



TC01769

**Appeal numbers TC/2010/8781, 8783,
8785, & 8786**

Rollover relief under s 152 and 153 TCGA – whether s 156(26) permits apportionment in relation to land used but not occupied; held no – whether s 152(6) permits apportionment in relation to consideration for new assets; held no – whether s156(4) applied; held in part only – whether s152(5) applied; held no.

Benefits in kind – Class 1A NIC and income tax – house occupied by directors – calculation of benefit

FIRST-TIER TRIBUNAL

TAX

**PEMS BUTLER LTD
RUPERT BUTLER
JENIFER BUTLER**

Appellants

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: CHARLES HELLIER
RICHARD CORKE**

Sitting in public at 5 Notte Street, Plymouth on 24 October 2011

Mr Davies of Rosy Jeffery and Mr Challenger of Watts Gregory LLP for the Appellants

Mr Colin Williams for the Respondents

DECISION

Introduction

5 1. PEMS Butler Ltd (the company) conducts a trade which comprises the sale of kits for model buildings. The kits are supplied as printed cut card which is assembled by the eventual purchaser. In the period under appeal, the company ordered the cards from printers, received delivery, arranged their packaging, stored them and sold and despatched them, principally to model shops.

10 2. Mr. and Mrs Butler are directors of the company. The company acquired a property known as the Red House in May 2000. It comprises a house, outbuildings and fields. Since then the company has permitted Mr. and Mrs Butler to live there and the business of the company has been conducted at that property.

15 3. Prior to the purchase of the Red House, the company owned a property known as Lily Bank Farm. The business of the company was carried on there too and Mr. and Mrs Butler were also permitted by the company to reside there.

4. The Red House comprises a house, farm outbuildings, and some 16 acres of fields. Lily Bank Farm was a similar establishment.

5. This decision relates to 4 appeals:

20 (1) the first relates to the company's claim for rollover relief under section 153 TCGA 1992 to roll over part of the gain on its sale of Lily Bank Farm into its purchase of the Red House. It claims relief under that section which HMRC Dispute;

25 (2) the second is Mr R Butler's appeal against assessments to income tax on the benefit in kind of accommodation at the Red House provided by the company for the years 2000/01 until 2006/07. Mr. Butler accepts that he received a taxable benefit, but disputes its computation;

(3) the third is Mrs J Butler's appeal on the same grounds against similar assessments:

30 (4) the fourth is an appeal by the company against Class 1A NIC decisions in relation to the benefits of the accommodation for the years 2001/02 until 2006/07. Again the issue is the quantum of the charge.

The Evidence and the Facts.

6. We heard oral evidence from Mr Butler and had before us bundles of copy correspondence between the parties.

35 The company and its business

7. At relevant times the only shareholders in the company were Mr and Mrs Butler's four children. Mr and Mrs Butler had no shareholding interest but were the only directors.

8. The company started by exporting model building kits which were manufactured by another business. Later it acquired the business of the manufacture of the kits and its business became the arranging of the manufacturing and packing of the kits, and their sale to model shops. In 1978 the company acquired a warehouse in Old Street in London where it operated. Mr. and Mrs Butler took up residence on the top floor to manage the operation of the business; initially they returned to their house in Lincolnshire at weekends, but after the sale of that house in 1984 they resided only in the top of the warehouse. During the company's ownership of the Old Street warehouse it improved and refurbished the property.

9. In 1986 the company sold the Old Street warehouse at a profit to a pub restaurant business which had liked the way it had been refurbished. The company bought another warehouse in nearby Curtain Road for £135,000. This was 1000 square feet bigger, and had spartan living accommodation in which Mr. and Mrs Butler lived. Some one third to one half of the warehouse space was let out to other small businesses and the remainder was used in the company's business. Mr. Butler told us that it had been intended to renovate the property but that in the three years that it was owned by the company trading conditions prevented them from doing much.

10. In 1989 company sold the Curtain Road warehouse. It had experienced some financial difficulties: the exporting trade was not as profitable as it had been, and the banks were getting fidgety. The company discontinued the export trade. The revised business of the company no longer required it to be present in London. It sold Curtain Road at the height of a rising market for £810,000. The profit was principally due to the rising market rather than to improvements to the property.

11. Then in February 1990 the company purchased Lily Bank Farm. Changes in its business model enabled it to operate from outside London. The company pursued its business at Lily Bank Farm until 2000. During its occupation of Lily Bank Farm the company refurbished and improved the property. In particular a barn was repaired and used for the storage of the company's products.

12. The sale of Lily Bank Farm took place because a neighbour was very keen to buy it. It was sold to the neighbour for £600,000. Mr. Mrs Butler started looking around for a similar property in a cheaper area. What was required was space to pursue the company's business and accommodation for Mr and Mrs Butler. They found the Red House and the company bought that. It paid £354,900 for it.

13. On the sale of each of the warehouses HMRC (or its predecessor) had not contested the claim made by the company for CGT rollover relief under section 152 and 153 TCGA. On the purchase of Lily Bank Farm a rollover claim had been accepted which treated 75% of the purchase price of Lily bank Farm as being eligible for use in a rollover claim. At the time of the sale of Lily Bank Farm the company received advice from its accountants in relation to rollover relief. It was advised not to buy a property at Sturminster Newton because the divided nature of the property would mean that no rollover relief would be available. In the end it bought the Red House.

14. In May 2000, when the company acquired the Red House, there were, in addition to the house, 12 or 13 outbuildings. Many of these were in a dilapidated condition. They had previously been used as farm buildings in association with the use of the house as a farmhouse. The largest of these buildings was the "Zeppelin hangar", so
5 called because of its height. This had some 150 m² of storage space. Near this was a larger (200 m²) cattle shed initially less suitable for the company's storage and despatch business. Initially the company used the "Zeppelin hangar" to store its product but, after some changes were made to it, the larger cattle shed came to be used as the principal storage area for the kit business.

10 15. In addition to these two structures there was a straw barn which was in bad repair and later demolished, a woodworm ridden corrugated iron roofed woodshed which was used to store the tractor, a lean-to extension to that shed, a calving shed of about 45 m² which Mr. Butler initially made his packing store before moving to the cattle shed and, a dairy parlour of some 65 m² filled with dairy equipment. Later the dairy
15 parlour was improved and used as a workshop for tradesmen working on the house. There was also a tiny dairy office room which was not used before 2006 at which time Mr. Butler used it as his office with the files for the company's business; a garage in which they kept garden tools and a vice; two field pigsties which were not used; a yard pigsty which was also later demolished; a concrete garage which was later
20 demolished and whose area was covered by an extension of the house; a pump house which again was later demolished; and an office/games room which again was later demolished with its area becoming part of the house.

16. Our overall impression was that although there were a large number of buildings there were only two or three which, at the time the company acquired the property, it
25 could and did later use for the purposes of a receiving, storing and despatching its product and arranging its acquisition and sale.

17. At the time of its purchase, the house consisted of six downstairs rooms: a drawing-room unusable because of dry rot, a hallway, a living room, a study used by
30 Mr. Butler as an office, a kitchen, a scullery, and an attached outbuilding used by Mrs Butler in connection with the company's business. Upstairs there were three bedrooms, a bathroom and a landing. None of them were in outstanding condition, and at least one bedroom was in a very poor condition.

18. Attached to the house and outbuildings were some 14 acres of grazing land which were let to a neighbouring farmer on informal grazing agreements.

35 19. The company made substantial changes and improvements to the house in the years 2001 to 2005: adding rooms and consuming old adjacent buildings in extensions of the house. Now there are 5 bedrooms. It spent at least some £123k in this activity.

20. From the time of its acquisition of the Red House Mrs Butler spent a couple of hours a week in the business of the company. Her responsibility was the public
40 relations side of the business. Mr. Butler conducted the majority of the business of the company. He ordered the printed card from the printers, received the printed material, took batches of printed material to packers who packed it in individual envelopes,

collected the packed material, selected and packed material to satisfy orders, and arranged the dispatch of orders. Dispatch was arranged generally through Parcelforce but sometimes through other carriers. We got the impression that Mr. Butler spent two or perhaps three days a week engaged in the business of the company.

5 21. Orders from model shops for the company's product were received by post, fax or telephone and latterly by e-mail. They were received at the house. Mr. Butler would then arrange selection and dispatch. Some customers however came to the call at the house. There was one customer situated nearby who came directly to pick up what he required. A customer from Dublin had arrived in a van, and perhaps four
10 times a year individual modellers came to acquire kits. These were people who thought they might get a cheaper price by coming directly to the wholesaler. Mr. Butler sold them kits, but told us that that they were disappointed in their aim because he sold at the full retail price.

15 22. From the time of the company's relocation to the Red House Mrs Butler received a payment of £1,000 per annum from the company. No payment was made in the relevant period by the company to Mr. Butler for the work he did.

23. Mr. and Mrs Butler made a payment of £5,000 per annum to the company in respect of their occupation of the Red House. Mr Butler told us that they had no tenancy agreement with the company: they were licensees with no security of tenure.

20 24. Council tax was paid in relation to the Red House, but business rates were not.

25. In June 2007 a meeting was held at the Red House attended by Mr Thomson and Mr Clutterbuck of HMRC. Mr Thompson's note of the meeting records that Mr Butler said that he hoped that the property would generate a large profit when it had been developed and sold on in due course.

25 26. The District Valuer was asked by HMRC to apportion the purchase price of the house between the house and the land and outbuildings. He attributed £270,000 to the interest in the house and garden and £86,500 to the remaining land and outbuildings. The apportionment had been agreed by Mr Challenger from the Appellants' advisors.

30 27. Mr Butler provided a schedule of measurements of the outbuildings. We accept that his measurements were about right. The schedule showed that the volume of the outbuildings was some 2900 cubic metres and that of the house was some 410 cubic metres. The schedule enabled floor areas to be estimated.

35 28. The company made a rollover relief claim in respect of the gain on Lily Bank farm in December 2005. On 20 November 2006 HMRC gave notice that they were opening an enquiry into the company's tax return for the year ended 30 April 2001. On 30 July 2008 HMRC send a closure notice amending the amount of the taxable chargeable gain in respect of the sale of Lily Bank Farm in the company's taxable profits and gains to £422,159. That figure was computed by treating 95% of the Red House as being used for non trade purposes so that only 5% of its acquisition
40 consideration was treated as reinvestment of the gain arising on the sale of Lily Bank Farm.

29. On 8 August 2008 HMRC sent Mr and Mrs Butler notices of assessment for the years 2002/03 to 2005/06 and of amendment to their respective self assessments for 2007/07 to reflect the receipt of the benefit of accommodation in those years at the Red House.

5 30. On 5 August 2008 HMRC gave the company notice of decisions that it was liable to pay Class 1A NIC contributions in respect of the accommodation made available to Mr and Mrs Butler for the period between 6 April 2000 and 5 April 2007.

The relevant legislation.

10 31. We set out here parts of the relevant legislation. Other parts are discussed in more detail in the section Discussion below.

32. Section 152 TCGA 1992 provides:

15 (1) "(1) If the consideration which a person carrying on a trade obtains for the disposal of, or of his interest in, assets ("the old assets") used, and used only, for the purposes of the trade throughout the period of ownership is applied by him in acquiring other assets, or an interest in other assets ("the new assets") which on the acquisition are taken into use, and used only, for the purposes of the trade, and the old assets and the new assets are within the classes of assets listed in section 155, then the person carrying on the trade shall, on making a claim as respects the consideration which has been so applied, be treated for the purposes of this Act -

20 (a) as if the consideration for the disposal of, or of the interest in, the old assets were (if otherwise of an greater amount of value) of such amount as would secure that on the disposal neither a gain nor loss accrues to him, and

25 (b) as if the amount or value of the consideration for the acquisition of, or of the interest in, the new assets were reduced by the excess of the amount or value of the actual consideration for the disposal of, or interest in, the old assets over the amount of the consideration which he is treated as receiving under paragraph (a) above,

30 but neither paragraph (a) nor paragraph (b) above shall affect the treatment for the purposes of this Act of the other party to the transaction ..."

33. Section 153 makes similar provision where the consideration for the disposal of the old assets is greater than that applied in acquiring the new assets, and incorporates subsection (3) to (11) of section 152.

34. Section 155 provides:

35 "The classes of assets for the purposes of section 152 (1) are as follows

CLASS 1

Assets within heads A and B below.

Head A

1. Any building or part of a building and any permanent or semi-permanent structure in the nature of a building, occupied (as well as used) only for the purposes of trade.

5 2. Any land occupied (as well as used) for the purposes of the trade.

Head A has in effect subject to section 156.”

35. Section 156 provided (before 6 April 2005): --

“(1) This section has effect as respects head A of class 1 in section 155....

10 (4) Where section 98 of the Taxes Act applies (tied premises: receipts and expenses treated as those of trade) the trader shall be treated, to the extent that the conditions in subsection (1) of that section are met in relation to premises as occupying as well is using the premises for the purposes of the trade.”

36. Subsection (4) of section 156 was amended by FA 1998 with effect from 17 March 1998. Prior to that date it read:

15 “A person who is a lessor of tied premises shall be treated as if he occupied (as well as used) those tied premises only for the purposes of the relevant trade...”

It seems clear that the new version of subsection (4) is restricted to tied premises only in so far as section 98 is so restricted.

20 37. Section 98 TA 1988 provides as follows:

“Tied premises: receipts and expense is treated as those of trade

(1) This section applies for corporation tax purposes where a company ("the trader ") --

- 25 (a) carries on a trade,
 (b) in the course of the trade supplies, or is concerned in the supply of, goods sold or used on premises occupied by a person other than the trader,
 (c) has an estate or interest in those premises, and
 (d) deals with that estate or interest as property employed for the purposes of the trade.

30 (2) Where this section applies the receipts and expenses in connection with the premises that would otherwise fall to be brought into account in computing profits of a Schedule A business carried on by the trader shall instead be brought into account in computing the profits of the trade.

35 (3) Any necessary apportionment shall be made on a just and reasonable basis of receipts or expenses --

- (a) which do not relate only to the premises concerned, or
- (b) where the conditions in subsection (1) are met only in relation to part of the premises."

5 38. The provisions relating to benefits in kind are now found in ITEPA, but in 2001 were found in s 145 and 146 TA 1988. Neither party suggested that there was any relevant material difference between the provisions. We refer to the older provisions.

10 39. Section 145(1) provides that "where living accommodation is provided for a person in any period by reason of his employment ... he is to be treated for the purposes of schedule E as being in receipt of emoluments of an amount equal to the value to him that the accommodation that period, less so much as is properly attributable to that provision of any sum made good by him ...". By subsection (2) the value of the accommodation is the annual rent, (which was at the relevant time taken to be the gross rating value), but by section 146 where the cost of providing accommodation exceeded £75,000 an additional amount is to be added to the rent.

15 That amount is determined by applying an appropriate percentage to the amount by which the cost of providing the accommodation exceeds £75,000 (see subsection (3)). By subsection (4) the cost of providing the accommodation is the aggregate of "the amount of any expenditure incurred in acquiring the estate or interest in the property held by the relevant person" and improvement expenditure. By subsection (11)

20 "property" means "the property consisting of that accommodation".

40. There was no dispute between the parties as to the amount which would be treated, as the annual value of the living accommodation nor of the amount which was made good in respect of that accommodation. The only question which arises is the amount of the additional rent payable under section 146. That is dependent upon the

25 determination of the expenditure incurred in acquiring the living accommodation (and thus upon a consideration of what part of the consideration for Red house was for the living accommodation).

The Parties' Arguments

30 41. Mr Davies says that the company's rollover claim arises under section 153. Part of the consideration for the disposal of Lily Bank Farm was applied in acquiring the Red House. The reported CGT computation was thus:

(1)	Sale proceeds of Lily Bank Farm	600,100.
(2)	Applied in acquisition of the Red House and changes	<u>556,121</u>
(3)	s 153(1)(a) reduced gain	43,979
35	(4) Brought forward losses	<u>(26,529)</u>
	(5) Taxable gain	17,350

42. Mr Davies accepts that as a result of section 152(1) (operating via s 153) and section 155 the new assets have to be both used and occupied for the purposes of the trade.

43. He says that the “use” test is clearly passed. The company used the Red House to secure or pay for Mr and Mrs Butler’s services; in much the same way it could have used money to pay them salaries. That use was use for the purposes of its trade.

5 44. So far as concerns “occupy”, he says that this test is satisfied by reason of section 156(4). He says that the conditions in section 98(1) TA were fully met and thus that the company should be treated as both occupying and using the Red House. Were it not for section 156(4) he accepts that *Anderton v Lamb* 55 TC 1 would mean that Mr and Mrs Butler’s occupation could not be treated in its entirety as occupation by the company.

10 45. In relation to the conditions in section 98(1) TA 88 he says:

(a) is satisfied: there is no dispute that the company carries on a trade;

(b) is satisfied because in the course of its trade in model kits the kits are sold “on” premises occupied by Mr and Mrs Butler. In this context he says that the sale of a kit takes place where the company accepts the customer’s order and that is at the Red House. The sale thus takes place “on” the premises;

(c) is satisfied: the company owns the freehold in the Red House;

(d) is satisfied because the company deals with the Red House as property employed for the purposes of the trade by using it for the supply of its product and making the house available to its workers for their services. The treatment in its accounts of repairs and receipts in the accounts is further evidence of the way the Red House is dealt with as part of its trade.

We asked whether it might be said that the Red House was used by the company for two purposes: first to pay Mr and Mrs Butler for their work for the company, and second to satisfy their shareholder children’s concerns that their parents were well housed. Mr Davies said that given the state of the Red house on acquisition in 2000 it could not be said that Mr and Mrs Butler were then “well housed”.

46. Mr Davies emphasises that the applicable (revised) form of section 98 does not relate solely to tied premises but to any premises which satisfy its conditions.

47. He says that section 98(3) was irrelevant.

30 48. If we were to find that section 98 did not apply, then Mr Davies’ secondary contention is that section 152(6), which applies to section 152 by virtue of s 153(2), directs an apportionment to determine what part of the Red House was occupied and used by the company, and that relief should be available in relation to that portion of the expenditure. He says that although section 152(6) speaks of apportionment by reference to “use”, it would make nonsense of section 155 if, because a small part of some building was not *occupied*, relief should not be available in respect of any part of the consideration; whereas it was clear that if a part were not *used* then an apportionment could be made. Effectively “use” in section 155(6) must be read to mean “occupation and use”.

49. Such an apportionment must be made under section 159(11): in a just and reasonable manner.

50. In relation to the “just” limb, regard should be had to the history of the rollover relief granted. The earlier sales of the warehouses had been accorded full rollover relief notwithstanding the element of domestic accommodation; Lily Bank Farm, which had domestic accommodation, had had 75% treated as qualifying. The Red house was occupied and used in the same way as Lily Bank Farm. The company had a legitimate expectation that the same percentage should be allowed in relation to the Red House. Because a larger part of the gain on the sale of the second warehouse had been rolled over into Lily Bank Farm, and thereby reduced its CGT base cost, it was not just to apply a lower percentage to the Red house than was applied on the acquisition of Lily Bank Farm.

51. Mr Davies made clear that in this submission he was not arguing that the tribunal should accept a form of judicial review jurisdiction so as to hold that HMRC were estopped from arguing for a lower percentage, but merely that in determining what was “just” the previous practice of HMRC should be taken into account, because it had affected the taxpayer’s decision making.

52. In relation to the “reasonable” limb, such an apportionment, he said, should be done with regard to the parts which were occupied and used for the purposes of the trade, namely the offices, storage and packing sheds; and the parts which were used but not occupied by the company for the purposes of its trade namely the majority of the house.

53. The District Valuer’s apportionment apportioned about 75% of the value of the Red house to the house and 25% to the rest. That apportionment ignored the parts of the house which were used as office space and generally for the business of the company. The Valuer had been instructed by HMRC that very little business use had been made of the other parts of the property. An apportionment on the basis of the volume of the buildings or their area showed that 89% was commercial space and 11% domestic.

54. Overall an attribution to trade occupation and use of between 74% and 98% would be just and reasonable. HMRC’s contention of 5% was neither just nor reasonable.

55. Section 152(5) did not apply to deny rollover relief. Mr Butler had said that they hoped to make a profit on the eventual sale of the house. That might have been a motive for repairing and remodelling it, but there was a well known difference between a motive and a purpose. [*Marshall Richards machine Tool*] The purpose of the acquisition of the Red House was so that the trade could be carried on there. Many individuals bought houses with the hope and expectation that they would increase in value: they might do them in the hope that they would be worth more, but that was not sufficient to cause the loss of the principal private residence exemption in section 222 TCGA by reason of the same words in section 224(3). What was required was

something more than improvements to make the house more attractive and comfortable to live in.

56. Mr Williams for HMRC made the following points.

57. That it was not accepted by HMRC that the company “used” the whole of the Red House for the purposes of its trade. The company’s trade was selling model kits. The parts used for the trade were the parts used for selling those kits. None of the fields, the pigsties, the garage or the other dilapidated building were so used. Had the company provided the house as remuneration for Mr and Mrs Butler? He accepted their low cash remuneration was a relevant feature, but said that that was not the only reason the house was provided: this was a family company. Relief under section 152 was available only if the house was *only* used for the trade.

58. Unless section 156 applied to deem it to be the case, the company did not occupy the whole of the premises. Mr and Mrs Butler occupied the house, not the company. He relied on *Anderton*.

59. Section 156 applied only to the extent the conditions in section 98 were met. The condition in (1)(b) was not met. The sales were not made “on” the premises: it would be an odd use of language to say that if someone telephoned to order a model kit, the sale was made “on” the premises of the Red house. The kits were sold *from* the premises not “*on*” them. It was not like buying a beer in a pub or a bottle of wine to take away. The condition in (d) was not satisfied: Mr Williams agreed that there was no discernable difference between the phrase “dealt with as employed in for the purposes of the trade” and “used for the purposes of the trade”, but he said that the premises as a whole were not used for the purposes of the trade.

60. Section 152(5) could be found to apply. The factual possibilities ranged from living somewhere with the hope one day that you might sell for more than you bought, and an organised deliberate profit making operation in the nature of a trade. A “purpose of realising a gain from the disposal” fell within that range. The tribunal should take into account: (i) the significant amount of work done; (ii) the pattern of ownership and improvement in relation to earlier properties, (iii) the pattern of buying run down properties and doing them up (iv) Mr Butler’s recorded comments and (v) the remark he made that much of the (enlarged) house was not used by him and his wife, even though it had been significantly extended. Whilst it was the case that part of the purposes of the company were to find accommodation for its business and for Mr and Mr Butler, another part was the purpose of making a profit from the property.

61. Section 152(1) required that the property be used “only” for the purposes of the trade. If it was also used for another purpose the relief was not available. It was in that respect a hard edged provision.

62. In an apportionment on a just and reasonable basis the requirement that it be “just” did not encompass any legitimate expectation on the company’s behalf that it would be permitted relief on the basis that 75% of the house was for trade use. In particular: (i) there was a difference between an administrative practice which could

5 give rise to a legitimate expectation that it would be continued until notice was given, and the determination of the tax results of a particular transaction; (ii) transactions fell to be assessed by reference to the facts prevailing at a particular time; (iii) Mr Davies' argument suggested that whether or not HMRC had made any enquiries, what had been done in the past should be expected in the future; there was no estoppel- see *CIR v Sneath; Bard v Bradbury* ; (iv) the depressed base value of Lily Bank Farm was the effect of the previous claim: it was irrelevant to its disposal.

10 63. The object of a reasonable apportionment was to arrive at some sort of notional consideration for the notional separate asset. It should thus reflect the relative values of the parts. A just and reasonable apportionment should, in relation to the house, therefore reflect the relatively high value of residential property.

15 64. Save perhaps in relation to the office room, there was no trade occupation of the house, and no trade use of it. Only some part of the outbuildings could be said to be so used. The apportionment should therefore be of some part of the Valuer's £86,500. It could be appropriate to take in something for the part of the house used as office.

65. The same apportionment would be relevant in determining the accommodation benefit to be assessed.

Discussion

(I) Rollover relief

20 66. We have set out the provisions of section 152(1) and 155 above. From those quotations it is evident that for new assets to qualify they must satisfy two conditions: first they must be "used and used only for the purposes of trade" and second that they must be occupied (as well is used) only for the purposes of that trade. There was no dispute in relation to other conditions.

25 67. We start by considering use and occupation apart from section 98. Then we consider the effect of section 98. After that we consider whether section 152(5) is in point, and finally whether and if so how any apportionment should be done for the purposes of section 153.

(a) use and occupation apart from section 98 TA 88

30 68. "Use". In our view to the extent that the granting of a licence to live in the house could be viewed as payment by the company to Mr. and Mrs Butler for their work for the company, the house was used by the company for the purposes of its trade.

35 69. It is clear that at least part of their occupation derived from this source. They received between them only £1,000 per annum and the company made profits from its trade in 2001 of some £11,000 (and we assume at a similar level thereafter). They worked between them for about half of each week. Some greater remuneration would have been appropriate. The value attached to their occupation by the statutory formula was some [£12,000] a year. That is not markedly different from the profits their activities generated. It seems to us that remuneration equal to the rental value of the

house would not have been excessive in relation to the activities they performed. There was no express evidence that the company had any other purpose in permitting them to occupy other than to remunerate them for their work. We find on balance that the company used the house to provide them with consideration for their work for the
5 company and not for another purpose. We therefore find that the house was used the purposes of trade.

70. “*Occupation*” In *Anderton* Golding J considered the meaning of "occupation" in the predecessor provisions. Those provisions were in substantially the same terms as those set out above. He applied to the test in *Northern Ireland v Fermanagh*
10 *Protestant Board of Education* that the occupation of a building by a servant of a master would be the occupation of the master only if it was in one of two circumstances:

- (a) if the occupation of the servant is essential to the performance of the duties and
- 15 (b) where it is not essential for the servant to occupy a particular house, but by doing so he can better perform his duties as a servant to a material degree, and there is an express term in the contract between master and servant that he shall so reside.

71. In this case Mr. and Mrs Butler occupied the house in the common everyday
20 sense of that word: it was their home. They also occupied by virtue of a licence from the company. But they did not occupy it by virtue of any express term in their contract with the company. Their occupation was not essential to the performance of their duties. It did not seem to us that by occupying the house Mr. and Mrs Butler could better perform their services; they could have attended the house during working
25 hours and that would have been sufficient.

72. Accordingly we find that Mr. and Mrs Butler were the occupiers of that part of the house other than the part used as an office, and that the company was not the occupier.

73. It was clear that the company was not the occupier of the fields for the purpose of
30 its trade.

74. However the company was in our view the occupier of those outbuildings which were used for the storage packing and organisation of its sales. Those parts were used by the company as well is occupied by it. It also used and occupied the office in the house,

35 75. (b) section 98 TA 1988.

76. Three issues in relation to this section call for comment: section 98(1)(b), section 98(1)(d), and the meaning and effect of subsection 156(4) when taken with 98(3).

77. Section 98 is part of the code for the taxation of trading profits. It must be
40 construed as part of that code rather than in the light of its association with the rollover regime for CGT. Its purpose seems clear: it is to oust the normal rule that

income and expenses deriving from a Sch A activity cannot be taken into the Schedule DI computation in circumstances where the property's use is intimately bound up with the supply of goods on the premises. In that context it seems to us that there is no warrant for a restricted construction of its terms.

5 78. In relation to 98(1)(b) the question is whether the company sold goods "on" the premises. In our view these are ordinary words and are not equivalent to the more legalistic formulation "the contract for sale is made on the premises". Thus we ask ourselves whether as a matter of ordinary language whether the company sold its kits
10 on the premises. In our view it did (at least on part of the premises- see below). It was on the premises that the activity of selling took place. If we are wrong and the contractual formulation is the proper meaning of the provision then we find that some sales did take place on the premises (when modellers turned up, and when the local enterprise came in its van) and thus that the test is satisfied .

15 79. In relation to (1)(d) the first question is whether this means anything different from the premises being used for the purposes of the trade. It seems to us that the legislation has avoided the word "use" because of the technical meaning that word has been given in other cases (where for example the use by a servant is treated as the use by the master – see *Anderton*), but in ordinary language the provision asks whether the premises are used for the purposes of the trade. In our view that test is satisfied at
20 least in relation to the house and some of the outbuildings.

80. In relation to subsection (3), this raises the question whether , if only part of the premises satisfied the conditions what effect that has by reason of the operation of the following words in section 156(4):

25 "to the extent that the conditions in subsection (1) of that section are met in relation to premises as occupying as well is using the premises for the purposes of the trade."

81. In this context we note that subsection 98(3) provides:

"any necessary apportionment shall be made on a just and reasonable basis of receipts or expenses --

30 (a) ...

(b) where the conditions in subsection (1) are met only in relation to part of the premises."

35 82. In our view the italicised words in section 156(4) reflect the possibility referred to in section 98(3) that part of the premises might qualify and part not. It seems clear to us that only part of the Red House could satisfy all the conditions in section 98(1). Nothing was sold on the fields or in the bedrooms, kitchen or hall of the house or in the dilapidated buildings. The conditions were satisfied only in relation to the other parts. Thus the conditions were met only to that "*extent*".

83. We therefore find that section 156 and section 98 have the effect that only those parts of the Red house which were actually used for selling are to be treated as both used and occupied by the company for the purposes of its trade.

84. (c) section 152(5)

5 85. This section provides:

"This section shall not apply unless the acquisition of, or the interest in, the new assets was made for the purposes of their use in trade, and not wholly or partly of the purposes of realising a gain from the disposal of, or of the interest in, the new assets."

10 86. These words mirror those in relation to the private residence relief in section 224(3):

"Section 223 shall not apply in relation to a game if the acquisition of, or the interest in, the dwelling house ... was made wholly or partly for the purpose of realising a gain from the disposal of it ..."

15 87. It seems to us that both the earlier and the later behaviour of a person may indicate the nature of his purpose at a particular time. In this case the following factors point to a purpose at the time of acquisition which included realising a gain on disposal:

- (1) Mr Butler's recorded statement ;
- 20 (2) the fact that the company had a history of making profits; and
- (3) the extensive work done on the house.

And the following point away from such a purpose:

- 1) that the company bought the house ten years ago and has not sold it;
- 2) that at least one previous profit arose from a rising market generally, rather
25 than as a result of major improvements; and
- 3) that the sale of Lily Bank Farm was at the behest of a neighbour rather than at the instigation of the company

30 Overall we conclude that although the company may have hoped to sell one day at a profit, and that it expected that the improvements would add to the value of the house, its purpose in buying the house did not include a purpose to realise a gain on its sale.

We therefore conclude that section 152(5) did not apply .

88. (d) apportionment

89. 152 (6) provides:

5 "If, over the period of ownership or any substantial part of the period of ownership, part of a building or structure is, and part is not, used for the purposes of trade, this section shall apply as if the part so used, with any land occupied for purposes ancillary to the occupation and use of that part of the building or structure, were a separate asset, and subject to any necessary apportionments of consideration for an acquisition or disposal of, or of an interest in, the building or structure and other land."

90. Subsection (7) provides further instruction in relation to other assets in a similar situation:

10 "If the old assets were not used for the purposes of trade throughout the period of ownership this section shall apply as if a part of the assets representing its use for the purposes of the trade having regard to the time and extent to which it was, and was not, used for those purposes, were a separate asset which had been wholly used for the purposes of the trade, and this subsection shall apply
15 in relation to that part subject to any necessary apportionment of consideration for an acquisition or disposal of, or the interest in, the asset.

91. It seems to us that these two subsections relate to assets which have been owned by a taxpayer and are disposed by the taxpayer. They do not relate to new assets which are acquired by a taxpayer. That appears to be the case as a result of the
20 opening words of subsection (6). They relate to an asset which has been owned by a company. And they relate to the use of that asset during its period of ownership. It is not a forward-looking provision. Likewise subsection (7) starts by considering the "old assets".

92. The structure of subsection (6) also shows this. The words from "If," to "were a separate asset" are solely concerned with dividing up an old asset. The section then continues to require that it will apply "subject to any necessary apportionment of consideration for an acquisition or disposal of an interest in the building or structure and other land". Likewise the first part of subsection (7), from "If" to "were a separate
30 assets which had been used only for the purposes of the trade" relates only to the old assets. It is only the closing words that require that the section shall apply to that part subject to necessary apportionment of the consideration for "an acquisition or disposal of, or an interest in the asset."

93. The word "necessary" in subsection (5) and (6) links the apportionment to the operation of the earlier part of the subsections.

35 94. Why do both sections thus refer in their closing words to apportionment of consideration for "an acquisition" of an asset? Does that mean that the sections should also be read as applying to require apportionment in relation to new assets which will not be wholly used to the purposes of trade? It does not seem to us that that is the purpose of the reference to "acquisition"; instead and the words in our view refer to
40 the necessity to apportion the original consideration for the acquisition of the old assets in order to apply in the provisions of section 152(1) (a) or section 153(1)(a). That subparagraph (a) requires the consideration for the acquisition of the notional

part assets to be determined in order to work out whether a gain arises on the disposal of that asset. It provides:

5 "as if the consideration for the disposal of, or of the interest in, the old assets were (if otherwise of the greater amount of value) of such amount as would secure that on the disposal neither a gain nor a loss accrues to him".

95. In order to work out the gain that would otherwise accrue on the disposal of the old asset it is necessary to apportion the original consideration for the acquisition of the old assets. That is the acquisition consideration which is referred to in subsections (6) and (7).

10 96. Understood in that way those sections do not require or permit an apportionment of consideration in relation to the acquisition of an asset which is to be used partly to trade purposes and partly of other purposes; instead the provisions relate to the historic use of an old asset. Such an asset might be one which was originally acquired and used wholly for trade purposes but over time ceased to be so used.

15 97. Having reached that conclusion it does not seem to us that a discussion of whether or not these subsections permit apportionment by reference to use as well as to occupation would be relevant.

20 98. Is there any other provision in section 152 which permits apportionment of acquisition consideration and under which an asset can be divided into parts in relation to which a claim may or may not apply? The only available provision is subsection (11). That provides:

25 "without prejudice to section 54(4) [which relates to the indexation allowance and is irrelevant for present purposes], where consideration is given for the acquisition or disposal of assets some or part of which are assets in relation to which a claim under this section applies, and some or part of which are not, the consideration shall be apportioned in such manner as is just and reasonable."

30 99. In this context we note the provisions of section 6 of the Interpretation Act: "unless the contrary intention appears, -- ... (c) words in the singular include the plural and words on the plural include the singular." Read subject to that section subsection (11) would include the situation where

35 "consideration is given for the acquisition...of an asset some part of which is an asset in relation to which a claim under this section applies and some part of which is not..."

100. We can see no contrary intention in the section which would oust this reading. However the provision so read requires an identification of parts of an asset; it does not permit, for example, an asset which is used for more than one purpose to be divided into two assets according to that use. In the context of the appeal therefore
40 this section can assist the company only to the extent that the Red House can be

divided into parts which are “assets in relation to which a claim under this section applies”.

101.152 (1) provides for the making of a claim in respect of consideration which has been applied on the acquisition of assets which are both (i) taken into use and used
5 only for the purposes of the trade, and (ii) within the classes listed in section 155. It seems to us that "an asset in relation to which a claim under this section applies" is an asset which is within the classes listed in section 155 and which is "taken into use, and use only, to the purposes of trade". In other words subsection (11) permits the apportionment of consideration between parts of the Red House which were to be
10 both used and occupied the purposes of the trade (since such assets will be within section 155 and will be new assets of the purposes of section 152 (1)) and parts were not to be both used and occupied the purposes of trade.

102.Section 152 (1) relates to assets "used, and use only, to the purposes of the trade". To the extent part of an asset is not used only for the purposes of trade that part would
15 not qualify and would not be a part to which section 152 could apply. Likewise Head A of section 155 refers to the requirement that the asset be "occupied (as well as used) only for the purposes of the trade". Thus part of an asset which was occupied for the purposes of the trade and for another purpose could not be a part of an asset to which section 152 would apply.

20 103.Accordingly the parts, and only those parts, of the Red House which could support a claim under section 152 would be those parts which were both used and occupied the purposes of the company's trade.

104.The parts so ascertained will encompass those parts which section 156 deems by reason of satisfaction of section 98 to be so used and occupied.

25 105.Those parts must be identified at the time of acquisition. That is the case because section 152 says "on the acquisition are taken into use". The language of section 155 is less clear: it speaks of the building being occupied as well as used does not indicate the time at which the test must be applied. It seems to us however that the only time at which it can be applied is the time of acquisition and the question is whether the
30 building is to be occupied the purposes of the trade.

106.At the time of acquisition of the Red House only the following parts were in our view to be taken into use and occupied the purposes of the trade:

- (1) the "Zeppelin hangar";
- (2) the cattle shed;
- 35 (3) the calving shed;
- (4) the room in the house used as an office by Mr. Butler.

(e) Just and Reasonable

107.In our judgement the object of the apportionment required by section 152(11) is to estimate what would have been paid for the separate parts of the property. The

section's operation turns on the amounts of the consideration given. What is therefore needed in relation to a part is to determine what would have been given for it. To our minds the use of the word "just" does not require the consideration of issues which are not related to the nature and value of the property and the bargain under which it was bought. Thus whereas an apportionment by reference to the relative values of the parts might be a reasonable starting point, the presence of a goldmine under one part of the property unknown to the purchaser but ascertainable to a more informed purchaser might make an apportionment on the basis of value unjust. We see however no warrant in these words for taking into consideration the apportionment applied in relation to another property at another time.

108. We therefore conclude that in this appeal there were no factors which indicated that an apportionment of the consideration by reference to the values of the parts would be unjust. Given the purpose of the section as we see it, an apportionment by reference to the area or volume of the spaces or buildings would not be reasonable.

109. The District Valuer's instructions were to value the parts separately. Those instructions contained some unfortunate comments about use but they did not affect the nature of the request. We conclude that it is just and reasonable to apportion the consideration on the basis of his findings of value.

110. The District Valuer apportioned £86,000 to the outbuildings and fields. It seems to us that, given the dilapidated state of the other buildings most of the consideration attributable to the buildings should be apportioned to (1), (2) and (3) above. The fields extended to 16 acres. Mr Butler said that agricultural land was then some £2-3,000 an acre. In our view a just and reasonable apportionment of the consideration to those buildings would be £40,000.

111. The Valuer apportioned £270,000 to the house. We apportion that amount of the consideration to the house. We apportion 10% of that to the office. That is £27,000.

112. Thus in our view a just and reasonable apportionment of the consideration to those parts of the Red House which were taken to be used and occupied for the trade, ie were parts to which a claim under section 152 could apply is £67,000.

The employment benefit in kind charges.

113. HMRC calculate the taxable benefit by taking the District Valuer's allocation of the consideration to the house of £270,000, and using that figure (together with amounts spent on improving the house) to calculate the additional value treated as being received by virtue of section 146 and its successors. To this they add the Gross Rating Value and then subtract the payment made to the company by Mr and Mrs Butler. They then apply a 5% deduction to reflect the business use of the house.

114. That deduction Mr Williams explained was designed to recognise that the £270,000 etc was the apportioned cost of the House, but that the "living accommodation" was different from the house because in valuing it account had to be taken of the contemporaneous use of the house by the company.

115.It seemed to us that, subject to one amendment, this method achieved the same result as a strict application of the statute. That amendment is that the amount paid by Mr and Mrs Butler should be deducted after the application of the deduction rather than before it.

5 116.So far as concerns the amount of the business use deduction, we believe a deduction of 10% rather than 5% would properly reflect the effect of the use of the house and parts of it for the organisation of the trade of the company.

Conclusions

10 117.[Rollover relief under s 153 is available only in respect of £67,000 of the consideration paid for the Red House

118.We formally adjourn the hearing for the parties to recompute and agree figures. If they do not agree within 4months they are to apply for the hearing to be reconvened.

15 119.This document contains full findings of fact and reasons for the decision in relation to the rollover relief appeal, and subject to agreement between the parties in relation to the calculation of the benefit in kind consequent on our decision, in relation to the benefit in kind appeals. 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.
20 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.

25 **Charles Hellier**

TRIBUNAL JUDGE
RELEASE DATE: 23/01/2012

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