TC04103

Appeal number: TC/2011/04602

CAPITAL GAINS TAX – taper relief – para 5(1A) Schedule A1 TCGA 1992 – whether asset disposed of was a business asset – use of land for horse breeding – whether a trade – whether HMRC bound by previous decision to allow relief for trading losses – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EUGENE BLANEY **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MISS PATRICIA GORDON

Sitting in public in Belfast on 7 May 2014 with subsequent written submissions completed on 28 July 2014

Mr Jonathan Dunlop of counsel instructed by Cleaver Fulton Rankin Solicitors for the Appellant

Mr Pascal Donnelly of HM Revenue & Customs for the Respondents

DECISION

Background

1. On 19 July 2005 the Appellant, Mr Eugene Blaney, disposed of an interest in land at Drumaness, Ballynahinch, County Down ("the Land"). Mr Blaney included the disposal of his interest in the Land on his tax return for 2005-6 for capital gains tax ("CGT") purposes. At the same time he claimed taper relief at the rate applicable to business assets.

2. In November 2007 Mr Gilles Wilson of HM Revenue & Customs commenced an enquiry into the CGT due on disposal of the interest in the Land. In a subsequent closure notice Mr Wilson amended Mr Blaney's self-assessment, restricting the amount of taper relief available to Mr Blaney.

3. Mr Blaney contends that he used the Land for business purposes in that he was a horse breeder and kept broodmares and their produce on the Land. The principal issue in this appeal is the nature and extent of Mr Blaney's horse breeding activities and whether they amount to the carrying on of a trade on the Land.

4. We heard evidence from Mr Blaney himself, from a vet Mr Alan Dunlop and from an accountant Mr Seamus Ryan on behalf of the Appellant. On behalf of the Respondents we heard evidence from Mr Wilson and from Mr Phelim Leonard who was involved in an enquiry into Mr Blaney's tax affairs in 2003 and 2004.

5. Mr Jonathan Dunlop, who appeared on behalf of the Appellant submitted that:

(1) Mr Blaney had carried on a trade of horse breeding on the Land throughout the period from 1998 to 2005 ("the relevant period"); alternatively

(2) During the course of a previous enquiry, Mr Leonard had accepted that Mr Blaney was carrying on a trade of horse breeding and HMRC could not resile from that conclusion.

6. As far as the first submission is concerned, the burden is on Mr Blaney to establish on the balance of probabilities that he carried on a trade of horse breeding on the Land during the relevant period. The burden is also on Mr Blaney to establish the facts relied on to support the second submission.

7. At one stage there was an issue as to the date of disposal and the nature of the asset disposed of. We understand that issue was resolved prior to the hearing and it was not addressed by the parties before us.

8. The amount of CGT at stake in this appeal is some £63,000.

The Law

9. In 2005-06, Section 2A Taxation of Chargeable Gains Act 1992 ("TCGA 1992") made provision for taper relief on the disposal of assets with a qualifying

holding period. The amount of relief available depended on whether the asset disposed of was a business asset or a non-business asset. The relief had been introduced with effect from 6 April 1998.

10. In relation to business assets, 25% of the gain would be chargeable if the asset had been held for two or more years in the qualifying holding period. The qualifying holding period was the period after 5 April 1998 for which the asset had been held at the time of its disposal.

11. Schedule A1 TCGA 1992 made further provision in relation to taper relief. In particular a chargeable gain is a gain on the disposal of a business asset if that asset was a business asset throughout its relevant period of ownership. For the purposes of this appeal the relevant period is from 6 April 1998 to 19 July 2005.

12. Paragraph 5 Schedule A1 contains the conditions which must be satisfied for an asset to qualify as a business asset at any particular time. For present purposes a business asset is defined as follows:

> "*(1A) The asset was a business asset at that time if at that time it was being used, wholly or partly, for the purposes of a trade carried on by –*
>
> *(a) an individual …"*

13. Paragraph 22(1) defines trade as follows:

> "*'trade' means … anything which –*
>
> *(a) is a trade, profession or vocation, within the meaning of the Income Tax Acts; and*
>
> *(b) is conducted on a commercial basis and with a view to the realisation of profits; "*

14. Both parties accepted that horse racing activities carried out by Mr Blaney did not amount to a trade for the purposes of the Income Tax Acts. We are concerned with Mr Blaney's alleged activities as a horse breeder.

15. The question of whether there is a trade is a question of fact. That question is generally approached by reference to the "badges of trade" first identified by a Royal Commission on Taxation of Profits and Income in 1955. Having identified the relevant facts by reference to the badges of trade it is then necessary to form an overall view as to whether the activity amounts to trading. In *Barnett v Brabyn* [1996] STC 716 at 724c Lightman J stated:

> "*The proper course for the court in each case, no doubt after first identifying the individual badges of potential significance, is to form an overall view giving due weight to the relative significance of the various badges in the particular context.*"

16. During the course of submissions we were referred briefly to the badges of trade. We have considered the badges of trade in a little more detail for the purposes of this decision. They were summarised by Sir Nicolas Browne-Wilkinson VC in *Marson v Morton 59 TC 381* at 391:

" *The matters which are apparently treated as a badge of trading are as follows:*

(1) That the transaction in question was a one-off transaction. Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.

(2) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.

(3) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the Chairman quoted from Reinhold? For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.

(4) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?

(5) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade.

(6) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.

(7) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.

(8) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in

place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

(9) Did the item purchased provide enjoyment for the purchaser (for example, a picture), or pride of possession, or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of possession pending resale, that is a strong pointer in favour of it being a trade rather than an investment.

17. The Vice Chancellor went on to describe the approach to be taken in applying the badges of trade:

" *I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture…*"

18. That approach is also subject to what Oliver J said in *Salt v Chamberlain* [1979] STC 750 at 760,:

" *In particular, I doubt whether the question whether in any given case a person is or is not carrying on a trade is capable of solution by the application of a logical progression of propositions culled from decided cases. The question is, I think, one of overall impression. Some of the difficulties of definition are referred to in the judgment of Rowlatt J in Graham v Green* (*Inspector of Taxes*), *and it is not, I think, helpful to seek to define or confine the term 'trade' by reference to the status of the taxpayer or the subject-matter of the transactions. As Lord Wilberforce said in Ransom* (*Inspector of Taxes*) *v Higgs [1974] 3 All ER 949 at 964, [1974] 1 WLR 1594 at 1610, [1974] STC 539 at 554, '... everyone is supposed to know what "trade" means: so Parliament, which wrote it into the law of income tax in 1799, has wisely abstained from defining it.*"

19. In relation to the first badge of trade, concerning repetition of transactions, the Respondents relied on a passage from the decision of Rowlatt J in *Pickford v Quirke (1927) 13 TC 251*:

" *it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he*

becomes a trader and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in a trade as a whole, setting losses against profits, of course, and combining them all into one trade."

20. We set out below our findings of fact and reasoning relevant to the issue of whether Mr Blaney was trading as a horse breeder in the relevant period. We then consider separately whether Mr Leonard reached any contrary conclusion in his enquiry in 2004, and if so what is the effect of that conclusion on Mr Wilson's assessment?

Findings of Fact

21. For the purposes of our decision we must consider whether the facts, in light of the badges of trade, give rise to a conclusion that Mr Blaney was trading as a horse breeder in the relevant period. We deal below with the question of commerciality, but we have also made findings of fact relevant to that issue in so far as there was evidence before us.

22. We have considered all the evidence relied on by the parties and make the following findings of fact.

23. Mr Blaney is 75 years old. His main business has been house building. He has a house and yard known as Harmony Hill at Drumaness which adjoins the Land.

24. The Land was agricultural land. In 1996 Mr Blaney sold an interest in the Land to Mr Kirkpatrick, an architect who hoped to get permission to build on the Land. Mr Blaney retained an interest which was the subject of his disposal in 2005.

25. Mr Blaney said that he kept horses, mostly on the Land. HMRC conceded that Mr Blaney was an active horse breeder and may have been trading as such in the early 1980's. However they submitted that by 1998 the level of activity did not amount to a trade.

26. We accept that Mr Blaney has always grazed horses on the Land. The question is whether he did so as part of a trade of breeding horses in the relevant period. When Mr Blaney wished to breed a mare he would wait until it was in season, taking steps to bring her into season more quickly. Alan Dunlop, the vet, would carry out tests on the mare to confirm that she was in season. The mare would then be taken to a stud farm for a couple of months to be covered by a stallion.

27. Mr Blaney would pay stud fees to the owner of the stallion and keep fees to the stud farm. Once the mare was covered it would be kept at the stud farm for a month or so and would be scanned to see if she was in foal. She would then be brought home to the Land for pasture and a close eye would be kept on her.

28. Alan Dunlop has acted as Mr Blaney's vet since 1992. Over the years since 1992 he had examined broodmares belonging to Mr Blaney and attended to their foals at the Land. Alan Dunlop specialises in horses, and in particular broodmares. His work for Mr Blaney included attendance at foaling, services pre- and post-foaling

including various laboratory tests before a mare can be covered and the micro-chipping and passporting of foals.

29. When the Land was sold to Mr Kirkpatrick in 1996 Mr Blaney was granted a building licence for the purpose of developing the Land. Clause 2.3 of the building licence provided that Mr Blaney was not entitled to occupy the Land for any other purpose. As a matter of fact however we accept that Mr Blaney did occupy the Land for the purpose of keeping horses albeit possibly in breach of the building licence.

30. Mr Blaney said that the purpose of breeding was to sell the foals. However there was a lot of luck involved. For example a foal might get injured or grow too big for flat racing. If a yearling wins then it will enhance the value of the mare and other foals from that mare. He put it in terms that there would be many failures but as with all breeders he was hoping for a big winner. We accept that as a general description of Mr Blaney's activities, subject to our findings below as to his motivation. He would consider selling any foal that made the grade.

31. During the course of Mr Wilson's enquiry, on 10 May 2010 Mr Ryan sent HMRC a list of horses said to have been bred from mares owned by Mr Blaney over many years. It was not restricted to the relevant period. In the course of his oral evidence Mr Blaney was uncertain as to the accuracy of this list. There were four mares on the list – Larksville, Bold Lady, Vernil Slave and Swift Lady.

32. Mr Blaney said that once a foal was born Alan Dunlop would take the markings and register the foal with Weatherbys and the British Horseracing Authority. We understand from the evidence before us that Weatherbys is part of the British Horseracing Authority and registers breeding mares and their foals. The British Horseracing Authority registers horses for racing.

33. A racehorse cannot race in the UK or Ireland unless registered with the British Horseracing Authority or Horse Racing Ireland. Racehorses cannot be bred unless the mare is registered at Weatherbys. A broodmare would be registered at Weatherbys at 3 years old. The register includes the name of the broodmare, its owner at that time and the names of foals bred from that mare.

34. If someone buys a broodmare and wants to be identified as the breeder then the new owner must apply to Weatherbys to be registered as such. However there is no obligation on a new owner to register. The only regulatory requirement at that time was for the horse to have a passport which would include confirmation that Weatherbys had registered the horse as a broodmare.

35. We were presented with evidence from Weatherbys Limited, the British Horseracing Authority and Horseracing Ireland. The evidence from Weatherbys identified no broodmares registered to Mr Blaney in the relevant period. The only horses where Mr Blaney was registered as the breeder were all registered in the period 1979 to 1987.

36. The British Horseracing Authority also maintains a register of the owners of horses registered to race in Great Britain. In the period 1988 to 2007 Mr Blaney was

registered as the owner of three racehorses – Kassala in 1988, Harmony Hill in 1999-2001 and Modhana in 2007. We also had some information from Horse Racing Ireland but this showed no other horses registered in the name of Mr Blaney in that period. Harmony Hill was registered for the period 1998-2004.

37. Mr Blaney was unable to say why Weatherbys did not have any horses or foals registered in his name after the 1980's.

38. Both Weatherbys and the British Horseracing Authority emphasised in providing information that there may be instances where horses have left the ownership of a registered owner but they have not been informed by the new owner. That would not explain why Mr Blaney was not registered as the owner of any broodmare in the relevant period.

39. Apart from evidence of registration, Mr Blaney produced evidence of a horse called Winged Foot being kept at the premises of J F C Maxwell in a period from 24 May to 6 August. It appears this was in 2003 because there is an invoice from a vet in February 2003 which relates to this horse and includes a reference to "Mare's @ Maxwells". Maxwells was a stud farm in Downpatrick.

40. It is notable however that Winged Foot does not appear in any register as being owned by Mr Blaney, nor is there any evidence that Winged Foot had any foals.

41. Mr Blaney's case on this appeal was hampered by the fact that he did not keep any accounts or detailed records of his breeding activities. We were provided with a manuscript list of cheques written by Mr Blaney in the period April 2001 to February 2006. HMRC did not challenge the accuracy of this list and we accept it as accurate. The list included the following entries:

(1) 8 cheques totalling £3,105 to "J E Parkes" also noted as "Trainer" in the period April 2001 to November 2001. Mr Blaney said that Mr Parkes was a man in Yorkshire and that he took horses to him to sell. Mr Blaney did not identify the names of any horses sent to Mr Parkes, whether any were sold and if not what became of them.

(2) Payments for hay, feed, vets fees and blacksmiths services. These are all consistent with keeping horses but do not say anything about the nature or extent of any trade as a horse breeder.

(3) A payment of £1,500 to Barney Jones in September 2005. This was a payment for a young horse to be broken. Again, it does not say anything about the nature or extent of any trade as a horse breeder.

(4) A payment of £7,379 in February 2006 to Juddmonte Farms which was a stud fee in relation to a mare owned by Mr Blaney called Tara Gold. This was after the period we are looking at but we accept it is evidence which may be relevant to his activities in the period up to July 2005.

(5) A payment of £8,652 to a P Murray in January 2006.

42. Mr Blaney could not recall the circumstances of this payment to P Murray. A paying in slip in February 2005 recorded a lodgement into Mr Blaney's account with Bank of Ireland of €13,393.59 with the notation "*Horse South P Murray paid in Euro draft.*" Initially Mr Blaney could not recall exactly what this was for, but suggested it might relate to a share in a horse. When pressed he suggested that it might have been for a share in horse called Twicken. Eventually he was certain that it related to a sale of a share in Twicken, which was a broodmare. He had paid about £26-30,000 for Twicken as a racehorse. He had not been looking to sell a share in the horse but following a casual conversation he had sold a half share in order to cut his losses.

43. It was odd that Mr Blaney's recollection in relation to Twicken should be so poor, especially as in 2006 he went into business with Mr Murray in a joint venture company. This was also the only sale of a horse in the relevant period relied on by Mr Blaney to establish his horse breeding trade. We do however accept that this lodgement did relate to the sale of a share in Twicken to Mr Murray.

44. The sale proceeds of Twicken were incorrectly accounted for by Mr Blaney's accountants as a house sale. The accountant who dealt with Mr Blaney's housebuilding business misread the lodgement and thought that it related to the sale of a house.

45. There is no evidence of any other horse sales in the relevant period, whether of broodmares or their produce. In any event, the trade Mr Blaney seeks to establish is that of horse breeding and not that of horse dealing. The sale of a broodmare such as Twicken could only be part of a trade of horse breeding if there was such a trade in the first place.

46. Mr Blaney was a member of the Down Royal Corporation of Horse Breeders for which he paid a membership subscription of £100 plus VAT in July 2000.

47. There is evidence, which we accept, that Mr Blaney incurred expenditure on horse feed and bedding. In relation to feed Mr Blaney purchased racehorse cubes which are a high protein feed for racehorses. Stud cubes are even higher in protein for broodmares but we were not shown any evidence that stud cubes were purchased. It may be that they would be included in keep fees whilst the mares were at stud farms.

48. Mr Blaney said that he probably had 3 or 4 horses at any one time, including foals, racehorses and broodmares. If a foal didn't make the sales as a yearling then he would keep it on and race it himself as a two year old. We set out below our findings as to the extent of Mr Blaney's activities as a breeder.

49. Mr Blaney formed a company in October 2006 called Muirhill Bloodstock Ltd. The purpose of the company was to breed horses and it used Mr Blaney's land. It had some success selling yearlings. Mr Blaney was the major shareholder together with his son, Mr P Murray and one other party. When the company was formed Mr Blaney said that he reduced the number of horses in his own name but he continued to breed horses on his own account.

50. We accept that the Appellant has always owned horses, and to a greater or lesser extent has always bred horses. In his own words, he did so because he enjoyed working with horses in his spare time. He wasn't in it for the money, but because of his love of horses.

51. In October 2003 Mr Blaney had correspondence with a veterinary practice in Newmarket concerning a grey gelding. The vets had apparently failed to spot a medical condition and we understand Mr Blaney had purchased the horse. The vets paid £2,000 compensation without accepting liability. This evidence says nothing about Mr Blaney's case that he was breeding horses. Mr Blaney said that he purchased the gelding for point to point racing.

52. We are satisfied from documentary evidence that:

(1) In 2005 Mr Murray was invoiced for the transport of a mare and foal from Mr Blaney's land.

(2) In 2005 Patrick Murray invoiced Mr Blaney in connection with keep fees for Twicken and foal, Stridhanna and foal and Tara Gold and foal in 2005.

(3) In April 2007 Mr Blaney paid stud fees in relation to a broodmare at Boothill Stud, Newmarket.

53. The invoice in relation to Stridhanna was the only evidence before us in relation to that horse. It was not mentioned by Mr Blaney.

54. During the relevant period Alan Dunlop could recall 3 mares in particular. His accounting records for that period have been lost although we were referred to an invoice from Alan Dunlop dated 30 November 2005 in which he charged £100 for visiting Tara Gold, its foal and Twicken. Apart from this he relied on memory.

55. The first horse Alan Dunlop recalled was Twicken, in the early 2000's, although it died after a couple of years. He recalled referring Twicken to Troytown (a centre of excellence in veterinary science) at that time. Twicken was only in Mr Blaney's ownership for a relatively short period of about 2 years and died carrying a foal. Alan Dunlop also recalled Tara Gold which he said produced 3 or 4 foals during the 2000's, and Highland Diva which he said produced 4 foals, although not in the period 1998 to 2006. He said and we accept that Highland Diva is still a broodmare. In the distant past he could remember a horse called Nairin. Evidence from Weatherbys shows that Nairin was sold in 1989. In total Mr Dunlop thought that he attended 1 or 2 mares in the course of a year in the period 1998-2006. There may have been years when he did not visit.

56. We accept that Alan Dunlop was doing his best to recollect his dealings with Mr Blaney's horses during the relevant period. His recollection was not at all specific, which we fully understand. It leaves us with only vague evidence as to the nature and extent of Mr Blaney's horse breeding activities in the relevant period.

57. Alan Dunlop was shown documentation in relation to Winged Foot. He was able to confirm she was a broodmare because he had looked up her details. We accept

that evidence. He did not suggest that he had treated Winged Foot and there was no evidence she produced any foals. He did not refer in his evidence to Stridhanna.

58. Doing the best we can with the evidence we have seen and heard we find that Mr Blaney owned a total of 3 broodmares at various stages in the relevant period – Twicken, Tara Gold and Winged Foot. He kept these broodmares on the Land with a view to breeding horses. We cannot be satisfied how many foals Twicken and Tara Gold produced, although they each produced at least one foal. We are not satisfied that Winged Foot produced any foals. We cannot be satisfied as to the period of time these broodmares were owned by Mr Blaney, although they were owned by him for at least part of the relevant period. We cannot be satisfied what became of the foals that were produced, whether they were offered for sale or whether they were raced by Mr Blaney. We are not satisfied that Mr Blaney owned or bred foals from Stridhanna.

Decision

59. Mr Dunlop's principal submission was that Mr Blaney was trading as a horse breeder throughout the relevant period.

60. Mr Dunlop also submitted that:

(1) Participation of horses in racing is in no way inconsistent with the trade of breeding. Horses are often entered into races to improve their value.

(2) Enjoyment is not inconsistent with a trade. There is no requirement that trade should be a drudgery.

(3) There is no requirement for a trade to be financially successful.

(4) Horse breeding by its nature is precarious with intermittent sales.

61. We accept these four submissions, but we must consider them in the context of our findings of fact in relation to Mr Blaney's activities and by reference to the badges of trade.

62. It seems to us that the following badges of trade are particularly relevant to the present circumstances (using the paragraph numbers in Marson v Morton):

63. *(1) Frequency of transactions*. The larger the number of broodmares owned, the more likely it is to be a trade. Mr Blaney did own 3 broodmares at various stages during the relevant period and kept them on the Land. We accept that breeding racehorses is precarious and can result in intermittent sales. There is however no evidence of any sales of horses produced by Mr Blaney's broodmares. The only horse sale was a share in Twicken which was not produced by Mr Blaney's breeding activities.

64. *(2) Relationship to other activities of the taxpayer*. The activity of horse breeding is not related in any way to a trade which Mr Blaney carries on. He is a house builder with a love of horses and horse racing. It was not suggested, nor could it have been, that his racing of horses amounted to a trade. The activity of horse breeding was certainly related to Mr Blaney's general enjoyment of horses and horse

racing. Having said that, HMRC have accepted that in the 1980's Mr Blaney may have been engaged in a trade of horse breeding which gives some support to his case in relation to the relevant period.

65. *(3) Nature of the subject matter*. An owner of horses will almost always derive personal enjoyment from ownership. Mr Blaney accepted that he derived personal enjoyment. However breeding horses can undoubtedly amount to a trade in appropriate circumstances. As Mr Dunlop submitted, conducting a trade does not need to involve drudgery.

66. *(6) Work done on the asset*. Supplementary work done on an asset prior to sale may point towards trading. Certainly broodmares and foals require considerable care and attention, including the services of a vet. We accept also that racing the produce of a broodmare can increase the value of the horse being raced, the mare and any other produce. In that sense racing horses could in appropriate circumstances be viewed as part of a horse breeding business. However we have no evidence as to which, if any foals were subsequently raced by Mr Blaney.

67. *(8) Purchaser's intentions at the time of purchase*. The intention to make a profit on re-sale is an indicator of trading. Whilst there were no sales of horses, we accept that Mr Blaney lived in hope that he would breed a winner. It seems to us that this was highly speculative. Some trading might be highly speculative but on the facts of this case it does not seem to us that Mr Blaney's intention to sell a successful horse is a significant factor.

68. *(9) Enjoyment of the owner*. In our view this is one of the most significant factors for present purposes. Mr Blaney enjoyed owning and racing horses, although the extent to which he raced horses in the relevant period was not entirely clear. His enjoyment extended to breeding racehorses in the hope that one day he would breed a big winner.

69. We must stand back and consider our findings of fact and the badges of trade as a whole. Doing so, it seems to us that Mr Blaney's principal motivation was his love of horses and horse racing.

70. There may be circumstances where racing horses is part and parcel of the activities of a horse breeder. The racing adds value to the trade of horse breeding. Conversely breeding horses may be part and parcel of the activity of horse racing. On the present facts the common thread is Mr Blaney's love of horses and horse racing and the personal enjoyment he gets from both racing and breeding horses.

71. We have accepted Mr Blaney's evidence in so far as it confirmed that he had been breeding horses at the Land. However we are not satisfied that the horse breeding was on anything other than a small scale. We do not have any reliable evidence as to the scale of his horse racing activities, but from the evidence we do have it was also on a small scale. Each activity complemented the other but we do not consider that the horse breeding amounted to a trade.

72. Looked at in the round we find that Mr Blaney's activities were carried out for personal enjoyment rather than by way of trade.

73. If there had been a trade, the next question would logically be whether that trade was conducted on a commercial basis and with a view to the realisation of profits as required by paragraph 22 Schedule A1 TCGA 1992.

74. Mr Donnelly for HMRC did not put his case either to Mr Blaney or in submissions on the basis that any trade which might have existed was not conducted on a commercial basis with a view to the realisation of profits. There is a body of case law in other contexts which deal with those concepts. We were not referred to that case law, or indeed to paragraph 22 Schedule A1 TCGA 1992. The closest the Respondents came to asserting that any trade was not conducted on a commercial basis was the evidence of Mr Wilson in cross-examination.

75. On the basis of what we have heard it seems unlikely that even if Mr Blaney was carrying on a trade of horse breeding that such a trade was conducted on a commercial basis with a view to the realisation of profits. However in light of the way in which HMRC have put their case it would not be right for us to make any such finding and we say nothing further on this aspect. Our factual finding is that Mr Blaney was not carrying on a trade.

Previous Findings of Mr Leonard

76. Mr Dunlop submitted that HMRC were bound by a previous assessment of Mr Leonard which allowed loss relief for trading losses in connection with Mr Blaney's horse breeding activities. He submitted that there had been no discovery of any material fact that would permit HMRC to make a different finding to that made by Mr Leonard. Reliance was placed on HMRC's enquiry manual dealing with discovery assessments pursuant to section 29 Taxes Management Act ("TMA 1970").

77. There was a meeting between Mr Blaney, Mr Ryan and Mr Leonard on 14 January 2004 in connection with an enquiry into Mr Blaney's self-assessment return for 2001-02. The notes of that meeting record the following:

> "*In earlier correspondence, Leonard had suggested that the Farming by the taxpayer, which proved to be the keeping of horses only, had been a hobby rather than a trade. The taxpayer now maintained that he bought young horses that had the potential to sell at a profit as point to point racers and that he did so with the intent of making a profit and thus it was a trade rather than a hobby, though he acknowledged considerable pleasure from simply having horses.*
>
> *Leonard indicated he did not propose to disturb the position here, accepting these activities as a trade with the past losses relieved against other income etc.*"

78. Both parties accepted that Mr Blaney claimed trading losses in relation to the horses in tax years 1998-99 to 2001-02.

79. Mr Leonard stated that he was never made aware that Mr Blaney was breeding horses. It was put to Mr Leonard that horse breeding had been raised and Mr Ryan gave evidence to that effect. Mr Leonard's enquiry was in 2003 and 2004. There was no documentary evidence that the question of horse breeding was discussed with Mr Leonard. In the absence of any documented reference we are not satisfied that Mr Blaney's activities at that time were described as horse breeding, as opposed to horse dealing. We are satisfied that Mr Leonard was aware Mr Blaney was involved in selling horses as point to point racers but not that he was involved in breeding horses.

80. The trading losses were a small part of Mr Leonard's enquiry and he said in evidence that he was prepared to allow losses for earlier years on the understanding that relief would not be claimed for future losses. There was an issue as to whether there was such an understanding. There was no evidence before us as to how horse-related activities were treated in subsequent years, although in 2006 there was evidence that an estimated profit of £1,000 had been returned.

81. On 19 June 2009 Mr Wilson wrote to Mr Ryan stating that he was not bound by Mr Leonard's agreement that Mr Blaney was carrying on a trade. The reason he said he was not bound was because Mr Leonard had not been told that Mr Blaney was involved in point to point racing. It is clear that there was some discussion at the meeting on 14 January 2004 in relation to point to point racing, but it is not clear from the notes that Mr Blaney was racing horses.

82. Mr Dunlop submitted that Mr Leonard was aware that Mr Blaney was involved in point to point racing. Further, because Mr Leonard had accepted that Mr Blaney was carrying on a trade then it was improper for HMRC to assess CGT on the basis that there was no trade in the absence of any new evidence.

83. As far as our factual findings are concerned the burden of proof is on the appellant. We are not satisfied on the evidence before us that in 2004 Mr Leonard was aware that Mr Blaney was involved in breeding horses. Nor are we satisfied that he was aware that Mr Blaney's horses were being raced at point to point meetings.

84. We are not concerned with discovery assessments so the provisions of section 29 TMA 1970 are not relevant.

85. Even if Mr Leonard had been fully aware of Mr Blaney's horse breeding activities and allowed the loss relief, the evidence does not satisfy us that Mr Leonard was agreeing to treat this as a trade for all tax purposes in the future.

86. Quite apart from our findings of fact, Mr Dunlop's argument is essentially that Mr Blaney had a legitimate expectation that his activities would be treated as a trade even if as a matter of fact they did not amount to a trade. Whilst we were not referred to any authorities, we do not consider that we have jurisdiction to determine this appeal on such a basis.

87. The Upper Tribunal in *Commissioners for HM Revenue & Customs v Abdul Noor [2013] UKUT 071 (TCC)* was concerned with the extent to which the First-tier Tribunal ("FTT") has jurisdiction when dealing with a VAT appeal to consider a

taxpayer's claim based on the public law concept of legitimate expectation. The same principles will apply to jurisdiction in relation to other taxes, including CGT.

88. The Upper Tribunal construed the relevant statutory provisions and found that the FTT had no such jurisdiction. It referred to the following quote from Nicholls LJ in an income tax case of *Aspin v Estill [1987] STC 723 at 727c*:

> " *The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review.*"

89. We are satisfied that nothing in the TCGA 1992 or in the TMA 1970 gives us jurisdiction to give effect to any legitimate expectation Mr Blaney might have had that his activities would be treated as a trade.

Generally

90. For the reasons given above we are satisfied that Mr Blaney was not carrying on a trade of horse breeding. We are not satisfied that HMRC are prevented from relying on that fact in making their assessment to CGT, or that we otherwise have jurisdiction to set aside the amendment made by Mr Wilson. In the circumstances we dismiss this appeal.

91. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 4 November 2014