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Case Number: TC 09985

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2024/04975/04976/04977/04978

CAPITAL GAINS TAX – entrepreneurs' relief – whether company's activities included to a substantial extent activities other than trading activities taking it outside the definition of "trading company" in section 165A(3) Taxation of Chargeable Gains Act 1992 – no – appeals allowed

Heard on: 5, 7 and 8 May 2026
Judgment date: 13 August 2026

Before

TRIBUNAL JUDGE MARK BALDWIN
RICHARD LAW

Between

ALAN PONTIN
THOMAS PONTIN
CAROL PONTIN
BENJAMIN PONTIN

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Laurent Sykes KC of counsel, instructed by Deloitte LLP

For the Respondents: Varuna Jeewon, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. On 2 June 2016 the Appellants each sold shares (the "HHL Shares") in a company called Highland Holdings Limited ("HHL"). HHL's only asset was a holding of the entire issued share capital of Associated Properties UK Limited ("APUK"). All the Appellants were directors of HHL from 14 January 2008 until 2 June 2016, and they each held at least 5% of the ordinary share capital and voting rights in HHL.

2. Each of the Appellants claimed entrepreneurs' relief in respect of the gain arising on the disposal of their HHL Shares. It is common ground that, if HHL had been the holding company of a trading group throughout the period (the "Relevant Period") of one year up to the date of disposal of their HHL Shares, the Appellants' claims would be successful. It was also common ground that HHL would have been the holding company of a trading group throughout the Relevant Period if APUK had been a trading company throughout that period.

3. Although the Appellants disposed of the HHL Shares on 2 June 2016, the disposal took place under a contract of sale which came into force on the exercise of an option (all discussed further below). The option exercise took place on 22 April 2016 and therefore strictly the disposal took place at this point (see section 28(2) of the Taxation of Chargeable Gains Act 1992 ("TCGA")) and the Relevant Period runs from 22 April 2015 to 22 April 2016. It is not, however, considered that it makes any difference to the analysis whether the Relevant Period runs from 22 April 2015 or 2 June 2015.

4. The relevant definition of "trading company" is contained in section 165A of TCGA, which provides (so far as relevant for us):

> "(3) "Trading company" means a company carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities.
>
> (4) For the purposes of subsection (3) above "trading activities" means activities carried on by the company—
>
> (a) in the course of, or for the purposes of, a trade being carried on by it,
>
> (b) for the purposes of a trade that it is preparing to carry on,
>
> (c) with a view to its acquiring or starting to carry on a trade, or
>
> (d) with a view to its acquiring a significant interest in the share capital of another company that—
>
> (i) is a trading company or the holding company of a trading group, and
>
> (ii) if the acquiring company is a member of a group of companies, is not a member of that group.
>
> (5) Activities do not qualify as trading activities under subsection (4)(c) or (d) above unless the acquisition is made, or the company starts to carry on the trade, as soon as is reasonably practicable in the circumstances."

5. HMRC initially argued that APUK was not carrying on "trading activities" during the Relevant Period and, even if it was, that its activities included to a substantial extent activities other than trading activities.

6. During the hearing HMRC abandoned the first of these arguments. They now accept that, throughout the Relevant Period, APUK was carrying on activities with a view to its starting to carry on a trade and that it started to carry on the trade, as soon as was reasonably

practicable in the circumstances. However, they say that APUK did not meet the definition of "trading company" as its activities during the Relevant Period included to a substantial extent activities other than trading activities.

THE AGREED FACTS

7. There was an agreed statement of facts, which included the following:

(1) APUK owned a property (the "Property") in Henley on Thames.

(2) In 2011 the directors of APUK decided to change the company's activity to one of actively developing the Property for residential property. As a result, the Property was reclassified in APUK's accounts from being fixed asset investment property to trading stock.

(3) On 12 October 2012 the Appellants entered into an option agreement (the "Option Agreement") with Crest Nicholson Operations Limited ("CNOL") over the HHL Shares. Key provisions of the Option Agreement are summarised at [XX] below. in HHL.

(4) The Joint Henley and Harpsden Neighbourhood Plan (the "Neighbourhood Plan"), the key document setting out the framework for development in the local area, was nearing finalisation in 2015 and it was becoming apparent that the Neighbourhood Plan would allocate around 170 houses for development at the Property. Consequently, it was agreed between APUK and CNOL that planning permission should be sought. This was applied for in July 2015 by CNOL with the application countersigned by one of the HHL directors.

(5) In April 2016, "following significant work and efforts by the directors of APUK", it was formally confirmed that the Property was included in the Neighbourhood Plan.

(6) The option was exercised by CNOL on 22 April and the share sale completed on 2 June 2016.

WITNESS EVIDENCE

8. We heard from three witnesses for the Appellants, who were all cross-examined (albeit relatively briefly) by HMRC. We found all 3 witnesses to be credible individuals and have no difficulty in adopting their evidence.

Robert Searby ("Mr. Searby")

9. Mr. Searby was a director of APUK from 2001 to 2016 together with Alan Pontin ("Mr. Pontin"). He was involved in all aspects of the activities of APUK during this period and with matters relating to this appeal since then.

Use of the Property: leasing/preparation for development

10. Mr. Pontin set up HHL in 1996 and, with the assistance of venture capitalists, used this company to acquire a road surfacing business, which owned the Property, in 1997. Mr. Pontin sold most of this business in 2000, retaining a small stake in a company called Associated Facilities Services Ltd ("AFS") and the Property, which was transferred into APUK, then a newly incorporated company.

11. In 2001 AFS was sold. As part of the sale and a wider transaction, APUK needed to guarantee AFS's overdraft with Bank of Scotland. In 2002 the corporate group which bought AFS was placed in receivership, and a sizeable call was made on APUK in respect of the bank guarantee. Most of the trading businesses at the Property were sold by the receiver to Aggregate Industries UK Ltd ("AIUK") and discussions took place regarding a lease at the Property to AIUK. In order to raise sufficient funds to pay the guarantee call, it was necessary for APUK to take out a bank loan secured on the Property, and, in order to borrow the sum required,

APUK had to enter into a lease with AIUK for a sufficiently long period to provide APUK with the income necessary to service and repay the debt.

12. As a result, a 16-year lease, from 2002 to 2018, was entered into between APUK and AIUK. APUK's new loan was repayable over 16 years to match the lease with AIUK. Mr. Searby recalls that, even then, Mr. Pontin recognised the development potential of the Property and felt that a 16-year lease, while necessary to obtain the bank loan, could prejudice future development. So, he negotiated a one-way break clause in the lease. However, the quid pro quo was that AIUK required a pre-emption agreement under which, if APUK wanted to sell the Property, either in whole or in part, AIUK had a first right of refusal at a price lower than that proposed for the third party sale or, at AIUK's option, a share of any profit on the disposal. The pre-emption agreement ran until 2023. Mr. Searby said that APUK considered this was important and willingly agreed to the two agreements to protect the upside of a potential future development of the Property.

13. When Mr. Searby was first involved with APUK there had been some long-term leases at the Property with reasonably large companies. The Property was well maintained and a thriving business and industrial complex. In 2005 the Property was still fully occupied with long term leases: for another 13 years in the case of AIUK but coming to an end on most of the remainder of the Property. In 2005, when a building called the Farmhouse was vacated by the then tenant, money was spent on refurbishing the Farmhouse with a view to attracting further good tenants.

14. However, the nature of the rental market changed over the next few years, and it became clear that the Property was not and could not be an attractive location for a number of businesses. As leases finished, between 2003 and 2008, APUK found it increasingly difficult to attract tenants of the same calibre or at similar rentals, reflecting the alternatives available locally and the dated nature of the Property.

15. In addition to the office tenants the agricultural land around the outside of the Property was leased to a farmer for a nominal annual sum, in exchange for which the farmer maintained the land. Mr. Searby said that he and Mr. Pontin had been aware of potential issues around security of tenure for agricultural land for a long time and had taken advice as long ago as 2008 to ensure that nothing agreed with the farmer would prejudice future development of any of the Property.

16. By 2011 the Property comprised warehouse building used as a workshop, several office buildings and open space parking areas. It was already dated. No money had been spent on maintenance of the buildings, other than essential repairs, since 2005 and the offices were, by modern standards, gloomy and outdated. As newer office buildings became available elsewhere, the Property became less attractive to tenants, and little money was spent on the Property. Increasingly, the main tenants, apart from AIUK, were small businesses and individuals, reflecting the change in nature of the site and the town as a location for business.

17. AIUK moved out on 30 June 2011 and had no presence at the Property after 2011 apart from occasional visits from their estates management team. The state of the space leased to AIUK became dramatically worse. Their offices quickly became very dilapidated; the radiators were all taken out by AIUK and no maintenance was carried out. (Mr. Pontin expanded on this and told us that APUK allowed AIUK to remove all plumbing fittings to stop them having to pay rates.) The workshop had most equipment removed around this time.

18. Mr. Searby says that, under their lease, AIUK would have had to return the property to the original standard at the end of the lease in 2018. The requirement for dilapidations to be put right under the existing lease was seen as a substantial bargaining point in any negotiations with AIUK, although there was an informal expectation that these would be waived in an

agreement terminating the lease and the pre-emption agreement. APUK had no responsibilities for this part of the Property other than arranging insurance annually for the whole of the Property.

19. Following the directors' decision in 2011 to pursue development of the Property for housing, minimal money was spent on repairs and redecoration and much less resource generally put into commercial letting of the Property. The properties were allowed to decline in condition. No major repairs were carried out, no redecoration, only essential maintenance. This was reflected in reduced rents for offices let out. This contrasts with the period up to 2005 when The Farmhouse and The Barn were each let as single long-term tenancies with much higher rents than ever received afterwards.

20. By the time discussions took place with CNOL in 2012 there were about 31 small tenants at the Property, 17 of whom were in rooms in the Farmhouse, the majority being for a room or two, and all capable of termination at reasonably short notice. The largest annual rental was £21,000, from a tenant occupying one floor of the Farmhouse, although this tenant left at the end of 2012.

21. Mr. Searby says that, had APUK not proceeded with a residential development, either with Crest Nicholson or in some other form, there would have been no option commercially but to demolish most of the buildings as they would have been uneconomic to use. He does not think that, by the time the AIUK lease and APUK's bank loan ended in 2018, the buildings at the Property would have had any future value. He cannot see that the Property would have had any sustainable future as an investment property; the only sensible route forward would have been some alternative form of development.

22. Mr. Searby says that, if he and Mr. Pontin had continued with the rental business at the Property, they would have had to incur significant expenditure to improve the Property and would have sought and entered longer term leases with larger organisations than the small and 'hobby' businesses that were using the Property.

23. Mr. Searby says that the rental activity carried out is described in APUK's accounts as ancillary to the trading activity. That is because the minimum was done and rents simply came from owning the Property which, if all came to plan, was to be developed into residential units which would be sold. The rents were sufficient to meet the ongoing operational costs and make the necessary payments on the company's bank debt and provide money to fund the development. It funded his wages, for example. It also funded the cost of consultants and any other works that were carried out towards the development.

24. Mr. Searby commented that the obligations in the Option Agreement meant that the Property and business had to be run in a way which would permit development and sale to occur easily.

25. From the time the Option Agreement was entered into, APUK was focused on moving the occupation of the Property to where it needed to be at completion of the envisaged sale of HHL Shares, or 'managing the tenants out', although this had to be done in such a way that nothing prejudiced the progress of the Neighbourhood Plan.

26. As of April 2015, there were 20 tenants in the Farmhouse and 14 elsewhere on the Property, with a total rent of £118,000. About 10 of these leases were for storage only and everything could be terminated with at most 3 months' notice. The continued occupation of parts of the Property by small businesses not only provided APUK with a small ongoing income to cover its costs but also reduced the amount of business rates which would have been paid by APUK had all or more of the Property been unoccupied. The reduction in rental income, excluding AIUK, was gentle over the period, reflecting the slow reduction in attractiveness of

the Property for letting but there was no large reduction until the tenants were finally asked to leave in 2016/2017 following exercise of the option.

27. Mr. Searby says that he and Mr. Pontin were always aware that there would be a referendum on the Neighbourhood Plan with a public vote in a small town. They considered it was essential to avoid any negative publicity, such as might have arisen had they asked any tenants to leave, appeared arrogant or assumed a favourable outcome. They maintained good relations with all the tenants, keeping them updated on progress with the Neighbourhood Plan process, and, when the time came, assisted them as much as they could with suggestions for alternative premises.

28. Mr. Searby explained that the terms of the agreement with CNOL were predicated on a value of the Property, once a satisfactory planning permission had been obtained, of £25m. The shape and complexity of the agreement make this difficult to demonstrate but the figure is essentially £13m for initial consideration and £12m in two instalments of deferred consideration.

Work at the Property

29. Some physical works were carried out on the Property between 2012 and 2016. These were mainly carried out by staff working for companies under common ownership and invoiced to APUK as part of the management charge, with any external costs being included within the cost heading for property repairs and maintenance. Site clean-up costs of £66,782 were included in the tax return for the year ended 31 October 2014 and £58,862 in the year ended 31 October 2015.

30. A number of bitumen barrels had been left by a road surfacing business which had become buried in certain areas of the Property. Work was done to dig, uncover, remove and dispose of these barrels and any polluted soil with appropriate care. Some asbestos also needed to be cleared up and collected, and this was disposed of in 2014. Other site clearance and tidying up work took place in various locations.

Work on rental activities

31. Mr. Searby says that rental activities were not substantial and APUK simply allowed the Property to continue to produce rent without investing or making any efforts to prevent the Property's decline. Mr. Searby says that the lack of investment makes this point clear as does the profile of rents.

32. The resources required to maintain the tenants was small. Mr. Searby says that he dealt with the financial side of lettings. Most of the tenants were invoiced monthly. He maintained a spreadsheet so that he could raise invoices very quickly. Most tenants did not require invoices, but those that did could be delivered by a quick walk round the site or by email. He tracked all cash daily for all the companies he looked after, noting APUK's rent receipts. He maintained a simple spreadsheet keeping track of rent receipts: most tenants paid by standing order but occasionally one or two needed to be chased for payment. He would explain the procedure to new tenants when they started at the Property. He also dealt with the payment of business rates at the Property. The costs of Mr. Searby's services here were included within the management charge from Peel Fold Holdings Ltd (an associated company) to APUK and the time involved would have been no more than the equivalent of 10 full days a year.

33. Mr. Searby told us that the buildings were all rated separately and some of the buildings were divided into individual units depending on the layout. This enabled many of the small units to be exempted from business rates provided they were small enough and occupied by a small business for whom this was their only property, a position that applied in a good number

of cases. This meant that the cost of business rates would be less than if premises were empty.

34. Mr. Searby said that Ben Pontin dealt with most non-financial matters. Prospective new tenants would either phone, email or occasionally just turn up at the Property and talk to Ben. If terms were agreed, then a simple one page relatively informal agreement would be entered into, always with a notice period of no more than three months. Ben would show them round the site and, if required, arrange for keys to be cut. Ben would also liaise with any tenants leaving.

35. There was very little routine maintenance carried out, and the properties were only being maintained to a minimum standard in view of their intended imminent demolition. Most ad hoc repairs would be carried out by Ben Pontin or by Dave Cheesbrough, another employee of the Peel Fold Holdings group, who worked mainly on maintenance and building projects elsewhere. In one building (the Farmhouse) it was necessary to keep the boiler working in the winter and Ben Pontin would arrange for an engineer when required for such repairs. The time spent by Ben Pontin and Dave Cheesbrough was also included in the management charge from Peel Fold Holdings.

36. Ben Pontin had ongoing dialogue with the farmer regarding progress with the development proposals. APUK wanted him to remain on the land to maintain it for as long as possible. In September 2015 Ben Pontin wrote to the farmer to explain that the lease would not be renewed from 30 September 2015.

Income

37. Mr. Searby says that, between May 2011 and the departure of the last tenant, rental income in APUK's accounts was approximately £2,530,000. This figure for rental income includes £297,000 from AIUK for periods after 30 June 2015, which was refunded as part of the arrangements for AIUK to surrender their lease, although the rent was shown as income in the accounts and the refund was shown as a development cost. This (he says) reduces the rental income to £2,233,000 during the period 2010-2017. On the same basis, invoices for rent raised for the twelve months from June 2015 to May 2016 amounted to a total of £143,846.

38. By contrast, the development of the Property by APUK (now called Crest Nicholson (Henley on Thames) Limited) shows cumulative income up to 31 October 2024, the most recent accounts publicly available when he prepared his witness statement, of approximately £82.5 million and profit of approximately £32 million. At this point Mr. Searby estimates the development to be around 75% completed.

39. So, he says, during the period 2011 to October 2024 letting income is well under 3% of total income and, on completion of the development, will be even less.

Development-related work

40. Mr. Searby explained in detail the activities undertaken by APUK relating to securing permission for the development. There were three stages to this:

(1) South Oxfordshire Local Plan (of which the 'Core Strategy' was a part)

(2) The Neighbourhood Plan

(3) Planning Application.

41. Mr. Searby said that getting the Property through the first two stages was a process in which APUK was extremely active from 2010 to 2016. It had always been envisaged that, since Crest Nicholson would make the decisions on site layout, house types etc, the application for planning permission itself would be made by Crest Nicholson and this was done before the

Neighbourhood Plan was completed. He said that approval of the planning application should automatically follow approval of the Neighbourhood Plan provided that other requirements for planning in the district and neighbourhood were complied with.

42. Stage (1) was achieved in 2012. It was getting through stage (2) which occupied APUK (and Crest Nicholson) from 2012 to 2016.

43. Mr. Searby explained that the National Planning Policy Framework 2012 ("NPPF") set out a 'presumption in favour of sustainable development'. It also set out the obligations for each local planning authority to prepare a local plan. In this case the local planning authority was South Oxfordshire District Council ("SODC"). The NPPF contained an obligation to involve neighbourhoods and communities in local plans. Neighbourhood plans give local communities the opportunity to shape decisions on development in their communities. Once a neighbourhood plan has been finalised and brought into force, its non-strategic policies take precedence over those in the local plan and applications for planning permission are decided based on the policies in the neighbourhood plan. Applications have to comply with all aspects of the relevant plans on matters such as design etc, but the principle of development in line with the neighbourhood plan is taken as being agreed.

44. Mr. Searby said that before the NPPF came into force the Property stood no chance of obtaining planning permission for residential development (albeit other kinds of development were possible, e.g. care homes, and APUK had looked at some of these). It was an employment site. It was not in the built-up area of Henley and would have clearly extended the built limits of the town contrary to a policy in the SODC 2011 local plan. The Property was also in an Area of Outstanding Natural Beauty, which counted strongly against it being developed. SODC's policy on new housing was clear at that time: it was concentrated in Didcot with very little elsewhere.

45. Mr. Searby explained that, because of the way various planning policies operated, it was essential for APUK's ability to develop the Property that the site was included for residential development in a neighbourhood plan for Henley. Mr. Searby says that APUK was confident that the Property would be included in a neighbourhood plan as it would be impossible to achieve the number of new houses anticipated for Henley without using the Property, given that all the other sites were more contentious with local opposition groups.

46. Mr. Searby says that getting the Property approved for residential development in a neighbourhood plan was APUK's responsibility under the agreement with CNOL and this was a major exercise in promoting the Property, lobbying, steering discussions and talking to stakeholders, decision makers and local people.

47. Mr. Searby explained what was done to achieve this:

(1) Getting the political will locally to prepare a neighbourhood plan; To start the project of preparing a neighbourhood plan for Henley it was necessary to persuade Henley Town Council, the only body which could realistically lead the project, to embrace the idea, form a steering group, choose consultants and allocate funds to the process. In the first place the town council was not keen to do this, but Mr. Pontin lobbied several councillors to explain the benefits of having a neighbourhood plan and the risks of not having one.

(2) Getting Harpsden included in the neighbourhood plan; Initially Harpsden parish council, adjacent to Henley and where the Property was situated, did not wish to participate in the neighbourhood plan as it felt it was sufficiently small that it would not need to provide any housing allocation. However, only with the Property included, would it be possible for Henley to find the number of new houses it was required to deliver. In

the end Harpsden parish council came round and appreciated that, by including the Property in the plan, which did not have much effect on the residents of Harpsden village, there were benefits to Harpsden, both financial (from community infrastructure levy) and from being able to exclude another site which would have had more impact on the village of Harpsden.

(3) Lobbying for the inclusion of the Property in the Neighbourhood Plan; Although previous stages in the planning process had identified the Property as a potential site for inclusion in the plan there had been great resistance to the idea of housing at the Property for many years. There were also objections as the site was some distance from the town centre, was in the Chilterns Area of Outstanding Natural Beauty and had employment on the site. There was therefore much work for APUK to do to persuade all the interested bodies and parties that the Property should include a substantial allocation of houses.

(4) Lobbying as appropriate against other sites in the Neighbourhood Plan; The greatest advantages that the Property had over other sites was that it could take a greater proportion of the housing allocation required for Henley and that it had fewer people closely affected by development. In contrast many of the other potential sites would have impacted other people more and the Property was the site which had the best chance of making their own unwanted site unnecessary. There were campaigns about a site at Lucy's Farm and several other unsuitable sites came forward as part of this process. APUK got involved, discreetly where necessary, to assist with the process of eliminating or reducing the number of other sites where possible.

(5) Presenting the case for the Property to the neighbourhood plan steering group and SODC; At the early stages of the neighbourhood plan process there were presentations from and on behalf of APUK to the steering group, councils and the general public, to highlight the benefits of the Property.

(6) Background lobbying of politicians, Henley Mayors, the local MP, influential people locally, societies etc and meeting as many interested parties / residents as possible; As well as meeting the steering group and councils there were many meetings with other parties involved in the process, mostly informal meetings with a view to securing support for the Property from the most influential people. Mr. Pontin was always prepared to meet with anyone at any time to put the case for the Property.

(7) Attending meetings of Henley Town Council, Harpsden Parish Council and the neighbourhood plan steering group; There were many meetings with the steering group preparing the neighbourhood plan and with the relevant councils themselves. Some of these involved Mr. Pontin and Deidre Wells, a consultant on behalf of APUK, while Crest Nicholson also became more involved as the plans for the development took shape.

(8) Being involved in specific debates about the Property and competing sites; Mr. Searby said that Mr. Pontin has always been one of the best "networkers" he has ever known and had contacts throughout the local areas of influence. However much anyone was opposed to development at the Property, Mr. Pontin would make an opportunity to meet with them and explain the benefits of having a neighbourhood plan for the area and including the Property within it.

(9) Submission to neighbourhood plan consultations; At each stage of the process there were formal consultations and it was always necessary to restate the case for the Property based on the current level of debate locally. These submissions were generally made by Deidre Wells on behalf of APUK.

(10) Submission to the neighbourhood plan inspector on his review of the neighbourhood plan; Just about the final stage of the process took place after the steering group had finalised the Neighbourhood Plan. The plan had to be reviewed by a government-appointed inspector to check it was compliant with the requirements for such plans and was properly put together. There was still scope for improvement at this stage and the submission made by Deidre Wells on behalf of APUK successfully led the inspector to correct an illogical constraint on development of part of the Property.

(11) Leafleting and lobbying residents to vote in favour of the Neighbourhood Plan at the referendum on 10 March 2016; After the inspector had approved the plan the referendum date was announced and a campaign was started to have the plan approved. This was led by the steering group and the councils which had been responsible for preparation of the plan and was generally not site-specific, as the whole Neighbourhood Plan was either approved or rejected. Mr. Pontin used all his skills to reach as many people as possible and, in co-ordination with other interested parties, APUK leafleted houses in the areas where it was felt this would most likely be effective.

48. Mr. Searby told us that, while the Neighbourhood Plan process was going on, several other issues needed to be addressed to enable the development to take place successfully following completion of the Neighbourhood Plan. Crest Nicholson focused on matters such as site layout, mix and type of housing and made the initial planning application, although Mr. Pontin and Deidre Wells were involved in discussions on many aspects of this as they had the local knowledge and contacts. Many other matters remained with APUK and its existing management. These included:

(1) Archaeology as some palaeolithic remains had been discovered from earlier excavations on the Property. Intense lobbying was required to avoid a sizeable part of the site being sterilised by inappropriate restrictions on development. A Site of Special Scientific Interest and Scheduled Monument within the site also needed to be managed to avoid too great a restriction on development.

(2) The landscape had always been an issue with the site being included within the Chilterns Area of Outstanding Natural Beauty and this needed to be managed, including a meeting on site which Mr. Searby attended with key planning personnel in April 2015.

(3) There was also a proposal to revisit a failed 2011 attempt to obtain a "listing" for the Farmhouse, with an article in the Henley Standard in March 2016. This proposal was quickly and successfully resisted.

The Management Charge and other expenses

49. Mr. Searby told us that all the staff and most office costs relating to the business of several companies were borne by HHL and Peel Fold Holdings Ltd and some of these needed to be apportioned and charged to other companies (including APUK) to recover an appropriate proportion of costs. No records were kept of time spent on different activities and individuals would switch from one item to another many times during a typical day. Mr. Searby says that he did not carry out detailed calculations for the management charges; instead he made a broad brush estimate each year of the charge he considered to be appropriate. He was aware of the activities being undertaken and was well placed to make this assessment. This was invoiced quarterly at a fixed amount supplemented in later years by additional invoices to reflect the extra time spent on development at the Property, particularly by Mr. Pontin.

50. Mr. Searby said that the management charge expenditure can be seen in the tax computations of APUK for the periods ending 31 October 2012 to 2015, which he exhibited.

The tax computations of APUK required an apportionment of costs between rental activities and other activities. The breakdown between development and rental activities (which Mr. Searby calculated using days spent each month averaged over the year and fair daily rates chargeable for the services) is as follows:

Year end October 2012: £221,000 split 75% development, 25% rental;

Year end October 2013: £208,000 split 85% development, 15% rental;

Year end October 2014: £196,000 split 85% development, 15% rental;

Year end October 2015: £195,000 split 85% development, 15% rental.

51. Mr. Searby says that in the period 2015-16 he spent about 4 days a month on average on development activities at the Property (plus one on rental), including discussions with the internal team, external meetings and events, discussions with Crest Nicholson and negotiations with AIUK, mostly supporting the work Mr. Pontin was leading. Ben Pontin worked closely with Mr. Pontin and Mr. Searby and attended many meetings with them. He also hosted meetings and site visits at the Property and worked with other groups in Henley and Harpsden with an interest in the neighbourhood plan and liaised with adjacent properties. With Dave Cheesbrough he also carried out and organised works on the Property such as cleaning up some areas, fencing and trees and worked with the farmer on the physical appearance of the farmland.

52. In addition, Deirdre Wells provided planning consultancy services to APUK throughout the period, particularly in the earlier stages, including making submissions to the Neighbourhood Plan process, and she provided a great deal of input into all aspects of planning matters. In the period November 2010 to March 2015 her charges came to £29,288 plus VAT. All these invoices were paid by APUK and included in the tax computations as APUK as development expenses.

53. Deloitte calculated about £386,000 of costs were directly incurred by APUK on external development costs during the period 2011-2015. This excludes the management charge for time of staff and directors.

54. Mr. Searby says that the other main costs incurred were loan interest, business rates, electricity and boiler fuel, maintenance, temporary staff, waste disposal and insurance. Some of these costs were included within a service charge payable by some tenants, although in later years this was mainly AIUK.

55. Loan interest would have been incurred whether or not there were tenants. Business rates would have been payable regardless and indeed would have been a greater cost if there had not been any tenants. Insurance would have been the same. Electricity, boiler fuel, maintenance, waste disposal and temporary staff would have been lower without any tenants although APUK was still using the Property as their office and some costs would have been required.

56. Taking 2014-15, which was a typical year, as an example, the largest property cost was business rates which would have been higher (as properties would have been empty and higher rates charged) had there not been tenants. Excluding business rates. costs total about £90,000, of which £42,500 was charged to tenants.

57. Mr. Searby says that Crest Nicholson's accounts for the development (up to October 2024) show income of £82.5m and profit of £32m, so roughly £50.5m has been expensed as costs relating to the development. In addition, £9.7m remains on the balance sheet as work in progress while there was £4.9m on the balance sheet when CNOL acquired APUK. He says that this implies that APUK (Crest Nicholson (Henley on Thames) Limited) has incurred development costs of around £55m since CNOL completed the acquisition of HHL.

Alan Pontin ("Mr. Pontin")

58. Mr. Pontin agreed with, and then expanded on, Mr. Searby's evidence.

59. He told us that the Property was 83 acres in total of mixed industrial, offices, agricultural uses and housing - with 6.5 hectares developed including 11 privately owned houses located on Highlands Lane and a further bungalow on the outskirts of the site.

60. An SSSI (site of special scientific interest) and a National Monument were located on the Property and there was considerable archaeological interest in both the buildings and the grounds.

61. In terms of physical work at the Property Mr. Pontin said that an important part of APUK's action plan was to manage physical and visual changes to the Property to support the planning objectives, including landscaping, partial wilding, tree management, infrastructure and building management. In his evidence, Mr Pontin gave a number of examples of physical works at the Property which had been focused on improving the planning position.

62. Mr. Pontin explained how the Neighbourhood Plan process worked. His narrative reflected Mr. Searby's. In broad terms, he said that from 2011 his sole focus had been to achieve permission to develop residential housing at the Property. In this period, he met and talked with as many people as possible to promote the setting up of the Neighbourhood Plan, the promotion of the Neighbourhood Plan and the adoption of the Neighbourhood Plan including an allocation of residential housing for the Property.

63. Mr. Pontin listed numerous meetings he had attended and other activities he had undertaken in relation to the Neighbourhood Plan process. In March 2015, for example, he appears to have attended at least 11 events, met a similar number of people outside those events and carried out other activities.

64. In particular, he told us that, in the 18 months from January 2015 to June 2016 as the Neighbourhood Plan was getting close to completion, he ramped up his time. He says that, if he had been charging a third-party market rates to do the work he did, this would amount to approximately £125,000 a year. Full market rates would be at least £250/hour. He did not seek to recover expenses and absorbed these into his charge. Not all his time was charged, more a reasonable proportion. The main point of the management charge was to recover costs in the company which bore the costs of offices, staff etc, not to make a profit.

Deidre Wells ("Ms. Wells")

65. Ms. Wells is a Chartered Town Planner. Through her business (Red Kite Development Consultancy) she has been working for APUK since 2007.

66. She was heavily involved for APUK in the process around the development of SODC's Core Strategy. In particular, she successfully challenged the original proposal to make no allocation for housing growth in Henley and instead focus on growth at Didcot, Thame and Wallingford. Beyond that she sought to promote the Property specifically as suitable for providing a substantial part of any new housing delivery, supported by planning, landscape, affordable housing and traffic evidence.

67. She told us that she was aware that APUK undertook extensive networking locally including responding to press interest and engagement with the Town Council and others in the lead up to and after the public examination of the proposed Core Strategy, in an attempt to garner local support. She attended formal Town Council meetings on behalf of APUK and interrogated all background documents.

68. Once Henley Town Council began to work on a Neighbourhood Plan, Ms. Wells says that she participated fully in that process, attending public and private meetings, reviewing

published reports and making formal submissions at various stages of the consultation process. In the Neighbourhood Plan process this involved what she called a competitive environment as new sites were brought forward and various combinations were examined to add up to the required numbers. She developed a strategy with APUK to stand out from the competition and commit to deliver the maximum possible infrastructure, social, environmental and other benefits, and in particular a commitment to 40% affordable housing.

69. Ms. Wells says that "unsurprisingly" there were problems with objectors raising concerns which had to be addressed along the way and a general hostility to new development in the countryside. It took considerable efforts to successfully rebut an attempt by an individual who sought National Heritage Listing for some buildings on the Property from February 2012. Concerns on potential impacts on the SSSI/Scheduled Monument also took expert inputs to agree mitigation compatible with new development in 2014. She was involved throughout to make submissions on behalf of APUK.

70. Nearly 10 years elapsed between Ms. Wells first being approached by APUK and planning permission being granted. She says this is not at all unusual for developments of non-urban sites of this scale. For sites within the designated AONB it might well be expected to take longer, as it is clearly stated in successive versions of the National Planning Policy Framework that 'Permission should be refused for major development (cf. in the AONB) other than in exceptional circumstances and where it can be demonstrated that the development is in the public interest.' Overcoming the in principle national policy of rejecting major development in an AONB was a high bar that faced APUK throughout and this was not resolved until 2016. She says this was only one aspect of the task – the location outside settlement limits combined with the scale within the rural area, public and political opposition to large scale housing near Henley, taken with unique factors such as the potential impact on an archaeological SSSI were all factors that had to be addressed in a changing policy environment.

71. All this meant that lengthy and complex preparatory work was required. She outlined her role, but said that she was conscious that throughout the process Mr. Pontin, Mr. Searby and APUK's other contacts have been very active in other respects.

ACCOUNTING TREATMENT

72. In its financial statements for the year to 30 April 2010, APUK described its activities as follows:

> "The principal activity of the company in the year under review was that of the letting of property. The company owns property in Highlands Farm, Henley on Thames, Oxfordshire, a mostly industrial and commercial property let to a number of tenants."

73. In its financial statements for the 6 months to 31 October 2011, APUK described its activities as follows:

> "Until April 2011, the principal activity of the company was the ownership and rental of an investment property in Highlands Farm, Henley-on-Thames, Oxfordshire. The property is an industrial and commercial property which is let to a number of tenants. At the end of April 2011, the directors decided to actively seek planning permission for the property with a view to demolishing the existing property and replacing it with a residential development. Since April 2011, the directors have been working with professional advisers to obtain planning permission for the site. However, since the primary purpose of the business has now changed, the property has been moved from being a fixed asset investment property to trading stock. The company continues to receive rental income from the property. This is now considered to be ancillary

to the main business of the company and is expected to gradually reduce as the site is prepared for development."

74. Up to (and including) its financial statements for the year to 31 October 2015, APUK described its activities in similar terms (including an update each year on progress with planning etc).

75. In its financial statements for the year to 31 October 2016, APUK (now called Crest Nicholson (Henley On Thames) Limited) described its activities in different terms as follows:

> "The principal activity of Crest Nicholson (Henley On Thames) Limited (formerly Associated Properties UK Limited) (the 'Company') is that of property investment and development. On the 2nd June 2016 Crest Nicholson Operations Limited bought the entire share capital of the Company. The comparative figures for the year ended 31st October 2015 are unaudited. The company holds the freehold of the property at Highlands Farm, Henley-on-Thames Oxfordshire. An outline planning application for mixed use development was made in January 2016. At this time, planning has not been obtained. In the meantime, the Company continues to receive rental income from the property".

THE OPTION AGREEMENT

76. We have referred to the Option Agreement in several places in this decision (and Mr. Searby commented on the implications of those terms for what APUK could do with the Property). We set out its key terms below:

(1) The parties were the Appellants (as owners of shares in HHL (the "HHL Shares")), CNOL and Crest Nicholson PLC (which guarantees CNOL's performance of its obligations and is party to provisions relating to confidentiality and announcements);

(2) CNOL paid the Appellants £100,000 on signing;

(3) The Appellants granted CNOL an option (the "Call Option") to purchase all the HHL Shares on the terms set out in the agreement;

(4) Crest granted the Appellants an option (the "Put Option") to require CNOL to purchase all the HHL Shares on the terms set out in the agreement;

(5) The parties were required to "use reasonable efforts to procure the satisfaction of the Core Strategy Condition". This required SODC to adopt the Core Strategy "that is currently being considered and is due to be adopted following examination" and that decision not to be challenged by way of judicial review or the challenge to fail. In addition, the Core Strategy had to allocate a minimum of 400 dwellings for Henley-on-Thames (including windfall sites) either specifying no date as to when those dwellings would come forward for development or, if a date was specified, containing a date falling not later than 31st March 2018.

(6) £2,500,000 was payable to the Appellants once the Core Strategy Condition was satisfied.

(7) The Call Option could be exercised at any time by CNOL.

(8) The Put Option could be exercised only if: (a) the Core Strategy Condition had been satisfied or waived by CNOL; and (b) the Property had been allocated for residential development either under a development plan document adopted by SODC or under an approved Neighbourhood Plan.

(9) The Put Option and the Call Option lapsed if they had not been exercised by 31 July 2018.

(10) Once the Put Option or the Call Option had been exercised, completion of the sale and purchase of the HHL Shares was conditional on AIUK releasing APUK from the pre-emption agreement, terminating its lease, and vacating the part of the Property it occupied; and the termination of the lease of part of the Property to a company associated with the Appellants without any unsettled outstanding liability on APUK. The Appellants undertook to negotiate and agree these matters, subject to an obligation to keep CNOL informed, consult with it and not agree terms with AIUK without CNOL's prior agreement.

(11) Subject to satisfaction or waiver of the conditions in (10), the service of an option exercise notice bound CNOL to buy and the Appellants to sell the HHL Shares. At the same time Ben Pontin and Thomas Pontin were to sell (and CNOL to buy) certain pieces of land carved out of the Property and owned by them.

(12) There was a complex provision for determining the price to be paid for the HHL Shares. This included a mechanism designed to reflect future development value (depending on the planning permission CNOL obtained) and to take into account (by reducing the price paid for the HHL Shares using an assumed (20%) rate of corporation tax) the fact that, although the price had been "calculated on the assumption that such payments would be fully deductible trading expenses for the purpose of calculating corporation tax payable on the development of the Property", no such deduction would be available.

(13) The Appellants undertook to CNOL that, from the signing of the Option Agreement, the business of APUK was to be conducted in the manner provided in Schedule 5 to the Option Agreement. This included:

(a) APUK was to carry on business in the normal course (including maintaining insurance of the type currently obtained) except that APUK was not to grant any short term leases in respect of any part of the Property without such leases containing provision for termination on no more than three months' notice and being excluded from the Landlord and Tenant Act 1954 and, following service of an option exercise notice, APUK was not to grant any short term leases in respect of any part of the Property without CNOL's prior written consent with a view to the Appellants reducing the number of short term leases to zero in advance of completion of the sale and purchase of HHL Shares.

(b) Save with CNOL's prior written consent (such consent not to be unreasonably withheld or delayed), the Appellants were to procure that APUK did not:

(i) dispose of any material asset used or required for the operation of its business including any interest in the Property; or

(ii) incur any capital expenditure; or

(iii) borrow any sum more than the amounts borrowed in the ordinary course of business and available to it at the date of this agreement; or

(iv) cause or knowingly allow anything to be done to or upon the Property that could result in a material change in the state or character and/or condition of the Property which could adversely affect the likelihood of the Core Strategy being adopted; or increase materially the costs of or materially delay the proposed development of the Property; or materially prejudice the development of the Property for residential purposes.

(14) CNOL agreed that, without the prior written consent of the Appellants, during the period between completion of the sale and purchase of the HHL Shares and the date when the corporation tax computations for the second accounting period ending after completion had been agreed with HMRC, it would (a) procure that APUK remained a registered company and was not struck off the Register of Companies, and was not wound up, whether solvently or insolvently, and (b) procure that any development of the Property was conducted by APUK.

(15) A warranty in the Option Agreement stated that "At Completion APUK will have no business other than the promotion for planning and development of the APUK Property and the management of any residual leases granted over it and the maintenance of the APUK Property".

DISCUSSION

77. As we have already noted, the only remaining issue for us to decide is whether APUK met the second limb of the definition of "trading company", that its "activities [did] not include to a substantial extent activities other than trading activities". In the context of HMRC's agreement that APUK was carrying on activities with a view to its starting to carry on a trade, this translates into asking whether APUK's activities during the Relevant Period included to a substantial extent activities other than activities carried on by it with a view to its starting to carry on a trade.

78. In *Allam v HMRC*, [2021] UKUT 291 (TCC) ("*Allam*"), the taxpayer challenged HMRC's decision that he was not entitled to entrepreneurs' relief on a disposal of shares in a company ("ADL"). ADL's business involved property development and property investment. There was no dispute that ADL carried on trading activities in the form of property development. The issue before was whether the activities of ADL included, to a substantial extent, activities other than trading activities.

79. During the period under consideration ADL's turnover was made up almost entirely of rental income from several properties, some of which the directors intended to develop for residential use. Administrative expenses amounting to £50,246 included legal and professional costs of £32,469 which were attributable to development work. ADL's balance sheet showed fixed assets of £8,871,964, which was the value of all its properties together with some capitalised expenditure relating to planning costs on the two intended for residential development. The properties were described as "property investments" in the accounts. The main liabilities in ADL's accounts were long term mortgages. Of the two directors one spent approximately 20-30% of his working week dealing with ADL business. The bulk of that, some 90-95%, was spent on development matters. The other spent only one or two hours a week on ADL business, largely dealing with banks on financing matters.

80. Of the properties owned by ADL:

(1) One property was the main factory and offices of an associated company ("AML"). The site was acquired by ADL in 2007 and the property leased to AML, subject to a small part of the site which comprised office buildings which were leased to a third party.

(2) Another was a site was on the river frontage in Hull. It was acquired by ADL in the 1990's. The site was leased to AML as its main factory and offices for much of the period up to 2007. In 2007, AML relocated its main factory and offices to the first site. There had been some development of this site. However, from 2007 onwards, and throughout the relevant period, the site had been leased to AML as additional office and factory space. The evidence was that the directors intended the site for residential development

into flats and apartments. However, planning permission has not been obtained for this site.

(3) In 2008, ADL acquired the freehold of a factory site and related car parking facilities from an engineering business in Hull. As part of the transaction for the acquisition of the site, ADL immediately leased the property back to the seller on a full repairing and insuring lease. It was said that ADL intended to obtain planning permission for the site and to develop the property into low-cost housing. In the period in question, the company instructed architects to draw up plans for the development and made several attempts to obtain planning permission for the site, none of which was successful. At the time, the property continued to be leased to the seller as a factory site to maintain income.

(4) In 2006/7 ADL acquired a collection of sites which, for the most part, were developed into a pay and display car park in 2010 and 2011. The FTT had no evidence of how or by whom the car park was operated after the works had been completed.

81. The Upper Tribunal ("UT") discussed in some detail the meaning of the expression "to a substantial extent" and the approach to be taken in determining whether a trading company is carrying on non-trading activities "to a substantial extent". In particular, the UT made these observations:

> "[90] Both parties accept that the FTT gave the right meaning to the word "substantial" at [157] of the decision. We agree with the FTT that in this context substantial should be "taken to mean of material or real importance in the context of the activities of the company as a whole". Both parties agreed and we agree that the test is qualitative and quantitative. It is necessary to look at both the nature of the activities and to measure in some way the extent of those activities. Further, the company's activities must be looked at as a whole. It is not appropriate to apply any sort of numerical threshold as suggested by HMRC's guidance.
>
> [93] … What is substantial in the context of trading and non-trading activities should be given its ordinary and natural meaning. Application of the test involves identifying the trading and non-trading activities and then considering how best to measure the non-trading activities to see whether they are substantial in the context of the company's activities as a whole. The real issue between the parties in this appeal is how one measures the extent of an activity.
>
> [98] … in considering the activities of a company, the test is a holistic one. The test is not confined to physical human activity, but requires an overall consideration of what it is that the relevant company does.
>
> [101] In our view, the question of what amounts to an activity in the context of a company is a straightforward question. It is what the company does in commercial terms. The question of how to measure the extent of an activity may be more difficult and will be informed by the statutory context. In the present case, the context is that of a relief from capital gains tax aimed at trading companies. Trading companies are defined in the first instance as companies carrying on trading activities, with an exclusion by refence to the extent of any non-trading activities. In that context it is clear to us that the FTT was right when it said at [153] that the purpose of the relief would be defeated if the limitation did not exclude shares in companies having substantial investment holdings. The holding of investments is an activity for these purposes. As we have said, we consider that the FTT was correct not to focus solely on physical activities. Otherwise, shares in a company with a small

trading activity would qualify for relief even where it had a large investment business involving very little physical activity. Conversely, shares in the same company would not qualify for relief if it had a large investment business involving considerable physical activity. That result makes no sense to us in the context of a relief aimed at shares in companies carrying out trading activities. The measure of an activity for these purposes must be more than a simple measure of the time and work involved in carrying on the activity.

> [102] In the context of a relief from tax in relation to the shares of a trading company we consider that Parliament intended financial measures of activity to be taken into account as well as measures of physical activity.
>
> [106] The FTT took into account as relevant factors the value of the capital assets employed in the various activities and the comparative turnover, expenses and profits. …
>
> [107] We consider that in these paragraphs the FTT was looking at all the relevant factors and making a value judgment. It clearly considered that the factors to be given most weight were the income from non-trading activities and the capital employed in non-trading activities. The FTT recognised at [165] and [166] that certain assets were earmarked for development, which was a trading activity, but in the meantime had been let out for many years on full repairing terms. For example, it took that fact into account at [166] where it stated in relation to the Lime Street Car Park site:
>
>> "There must come a point at which, it is appropriate to discount the development activity (or the preparation for it) that has been undertaken in the light of the continued use of the property to derive rental income."
>
> [108] For the reasons given above, we are satisfied that in this case the FTT was entitled to take into account turnover and capital employed as a measure of activity. It did not do so in isolation. At [167] it stated that it took into account all the previously stated factors. It took into account that the development activity was a long term activity and might not have significant income in any particular year. It was entitled to take into account that the investment activity produced significant income in the meantime.
>
> [109] … We do not consider that expenses incurred on trading or non-trading activities are by themselves a measure of those activities. Incurring expenses may indicate physical activity, but for the reasons given above the test is not solely concerned with physical activity."

82. The FTT had held that ADL was carrying on activities which were, to a substantial extent, not trading activities and the UT dismissed the taxpayer's appeal.

83. *Allam* makes it clear that our approach to answering the question before us should be a holistic, multifactorial one, forming an overall value judgment after looking at everything APUK does, considering physical and financial activities. With the benefit of that guidance from the UT, we turn to answer the question before us.

Time before and after the Relevant Period

84. HMRC stress that the test of substantiality (whether APUK's non-trading activities were substantial) is to be applied over the Relevant Period and so those 12 months immediately before the sale of the HHL Shares are very important. Although APUK's trading activities ultimately delivered £25 million profit, we are to look only at the Relevant Period. They say that any income generated after this time is irrelevant.

85. In *Clark v Medway Housing Society Ltd*, [1997] STC 90, Lightman J had to consider whether the society (whose objects were to benefit the community) fell within the statutory

definition of an investment company (one "whose business consists wholly or mainly in the making of investments and the principal part of whose income is derived therefrom"). In deciding that question, he considered that the society's activities at any given time needed to be analysed, but regard needed to be paid to the society's past history and future plans to avoid painting a "partial and incomplete picture" (p109a).

86. HMRC are right, of course, that the statutory test focuses on the activities of APUK in the twelve months immediately prior to the disposal of the HHL Shares. However, we agree with Mr Sykes that this question cannot be answered just by looking at the activities of APUK in that period where doing so would paint a partial or incomplete picture of the company's activities.

87. This is particularly the case where, as is the case here, the financial fruits of the company's trading activities will not ripen for some time. In particular, we consider that it would be wrong to ignore the long-term results of APUK's very successful development of the Property, just because building had not started and no houses had been sold during the Relevant Period. Equally, as the FTT noted in *Allam*, we cannot ignore the continuing use of the Property to derive rental income during the Relevant Period, particularly when that is the only income, which was derived during the Relevant Period.

Physical/management activity

88. HMRC accept that the time spent by APUK, as Mr. Pontin suggested, was geared towards the inclusion of the Property for residential development in the Neighbourhood Plan, but they say that there was also non-trading activity, such as the general maintenance of the site and dealing with tenants.

89. We agree that there was some activity on APUK's part that was directed at dealing with tenants and generating rental income, but we do not consider the level of that activity to be material. Instead, if we look at the activities of the company, carried on by the directors and others performing functions for it at its cost, which includes Mr. Cheeseborough and Ms. Wells, the clear picture painted here is of a company whose focus has shifted from property investment to property development.

90. Mr. Searby explained in great detail why the Property was no longer a viable investment proposition. The buildings available for letting had become tired and dated and there were much better buildings, both in terms of quality and location, readily available elsewhere. As he put it, certainly by 2018, when the AIUK lease was due to expire naturally, it was difficult to see what future the Property had in its then state as an investment proposition.

91. All of Mr. Pontin's time was devoted to securing the adoption of a neighbourhood plan for Henley and Harpsden and making sure that the Property was included in that neighbourhood plan as a location for a large residential development. This was the key to APUK being able to carry out a successful property development. We have seen, both from Mr. Searby's evidence and Mr. Pontin's, that Mr. Pontin carried out a significant amount of work, including all sorts of different activities, of very great importance for the company's financial future.

92. He was supported in this by Mr. Searby, Ben Pontin, and Ms. Wells. Where the work was carried out by Mr. Pontin, Mr. Searby or Ben Pontin, a management fee was charged to APUK by other associated companies, which bore the costs of employing the relevant individuals, or charged by Ms. Wells' consultancy business. On the figures actually charged, only about fifteen percent of the fees related to non-development work. However, on Mr. Pontin's evidence, the management charge significantly undervalued his work. He told us that, if he had been carrying out the same work for a third party at market rates, he would have charged significantly more, and we can readily understand, given the importance of what he

was doing, why that would be the case. Similarly, Mr. Searby told us that Ms. Wells was not very prompt at raising invoices and that her charges were very reasonable. It strikes us that her total fees, less than £30,000 for working over a five-year period, are at a very reasonable end of the spectrum, and we suspect that these too may underrepresent the value of what she did.

93. When looking at the work carried out by APUK, we consider that we can take into account the work/effort supplied to APUK by individuals who were not (or were not always acting as) its employees or directors. Although Mr Pontin and Mr Searby were directors of APUK, their services (as well as those of Ben Pontin and Mr Cheeseborough and possibly others too) were supplied in return for a management fee by HHL or PFHL and Ms Wells' services were supplied by her consultancy business. This point was addressed by the FTT in *Mark Stolkin & Ors v HMRC*, [2024] UKFTT 00160 (TC) at [140]:

> "We do not agree with HMRC's argument that the use of third parties (here planning and development consultants such as Iceni or Savills) means that the work carried out is to be disregarded in deciding whether SGL was trading. The passages said to support that view in *Ransom v Higgs* merely indicate that A is not trading if they procure or compel B to trade. That is not the position here at all. SGL is not procuring Iceni or Savills (or any other consultants) to trade; SGL is buying-in their services as contractors to help it carry on the activities it carries on as principal and which (it says) amount to trading. *Livingston* does not provide clear support for the view that, to be trading, a person must carry out the relevant activities personally (if an individual) or by using employees; contractors' services can be used without that preventing a trade being carried on. On Mr Stolkin's and Ms Clements' evidence, the consultants' work was co-ordinated by the directors of SGL and, of course, SGL owned the Site. We ascribe no importance to the fact that SGL had no planning experience and had to buy in services from Savills, Iceni and others."

94. Although we can take these "bought in" services into account in evaluating the physical activities of APUK, as well as work done by Mr Pontin and Mr Searby as directors of APUK (and we note in this context that one of the agreed facts is that it was formally confirmed that the Property was included in the Neighbourhood Plan "following significant work and efforts by the directors of APUK"), it is important that, when we come to look at APUK's expenditure as part of its financial activities, we do not "double count" these bought in services by giving too much weight in that evaluation to high fees paid for development-related work. We will come back to this point later.

95. Against this, the evidence is that very little work was done on recruiting or looking after tenants. Mr. Searby ran all the administration of the property letting side of the business in, on average, a day a month, and Ben Pontin and Mr. Cheeseborough carried out, or arranged, such maintenance work as was necessary. Other work was carried out at the Property, beyond that needed to look after the tenants, but that too was focused on the development. Mr. Pontin's evidence points to a number of pieces of work carried out over a period, not just during the Relevant Period, all of which were designed to try to maximize the chances of the proposed development being included in the neighbourhood plan and generally to facilitate the development project.

Income

96. HMRC say that APUK's property letting activity was a non-trading activity and the only income generated during the Relevant Period was passive rental income.

97. HMRC say that there was no trading activity generating the rent. The rental income was the primary ongoing activity during the Relevant Period. Ms Jeewon pointed out that rental

profits are charged to tax under entirely separate provisions from those dealing with trading profits; trading income/profits are dealt with under Part 2 of the Corporation Tax Act 2009 ("CTA 2009") and UK property business profits/income under Part 4 of that Act. Section 201 CTA 2009 provides that a receipt which falls within Chapter 2 of Part 2 (receipts of trade) and Chapter 3 of Part 4 (so far as it relates to a UK property business) "is dealt with under Chapter 3 of Part 4". She also pointed us to a comment by Lord Macmillan in *Salisbury House Estate Ltd v Fry*, (1928-31) 15 TC 266 at p330:

> "A landowner may conduct a trade on his premises, but he cannot be represented as carrying on a trade of owning land because he makes an income by letting it."

98. HMRC disagree with the idea that the rental income here was a by-product of a trade; the Property was acquired in 2000 as an investment and the rental income simply continued throughout.

99. Mr Sykes referred us to *Nuclear Electric plc v Bradley*, [1996] STC 405. The issue here was whether income from investments held for the purposes of meeting future back-end and decommissioning costs was trading income. Lord Jauncey (at p411) observed:

> "Whether income from investments held by a business is trading income must ultimately depend upon the nature of the business and the purpose for which the fund is held. At one end of the scale are insurance companies and banks part of whose business is the making and holding of investments to meet current liabilities. It has been suggested that tour operators might fall into this category but without a good deal more information I do not feel able to express an opinion on this matter. At the other end of the scale are businesses of which the making and holding of investments form no part. In between these two ends there will no doubt fall other types of businesses whose position is not so clear. However in this case it is absolutely clear that the business of NE was to produce and supply electricity. The making of investments was neither an integral nor any part of its business. Furthermore the investments which it did make were in no sense employed in the business of producing electricity during the year of assessment. It follows that wherever the line may be drawn the income from NE's investment cannot be treated as trading income.
>
> In this case we are dealing with a very large sum of money intended to be invested for a long period. Therefore in reaching the conclusion that this fund was not employed in NE's business I would not wish to be taken as suggesting that sums held by a trader in an interest-bearing account to meet current or short-term trading liabilities should be similarly considered."

100. HMRC are right, of course, that the only income derived by APUK during the Relevant Period was the rental received from the remaining tenants at the Property and that the receipts of a UK property letting business are always brought into charge to tax under the regime for taxing property income, even if that receipt would also be capable of being a trading receipt. It does not, however, automatically follow that rental income should always be treated as investment income with a consequent negative impact on the question whether a company's activities are substantially non-trading.

101. We agree with Mr. Sykes that much will depend on why the company receives the rental income in question. As *Nuclear Electric* makes clear, what might in ordinary circumstances be investment income can be trading income if making and holding the investments which give rise to the income is a part of the trade carried on by a particular business. Similarly, we consider that rental income received by a company will not necessarily be a negative feature in this analysis if the receipt of the rental income is connected with its trade.

102. So, here, where rental income was received from short-term tenancies designed to be easily terminable, so as not to obstruct implementation of the development, put in place to generate a small ongoing income to cover APUK's development and other costs and reduce the amount of business rates which would have otherwise been payable, and to facilitate the approval of the Neighbourhood Plan (crucial for the development), by avoiding negative publicity, such as might have arisen had they asked any tenants to leave, appeared arrogant or assumed a favourable outcome, we consider that such income was integral to APUK's preparations to trade and should not count against APUK when it comes to assessing whether it carried on substantial non-trading activities.

103. The same is not true, however, of the income derived from AIUK. That income was derived under a long lease, signed many years ago, designed to generate the income APUK needed to discharge its obligations under a long-term borrowing arrangement. Whilst we accept that Mr. Searby and Mr. Pontin already had an eye on possible future development at the time this lease was entered into, we consider that the lease with AIUK cannot be regarded as generating anything other than long-term investment income. It has nothing to do with APUK's plans to start a development activity.

104. On 30 June 2015 AIUK agreed (in the "Surrender and Release Agreement") to surrender its lease of part of the Property and to terminate the pre-emption agreement within 30 days of an option exercise notice being given under the Option Agreement. The Surrender and Release Agreement provided that, on completion of the surrender of its lease and termination of the pre-emption agreement, AIUK was to be paid "a sum equivalent to all payments of rent and service charges made by the Tenant under the Lease (calculated excluding any VAT) paid from 30 June 2015 until determination of the Lease". The lease was surrendered and the pre-emption agreement terminated on 2 June 2016. In pure cash terms, therefore, APUK would have retained approximately two months' rent (the period from 22 April 2015 to 30 June 2015) from the AIUK lease during the Relevant Period.

105. On Mr. Searby's evidence, the figure for rental income in APUK's accounts includes £297,000 from AIUK for periods after 30 June 2015, when this amount was refunded. This period was 11 months (30 June 2015 to 2 June 2016), so the annual rent would have been £324,000. Of the £324,000 received during the Relevant Period, APUK would have kept £54,000. The invoices for rent excluding AIUK for the twelve months from June 2015 to May 2016 amounted to £143,846.

106. We agree with HMRC that we should not reduce the rental income from AIUK to reflect the payments under the surrender arrangements. The "rent refund" was in fact a separate payment made under the Surrender and Release Agreement in return for the surrender of the lease and the termination of the pre-emption agreement. This is made even clearer by the surrender/termination documents themselves. The payment is not referred to in the deed of surrender of the lease, which is expressed to be made in consideration of APUK releasing AIUK from its obligations under the lease, whereas the recitals to the deed terminating the pre-emption agreement record (our emphasis) that:

> "<u>In consideration of the payment</u> made by APUK to AIUK pursuant to an Agreement for Surrender and Release dated 2 June 2016 [this must be a mistake – the date should be 30 June 2015] and made between APUK (1) and AIUK (2) (the "Agreement") <u>AIUK has agreed to release APUK from its obligations in the Pre-emption Agreement</u> on terms set out in this deed".

107. So, during the Relevant Period APUK received approximately £144,000 of rent from leasing arrangements we regard as integral to APUK's preparations to trade and £324,000 from a long-term investment leasing arrangement.

108. Although we consider that we should treat APUK as receiving £324,000 of investment rental income during the Relevant Period, we also consider that it is important to take into account the fact that the arrangements for the receipt of this income were coming to an end. Indeed, the act which brought the Relevant Period to an end, the service of the exercise notice under the Option Agreement, also triggered the 30-day period for the surrender of the AIUK lease.

109. As the FTT pointed out in *Allam*, the exclusion from the definition of trading company of a company which has substantial non-trading activities is designed to make sure that entrepreneur's relief is available only on the sale of genuine trading companies and shareholders are unable to benefit from the relief where a significant amount of investment value is wrapped up in a company which carries on a trade. That concern is not present in circumstances where, as is the case with APUK, a company received a significant amount of non-trading, investment income in the year before the share disposal of shares in the company but that income stream was turned off by the disposal. So, although the receipt of £324,000 of rental income is clearly a material receipt looking at the Relevant Period alone, we should not ignore the fact that this income stream would not continue beyond the sale of the HHL Shares and this factor is, in our judgment, not as significant as it would have been had the AIUK lease continued after the HHL Shares were sold.

110. Finally (as discussed at [84]-[87] above) we should not lose sight of the fact that, although there were no development receipts or profits during the Relevant Period, APUK's development trade ultimately generated profits in excess of £25m.

111. When we look at whether APUK's income in the Relevant Period points to its activities in the Relevant Period being, to a substantial extent, not trading activities, we need to bear in mind that, whilst £324,000 is clearly not a small amount of money in absolute terms, all APUK's other income (£144,000) came from leasing arrangements that were integral to its preparations to trade, the investment income was derived from an old arrangement APUK was bringing to an end and APUK was taking steps with a view to starting a trading activity which ultimately generated over £25m of profit.

Assets

112. APUK's sole asset was the Property. Mr. Sykes says that the Property had been appropriated by APUK to trading stock. HMRC say that the Property could not be trading stock, because APUK had not started to carry on a trade.

113. HMRC say that the intention of the directors may have changed, after the Property was acquired as an investment property, but it has generated income since then and was still a non-trading asset. HMRC says that this is not at all affected by their concession that APUK was carrying on activities with a view to commencing a trade and the Property was subsequently (after the end of the Relevant Period) used as trading stock in a substantial development trade.

114. Mr Sykes disagrees with HMRC's position that it is not possible to have trading stock before a trade has commenced. By way of example, he said, suppose someone purchased 10,000 toilet rolls for sale but had not yet opened a shop or found any customers or set up the infrastructure of their business. The toilet rolls are clearly not a fixed asset; they are trading stock even though the trade has not started. In this context he points us to some comments of Lord Wilberforce in *Lionel Simons Properties Ltd v CIR*, (1980) 53 TC 461 at 491G:

> "Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a

permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock—and, I suppose, vice versa. … What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status—neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review."

115. The point is developed further in *Heather Whyte v HMRC*, [2021] UKFTT 270 (TC):

> "486. As the acquisition of the Estate cannot be split into a trading and non-trading part, and as it cannot be acquired with mixed intentions, I need to determine the predominant intention of the acquisition. I find that the predominant intention of Mr and Mrs Whyte at the time the Estate was acquired was capital in nature – Mr and Mrs Whyte acquired the Estate in order to have a family home. The enabling development, whilst undoubtedly one of the purposes of the acquisition, was subordinate to the predominant intention of acquiring a home. I therefore find that the Estate was acquired as a capital asset."

116. Essentially, Mr Sykes submits, the Property must be either trading stock or an investment asset; it cannot be both, nor can it exist in some kind of limbo Which it is falls to be determined by the intention (or "predominant intention") of the taxpayer, and here it is abundantly clear that APUK's predominant intention so far as the Property was concerned was to bring about a residential development; it had long ago effectively given up on the idea of the Property having any meaningful value as an investment.

117. It is important to pause and remember that, although HMRC agreed that APUK was carrying on trading activities because it was preparing to start a trade, they have not conceded that the company was carrying on a trade at any time during the Relevant Period. Mr. Sykes says that he could, but does not need to, sustain an argument that the company was carrying on a trade in the Relevant Period, but this issue was not canvassed in any detail before us and we should determine this appeal on the basis of what was agreed: APUK was carrying on activities with a view to starting to carry on a trade which it started to carry on as soon as is reasonably practicable in the circumstances.

118. In these circumstances, whilst we agree with HMRC that it does seem slightly odd to refer to the Property as trading stock, stock in (a presently non-existent) trade, we do not consider that the key to evaluating APUK's assets as a factor in determining the extent of its non-trading activities is to be found in a rather casuistic discussion about whether an asset can properly be labelled as trading stock of a trade which has not yet started.

119. The legislation clearly contemplates that a company can be a trading company for these purposes, even where its trade has not yet started, and so Parliament cannot have intended that every asset owned by such a company would automatically be a negative factor in determining whether its activities are substantially non-trading activities just because (if this is the case) none of its assets can currently properly be labelled as trading stock. The correct approach to evaluating assets as a factor in such a company's activities must be to ask whether an asset is held with a view to its being used (here as trading stock) in the trade when it starts and whether any current user is consistent with that.

120. It is far more important, therefore, that, whether its trade had started by then or not, from before the start of the Relevant Period (and then throughout the Relevant Period) the Property was being held by APUK with the predominant intention that it should be the subject matter of a residential development, which would involve developing the Property and selling it off in parcels as houses were built. The unchallenged evidence is that this is what the directors decided to do in 2011.

121. On the evidence, the value of the Property to the company lay in its ability to carry out a residential development on the site. As we have already noted, APUK gave up on the idea of the Property as a meaningful real estate investment in 2011 and saw its future as a development site. As Mr. Searby explained, APUK did not spend any money on the Property, carrying out only the absolute minimum maintenance necessary, and much of the site work it did beyond maintenance was, as Mr. Pontin explained, focused on supporting APUK's case for the Property as a development site.

122. The Property still generated some rental income for APUK, albeit that all new leases were short-term leases of small amounts of space to relatively low-quality tenants; the length of those leases and the quality of the property available for letting (and therefore the terms, including rents, which could be obtained by APUK) were impacted in part by the decision to develop the Property. New leases were constrained in their terms by the undertakings given to CNOL in the Option Agreement, which themselves were driven by the need to be free to develop the Property. The only income that could be considered to be long-term investment income was derived from the AIUK lease, which was granted long ago in 2002, would expire in 2018 and which APUK was arranging to bring to an end before its natural expiry.

123. As Mr. Searby told us, if APUK had wanted to continue with a rental business at the Property, it would have had to incur significant expenditure to improve the Property and would have sought and entered longer term leases with larger organisations than it did.

124. The position APUK had reached with the Property is very different from that which obtained in relation to the properties in *Allam* (see [80] above) where, so far as we can see from the FTT decision, the company was continuing to let the properties and receiving a significant amount of rental income, having only earmarked the properties for development. Here, APUK had done far more than that. It had decided, back in 2011, to move from holding the Property as an investment to looking to use it to carry out a development and this had a significant impact on the rents it received and how it managed the Property.

Expenditure

125. HMRC also accept that expenditure incurred in the Relevant Period was a mixture of non-trading and trading expenditure, but they say that expenditure on non-trading activities was substantial.

126. Looking at the company's expenditure during the Relevant Period (based on the figures for expenditure in the 6 months to 30 April 2016 and half of the figures for the year to 31 October 2015 in APUK's financial statements) we see total expenditure (leaving aside the management charges for now, so as not to double count the effect of the work they paid for, and ignoring £15,000 of cost writebacks in the final period) of approximately £129,000. Of this £39,721 comprised business rates (we know that business rates would have been incurred in any event and would have been higher if there had been no lettings) and £31,129 were fees related to property development. That leaves around £58,000 of expenditure which is not business rates and not related to property development. The biggest single cost driven by occupation/letting is likely to be fuel (electricity/gas/heating oil) which comes to approximately £20,000 over the period. Mr Searby suggested that some costs would have been recharged to tenants or related to APUK/HHL using the Property, and we would have expected individual

tenants to be charged for the energy they consumed, but we do not have sufficiently detailed information to know whether this was the case and, if it was, the amounts involved. The next largest figure is temporary staff (around £16,800), but we do not know what the temporary staff were doing. Other expenditure, such as accountancy fees (£4,400) and insurance (£4,200) would have been incurred in any event.

127. Standing back and looking at expenditure, which is neither business rates nor management fee, we can see that around 35% of such expenditure is fees directly linked to property development. We cannot tell how much of the remaining expenditure is expenditure permanently borne by APUK and linked to non-trading activity, as opposed to inevitable overheads or development-linked expenditure shown in the accounts by type (e.g. hiring plat or temporary staff costs). Assuming that all this expenditure is non-trading activity cost ultimately borne by APUK in the Relevant Period, that gives us £58,000 of non-trading activity linked expenditure in the Relevant Period.

128. If we add the management fee back, total non-trading activity measured by cost is £88,675 (58,000 + (0.15 x 204,500)) and trading activity measured by cost is £204,954 (31,129 + (0.85 x 204,500)).

CONCLUSION

129. Looking at all these factors in the round, we see that during the Relevant Period:

(1) a very significant part of APUK's physical activity was focused on development, not investment, activity.

(2) That activity led to APUK carrying on a very successful development trade (as envisaged in the Option Agreement) which generated over £25m of profit in due course.

(3) The Property, APUK's only meaningful asset, was held with the predominant intention of being redeveloped and sold off in the course of that trade. APUK had done far more than decide that it wanted to carry on a development trade; it had started to take action, which proved to be very successful, to bring a development about and it dealt with the Property in a way which was entirely consistent with that goal.

(4) APUK derived some legacy, long-term investment income, but during the Relevant Period it took steps to bring that income stream to an end before the HHL Shares were sold.

(5) In the Relevant Period APUK derived some rental income from short-term leases which were a natural part of its development plans; they contributed to its costs and held down its business rates liability, were granted on terms which meant that they would not hinder the development when it started and were beneficial in terms of those development plans (avoiding creating a negative impression before the crucial Neighbourhood Plan referendum).

(6) What may be a relatively high percentage (65%) of non-management fee/business rates expenditure appears to be linked to non-trading activity, but that is not a fully interrogated number, likely overestimates non-trading expenditure and at £58,000 does not represent a material cost, particularly when seen in the light of the management fee (which in Mr Pontin's view underestimates his contribution to the development).

130. None of this points to non-trading activities, physical or financial, being of material or real importance in the context of the activities of APUK during the Relevant Period.

DISPOSITION

131. For the reasons set out above, we have decided that during the Relevant Period APUK's activities did not include to a substantial extent activities other than trading activities and so throughout the Relevant Period HHL was the holding company of a trading group.

132. These appeals are allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

133. 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:
13 August 2026