[2016] UKFTT 0176 (TC)

TC04962

Appeal number: TC/2014/05065

Income tax - ITA 2007 ss67(2) and (3), s68 - claim by farmer for trade loss relief against other income -trade losses made consecutively in previous five years - whether reasonable expectation of profit - no - whether sideways relief allowable – no - whether HMRC entitled to issue closure notice - yes - appeal disallowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALAN ASHCROFT **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER JOHN WILSON

Sitting in public at the Tax Appeals Tribunal, Alexandra House, 14-22 The Parsonage, Manchester on 28 September 2015

Mr Dennis Benson Chartered Accountant for the Appellant

Ms Catherine Douglas Officer of HM Revenue and Customs for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Alan Ashcroft ("the Appellant") against the closure notice and amendment issued by the Respondents ("HMRC") pursuant to s 28A(1) and (2) Taxes Management Act 1970 ("TMA") in respect of the 2011-12 tax year and discovery assessments raised pursuant s 29 TMA 1970 in respect of the 2009-10, 2010-11 and 2012-13 tax years.

2. The issue to be decided is whether the closure notices, together with a consequential amendment raised in respect of 2011-12, and the discovery assessments raised in respect of 2009-10, 2010-11 and 2012-13 were validly issued. The Appellant contends that they should not have been issued.

3. The amendment in respect of the 2011-12 tax year and discovery assessments raised in respect of the 2009-10, 2010-11 and 2012-13 tax years, have not been formally appealed, although they are disputed by the Appellant.

4. If the amendment and discovery assessments were validly issued, a further issue to be decided is whether they are in the correct amount. HMRC have denied losses from the Appellant's farming trade income from being offset against other income of the same year, and in that regard the Tribunal is to determine whether in so doing HMRC have applied the law in respect of the restriction on farming losses correctly.

5. Details of the Closure Notice, Amendment and Discovery Assessments are :

Year	**Description**	**Additional Liability**	**Date of Issue**	**Amount of Losses**
2009-10	Discovery Assessment	£154.80	18 March 2014	£7,622
2010-11	Discovery Assessment	£116.90	18 March 2014	£7,992
2011-12	Closure Notice & Amendment	£1,787.00	18 March 2014	£8,938
2012-13	Discovery Assessment	£557.60	18 March 2014	£4,208
	TOTAL	**£2,707.30**		

Background

6. Generally, if a person's business income is derived from various elements and one of those elements is loss-making, then those losses may be taken into account in the computation of overall profits. Further, under s 64 ITA 2007, if a person who carries on a business makes a loss from trading, those trade losses may be offset against other general income (or a chargeable gain) received in the same year or preceding year. It may also be possible to carry trade losses back to earlier years, or forward to subsequent years.

7. Claims to trade loss relief against general income (or gains) are, under s66 ITA 2007, restricted to businesses that trade on a commercial basis with a view to making a profit throughout the basis period of the tax year. Sideways relief is not allowed for losses where the trade demonstrably lacks commercial inspiration. The trade must be carried on throughout the basis period for the tax year with a reasonable expectation of profits.

8. Other loss relief restrictions may apply where losses have been sustained in the course of farming or market gardening. Because losses are often generated by 'hobby farmers', in 1967 the 'five year test' was introduced and is now set out in s67 ITA 2007. Under this, if a loss has been incurred by a farmer or market gardener in each of the last five years, then the loss incurred in the sixth year cannot normally benefit from sideways set off against general income; it can only be carried forward to set against future farming profits. The loss here is the tax adjusted loss; in other words it is calculated without regard to capital allowances. If a profit is made in the sixth year, the five year clock is reset.

9. HMRC say that the provisions of s 64 ITA 2007, which allow sideways relief, is denied under s 67(2) ITA 2007 where losses calculated without regard to capital allowances have been made in the taxpayer's trade in each of the previous five tax years. S 67(3)(b) provides that section 67 does not prevent relief for the loss from being given if the carrying on of the trade forms part of, and is ancillary to, a larger trading undertaking, and the farming or market gardening activities meet the reasonable expectation of profit test as set out in section 68. HMRC concluded that having taken into account all the circumstances and the nature of the Appellant's farming activities, the exception to this under s 67(3)(b), where there is a reasonable expectation of profit, did not apply.

10. Section 68 ITA 2007, sets out the 'reasonable expectation of profit' test by reference to the 'expectations of a competent farmer'. The test is met where:

a. a competent person carrying on the farming activities in the current tax year would reasonably expect future profits; but

b. a competent person carrying on the activities in the last five years could not reasonably have expected the activities to become profitable until after the end of the current tax year.

11. In practical terms, when deciding whether a competent farmer would reasonably expect future profits, it is necessary to consider the nature of the whole of the farming activities and the way in which those activities are carried out.

12. HMRC recognise that certain specialised activities, for example stud farms, may take a long time to establish. It is therefore accepted by concession that in such cases HMRC would not invoke s 67 ITA 2007 until eleven years after the start of the trade, rather than the usual five. However the trade still needs to be potentially profitable in the future to withstand a challenge under s 66.

13. An enquiry was opened into the Appellant's 2011-12 return pursuant to s 9A TMA 1970 on 21 October 2013. The enquiry notice enquired why the Appellant's farming losses had not been restricted under s 67 ITA 2007, as the accounts for the previous five years showed losses in each of those years.

14. The following details the profit/(loss) reported by the Appellant for the years 2003-04to 2013-14.

Year	**Profit (Loss)**	**Amount**	**Year of losses**
2003-04	Profit	£839	
2004-05	(Loss)	(£5,253)	1
2005-06	(Loss)	(£7,348)	2
2006-07	(Loss)	(£10,258)	3
2007-08	(Loss)	(£9,330)	4
2008-09	(Loss)	(£7,003)	5
2009-10	(Loss)	(£7,622)	6
2010-11	(Loss)	(£7,992)	7
2011-12	(Loss)	(£8,935)	8
2012-13	(Loss)	(£4,208)	9
2013-14	(Loss)	(£14,316)	10

15. The Appellant was represented throughout the enquiry by Frank Benson FCA ("the agent") who on 25 November 2013 confirmed that losses had been made since 2004-05 but these had been carried forward to later years and it was only losses for the years 2007-08 to 2010-11 which had been set against other income. He said that

for 2011-12 losses were not restricted under s 67(2) ITA 2007 as they had only been claimed in the previous four years and the five year remit of s 67 ITA 2007 should be extended pursuant to s 67(3)(b) ITA 2007 because the farming activities met the reasonable expectation of profit test under s 68 ITA 2007. He explained that the farming activities emphasis had changed from dairy to beef in recent years and there was a reasonable expectation that better beef prices would return the business to profits. He said that it was only in the year 2012-13 that the Appellant benefited from significant loss relief.

16. HMRC responded on 13 December 2013 and explained that sideways relief was available for 2004-05 to 2008-09, but thereafter loss relief ought to be carried forward and set against future farming profits. HMRC said that s 68 ITA 2007is intended to meet the genuine case of a farmer engaging in specialised activities which are potentially profit making but cannot be expected to show a profit before the end of the year of claim. HMRC did not consider that the change of activities from dairy to beef farming could be considered specialised. HMRC asked for details of the long term nature of the farming activities and evidence of the normal period of years over which the farming activity would expect to show initial losses so they could consider the matter further.

17. The agent responded on 20 January 2014 advising that he had nothing further to add and suggested HMRC close their enquiry and raise assessments to allow the Appellant to appeal.

18. On 27 January 2014 HMRC asked the agent to reconsider whether he could provide the additional information requested, as without that, they were unable to consider whether the farming activities met the reasonable expectation of profits test; they also said without such evidence the farming losses would be restricted in 2011-12 as they had arisen since 2004-05 (2011-12 being the 8th year). The restriction of losses applied from 2009-10 onwards and if no further information was received they would conclude their enquiry into 2011-12, issue an amendment to the Appellant's return and issue discovery assessments for 2009-10 and 2010-11 as well as for 2012-13, as a return for that year had been submitted which also sought to set off farming losses against general income of the same year

19. The agent responded saying that in the years farming losses were utilised sideways, from 2007-08 onwards, much was lost by the amount of unused personal allowances and the first year that full benefit of the sideways claim was achieved was in 2011-12 when the Appellant had reached retirement age and took his personal pension in the form of a taxable sum. The agent objected to HMRC's interpretation of the law. He indicated that he could 'probably' supply figures showing a reasonable expectation of profit but it would be very difficult to do so in a meaningful and accurate manner and it would be costly to the Appellant. The agent suggested that the losses in 2012-13 were lower than previous years and 2013-14 may show a profit. He proposed that the enquiry be put on hold until accounts were prepared, but, in any event would not agree to discovery assessments as no error had been made.

20. On 28 February 2014, HMRC reiterated their view that the provisions of s68(3)(b) ITA 2007 had not been met, which they explained was reserved for the genuine case of a farmer engaged in specialised activities which are potentially profitable but cannot be expected to show a profit before the end of the year of claim.

21. HMRC also addressed the agent's disagreement that discovery assessments could be raised. They provided copies of guidance notes SP8/91 and SP1/06. The opportunity for HMRC to make a discovery could be restricted where a taxpayer had provided sufficient information about the issue at stake and it was immediately apparent, so that an HMRC officer could have realised within the enquiry period that the self-assessment was insufficient. A discovery could be made if the taxpayer did not provide enough information for the inspector to realise within the enquiry period that the self-assessment was insufficient. HMRC said the notes made reference to the white space on returns; HMRC explained that they would not be able to make a discovery if an explanation was included explaining why the losses were being claimed in the way they had been beyond the normal five year period. This requirement was an annual obligation on each Return where the claim continued beyond the five year period. HMRC said they had looked at each tax return and the returns did not include any explanation. HMRC was therefore satisfied that a discovery had been properly made and they were not precluded from raising an assessment under s 29 TMA 1970. HMRC advised of their intention to conclude the 2011-12 enquiry and raise discovery assessments for the years 2009-10, 2010-11 and 2012-13.

22. On 18 and 19 March 2014, HMRC issued a closure notice and amendment for 2011-12, and discovery assessments for 2009-10, 2010-11 and 2012-13, each restricting the farming losses from being set against income of the same year pursuant to s67(2) ITA 2007. The letter of explanation said farming losses accrued at 5 April 2013, were available to set against future profits from farming, and stood at £64,655.

23. On 8 April 2014, HMRC received a letter from the agent dated 17 March 2014. This gave further information about the farming activities which explained that the Appellant had diversified into beef farming after selling his dairy herd and milk quota in March 2007. He had made a profit in 2003-04. Thereafter he had made losses but did not make a loss relief claim until the change in the farming activity. He said 2007-08 was the first full year since the change in activities that the loss could be set against PAYE income. He said that it was no surprise losses were made up to 2012-13 and that a small profit was expected in 2013-14. He said that with the change in farming activity in 2007-08, the five year rule should apply from that date to 2012-13. He added that if this was not accepted, further substantive arguments regarding HMRC's interpretation of s68 ITA 2007 could be put to HMRC within two weeks of a reply.

24. No further substantive argument was received from the Appellant's agent, but on 14 April 2014 he appealed HMRC's decisions, on the grounds that they were

onerously and prematurely raised with regard to the 2012 self-assessment return. The agent also included a complaint regarding the conduct of the enquiry.

25. Matters were delayed whilst the complaint was dealt with, following which on 22 August 2014, HMRC said their view of the matter had not changed.

26. The Appellant appealed to Tribunal on 10 September 2014.

Legislation

ITA 200 ss 64,66,67& 68

Section 64 *Deduction of losses from general income*

(1) A person may make a claim for trade loss relief against general income if the person—

(a) carries on a trade in a tax year, and

(b) makes a loss in the trade in the tax year ("the loss-making year").

(2) The claim is for the loss to be deducted in calculating the person's net income—

(a) for the loss-making year,

(b) for the previous tax year, or

(c) for both tax years.

(8) This section needs to be read with—

(b) sections 66 to 70 (restrictions on the relief),

Section 66 *Restriction on relief unless trade is commercial*

(1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.

(2) The trade is commercial if it is carried on throughout the basis period for the tax year—

(a) on a commercial basis, and

(b) with a view to the realisation of profits of the trade.

(3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits.

(4) If the trade forms part of a larger undertaking, references to profits of the trade are to be read as references to profits of the undertaking as a whole.

(7) This section applies to professions and vocations as it applies to trades.

Section 67 *Restriction on relief for "hobby" farming or market gardening*

(1) This section applies if a loss is made in a trade of farming or market gardening in a tax year ("the current tax year").

(2) Trade loss relief against general income is not available for the loss if a loss, calculated without regard to capital allowances, was made in the trade in each of the previous 5 tax years (see section 70).

(3) This section does not prevent relief for the loss from being given if—

(a) the carrying on of the trade forms part of, and is ancillary to, a larger trading undertaking,

(b) the farming or market gardening activities meet the reasonable expectation of profit test (see section 68), or

(c) the trade was started, or treated as started, at any time within the 5 tax years before the current tax year (see section 69 below, as well as section 17 of ITTOIA 2005).

Section 68 *Reasonable expectation of profit*

(1) This section explains how the farming or market gardening activities ("the activities") meet the reasonable expectation of profit test for the purposes of section 67.

(2) The test is decided by reference to the expectations of a competent farmer or market gardener (a "competent person") carrying on the activities.

(3) The test is met if—

(a) a competent person carrying on the activities in the current tax year would reasonably expect future profits (see subsection (4)), but

(b) a competent person carrying on the activities at the beginning of the prior period of loss (see subsection (5)) could not reasonably have expected the activities to become profitable until after the end of the current tax year.

(4) In determining whether a competent person carrying on the activities in the current tax year would reasonably expect future profits regard must be had to—

(a) the nature of the whole of the activities, and

(b) the way in which the whole of the activities were carried on in the current tax year.

(5) "The prior period of loss" means—

(a) the 5 tax years before the current tax year, or

(b) if losses in the trade, calculated without regard to capital allowances, were also made in successive tax years before those 5 tax years (see section 70), the period comprising both the successive tax years and the 5 tax years.

TMA 1970

S29 Assessing procedure

(1) Except as otherwise provided, all assessments to tax shall be made by an inspector, and—

(a) if the inspector is satisfied that any return under the Taxes Acts affords correct and complete information concerning profits in respect of which tax is chargeable, he shall make an assessment accordingly,

(b) if it appears to the inspector that there are any profits in respect of which tax is chargeable and which have not been included in a return under Part II of this Act, or if the inspector is dissatisfied with any return under Part II of this Act, he may make an assessment to tax to the best of his judgment.

(2) All assessments to surtax shall be made by the Board and—

(a) if they are satisfied that a return under Part II of this Act of the income of an individual affords correct and complete information concerning the whole of his income computed in accordance with the provisions of the Income Tax Acts relating to surtax, they shall make an assessment accordingly, and

(b) if it appears to them that there has been a failure to make a return under Part II of this Act of the income of an individual, or if they are dissatisfied with such a return, they may make an assessment to surtax to the best of their judgment.

(3) If an inspector or the Board discover—

(a) that any profits which ought to have been assessed to tax have not been assessed, or

(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 inspector or, as the case may be, the Board may make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged.

(4) All income tax at the standard rate which is charged for any year on any person under subsection (3)(c) above may, notwithstanding that it was chargeable under more than one Schedule, be included in one assessment and an appeal against an assessment under subsection (3)(c) above shall be to the Commissioners to whom an appeal would lie on a claim for the relief in connection with which the assessment is made.

(5) Notice of any assessment to tax shall be served on the person assessed and shall state the time within which any appeal against the assessment may be made.

(6) After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the

The Appellant's case

27. The Appellant's agent continued his correspondence with HMRC, arguing that the assessments were raised prior to conclusion of HMRC's enquiry into the Appellant's 2011-12 return, which had not been concluded. He argued that a time scale for the enquiry had been agreed by both parties. HMRC had ended the enquiry abruptly and prematurely by raising the assessments, which was contrary to accepted procedure and in contravention of the Tax Charter. The agent said that the assessments should be withdrawn and the enquiry into 2011-12 tax return reviewed by a different HMRC officer.

28. In a letter to the Tribunal dated 22 December 2014, the agent clarified that the Appellant's grounds of appeal were:-

(1) The assessments issued on 18 March 2014 were invalidly raised. In addition, HMRC were not entitled to raise "discovery assessments" for 2009-10, 2010-11 2011-12 and 2012-13. The assessments should be set aside.

(2) The tax returns as submitted were correct and were in accordance with the Taxes Acts, relevant statute law, the Human Rights Act and what is reasonable and fair.

(3) Failing that, the hearing should be adjourned to allow sufficient opportunity for the substantive grounds of appeal, being the contentions put by the agent to HMRC during the enquiry, to be considered by the Tribunal. This would however involve a considerable amount of work.

HMRC's Case

Was the closure Notice validly issued at law?

29. In respect of the closure notice for 2011-12, HMRC must firstly demonstrate that a valid enquiry notice was issued and secondly that the closure notice states HMRC's conclusions. The amendment must give effect to those conclusions. If this is established the onus reverts to the Appellant to show that the amendment is incorrect.

30. In respect of the assessments for the three tax years 2009-10, 2010-11 and 2011-12, these were raised under the provisions of discovery as provided for at s29 TMA 1970. For each year, HMRC must first demonstrate that they discovered a loss of tax to the Crown and therefore that they are able to issue discovery assessments for each year; if this is established the onus will revert to the Appellant to demonstrate that he has been overcharged by the assessments.

31. There is also the statutory onus of proof at s 50(6) TMA 1970 which says that on an appeal to the Tribunal the assessment shall stand good unless the Tribunal decides the Appellant has been overcharged.

32. Self-assessment imposes the responsibility for creating the correct legal charge to tax on the taxpayer.

33. If the conclusions of HMRC's enquiries are challenged, then HMRC must show that the conclusions reached are reasonable. HMRC contend that in the present case, they have applied the relevant law to the facts as established regarding the Appellant’s farming activities.

34. The Appellant’s 2011-12 tax return was submitted on 10 January 2013 and a formal notice of enquiry was commenced on 21 October 2013, within the time allowed of twelve months from the filing date pursuant to s 9A TMA 1970

35. Consequentially the enquiry notice issued in respect of the2011-12 tax return was valid in law.

36. In the course of their enquiry HMRC requested information about the Appellant’s farming activity in order to establish the facts relating to the farming losses reported in 2011-12. The legislation does not specify a timeframe within which this must be completed, but HMRC must specify their conclusions when their

enquiry is completed. HMRC formally notified the Appellant of their conclusions and made amendments to his 2011-12 return to give effect to those conclusions pursuant to s 28A(1) and (2) TMA 1970on 19 March 2014.

37. Consequently the Closure Notice and corresponding Amendment in respect of 2011-12 were also valid in law.

38. It was only as a result of their enquiries that HMRC discovered, pursuant to s 29 TMA 1970, that farming losses had been claimed incorrectly in the enquiry year and also in the years 2009-10, 2010-11 and 2012-13.

39. Under s 29(1) TMA 1970, if an officer of HMRC discovers that income or gains which should have been assessed have not been assessed, that an assessment to tax is or has become insufficient, or that any relief which has been given is or has become excessive, then the officer may make an assessment in the amount or further amount which ought in his opinion to be charged in order to make good to the Crown the loss of tax.

40. If a taxpayer has submitted a tax return, HMRC accept that their power to make a discovery assessment is restricted. Under s 29(3) TMA 1970, where a taxpayer has made a return, an assessment may only be made under s 29(1) if one of the two conditions set down in s 29(4) and s 29(5) has been satisfied:

Section 29(4) provides that "the situation mentioned in subsection (1)" (ie income has not been assessed which ought to have been assessed) must have been brought about carelessly or deliberately by the taxpayer or by a person acting on his behalf.

Section 29(5) provides that at the time when an officer of the board

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return in respect of the relevant year of assessment, or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1).

41. Section 29(6) TMA 1970, sets out those circumstances where information is deemed to be "made available" and that is:

a. It is contained in the taxpayers return for the relevant tax year, or in any accounts, statements or documents accompanying the return, or

b. It is contained in any claim for the relevant year by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim, or

c. It is contained in any document, accounts or particulars which, for the purpose of any enquiries into the return or any such claim by an HMRC officer, the taxpayer produces or provides to the officer, or

d. It is information the existence of which, and the relevance of which as regards the situation mentioned in s29(1) TMA 1970, an HMRC officer could reasonably be expected to infer from information falling within the first three categories above; or the taxpayer notifies in writing to an HMRC officer.

42. Under s 34(1) TMA1970, an assessment to income tax or capital gains tax may be made at any time not more than four years after the end of the year of assessment to which it relates.

43. HMRC referred to the authorities where onus is considered.

44. In *Jonas v Bamford* (51 TC 1) Lord Walton J said:

"But, so far as the discovery point is concerned, once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

45. In *Johnson v Scott* (52 TC 383) a discovery assessment had been issued and onus of proof was considered. Justice Walton said:

"…it is important at the outset to determine expressly where the onus of proof lies. It was correctly accepted by Mr. Davenport on behalf of the Crown that the onus lay upon the Crown to show "neglect". The relevance of the finding of neglect is, of course, that it enables the Crown to make assessments for the purpose of making good the loss of tax thereby caused in cases where the assessments would otherwise be out of time (see Taxes Management Act 1970, S29). However, if that onus is discharged, then the onus of displacing the assessment shifts to the taxpayer, it is the taxpayer who must adduce the evidence to show that the assessment is too large (see Taxes Management Act 1970, s50(6))."

46. HMRC assert that they have correctly applied the presumption of continuity as referred to by Lord Walton J in *Jonas v Bamford* and each discovery assessment was raised within the normal time limit of s 34 TMA HMRC the discovery assessments for 2009-10, 2010-11 and 2012-13 are valid in law.

Can the Appellant's losses from the trade of farming be set off sideways against other income of the same year in pursuant to s67(2) ITA 2007?

47. As farming losses were first reported in 2004-05 (first year of losses), they are available to set off sideways against other income of the same year up to and including 2008-09 (fifth year of losses); thereafter they may only be carried forward to be set off against any future farming profits..

48. HMRC's decision that the Appellant cannot avail himself of sideways relief is based on the provisions of s 67 ITA 2007. The only avenue for allowing the Appellant's claim to set off farming losses sideways, where losses have been made in the previous five years, is by virtue of ss67(3)(b), and the farming activities meet the 'reasonable expectation of profit' test as set out in s 68. The onus falls to the Appellant to show the amendment and assessments are excessive.

49. Section 67 ITA 2007 restricts losses in the case of farming or market gardening if a loss, calculated without regard to capital allowances, has been made in each of the previous five years. However this restriction does not apply if, as provided at (3)(a) the farming trade is part of and ancillary to a larger undertaking, the farming or market gardening activities meet the reasonable expectation of profit test (see s 68), or if the farming trade commenced in the previous five tax years before the current tax year.

50. The point is further explained in HMRC's BIM75640:

"The restriction is dis-applied only if a competent person carrying on the activities at the beginning of the prior period of loss (see subsection (5)) could not reasonably have expected the activities to become profitable until after the end of the current tax year. That is, the farmer has engaged in 'specialised activities'."

51. Section 68 ITA 2007 explains how the farming activities can meet the reasonable expectation of profit test for the purpose of s 67 and the test is decided by reference to the expectations of a competent farmer carrying on the activities. Section 68(3) ss (5) says the prior period of loss means the five tax years before the current tax year.

52. The Appellant has contended he has been a farmer for the whole of his working life, but in March 2007 the emphasis of farming activities changed from dairy to beef. Profit was made in 2003-04 and thereafter losses were reported right up to 2013-14.

53. In this case the Appellant's activities are not 'specialised activities'. Section 69 ITA considers whether the trade is the same trade. In this case it was the same trade. The Appellant asserted that farming changed emphasis from dairy to beef in 2007. No evidence has not been provided to demonstrate that there was a cessation of the farming trade, the returns and accounting information supplied only report details of a farming trade. There has not been a break in any accounting periods with accounts in each year drawn up to 28 February.

54. Section 9(1) ITTOIA 2005 provides that farming in the UK is treated for Income Tax purposes as the carrying on of a trade, or part of a trade, (whether or not the land is managed on a commercial basis and with a view to the realisation of profits) and s 9(2) of the same Act provides that all farming in the UK carried on by a person, other than farming carried on as part of another trade is treated for Income Tax purposes as one trade.

55. HMRC therefore contend that whilst the Appellant diversified from dairy to beef farming, all farming carried on by one person is one trade and this is specified in the legislation. The Appellant reported a farming profit in 2003-04 and then farming losses were reported in 2004-05 and in each successive year. Losses may be set off against other income of the same year from 2004-05up to and including 2008-09, this being the fifth year of farming losses. After 2008-09 the losses are prevented from being set against income of the same year pursuant to s 67(2) ITA 2007; they may then only be carried forward to be set against future farming profits unless the conditions at s 67(3) ITA 2007 are satisfied.

56. The Appellant contends that loss relief has only been claimed against other income for four years, the years 2007-08 to 2010-11. But regard must be given to the wording of the legislation itself. This says at s 67(2) ITA 2007:-

"Trade loss relief against general income is not available for the loss if a loss, calculated without regard to capital allowances, was made in the trade in each of the previous 5 tax years (see section 70)."

57. The significant word is "made". As losses have been made in 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09, they may be set against other income of the same year for these years but thereafter they are to be prevented from being set against other income of the same year.

58. HMRC contend that the legislative provisions must be applied by reference to their strict wording. Once there have been five years of losses where the trade is farming, s67 ITA is potentially engaged. HMRC have not challenged the quantification of the losses and therefore those arising in 2009-10 to 2012-13 remain available to be carried forward and utilised against any future farming profits.

Conclusion

59. The Appellant's tax returns as submitted for the years 2009-10, 2010-11 and 2012-13 did not contain any information to alert HMRC that the farming losses claimed were excessive. In each year, the returns did not contain an explanation or include any information which would have alerted HMRC to the fact that farming losses had been claimed in the way they had, that is, beyond the normal five year period allowed. Therefore in each year HMRC are not precluded from making a discovery assessment.

60. The Appellant asserts that s 67(3)(b) ITA 2007 applies. In that regard the onus of proof lies entirely with the Appellant. HMRC asked for supporting information and an explanation or evidence in support of the assertion that the Appellant's activities are potentially profit making, however this was not provided. Indeed losses have been reported for the year 2013-14.

61. Relief can be extended beyond five years pursuant to s 67(3)(b) ITA 2007 if both conditions s 68(3)(a) and (b) are satisfied. During the enquiry HMRC accepted that the Appellant satisfied s68(3)(a) ITA 2007 - that is he was 'a competent person

carrying on the activities in the current tax year and would reasonably expect future profits'. However we agree that s 68(3)(b) ITA 2007 was not satisfied. That is, 'a competent person carrying on the activities at the prior period of loss could not reasonably have expected the activities to become profitable until after the end of the current tax year'.

62. The legislation stipulates that consideration must be given to the whole of the activities undertaken in the year of claim. In the present case this is the beef enterprise being carried out in the enquiry year 2011-12. It is these activities which are then related back to the prior period of loss, which in the Appellant's case is 1 March 2004. The question then to be asked is - would a competent farmer expect to be in profit by the year 2011-12? We have not been provided with any information to suggest there is anything specialised about the Appellant's farming activities and therefore the answer to the question is 'yes'. As such s 68(3)(b) ITA 2007 is not satisfied. Therefore the loss relief period may not be extended beyond five years. Section 67(2) ITA 2007 is engaged after 2008-09; as such farming losses may not be set against other income in 2009-10, 2010-11, 2011-12 and 2012-13.

63. We accordingly find that the Appellant has not discharged the onus upon him to show that the amendments to his self-assessment returns for 2009-10 to 2012-13 are incorrect and therefore that

a. The closure notice and amendment for 2011-12 and the discovery assessments for 2009-10, 2010-11 and 2012-13 are correct in law.

b. The quantum of losses restricted in each year and amounts assessed have been calculated correctly

64. For the above reasons we dismiss the appeals and confirm HMRC's assessments.

65. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

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