



Neutral Citation: [2025] UKFTT 00495 (TC)

Case Number: TC09504

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[Taylor House]

Appeal reference: TC/2023/00140

INCOME TAX – loss relief – loss in trade – whether a trade was carried on by the Appellant – yes – whether the trade made a loss – yes – whether the Appellant’s trade losses can be set-off against general income under section 64 of the Income Tax Act 2007 and/or whether there are restrictions under section 66 which bar the Appellant from claiming the losses against her general income – the two conditions in section 66(2) – whether the trade was carried on ‘on a commercial basis’ and ‘with a view to the realisation of profits’ – the need to satisfy both elements of the test and the wholly subjective qualitative test of ‘with a view to profit’ – whether profit needs to be the predominant aim – no – the context of the trade in question and the way in which the trade is conducted – the realistic possibility of profit – whether the trade is part of a larger undertaking – no – Appeal dismissed

Heard on: 27 February 2025

Judgment date: 1 May 2025

Before

**JUDGE NATSAI MANYARARA
DUNCAN MCBRIDE**

Between

CHARLOTTE MACDONALD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Firth KC

For the Respondents: Mx Cleo Lunt, Litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This appeal concerns whether the Appellant (Charlotte Macdonald) was eligible to claim sideways loss relief against her general income. The Appellant owns a 1,500-acre private estate in Bretby, Derbyshire (“**the Estate**”). The losses were said to have been incurred in relation to a woodland shoot (“**the Shoot**”) which took place on the Estate during the tax year(s) in question.

2. The Appellant appeals against a discovery assessment (“**the Assessment**”), raised on 25 March 2021, for the 2016-17 tax year. The Assessment was raised pursuant to s 29 of the Taxes Management Act 1970 (“**TMA**”). The Appellant also appeals against closure notices issued pursuant to s 28A TMA (“**the Closure Notices**”), for the 2017-18 to 2020-21 (inclusive) tax years. The Closure Notices were issued on 21 September 2022.

3. HMRC concluded that by virtue of the application of s 66 of the Income Tax Act 2007 (“**ITA 2007**”), the losses generated by the Shoot and shown in the Appellant’s tax returns were not available to be set off against the general income in those tax years. The Appellant was not, therefore, eligible to claim relief from the losses. Therefore, the losses claimed in each of the relevant years were disallowed and income tax was charged, as follows:

Tax year ended	2021	2020	2019	2018	2017
Total income	£202,212.00	£323,273.00	£278,180.00	£352,293.00	£302,016.00
Loss relief claimed	£19,043.00	£46,330.00	£44,006.00	£65,693.00	£71,329.00
Loss relief due	£913.00	£173.00	£803.00	£5,094.00	£2,521.00
Additional tax due	£8,158.50	£20,763.50	£19,580.23	£27,269.55	£30,867.45¹

4. Although HMRC originally assessed the Appellant for the 2015 and 2016 tax years, HMRC are not defending the assessments raised for those years.

ISSUES

5. The issues in this appeal are:

(1) whether the Appellant is able to claim the losses made by the Shoot against her general income in each of the relevant years under s 64 ITA 2007; or

(2) whether there are restrictions under s 66 ITA 2007 which bar the Appellant from claiming the losses against her general income.

6. This, in turn, requires consideration of:

(1) whether the Shoot was carried on on a commercial basis and with a view to the realisation of profits (“**the Commerciality and Profitability Issue**”); and/or

(2) whether the Shoot was part of a larger undertaking (“**the Larger Undertaking Issue**”);

BURDEN AND STANDARD OF PROOF

The Assessment

7. In accordance with s 29(1) TMA, HMRC bear the burden of proof of establishing that a loss of tax has been discovered. Once this has been established, the burden of proof shifts to

¹ The proposed sideways loss relief is equal to the loss from a Biomass boiler on the Estate. This resulted in a variance from the original Assessment for 2017, in which the entire sideways loss relief claim was denied, including that from the Biomass boiler. The Assessment was therefore varied from £32,001.90 to £30,867.45.

the Appellant to provide evidence to either reduce, or set aside, the Assessment. In this respect, s 50(6) TMA provides that if, on an appeal, it appears to the tribunal that an appellant is overcharged by an assessment, the assessment shall be reduced, accordingly, but “otherwise the assessment ... shall stand good.” The Appellant, therefore, has the legal burden of demonstrating that she is overcharged by the Assessment.

Closure Notices

8. The burden of proof is on HMRC to show that the Closure Notices were validly issued. The burden of proof then shifts to the Appellant to show that the Closure Notices are incorrect, or excessive. As confirmed by the Upper Tribunal (‘UT’) in *Shinlock Ltd v HMRC* [2023] UKUT 107 (TCC) (‘*Shinlock*’), the matter in issue in relation to an appeal against a closure notice is the conclusion notified in the closure notice - albeit not limited to a stated reason for that conclusion - and the associated amendment arising from such conclusion.

9. The standard of proof is the ordinary civil standard; that of a balance of probabilities.

AUTHORITIES AND DOCUMENTS

10. The authorities to which we were specifically referred by the parties were:

- (1) *Wannell v Rothwell (HM Inspector of Taxes)* [1996] 68 TC 719 (‘*Wannell v Rothwell*’);
- (2) *Brander v HMRC* [2009] UKFTT 101 (‘*Brander*’);
- (3) *Brander v HMRC* [2010] UKUT 300 (TCC) (‘*Brander (UT)*’);
- (4) *Kerr v HMRC* [2011] UKFTT 40 (TC) (‘*Kerr*’);
- (5) *Charles Atkinson v HMRC* [2013] UKFTT 191 (TC) (‘*Atkinson*’);
- (6) *Samarkand Film Partnership No 3 & Ors v HMRC* [2017] EWCA Civ 77 (‘*Samarkand*’);
- (7) *Seven Individuals v HMRC* [2017] UKUT 0132 (TCC); [2017] STC 874 (‘*Seven Individuals*’);
- (8) *Jerome Anderson v HMRC* [2018] UKUT 159 (TCC) (‘*Anderson*’);
- (9) *Beacon v HMRC* [2018] UKFTT 104 (TC) (‘*Beacon*’);
- (10) *Ingenious Games LLP & Ors v R & C Comrs* [2019] UKUT 226 (TCC) (‘*Ingenious Games (UT)*’);
- (11) *Roulette V2 Charters LLP v HMRC* [2019] UKFTT 537 (TC) (‘*Roulette V2*’);
- (12) *CHF Pip! Plc v R & C Comrs* [2021] UKFTT 383 (TC) (‘*CHF*’);
- (13) *HMRC v Tooth* [2021] EWCA Civ 826 (‘*Tooth*’);
- (14) *Ingenious Games LLP & Ors v R & C Comrs* [2021] EWCA Civ 1180 (‘*Ingenious Games (CoA)*’).

11. The documents to which we were referred were: (i) the Documents Bundle consisting of 894 pages; (ii) the Supplementary Bundle consisting of 13 pages; (iii) the Authorities Bundle consisting of 589 pages; (iv) HMRC’s skeleton argument dated 17 February 2025; and (v) the Appellant’s skeleton argument dated 17 February 2025.

BACKGROUND FACTS

12. In 1985, the Appellant's father established the Shoot at the Estate. The Estate is a mixed-use estate with arable land, grazing land, woodland, agricultural buildings, stables, gallops, horse paddocks and residential properties. The arable land is let on a Farm Business Tenancy ('FBT') and the grazing land is let on grazing tenancies. The main house, ("**Dower House**"), is occupied by a tenant and a second house is occupied by another tenant.

13. In 2005, the Appellant's father gifted the Estate to the Appellant. Three income streams are generated by activities which take place on the Estate; namely, the Shoot, a Biomass boiler and rental income. The Biomass boiler was installed and began operating during the 2015-16 tax year. The Biomass boiler provides energy for the buildings on the Estate.

14. The Shoot comprises the shooting of partridges and pheasants. The 'shooting rights' cover the entire Estate and the Shoot uses the same land as the rest of the Estate. Participants stand in fields that are let to arable and grazing tenants. Approximately 80-85 % of the Estate's land and woodlands are walked over and beaten into drives to enable a day's shooting to take place. Shooting season officially runs from 1 September (partridges) and 1 October (pheasants) to 31 January each year. The Shoot starts slightly later than 1 September to allow farming tenants to complete their harvest. The amount of shooting in each area is limited for animal welfare reasons. Generally, there is at least one shoot a week with an aim to complete between 20 and 28 shoots per season.

15. The Shoot prepares annual accounts to the year ended 31 March and income from the Shoot is declared in the Appellant's self-assessment tax returns. In the year ended 31 March 2018, 32 days of shooting were held (including three family days). No income is received from family days.

16. The Appellant does not live on the Estate but plays an active role in the business. She travels to attend and host the Shoot, acting as 'Shoot Captain' for each day. In this role, she is responsible for safety, positions of guns on each drive, and hospitality. She also manages bookings and arranges catering.

17. The Appellant employs a 'Head Keeper' who ensures that the value of the farming land on the Estate is maintained. The head keeper fills out the Biomass boiler, which provides heating to two of the rental properties on the Estate. He also carries out maintenance and repairs to gates, fences and tracks, maintenance of the supply of water to troughs in fields, as well as the emptying of the muck trailer for the stables' tenants. The head keeper's duties on a shoot day include, *inter alia*, co-ordinating the beating line and planning the order of drives. The head keeper is also in charge of the pickers. At other times in the year, the head keeper's duties include the rearing of birds, release of birds, vermin control, Estate security (given that the Estate is so close to a town there are issues such as fly tipping, trespass and poaching), tree management and some Estate maintenance.

18. During the 2017- 2018 season, the head keeper had an accident (early December) and was in an induced coma for two to three weeks. The head keeper was kept on full pay for December and January, until the season had finished. He ceased employment in February, with a severance package that took account of his nine years' employment, for which he received £6,500 and his holiday pay in lieu which was £1,513.12. The underkeeper was under qualified to ensure the smooth running of the Shoot and so the Appellant had to employ someone else as head keeper for the remainder of the season. The costs of this were c. £23,000. The Shoot employed two members of staff until 2020. From February to July, the keepers are busy with collecting pheasants, eggs, incubation and then the rearing of the birds. Once the birds are released, the main jobs for both keepers are feeding and watering the birds daily.

19. For the 2018 tax year, the Biomass boiler and the Shoot both made losses, which were claimed as relief against the total income on the Appellant's tax return (which included profit from the Estate rentals).
20. On 10 December 2019, Officer Scrivens (of HMRC) wrote to the Appellant informing her that HMRC were opening a check into her tax return for the 2018 tax year. The activities referred to in the tax return included the Shoot, the Biomass boiler and income from property.
21. On 19 February 2020, the Appellant provided electronic copies of the Bretby Estate accounts.
22. On 5 August 2020, a teleconference took place between Officer Scrivens, Miss Aziz (HMRC), Mr Jon Cooper (agent), Ms Jayne Bryars (agent) and the Appellant. A number of points were discussed, including that:
 - (1) the cost of the head keeper's accident to the Shoot was in the region of c. £23,000, including lawyer costs.
 - (2) the Appellant increased the turnover generated by the Shoot by around £50,000 in recent years.
23. Notes of the call were sent to the Appellant by email on 12 August 2020.
24. On 21 August 2020, Mr Cooper acknowledged receipt of the meeting notes and made several amendments. He argued that the Shoot was an integral part of the Estate, which could not operate independently. Mr Cooper made the following points in support of this argument:
 - (1) The income generated by the Shoot and rental activities would both be diminished without the existence of the other, or the costs associated with each operation would be greatly increased without the other.
 - (2) The Shoot could not operate many miles apart from the Estate because the woodlands provide the habitat and shelter for the birds to live; but almost all of the shooting and collecting of the birds takes place on surrounding land. Shooting rights are held over these fields.
 - (3) The presence of the keepers ensures the required pest and vermin control needed to maintain the current level of rents received for land on the Estate. The keepers would need to be retained in employment, even in the absence of the Shoot, for this purpose.
 - (4) Each year a shooting meeting is held in February to review the season just finished and to set targets for the coming season.
 - (5) Roughly a third of the Estate is covered by woodland; the remainder is farmed with a mixture of pasture and arable cropping.
 - (6) The terrain and landscape features of the Estate earned the Shoot a reputation as one of the finest lowland shoots in England.
25. On 19 January 2021, 22 December 2021 and 25 July 2022, Officer Scrivens wrote to the Appellant to inform her that HMRC were opening checks into her tax returns for 2019, 2020 and 2021 tax years, respectively.
26. Overall, the Appellant's tax return for:
 - (1) the 2017 tax year showed an adjusted loss of £71,329;
 - (2) the 2018 tax year showed an adjusted loss of £65,693;
 - (3) the 2019 tax year showed an adjusted loss of £44,006;

(4) the 2020 tax year showed an adjusted loss of £46,330; and

(5) the 2021 tax year showed an adjusted loss of £19,043.

27. The losses were all from the Shoot and were set-off against general income for each year.

28. The documents submitted also showed that the losses made since 2005-06, when the Appellant took ownership of the Estate.

29. Since the 2006 tax year, the Shoot and the Biomass boiler accumulated losses of £750,589 (net profit/loss after depreciation but before capital allowances and once adjusted for private use). Of this amount, £7,615 was attributable to the Biomass boiler.

30. For the years under appeal, the Appellant's Profit & Loss ('P&L') accounts for the Shoot were as follows:

Accounting period ended 31 March	Turnover	Cost of sales	Expenses	Total costs for the year	Net loss for the year
2017	£78,050	£104,103	£67,399	£171,502	£93,453
2018	£129,317	£138,025	£77,943	£215,968	£86,651
2019	£97,218	£100,063	£64,115	£164,178	£69,960
2020	£109,017	£97,832	£68,073	£165,905	£56,888
2021	£35,769	£34,911	£35,897	£70,809	£35,039

31. On 25 March 2021, HMRC raised the Assessment. Officer Scrivens concluded that there had been an insufficiency of tax caused by the application of loss relief under s 64 ITA 2007 that was not allowable. The removal of this loss relief caused the total taxable income to rise, in turn giving rise to an additional chargeable amount of £32,001.90. Officer Scrivens observed that losses were being suffered by the Shoot and the Biomass boiler within the Estate. Officer Scrivens further determined that rental properties owned by the Appellant on the Estate were profitable and the losses incurred by the Shoot and Biomass boiler had been set against these profits under s 64 ITA 2007. He believed that the losses were not eligible for relief under s 64. Officer Scrivens also came to the conclusion that the Appellant's trade was not being carried on with a reasonable expectation of a profit.

32. On the same day (i.e., 25 March 2021), HMRC also raised assessments for the 2015 and 2016 tax years but, as stated, HMRC are not defending these assessments.

33. On 1 April 2021, the Appellant appealed against the Assessment.

34. On 21 September 2022, HMRC issued the Closure Notices.

35. On 26 September 2022, the Appellant appealed against the Closure Notices.

36. On 30 September 2022, HMRC issued their view of the matter and offered the Appellant a statutory review.
37. The review conclusion letter was sent to the Appellant on 3 February 2023, upholding the decision.
38. On 10 January 2023, the Appellant submitted an appeal against the Assessment to the First Tier Tribunal ('FtT').
39. On 3 March 2023, the Appellant submitted an appeal against the Closure Notices to the FtT.
40. On 5 May 2023, HMRC made an application to consolidate the appeal against the Assessment (TC/2023/00140) and the appeal against the Closure Notices (TC/2023/00963).
41. On 5 December 2023, the Tribunal directed that the two appeals were to be consolidated under the reference "TC/2023/00140".

RELEVANT LAW

42. In order to put the parties' respective contentions into context, we start with the relevant statutory provisions. The relevant law, so far as is material to the issues in this appeal, is as follows:

43. With effect from 6 April 2007, ss 380, 381 and 384 of the Income and Corporation Taxes Act 1988 ('ICTA') were replaced by provisions of ITA 2007. For these purposes, "trade" includes "any venture in the nature of trade": see s 989 ITA 2007. There is no further statutory definition of 'trade', the meaning of which has been developed through case law. A "qualifying trade" is defined in s 189 ITA 2007 as a trade which is conducted on a commercial basis, with a view to the realisation of profits, and which does not consist wholly, or as to a substantial part, in the carrying on of excluded activities.

44. Section 83 ITA 2007 enables a person who has made a loss in a trade in a tax year to claim relief for that loss by carrying it forward to reduce later income of the same trade.

45. Section 25(1) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") provides that the profits of a trade must be calculated in accordance with generally accepted accounting practice ("GAAP"), subject to any adjustment required or authorised by law in calculating profits for income tax purposes.

ITA 2007: Loss relief

46. Under s 64 ITA 2007, a person who has made trade losses may make a claim for relief against his general income. Section 64 provides that:

"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.

(3) If the claim is made in relation to both tax years, the claim must specify the tax year for which a deduction is to be made first.

- (4) Otherwise the claim must specify either the loss-making year or the previous tax year.
- (5) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the loss-making year.
- (6) Nothing in this section prevents a person who makes a claim specifying a particular tax year in respect of a loss from making a further claim specifying the other tax year in respect of the unused part of the loss.
- (7) This section applies to professions and vocations as it applies to trades...”

47. Section 66 ITA 2007 is required to be satisfied for a loss made in a trade to be available to set against wider income. Section 66 provides that:

“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 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...”

48. If either, or both, of the conditions under s 66(2) are not met, then s 66 acts to restrict loss relief under s 64.

TMA: The Assessment and the Closure Notice

49. In relation to the Assessment, s 29 TMA provides that:

“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.

(2) Where—

- (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
- (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above

(a) in respect of the year of assessment mentioned in that subsection; and

(b)... in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf...

(5) The second condition is 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 under section 8 or 8A of this Act in respect of the relevant [F2year of assessment]; or

(b) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

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) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment 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;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer F10... ; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; F12...

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.”

50. The powers of the FtT on an appeal are set out at s 50 TMA, as follows:

“(6) If, on an appeal notified to the tribunal, the tribunal decides—

...

(c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.”

51. In relation to a “**notice of enquiry**”, s 9A provides that:

“(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so (“notice of enquiry”) –

(a) To the person whose return it is (“the taxpayer”),

(b) Within the time allowed.

(2) The time allowed is –

(a) If the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered.”

52. In relation to a “**closure notice**”, s 28A(1B) and (2) provide that:

“**28A Completion of enquiry into personal or trustee return ...**

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

...

(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a “final closure notice”) —

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

(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

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

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

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

(3) A partial or final closure notice takes effect when it is issued.”

THE EVIDENCE AND KEY SUBMISSIONS

53. The documents for the hearing, set out at para. 11 above, comprised of pleadings, correspondence relating to HMRC’s enquiry, the accounts relating to the business, appeal correspondence and minutes of the meeting that took place between the Appellant, her representatives and HMRC.

54. At the commencement of the appeal hearing, Mr Firth handed up a copy of HMRC’s internal manual “*BIM85705 – Trade losses – restriction of relief: uncommercial trades – not on a commercial basis*”, published on 22 November 2013 and updated on 27 January 2025.

Appellant’s evidence and submissions

55. We heard oral evidence from the Appellant, which we considered to be of assistance to us in understanding the background and details regarding the Shoot, and the Estate as a whole. The key features of the Appellant’s evidence were as follows:

(1) The Estate is a ‘sporting estate’ due to the existence of horse training, stables, horse paddocks and the Shoot. The historic ownership and fame of the Carnavons of Highclere Castle and Highclere Stud contributes to the turnover and income generation abilities of the Estate.

(2) The head keeper performs many roles on the Estate, which benefit the Estate as a whole, ensuring that the rental values of the farming land is maintained due to the high yield of arable crops, good performance of rearing livestock, implementation and planting of game covers, hedgerows and woodland plantings that enable the Estate to claim stewardship schemes and hedgerow grants, thus increasing the income and turnover of the Estate and the Shoot.

(3) One of the fundamental elements of the head keeper’s job is to bring another revenue stream into the Estate and to ensure that shooting rights are utilised to the good of other tenants. Vermin control is of significant importance to the good establishment of the arable tenants’ crops, new hedges and new woodland plantations. Vermin is kept to a minimum in order to protect grazing tenants’ livestock, protect arable tenants’ crops (such as wheat, barley and oil seed rape) which can be decimated by wild bird activity. Breeding ewes can fall prey to foxes, carrion crows and rooks.

(4) In 2017-18, the Environmental Stewardship Scheme (“the Scheme”) (through the planting and use of game covers) brought in £8,287 of revenue, but this was incorrectly allocated to the Estate as a whole, and not the Shoot.

(5) In 2018-19, the Scheme brought in revenue of £3,460, which was allocated to the Estate.

(6) In 2019-20, the Scheme brought in £3,853 of income, which was allocated to the Shoot, and there was other Grant income of £4,339 due to the Shoot activities of cultivation and tree planting.

(7) In 2020-21, the Scheme brought in £7,325, which was correctly allocated to the Shoot.

(8) Due to increasing cost pressures on the Shoot, the COVID pandemic and the lockdown, the existence of the Estate being on the fringes of the exclusion zone for Bird Flu and the need to decrease costs, the decision was taken in 2020-21 to scale down the Shoot and employ another under keeper (when the original under keeper left).

(9) The single largest source of income to the Estate is via the arable tenants’ FBT. This is paid quarterly in March, June, September and December. The Shoot is another income stream for the Estate and enables better cash flow during the winter months.

(10) The Estate made an accounting profit in 2014-15, 2015-16, 2019-20, 2020-21 and 2022-23. This profit has been growing. The turnover of the Estate has increased from £242,926 in 2013-14 to £289,427 in 2022-23, despite cutting back on the Shoot and decreasing income from the Shoot. Profit for the Estate in those years has gone from an accounting loss in 2013-14 of £5,749, to a profit of £54,939. The Shoot loss was £10,441 and, without depreciation, would have been profitable in both 2022-23 and 2013-14.

(11) Rental income has gone up from £126,829 in 2013-14 to £199,163 in 2021-22 due to efforts in increasing the profit on the Estate and the Shoot. This is against a background of decreased Rural Payments Agency (“RPA”) payments due to Brexit. The RPA payments on the Estate have reduced from £65,161.05 in 2016-17, to £45,341.95 in 2020-21.

(12) A single set of accounts is produced to cover the whole Estate. A single balance sheet details the Estate's assets and liabilities.

(13) Estate rents were slightly reduced in 2016-17 due to the Dower House tenant requesting a rent reduction following redundancy. Rents were still at £84,569. This compares well with £81,512 for 2014-15, but is a reduction from £107,149 in 2015-16.

(14) 2017-18 saw a good level of bookings for the season, with increased income. The head keeper however had an accident and he suffered a traumatic brain injury. Shoot income increased to £124,195.02, but feedstuff costs rose to £48,211 (88.8 tonnes of wheat being used when normal usage is around 30 tonnes). Medication costs were exceptionally high at £2,150. The overall Estate profit was £41,642, due to the unexpected extra staffing costs and legal and professional fees (which added £22,356,87 of unforeseen costs).

(15) 2018-19 saw the employment of a new head keeper, who only started working in April 2018. A meeting resulted in a discussion about buying new pheasant stock. It was decided that the business would try to achieve an income of around £90,000, given that bookings were likely to be down due to there being a new head keeper.

(16) A Shoot meeting in the 2019-20 tax year was held to determine the season ahead, and to increase Shoot bookings. The business purchased another 3,400 pheasants but suffered a flooded rearing field due to the wet Spring conditions. Depreciation stayed at a high level due to the purchase of two new sheds, and costs were higher with the need to replace shed heaters at a cost of £1,080.60. Shoot turnover was increased to £109,017 from £97,2018.

(17) The cost per bird for the Shoot was kept in line with local shoots, at £30 plus VAT.

56. In respect of "the Commerciality and Profitability Issue", Mr Firth submits (in summary) that:

(1) The question of whether a trade is carried on on a commercial basis is an objective one. Carrying on a trade on a commercial basis is used in contradistinction to carrying it out on an uncommercial basis. A person who seeks to conduct the trade on a commercial basis, but is blown off course by unexpected events, is nevertheless carrying on the trade on a commercial basis. HMRC accept that the Shoot was conducted in a manner that is similar to other shoots of a similar nature. HMRC have misunderstood the statutory test because they go on to make allegations about the subjective motivation for the Appellant carrying on the Shoot.

(2) There is no need for profit to be the predominant aim. The likelihood of profits may, nevertheless, be evidence relevant to whether there was a subjective intention to make profits. There is no specification as to the time frame within which the profits must be expected (i.e., it is not necessary that profits were expected in the period under consideration), or as to the quantum of the expected profits (a small profit is still a profit).

(3) When adjustments are made for exceptional expenditure/expenditure that would be incurred in any event, the Shoot did make profits in some years. That does not take account of the increased income that would have been expected but for those exceptional events. Whilst a trade is deemed to be carried on with a view to profit if there is a reasonable expectation of profit (s 66(3)), the reverse does not follow.

(4) The Shoot has been affected by a number of factors outside the control of any person carrying on such an activity due to: (i) an accident causing the owner to be unable to participate in the activity; (ii) a serious traumatic brain injury to the head keeper leading to additional costs; (iii) addressing the consequences of having to introduce a new head keeper; (iv) large increases in feed prices; and (v) the global pandemic and national lockdown.

57. In respect of “the Larger Undertaking Issue”, Mr Firth submits (in summary) that:

(1) The Shoot was part of a larger undertaking, being the management of a landed estate (i.e., the Estate). Both the Shoot and/or the larger undertaking were carried on on a commercial basis in each year, and were carried on with a view to the realisation of profits in each year.

(2) There can be no doubt that the various activities on the Estate were interlaced and interconnected in the way described by the Appellant in her witness statement. They amounted to the typical undertakings of a traditional landed estate because: (i) the same staff and personnel worked on activities across the Estate; (ii) the Estate and the Shoot are run by the same person, aiming to ensure the Estate runs profitably; (iii) the land used is the same; (iv) the planting of game covers, hedgerows and woodlands enable the Estate to claim stewardship schemes and hedgerow grants (used for the Shoot); (v) vermin need to be kept to a bare minimum for the benefit of all activities; (vi) the cashflow from the Shoot smooths the lumpiness of other elements of the cashflow from the Estate.

(3) The Appellant’s evidence demonstrates that both the Shoot and the larger undertaking (i.e., the Estate) were carried on on a commercial basis because: (i) prices are set by reference to how much competitors are charging and changing levels of demand; (ii) prices were increased when several local shoots closed down and also in response to increased costs; (iii) advertising is undertaken to get new customers in due to an ageing customer base; and (iv) tighter controls were applied to costs.

58. Whilst we did not receive a copy of the Authorities Bundle before the hearing, we had access to the authorities referred to by Mr Firth during his submissions. The Authorities Bundle was forwarded to us prior to the determination of this appeal and we refer to the authorities in our “Discussion”, later.

HMRC’s evidence and submissions

59. We had the benefit of reading Officer Scrivens’ witness statement. He was not called to give evidence and Mr Firth did not suggest that he wished to cross-examine him, albeit that Mr Firth’s submission was that the wrong test was applied by HMRC in relation to s 66 ITA 2007. In his witness statement, Officer Scrivens sets out the chronological background leading up to the Assessment and the Closure Notices. Officer Scrivens became involved in this matter when he opened the initial enquiry into the Appellant’s tax return for the tax year ended 5 April 2018. He came to the conclusion that the Appellant’s trade was not being carried on with a view to the realisation of a profit as the work that the Appellant had carried out in recent times had sought to maximise the possible income and minimise the outgoings. Despite this being done to the best of the Appellant’s abilities, Officer Scrivens judged that the trade could not be seen to have a reasonable expectation of profit.

60. In respect of “the Commerciality and Profitability Issue”, Mx Lunt submits (in summary) that:

(1) Section 66 ITA 2007 restricts relief under s 64 where the loss-making trade was not commercial during the year in question. In order for the losses made by the Shoot to be available to relieve the Appellant's general income in each of the years in question, the Shoot must have been carried on both on a commercial basis, and with a view to the realisation of profits.

(2) While the test as to whether a trade is conducted "with a view to" profit is a subjective one, there is an objective element in that there must be a view to objective profits, and there must be – based on the facts and circumstances of the trade – an objectively realistic possibility of profits being realised. Given the fact that the Shoot consistently made losses, year on year, and that the Appellant's ability to make changes to the way the Shoot operated were limited, she must have had an awareness that the Shoot was not going to become profitable.

(3) The Shoot has made an annual loss every year since the Appellant took over the running of the Shoot, with the exception of the year ended 31 March 2014 when it made a loss prior to the adjustments required to calculate taxable profit. After adjustments for private use and depreciation, the Shoot's loss for accountancy purposes of £17,514 became a taxable profit of £4,183.

(4) The Shoot was not carried on on a commercial basis in any of the years in question. In order to be carried on on a commercial basis, the trader must be able to demonstrate a clear intention to make a profit from the business. For a commercial venture, especially one which was struggling to realise a profit, it would be reasonable to expect to see business plans, budget projections, notes of meetings where plans to improve profitability were made, and similar documents. The desire to maintain the reputation of the Estate as a 'sporting estate', the perceived increase to the Estate's capital value, as well as the Appellant and her family's enjoyment of shooting, all provide motives for the Appellant to continue the Shoot separate from making a profit. The business plans do not include profit projections, or detail of when and how profits will be generated by the Shoot. The aim or purpose of the Appellant in carrying on the Shoot was not to realise profits from the Shoot itself. Therefore, the test at s 66 (2)(b) ITA 2007 was not met. The Shoot was not commercial and loss relief under s 64 is restricted.

61. In respect of "the Larger Undertaking Issue", Mx Lunt submits (in summary) that:

(1) The Shoot is not part of a larger undertaking and should be viewed on its own. The various activities taking place on the land which comprises the Estate are separate activities which happen to share a location; that being the land which comprises the Estate. They are neither interconnected, nor interdependent, to the degree necessary to form a larger undertaking.

(2) The farming tenants occupy land which is suitable to their purposes. Whether or not the residential properties are occupied, and whether or not those properties are supplied with energy from the Biomass boiler or mains electricity, is wholly inconsequential to the tenants of the farmland.

(3) It is acknowledged that the Shoot uses land on the Estate, which is also rented to farming tenants. However, the farming tenants could continue to make use of the land were the Shoot to cease and, in fact, during the pandemic when the Shoot's activities were restricted, the activities of the farming tenants were not impacted. Similarly, on a shoot day, shooting occurs on land that is let to farming tenants and on land that is not. This demonstrates that neither activity is reliant on the other. The Shoot does not, in

any way, enhance the profitability of any of the other activities carried out on the Estate.

62. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

63. We have considered any key points of disagreement in determining the facts as set out below. Having considered all of the evidence, we are satisfied that:

(1) The Appellant has been running the Estate since she inherited it from her father in 2005. The Appellant runs a Shoot on the Estate and she acts as Shoot Captain on shoot days. She travels to the Estate to do this. She is also involved in planning and hosting shoots. The Shoot operates at around 30 days per season. A season runs from September to January. The Appellant's role is to host the shooting days, take bookings, organise catering, take the guns around and be in charge of safety. Out of season, the Appellant's role includes marketing the Shoot and taking the bookings, as well as managing the staff and their day-to-day roles. The Appellant does not employ a financial adviser due to her knowledge of the workings of the Estate.

(2) The Appellant employs a head keeper on the Estate. Due to the head keeper suffering a brain injury, he was out of work during the year of enquiry. The Appellant had to employ someone additional to carry out his duties. The Appellant also employed an employment lawyer to help with the process. The head keeper was in a coma for two to three weeks and the Appellant kept him on full pay during this time.

(3) During the year ended 31 March 2018, 32 days of shooting were held, including three family days. No payments are received for the family days. The Appellant's family enjoys shooting. The family shoots less than 8% of the days annually. No vehicle purchases or expenses are run against the Shoot by the Appellant.

(4) Every year accountants' meetings are held (in September and January) to review the accounts and there is an annual Shoot meeting in February/March to review the previous season, to set targets and to discuss the forthcoming season. Budgets are produced and reviewed. Costs are analysed and compared year-on-year in line with bookings. Shoot accounts are produced within the Estate accounts in order for ease of cost analysis. Billing and accountancy work are largely done in-house by a trained bookkeeper, who works five days a week in the Estate Office.

(5) The Estate has been profitable since 2013-14 (apart from 2015-16 when installing the Biomass boiler). The Estate made an accounting profit in 2014-15, 2015-16, 2019-20, 2020-21 and 2022-23. The turnover of the Estate has increased from £242,926 in 2013-14 to £289,427 in 2022-23. Rental income has gone up from £126,829 in 2013-14 to £199,163 in 2021-22.

(6) The Shoot made losses every year since 2005-06, with one exception (2013-14). After adjustments for private use and depreciation, the Shoot's loss for accountancy purposes of £17,514 became a taxable profit of £4,183. The Appellant stated the loss was due to an exceptional circumstance, which was the employment issue (concerning the head keeper).

(7) The total income from the Estate includes: (i) profit from the Bretby Estate Farm rents; (ii) a Biomass boiler; and (iii) the Shoot. The Estate makes a profit and the latter two make losses, which are then set off against the profit from Bretby through s 64 relief. The businesses are handled separately with separate P&L accounts.

(8) The Estate does not need a reputation as a sporting estate in order to let land to farming or residential tenants, nor to operate the Biomass boiler.

(9) The Estate was able to continue operating its other activities when the Shoot was impacted by the pandemic.

(10) The farming tenants are able to continue their activities wholly separate from the activities of the Shoot.

(11) The activities of the Estate and the Shoot are neither interlaced, nor dovetailed.

64. We, therefore, make these findings of fact.

DISCUSSION

65. The Appellant appeals against an Assessment and Closure Notices in relation to loss relief claimed against her general income. As explained by Moses LJ in *Tower MCashback LLP 1 v HMRC* [2010] STC 809 (*'Tower MCashback'*), at [17] to [18], the taxpayer's self-assessment constitutes the final determination of their liability, subject to three circumstances; namely (i) an amendment to the return; (ii) an enquiry by HMRC; or (iii) a discovery assessment. HMRC's case is that the Assessment was issued within the ordinary four-year time-limit, as required by s 34 TMA, and valid notices of enquiry were issued to the Appellant within the time permitted.

66. Broadly speaking, there are a number of conditions which the Appellant needs to satisfy in order to be entitled to set off the trading losses against general income for the years in question (under s 64 ITA 2007). Section 66 ITA 2007 prohibits such set offs where the trade was not carried on 'on a commercial basis' and with a 'view to the realisation of profits'. In this respect, we are examining the commerciality and profitability of the Appellant's trade.

67. Mr Firth, ultimately, submits that the Appellant's business was carried on on a commercial basis, with a view to the realisation of profits. Mr Firth further, and alternatively, submits that the Shoot was part of a larger undertaking.

68. HMRC disagree. Mx Lunt submits that the Appellant's trade was not commercial, within the meaning of s 66 ITA 2007, due to there not being a realistic view to realising profits. Thus, the Appellant was not permitted to set off the losses against general income in the years in question. Mx Lunt further submits that the various activities taking place on the land which comprises the Estate are separate activities which happen to share a location. He adds that the activities are neither interconnected nor interdependent to the degree necessary to form a larger undertaking.

SECTION 64 ITA 2007 AND THE AVAILABILITY OF LOSS RELIEF

69. In order for there to be a valid claim for loss relief, there must be a trade taking place.

[All references to "sections" "s" below are to ITA 2007 unless stated otherwise]

70. Section 64 allows for the relief of losses generated by a trade against the general income of the person who carried on the loss-making trade in the tax year in question. Section 66 restricts relief under s 64 where the loss-making trade was not commercial during the year in question. Section 66 does not prevent a person from carrying forward the trading losses to reduce later income from the same trade. It simply limits the options available for managing trading losses.

71. It is not disputed that the Shoot is a trade carried on by the Appellant and that, in each of the years in question, the Shoot made a loss. It is further not disputed that the Appellant

had general income in each of the years in question, which could be relieved under s 64, subject to the restrictions under s 66.

72. The commercial test in s 66 involves two distinct elements, which both have to be satisfied in order to meet the test. The two elements of the test are set in s 66(2), which provides that:

“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”.

73. As Henderson LJ (with whom David Richards and Arden LJJ agreed) said in the Court of Appeal in *Samarkand*:

“The conditions therefore embody two tests: a test of commerciality, and a profits test...broadly speaking [the profits test] requires the trade to have been carried on with a view to making profits.”

74. Henderson LJ went on to say that:

“... considerations of profitability cannot be divorced from an assessment of the commerciality of the business. In my judgment it is wrong to regard the profitability and commerciality tests in the legislation as mutually exclusive, and they necessarily overlap to an extent which will vary from case to case.”

75. For that reason, in many cases, either both conditions will be satisfied or both conditions will not. Whereas the condition in s 66(2)(a) is objective in nature, the condition in s 66(2)(b) is subjective in nature. The second element of the test, “with a view to the realisation of profits”, is expanded upon in s 66(3), which provides that:

“if at any time a trade is carried on so as to afford a reasonable expectation of profit, it is carried on at that time with a view to the realisation of profits”.

76. The subjective nature of the condition in s 66(2)(b) is, therefore, demonstrated by the existence of the objectively-measured safe harbour in s 66(3).

77. Section 66 requires the Tribunal to examine the commercial test throughout the basis period for the tax year. Thus, the test has to be considered afresh for the basis period of each tax year under appeal.

The Commerciality and Profitability Issue

78. The principal issue raised in the appeal is that concerning whether the Appellant was carrying on the trade on a commercial basis, with a view to the realisation of profits.

The first element of the test: ‘on a commercial basis’

79. The leading authority in relation to the condition in s 66(2)(a) is the judgment of Robert Walker J in *Wannell v Rothwell*. The judgment is often cited as explaining the meaning of “on a commercial basis”, where Robert Walker J stated that:

“I was not shown any authority in which the court has considered the expression “on a commercial basis”, but it was suggested that the best guide is to view ‘commercial’ as the antithesis of ‘uncommercial’. A trade may be conducted in an uncommercial way either because the terms of the trade are uncommercial 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)...”

80. The appeal concerned a claim by the taxpayer for loss relief under similarly worded predecessor legislation. Mr Wannell had set up in business buying and selling shares and commodities. There was no suggestion that he was doing anything other than trying to make money out of it but, in fact, he had consistently made a loss. He claimed loss relief under what was then s 168 of the Income and Corporation Taxes Act 1970. The deputy Special Commissioner had found that although Mr Wannell might have been trading, he had not been trading on a commercial basis. This was because of the lack of commercial organisation. Robert Walker J said of this, at 461:

“...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. There will no doubt be many difficult borderline cases ... for the commissioners to decide; and such borderline cases could as well occur in Bond Street as at a car boot sale.”

81. In Robert Walker J’s view, a trade should not be treated as having been carried on ‘on a commercial basis’ if the terms of the trade were uncommercial, or if the way in which the trade has been conducted was uncommercial. On the facts of that case, Robert Walker J expressed some doubts about the finding of the Special Commissioner, to the effect that the lack of commercial organisation which had characterised the relevant activity meant that the trade had not been carried on on a commercial basis, but he ultimately dismissed the appeal.

82. Robert Walker J referred to the finding of the Special Commissioner to the effect that “the taxpayer was aiming at profits – quick profits” and noted that it was implicit in what the Special Commissioner had said about the taxpayer’s experience, and method of operating, that the taxpayer “had a reasonable prospect of achieving profits”. It is, therefore, clear that had he been required to decide the point on the facts in that case, Robert Walker J would have held that the condition in s 66(2)(b) was satisfied, even though he did not feel able to disturb the Special Commissioner’s conclusion that the condition in s 66(2)(a) was not satisfied.

83. *Wannell v Rothwell* is an example of facts which failed the objective condition in s 66(2)(a), but satisfied the condition in s 66(2)(b) because the taxpayer in that case met both the subjective standard in the latter condition itself, and the objectively- measured safe harbour in relation to the latter condition in s 66(3). Robert Walker J’s consideration of the meaning of ‘commercial’ in *Wannell* demonstrates that the carrying on of a trade is not sufficient, in and of itself, to show that that trade is being carried on on a commercial basis.

84. In *Samarkand* (at [2011] UKFTT 610 (TC)), the FtT had quoted the passage from *Wannell v Rothwell* and said this, at [253]:

“It seems to us that the serious interest in a profit is at the root of commerciality.”

85. The appeals in *Samarkand* concerned whether two “film scheme” partnerships, which were marketed to wealthy individuals, resident but not domiciled in the United Kingdom, who wished to generate substantial first year losses to set against their taxable income were carrying on a trade. If the partnerships were not trading, the schemes failed to achieve their fiscal objective in accordance with the relevant legislation governing the grant of tax relief for the financing of films. That purpose could only be achieved if the partnerships were carrying on a trade. The FtT found that the partnerships were not trading, so the schemes failed. This conclusion was then upheld on appeal by the UT and the Court of Appeal.

86. On appeal to the UT (Nugee J and Judge Sinfield), the UT agreed with the FtT on this point and upheld the FtT’s conclusion that there was, in that appeal, a lack of commerciality: see [2015] UKUT 211 (TCC). At [96] to [97], the UT said this:

“96 ‘Commercial’ and ‘with a view to profit’ are two different tests but that does not mean that profit is irrelevant when considering whether a trade is being carried on on a commercial

basis. The reference in *Wannell v Rothwell* to the serious trader who is seriously interested in profit is not only relevant to deciding whether a person is a serious trader or an amateur or dilettante. We consider that the FTT were right when they said, at [253], that the serious interest in a profit is at the root of commerciality. We also consider they were correct in regarding “profit” in the context of commerciality as a real, commercial profit, taking account of the value of money over time, and not simply an excess of income over receipts.

97. The FTT were, in our view, right to conclude that a trade that involved transactions that were intended to produce a loss in net present value terms, with no compensating collateral benefits, was not conducted on a commercial basis. No-one who was seriously interested in running a business or trade on commercial lines would pay £10 for an income stream with a net present value of £7 unless there were some good reason to do so. Of course in this case the reason why the partnerships were willing to do this was because they believed that tax relief would be available to the partners.”

87. On further appeal to the Court of Appeal, the appellant taxpayers challenged this. The grounds of appeal raised two issues: (i) firstly, whether the profitability of the trade is relevant to the commerciality test; and (ii) secondly, whether it is permissible to take account of the availability of loss relief to the individual partners in assessing the commerciality of the trade. The court found no grounds upon which to interfere with the multifactorial evaluation carried out by the FtT: see in particular the judgment of Henderson LJ, at [59] to [64].

88. Henderson LJ endorsed the conclusions of the UT:

“(1) The relevance of profitability to the commerciality test

The UT dealt with this question at [96] and [97] of the UT Decision ...”

89. At [90], Henderson LJ cited the same passage from Robert Walker J’s judgment in *Wannell v Rothwell* and said this:

“...In my judgment it is wrong to regard the profitability and commerciality tests in the legislation as mutually exclusive, and they necessarily overlap to an extent which will vary from case to case. I therefore see no error of law in the approach which the FTT adopted to this question, and I agree with the observations of the UT in [96] and [97] of the UT Decision, quoted above.”

90. It is clear that a trader can fail the commerciality element of the test either because of a lack of commercial organisation, or because of a lack of any interest in making money. If a trade is run in a way in which no-one seriously interested in profits (or seriously interested in making a commercial success of the trade) would run it, that trade is not being run on commercial lines. In *Seven Individuals*, at [46] and [47], Nugee J said this:

“46. ... I agree that a trade can fail the commerciality limb in different ways. This is indeed what Robert Walker J says in *Wannell v Rothwell* where he refers to a trade being uncommercial either because the terms of trade are uncommercial, the prices not covering the costs, or because of the way the trade is conducted in other respects. So I agree that a trader can fail the commerciality limb either because of a lack of commercial organisation (Mr Maugham’s class 1A) or because of a lack of any interest in making money (Mr Maugham’s class 1B). But I do not think it follows that as long as the trade is sufficiently organised and the trader hopes to make a profit (Mr Maugham’s class 2) that is always enough. Let us assume that a trade is well organised. The question whether such a trade is being carried on on commercial lines is not to my mind answered simply by pointing to a hope by the trader to make profits. A trade run on commercial lines seems to me to be a trade run in the way that commercially-minded people run trades. Commercially-minded people are those with a serious interest in profits, or to put it another way, those with a serious interest in making a commercial success of the trade. If therefore a trade is run in a way in which no-one seriously

interested in profits (or seriously interested in making a commercial success of the trade) would run it, that trade is not being run on commercial lines.

47. That is in effect what we said in the UT in *Samarkand* at [97], which has been endorsed by Henderson LJ in the Court of Appeal. If that is right, it is not I think an answer to point to the hope of the trader that profits will nevertheless be made. In other words the concept of a trade carried on on commercial lines has an objective element to it, and cannot be satisfied by proof merely that the trade is well organised and that the trader had a purely subjective hope or desire to make a profit.”

91. The facts in *Seven Individuals* were very different from those in *Samarkand*, where the return from the investment was measurable at the outset. In *Seven Individuals*, by contrast, no meaningful estimate of the returns from the projects could be made at the outset as it would entirely depend on how successful they were; something which on the evidence was impossible to predict.

92. Having considered the evidence, together with the authorities, we are satisfied that the Appellant is carrying on a trade on a commercial basis (in respect of the Shoot). Case law refers to the distinction between the ‘serious trader’ (whatever his shortcomings in skill, experience or capital) and the ‘amateur or dilettante’. We are satisfied that the Shoot is not a mere hobby for the Appellant, despite her familial association with the Shoot and the fact that her family enjoys shooting. We are further satisfied that the Appellant does not have a personal motivation for maintaining the infrastructure of the Shoot. We give our reasons for so finding.

93. The Appellant is deeply involved in decision-making in relation to the Shoot and she employs keepers to help. The Appellant does not reside on the Estate, but travels to the Estate on Shoot days in order to host and captain the Shoot. In this respect, the Appellant takes a two and a half hour journey each way, manages bookings and arranges catering. Whilst only two business plans were submitted, the Appellant clearly carries out proper planning for the Shoot, which she devotes time to. Every year, accountants’ meetings are held in September and January to review the accounts. There is an annual “Shoot Meeting” in February/March to review the season passed (on 30 January) and to set targets and discuss the forthcoming season. Budgets are produced and reviewed, and costs are analysed and compared year-on-year in line with bookings. The Shoot then prepares annual accounts to the year ended 31 March.

94. The Appellant does not have a financial planner, but we accept that this is because she understands the business and is fully apprised of all of the details surrounding the Shoot. She was able to succinctly describe the variation in feed cost and the needs of the customer base. Whilst we do not have any information about the manner in which other shoots are run, HMRC accept that the Shoot is run in a similar manner to other shoots and the Appellant aims to keep her pricing competitive. We have considered the fact that the Shoot suffered significant losses during the relevant period. We accept that simply making losses over a number of years does not mean that a person is not trading on a commercial basis. We have regard to the fact that profit is relevant to the commercial element of the test, but it need not be the predominant aim.

95. Whilst we are satisfied that the Shoot was carried on on a commercial basis, this is not determinative of the appeal. This is because there is a need for both elements of the Commerciality and Profitability test to be satisfied in order for the Appellant to be able to claim loss relief. We, therefore, proceed to consider the second element of the test.

The second element of the test: ‘with a view to the realisation of profits’

96. In respect of the second element of the test, the appeal in *Ingenious Games* (before the FtT at [2016] UKFTT 0521 (TC)) was against closure notices issued to LLPs by HMRC, which amended their partnership tax returns to deny their claims for trading losses in successive tax years: 2002-03 to 2009-10. The decision dealt with the question of whether, and to what extent, the LLPs' respective claims for trading losses in those tax years should be allowed. The FtT discussed the meaning of "with a view to profit" in s 863 ITTOIA. The FtT's conclusions are set out at [490], in sub-paragraphs (a) to (k), as follows:

(a) the test requires some element of purpose, intention or contemplation. That is apparent from the word "view" and the approach to it by other courts and tribunals.

(b) whether or not a taxpayer has a subjective intention depends on all the evidence: a mere assertion of intention may not be enough;

(c) The test does not require an overriding objective of making profit or its pursuit to be the main or predominant purpose of the activity. As Lord Hoffmann said in *Dextra*, had that been intended Parliament would no doubt have used such expressions "which are by no means unfamiliar in tax legislation".

(d) Thus the existence of other hopes or intentions in the conduct of the business need not prevent the carrying on of the business having a view of profit.

(e) Having an intention to make profit is not enough; the taxpayer must conduct the business with a view to profit. The nature of the conduct of the business is relevant. The test is about how the trade is carried on and how the taxpayer intends to carry it on. That focuses on the activities of the business and their possible future income, and that focus is a counterweight to a purely subjective analysis of the taxpayer's motives or hopes.

(f) A "view" looks to the future – to the intentions as to the conduct of the business and the results which will flow from it. The taxpayer's intentions as to the conduct of the business are part of the subjective elements of the test.

(g) *Dextra* indicates that there may be some objective element in "with a view to" although in a different statutory context. In the present context "profit" has a meaning independent of what the taxpayer considers it to be: that indicates an objective element in the test: an assessment of whether the intended conduct of the business has a realistic possibility of delivering a profit...

(h) As a result, if the conduct or intended conduct of the business is such that there is no realistic possibility of profit, the business cannot be said to be carried on with a view to profit, no matter what the subjective intentions of the taxpayer as to profit are.

(i) That objective test is, however, about whether the conduct is such as to give a realistic possibility of profit, not about whether it is businesslike or commercial.

(j) If the conduct of the business is such that it is inevitable or almost certain that a profit will be made that will be the carrying on of the business with a view of profit...

(k) Between the two extremes, no realistic possibility of profit and almost inevitable profit, there is a hinterland in which the hopes and expectations of the taxpayer will be a significant factor and where the flexibility of the phrase "with a view to" permits the weighing of the subjective intentions of the taxpayer as to the financial results (not the "profit") of the business and the likelihood of the intended conduct and so those results yielding a profit."

97. As is evident from [490(h)] to [490(k)], the FtT in *Ingenious Games* took the view that an LLP could not be said to be carrying on a business with a view to profit if, objectively, there was no realistic possibility of profit. But at [490(i)], the FtT expressly said that that objective test was not to be equated with whether the conduct of the business was businesslike, or commercial. As the FtT said at [475], 'profit' means the excess of income over expenditure – something they referred to as a "*cruder, everyday understanding*" of profit.

98. The acceptance that a business is carrying on a trade with a view to profit does not necessarily carry with it an acceptance that the trade was being carried on ‘on a commercial basis’. At [415], the FtT concluded that a trade which is virtually certain to lead to a loss cannot, realistically, be described as commercial. Earlier, at [370] the FtT said this:

“No business is certain to succeed, and the making of a loss, or of only modest profits, is not necessarily an indication that its proprietor has not pursued the trade on commercial lines. But if, as Mr Blair demonstrated, it can be shown that at the moment the business was started the prospect of recovering the capital invested, even without a surplus, was dependent on the realisation of an unrealistically high profit with the consequence that loss was, if not certain, then much more probable than not, it does not seem to us that it can fairly be said that those embarking on the trade can have entertained a serious profit motive, and their claim to have intended to conduct the trade on commercial lines must, at the least, be doubtful. The amateur may be content to make a loss since the pleasure of the activity is reward in itself; the ordinarily prudent commercial person would not enter into a partnership whose business was more likely than not to result in a loss.”

99. In *Seven Individuals*, Nugee J endorsed the FtT’s view in *Ingenious Games* of “view to profit”, as having an objective element. Nugee J observed, at [35], that:

“It is true that these provide that if a trade is carried on so as to afford a reasonable expectation of profit, then the profit limb is deemed to be satisfied (s. 384(9) ICTA and s. 66(3) ITA). But it does not follow that if there is no reasonable expectation of profit, the profits limb cannot be satisfied. What is required by s. 384(9) ICTA/s. 66(2)(b) ITA is that the trade is carried on “with a view to the realisation of profits in [or of] the trade”. That requirement is looking at the aim or purpose of the relevant person, which is (primarily at least) a subjective question, rather than whether profits could reasonably be expected, which is an objective question. The two are not therefore synonymous - indeed if they were the deeming provisions in s. 384(9) ICTA/s. 66(3) ITA would be of no effect.”

100. Nugee J referred to the question of whether s 66(2)(b) was satisfied as being “primarily at least...a subjective question”. He did not say that the question was wholly subjective. In saying this, he may have been thinking of the decision of the FtT in *Ingenious Games*, to which he referred later in his decision.

101. An objective element to s 66(2)(b) was discredited by the UT in *Ingenious Games (UT)* (Falk J (as she then was) and Judge Herrington), who said that the test was a “wholly subjective” test. The UT said this, in respect of what Nugee J had said in *Seven Individuals*:

“332... Nugee J was considering a different test in that case, and was not deciding whether an objective override formed part of the “with a view to profit” test in s 863 ITTOIA, or indeed what was meant by “realistic possibility”. He assumed for the purposes of his decision that the FTT in *Ingenious* was correct in its formulation of the test, without deciding the point. In addition, where he says “it could be said that there was a realistic possibility of profit”, the “could” is possibly a qualification rather than an endorsement, and “remote” could relate to the point Nugee J made about the possibility of a profit in year 10, that is a temporal point rather than being a descriptor of the chance of profit. We therefore place no reliance on what was said in *Seven Individuals*.

333. We consider the better view to be that the test is a purely subjective one. There is no need for profit to be the predominant aim. As is noted in *Lindley & Banks*, difficult questions can arise when any profit-making aim is subsidiary to other purposes. In those circumstances, it is necessary to consider at what point the line is crossed and there is in fact no view to profit. Some sort of “reality check” is needed. It is necessary to identify whether there is a “real” intention rather than something that was not, in fact or reality, aimed for. The question as to whether a trade was carried on “with a view to profit” also cannot be answered in isolation, divorced from the context of the business in question. The context of “carries on a trade...” directs attention at least to some extent to the way in which the trade is conducted.

Furthermore, an indifference to whether a profit is realised is not sufficient to meet the test. In this case, therefore, the FTT would have had to have been satisfied that the LLPs had genuinely intended to seek a profit from their activities.”

102. At [344] to [345], the UT in *Ingenious Games (UT)* said this:

“344. In determining whether there is the requisite subjective intention, all the evidence must be considered. As mentioned in *Gestmin v Credit Suisse* at [22] which we have cited at [342] above, contemporaneous documentary evidence will always be highly relevant. Objective evidence is also relevant and, depending on the context, it may be significant. This may include evidence about whether there was, in fact, a real potential for, or likelihood of, profit. This is not because there is an objective test or override. Rather, the potential for profit is one part of the evidence that may be relevant to determine whether the requisite subjective intention exists.

345. Where the intention being tested is that of experienced businessmen, the lack of any realistic potential for or likelihood of profit on an objective basis may call into question whether there is a (subjective) view to profit. Experienced businessmen of course take risks, and different individuals will be willing to take differing levels of risk, but businessmen will generally seek to satisfy themselves that the risks are worth taking for the potential return on capital employed, at least if they are risking their own funds. The dynamics may differ where it is someone else's money that is at risk of being lost. HMRC repeatedly submitted that this was a case where the investment was being made with other people's money, namely that of the Exchequer in the form of the monies that the investors expected to receive from HMRC by way of tax repayments. And the extent of the risk taken may depend not only on the risk appetite of the investors but on the degree to which the individuals making the decisions are answerable for any failure, or incentivised by success.”

103. The UT earlier said this, at [340]:

“340. In our view, that approach, and indeed any mathematical approach, is not correct. The test is a qualitative rather than a quantitative one and it would be wrong to prescribe a minimum percentage of probability of profit. The question is whether there is a real and serious intention to make a profit. As noted at [344] and [345] below, the likelihood of profit may be an element of relevant evidence, but no more.”

104. The test was expanded on in *Ingenious Games (CoA)* (Henderson and Phillips LJJ and Sir David Richards), at [121] to [123], where the Court of Appeal endorsed the view of the UT, as follows:

“121. We endorse the way it was expressed by the UT at UT/333:

...

122. While there is no objective element to the requirement for a view to profit, the likelihood of profits and the timescale in which they might be achieved will often be relevant to testing whether there is a genuine subjective view to profit. This was well expressed by the UT at UT/345:

...

123. Other aspects of the test are uncontroversial. First, “profit” has an objective meaning. If putative partners only have a view to making what they wrongly believe to be profits, for example gross revenue, they will not have a view to profit. Second, there is no maximum period during which the partners must intend to make a profit, although no doubt the longer the period the more searching the inquiry into the real subjective purpose of the partners. Third, in broad terms, “profit” has the basic meaning of an excess of income over costs over a possibly indefinite period. It follows that the complex mosaic of generally accepted accounting practice (GAAP), which enables accounts to be properly prepared for defined periods, most commonly for a year, will generally have little part to play. Fourth, as noted by

the UT at UT/333, the view to profit need not be the predominant subjective purpose, but it must be part of the partners' subjective purpose."

105. We are bound by *Ingenious Games (UT)* and *Ingenious (CoA)* to proceed on the basis that the test in s 66(2)(b), before taking into account the objectively-measured safe harbour in s 66(3), is wholly subjective in nature. Accordingly, therefore, there is no basis for concluding that before taking into account the objectively-measured safe harbour in s 66(3), whether or not the relevant taxpayer was intending to realise profits from the trade has any objective component whatsoever. As the UT noted at [340], "the question is whether there is a real and serious intention to make a profit".

106. The authorities referred to above provide the most meaningful guidance on the "Commerciality and Profitability Issue". The other authorities to which we referred applied that guidance. We shall not, therefore, refer to those authorities in any depth. In summary, they are:

(1) *Roulette V2*, where the FtT said this, at [48], [51] and [57(3)]:

"48. An inevitable conclusion to be drawn from the existence of that deeming provision is that the condition in Section 66(2)(b) of the ITA can be satisfied in a particular case even if there is no reasonable expectation of profit.

...

57. We have therefore drawn the following conclusions in relation to the two conditions in Section 66(2) of the ITA, taking into account the decisions in the cases set out above:

...

(3) the likelihood of profits is relevant in relation to the language in Section 66(2)(b) of the ITA only to the extent that, as an evidential matter, it might call into question the assertion that the relevant taxpayer had a subjective intention to make profits; ..."

(2) *Kerr*, which concerned the lease of a National Trust property, Grantham House, by a taxpayer who intended to make a profit by opening the house and gardens to visitors and holding functions there. Under the terms of the lease, he was required to pay rent of £45,000 per annum and to maintain the house and gardens, which he did at a cost, including wages of approximately £22,000. Because of a delay in negotiating the lease, he was only able to open the house and gardens for two days in autumn 2006 and in the absence of any paying customers his total turnover was £80. Having found the taxpayer had carried on a trade, the FtT (Judge Radford and Member Agboola) said, at [38]:

"As to whether the trade was commercial with a view to making a profit we find that the Appellant did all that he could with the intention of making a profit. We find that he was severely hampered by the length of time it took to obtain the lease but nevertheless we find that the anticipated activities when carried on as a trade would clearly be and were commercial."

(3) *Atkinson*, which concerned a yacht-chartering business, where two separate businesses were being carried on, one by the taxpayer as an individual and the other by a company controlled by the taxpayer, and a significant issue in the decision was the way in which income and expenses were allocated between the two businesses.

(4) *Beacon*, where the FtT dismissed, for lack of evidence, most of the factual contentions which HMRC had made in that case, including that there was no business plan, or business records, that the taxpayer had carried on the trade as an exit strategy from his medical practice instead of for the purposes of realising profits, and that

customers were charged non-commercial rates for contracting with the taxpayer. The FtT said this, at [47]:

“Indeed, all the evidence points to Mr Beacon carrying on his “Hospitality at Home” trade at the Villa during 2010-11 and 2011-12 in accordance with ordinary prudent business principles who, like the appellant in *Walls v Livesey*, was somewhat “blown off course” by adverse economic circumstances following the 2008 World recession which appears to have hit North West Tuscany and businesses such as Mr Beacon’s particularly hard.”

(5) *Anderson*, where the losses claimed by Mr Anderson were said to have arisen from a trade carried on by Mr Anderson as a sole trader. The trade was said to involve Mr Anderson carrying on activities to acquire a stake in young African footballers whom he would then seek to market to major European clubs.

107. Turning to the circumstances of this appeal, we find that there is considerable force in HMRC’s submission that the consistent pattern of loss making, combined with the realities of the necessary costs of the Shoot, mean that it is not reasonable to conclude that the Shoot was carried on with a view to realising a profit. The evidence before us shows that for the relevant years in question, the Shoot’s turnover, expenditure and losses were as follows:

Tax Year Ended	Turnover	Expenses	Net loss	Taxable losses
2017	£78,050	£171,502	£93,452	£68,808
2018	£129,317	£215,968	£86,651	£60,599
2019	£90,100	£164,178	£74,078	£43,203
2020	£109,017	£165,905	£56,888	£46,157
2021	£35,796	£70,808	£35,039	£18,130

108. This shows that the Shoot’s expenses are consistently higher than turnover.

109. Mr Firth submits that the Appellant was simply “*temporarily blown off course*”, that her “*plans are subject to the winds of change*” and that she was doing everything she could to increase profits. In his skeleton argument, Mr Firth submits that relevant factors that affected the performance of the Shoot included:

- (1) 2016-17: An accident affecting the Appellant’s ability to carry out shoots and oversupply in the market.
- (2) 2017-18: The head keeper’s accident, leading to hospitalisation and traumatic brain injury/coma, whilst salary still being paid to head keeper for December and January. The subsequent employment of another member of staff meaning that the cost base was “*wrecked*” due to legal fees, occupational health fees, ACAS’ involvement, termination of employment. Shoot income increased, but feedstuff and other costs rose.
- (3) 2018-19: The Appellant was dealing with customers’ ill-feeling about the departure of the old head keeper (lost five regular customers). Feed costs were brought down (1/4 of previous season). New pheasant stock bought as rearing stock not satisfactory.
- (4) 2019-20: Flooded field due to very wet Spring conditions, leading to adverse rearing conditions and purchase of 3,400 birds. Staff reduced from two to one in 2020. The national lockdown from March 2020.

(5) 2020-21: Unknown territory due to national lockdowns. Aim to preserve the business for future seasons. Prices increased in line with other local shoots. Shoots continued in order to retain existing clients. Reduced number of birds purchased to reflect lower number of days being shot. Keepers not furloughed as they were required to maintain and look after the site.

110. The Appellant's explanation for the performance of the Shoot is that:

(1) 2016-17: Estate rents were slightly reduced due to tenant requesting a rent reduction for the Dower House but rents were still at £84,569, which compared well with only £81,512 in 2014-15 but was down on 2015-16 at £107,149. Decision to keep the cost per bird in line with other local shoots at £30 plus VAT. Game sales dwindled to only £50 due to oversupply in the market. Bird and egg sales were down to £4,382 and the Shoot loss was higher than previously at £68,808 but, overall, the Estate made a profit of £13,240.

(2) 2017-18: Good level of bookings for the season ahead but head keeper's accident on 1 December led to his hospitalisation. This gave rise to the need to temporarily employ another member of staff to cover shoot days for whole of December and January in order to fulfil shoot commitments. For the remainder of December, there were seven days' shooting left to fulfil, and 9 days in January. The under keeper was under qualified to ensure the smooth running of the shoot and to organise the beating line so the Appellant had to employ someone else as head keeper for the remainder of the season and to begin the rearing process. The cost base was affected due to lawyer's fees and having to end the head keeper's employment, paying holiday pay in lieu and ensuring a smooth exit so that a new head keeper could be employed. Game Cover cultivation costs were increasing and feedstuffs costs had increased. Shoot income was increased to £124,195.92 but feedstuff costs rose to £50,236.88 and so the overall Estate profit was £41,642 due to the unexpected extra staffing costs and legal and professional fees.

(3) 2018-19: New keeper employed in February 2018 and the plan was devised to buy new pheasant stock as rearing stock were not satisfactory. The quality of how the birds flew had been noted. The new pheasants were put out on a different part of the Estate to see how well they flew in comparison to the old rearing stock. The business would try to achieve income of around £90,000 given that bookings were likely to be down as there was considerable ill-feeling about the departure of the old head keeper, despite his exit being dealt with legally and compassionately. Feed costs were reduced from £48,211 in 2018 to £37,073 in 2019 as this is the single biggest variable cost and so the Shoot loss was reduced to £43,203 with having to buy partridges and some pheasants to shoot, and to use as new rearing stock. The Estate profit was £35,177.

(4) 2019-20: A business plan was devised in early March 2020, in line with the pandemic and the consequential issues involved, when it was apparent that a national lockdown was going to be imposed. It was decided that: (i) the business would shoot for eight days during that season to bring in a revenue of approximately of £63,360 as this number of days could be squeezed into a five week period if there was a national lockdown; (ii) reduction in variable costs such as the gas (for rearing the birds) and feed would be reduced to a 1/3 of their normal levels; and (iii) other costs such as catering and beaters would be reduced to a 1/3 of a normal season due to the number of days being shot. Other reductions had taken place in areas such as the type of Game Covers planted so that costs for planting these do not exceed £7,000.

(5) The decision to keep shooting that season was also made in order that the business would not have to buy in any pheasants in the Spring of 2021, when the cost of pheasants would be exorbitant due to the lower number of shoots. A reduced number of partridges would be bought in to reflect the lower number of days being shot.

(6) The business aimed to shoot at least 28 days in the 2021-22 season, and push for profitability with stringent cost cutting.

111. Whilst it may be the case that certain events had an impact on income from 2017, the incontrovertible facts of this appeal are that prior to the period covered in the Table at para. 108 above, the Shoot consistently made losses from 2005 and only made a profit - for tax purposes - in a single year (2014 where a profit of £4,183 was made). When adjusted to show the profit or loss after depreciation but before capital allowances, the Shoot has made a cumulative loss of £589,807, with a loss in every year. We, therefore, find that this was not simply a case of being “temporarily blown off course”. The Shoot simply was not profitable. This is not a finding that profit needs to be the predominant aim, but is a balanced appraisal of all of the evidence.

112. We have considered the context of the business in question to determine whether the business was conducted with a view to the realisation of profits. Firstly, we consider the fact that the number of shoots conducted each year is based upon the number of birds which can be humanely raised and kept on the Estate. The Appellant runs the Shoot according to a season, which officially runs from 1 September (partridges) and 1 October (pheasants) to 31 January each year. There is at least one shoot a week, with an aim to complete between 20 and 28 shoots per season. During the year ended 31 March 2018, 32 days of shooting were held, including three family days. No payments are received for the family days.

113. Standing back, and considering all the circumstances (including the context of the business), we are satisfied that whilst the Appellant was operating a trade on a commercial basis, the trade was not being carried on with a view to the realisation of profits.

114. *Ingenious Games (UT)* makes clear that the “with a view to profit” element of the test is a purely subjective one. The UT added, however, that some sort of “*reality check*” is needed, and the question must be answered in the context of the business in question. Whilst there is no objective element to the requirement for a view to profit, the likelihood of profits and the timescale in which they might be achieved will often be relevant to testing whether there is a genuine subjective view to profit. Profit clearly means the excess of income over expenditure. The Shoot hardly made a profit in over 15 years of operation. Having considered all of the information in the documents before us, we did not get the impression that the Appellant could have a reasonable expectation that the income from the Shoot would exceed expenditure.

115. We, therefore, hold that whilst the Shoot was carried on on a commercial basis, it was not carried on with a view to the realisation of profits.

The Larger Undertaking Issue

116. Under s 66(4), where a trade forms part of a larger undertaking, the Tribunal is entitled to consider the profits of the trade as referring to the profits of the undertaking as a whole. Section 66(4) provides a sharp dividing line between the treatment of the two elements of the commercial test. Section 66 (4) provides that:

“66 Restriction on relief unless trade is commercial

...

(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.

117. Mr Firth submits that the Shoot is an integral part of the Estate, which could not operate independently from the Estate as the area and operations are intrinsically linked. He further submits that the existence of the Shoot enhances the capital value of the entire Estate by ensuring that rental values of the farming land are maintained due to high yields of arable crops and good performance of rearing livestock. He adds that Bretby Park has an historical reputation as a “Sporting Estate”. He further adds that the Appellant has provided an analysis for each of the years showing what the result would be, the exceptional costs and the costs that would need to be borne by the Estate, even if the Shoot did not happen. The following information concerning the income and expenditure for the Estate, as a whole, for 2017-18 is included in the bundle as follows:

“2017/2018

Costs Required by the Estate

1. Contract Labour

£5270 – *Roadside tree removal £360 should have been allocated to the estate and not the shoot. Due to health & Safety regulations an outside contractor was employed to do this. Hedge cutting £4910 costs would still be required.*

2. Equipment Hire

£90 – *Digger hire for digging drainage ditches*

3. Wages

£28726 – *60% from shoot would automatically go to the estate as Keeper would still be employed due to estate maintenance, trespassing, pest control, help for tenants*

4. Pension

£210 - *60% from shoot would automatically go to the estate as Keeper would still be employed due to estate maintenance, trespassing, pest control, help for other tenants*

5. Rent and Rates

£4642 - *60% from shoot would automatically go to the estate as Keeper would still be employed due to estate maintenance, trespassing, pest control, help for tenants. Contractual obligation to keeper to provide accommodation and council tax*

6. Water Rates

£383 – *Cost included for Gamekeepers Cottage £133 and Bretby Park Farm £250. Less costs due to not rearing the birds and not using Bretby Park Farm for catering.*

7. Insurance

£377 - *would still be required to cover directors liability and employers liability.*

8. Motor and Tractor Expenses

£9222 - *Estate vehicle would still be needed as would the tractor. Keeper cannot be expected to use his own vehicle as off road needed and also a Polaris to access more inaccessible areas and the tractor is needed for jobs such as muck lifting, towing mower, mowing, timber work and transportation of timber.*

9. Telephone

£2444 – *Part of Keepers contractual obligations for security etc and Bretby Park Farm phone lines would still be required as it is used by owner for estate work purposes.*

10. Management Charge

£5000 – Contribution to office costs would still be required to cover payroll, administration costs

11. Accountancy Fees

£2588 – Fees will still be payable

12. Depreciation

£6350 – Estate vehicles would still be required. Depreciation for stable doors was also included in shoot when this should be an estate cost £1153.

13. Hire Purchase Charge

£939 - still required as Polaris needed to access certain areas of the estate

Total Cost Required by Estate £66,241 – this only includes 60% of the total Keeper costs as 40% is already paid by the estate

Exceptional Items

1. Feedstuffs

£9482 – Higher usage of wheat of 88.8T – normal usage around 30T (196% increase). Exceptional 51.2T £7270 average cost £145. Last delivery in February of 15.8T (£2212) should have been included in the next year. No explanation as to why costs so high other than unreliable keeper who had received a verbal warning re appearance in previous season and had accident while intoxicated.

2. Birds & Eggs

£6325 – Keeper had to buy additional 5500 day old partridges in October due to disease in birds –please refer to point 3 below and see the usually large veterinary bills. The shoot wasn't in a bird flu exclusion zone but clearly given the need for an autopsy and vets visits we had an issue

3. Veterinary & Medication

£2051 – due to diseased birds and autopsy cost Costs are normally under £100 per year (1951% increase compared to average cost in other years)

4. Contract Labour

£4800 – Additional cost to cover Keeper after accident. (December – March) The allocation for the replacement keeper was 100% to the shoot and not allocated 60/40 as the keepers wages. This is due to minimum shoot cover (working 30hrs per week) until a replacement permanent keeper could be employed. There was an underkeeper employed who covered the estate work as he was full time and the replacement keeper only worked 30hrs rather than the contractual 48hrs a week of the head keeper who he was covering

5. Light & Heat

£3750 – High usage of gas bottles. 171 used compared to 64 in 2018/19 season (167% higher). Average cost £37.50 –100 bottles exceptional usage - due to the keeper being off sick it was impossible to know why the usage was this high.

6. Legal & Professional Fees

£4551 – Exceptional costs relating to Keeper accident

Total Exceptional Costs £30,959

Without exceptional costs and other costs being allocated to the estate the profit would have been £10,549”

118. For the later years, the figures are as follows:

(1) 2018-19: Total cost required by Estate £55,634 – this only includes 60% of the total keeper costs as 40% is already paid by the Estate. Total exceptional costs £8,088. Without exceptional costs and other costs being allocated to the Estate, the loss would have been £3,238.

(2) 2019-20: Total cost required by Estate £52,424 – this only includes 60% of the total keeper costs as 40% is already paid by the Estate. Total exceptional costs £9,117. Without exceptional costs and other costs being allocated to the Estate, the profit would have been £4,653.

(3) 2020-21: Total cost required by Estate £24,451 – this only includes 20% of the total keeper costs as 80% is already paid by the Estate. Total Exceptional Costs £195. Without exceptional costs and other costs being allocated to the Estate, the loss would have been £10,393.

119. Mr Firth places significant reliance on the decision in *Brander*. *Brander*, was principally concerned with (i) the correct analysis of Lord Balfour's interest in the heritable properties in a trust estate while a liferenter; (ii) the way in which the estate was run before 2002; and (iii) the nature of the business or businesses conducted on that landed estate both before and after 2002. The FtT said this, at [30]:

“30. The business was the traditional mix of a traditional Scottish landed estate and consisted of a blend of agriculture (in-hand and let farms), woodland and forestry management and related sporting interests, and the letting of cottages and other properties within the estate either to estate workers or to others. The letting of some of the cottages provides a good illustration of the fact that the management of the various activities on the Estate was integrated and strategically prudent, e.g. the provision of accommodation at reasonable or low rents to attract good workers or occupants who had skills which might one day be deployed on the Estate. The Estate work force was not rigidly divided so that each member worked exclusively on only one particular estate activity although it is likely that some carried out much the same activity all the time. They did not report to the Trustees but to Lord Balfour. Lord Balfour's secretary was involved in administrative aspects of all activities of the estate which required secretarial services. As with Lord Balfour himself, there were no demarcation lines except for administrative purposes to reflect the fact that Lord Balfour's interest until November 2002 was as liferenter and not as owner of the Estate. Thus, Trust accounts were kept. The Trust was separately registered for VAT. Whatever the accountancy treatment, Lord Balfour was entitled to the fruits or profits of the Estate's business activities.

31. It seems to me plain on the evidence that Lord Balfour used the trust assets as part of the overall business enterprise carried on by him for gain at Whittingehame Estate. Indeed, given the nature of a traditional Scottish landed estate, it would be difficult to do otherwise. Sections 49 and 110 of the 1984 Act are applicable, as is the reasoning in *Fetherstonaugh & Ors(Finch) v IRC 1984 STC 261 at 269j-270h*, and *274g-h*. In his capacity as liferenter (until November 2002) Lord Balfour has to be treated as beneficially entitled to the property in which the liferent interest then subsisted. That was, essentially, the whole Estate. The fact that the trust was a separate entity from Lord Balfour does not mean that there had to be two separate businesses. The existence of these two entities required certain administrative accounting procedures but such procedures do not of themselves create two separate businesses.

32. In reaching these conclusions on the facts, I have taken into account *Scales v George Thompson & Co Ltd 1927 13 TC 83* cited by the Appellants, where the issue was, for the purposes of Income Tax liability, whether the underwriting activities carried on by the

taxpayer company, was a separate trade, profession or vocation to that of ship owning. The detailed facts do not matter. However, the approach of Rowlatt J, which is instructive, was to consider whether the conduct of the two businesses were interlaced or dovetailed into each other. Here, it can readily be concluded that various activities on the Estate are interlaced or dovetailed. The letting of farm cottages to employees or to persons who could otherwise be of benefit to the Estate is but one example.”

120. The decision was upheld on appeal by Lord Hodge and Sir Stephen Oliver: at [2010] UKUT 300 (TCC), as follows:

“49. We are not persuaded that Judge Reid misinterpreted *Scales (Inspector of Taxes) v George Thompson & Co Ltd* (1927) 13 TC 83. While it is correct that in that case one company ran two businesses and one of the businesses, underwriting, was held to be a separate business, the relevance of the case was in the approach which Rowlatt J adopted in assessing whether there were separate businesses. He looked not to the method of financial book-keeping but to whether there was any ‘... inter-connection, any interlacing, any interdependence, any unity at all embracing those two businesses ...’ (see 13 TC 83 at 89). In para [32] of his decision, Judge Reid looked to the approach and not the particular facts. There was thus no need to distinguish the facts. In the context of Lord Balfour’s management of a traditional landed estate, using the assets made available to him by the liferent, we have no difficulty in seeing why Judge Reid ascertained in the established facts the needed interlacing and dovetailing of activities.”

121. We accept that the Estate is under the same ownership. We further accept that the head keeper lives on site and performs many roles on the Estate. These roles include ensuring that the shooting rights are utilised to the good of the tenants, vermin are kept to a bare minimum in order to protect grazing tenants’ livestock, and that arable tenants’ crops are protected as they can be decimated by wild bird activity such as pigeons. As considered by the FtT in *Brander*, in *Scales v George Thompson & Co Ltd* [1927] 13 TC 83, the approach of Rowlatt J was to consider whether the conduct of the two businesses were interlaced or dovetailed into each other. Rowlatt J looked not to the method of financial book-keeping, but to whether there was any “... inter-connection, any interlacing, any interdependence, any unity at all embracing those two businesses”.

122. Overall, we find that there is considerable force in Mx Lunt’s submission that the various activities taking place on the land which comprises the Estate are separate activities, which happen to share a location; that being the land which comprises the Estate. In this respect, the farming tenants occupy land which is suitable to their purposes. Whether or not the residential properties are occupied, and whether or not those properties are supplied with energy from the Biomass boiler or mains electricity is inconsequential to the tenants of the farmland.

123. Furthermore, whether or not there are farmers making use of the available arable land or grazing pastures is irrelevant to the operation of the Biomass boiler. We are satisfied that the Estate does not need a reputation as a sporting estate in order to let land to farming or residential tenants, nor to operate the Biomass boiler. We are satisfied that the activities of the Estate and the Shoot are neither interlaced, nor dovetailed. Common ownership and the employment of a head keeper to cover the whole Estate does not, on the facts of this appeal, translate into the Shoot being part of a larger undertaking, or indeed a finding that the Estate is a “Sporting Estate. It is clear that those who travel to the Estate to take part in shooting go to the Estate to shoot, and nothing more. There is no indication of there being any other range of activities that shooters can take part in on the Estate. Moreover, the Estate was able to continue operating its other activities even when the Shoot was impacted by the pandemic. We are satisfied that the farming tenants are able to continue their activities wholly separate

from the activities of the Shoot. Indeed, there is a rigid division between the activities of the farming tenants, and the activities of the Shoot.

124. We, therefore, hold that there are restrictions which bar the Appellant from claiming the losses against her general income.

THE ASSESSMENT: 2016-17

125. If HMRC discover income which ought to, but has not, been assessed for income or corporation tax, they may make an assessment in that amount to make good the loss of tax. Section 29(1) TMA focuses on the state of mind of the individual officer of HMRC who makes the assessment. What must be “discovered” is that:

- (1) any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, has not been assessed; or
- (2) that an assessment to tax is, or has become, insufficient; or
- (3) that any relief which has been given is, or has become, excessive.

126. The above elements are commonly abbreviated as “a loss of tax”. What has been discovered must fall within at least one of those descriptions.

127. The legal approach as to whether there is a discovery is set out in the decision of the UT in *HMRC v Charlton* [2012] UKUT 770 (TCC); [2013] STC 866 (*‘Charlton’*), at [37], where the UT said this:

“37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight.”

128. At [28], the UT held that the word ‘discover’ connotes change in the sense of a threshold being crossed. At [35], the UT referred to the need for the officer to act “honestly and reasonably”. The officer’s belief is, therefore, required to be one which a reasonable officer could form: see *Anderson v HMRC* [2018] STC 1210, at [111] (Morgan J and Judge Berner) in relation to there being an ‘objective’ test with a ‘subjective’ element. In the earlier case of *Hankinson v HMRC* [2012] 1 WLR 2322; [2011] EWCA Civ 1566 (*‘Hankinson’*), the Court of Appeal held that the threshold for a discovery was that an officer came to a conclusion, or satisfied himself, as to an insufficiency of tax.

129. The requirement for the conclusion to have “newly appeared” is implicit in the statutory language. A discovery assessment is, therefore, not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present: *Beagles v HMRC* [2018] UKUT 380 (TCC); [2019] STC 54 (*‘Beagles’*) (Birrs J and Judge Greenbank), at [100] to [106], [113] and [122], in reliance on Patten LJ’s summary of the authorities in *Sanderson v R & C Comrs* [2016] STC 638 (*‘Sanderson’*).

130. The provisions as to self-assessment and as to the power of HMRC to enquire into a self-assessment were summarised by Patten LJ in *Sanderson*, at [25]. There, he said, *inter alia*, that the exercise of the s 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery is made. The officer must believe that the information available to him points in the direction of there being an insufficiency of tax. HMRC’s case is that a discovery had been made within the meaning of s 29(1) TMA. The Appellant’s 2017 tax return was made in accordance with s 8 TMA and s 29 TMA is, accordingly, on point.

131. Where, as in this appeal, the taxpayer has delivered a tax return, s 29(3) provides that HMRC may not issue a discovery assessment unless either the condition in s 29(4), or the condition in s 29(5), is fulfilled. It is common ground that s 29(4) is not in point in this appeal, so that HMRC must show that the condition in s 29(5) was satisfied as regards the discovery assessment issued to the Appellant². This means that HMRC must show that, at the time when the enquiry window into the relevant year closed, a hypothetical HMRC officer “could not reasonably have been expected to be aware of the insufficiency of tax” for that year, on the basis of the information made available to the hypothetical officer (as defined in s 29(6)) before that time); which, in summary, is the information that is contained in the return or accompanying documents provided by the taxpayer, or information the existence of which and the relevance of which as regards the insufficiency of tax could reasonably be expected to be inferred by the officer from the return and any accompanying documents.

132. There are time limits as to when a discovery assessment under s 29 TMA can be made. The general position, provided by s 34 TMA, is that an assessment may not be made more than four years after the end of the year of assessment to which it relates. The period of four years is extended to six years in a case where the loss of tax was brought about carelessly by the taxpayer (s 36(1) TMA); and is extended to twenty years where the loss of tax is brought about deliberately by the taxpayer (s 36(1A) TMA).

133. The Appellant submitted her self-assessment tax return for the year ended 5 April 2017 on 31 January 2018. Under s 9A(2)(a) TMA, HMRC ceased to be entitled to give notice of their intention to enquire into the return on 1 February 2019. The discovery assessment was made on 25 March 2021 (within the required four-year time-limit). The discovery assessment which HMRC purported to make in the present case was on the basis that an officer had discovered, as regards the Appellant, that an assessment to tax was or had become insufficient. This was because the Appellant was considered to have claimed loss relief to which she was not entitled as a result of s 66 ITA 2007. We have found that the restrictions in s 66 apply in the circumstances of this appeal. This is because whilst the Appellant was carrying on her trade on a commercial business, the trade was not carried on with a view to the realisation of profits. Furthermore, we have found that the Shoot was not part of a larger undertaking.

134. We are satisfied that there was a discovery in this appeal. Applying the principles from case law to the facts of the present case, the question is whether from the information in and accompanying the return, a hypothetical officer could not reasonably have been expected to be aware of the insufficiency.

Section 29(5) and Section 29 (6) TMA: Could the hypothetical officer reasonably be expected to have been aware of the insufficiency?

135. There are a number of decisions relating to the interpretation of s 29(5). The most important are *Hankinson*, *HMRC v Lansdowne Partners Ltd Partnership* [2011] EWCA Civ 1578; [2012] BTC 12 (*‘Lansdowne’*) and *Sanderson*. The principles to be derived from the authorities were helpfully summarised by the UT in *Beagles*, in which the UT referred, predominantly, to the decision of the Court of Appeal in *Sanderson* and the leading judgment of Patten LJ. The principles to be derived were summarised as follows, at [100] of the decision:

² The burden of establishing this, to the ordinary civil standard of the balance of probabilities, rests on HMRC: *HMRC v Household Estate Agents Ltd* [2007] EWHC 1684 (Ch) at [48], applied in *Burgess v HMRC* [2015] UKUT 578 (TCC).

“(1) The test in s 29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.

(2) The test requires the court or tribunal to identify the information that is treated by s 29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.

(3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).

We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.

(4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17](3)).

(5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s 29(6) (Auld LJ, *Langham v Veltema* [33]–[34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).

(6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must 'justify' raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2010] EWHC 2582 (Ch), [2011] STC 372, at [48]).”

136. In *HMRC v Tooth* [2021] UKSC 17, at [68], the Supreme Court clarified that there is no concept of corporate or collective knowledge on the part of HMRC applicable in respect of the hypothetical officer in section 29(5).

137. Section 29 (5) requires that a taxpayer should make sufficient disclosure in order to enable an officer to make an informed decision as to whether an insufficiency existed, in the words of Moses LJ [in *Lansdowne*, at [69]]. A taxpayer is protected against discovery provided adequate disclosure has been made (see also *Sanderson* per Patten LJ, at [25]). The senior courts have, in the past, found that s 29(5) TMA did not preclude HMRC from raising a further assessment because a taxpayer/agent had not clearly alerted HMRC to the insufficiency of the assessment. In the circumstances, the officer could not “reasonably be expected” to infer that the assessment was correct based on the information given: as in *Langham v Veltema* [2004] STC 544, which considered the sufficiency of the information made available to a hypothetical officer for the purposes of the test in s 29(5) TMA.

138. The purpose of s 29(5) is to strike a balance between the protection of the revenue on the one hand, and the taxpayer on the other. Section 29(5), therefore, focuses primarily on the adequacy of the disclosure by the taxpayer. What constitutes adequate disclosure for the purposes of s 29(5) will vary from case to case. It depends on the nature and tax implications of the arrangements concerned and not on the assumed knowledge (or lack thereof) of the hypothetical officer. The obligation is on the taxpayer to make the appropriate level of

disclosure as befits a self-assessment system. The disclosure must be from the sources referred to in s 29(6) (as amplified by s 29(7)). HMRC are protected because they can raise a discovery assessment if adequate disclosure has not been made.

139. It is first necessary to establish what information has been “made available” to the hypothetical HMRC officer by the relevant date. Section 29(6) provides that information is made available if (broadly) it is supplied by the taxpayer to HMRC in his return for that year or another document provided to HMRC, or:

“(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above -

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.”

140. In *Charlton*, the UT held that all that was necessary was for the officer to be able to infer from the return and accompanying documents that the information existed and that it was relevant to the determination of the insufficiency in the return (*Charlton* [76]). The UT emphasised that there were limits on the application of s 29(6)(d)(i). The UT said this, at [78] and [79]:

“78 The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc. provided by the taxpayer.

79 As we have described, the balance provided by s. 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s. 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s. 29 when applying the test of reasonableness.”

141. In *Beagles*, the UT endorsed the view expressed in *Charlton*.

142. The information that is treated as available to the officer is, therefore, the information that is contained in the return or accompanying documents provided by the taxpayer. This is extended, by s 29(6)(d), to information the existence of which and the relevance of which as regards the insufficiency of tax could reasonably be expected to be inferred by the officer from the return and any accompanying documents.

143. Having considered all of the evidence, cumulatively, we are satisfied that Officer Scrivens could not reasonably be expected to have been aware of the excessive relief claimed on the basis only of the information available to him prior to, at the earliest, the 19 February 2020; which is when the Appellant first provided information and documents. We are further satisfied that the information provided by the Appellant during the enquiry process was necessary for Officer Scrivens to reach his conclusions.

THE CLOSURE NOTICES: 2017-18 TO 2020-21 (INCLUSIVE)

144. A discovery assessment is not the only way in which HMRC can go behind past assessments to tax, or claims to relief. Where a claim is included in a return made under ss 8 or 8A TMA, the enquiry must be under s 9A. Enquiries under s 9A extend to anything contained in the return or required to be contained in the return, including a claim or election

included in the return. The time-limit for s 9A enquiries is, again in broad terms, 12 months from the filing of the return.

145. The jurisdiction of the FtT is fixed and defined by the terms of the Closure Notices, as confirmed by the UT in *Daarasp LLP & Anor v HMRC* [2021] UKUT 87 (TCC) (“*Daarasp*”), at [25(7)]. Consistent with the decision of the UT in *Shinlock*, we adopt the summary of the essential workings of the enquiry and closure notice process set out in *Daarasp*:

“22. An enquiry, begun by way of an enquiry notice, is concluded by a closure notice. The closure notice comprises two elements:

- (1) A statement of the officer’s conclusions; and
- (2) A statement of what, if anything, must be done to give effect to those conclusions.

23. The whole point of tax returns and enquiries into them is to ensure that the public interest in taxpayers paying the correct amount of tax is met. To that end, HMRC must have an appropriate ability to examine the return, but the taxpayer must have a fair opportunity to challenge (by way of appeal) either (i) the conclusions of HMRC or (ii) the manner in which those conclusions have been given effect to (by way of amendments to the return). As can be seen from section 28A of the Taxes Management Act 1970, a closure notice quite clearly contains – and must contain – both elements; equally, as section 31(1)(b) of the same Act provides, an appeal lies against both “any conclusion stated” or any “amendment made”.

24. It is important to appreciate that the conclusions of a closure notice are distinct from the amendments that may arise out of those conclusions. Obviously, there is a nexus between the two – the amendments implement the conclusions reached – but they are very different things. The conclusions in a closure notice consist of a statement why the taxpayer’s return is incorrect (if it is), whereas the amendments set out how the return must be corrected in order to give effect to those conclusions. A closure notice must state the officer’s conclusions; and having issued a closure notice, HMRC has no power to amend the relevant return other than to give effect to the conclusions: *Bristol & West* at [24]; *Investec* at [51].”

146. We also adopt the principles set out in *Daarasp*, at [25], as having been provided by the authorities which have considered closure notices. In this respect, we agree that:

“(5) It is desirable that the statement by the officer of his conclusions should be as informative as possible: *Tower MCashback* at [83]; *Fidex* at [42]. Furthermore, notices are given at the conclusion of an enquiry, and must be read in context. It will be rare for a notice to be sent without some previous indication during the enquiry of the points that have attracted the officer’s attention: *Tower MCashback* at [84]; *Fidex* at [42], [45]; *Lavery* at [37]. That said, a narrowly drawn closure notice – properly construed – cannot be widened by reference to the scope of the enquiry which preceded it: *Lavery* at [34].

(6) It is not appropriate to construe a closure notice as if it were a statute: *Fidex* at [51]; *Lavery* at [28]. The ordinary rules of construction apply to closure notices, and the question of construction is a mixed question of fact and law: the identification of the relevant circumstances and context in which the document is to be construed is a question of fact, whilst the meaning of the document – construed within that context, as found – is a question of law: *Lavery* at [36]. Essentially, when approaching the question of construction, it is appropriate to consider how the reasonable recipient of the notice, standing in the shoes of the taxpayer, would have construed it: *Lavery* at [42].”

147. We further agree with the UT in *Daarasp* at [36(4)(c)] that:

“...we must bear in mind that it is perfectly possible for the consequential adjustment in a closure notice itself to be in error, in that it fails to articulate the adjustment required by the conclusion articulated by the officer.”

148. As the UT decided, the amendment made by the officer needs to be considered, but it does not in itself determine the matter in question where the evidence of a closure notice and its conclusions as understood by the parties casts a different light on the nature of the dispute.

149. The conclusion in each of the Closure Notices against which the appeal has been made relates not to the question of whether the trading losses have arisen in the first place, but rather to the question of whether the Appellant is entitled to set off those trading losses against her general income. The Closure Notices were set out in the following terms:

“Description

Sideways loss relief claimed from the Woodland Shoot

Our conclusion

No sideways loss relief is due on the losses arising from the Woodland Shoot

Reason for our conclusion

The loss arising from the Woodland Shoot does not meet the requirements of Section 66 Income Tax Act 2007...”

150. Again, we have found that the Appellant did not meet the conditions for entitlement to loss relief as a result of the restrictions that apply in s 66 ITA 2007. Consequently, therefore, no loss relief was due and the amendments apply. We uphold the Assessment (as varied) and the Closure Notices.

151. Accordingly, therefore, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

152. 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.

Release date: 01st MAY 2025