's evidence that the Beetle was hired on one occasion to be used at a wedding in 2000 and was then available to be used in films and television shows recorded at Pinewood Studios where the Beetle was kept. As the Appellant stated in his timeline that the income received was less than the costs of repairing the Beetle, we find that the arrangement of keeping the Beetle at Pinewood Studios was undertaken at a loss to the Appellant.

58. We find that there is no record of the Appellant notifying the Respondents of the commencement of a trade in around 1999 or 2000, and no mention of any income, profits or losses from car hire trade in the Appellant's tax returns for 1999/00 or 2000/01.

59. The Beetle was stolen in 2001.

60. We find that the Appellant did not engage in any car hire activities from 2001 to 2006, and that the Beach Buggy was in storage during this time.

61. We find that on 31 August 2005 (the date set out in the Appellant's tax return for 2005/06) the Appellant became employed by Chris Lucy Limited, a limited company of which the Appellant was a director.

62. On the basis of the Appellant's oral evidence we find that between 2006 and 2008 the Appellant was also employed, from time to time, by an experiential marketing agency called Mash Marketing.

63. We accept the Appellant's evidence that he acted as an employee up until 2009, and we find that all car hire activity in which the Appellant was involved between 2006 and 2009 (including the one letting of the Mercedes as a wedding car at the end

of 2008) was undertaken by the Appellant in his capacity as an employee (either of Chris Lucy Limited or of Mash Marketing).

64. The Appellant's employment with News International is first declared in the Appellant's tax return for the tax year 2009/10, and we find that the Appellant entered full time employment with News International in 2009.

65. On the basis of the Appellant's email to the Respondents of 18 June 2012 we find that Chris Lucy Limited was declared dormant in 2009. We find that any trade undertaken by that company ceased upon that company being declared dormant.

66. We find that from 2009 until at least the middle of 2010 the Appellant's energies were invested in his employment with News International.

67. We find that the Beach Buggy was being repaired throughout the period from 2010 to 2012 having suffered damage while being kept in storage between 2001 and 2006. We find that the Beach Buggy was not available to be hired from (at the latest) 2006 until the dispute with the DVLA was resolved on 30 May 2012. We find that in 2013 the Appellant first approached advertising agencies to offer the use of the Beach Buggy.

68. We find that the Mercedes was being repaired during substantially all of the period between 2009 and 2012. We find that there were limited opportunities for the Mercedes to be hired in this period.

69. We find that there was no hire of either the Beach Buggy or the Mercedes in period between 2009 and 2012.

70. We find that in 2013 (the date of blog entries shown on a screenshot of the website) the Appellant ran a website which related to the cars he owned or had owned. We make no findings as to the website's existence in any earlier years. The website screenshot which the Appellant showed us included a picture of the Beetle which was stolen from the Appellant in 2000. On the basis that the Appellant could not have made the Beetle available for hire in 2013, we find that the Appellant was not using this website to make vehicles available for hire in 2013.

71. In the absence of submissions on the point from the Appellant or the Respondents, we make no findings in respect of the expense claim sheets set out at the end of volume 3 of the Respondents' bundles which suggest that between 2010 and 2012 the Appellant was again employed by Chris Lucy Limited and was undertaking all car hire activities in this period in the capacity of employee.

Foreign exchange trading

72. On the basis of the Appellant's oral evidence we find that from the summer of 2010 the Appellant began attending a course in order to learn how to become a foreign exchange trader. On the basis of the Appellant's email to the Respondents dated 18 June 2012 we find that the Appellant froze his attendance on the course in

the summer of 2011, and resumed his learning in January 2012. We find that the Appellant concluded his remaining six months of study in the summer of 2012.

73. From the Appellant's oral evidence we find that in July 2012 the Appellant was given the opportunity to join an organisation which would provide him with the capital with which to trade on behalf of others, but that the Appellant did not take up this opportunity.

74. On the basis of the Appellant's oral evidence, we find that at no point in the tax year 2010/11 or the tax year 2011/12 was the Appellant authorised to trade on behalf of another person, and we also find that at no point in either of those tax years did the Appellant trade on behalf of another person.

75. As with the car hire activities, in the absence of submissions from the Appellant or the Respondents, we make no findings in respect of the expense claim sheets which suggest that all foreign exchange trading activity undertaken by the Appellant between 2010 and 2012 was undertaken in his capacity as an employee of Chris Lucy Limited.

Decision

Had the Respondents fulfilled the conditions necessary to enable them to raise the discovery assessment for 2010/11?

76. We deal first with the discovery assessment issue. It is common ground that the Appellant submitted tax returns for 2010/11 and 2011/12 and that both returns were submitted on time.

77. Section 29(1) TMA 1970 provides:

> If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-
>
> (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 their opinion to be charged in order to make good to the Crown the loss of tax.

78. Subsection 29(2) prevents assessments where the error in the return where the return was made on the basis of the generally prevailing practice. That is not applicable here. Subsection 29(3) prevents an assessment being raised unless one of two conditions (set out in subsections 29(4) and 29(5)) are met. The Respondents here rely on subsection (5) which provides that an assessment can only be raised if, at the time when the officer became no longer entitled to enquire into the Appellant's return, the officer could not have been reasonably expected to be aware of the insufficiency.

79. In order to establish whether this condition is fulfilled, it is necessary to look at the information available to the officer at the deadline for opening an enquiry into the Appellant's return for the year 2010/11. The only information the Appellant supplied to the Respondents prior to them opening the enquiry into his tax return for 2011/12 in June 2012 was the information set out in his tax return for each year.

80. The Appellant's entries in his tax return for 2010/11 are sparse. The Appellant has provided details of two businesses. For the first of these businesses, the Appellant's description is "Car restoration". The business postcode which is given is the Appellant's home address, and the Appellant has provided the date to which the business accounts are made up. The next entry in relation to this business is the declaration that the total allowable expenses of £14,538. No breakdown is provided and the other boxes on the page (which would provide the breakdown) are left blank. The Appellant then declares that the loss of £14,538 is a net loss, a net business loss for tax purposes, and that such loss should be set off against other income for that year. The second business is "Investment" and the Appellant has provided the same postcode and date to which the accounts are made up. For this business the Appellant has claimed total allowable expenses of £32,026. That figure has been carried forward and declared to be the net loss of the business, the net business loss for tax purposes and finally a loss which should be set off against other income for 2010/11.

81. We consider that the information provided on the Appellant's tax return for the year 2010/11 was not sufficient for an officer of the Board to have been reasonably aware that the relief claimed was excessive. We accept that the Respondents submission that a discovery was made when the Appellant provided further information during the enquiry and the detail of the Appellant's claim became clear to the Respondents.

82. We conclude that the Respondents have satisfied the onus of proof in relation to the raising of the discovery assessment upon the Appellant for the year 2010/11.

The substantive issues

83. In relation to the substantive issues, the burden of proof is upon the Appellant to satisfy us that he was trading on a commercial basis (in car hire and as a foreign exchange trader) in order to establish his entitlement to claim general loss relief from each of those activities for each of 2010/11 and 2011/12.

84. The starting point in the legislative framework is Subsection 64(1) Income Tax Act 2007 ("ITA 2007") which provides:

> (1) A person may make a claim for trade loss relief against general income if the person-
>
> (a) carries on a trade in a tax year, and
>
> (b) makes a loss in the trade in the tax year ("the loss-making year").

85. This entitlement is restricted by Section 66 ITA 2007, the relevant parts of which provide:

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

86. In approaching the issue of whether the Appellant was trading we have had regard to the "badges of trade", and have considered the character of the Appellant's activities, how those activities arose, the frequency of the activities, the financing of the activities and the Appellant's intent. We accept the Respondents' submission that it is appropriate to look at the way the Appellant conducted his activities and to consider whether this is characteristic of ordinary trading in that line of business.

87. In looking at whether any such trade was commercial we have also considered the Appellant's approach to his activities and whether that indicates a serious intention to realise profits rather than an amateur dabbling or dilettantism.

88. We consider separately the Appellant's case in relation to car hire and then foreign exchange trading.

Was the Appellant was trading in car hire in 2010/11 and 2011/12?
If so, was that trade on a commercial basis?

89. Given the extensive period over which the Appellant claims to have been trading in car hire, we have considered the Appellant's position in separate periods of time from 2000 until the end of the tax year 2011/12.

90. We conclude that the Appellant's letting of the Beetle for one wedding in 2000 taken together with the subsequent arrangement that the Beetle should be used as a prop at Pinewood Studios until it was stolen in 2001, was in the nature of trade. Although there was only one wedding letting, the Beetle was subsequently used as a prop over a number of months. The Beetle was purchased shortly before the wedding letting and we conclude that the Appellant's intention when he purchased the Beetle was to use it for car hire.

91. As we conclude that the Appellant was trading in 2000 and 2001, we go on to consider whether the Appellant's trade of car hire in this period was conducted on a commercial basis. We conclude that the loss-making nature of the Appellant's arrangement with Pinewood Studios, and the absence of any other wedding lettings in this period, were indicative that the Appellant's trade at this time was casual and not on a commercial basis. We conclude that the Appellant would have made more effort

to seek additional car lettings had he been trading seriously at this time and that the arrangement was convenient but not with the serious intention of realising profits.

92. We conclude that this trade ceased entirely upon the theft of the Beetle in 2001.

93. The next period to consider is 2006 to 2009. The Appellant's own case was that he acted as an employee in relation to all of his car hire activities in this period, and we have made findings to this effect. We conclude that all car hire activity in which the Appellant was involved between 2006 and 2009 was undertaken by the Appellant in his capacity as an employee (either of Chris Lucy Limited or of Mash Marketing).

94. As we have concluded that the Appellant did not act on his own account in relation to any car hire activities in the period between 2006 and 2009, it is not necessary for us to consider whether the car hire activities which were undertaken by others in this period constituted trading.

95. We conclude that the Appellant did not trade in car hire at all during 2006 to 2009 as all trading activities were conducted by other persons. It follows that the Appellant cannot have been trading on a commercial basis in this period.

96. The final period to consider is 2009 to 2012. We have found that the Appellant did not let either the Beach Buggy or the Mercedes during this period. In applying the badges of trade to a period where there was no activity at all throughout the period, we look to the reasons for that lack of activity, the financing and the Appellant's intent. The Appellant's submission to us was that there was a series of unfortunate events, primarily damage to both vehicles and poor summer weather, which prevented him from letting the two vehicles. The Respondents' submission was that someone trading in car hire would have responded to those events with much more alacrity, and would have had better insurance in order to ensure the vehicles were repaired much more quickly.

97. On the basis of the Appellant's evidence to us we have found that in his first year of employment by News International the Appellant invested his energies into that employment rather than into other activities. We found that the Appellant took from 2010 until 2012 to repair the Beach Buggy and that the Mercedes was undergoing repairs for substantially all of that period. We bear in mind the Appellant's evidence that he was working longer hours for News International from the middle of 2010, and also our finding that the Appellant undertook his trading course from the middle of 2010 to the middle of 2012. The Appellant's focus upon other activities in this period indicates that the repair of the vehicles so that they were available for hire was not a priority for the Appellant at this time – this conclusion is supported by the Appellant's email in March 2013 which refers to the Appellant "now" looking for ways to make the Beach Buggy pay for itself, suggesting that such intent was lacking prior to 2013.

98. The Appellant apparently did not seek additional financing in order that the repair of either vehicle could be undertaken more quickly, nor attempt to find alternative vehicles which could be made available for hire. We consider that the

Appellant's approach to letting his vehicles in the period 2009 to 2012 was not characteristic of ordinary car hire trading. We conclude that in the period 2009 to 2012 the Appellant was not trading in car hire.

99. For the avoidance of doubt we conclude that the Appellant was not trading in car hire in the tax year 2010/11 or in the tax year 2011/12.

100. Alternatively, in case we are wrong in concluding that the Appellant was not trading in car hire in the tax year 2010/11 or the tax year 2011/12, we also consider whether any car hire trade conducted by the Appellant in 2010/11 or in 2011/12 was conducted on a commercial basis. We conclude that any such trade was not on a commercial basis, due to the casual manner in which the Appellant approached the activity of car hire. This casual manner was demonstrated by the Appellant's lack of business records or business plan, lack of business insurance, and the Appellant's failure to give priority to the speedy repair of the vehicles or to identify substitute vehicles which could be made available.

Was the Appellant was trading as a foreign exchange trader in 2010/11 and 2011/12?

101. We have found that the Appellant was undertaking a trading course from the summer of 2010 until the summer of 2012. The Appellant's evidence was that he was able to trade on behalf of others upon completion of his course. The Appellant accepted that he did not trade on behalf of others and he was not authorised to trade on behalf of others.

102. In considering the badges of trade we note that during the tax years 2010/11 and 2011/12 the Appellant undertook no trading activities for others, and was unable to undertake such activities. The tax years in dispute run concurrently with the period the Appellant was undertaking the course in order to learn how to trade and so the Appellant could have had only limited knowledge of foreign exchange trading at the beginning of the tax years in dispute. Subsequent to the tax years in dispute, when the Appellant concluded his course, the Appellant was presented with the opportunity to join an organisation which would enable him to trade with others' funds, but the Appellant decided not to seek financing to enable him to take up the opportunity.

103. We conclude that the Appellant did not trade as a foreign exchange trader in the tax year 2010/11 or the tax year 2011/12. The Appellant's activities were not characteristic of ordinary foreign exchange trading.

104. Alternatively, if we are wrong in concluding that the Appellant was not trading as a foreign exchange trader in the tax year 2010/11 or the tax year 2011/12, we also consider whether any foreign exchange trading conducted by the Appellant in 2010/11 or in 2011/12 was conducted on a commercial basis. We conclude that any such trade was not on a commercial basis but undertaken as a hobby. The Appellant's casual attitude to his trading activities is shown by the Appellant's failure to give priority to the July 2012 opportunity to develop professionally, failure to seek Financial Services Authority authorisation to trade, and apparent failure to develop any business plan, advertise his services or attempt to gain clients.

Conclusion

105. The Respondents have satisfied us that there was a discovery and they were entitled to raise a discovery assessment for 2010/11.

106. The Appellant has failed to satisfy us that he was trading in car hire at all, or alternatively he has failed to satisfy us that he was trading in car hire on a commercial basis, in either 2010/11 or in 2011/12 and we conclude that he was not entitled to the general trade losses claimed in respect of his car hire activities.

107. The Appellant has failed to satisfy us that he was trading as a foreign exchange trader at all, or alternatively he has failed to satisfy us that he was trading as a foreign exchange trader on a commercial basis, in either 2010/11 or in 2011/12 and we conclude that he was not entitled to the general trade losses claimed in respect of his foreign exchange trading activities.

108. Therefore we dismiss the Appellant's appeal against the discovery assessment for 2010/11, and we dismiss the Appellant's appeal against the Revenue Amendment to his tax return for 2011/12.

109. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 9 FEBRUARY 2016