[2022] UKFTT 00042 (TC)

TC 08394/V

INCOME TAX, VAT and PENALTIES – discovery assessment and closure notice – ss 28 and 29 and 34 of Taxes Management Act 1970 – capital allowances and revenue expenditure and loss relief claims – expenditure to construct a sports complex and house renovation – whether there was a 'trade' being carried on for income tax purposes – whether entitlement to input VAT relief – s 24 of Value Added Tax Act 1994 – whether inaccuracies in returns 'deliberate' for Sch 24 penalties – whether surcharge upheld – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/05284
TC/2017/06947
TC/2018/00450
& TC/2018/00494

BETWEEN

GRAHAM MICHAEL WILDIN **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
CELINE CORRIGAN

The hearing took place on 14 to 18 June 2021

With the consent of the parties, the form of the hearing was V (video) on the remote platform hosted by the Video Hearings Service of HMCTS. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Graham Wildin in person, for the Appellant

Mr Martin Priestley, Litigator of HM Revenue and Customs' Solicitor's Office and Legal Services, for the Respondents

DECISION

INTRODUCTION

1. The conjoined appeals are brought by Mr Wildin ('the appellant') against the following decisions by the respondents ('HMRC') in relation to:

(1) Closure notice and Discovery assessments pursuant to sections 28A and 29 of the Taxes Management Act 1970 (the '**Income Tax Assessments**');

(2) Assessments under section 73 of the Value Added Tax Act 1994 (the '**VAT Assessments**');

(3) Penalties for inaccuracies in returns under Schedule 24 to the Finance Act 2007 (the '**Penalty Assessments**');

(4) Surcharge under section 59 Value Added Tax Act 1994 ('**VAT Surcharge**').

2. The central issue for determination in these appeals is whether the statutory conditions as set down by the relevant provisions in relation to there being in existence a 'trade' at the relevant time for the appellant's claim of: (a) capital allowances, (b) income tax loss relief, and (c) input VAT, which HMRC's decisions sought to disallow.

3. The claims under the different heads of tax were all related to the expenditure incurred by the appellant in constructing a sports and leisure complex ('the Complex') adjacent to his dwelling house and in the garden grounds of the surrounding properties he also owned.

4. The overall quantum under appeal is £297,630.65 (not including interest), and relates to the following periods as tabulated under the relevant headings.

	Tax year	**Income Tax Decision**	**Date**	**Amount**
1	2013-14	Closure notice s 28A TMA	2 June 2017	27,496.00
2	2014-15	Discovery assessment s 29 TMA	1 Nov 2017	23,760.38
3	2015-16	Closure notice s 28A TMA	1 Nov 2017	32,126.40
		Income Tax Total		**£83,382.78**

	VAT Period	**Date of Decision**	**Amount**
1	11/13	All issued on	1,505
2	02/14	10 October 2017	3,299
3	05/14		49,410
4	08/14	Assessments	24,863
5	11/14	pursuant to	26,909
6	02/15	s 73 VATA	18,780
7	05/15		5,156
8	08/15	Hardship application	11,313
9	11/15	Granted by HMRC	2,527
10	02/16	On 5 April 2018	10,416
11	05/16		112
12	08/16		3,170
		VAT Total	**£157,460**

	Period	Type of Decision	Date	Amount
1	02/16	VAT Penalty Sch 24 FA 2007	10 July 2017	22,091.99[1]
2	2013-14	IT Penalty Sch 24 FA 2007	31 Oct 2017	9,623.60
3	2014-15	IT Penalty Sch 24 FA 2007	1 Nov 2017	8,208.20
4	2015-16	IT Penalty Sch 24 FA 2007	1 Nov 2017	16,062.16
5	02/17	Surcharge under s 59 VATA	13 April 2017	801.92
		Total Penalties & Surcharge		**£56,787.87**

LEGISLATION

5. The legislative frameworks relevant to this appeal are as follows, and relevant statutory provisions are set out in the **Annex**.

(1) The Taxes Management Act 1970 ('**TMA**') is in relation to the enquiry, and closure notice, discovery assessment and time limit, and the Tribunal's jurisdiction on appeal.

(2) The Capital Allowances Act 2001 ('**CAA**') is in relation to the eligibility of a claim for expenditure incurred in a qualifying activity, including that of UK furnished holiday letting businesses, and the definition of 'Trades' for capital allowances purposes.

(3) Income Tax (Trading and Other Income) Act 2005 (**ITTOIA**) is in relation to trading profits and deductible expenses being 'wholly and exclusively for the trade'; the meaning of 'generating income from land' and 'commercial letting of furnished holiday accommodation' and capital allowances and loss relief.

(4) Income Tax Act 2007 (**ITA**) is in relation to 'the restriction on relief unless trade is commercial' and the context of relief for UK furnished holiday lettings business.

(5) The Value Added Tax Act 1994 ('**VATA**') is in relation to 'allowable' input VAT, the meaning of 'business', the default surcharge regime and mitigation.

(6) The Value Added Tax Regulations 1995 (the '**VAT Regulations**') set out the requirements in relation to input VAT claims, return submissions and VAT payments.

(7) Schedule 24 to the Finance Act 2007 ('**Sch 24**') is in relation to the penalty assessments for inaccuracies in returns.

(8) The Licensing Act 2003 ('**LA2003**') is in relation to Licensable activities, meaning of 'supply of alcohol' and 'sale by retail'.

(9) The Town and Country Planning (General Permitted Development) Order 1995 (SI/1995/418) ('**GPDO 1995**') in relation to 'Permitted Development' within the curtilage of a dwelling house.

CASE LAW

6. The authorities lodged by the parties are listed with citation references in the Annex.

[1] The VAT penalty assessment originally in the sum of £23,196.56 is subsequently reduced by £1,104.57 to the quantum of £22,091.99, the latter being the figure as stated in HMRC's Statement of Case.

EVIDENCE

Documentary evidence

7. The Tribunal is provided with the following documentary evidence from the parties:

(1) Joint bundles of documents in electronic format: Part 1 of 903, Part 2 of 639 pages, and Part 3 of 30 pages.

(2) The appellant's Powerpoint presentation of 352 slides showing the surroundings and the interiors of the Sports Complex.

(3) A short video clip on MP4 being an interview of the appellant.

(4) The appellant's 'additional documents' of 29 pages, being 4 pages of submission followed by an income summary and unaudited Financial Statements of Forest of Dean Luxury Holidays.

8. In the course of the hearing, the parties have lodged further documents as follows:

(1) The appellant produced a page of Bank Statement for March 2021 for the entity known as Forest of Dean Luxury Holidays, and VAT return for the two quarters to 30 November 2020, and 28 February 2021;

(2) The appellant produced a copy of the High Court Injunction Order issued against him on 12 December 2018 and associated documents;

(3) HMRC provided a chronology of events leading to the High Court Injunction Order at the request of the Tribunal, and another chronology in relation to the transfer of land.

Witness evidence

9. The Tribunal heard Mr Wildin's evidence, followed by HMRC's witnesses in the order of: (i) Officer Stuart Ferguson; (ii) Mrs Helen Blundell; and (iii) Officer Russell Hall.

10. Mr Wildin led his own evidence and spoke mainly to the 352 slides in his Powerpoint presentation. He was cross-examined by Mr Priestley, and answered supplementary questions from the Tribunal. In relation to the purpose of the expenditure incurred for the Complex, we do not find Mr Wildin a credible or reliable witness. There are significant inconsistencies over the same factual matrix between his evidence at a High Court hearing in September 2018, and his evidence to this Tribunal in June 2021. We find that the material aspects of his oral testimony to this Tribunal represented an account of events framed with the legal issues in mind. In some such areas, we have accorded more weight to primary facts ascertainable from contemporaneous records, and have based our findings of fact on known and probable facts, and inferences drawn therefrom. We consider the value of Mr Wildin's evidence lies largely in the opportunity afforded by cross-examination to subject the documentary evidence to critical scrutiny, and for the Tribunal to gauge the personality, acumen, and intentions of the appellant.

11. Officer Stuart Ferguson has been an investigator of the Fraud Investigation Service (FIS) of HMRC since July 2016, and was formerly a Corporation Tax Specialist in Large Business within HMRC. Officer Ferguson took over the investigation from Officer Hall, and was the officer who concluded the enquiry and raised the assessments that are the subject matters in these appeals. To bring the enquiry to a close, Officer Ferguson had worked closely with Officer Hall, who started the investigation and has specialism in VAT from having worked in HM Customs and Excise since August 1985 before moving to FIS in 2014. We find both witnesses to be credible and reliable, and accept their evidence as to matters of fact.

12. Mrs Blundell is a solicitor employed by Forest of Dean District Council ('**the Council**') in Gloucestershire. She gave evidence as the solicitor with conduct of the injunctive proceedings brought by the Council against Mr Wildin that led to the High Court Injunctive

Order of December 2018, she spoke to the terms of the relevant documents which stand as evidence of the actions taken by the Council in relation to the Complex. We find Mrs Blundell a credible and reliable witness; we accept her evidence in relation to matters of fact.

PRELIMINARY MATTER

13. For completeness, we record the preliminary matter to these proceedings that arose due to an allegation made by Mr Wildin at the Test Hearing (for equipment) on 7 June 2021, which was attended by participants and witnesses. At the Test Hearing, Mr Wildin made comments that Mrs Blundell gave 'false' evidence in a different set of proceedings, causing the case to be 'dropped', which at first suggested that it was a finding from a court decision that was already in the public domain. Mr Wildin was told not to make any further comments at the Test Hearing as he was making an extremely serious allegation, and that Directions would be issued for him to state in writing the substance of his allegation regarding Mrs Blundell's credibility.

14. Directions were issued on the same day at 16:34 hours on 7 June 2021 for Mr Wildin to state the substance of his allegation against Mrs Blundell's credibility in writing. It was made clear to parties in the Directions that the admissibility as evidence in this appeal of any such statement by Mr Wildin would be considered as a preliminary matter at the substantive hearing.

15. By email dated 7 June 2021 at 12:33 hours (before the issue of Tribunal's Directions), Mr Wildin provided some details of the proceedings, in which he alleged Mrs Blundell's evidence 'relating to her contact with the Crown Prosecution Service had been proven to be untrue'. A second email dated 9 June 2021 stated as follows:

> 'I have spoken this morning with Philip Lambert, who supplied me with the earlier details. He said that he attended a hearing at Cirencester Court, which was sitting as a Nightingale Court as a Crown Court, two weeks ago. The case was the Council verses Thomas Clark. I am informed that at a provisional hearing before a District Judge Helen Blundell said to the Judge that she had reported the case to the Crown Prosecution Service and asked them to take action but they have declined to do so. The defence for Thomas Clark said his information was that this was untrue and asked for the case to be dismissed. The defence solicitor introduced as evidence his attendance note of the hearing at which Helen Blundell gave the false information.'

16. By email dated 10 June 2021, HHJ Michael Cullum of Gloucester and Bristol Crown Courts wrote in response to the Forest of Dean Council's request made via Ms Blundell on 9 June 2021, and asked for the following to be stated and shared with defence of that case:

> 'There is a non-digital file to which I have no access at present … The comments below are made from memory. If the Council wish to obtain a transcript, then of course they are entitled to …
>
> From my personal recollection … I am sure there was no "suspension of the proceedings" due to a false statement being made.
>
> The application was to adjourn the trial to see if the CPS would take over the prosecution to effectively stay it as not being in the public interest. I determined that I would not adjourn for this purpose at that stage.
>
> […]
>
> In conclusion the suggestion if made that the prosecution was suspended at a hearing before me due to a false statement by Mrs Blundell is false.
>
> If such an allegation against a lawyer such as Mrs Blundell has been made in proceedings and can be demonstrated to be deliberately false then I would expect an investigation to be made as to whether this further allegation intended to pervert the course of justice.

> Such allegation are [sic] extremely serious and I fully understand the need for the record to be corrected.
>
> I am content for this email to be disclosed in the proceedings to which Mrs Blundell refers in her email.'

17. The preliminary matter was disposed of by refusing the substance of Mr Wildin's email communications of 7 and 9 June 2021 to be admitted as evidence. We also consider that it is important to record Cullum J's statement, and for it to stand as an accurate summary to correct what was otherwise hearsay evidence sought to be relied on by the appellant for the purpose of founding an extremely serious allegation against the credibility of a witness who is a solicitor.

THE FACTS

Background

18. Mr Wildin is a chartered accountant and the principal partner of the partnership (an accountancy firm) known as Wildin & Co, which provides a range of services: business planning, audit, payroll, tax advice, and employs 30 staff members and has 3,000 clients, (staff and clients numbers are as given by the appellant and not independently confirmed).

19. A Mr Lewis was the only other partner in Wildin & Co, but left the partnership in April 2018, leaving Mr Wildin as the sole proprietor of the firm.

20. Mr Wildin's three adult children, two being qualified accountants and one a financial adviser, provide their services to Wildin & Co via a company called Expresser Limited, which is owned by his adult children.

21. Mr Wildin has as his principal private residence a dwelling house known as Altea at 24A Meendhurst Road, Cinderford (Number 24A), which has been his home since July 1982. He acquired two terraced cottages on Meendhurst Road (first Number 34, then Number 30) which back onto Altea. The two properties had been rented out on short-term lease (last tenancy being in 2016), while the back gardens of Numbers 34 and 30 adjoining Altea's were amalgamated into Number 24A, and 'became part of Altea' as described by Mr Wildin.

The amenities in Altea

22. In the enlarged curtilage of Altea following his purchase of Numbers 30 and 34, Mr Wildin had constructed various outbuildings over the years: (i) a show room with a signage 'Cars of Distinction' housing 9 vintage cars of models corresponding to those once owned by Mr Wildin, (three more vintage under a carport in the forecourt); (ii) a large Oriental Garden with pagodas in the style of an 'Oriental Palace' with a suite of outbuildings with green glazed roof tiles and a 'guard's post house', oriental statues (including a solid jade Eagle of 1.5 tonnes) guarding the 'Palace Doors' painted in red, together with an oriental eating house, (iii) outdoor playground areas with a construct of climbing frames and chutes, a 15-feet high four-slide ride with rope bridges that can be changed into water slides; (iv) a Wendy House with its own decking terrace and garden furniture such as a picnic bench with a parasol; (v) children's side-and-ride equipment in the form of miniature fire engine, a pirate ship; (vi) an amusement arcade with a dozen of games: shooting, driving, 'penny' slot machines, toy pick-up games, etc. (vii) an 8-person hot-tub and sauna, and (viii) the plan for an indoor swimming pool; the last few Powerpoint slides showed the pool under construction, said to have completed in two months.

23. In response to Tribunal's questions about the idea of an oriental eating house, Mr Wildin explained that it was 'purely a personal thing', thinking about 'what to do with that area', and decided on a Chinese garden with an oriental eating house; that he likes Chinese food, though he has never been to China; and every week (up until a year ago) he would order from the local Chinese restaurant, and his family (his partner of 17 years, his three adult children and nine

grandchildren) would have family time with all the amenities like going to a restaurant situated in a garden with outdoor play areas; that 'basically it was for the children's company'.

24. In relation to the construction of these outbuildings, Mr Wildin said he 'designed it all' and 'built all ourselves'; that he had a close friend by the name Clive, who had worked for him for 40 years until 'he died of cancer'; 'he laid every block'. Clive was engaged as the building contractor to work on the sports complex and upgrade Number 24 (see below). At a later stage of the hearing, Mr Wildin also said that Clive worked as a 'maintenance man' and was an employee of Expresser Ltd, the company owned by Mr Wildin's adult children.

Patterns in furnishing Altea

25. Mr Wildin said that for the furniture for the oriental eating house, he got two tables from a client, and then acquired chairs and tables from America online, which were imported some 15 years ago, that he paid £10,000 at the time, and input VAT on the import.

26. Mr Wildin spoke of searching on e-bay for furniture and equipment items to be acquired 'at the cheapest price we can'. He said, 'it is amazing what I have got', such as the way he bought all the fittings for the indoor swimming pool, on finding out that the new owner of a property acquired from a Scottish football player was going to discard all the fittings of the dismantled indoor swimming pool, and Mr Wildin 'took it all', driving personally to Edinburgh en-route visiting a client to collect, and paying something like 10% of what it would have cost.

27. The interior of Altea (of 6,500 square feet) is a menagerie of furniture and decorations along several themes: (i) The Western Room of the American Wild West, including imitation guns and a life-size male mannequin dressed in cowboy outfit complete with hat and boots; (ii) The Moulin Rouge Room has a king-sized poster bed from the Moulin Rouge area of France; (iii) The Sports and Memorabilia Room has as its display a large number of sports and memorabilia such as a 'Wembley' Seat, signed football and rugby items, (iv) The Egyptian Hallway with cabinets displaying a large number of Egyptian figures and artefacts; (v) The Beauty Room has an electrically operated bed for massage and beauty treatments, and salon set up for 'doing hair and nails'; (vi) The Snooker Room with a full sized snooker table in a specially constructed area, with sporting pictures and a 60-game console.

Acquisition of Number 24

Planning permission to renovate the bungalow

28. In June 2013, Mr Wildin acquired Number 24 for £230,000 from an unconnected party, and submitted an application for planning permission to renovate and extend the property into a six-bedroom house. The application was approved on 10 September 2013.

29. Number 24 came with a substantial back garden, which enlarged the curtilage of Altea to enable it to accommodate a sports complex with a footprint of some 570 square metres.

30. Mr Wildin referred to Number 24 as the 'White House' and the planning permission was to raise the roof space by 3' 6" and to turn the property into a large dormer bungalow with six bedrooms to sleep 14 people, with six bathrooms. A commercial grade water system has been installed which cost £15,000 to 'provide instant hot water to supply 6 showers and 6 baths all at the same time'; 'one of them has got steam shower, sauna and jacuzzi'.

31. Mr Wildin said he had thought that one of the children would be interested in moving into Number 24 after the renovations, which were carried out by Clive. (None of the children wanted to move into Number 24.)

Work commenced on the Complex without planning permission

32. On or around 14 October 2013, work commenced on the site to construct the Sports Complex. The appellant did not make a planning application with respect to the Complex

before commencing construction because he considered that planning permission was not necessary based on Permitted Development Rights.

33. The appellant stated in his witness statement for these proceedings that he had 'checked carefully the planning regulations' and that one of the conditions is that 'it must be used as part of the incidental enjoyment of the house' (i.e. Altea).

The Sports Complex

Connection to electricity supply

34. An invoice from Western Power Distribution dated 24 July 2014 addressed to Mr Wildin with the description of 'New electricity connection at Sports Complex, 24 Meendhurst Road, Cinderford' for £4,498.72 plus VAT of £20 gave the timing as to when the development was connected to electricity supply.

Press interviews of the appellant

35. The planning dispute over the Complex led to media reporting around the same time as the service of the Note of Case in Mr Wildin's appeal against the Enforcement Notice issued by the Council. The Daily Mail published an article on 24 November 2014, stating:

> 'Graham Wildin built the impressive entertainment complex in his garden for his five grandchildren to enjoy
>
> The 62-year-old accountant dug 18ft into the ground and removed 9,000 tonnes of soil to make room for the project …
>
> Mr Wildin – who refuses to disclose how much the development has cost – wants his family to be able to watch a movie, play roulette and go bowling without leaving home.'

36. On 24 November 2014, a video interview was published in the national press, in which Mr Wildin personally explained how he designed and intended the Sports Complex for the use of his immediate family, and the use it was being put to at the time. The video footage of 3 minutes 31 seconds duration was played during the hearing, featuring Mr Wildin in suit and tie speaking to moving images of the interior of the Complex, and excerpts of the interview transcript are as follows:

> 'The Forest of Dean is a great place to live. Unfortunately there aren't many things to do in the Forest of Dean. What we're trying to do here is to develop something for myself and my family and generations to come that provides sports and activity for the family, and for friends and people like that.
>
> […]
>
> I spend lots of time with my children and my grandchildren. They're over every weekend. Outside already we've got lots of things for them to do, with trampolines, slides, big Wendy-houses, a theatre, sorry, and amusement arcade etc.
>
> So there's [sic] lots of things for them to do outside, but obviously during the winter when the weather's bad we need to do something inside. And I've also tried to develop something that as the children get older, they needn't stop coming here. There's something whatever age they are they can come and play. And they can come and bring their friends to play as well – it's all part of, you know, enjoyment of the house in fact.
>
> And with the house, obviously, we've lived here for 32 years and it's evolved over that period. So I've got a car show-room, I've got an oriental eating house and garden, I've got a hot-tub room etc. All those things are to enjoy the house, basically.'

37. Towards the end of the video, and probably in response to a question put by the journalist conducting the interview, he said:

> 'I don't have a favourite room. The favourite thing is going to be seeing the children enjoying themselves. Every weekend virtually my five grandchildren get together here in the house. Whether it's playing in the house – if it's wet we play hide and seek or whatever we do, or we play outside. But it's just watching their enjoyment, it's great.
>
> [The Complex] is going to add to their enjoyment, … that's what you want to do for your children and grandchildren if you can, isn't it? … People do that in different ways. I'm lucky enough that I can do it in this way, where other people, unfortunately, aren't quite as fortunate maybe.'

The interior of the Sports Complex

38. Mr Wildin's interview footage was filmed against the background of two ten-pin bowling alleys and the camera moved on to show other facilities as described in the interview, which he grouped into 'for the children' and 'for the adults and children'.

(1) For the children:

(1) A 'giant dolls' house' on 3 floors, 25 ft by 22 ft in floor area, with low head room for children's use only; the caption in the Daily Mail article featuring the dolls' house under construction as: 'The soft play area for his five grandchildren as it was being built …'

(2) Garages for the children's electric cars underneath [i.e. the dolls' house has a basement garage];

(3) The first floor is a play area, and the second floor has a train set of 15 ft long;

(4) A large soft play area, which again is about 25 square ft and 18 ft high;

(5) 'All that can be viewed from the viewing galleries so that us as parents and grandparents can keep an eye on what the children are doing': per interview.

(2) For the adults and children:

(1) 'A sports hall which triples up for badminton, golf, tennis, table-tennis, indoor football, basketball, disco, whatever' (Mr Wildin's partner likes badminton and his son plays golf.)

(2) A squash court in relation to which Mr Wildin said: 'I'm a national squash referee. I'm a qualified coach, and what I hope to do, as I've coached my children, is to coach my grandchildren.'

(3) Upstairs to the sports hall and squash court is a 'leisure area' where 'you can oversee the sports-hall and the children's play areas, and also look down to the squash court'.

(4) There is a kitchen with also X-Box games to play, chess, Monopoly games.

(5) Above the ten-pin bowling alleys are two rooms: (i) one is set out 'like a small casino, with three tables and a bar etc'; (ii) the theatre room that is set out for a cinema, 'so the children can do their own little plays', and can also be an indoor golf playing area. The cinema has '16 nice leather seats' (in the style of reclining armchairs) to watch films.

39. There are special bathrooms for children's use, where the toilets and wash-hand basins are situated for the comfortable reach of children. Mr Wildin also spoke of the possibility of 'joint disco' of adults and children 'all within the same house'.

40. The Complex also has a fully-equipped gym with showering facilities, which was not mentioned at the video interview. Mr Wildin spoke of acquiring the multi-gym equipment from a gym closing down in Cheltenham for £25,000, while three casino tables for Roulette, Poker and Black Jack were from a Casino Royale 10 miles down the road. Mr Wildin said that he gave accountancy courses to personal trainers who have to keep their books as self-employed. (It would seem that through his business contacts, Mr Wildin was able to access unusual purchasing opportunities to equip the Complex, such as when a gym was to close down.)

Mail Online reporting April 2017

41. The ongoing dispute with the Council led to further reporting, and on 14 April 2017, Mail Online reported with the headline:

> '"He's like Donald Trump!" Neighbours of millionaire accountant who refuses to tear down his back-garden leisure centre say it's "one rule for him, one for everyone else" …'

42. The article also related that 'his partner of 15 years who wished to remain unnamed said: "He built this for his grandchildren and to tell you the truth, every week it is so wonderful to see how happy [it] makes Graham and all the children."'

Actions by the Council regarding the Complex

First site visit

43. On 11 November 2013, (less than 3 months after Mr Wildin's VAT registration), the Forest of Dean District Council conducted a site visit following complaint from a member of the public regarding excavations on land at the rear of and within the residential curtilage of Numbers 24 and 24A, (approximately 0.1 hectare). The site visit was within a month of work commencing on the construction around 14 October 2013.

44. In response to Mr Wildin's pre-application enquiry, accompanied by the plans of the proposed Complex with a footprint of approximately 570 square metres, a senior officer of the Council advised by letter dated 10 December 2013 that the proposed Complex was not permitted development, and that planning permission was unlikely to be granted.

Enforcement Notice for Demolition

45. On 6 March 2014, the Council issued an Enforcement Notice for the demolition of the Sports Complex pursuant to section 171A(1) of the Town and Country Planning Act 1990 for breach of planning control in the matters of:

> 'Without planning permission, the removal of topsoil and subsoil from the Land, the creation of new land form and the reprofiling of the Land so as to alter the natural ground level.
>
> Without planning permission, operational development in the form of the construction of walls and the installation of drainage in connection with the proposed erection of a building on the area of land which has been excavated.'

Appeal to the Planning Inspectorate

46. Mr Wildin appealed against the Enforcement Notice. Mr Kendrick of John Kendrick Ltd, Commissioners and Advocates, specialists in Town and Country Planning Practice, Procedure and Law, was instructed to represent Mr Wildin. The appeal proceedings against the Enforcement Notice resulted in a suite of documents in 2014 to include material relevant to our consideration, such as:

(1) The stated grounds of appeal lodged on 6 March 2014 included the following:

> 'v. The notice and the report to the committee express concern in a number of places … that there would be no control over the use of the building. This is misconceived. The only lawful use for the building would be for purposes incidental to the use of no 24A as a dwelling and no other purpose.
>
> x. The appellant is willing to enter into a dialogue with the local planning authority [LPA] to identify appropriate conditions to be attached to any permission under this ground, for example, one to restrict the use of the building to ancillary sports and leisure activities for the occupants of no 24A and their family and guests.'

(2) Mr Wildin's witness statement of 3 April 2014 in the Enforcement Notice appeal spoke of the existing amenities of Altea and how family life had been lived with the use of these amenities. He spoke fondly of his children and grandchildren and how he connected with their interests, taking the grandchildren to soft play area ('Jump' at Bristol) or to Gloucester Megabowl for ten pin bowling, of the time when his children and their cousins 'prepared, rehearsed and presented their own short shows', that he is teaching his eldest grandson to play snooker, and both of his eldest grandson enjoy using the gym equipment.

> 'Children are wonderful and there can be nothing better than watching them enjoying themselves, and taking part with them is even better. I am in a fortunate financial position where I am able to make my home a place in which I love to live, where my children and grandchildren and friends look forward to visiting, and which in my opinion is becoming one of the best homes in the country. In providing these facilities I am doing no harm to anyone.'
>
> 'The building is for the incidental enjoyment of my house and is to be used by myself, my partner, my partner's 22 year old son, my three grown up children and their spouses and my five grandchildren whose ages now range from 10 months to 8 years, and by my close friends when they visit me.'
>
> 'My children all still have keys to Altea, they visit on a regular basis (normally once or twice per week), and my grandchildren not only visit, but stay overnight, and for weekends. … My hope is that Altea will be a home to which all future generations will love to come, to spend time together as a family, and to join in together doing things which families love to do, to fully enjoy the facilities which we have luckily been able to create in our home.'

(3) In relation to the purchase of Number 24, Mr Wildin's witness statement stated that Number 24 'will either be used as a home for one of the three children and their families (if they wish) or if not it will be rented out.'

(4) The Council's Statement of Case was filed in May 2014, wherein it was stated:

> [7.33] The appellant was informed that he was carrying out the development at his own risk and The Council would be requiring the removal of all development from the land related to the building and the excavation. The appellant duly continued at his own risk with the development.

(5) The Note of Case for Mr Wildin was lodged on 17 November 2014, which stated:

> '8. This aspect of use is not considered in the report which suggests: "*The facilities on this scale are more likely to be offered by an institution similar to a social or sports and leisure club"*. Again, with respect, that misses the point. Many householders equip their homes with outbuildings under the GPDO to provide facilities that might be provided by a sports or social club – for

example, snooker rooms, tennis courts, swimming pools etc – for convenient use as part of their domestic routine.'

'10. At the end of the day the building here is intended, despite the scale and range of activities available, to operate as something subordinate to the dwellinghouse and an amenity to Altea, as such; that is part and parcel of Mr Wildin's large and well equipped, five bedroomed, family home serving the needs of all three generations of this extended family. *It is not intended to be a sports or social club and Mr Wildin's statement makes it clear that it will operate as such.* There is nothing unreasonable in that which has the effect of making the building something other than incidental to the dwellinghouse as such.' (italics added)

47. The appeal was heard on 30 September 2014 before the Planning Inspectorate with a site visit on 21 November 2014. (The video footage of interview by a journalist was around the time of the Planning Inspectorate's site visit.) The Planning Inspectorate's decision of 19 February 2015 varied the Enforcement Notice such that Mr Wildin was required to demolish the Sports Complex within two years.

Permission to appeal refused by High Court

48. Mr Wildin applied to the High Court for permission to appeal against the Planning Inspectorate's decision. A hearing for the application was held on 7 July 2015 before Hickinbottom J, with Mr Wildin in person, and the representatives for the Secretary of State for Communities and Local Government (the First Respondent), and Forest of Dean District Council (the Second Respondent).

49. The Order handed down by the High Court on 8 July 2015 signified the end of the appeal process by refusing permission to appeal the Planning Inspectorate's Decision of 19 February 2015. The finality of the matter means that the Complex must be demolished by July 2017.

Retrospective planning applications

50. On 8 November 2016, in the name of Graham and Philip Wildin (the appellant and his son), a retrospective application for a 'Lawful Development Certificate for an Existing use or operation or activity including those in breach of a planning condition' with the site address being Wildens Sports Complex at 24 Meendhurst Road. The description of use was 'Squash Court on the land of Altea' and the grounds for the application are stated to be:

'This is a certificate of lawfulness for JUST a squash Court which has been built on land owned by the applicants and their close relatives.' (Capital original)

When was the use or activity begun, or the building works substantially completed? ***28/3/2015***'

51. A further planning application was lodged on 16 November 2016, this time in the name of Graham Wildin only for the site 'Wildens Sports Complex'. For description of use, operation or activity: '*A leisure building for Squash, Ten Pin Bowling, Gym and Sports Hall Use*', and 'Permitted Development Rights' was given as the grounds for application for a Lawful Development Certificate, while the date the buildings works substantially completed was stated as '*1 January 2016*'.

52. The retrospective planning applications were both refused.

Application for Injunction relief

53. There was no compliance with the Planning Inspectorate's decision by demolition of the Complex by 7 July 2017, being the end of a two-year period reckoned from 7 July 2015, the date of the High Court Order to refuse permission to appeal the Inspectorate's decision.

54. On 3 April 2018, the Council applied to the High Court for an injunction against Mr Wildin. The injunction application trial was on 20 September 2018, and the transcript of Mr Wildin's evidence at the injunction application hearing recorded the following question from Mr Stephen Whale as counsel for the Council:

> 'Q: At no time, whether since the inspector's decision or before, at no time have you ever applied for planning permission for this building subject to a condition that you or your family be permitted to use it, have you?
>
> A: Nothing in anything that Mr Colgate [planning officer] sent me in anything else does it mention the fact that they would give me planning consent if that's the condition. *We're the only people that use it*.' (italics added)

55. The judicial decision disposing of the injunction application was by Jarman J in *Forest of Dean District Council v Graham Michael Wildin* [2018] EWHC 2811 (QB) and issued on 26 October 2018. Jarman J's findings at [26] are informative of the attributes of the appellant:

> 'Mr Wildin knew before or within a couple of months of the commencement of the development that the Council took the view that it would not constitute permitted development and was unlikely to be given planning permission due to the scale of what was proposed. The reply came from Mr Colgate in a letter dated 10 December 2013, in which his views as senior planning officer were made clear … Mr Wildin carried on regardless because he thought that his view … was correct, and the view of the Council's officers was wrong. As he accepted in an email to them in 2014, he knew that he was risking the cost of the development and that the building may have to be demolished if it turned out that the Council's view was correct. He has not taken any steps to comply with the enforcement notice and it is clear to me that he will not do so unless and until ordered to do so by the court. All these factors point very strongly in my judgement to the grant of an injunction.'

The Injunction Order

56. The consequential hearing for setting the terms of the Injunction Order was held on 16 November 2018. The Order was sealed on 12 December 2018, whereby:

> '1. The Defendant [Mr Wildin] … shall no later than 25 April 2020:
>
> (i) permanently comply with the requirements of the enforcement notice … as varied by the Appeal Decisions dated 19 February 2015; and
>
> (ii) permanently remove the rest of the Sports and Leisure Building constructed after 6 March 2014 on land at 24-24A Meendhurst Road …'

Permission to appeal refused by the Court of Appeal

57. On 6 December 2018, Mr Wildin made an appeal against the Injunction Order to the Court of Appeal.

58. On 6 November 2019, the Court of Appeal issued the Order by Lord Justice Irwin refusing permission to appeal, giving as reasons:

> 'The judge made a careful assessment of the facts. He was entitled to reach the conclusions he did as to the credibility of the Applicant. He allowed for the possibility of the foreclosure of the mortgage. There was no error of law and there is no arguable basis of appeal. This Applicant is entirely the author of his own misfortune.'

Contempt of Court proceedings

59. The date for compliance with the injunction order was no later than 25 April 2020. There has been no compliance with the injunction order. It is understood that Mr Wildin was due to appear in a set of proceedings for contempt of court on 24 and 25 June 2021.

Appellant's Tax Affairs

VAT Registration and invoices

60. On 13 August 2013, Mr Wildin registered for VAT by submission of Form VAT1, the relevant boxes for '*Voluntary Registration*' and '*Intend to make taxable supplies in the future*' were ticked. Mr Wildin stated that he was registering as sole-proprietor with the trading name as 'Forest of Dean Luxury Holidays'; he gave 'Luxury holidays' as the business description.

61. On 13 August 2013, two invoices were issued by Forest Dean Luxury Holidays to PJ and EJ Wildin (the appellant's son and daughter-in-law) and contain the following details:

(1) The first invoice was for '*Five Year advance charge usage for leisure facilities for Yourselves, your parents and your children*' in the sum of £10,000, with VAT at £2,000;

(2) The second was for '*Storge of Goods*' in the sum of £397.42 and VAT at £79.49.

Incorporation of two companies

62. On 15 August 2013, the appellant incorporated Forest of Dean Luxury Holidays Limited (**FDL-Holidays Ltd**). From HMRC's records, it has never submitted a Corporation Tax return.

63. On 14 August 2014, almost exactly a year after the first company was incorporated, the appellant incorporated another company by the name Forest of Dean Luxury Homes Limited (**FDL-Homes Ltd**).

VAT claims on input of construction costs

64. On 7 January 2014, the appellant submitted his first VAT return for the period from 13 August to 30 November 2013 with declared sales of £10,397 and purchases of £17,592. Subsequent VAT returns have resulted in substantial net repayments as input tax arising from the construction costs of the Sports Complex, and latterly the renovation of Number 24 exceeded the output VAT. The turnover of £10,397 was the combined total of the two invoices rendered to PJ and EJ Wildin on 13 August 2013 set out at §61.

65. Between 28 February 2014 and 31 January 2015, Mr Wildin issued invoices to Wildin & Co for the storage of records, culminating in an invoice dated 31 July 2015 for a payment of £120,000 plus VAT for the 'storage and management' of records for a ten-year period, 'paid upfront'. In the first meeting with HMRC in June 2015, Mr Wildin said that Wildin & Co's records had been stored at Numbers 30 and 34. In October 2015, when being interviewed under caution, he said that the records had also been stored at Number 24 and latterly at his house Altea (Number 24A).

66. The schedule of input VAT claim for the quarter to 31 May 2015 listed expenditure incurred in connection with the Sports Complex, such as:

(1) Dynamik Sports Surfaces for £690, Gloucester Glass for £1,128; and payments to carpenters and builders.

(2) Five utility bills from Npower were included: (a) £796.47 and (b) £613.62 on 18 May, plus three more Npower bills as having been 'missed' from previous quarter: (c) 10 December for £655.34; (d) 13 February for £309.51; (e) 16 November for £342.57.

(3) A big sum of expenditure included in the VAT input schedule was dated 31 May to Expresser Ltd for £26,400 (gross) and £4,400 as input VAT claimed. (It is unclear what the relevant supply from Express Ltd was.)

67. The larger sums of input VAT claims relate to the following quarters:

(1) Period 05/14 input £49,410; output £1,000

(2) Period 08/14 input £24,863; output £1,000

(3) Period 11/14 input £26,909; output £800

(4) Period 02/15 input £18,780; output £1,600

(5) Period 06/15 input £11,313; output £24,000 (for 10-year storage £120,000)

(6) Period 02/16 input £10,416; output £13,000 (first default, see §§71-72)

VAT invoices for record storage

Invoices to Wildin & Co for storage

68. Apart from the invoice for 'Storage of Goods' rendered to PJ&EJ Wildin for £397.42 on 13 August 2013, the following VAT invoices were rendered to Wildin & Co by Forest of Dean Luxury Holidays with the address of Altea, and Mr Wildin being the named proprietor.

Date	Description of supply per invoice	Net	VAT
28/02/2014	*To the storage of files during the period ended 28th February 2014*	10,000	2,000
31/05/2014	*To the storage of files during the three months ended 31st May 2014*	5,000	1,000
31/08/2014	*To the storage of files during the three months ended 31st August 2014*	5,000	1,000
31/01/2015	*To storage of files*	8,000	1,600
31/07/2015	*To storage and management charges at £12,000 per annum for the Ten year period of the agreement*	120,000	24,000
	Total to Wildin & Co	**£148,000**	**£29,000**

Ten-year agreement with Wildin & Co in July 2015

69. A document purported to be 'a ten-year agreement between Wildin & Co and Forest of Dean Luxury Holidays in connection with file storage and file management' states as follows:

> 'It is agreed that Forest of Dean Luxury Holidays will provide secure storage and management of files and paperwork *as set out in the attached documents.* … These files shall be made available to Wildin & Co within twenty four hours of being requested, and will be delivered and restored at no additional cost. …
>
> The charge per annum shall be £12,000 (Twelve Thousand Pounds)
>
> Monies have been withdrawn from the Wildin & Co practice and used within the Forest of Dean Luxury Holidays business and therefore the invoice now raised is to be treated as already paid as part of those monies.' (italics added)

70. The purported ten-year agreement was dated '31st day of July 2015' with parties to the agreement for signature listed as: (i) GM Wildin for Forest of Dean Luxury Holidays; (ii) GM Wildin on behalf of Wildin & Co; (iii) R L Lewis on behalf of Wildin & Co.

71. None of the parties' signatures are recorded on the copy of the agreement. The agreement referred to terms of the provision of the supply 'as set out in the attached documents', but none of these attached documents to be read in conjunction with the agreement are produced.

Further sales after the 10-year agreement

72. In addition to the invoices (included in the bundle) tabulated in the bundle, there would appear to have been further invoices (not produced) rendered to Wildin & Co, as indicated by the Output VAT schedules in VAT return periods 02/16 and 02/17 (all annotations such as '(no invoices raised)' are original; bold type added):

For quarter 1/12/15 to 28/2/16 Output VAT

Date	Gross	VAT	Net
31-Oct	180,000	30,000	150,000
31-Jan	42,000	7,000	35,000
28-Feb	-144,000	-24,000	-120,000
	78,000	13,000	65,000

For quarter 1/12/16 to 28/2/17 Output VAT

Date		Gross	VAT	Net	
31-Oct	**Wildin & Co**	108,000	18,000	**90,000**	
23-Dec	Lettings	900	150	750	(no invoices raised)
01-Dec		1,200	200	1,000	(no invoices raised)
		110,100	18,350	91,750	

Default surcharge

73. For period 02/16, the input VAT claimed was £10,416, against the output VAT payable of £13,000, leaving a VAT liability of £2,584, which was unpaid, and the appellant entered the default surcharge period. The second default occurred for the period 05/16, where the net VAT payable was stated to be £467.35, and did not lead to a surcharge at 2% as it falls below the *de minimis* amount.

74. For period 02/17, the input VAT claimed would appear to be £2,311.50 against the output VAT due of £18,350, leaving an output VAT liability of £16,038.50. A surcharge at 5% of the VAT payable results in the £801.92 under appeal.

75. The output VAT liabilities stated for the three periods remain outstanding.

Unaudited accounts for three accounting periods to 30 September 2016

76. Included in the bundle are accounts prepared by Wildin & Co for Mr Wildin trading as Forest of Dean Luxury Holidays for the three accounting periods which are summarised below.

		Year ended 30/09/2016	**Year ended 30/09/2015**	**Period 13/08/13 to 30/09/14**
Sales		26,600	22,500	27,747
Rates & Water		1,399	878	1,540
Insurance		34	0	0
Light & Heat		7,973	9,735	1,566
Repairs/renewal		0	0	340
Sundry expenses		792	0	1,755
		10,198	10,613	5,201
Loan interest		7,650	8,550	9,805
Net Profit		**8,752**	**3,337**	**12,741**

Tax Returns for three years from 2013-14 to 2015-16

77. Mr Wildin's 2013-14 Income Tax Self-Assessment (SA) return was filed on 30 January 2015 included a large claim of capital allowances. The return entries are as follows:

(1) An alleged trade in the nature of '*Holiday business*'

(2) The name of the business: '*Forest of Dean Luxury Holidays*'

(3) Date of commencement of the trade: *13 August 2013*

(4) The first accounting period to *30 September 2014*

(5) The turnover stated for the accounting period: *£27,747*

(6) Revenue expenses claimed: *£15,006*

(7) Total claim of capital allowances: *£100,452*

(8) A net loss for tax purposes for the period to 30 September 2014: *£87,711*

(9) Apportionment of tax loss for the first basis period to 5 April 2014: *£50,000*.

(10) Rentals totalling £26,900 from three properties, including Numbers 30 and 34.

78. The 2014-15 SA return was filed on 27 January 2016 with the following entries:

(1) For the alleged holiday business, the same accounting period as for 2013-14 return, being *13 August 2013 to 30 September 2014* with the same net loss calculation;

(2) The basis period was a six-month period from *6 April 2014 to 30 September* 2014;

(3) The claim of remaining loss of *£37,711*;

(4) No property pages were completed for 2014-15.

79. The 2015-16 SA return was filed on 31 January 2017 with the following entries:

(1) Accounting period: *1 October 2014 to 30 September 2015*

(2) Basis period: *identical to accounting period*

(3) Turnover: *£22,500*

(4) Expenditure: *£19,163*

(5) Capital allowances: *£188,266*

(6) Net losses for tax purposes: *£184,929*

(7) Election under s 64 ITA to utilise loss against other income: *£50,000* (being the maximum permitted under s 24A ITA)

(8) No property pages were completed for this return. Rentals from Numbers 30 and 34 amalgamated with the alleged trading income from (a) record storage, (b) hire of the Sports Complex to son and daughter-in-law.

80. By letter dated 15 August 2017 to HMRC, Mr Wildin gave the following analysis as to how the turnover of £22,500 for the year to 30 September 2015 was arrived at, being:

(1)	Hire of Sports Complex (one-fifth of £10,000)	2,000
(2)	Storage charge to Wildin & Co	12,000
(3)	Rent Number 30	6,600
(4)	Rent Number 34	1,900

Enquiries into the appellant's tax affairs

Opening of enquiries

81. In November 2014, around the same time as the Council's site visit and the video interview in relation to the planning dispute, Officer Hall was asked to look into the tax affairs of Mr Wildin following several newspapers reporting on the building of the 'mini Las Vegas' complex at his home and the subsequent dispute with the planning authority.

82. Mr Wildin was known to HMRC as an accountant operating in a partnership known as Wildin & Co. Officer Hall's initial concern was that Mr Wildin had claimed in the newspapers that the Complex was built for his family and was private, but the costs of the development would appear to have been claimed in his VAT returns.

83. On 21 January 2015, Officer Hall opened an enquiry under Code of Practice 8 (COP 8) and s 9A TMA into Mr Wildin's Self-Assessment return for the year ended 5 April 2013 (prior to the commencement period of the alleged trade). The COP 8 procedure was adopted for enquiries where significant losses of tax are suspected, possibly through deliberate action on behalf of the taxpayer. On 21 January 2015, Officer Hall also opened an enquiry under COP 8 and s 12A TMA into the Wildin & Co partnership return for the year ended 5 April 2013.

84. On 30 January 2015, Mr Wildin filed his SA return for 2013-14, which included the claim of £100,452 for capital allowances. On 19 February 2015, Officer Hall opened a COP 8 enquiry into both Mr Wildin's SA return, and the partnership return for the tax year 2013-14.

Contact the Council regarding planning dispute

85. In April 2015, Officer Hall contacted the planning department of Forest of Dean District Council in relation to the appellant's planning appeal against the enforcement notice served by the Council. By this stage, the Planning Inspectorate's decision of 19 February 2015 had been released to vary the Enforcement Notice such that the enforcement was for the demolition of the Sports Complex within two years. Officer Hall was concerned that the appellant had stated in the planning dispute that the Sports Complex was purely for personal use, while his SA returns and VAT returns had claimed deductions for the construction costs of the Complex.

First meeting and referral to Criminal Investigation

86. On 4 June 2015, Officer Hall attended the offices of Wildin & Co with a colleague, and interviewed Mr Wildin, who stated at this meeting that: (a) he had deliberately stressed to the newspapers that the Complex was for private use in an attempt to facilitate the resolution of his ongoing planning dispute; (b) he intended to let out 24 Meendhurst Road as a holiday let with access to the Complex for £3,000 to £4,000 a week, and his own private residence occasionally; (c) he confirmed that all capital allowances claim related to the Complex; (d) that rent was paid by the partnership for storage of business records at Numbers 30 and 34, and this has now ceased because the properties were tenanted, and most of the records have been shredded.

87. Officer Hall took the view that as an accountant, Mr Wildin would understand the difference between private and business expenditure; his actions appeared fraudulent, and the case was referred to Criminal Investigation ('CI') in July 2015 under the lead of Officer Evans.

88. Mr Wildin informed Officer Evans by email on 23 September 2015, attaching 'projected income' of the holiday let business, which he claimed would result in tax revenue in excess of £35,000 for VAT and £45,000 for income tax on the profits.

89. On 1 October 2015, HMRC had a meeting with the Council's planning control to discuss the planning dispute of the Sports Complex development. It became obvious to HMRC that nowhere in any correspondence or planning documents had it ever been mentioned that the facility would be anything other than for personal use; and no mention of business activity ever.

Interview under caution

90. On 7 October 2015, Mr Wildin was interviewed under caution at Cheltenham Police Station by two officers from Criminal Investigation, one being Officer Evans. Prior to the interview, HMRC had obtained a statement by Mr Wildin and a Statement of Case by his counsel (Mr Kendrick) in relation to the planning dispute. From the transcript to the interview, Mr Wildin was recorded to have stated the following in relation to the Sports Complex:

(1) 'the sports facilities at the back are nearly finished, they're like 99% finished so come the beginning of 2016, we'll be ready to go [with the letting business] …'

(2) When asked why the national newspapers were quoting Mr Wildin as saying 'this [development] is for my family I'm doing this for my family', Mr Wildin replied that because it has to be 'for the incidental enjoyment of the house', and:

> 'For me not to need the planning, once the building's there it can be used for any purpose right. As long as you then don't use it for … a club … because it's …commercial …But you don't have to apply for planning to have it as holiday lets because it's part of the house …'

(3) When asked what he had told Officer Hall in an earlier meeting:

> '… you described the development [to Officer Hall] as private for family use because you knew definitely you would not get planning permission if you stated the purpose was commercial.
>
> Wildin: I no, well I may have said that. … *I wouldn't have got planning consent for whatever purpose…. So I went on the fact I didn't need planning consent and all you have to do then is pass these five tests*.' (italics added)

91. In relation to the purported letting business, Mr Wildin stated in the interview that:

> '… to be a holiday let you have to provide more than just providing the house, right, which I was intending to do, and the sports facilities I saw it actually made it a business.'
>
> 'I've got somebody come to see me from Skyes Rentals in the next couple of weeks to say whether the £4,000 a week I'm thinking of is enough, …'
>
> '… from 1st of October 2013, that's when it became a business venture. So there's been rental income going across from Forest of Dean Luxury Holidays to Wildin & Co for whatever space and whatever was used at the time right.'
>
> 'the sports facilities are … like 99% finished so come the beginning of 2016 … we'll be ready to go … Skyes … don't think that [£4,000 a week is] going to be enough … The turnover … projections of what I consider it to be and in my opinion … there should be about £234,000 income [per annum].'

92. Regarding the supply of storage facility to Wildin & Co, Mr Wildin stated:

> 'Going back nine months ago [*i.e. January 2015*] we had a big clear out and decided we were only going to keep … probably 65% of what we kept in my houses … we shredded. So at my house there's still now a substantial amount of stuff in proper storage cabinets… and there's a rent charged for that alright.'

93. Regarding the supply of sports facilities to his son, Mr Wildin stated:

> '… it was never, never ever was intended to be a charge for the general use of the public. My son paid an upfront payment in … 2013 for five years for the family, which is himself, his wife and two children, myself, my partner and his … two sisters and their family to use the sports facilities and it's £2,000 a year. He paid 10,000 upfront right to help with the cost of things plus VAT to cover that day … that's all gone through the bank … to my accounts etc, etc.'

Officer Ferguson took over enquiry

94. On 13 January 2016, Officer Ferguson took over the enquiry from Officer Hall. On review of the documents available to him at that point, namely: (i) Officer Hall's notes of meeting on 4 June 2015; (ii) the verbatim transcript of the interview under caution on 7 October 2015; (iii) the business projections and invoices provided by the appellant; (iv) the retrospective planning applications for the Sports Complex, and (v) the associated press articles, Officer Ferguson identified the areas of concern to be:

(1) All sales to date were to connected parties with no apparent work done to establish if the rates were at arm's length;

(2) The Sports Complex did not have planning permission and had a demolition order against it;

(3) Mr Wildin's consistent representations to the Council and to the press that the development was to be used entirely by himself and his family, with no indication to exploit it commercially, nor any application for planning permission for business use.

95. By letter dated 26 February 2016 to Mr Wildin, Officer Ferguson set out the main areas of HMRC's concerns and requested information to be provided, to which Mr Wildin responded on 9 March 2016 in which he asserted that he intended to launch his own website to commence lettings 'as soon as the six bedroom house is finished, within the next two or three months'. On the basis of the income projection of the letting business attached, Mr Wildin asserted that it was clear that it was a 'commercial venture', and 'HMRC are likely to receive in excess of £2 million in VAT and profits tax over the next twenty years'.

96. In evidence, Officer Ferguson stated that he 'did not think these forecasts looked realistic': (i) the amounts of rental appeared to be 'overly optimistic', and (ii) the additional expenditure costs appeared to be 'very rough, round-sum estimates'; (iii) 'no real effort' appeared to have been put into these forecasts; (iv) no evidence to substantiate the figures; (v) no letting had begun despite the former assertion of having the two properties at 30 and 34, and Number 24 available to let 'come the beginning of 2016'; and that he had 'doubts about whether the appellant was following his business plan'.

Correspondence regarding Sykes Holiday Cottages

97. To establish the legitimacy and timing of the appellant's intentions to exploit the sports complex commercially, Officer Ferguson wrote on 10 May 2016, for a copy of all the correspondence between Mr Wildin and Sykes Holiday Cottages concerning the letting of his properties, to verify the extent Mr Wildin had sought advice regarding the value of rentals that could be achieved and any agreement relating to the marketing of the properties as holiday lets.

98. In this letter, Officer Ferguson also highlighted the fact that Mr Wildin's VAT return for the period 08/15 showed output VAT due of £24,000, which indicated a net sale of £120,000, and asked for copies of the VAT account, purchase and sales day book from period 11/14 onwards, and bank account statements of FDL-Holidays Ltd.

99. By letter dated 17 May 2016, Mr Wildin confirmed that FDL-Holidays did not have a bank account, and that the only agreements entered into by FDL-Holidays were with his own family and his partnership. The fact that over the course of the investigation there were no additional sales to anyone other than family members strengthened Officer Ferguson's belief that the appellant was not making any serious effort to make a profit from the Sports Complex.

100. Mr Wildin attached his email correspondence with Sykes, which showed that it was on 19 October 2015 when he approached Sykes. Officer Ferguson noted that the date was some months *after*: (i) Officer Hall had opened enquiry, (ii) the first meeting on 4 June 2015; (iii)

the interview under caution on 7 October 2015. The very timing of approaching Sykes suggested to Officer Ferguson that it was 'an afterthought' on the appellant's part, necessitated by HMRC's enquiries, 'in order to justify his position', and to give his business plan credibility.

101. Officer Ferguson also noted that the appellant's rental forecast appeared to be 'overly optimistic' compared to Sykes' advised figures, which were sent by email on 28 and 30 October 2015. The holiday letting income projections are set against band-periods designated as A to I plus Xmas, New Year, and the range of rentals *per week* for each property is stated as follows:

(1) Number 34 from £304 to £606; with Hot Tub, from £384 to £686; achieving lets of 30 to 35 weeks in total in a year;

(2) Number 30 from £264 to £527, with Hot Tub, from £329 to £592; achieving lets of 30 to 35 weeks in total in a year;

(3) Another pricing table is included but unspecified as to which property it relates, (probably for Number 24 *cum* Altea with Sports Complex) from £1,960 (for 8 weeks) to £3,715 (for the 2 weeks X'mas and New Year); achieving a total of 40 weeks in a year.

VAT questions remain unanswered

1. On 28 July 2016, Officer Ferguson wrote to query Mr Wildin's VAT return for 02/16, which declared output VAT of £13,000 against input VAT claimed of £10,416. The storage fee to Wildin & Co would appear to have increased from £120,000 to £150,000, plus a further sale of £35,000. The questions asked by Officer Ferguson in this letter are as follows:

> '… you said in the period 08/15 you Wildin & Co entered into an agreement with yourself for the storage of the records for ten years and charged £120,000 + VAT for this. The agreement showed this amount as being treated as paid as Wildin & Co had paid for the sports complex. Then in the period ending 02/16 there appears to be a refund alongside two other large payments of £150,000 +VAT and £35,000 + VAT. Please explain these transactions and if any money was actually paid by Wildin and Co to yourself.'

102. Officer Ferguson asked for a reply by 2 September 2016, but he never received a response to these questions from the appellant.

Second Meeting in October 2016

103. Officer Ferguson agreed to meet with Mr Wildin on 10 October 2016, which took place at the premises of Wildin & Co. HMRC officers (Ferguson, Hall and another) attended the meeting. The meeting notes recorded salient aspects of what Mr Wildin (as GW in the notes) told HMRC at that juncture, which were reiterated in Mr Wildin's oral evidence.

The membership invoice for the Sports Complex

104. In relation to the invoice rendered to his son and daughter-in-law for £10,000:

(1) His daughter-in-law won £1 million on the national lottery and could afford the payment for the whole family.

(2) GW had issued an invoice for the £10,000, but there was no other documentation setting out the terms and conditions of the subscription.

(3) The £10,000 received by GW is for a £2,000 annual membership to cover 5 years, and he said that was the amount comparable to fees charged by his clients running similar businesses (though no such evidence was produced to substantiate the claim).

The intention to trade with his 'estate'

105. The letting business of Number 24 with the use of sports complex facilities, whereby:

(1) GW confirmed that the 6-bedroom house had not been let yet, and that it would be ready for letting from 1 December 2016.

(2) The Sports Complex is approximately 10,000 square feet in area and was built predominantly on the garden of Number 24 with a small proportion reaching the garden of Altea at Number 24A.

(3) GW advised that his family can access the complex through his own back garden. There is a separate entrance to people who rent the property.

(4) GW is looking at the possibility of letting the property to corporate customers during the week and expects to achieve around £4,000 to £6,000 per week in rental.

(5) GW believed that it was not a furnished holiday let, as he was offering more than just a property for let, and would be willing to offer wine, croupiers for the casino tables and chefs. GW described it as like a hotel.

(6) There are no plans to let members of the general public use the complex facilities on a commercial basis as this would cause planning issues over parking etc.

(7) Plan to only allow people renting the 6-bedroom house (Number 24) access to the sports complex by paying an inclusive amount for the property and the use of facilities.

(8) If the cottages (Numbers 30 and 34) are to be used on a corporate package (such as conferences, away days, team building events) to accommodate additional guests, then the sports facilities would be available to those individuals staying in the cottages. (However, if the cottages were rented out to separate parties, they would not be able to use the sports facilities.)

(9) GW confirmed that the holiday let business had not started yet and none of the properties had been let on a short-term basis. To date there had only been long-term letting on six-month tenancy agreements and storage for Wildin & Co client records.

(10) GW considered that the facilities were unique and were one trade under the umbrella of Forest of Dean Luxury Holidays, which he referred to as an 'estate'.

The record storage business

106. During the meeting, GW said that the properties were being paid for providing a storage facility to Wildin & Co, which was not just storage and required Amanda (his partner) and Clive (the maintenance man) to retrieve files and deliver to the office as required. He maintained that it amounted to a trade, and not merely service.

Brief history of Expresser Limited

107. As related by Mr Wildin during the meeting:

(1) Expresser was incorporated in 1981 and the directors and shareholders were originally GW and his brother.

(2) Expresser owns the King's Building in which Wildin & Co partnership is based and the several other properties on the site.

(3) Shares were then transferred to the children of GW and his brother who each has three children at the time when the children were only minors.

(4) About 15 years ago it was decided to split the assets of the company. GW's children retained King's Building and his brother's children took ownership of the other properties in return for shares in Expresser Limited.

(5) GW's three children then provided professional services through Expresser Ltd.

Financial arrangements with his children

108. Some aspects of Mr Wildin's financial arrangements with his adult children were recorded in the meeting notes, as concerns the children's provision of their services to Wildin & Co, and the firm's provision of vehicles to each of the children.

(1) GWs children provided professional services through Expresser Limited. An annual amount for the services of Expresser is negotiated in advance, but no documentation is held. GW said Mr Lewis has to agree the price as he is the other partner.

(2) The adult children worked almost exclusively for Wildin & Co. GW said they did the other odd bit of work. The price set for the work they invoiced is based on the cost of employing similar skilled people directly by Wildin & Co.

(3) The children are listed as advisers on the partnership's letters.

(4) GW advised that he provided vehicles for his children on the basis that they were required to carry out the work for Wildin & Co, which owned the vehicles and that the agreements would be in the practice name or his; that his children could choose the car but GW set a budget of around £35,000. (By Mr Wildin's correction, the figure of £35,000 was for cars most recently purchased; in earlier years they were up to £55,000.)

(5) GW confirmed that the cars were not returned on P11D as a benefit as they were not company vehicles. Private usage adjustment on capital allowances at 20% was made to these vehicles provided to his children.

(6) GW advised that the vehicles all had some personal use, and they were all individually insured, and that his son arranges the insurance for the children's cars, which is in the children's names. GW is a named driver on all of the vehicles.

(7) GW confirmed that Wildin & Co pays for insurance, and for the fuel in relation to the vehicles provided to the children.

Appellant's corrections to the meeting notes

109. Mr Wildin was advised that meeting notes would be sent out to him for him 'to correct anything he disagreed with in the notes'. Mr Wildin advised that he would not sign a copy of the notes to agree their contents in any event, but would make corrections. On 13 October 2016, Officer Ferguson wrote, enclosing two copies of the meeting notes, and asked Mr Wildin to let him have any amendments or comments to the notes by 25 November 2016.

110. On 19 October 2016, Mr Wildin responded with his corrections, and we note the following corrections.

> 'Note 8: GW stated that as part of the booking clients would have many other things than just occupation of properties, which would include such things as golf, admission to local tourist attractions, a tour of the private car collection, fishing and cycling, and daily maid service if required. Other things such as chefs, and croupiers would be offered at additional cost. A total of 50 bottles of wine would be in the main property which could be drunk by the occupants, and they could either replace on a like for like basis before they left, or the cost of the wines drank would be deducted from their deposit payments. There would be no drinks licence and therefore there could be no sale of alcohol ...
>
> […]
>
> Note 62: The £35,000 figure [as the budget for his children's vehicles] was for cars most recently purchased, in earlier years they were up to £55,000.'

111. There were further corrections being made to the meeting notes, as per letter to Officer Ferguson of 28 November 2016, in which Mr Wildin stated under the subject heading of:

> ‘Children’s vehicles
> We say children’s vehicles, but the ages of the people are 40, 37 and 34. When each of them became 17 years of age I bought them a car, and every car which they had for themselves since then has been purchased by myself/my firm and all the running expenses paid likewise. Other cars for their spouses they have purchased themselves.
>
> Initially the children’s vehicles were not used for the business and therefore they were all funded by myself through my drawings … when they each became qualified and their business travel mileage increased their vehicles were then bought through the business, with percentages adjusted annually in respect of capital allowances and running costs to cover non business travel. What continued was therefore no different to what had taken place since they were 17 years of age, I continued to pay for their private motoring expenses.’

Other aspects of financial arrangements with children

112. The transcript of the evidence given by Mr Wildin at the High Court hearing on 20 September 2018 before Jarman J recorded that in the year to 31 March 2017, Wildin & Co paid £285,000 to Expresser Ltd, which Mr Wildin stated to be ‘for the services of the three qualified people’ (his adult children), and Mr Wildin’s own share of profit from Wildin & Co in the year to March 2017 was £116,000.

113. An arrangement in 2009 took place between Mr Wildin, his accountancy firm, and his children as shareholders of a company which then went into liquidation, with the result that £600,000 was extracted from the partnership which was used to fund the development. The summary of that arrangement is at [32] of Jarman J’s judgement:

> ‘[Mr Wildin] sold [his accountancy business] for a sum of £1.6 million to a company of which his children were the shareholders. Part of the deal involved the allocation of preference shares to him. The busines continued …. In 2009 that company went into liquidation, but Mr Wildin says he drew out £600,000 which he used to fund the development in question. He purchased the goodwill of the business from the liquidator for the sum of £1 and continues the business. On its website it is described as having a wide client base in the UK and Ireland and the largest and most successful accountancy practice in Gloucestershire with a growth rate which is unsurpassed.’

114. The Land Registry form TP1 for transfer of *part* of registered title was lodged to evidence the appellant’s transfer of 20% of his interest in 24 Meendhurst Road to Expresser Ltd on 21 January 2014 for consideration of £39,950.

The varying accounts of the trading entities

115. As set out earlier, two companies FDL-Holidays Ltd, and FDL-Homes Ltd were incorporated in August of 2013 and 2014 respectively. Varying claims in relation to these two companies in connection with the purported trade were made by the appellant at different junctures in his correspondence with HMRC during the course of enquiry.

(1) By letter dated 28 November 2016, the appellant stated to HMRC that:

> ‘[FDL- Holidays Ltd] has entered into long term agreements with myself and Expresser Limited for the three properties which are owned, two by myself and one jointly with Expresser limited. The agreements are for twenty years, there are rent reviews every five years … and the rents are £18,000 pa for No. 24, £6,000 for No. 30, and £6,500 for No. 34 … *It will be this company which will be doing the holiday lets*.’ (Italics added)

(2) By letter dated 12 January 2017, the appellant informed Officer Ferguson that:

> 'The actual rate for the use by the holiday makers is now based upon an agreed percentage of total monies paid by them for the occupancy of the house, other holiday facilities supplied, use of the sports complex etc. … Some holiday lettings have now taken place and the monies charged have been divided as follows:
>
> | | |
> |---|---|
> | Forest of Dean Luxury Homes Limited (supply of [Number 24]) | 40% |
> | Forest of Dean Luxury Holidays Limited (supply of services) | 20% |
> | G M Wildin t/a Forest of Dean Luxury Holidays (usage of sports complex) | 40%' |

(3) By email on 7 November 2017 to Officer Ferguson, the appellant stated:

> 'Just to make sure that there is no confusion. The letting income has been apportioned between, [the three entities] in accordance with the separate supposed supplies … this was agreed, is SET IN STONE NOW, …' (Capital original)

116. In relation to these two companies, however, Mr Wildin's evidence at the High Court hearing on 20 September 2018 as recorded in Jarman J's judgment at [31] was:

> '[Mr Wildin] and his grandchildren are the shareholders in two luxury holiday companies, but he says that these have not traded.'

Absence of infrastructure of a business being carried on

Websites for the letting business

117. Mr Wildin advised at the October 2016 meeting with HMRC that he was in the process of setting up a website with the address: www.forestofdeanluxuryholidays.co.uk. Officer Ferguson has periodically tested this web address throughout the course of the enquiry, and it has never opened as an active website, and would appear to have been dormant throughout.

118. Mr Wildin's witness statement dated 29 July 2019 exhibited pages from a draft website at http://forestofdeanluxuryholidays.promotemyplace.com, which has not gone live either.

PayPal payments system

119. In his witness statement of July 2019, Mr Wildin claimed that he had 'set up through an agency a "paypal" payments system for clients to be able to book and pay online'. He continued by stating that the PayPal system 'has existed ready to launch as soon as the planning issue is resolved'. No evidence has been produced in relation to the existence of the PayPal account.

Insurance documents

120. The insurance policy for Altea was with NFU Mutual Direct, and the Certificate of Employers' Liability Insurance issued for the year to 16 September 2017 stated that there was 'Mid-Term Alteration' to take effect from 3pm 16 September 2016. The premium was at £74.82 inclusive of insurance tax of £6.40, and the property details are outbuilidings to Altea at Number 24A, with cover being for 'accidental loss or damage' with replacement cost of £720,000. Other relevant details on the policy include:

> 'Type of property – outbuildings (date of the buildings – 2011)
> Property use – Only as Home/Private Use
> Occupier – you and your family
> Covers not included - Holiday accommodation – Not insured'

121. Another insurance policy document issued on 16 September 2016 was for Number 24, with premium being £495 for buildings, £167 for contents plus 'holiday accommodation' cover of £126.22. The following details are stated on the policy documents for Number 24:

> 'Number of bedrooms – 3
> Property ownership – Owned outright by you
> Property use – Self-Catering Holiday Accom

Occupier – paying guests
Maximum number of letting rooms – 3

The cover for this property has been extended to include the use for Holiday accommodation'

122. The Policy Schedules are to be read in conjunction with NFU Mutual's Policy Summary for Home and Lifestyle Insurance with some of the key facts being:

(1) Employers' liability defined as: 'Limit – the amount shown on your quotation and /or schedule including legal fees; Your legal liability following death, injury or illness to your employees, working solely for the benefit of your family, provided they are permanently resident in the territorial limits.'

(2) Key Exclusions and Limitations as concerns Liability re: Holiday accommodation: 'Liability caused by the use of any swimming pool, trampoline or other play equipment'.

Review conclusion letters

Income tax

123. The review conclusion letter in relation to the closure notices and Sch 24 penalties was issued on 14 September 2017.

Penalties

124. In Officer Ferguson's letter of 9 January 2017 to Mr Wildin, he set out the assessment of the penalty range at 35% to 70% for 'unprompted disclosure' and 'deliberate but not concealed behaviour', and gave an overall 95% mitigation to reach a penalty percentage of 36.75%. The reason for his penalty assessment was related in the following terms:

> 'As you are a highly qualified individual, I believe the mistakes were made due to deliberate behaviour. It is my opinion that you have attempted to deliberately mis-describe transactions in a way that was designed to mislead HMRC, by including income from your daughter-in-law as a trading transaction. Further to this you have claimed deductions and VAT repayments which as a qualified professional you must have known that you are not entitled to, due to the asset being used personally.'

125. On review, the officer increased the 'reductions for disclosure' to 100%, on the basis that if the disclosure was 'unprompted' as assessed by Officer Ferguson, then full reductions are due. The overall penalty percentage is reduced to the minimum of 35% for 'deliberate and not concealed' action which led to the inaccuracies in returns.

Appellant's witness evidence at this hearing

126. In his witness statement, Mr Wildin itemised the facilities for holiday makers to enjoy in addition to the physical facilities to be: (i) maid service in the swimming pool area, gym showers, saunas and hot tubs, (ii) maid service for non-living areas in sports and complex, car museum, gardens and play areas, (iii) maid service to change towels, (iv) complimentary flowers and arrival pack of grocery, wine and beer available at cost, (v) arrangements for hairdressers and beauticians to visit Altea to provide services, (vi) personal trainers to attend the gym and assist with keep fit and (charged directly), (vii) trips in the vintage cars, (viii) arrangements for take away services from local food establishments, (ix) arrangement for chefs and caterers when required.

127. The appellant's replies to questions during cross-examination included the following:

(1) Asked about the record storage activity, what percentage of records did he remove from the practice, he said: 'a large proportion'; that the storage service was comparable

to a 'commercial provider' to store customers' contents with 'alarm system in secured locked places'.

(2) Asked where these secure locked places are, he said: 'different places at different times'; at one point, he said 'There is not a lot here'; the percentage of 65% space to storage and 35% for holiday let was given at one point; when asked about what data-base system he ran for record retrieval, no particulars could be offered.

(3) Asked if he has been trading with himself since Mr Lewis left the partnership of Wildin & Co in April 2018, leaving him as the sole proprietor of the accountancy business, he said there was 'not a lot more recent stuff'; and when asked about the Ten-year agreement, Mr Wildin said he 'can't remember back five or six years ago'.

(4) When asked about his involvement in the storage business, he said 'I get up at 5am and work 12 hours a day, can't have anything to do with the storage business', that the 'Clive or Amanda [his partner] would take the records down to the office'.

(5) When asked why he stated at the High Court that 'We're the only people that use [the Complex]', he said: 'I did not say the Holiday Let business because it would not help the case – and it would just throw up any dispute into the area.'

(6) Asked about the paying guests to the Holiday business, he said: 'Girls Reunion, friends of daughters, ten of them booked into the hotel every 3 or 6 months, so they come here and pay and rent the place for a one-night stay here'; next day would be Sunday, and the children came the next day with their husbands, and would use the hot tubs.

(7) In relation to the supposed holiday business, Mr Wildin said in oral evidence that he could let out Altea as he has a property in Tenerife; (this he owned for more than 25 years and was used for family holidays and not rented out). He also said that he and his son would provide transport to take guests on a race day in Cheltenham, which is about an hour's journey from Altea, (a round trip of two hours).

No business plan

128. At the October 2016 meeting, Mr Wildin confirmed to HMRC that he had no business plan in place to show them. The Tribunal asked why there was no business plan, income forecast, budgeting in writing for his trading activities as befitting any business at inception, he replied that it would have been 'incredulous' for other men of business not to have such projections in writing, but he happens to be a chartered accountant with '40 years of experience and 3,000 clients', and does not need a business plan to guide him.

Partner's health

129. In the exhibits included with his witness statement of July 2019, Mr Wildin included the discharge letters from hospitals in relation to his partner's health condition. The procedural history to the progress of this appeal to its scheduled hearing shows that Mr Wildin applied for a stay on 17 August 2018, and on 18 October 2018 due to his partner's health issues. In oral evidence, Mr Wildin referred time and again to his partner's serious, and continual ill health.

The statements on property usage

130. In his witness statement of July 2019, Mr Wildin stated the following:

> 'Initially a company owned by my children purchased twenty percent of [Number 24] and provided monies for it to be repaired ready for letting and since then I have had to sell the remaining interest which I had in that house. This has meant that only a small proportion of the holiday let income … had indeed arisen to date and for the last three years the house and sports complex has remaining [sic] empty apart from the sports building being used

> occasionally by myself and my family and some short-term lettings of the houses/building.'

131. In April 2021, Mr Wildin lodged additional documents near to the time of the original scheduled hearing for 19-23 April 2021 (subsequently postponed on application by Mr Wildin). These additional documents are in the main the unaudited accounts for his supposed business, and his financial analyses of figures. One such analysis is entitled '*Income from facilities per VAT Returns/Files* for the 5 years to 30 September 2018'. From December 2016 to May 2018, he claimed he had taken in money for his holiday letting business of a total of £17,316, of which £3,900 was allocated to the house, and £13,416 to the Leisure Complex.

THE APPELLANT'S CASE

132. Mr Wildin started his submissions with a recitation of the facilities in his 'estate': starting with 16 bedrooms for 33 people, 19 toilets, 13 showers (7 being steam showers), 6 kitchens, 42 dining chairs inside; 32 dining chairs outside; 2 saunas and 8 baths, all the outbuilidings to Altea, before moving on to the range of facilities of the Sports and Leisure Complex, culminating with its '16 leather fully reclinable seats' in the cinema. He said he would have his grandchildren for a few weeks in a year, and that all the facilities in his estate could not have been for private use. To any extent that it was for private use, there could have been a reciprocal charge by restricting his claims.

133. Mr Wildin relies on the authority of *Flockton* which refers to the relevant time as 'at the time' the expenditure was incurred. For VAT purposes, Mr Wildin submits that it was his declared intention to trade that determinates the VAT deductibility, and that is 'the end of the story'; HMRC cannot subject the business purpose test to a different time frame now.

134. Mr Wildin submits that he did not carry on three trades; namely: (i) property let (ii) holiday trade with ancillary services of chef, laundry, and croupier, etc. (iii) storage service, as contended by HMRC, but that it was one business, which consisted in the exploitation of his land and buildings.

135. Mr Wildin maintains that the trading activities run from his estate as 'One Complex' are: (i) storage facilities, (ii) membership to the sports and leisure facilities, and (iii) holiday accommodation. Three trading activities are being carried on as one business; and 'Amanda and Clive run it for me' as 'one team to look after all that', to carry out 'repairs of what needs to be done'; that 'later I would employ more staff' but the business is not 'at that stage' due to the planning dispute. He said: 'I am 100% sure' that there would be '52 families who can afford to pay the rent'; there are 'lots of people with lots of money' – 'I am sure I will make a fortune'.

136. He reiterates that the 'main nub of the issue' for his input VAT claim is *intention* and that is a 'subjective test'; it cannot be substituted by an 'objective test'. It is about what he intended at the time when he incurred the expenditure; that the tribunal must look at the situation at the time, what happened after the event is not relevant.

137. He asks a series of questions intended to be rhetorical: Why would two people need 19 bedrooms? Why would a six-bedroom house be left empty 95% of the time? Why would a large swimming pool paid by Expresser Ltd, now owned by Altea, not be used to carry on with the business already set up? How could anyone find that he did not intend to start the business?

138. In relation to the Injunction Order for the demolition of the Sports Complex, Mr Wildin contends that 'the Injunction Order must be illegal' and put forward his arguments why it must be illegal in relation to clause 1 (that it will be illegal for a boundary wall to be taken down); clause 2 (that he has not got the £720,000 to reinstate the 9,000 tonnes of soil dug out); clause 3 (that no contractor would take on the job) and so on.

139. In relation to the Sch 24 penalty assessments, Mr Wildin's case is that the SA and VAT returns he submitted were all accurate, and that the figures as related are borne out by his trade. On the basis that all the submitted returns in question did not contain any inaccuracies, HMRC have no case in assessing him to penalties under Schedule 24.

140. In respect of the VAT surcharge, Mr Wildin maintains that he was right to withhold payments of the VAT due for the said periods because HMRC 'owed' him VAT repayments which have been withheld. Since he was 'owed' the VAT repayments, HMRC have no basis to impose surcharge in relation to the non-payment of his VAT liabilities for later periods.

HMRC'S CASE

Income tax submissions

141. HMRC's primary position is that the appellant's expenditure on the Leisure Complex was entirely personal in nature, and therefore does not qualify as revenue deduction under s 34 ITTOA, or for capital allowances under s 11 CAA.

(1) The key test for income tax purposes is whether or not the appellant carried on a trade or business related to the expenditure: *Ransom v Higgs*. HMRC submit that there has been no trade or business related to the Leisure Complex.

(2) Even if the undocumented sales the appellant claims to have made in December 2016 and the summer of 2017 could be shown to exist, and represent payments for the use of the Complex, HMRC contend that these would not prove the existence of a trade due to the lack of commerciality of the venture as a whole.

(3) If the Tribunal concludes that the appellant has carried out such a trade, it would then be for the appellant to demonstrate that it had commenced during the relevant accounting periods. Otherwise, any expenditure on constructing and fitting out the Complex and renovating Number 24 would at most amount to pre-trading expenditure: *Mansell v RCC*. Section 57 ITTOIA and s 12 CAA provide that pre-trading expenditure is treated a deduction as if it had been incurred upon commencement.

(4) The original model (prior to the change intimated by letter dated 28 November 2016) would 'hypothetically amount to a UK furnished holiday let', and such a business would be treated as a 'single trade' under ss 323-325 ITTOIA. HMRC contend that no UK furnished holiday let commenced in the relevant periods based on obtainable facts.

(5) The £10,000 receipt from the appellant's son and daughter-in-law was neither in the nature of trade nor commercial, whether considered in isolation or as part of a wider holiday trade. HMRC submit that the receipt was 'an isolated, non-arms-length, no-profit-seeking transaction that was not even of the kind or nature that the appellant had alleged his trade intended to engage in'. A single transaction does not establish a trade: *CIR v Livingston*.

(6) HMRC do not accept that the £10,000 was a genuine private use adjustment as the appellant submits. HMRC contend that the Complex was only for private use, and there was no need for private use adjustment. Further, HMRC submit that the transaction was entered into with the intention of gaining a fiscal advantage by using the £10,000 to justify the existence and commencement of the alleged trade.

(7) In summary, HMRC submit that the appellant neither commenced nor pursued a trade, holiday business or any other qualifying activity (per s 15 CAA) during the three years of assessments ended 5 April 2014, 2015, and 2016 for the expenditure incurred in relation to the Complex and Number 24 to be relieved against income (s 34 ITTOIA) or for capital allowances to be claimed (s 11 CAA).

142. In the alternative, if the Tribunal finds the appellant had carried on a holiday trade, HMRC submit that the capital expenditure was not wholly for the qualifying activity due to a primary private purpose, and requires severe restrictions to the capital allowances claimed per ss 205-206 CAA, while the revenue expenditure was not 'wholly and exclusively' for the purposes of the trade and therefore disallowed under s 34 ITTOIA.

143. HMRC have not sought to challenge directly the claim that there was a record storage trade, as 'the net tax effect in isolation is negligible'. However, it is submitted that if there had been a record storage trade, that would be treated as a 'single trade' in its own right and separate from any holiday let business in accordance with s 127(3) ITA. HMRC submit that the appellant's 'inappropriate conflation' with the alleged record storage trade and the property income arising from the rental of Numbers 30 and 34 has led to 'losses' in excess of the £50,000 limit set by s 24A ITA in his 2015-16 SA return. That is to say, the income from those separate sources were offset prior to the imposition of the £50,000 restriction.

VAT submissions

144. HMRC accept that input tax incurred prior to making taxable supplies can be recoverable. However, it is for the appellant to demonstrate: (a) that he has made, or intended to make taxable supplies, and (b) that the VAT claimed was directly and immediately linked to those intended supplies in order to make his respective claims for input tax valid. HMRC submit that the appellant has done neither. It is contended that:

(1) The appellant has never intended to make such taxable supplies, but intended to occupy the Leisure Complex for private purposes, and did not intend to supply holiday accommodation to the public.

(2) While HMRC do not challenge the supplies made for record storage to his accountancy practice, the appellant has not demonstrated that either the Complex or Number 24 was used as part of making these supplies, nor that the renovation and building costs incurred were directly and immediately linked with these supplies of storage. Neither was there evidence to support the claim of supplies of accommodation from Number 24 with access to the Leisure Complex having been made.

(3) Further, HMRC submit that there was no supply by the appellant to his family members of access to the Leisure Complex for the same reasons that HMRC contend that the £10,000 receipt was not a trading transaction for income tax purposes.

145. As matters stand, the appellant has asserted that he leased Number 24 to F-D Holidays Ltd, which would be an exempt supply, and with the Complex being under an injunction order for demolition, the appellant could no longer hold any credible intention to ever begin making taxable supplies from either of these properties going forward.

Schedule 24 penalty submissions

146. HMRC submit that the appellant is an experienced accountant with his own practice and would be well-aware of what would and would not be deductible for income tax purposes and allowable as input VAT. HMRC contend that there was a deliberate attempt to create the impression of an ongoing commercial holiday trade when he knew none existed through:

(1) making contradictory statements to different public authorities while his intended use of the Leisure Complex was personal;

(2) issuing invoices to his son and daughter-in-law and invoices to his own accountancy partnership for record storage; and

(3) the conflation of the alleged record storage trade with what would (at most) be a holiday letting business.

147. These were deliberate actions to obtain a fiscal advantage by claiming the losses and input VAT, and the appellant continued to put in returns making the expenditure claims even after HMRC had opened the enquiries, and to mis-classify his rental income as trading income to obtain side-ways loss relief.

VAT surcharge submissions

148. HMRC submit that the appellant wrongly withheld his own, self-declared liabilities with respect to the VAT periods 05/15, 02/16, 05/16 and 02/17. The appellant has not provided a reasonable excuse for his failure to pay his declared liabilities. The refusal of earlier claimed repayments was lawful, and does not give the appellant grounds to withhold the payment of VAT in other periods.

DISCUSSION

Issues for determination

149. In relation to each of the matters under appeal, the issues for determination are as follows:

(1) Income tax: whether the expenditure and capital allowances claimed in the appellant's SA returns (2013-14 to 2015-16) were allowable as deductions; and if so, to what extent are the income tax losses resulting from those deductions are restricted from use against the appellant's other income tax liabilities;

(2) VAT: whether the appellant was entitled to claim input VAT on the construction and fitting costs incurred in relation to the Sports and Leisure Complex during the period 1 September 2013 to 30 November 2016 inclusive;

(3) Penalties: whether penalties are imposable under Sch 24 FA 2007; and if so, whether the penalties have been correctly quantified;

(4) Surcharge: whether the default surcharge should stand.

Issue 1: Income tax

Burden of proof

The validity and time limit issues

150. The closure notices for 2013-14 and 2015-16 are validly issued pursuant to s28 TMA on 2 June 2017 and 1 November 2017, on the basis that the enquiries into the SA returns for the said years were opened within the statutory time limit under s9A TMA.

151. As respects the appellant's SA return filed for 2014-15, no s9A enquiry was opened, and the discovery assessment was raised on 1 November 2017 at the same time as the 2015-16 closure notice was issued. HMRC bear the initial burden of proof to establish that the discovery assessment for 2014-15 is valid in terms of meeting the conditions set out under s29 TMA. We are satisfied that the condition under s29(1) TMA is met, whereby Officer Ferguson made the discovery that in his opinion, there was an insufficiency of tax assessed in the 2014-15 SA return filed by Mr Wildin. As to the second condition under s29(5)(a), we are satisfied that Officer Ferguson could not have been reasonably expected, on the basis of the information made available to him before 1 November 2017, that there was an insufficiency of tax.

152. The discovery assessment is subject to the statutory time limit under s34 TMA, which provides for the general position that a discovery assessment may not be made 'more than four years after the end of the year of assessment to which it relates'. For the 2014-15 return, the time limit under s34 is 5 April 2019, and the assessment was raised on 1 November 2017. To that end, HMRC have discharged the burden as concerns the validity and time limit aspects of the discovery assessment. The burden then reverses to the appellant to prove the substantive issue under appeal.

Burden on the substantive issue

153. The appeal against the assessments by s28A closure notices, as with the s29 assessment, was brought under s50(6) TMA, which provides that the assessments 'shall stand good' unless the Tribunal decides that the appellant has been overcharged.

154. The significance of an assessment 'standing good' in relation to burden of proof is explicated by Judge Gammie in *Hull City* at [58]:

> 'This "stand good" language has been part of the Management Acts since at least section 57 of the Taxes Management Act 1880. It is the statutory basis for concluding that the taxpayer has the legal burden of demonstrating that he is overcharged by an assessment. The justification for placing this burden on the taxpayer, even though it may be that the Revenue which is asserting the tax is due, is that the taxpayer and not HMRC is ordinarily in possession of the relevant facts and figures. Essentially, HMRC are entitled to call for an explanation from the taxpayer of the circumstances surrounding the determination of his tax position and ultimately put the taxpayer to proof of the facts behind those circumstances. In that respect HMRC may issue an assessment because they are in possession of particular evidence suggesting that the taxpayer's explanation is untrue but it may also be that HMRC are not satisfied that what the taxpayer is telling them fully explains the particular circumstances with which they appear to be confronted. That is the justification but it is the particular statutory language used that places the legal burden on the taxpayer to satisfy the tribunal that the assessment is wrong and should be reduced or discharged.'

155. What Judge Gammie said at *Hull City* is particularly apt in the present case. HMRC are in possession of particular evidence which suggests that Mr Wildin's explanation of his tax position is either untrue (because it contradicted his own witness evidence in proceedings against the Enforcement Notice), or fails to fully explain the particular circumstances with which HMRC are confronted. The appellant is put to proof for the facts behind those circumstances which led to the income tax assessments under appeal.

156. The legal burden of proof rests squarely with the appellant in relation to the substantive issue in accordance with s50(6) TMA. The critical finding of fact that determines this part of the appeal is whether there was a trade being carried on by the appellant during the relevant periods for income tax purposes, to render the claims of revenue deductions and capital allowances valid for reducing his income tax liabilities via sideways loss relief. It is for the appellant to satisfy the Tribunal that the closure notice amendments and the discovery assessment are wrong; otherwise all assessments shall stand good.

Was there a trade being carried on for income tax purposes?

The meaning of a 'trade'

157. For the purposes of the Income Tax Acts, the statute has never defined trade or trading beyond the words '*every trade, manufacture, adventure or concern in the nature of trade*' which was streamlined into *'"trade" includes any venture in the nature of trad*e' under s989 ITA following the Tax Law Rewrite Project. The predecessor definition for 'trade' has given rise to a body of case law which continues to be relevant. The leading authority is *Ransom v Higgs*, where the House of Lords explicated the term 'trade' for tax purposes as follows.

> (1) 'As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. … it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services": Lord Reid at p78.

(2) 'Trade is infinitely varied; …but this does not mean that the concept of trade is without limits, so that any activity which yields an advantage, however indirect, can be brought within the net of tax': Lord Wilberforce at p86, who continued at p88 by stating:

> '"Trade" cannot be precisely defined, but certain characteristics can be identified which trade normally has. … Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed.'

(3) The characteristics named by Lord Wilberforce as indicia of a trade are at p88:

(1) 'Trade involves, normally, the exchange of goods or of services for reward – not all services, since some qualify as a profession or employment or vocation, but there must be something which the trade offers to provide by way of business.'

(2) 'Trade, moreover, presupposes a customer … trade must be bilateral – you must trade with someone.'

(3) 'Then there are elements … which prevent a trade being found even though a profit has been made – the realisation of a capital asset, the isolated transaction (which may yet be a trade).'

(4) Lord Simon of Glaisdal in *Ransom v Higgs* observed at p96:

(1) 'Within the meaning of the Act a man cannot trade with himself (cf. *Skarey v Wernher* [1956] AC 58); so that "mutual trading", although a commercial activity, as a matter of law is not "trade" for the purpose of income tax.'

(2) 'On the other hand, "trade" in ordinary parlance suggests (as its etymology indicates) some degree of continuance or recurrence; but the law says (this time by statutory definition) that for the purpose of income tax "trade" extends to an isolated adventure or concern in the nature of trade.'

(3) 'But between these two extremes there lies a "no-man's land" of fact and degree where it is for the Commissioners to evaluate whether the activity amounts to trade.'

The correct approach to the trading issue: legal principles

158. In *Samarkand* the Court of Appeal set out the correct approach in determining the trading issue, after a review of the relevant authorities. Henderson LJ's leading judgment in this respect is at [59], where he summarises the approach from *Eclipse (No 35)* as follows:

> '… the question whether what the taxpayer actually did constitutes a trade has to be answered by standing back and looking at the whole picture…. Although it is a matter of law whether a particular activity is capable of constituting a trade, whether or not it does so in any given case "depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. … It follows that it can never be appropriate to exert certain elements from the overall picture and treat them, viewed in isolation, as determinative of the issue. … The exercise which the FTT has to undertake is one of multi-factorial evaluation, and their conclusion can only be challenged as erroneous in point of law on *Edwards v Bairstow* grounds.'

159. In the High Court decision of *Ensign Tankers*, the question of whether a trade existed from the alleged activity was considered by Millet J, who set out nine principles of law at p761-763, and we find the following to be relevant to our consideration.

(1) In order to constitute a transaction in the nature of trade, the transaction in question must possess not only the outward badges of trade but also a genuine commercial purpose.

(2) Where commercial and fiscal purposes are both present, questions of fact and degree my arise, and these are for the commissioners. Nevertheless, the question is not which purpose was predominant, but whether the transaction can fairly be described as being in the nature of trade.

(3) The purpose or object of the transaction must not be confused with the motive of the taxpayer in entering into it. The question is not *why* he was trading, but *whether* he was trading. If the sole purpose of a transaction is to obtain a fiscal advantage, it is logically impossible to postulate the existence of any commercial purpose. …'

(4) The test is an objective one.

(5) In considering the purpose of a transaction, its component parts must not be regarded separately but the transaction must be viewed as a whole. That part of the transaction which is alleged to constitute trading must not be viewed in isolation, but in the context of all the surrounding circumstances.

160. If there was a trade in existence, then there could be claims of pre-trading expenses. To the extent that any qualifying 'pre-trading expenses' under s57 ITTOIA can be allowed as 'for the purposes of a trade', they are 'treated as if they were incurred on the start date'. This gives rise to the question of the timing as to when a trade can be said to have commenced, and we adopt the approach of the Special Commissioner in *Mansell* at [93]:

> '… a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits …'

161. In determining the timing of deductibility of expenditure, a crucial distinction is to be drawn between the setting up of a trade, and when operational activities in the course of that trade started. The observation by Lord Millet in *Miah v Khan* that 'it is necessary to identify the venture in order to decide whether the parties have actually embarked upon it, but it is not necessary to attach any particular name to it' is apt to the question faced by this Tribunal, in that it is necessary for us to identify the venture in order to decide whether the appellant has actually embarked upon it.

The 'venture' in question?

162. We have set out in some detail the appellant's accounts of the venture in question, which have varied with the passage of time. We have anchored the key events in chronological order to give substance to his accounts at different junctures. However, the dissonance between the appellant's contemporaneous statements made at the time to various authorities and the press, and his witness evidence to this Tribunal on the same factual matrix in his testimony, renders any attempt to identify the venture in question in the present case a mirage. The elusiveness of this venture in question can be illustrated by the following discord in the appellant's utterances at different times.

(1) The voluntary VAT registration in August 2013 was to be a 'sole-trader' and the business description was 'luxury holidays' (§60), but by November 2017, the letting income has been apportioned between three entities and 'set in stone' (§114(3)).

(2) The first invoice for £10,000 for 5-year use of the Leisure Complex was to family members and rendered on 13 August 2013 *before* the building works began in October 2013, and electricity supply to the Complex was only connected on 24 July 2014 (§34).

(3) The appellant's closing submissions on Day 4 of the hearing that all his trading activities are run from his estate as 'One Complex', and Amanda and Clive run it for him as 'one team to look after all that' are at odds with his oral evidence on Day 1, when he stated to the Tribunal that Clive had passed away (§24). His witness statement lodged for these proceedings in July 2019 (§128) was accompanied by hospital discharge letters to evidence the extremely precarious state of health of his partner (Amanda), and her precarious health remains the case was reiterated time and again in his testimony.

(4) In his witness statement of 3 April 2014 in the proceedings against the Enforcement Notice, the appellant stated that the Complex 'is for the incidental enjoyment' of Altea (§§33 and 46(2)), but in the first meeting with HMRC in June 2015, the Complex was to form part of the holiday let venture of Number 24 (§86).

(5) The starkest contrast was between the two interviews of the appellant: the video footage interview with the press on 3 April 2014 (§46(2)) against the HMRC interview under caution on 7 October 2015 (§90-93). In the video, the appellant was a kindly grandfather speaking of his joy in being 'lucky' to build the Complex for his family, and his hope that Altea would be a home for future generations. In the interview under caution, the appellant told HMRC that he intended to supply sports facilities as part of a holiday let, and that intention marked the beginning, and was 'when it became a business venture' from 1 October 2013.

163. In the absence of a consistent 'overall picture' readily emerging from the evidence we have heard of the venture in question, we consider the substantive issue by adopting the appellant's submissions at the hearing as the starting point, and consider the substance of those submissions in the light of case law principles to be applied to the primary facts in the present case, and to corroborative evidence other than the appellant's utterances.

Exploitation of propriety rights in the land

164. Giving the leading judgment in *Griffiths v Pearman*, Vinelott J highlighted the distinction between 'income derived from the exploitation of the owner's right of property and of his right of occupation' and 'income derived from the carrying on of a trade' by referring to Lord Greene MR in *Croft v Sywell Aerodrome Ltd* (1941) 24 TC 126 in the following passage at p137:

> '… why and on what principle is a person who, for example, sets up a refreshment stall on his land or provides services for people admitted to his land, not exhaustively taxed under Schedule A or B …in respect of the profits so earned? Such a person in my view is not exploiting his rights of property or of occupation save in the sense and to the limited extent that he must own or occupy the land before he can erect and carry on the refreshment stall or perform the services. The profits earned in such a case are referable, not to the exercise of the rights of property or of occupation since the customers come on to the land for the purpose of obtaining refreshment or procuring the benefit of the services. If, on the other hand, the owner of land having (let me suppose) a remarkable view or some historic monument merely allows the public to come on to the land in return for an admission fee, I cannot myself see why it should be said that his profits are not covered by the Schedule A assessment since all that he is doing is to exploit his right of property by granting licences to come upon the land. The fact that he keeps the paths in order or the monument in repair in order to make a visit more attractive to the public again

> appears to me to make no difference, any more than does the action of the landlord of a house in keeping it in repair.'

165. Vinelott J concluded that 'the letting of land does not constitute a "trade"', and that '"business"' is a wider concept than "trade"', and remarked that, in reaching the contrary conclusion, the Commissioners in *Griffiths v Pearman* 'must have been misled' into thinking that a taxpayer who can be fairly said to have been carrying on the *business* of letting furnished rooms and providing services to the occupiers is carrying on a trade.

166. The implications of a 'venture' being in the nature of the exploitation of propriety rights as set out by Vinelott J remain the case, then as now.

> 'It is a peculiar feature of United Kingdom tax law that the activity of letting furnished flats or rooms, while it may be a business and, in this case, a demanding and time-consuming business, is not a trade. … the proceeds of letting are taxable under Sch A and the rule operates to the disadvantage of the taxpayer; his income is not earned income and he is not entitled to capital allowances and to the rollover relief for capital gains tax purposes afforded to a person carrying on a trade.'

167. Section ITA 2007 would seem to be redressing this 'peculiar feature' in the rule which disadvantaged taxpayers letting out furnished accommodation by allowing the '*commercial letting of furnished holiday accommodation*' (within the meaning of Chapter 6 of Part 3 of ITTOIA; that is, ss322 to 328B) to be 'treated as trade'. The qualifying conditions include minimum days of availability to the public and the minimum days of actual let under s325 ITTOIA. Unless and until the suite of qualifying provisions under Chapter 6 Part 3 of ITTOA are met, the default position is that the exploitation of proprietary rights in land is *not* a trade.

168. Given that the default position remains that the exploitation of proprietary right in land is an activity that is *not* in the nature of a trade for income tax purposes (see s264 ITTOIA), Warner J's observations as follows in *Webb v Conelee Properties Ltd* continue to be relevant:

> (1) 'There is no such trade known in the tax legislation as "the letting of properties producing a rental". That is precisely what is taxed under Sch A, and it cannot constitute a trade taxable under Sch D.'
>
> (2) As to the question of 'fact and degree' the extent whereby the exploitation of land may become a trade, Warner J in *Webb v Conelee Properties Ltd* summarised the legal principle after a review of the relevant case law as follows:
>
> > '… those authorities establish that the owner of land may carry on activities on the land that go beyond the mere exploitation of his proprietary rights in the land, and which constitute a trade. Where it is shown that there have been such activities, it is a matter of fact and degree whether they are sufficient to amount to carrying on of a trade.'

Findings of fact as concerns the usage of properties in the 'estate'

169. The closing submissions by Mr Wildin are to say that his 'trading activities' fall into three areas: (i) property let, (ii) storage facilities, (iii) membership to the sports and leisure facilities, but they are not three separate trades, but one trade exploiting the land and buildings owned by him in the curtilage of his 'estate' at Meendhurst Road, which is to be regarded as 'One Complex'. The present case concerns an alleged trade which involves the exploitation of proprietary rights in the land.

170. While Mr Wildin's submissions may represent a viable proposition for considering what the venture may be in ordinary parlance, for income tax purposes, the settled law is that the letting of furnished properties does not amount to the carrying on of a trade unless the statutory

qualifying conditions are satisfied for a let property to be classified as 'furnished holiday accommodation' during a relevant period, and the qualifying conditions are subject to continual review to retain eligibility as furnished holiday accommodation.

171. Applying the legal principles to the facts in question, we make the following findings of fact in relation to each of the properties of which the appellant submits form the assets in the 'trade' he was carrying on, either from August 2013 (per the date of the £10,000 invoice), or from October 2013 (the date given at the interview under caution and probably referable to the commencement of the construction of the Complex).

Use of Sports Complex

172. In relation to the Sports and Leisure Complex, we find Mr Wildin's intention at the time of incurring the expenditure in constructing and fitting out the Sports Complex was that it would be used solely for the private enjoyment of himself, his family and any invited guests. This finding of fact is based on the following primary facts:

(1) The video interview published in the national press on 24 November 2014 stands as a contemporaneous, consistent, and convincing account of the appellant's intention that the Complex was built solely for private use (§36).

(2) The design and location of the Sports Complex shown in the plans, the descriptions, and photographs provided of the interior accord completely with the appellant's explanations in his video interview. The documentary and photographic evidence demonstrates that the design and situation of the Complex are customised to the desires and interests of the appellant and his immediate family, and of the envisaged usage of the sports and leisure facilities as promoting family life by bringing three generations of the appellant's extended family under the same roof (§§37-40).

(3) Mr Wildin's grounds of appeal (March 2014) and witness evidence (April 2014) in support of his appeal to the Planning Inspectorate were contemporaneous records setting out his intentions, being: (a) 'to restrict the use of the building to ancillary sports and leisure activities for the occupants of no. 24A and their family and guests' (§46(1)), and (b) for 'the incidental enjoyment of his house [at number 24] (§46(2)).

(4) In all the evidence and statements provided by Mr Wildin to the Council, Planning Inspectorate and High Court, there is no mention of use of the Sports Complex by any other persons, or otherwise being utilised commercially in any way. On the contrary, there was remarkable consistency throughout those proceedings that the whole Complex was built for the enjoyment of the occupants of Altea (§§46-58).

(5) The invoice of £10,000 to Mr Wildin's son and daughter-in-law was dated August 2013 was *before* the construction of the Complex which began in October 2013, and electricity was only connected on 24 July 2014 (§34). Expenditure on fitting the Complex continued to be incurred in 2015; retrospective planning application declared that work on the Complex was to be completed in January 2016, being over 28 months into the alleged agreement. The facilities simply were not available at the time of the invoicing of £10,000 membership fee.

(6) There is no evidence that the agreement was at arms-length. The invoice to close family members does not represent an arms-length transaction, and there was no contract setting out the terms or limits of use or any of the normal facets of a commercial agreement in the course of a trade being carried on. The appellant and his children had complex, interconnected financial arrangements involving capital sums of money and properties, and the true nature of and value of this transaction cannot be viewed in isolation (§§107, 110): *Ensign Tankers.*

(7) The appellant relies solely on the £10,000 invoice for the purported supply of membership subscription. The notion that the residents of Altea would have to pay commercially to use the facility was in direct contradiction to the appellant's core contentions in his planning dispute that the Leisure Complex is incidental to the enjoyment of that property and was private. The transaction was one-off, non-recurring, and there was no intention to make available the sports facilities to the public to allow the membership subscription offered to family members to be replicated to the general public. (Note of Case lodged by Mr Kendrick in the Enforcement Notice appeal at §46(5), and statements made at interview under caution §93.)

173. Even if we were to consider the capital allowances claim in relation to the Complex as potentially pre-trading expenses, their claims in the returns for tax years 2013-14 to 2015-16 were pre-mature since there was no evidence to support any operational activities during the two basis periods in question. The alleged trading activity was membership subscriptions for the use of sports facilities. On the fact, the Complex was under construction during the first basis period to 30 September 2015, when no such facilities could have been offered.

174. While such membership subscriptions could have been brought in during the second basis period to 30 September 2015, there was no insurance or public liability cover, no specimen contract setting out the terms and conditions, no advertising to evidence that the putative trade could have taken place. It is not to say that the activity of charging membership subscriptions for the facilities in the Complex cannot be a trade, but that activity remains a concept and a proposition in the mind of the appellant as a putative trader, and has not been a trade that has been carried on in any form or substance in reality.

175. The Complex has been under an enforcement notice and then an injunction order for demolition since March 2014. There is no real prospect for the proposition of such a trade being brought into existence in the future. It is unnecessary therefore to consider whether pre-trading expenses under s57 ITTOIA could have been in point in some distant future for the deferral of capital allowances claims. We have found, as a matter of fact, that the construction and fitting out expenditure claimed in the relevant periods is plainly unsupportable; the putative trade simply did not exist, and has no prospect of commencing given the demolition order.

Use of the residential properties

176. In relation to the residential properties, we find that during 'the relevant periods', the appellant had no intention to use the properties as commercial letting of furnished holiday accommodation (as provided under Chapter 6 Part 3 ITTOIA) for there to be a trade under s127 ITA. Our finding of fact to this effect is based on the following obtainable facts.

(1) The appellant's claim in his appeal against the Inspectorate Decision had consistently been that Number 24 was to be converted as a family home for one of the children, or if not taken by any of the children, be rented out (§46(3)).

(2) Numbers 30 and 34 were bought as buy-to-lets and were tenanted historically, and that being the case as at June 2015 (stated in the first meeting with HMRC §86), and UK property income had been returned up to the tax year 2013-14 (§77).

(3) The appellant's decision to let Number 24 to FDL-Holidays Ltd on a long-term lease in November 2016 (§114(1)) coincided with the completion of the renovation project on the property. FDL-Holidays Ltd was incorporated in August 2013, and FDL-Homes Ltd was incorporated in August 2014; both before the enquiries were opened. The incorporation of these companies would seem to indicate the appellant's intention to put one or more properties within a corporate structure, while the claim of a trade being carried on was in his personal capacity trading as Forest of Dean Luxury Holidays.

(4) There is no evidence of any holiday lettings of any of the properties. The appellant has not claimed to have made any holiday lets *before* December 2016 (§130).

(5) The long-term arrangements described in the appellant's letters of 28 November 2016 and 12 January 2017, and email of 7 November 2018 of the arrangements now 'set in stone' removed any potential for the appellant to conduct the alleged holiday-let trade after November 2016 (§114).

(6) The appellant's interest in Number 24 has now ceased entirely, having been sold to Expresser Ltd owned by his children for an undisclosed amount as stated in his witness statement in July 2019 (§130).

(7) The Enforcement Notice served on the Complex was not prohibitive to one or more of the residential properties to be made available to holiday makers, had that been the genuine intention. As a matter of fact, no holiday lets were being carried on during the relevant periods for which the capital expenditure was claimed.

177. In any event, the figures provided by the appellant in the unaudited accounts (§131) are unsupported by any evidence of the allocation of the receipts. The statements the appellant made under cross-examination (§127) suggest that the 'paying guests' were related to the members of his family circle, and the arrangements and durations fell short of the statutory conditions required in terms of holding out to the public and the actual usage being of the minimum prerequisite for a 'trade' to be carried on as the *commercial letting* of qualifying furnished holiday accommodation. Neither was there any evidence to suggest that the proposed suite of additional services (§126) was in place to turn what would appear to be the mere letting of accommodation into a trade for income tax purposes.

178. Furthermore, for an activity to be found to be a trade, the Tribunal needs to have regard to its frequency, its organisation, and its operation. There is insufficient evidence to support the claim that the appellant had intended to run a business at the time he incurred the expenditure, or that he currently holds any such intention. The infrastructure that is associated with a trade in the commercial letting of holiday accommodation was simply absent to lend credence to the appellant's submission that he had the intention to carry on a trade that meets the statutory criteria for being a trade.

(1) There was no business plan, or any form of research, or commercial planning expected from a novel business venture. The appellant has not previously claimed to be carrying on a trade in holiday letting, so the commercial venture in holiday letting with amenities remains a 'novel' venture even to an accountant of many years of experience.

(2) The projections of income and list of ancillary services appear to have been drawn up in preparation for the interview under caution (§§86, 91). The income projections appear to be, as HMRC submit, the appellant's 'retrospective attempt to justify his Returns in face of scrutiny'.

(3) The timing of making contact with Sykes would seem to have been prompted by the interview under caution in October 2015, and the appellant's projections were 'unrealistic' as HMRC submit compared with Sykes' projections (§§88,101).

(4) There was no organisational structure in place, such as active website, phone number, email or PayPal accounts, employees, customer contracts, and so on pertaining to the alleged business. The organisational structure was absent then as now (§§117-119).

(5) The premises are not licensed to provide alcohol at cost price as claimed (§110). No requisite insurance has been held to conduct the business activities claimed for the Complex (§§120-122).

179. In relation to the usage of residential properties in a potential trade in the future, the appellant stated in his witness statement lodged in July 2019 (§130) that the Complex and Number 24 had remained 'empty for the past three years apart from the sports building being used occasionally' by himself and his family and some short-term lettings. The Enforcement Notice was issued in March 2014, which means that the appellant cannot reasonably planned to trade with the Complex as part of the holiday letting business of the properties, since the demolition of the Complex has been required ever since the issue of the Enforcement Notice. Furthermore, the sale of the appellant's interest in Number 24 to Expresser Ltd (first of 20% interest in January 2014 (§114), and then the remaining interest (§130)) means that he can no longer implement the trade he claims he intended to commence, and no evidence has been provided of agreement for an alternative trade.

Record Storage

180. The provision of record storage facility has been claimed as a trading receipt with the first invoice of £397.42 being issued to family members in August 2013 (§61), followed by other invoices issued to Wildin & Co from February 2014 to the 10-year agreement in July 2015 (§68), and further invoices in February 2016 and February 2017 (not produced), one of which was for £90,000 (§72).

181. The only documentary evidence produced in relation to the record storage activity is the various invoices from the appellant to Wildin & Co. We can accord little weight to the invoices to vouch for what was actually being supplied, or to the supposed 10-year agreement between the appellant and his partnership, which was produced but unsigned by the partners, and the terms to the agreement, though referred to as to be read with the agreement, remain unspecified, and no terms have been produced that were supposed to accompany the agreement (§§70-71).

182. While the Tribunal has seen 352 photographs of the 'estate' to show the residential properties (Numbers 24, 30 and 34), Altea, and the Complex in their surrounding grounds, there are no photographs to show where such files or records were, have been, or are stored in the appellant's estate. No physical traces of evidence have been led to offer a glimpse of the operational aspects of the record storage activity as a professionally run operation that is in the nature of a trade, which reasonably can be expected to be visible, such as an archive of the records being stored in shelves, boxes or filing cabinets, a database system to track records for retrieval and return, security measures being implemented to safeguard the records, or insurance policy cover certificate against fire and theft of these records.

183. The appellant relies on his testimony to establish that the record storage activity existed as a trade, but we find appellant's testimony in relation to the where and how of this record storage activity raises more questions than it answers.

(1) At the first meeting with HMRC in June 2015, it was said that records were stored at Numbers 30 and 34, but then this arrangement ceased *because* the properties were tenanted (§86) and most of the records were shredded.

(2) A month after the explanation in July 2015, the 10-year agreement for £120,000 was made for storage and management of records (§69), which presumably was for some new records (if most of the records previously stored had already shredded). The 10-year agreement with the upfront payment of £120,000 would also seem to have been entered into without regard to the possible future needs of the partnership.

(3) If the 10-year agreement was supposed to cover the service from July 2015, why would there be another substantial invoice raised to Wildin & Co on 31 October 2016 for a net amount of £90,000 (§72)? The invoice for £90,000 is not produced to evidence what the supply in question was, and there were further substantial amounts invoiced to Wildin

& Co. (e.g. £150,000 in October 2015, and £120,000 reversed in February 2016 (§72)) since entering the 10-year agreement, and without any obvious commercial justification.

(4) There is no evidence to suggest that any of the invoices rendered to Wildin & Co were transactions at arms-length. The only contract produced does not sufficiently set out the terms of the services being offered, which suggests that this was not a genuine commercial arrangement.

(5) From April 2018 on the departure of Mr Lewis, the appellant has been trading with himself, and that would cover the remaining terms of the 10-year agreement made in July 2015, which cannot be in the nature of trade, given the legal principle that *trade must be bilateral*; one must trade with someone.

184. We are of the view that any claim of there being a record storage service provided with file retrieval has not been supported by any credible evidence. The credibility of the appellant's evidence is hugely undermined in relation to the supposed record storage management service to be run by the team of Clive and Amanda (his partner of 17 years), given the contradictions from other parts of his evidence about these individuals' respective personal circumstances (§§24, 106, 127(4), 129, 135). To the extent that the appellant has been trading with himself, that aspect of his claim that there had been a trade being carried on ceased from April 2018.

The claim of a single trade

185. The appellant has staked his case on there being one single trade with three constituent components: (i) property let, (ii) sports complex membership subscriptions, (iii) record storage/management. It is significant that the appellant changed the reporting of his income in his SA return for the basis period to 30 September 2015. While formerly, the rentals had been separately returned as income from properties up to 2013-14 (£26,900 in 2013-14), there was a change in 2014-15, whereby different income streams were pooled in the basis period to 30 September 2015 to augment the headline turnover to £22,500.

186. The breakdown of the turnover (§80) shows the predominance of record storage income stream, being £12,000 of the overall £22,500, followed by the rentals from Numbers 30 and 34 of £6,600 and £1,900 respectively. These two residential properties were tenanted as stated by the appellant in June 2015 (§86), and the rentals arising therefrom should have been separately returned as UK property income.

187. HMRC have not sought to challenge directly the claim that there was a record storage trade, for the reason that 'the net tax effect in isolation is negligible'. HMRC are of the view that the purported record storage activity was used as a means of withdrawing funds from the partnership. While HMRC have not sought to revise the entries in either the appellant's or the partnership's returns in relation to the payments for record storage, it is submitted that the timing of the commencement of this activity is indicative of its primary purpose being to provide an income stream for the appellant's supposed sole trade as FDL-Holidays, so as to make it appear a genuine commercial venture within the appellant's returns and reduce the risk of attracting further scrutiny, and we agree with this observation.

188. In conclusion, we are not satisfied that there was in existence a record storge activity in the nature of a trade being carried on during the relevant periods. Even if there had been a record storage trade, that trade would be treated as a single trade in its own right, distinct and separate from any holiday let business in accordance with the terms under s127(3) ITA:

> 'For the purposes of this Part (but as modified below) the person is treated instead as carrying on in the tax year a single trade –

> (a) which consists of every commercial letting of furnished holiday accommodation comprised in the person's UK furnished holiday lettings business, and
>
> (b) the profits of which are chargeable to income tax. …'

The relevance of profitability and commerciality test

189. In *Samarkand*, the Court of Appeal considered whether the film partnership was trading in the relevant period, and whether the partners were entitled to loss relief in respect to losses arising from expenditure incurred on acquisition of films. The parties in *Samarkand* made submissions on the nuanced distinction profitability and commerciality, which is not of facility to our consideration. What is of relevance is the observations by Robert Walker J in *Wannell v Rothwell (Inspector of Taxes)* [1996] STC 450 at 461 ('*Wannell*'), which was cited with approval by Henderson LJ in giving the leading judgment in *Samarkand* at [89]:

> 'I was not shown any authority in which the court has considered the expression "on a commercial basis", but it was suggested that the best guide is to view "commercial" as the antithesis of "uncommercial", and I do find that a useful approach. A trade may be conducted in an uncommercial way either because the terms of trade are uncommercial (for instance, the hobby market-gardening enterprise where prices of fruit and vegetables do not realistically reflect the overheads and variable costs of the enterprise) or because the way in which the trade is conducted is uncommercial in other respects (for instance, the hobby art gallery or antique shop where the opening hours are unpredictable and depend simply on the owner's convenience). The distinction is between the serious trader who, whatever his shortcomings in skill, experience, or capital, is seriously interested in profit, and the amateur or dilettante. There will be no doubt be many difficult borderline cases … for the commissioners to decide; and such borderline cases could as well occur in Bond Street as at a car boot sale.'

190. In *Brown v Richardson*, the taxpayer's 'primary purpose' for purchasing a property known as Heather Croft was as a holiday home; he also intended to let it as furnished holiday accommodation when he did not require it. Such letting was commercial and effected with a view to generating revenue to offset costs rather than with a view to the realisation of profits. The Special Commissioner held that '[a] letting is a commercial letting if it is let on a commercial basis with a view to the realisation of profits' (at [12]). Further, the statute cannot have intended that a project which was in fact unprofitable due to the heavy interest charges, should be regarded as profitable by ignoring the interest charges, and then to take into account the interest charges when relief for losses were claimed.

191. The facts in the present case in relation to the 'projects' in renovating Number 24 and constructing and fitting out the Complex are parallel to those in *Brown v Richardson*, (with the difference being that it was capital allowances instead of interest charges). Equally, this Tribunal finds Robert Walker J's observations in *Wannell* on commerciality helpful in our multi-factorial evaluation of whether any of the purported activities being carried on by the appellant amount to being a trade. We have regard to the fact that all the major transactions purported to be turnover for a trade are between connected parties, and absent any documentary evidence setting out the parties' obligations and undertakings in these transactions. The appellant has stated time and again that he works from 5am for 12 hours in his accountancy business (§127(4)), and to the extent that there is any organisation to carry on with a trade that befits a trader with a serious intention to profitability, it is down to the team of Clive and Amanda who would do it all. The appellant's intention as a serious trader with a view to profitability with his alleged trading activities is plainly improbable, if not fanciful, given the proposed organisation the appellant purported to have put in place.

192. Commerciality is a hallmark of a trade being carried on with the serious intention to profitability, and when we stand back and look at the whole picture, we are not satisfied that the appellant has proved, on the balance of probability, that the alleged activities being carried on bear the hallmark of commerciality in the nature of a trade.

Whether 'wholly and exclusively'

193. Insofar as any amendments to the SA returns by the closure notices or by means of the discovery assessment represent a disallowance of revenue expenditure, the relevant test is under s34 ITTOIA. The burden of proof is on the appellant to establish that there was a business purpose for which the revenue expenditure was incurred, and the determination as to the purpose is a question of fact.

194. The 'wholly and exclusively' test is predicated on there being an alignment between the trade in question, and the purpose of the expenditure being incurred. In the present case, the trade in question was the purported trade being carried on by the appellant as Forest of Dean Luxury Holidays. However, as we have concluded, we are not satisfied that there was a trade being carried on by the appellant in relation to the use of the Sports Complex, the residential properties, and record storage facility. It follows that the revenue expenditure as tabulated at §76 did not meet the requirement under s34 ITTOIA. To the very limited extent that expenses in rates and water, and heat and light, which the tenants of Numbers 30 and 34 had failed to discharge, those expenses would be deductible against £6,600 and £1,900 as rental income.

Conclusion on the Income Tax issue

195. In *Scales v Thompson* on appeal from the Special Commissioners, Rowlatt J held that the question of whether on the facts, the appellant was engaged in trading or an adventure or concern in the nature of trade at the relevant time is a question to be answered by applying the facts as found to the sections of the statute. Which side of the line a particular case falls will be entirely, or almost entirely, a question of fact or degree for the fact-finding tribunal, and in such cases the court will not interfere with the conclusion of that tribunal.

196. The conclusion we reach is that we are not satisfied that there was a trade being carried on by the appellant, trading as Forest of Dean Luxury Holidays during the relevant periods, whether in the nature of: (i) the letting of furnished holiday accommodation, or (ii) membership subscriptions for the sports facilities in the Complex, or (iii) a record storage service during the relevant periods.

197. The claims of capital allowances are in relation to the construction and fitting costs of the Complex, and the renovation costs of Number 24. The expenditure was not incurred in connection with the carrying on of a 'qualifying activity' as provided under s15 CAA, namely (a) 'a trade', (b) 'an ordinary UK property business', or (c) 'a UK furnished holiday lettings business' (as relevant to our consideration in the present case). Nor was any revenue expenditure under s34 ITTOIA deductible, save for the qualifications made above.

198. We conclude that there was no qualifying activity under s15 CAA being carried on in the two basis periods to 30 September 2015 for the claims of capital allowances to be valid. It follows that the trading losses created by the capital allowances claims in these basis periods are invalid. The trade loss relief claims under s64 ITA are invalid for income tax purposes.

Issue 2: VAT

Time limit issue

199. The VAT assessments are raised under s73(2) VATA for the periods 11/13 to 11/16 on the basis that the input VAT claimed was not properly due. HMRC bear the burden to establish that the assessments were validly made within the relevant statutory time limits under s73(6):

'**73**(6) (a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge…'

200. The VAT assessments were all raised on 10 October 2017. The assessments for periods 11/15 to 11/16 are therefore raised within the relevant time limit of two years under s73(6)(a).

201. As to the assessments in relation to periods 11/13 to 08/15, HMRC rely on the four-year limit provided under s 77(1)(a), which is to be applied in conjunction with the one-year time limit provided under s 73(6)(b). On the basis that the appellant was still providing information at the meeting of 10 October 2016, and in his correspondence with HMRC of 19 October and 28 November 2016, the assessments of 10 October 2017 have been validly issued in time under the terms as provided by s73(6)(b).

Statutory provisions for input tax entitlement

202. Section 24 VATA allows VAT to be treated as input tax on supplies made to a taxable person (who is not an exempt supplier) in the course or furtherance of a business. Sub-section 24(1) provides for the input tax relief entitlement to a taxable person only if the goods or services concerned are '*used or to be used for the purpose of any business carried on or to be carried on by him*'.

203. Section 25 provides for the offset of input VAT against any output VAT on supplies payable by the taxable person, and section 26 VATA provides for the basis of an input VAT claim, and the specific conditions for a valid claim are stated as follows:

'(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business […]'

Legal principles for establishing input tax entitlement

204. From European jurisprudence, *Rompelman* is the leading authority by ECJ on the entitlement to an input VAT claim by establishing the principle of the 'direct and immediate link' between the transaction and the business, whereby:

(1) 'the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a "continuing basis" is considered to be an economic activity': [17];

(2) 'the economic activities referred to in Art 4(1) may consist in several consecutive transactions, as is suggested by the wording of Art 4(2) which refers to "all activities of producers, traders and persons supplying services". The preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, which form part of those transactions must themselves be treated as constituting economic activity': [22].

(3) 'it must first be pointed out that it is for the person applying to deduct VAT to show that the conditions for deduction are met … Therefore Art 4 does not preclude the revenue authorities from requiring the declared intention to be supported by objective evidence such as proof that the premises which it is proposed to construct are specifically suited to commercial exploitation': [24].

205. In *BLP Group*, the European Court (CJEU) developed the principle of 'direct and immediate link' by holding that the right to deduct input VAT arises only in respect of goods and services which has 'a direct and immediate link' with taxable transactions which form the 'core business' of the taxable person; and the ultimate aim pursued by the taxable person is irrelevant. The Opinion of Advocate General Lenz relevant to our consideration is as follows:

> '… to give the right to deduct … the goods or services in question must have a direct and immediate link with the taxable transactions, and that the ultimate aim pursued by the taxable person is irrelevant in this respect': at [19]
>
> 'On the question whether the goods or services supplied to taxable persons, on which input tax has been charged, can be *attributed* to a transaction by the taxable person in such a way that deduction of input tax is justified, the Community Legislature decided on a criterion corresponding to the system: the amount which is to be deducted as input tax must have been "borne directly by the various cost components': at [31].

The business purpose of expenditure

206. The attribution test for there to be a direct and immediate link is referable to the 'purpose' of the expenditure so incurred. In relation to the purpose test, Stuart-Smith J stated in *Flockton*:

> 'The test is were the goods or services which were supplied to the taxpayer used or to be used for the purpose of any business carried on by him? *The test is a subjective one*: that is to say, the fact-finding tribunal must look into the taxpayer's mind as it was at the relevant time to discover his object. Where the taxpayer is the company, the relevant minds are those of the person or persons who control the company or are entitled to and do act for the company.' (italics added, at p399)

207. Having stated the relevant test, Stuart- Smith J continued by giving guidance to the fact-finding tribunal as how the test is to be applied:

> '… where there is no obvious and clear association between the taxpayer company's business and the expenditure concerned, the tribunal should approach any assertion that it is for the taxpayer company's business with circumspection and care, and must bear in mind that it is for the taxpayer company to establish its case and the tribunal should not simply accept the word of the witness, however respectable.
>
> It is both permissible and essential to test such evidence against the standards and thinking of the ordinary business man in the position of the applicant. If they consider that no ordinary business man would have incurred such an expenditure for business purposes that may be grounds for rejecting the taxpayer company's evidence, but they must not substitute that as the test. It is only a guide or factor to take into account when considering the credibility of the witness, and no doubt there will be many other factors which bear on that question which the tribunal should well understand.
>
> The tribunal must look at all the circumstances of the case and draw such inferences as they think fit. In the end it is a question of fact for them whether they were satisfied on the balance of probability that *the object in the taxpayer company's mind at the time the expenditure was incurred was that the goods and services in question were to be used for the purposes of the business*.' (sub-paragraphing and italics inserted, p399)

208. In *CEC v Rosner* Latham J, applying the legal principles of 'direct and immediate link' to consider whether the legal costs relating to criminal proceedings were costs for the business for VAT purposes, held as follows:

> 'Benefit … cannot be the test. There must be a real connection, a nexus, between the expenditure and the business. It seems to me that the nexus, if it is not to be benefit, must be directly referable to the purpose of the business. … by reference to an analysis of what the business is in fact doing. It is only by identifying the nature of the business is in that way that one can determine

> the extent to which any given expenditure can be said to be for the purposes of that business.'

209. Latham J set out the approach for the 'purpose' test in the following terms:

> 'I have been referred to a number of decisions of tribunals in which the question has arisen as to whether or not in any given case it can properly be said that expenditure has been for the purposes of a business. As is accepted by Customs, it is a deceptively simple phrase. But the thread, it is said, which allows one to keep control of a phrase which could otherwise be sued to cover a wide variety of circumstances is that there must be *a clear nexus between the matter in relation to which the expenditure has been incurred and the business itself*. That nexus cannot merely be the fact that the business will benefit from the expenditure. That seems to me to be abundantly clear.' (italics added)

Two aspects to the substantive issue

210. HMRC understand that the input tax claimed by the appellant relates mainly to the construction of the Leisure Complex and the renovation of Number 24. The appellant has not raised any challenge on the quantification of the VAT assessments. The substantive issue in the VAT appeal concerns whether the appellant is entitled to claim the input VAT on the basis that the expenditure which had borne the VAT was incurred for a business purpose.

211. The appellant bears the burden of proof on the substantive issue in relation to his entitlement to claim input VAT by satisfying the Tribunal that on the balance of probability, the input VAT incurred on the construction of the Complex and the renovation of Number 24 is eligible for input VAT relief.

Whether a direct and immediate link

212. Based on our extensive findings of fact on the Income Tax issue, and having concluded that the appellant has not discharged the burden that there was a trade being carried on during the relevant periods, it follows that there was *no* economic activity with a business purpose that could have given rise to a 'direct and immediate' link for the input VAT on the said expenditure to be reclaimable. Where there was no such economic activity to provide a direct and immediate link for the expenditure, there could have been no basis for any entitlement to input VAT.

213. For the same reasons as those relevant to determining the Income Tax issue, the contemporaneous evidence is not sufficient on its own to demonstrate an intention to trade or to let. Rather, as HMRC submit, the appellant's intention is to reduce his tax liabilities.

What was the 'subjective' test of purpose

214. The appellant claims that since the purchase of Number 24, he has always intended to commence a holiday business utilising the Sports Complex and the properties he owned an interest in on Meendhurst Road. However, the only contemporaneous documents provided to support the appellant's intention to trade are:

(1) The appellant's registration for VAT in August 2013;

(2) The incorporation of Forest of Dean Luxury Holidays Ltd, also in August 2013;

(3) An invoice to the appellant's son and daughter-in-law dated 13 August 2013 purporting to charge £10,000 plus VAT for the appellant, his immediate family members and guests to use the Sports Complex for five years.

215. The appellant relies heavily on the statement in *Flockton* and submits that the material fact as concerns input VAT claims is to find whether 'the [purpose] in the [taxpayer's] mind at the time the expenditure was incurred was that the goods and services in question were to be

used for the purposes of the business'. He submits that the purpose test is entirely 'subjective', and referable solely to the timing of the expenditure being incurred. He submits that events after the point of expenditure are not relevant for the purpose of determining whether the said expenditure was eligible for input VAT refund. All that matters, the appellant submits, was his subjective intention at the point when he incurred the expenditure on which input VAT was claimed, and he has no reservations in asserting and confirming that his subjective intention in incurring the said expenditure was business in nature, and that the Tribunal would be wrong to look beyond the timeline after the expenditure was incurred to find that purpose.

216. The appellant's contentions as regards the subjective test for business purpose does not alter the conclusion that there is no nexus between the expenditure and a taxable business in existence for the input VAT to be reclaimable. The appellant's contentions are premised on the misunderstanding of a 'subjective' test in the legal context. A 'subjective' test does not equate to adopting whatever the appellant asserts to be his intentions as the factual state of affairs without further examination. A legal test that is 'subjective' means that the fact-finding tribunal is required to take into consideration the specific set of circumstances, the personal attributes, or the peculiar mindset of the person in question, namely the appellant in the present case.

217. The contrast to a subjective test is to find the objective standards and attributes of the hypothetical, ordinary and reasonable person: 'the man on the Clapham omnibus'. When Stuart-Smith J referred to the business motive test as a 'subjective' test, he was saying that the purpose in incurring a particular item of expenditure is to be found with regard to the personal attributes and mindset of the person in question, and not by reference to the objective purpose of the man on the Clapham omnibus.

218. When the appellant invites the Tribunal to consider that it would be preposterous to assert that all the expenditure was incurred for a private purpose by reciting the facilities in his 'estate', and that there must be a business purpose in his mind when he incurred the expenses, he is actually making a submission of what the man on the Clapham omnibus would have in mind. The argument is premised on an 'objective' standard, in a similar manner as what the Council's finding in relation to the Sports Complex: 'The facilities on this scale are more likely to be offered by an institution similar to a social or sports and leisure club' (§46(5)). That objective standard as put forward by the Council was vehemently refuted by the appellant in the proceedings against the Enforcement Notice.

219. The subjective attribute of the appellant as a devoted father to his three children is the running thread in these appeals. Mr Wildin shows his parental devotion to a considerable extent by material provisions, be it to pay for the vehicles his children use ever since they turned 17 to the time when they are adults at the age of 34, 37 and 40 (§111), or to foster their careers through employment in his accountancy business, or to impart his wealth through capital transactions with Expresser Ltd, or to acquire Number 24 to be renovated into a 6-bedroom house with the view that one of the children would adopt it as a family home and be living close to Altea. As a devoted father and grandfather, he derives great personal joy in having his family and grandchildren visiting, in doing activities with them. The way he has enlarged the curtilage of Altea over the years to enhance its facilities to cater for the developing interests of his children's growing families is a testimony to this devotion, and he wishes the prospect of having the children and grandchildren visiting Altea to continue with the enhanced facilities.

220. If we were to apply the test as an objective test and ask what the man on the Clapham omnibus would be intending when he built a Sports and Leisure Complex of the scale we have seen, a probable answer would be that there was a business motive in mind in incurring the expenditure. However, the purpose test is a subjective test referable to the personal attributes and circumstances of Mr Wildin. In the present case, we have no difficulty in finding that, the

more improbable (by objective standards) is in fact the most probable answer (according to the subjective attributes of the appellant), and that on the balance of probability, at the time the appellant incurred the expenditure on which he claimed input VAT, his purpose was to enhance the facilities attached to Altea for the private enjoyment of his immediate family circle.

Conclusion on the VAT issue

221. Input tax relief entitlement is available to a taxable trader only if the goods or services concerned are 'used or to be used for the purpose of any business carried on or to be carried on by him'. The appellant has not proved that there was a business being carried on to give rise to a 'direct and immediate link' for the expenditure in relation to the construction and fitting costs of the Complex and the renovation costs of Number 24 for any claims of input tax relief under s25 VATA. The VAT assessments to disallow the input VAT claims are upheld.

Issue 3: Schedule 24 Penalties

222. Based on the conclusions we have reached in respect of the Income Tax and VAT issues, there is a *prima facie* case that there were inaccuracies in the SA and VAT returns submitted by Mr Wildin for the penalties under Sch 24 to be imposable. As to the penalty percentage being set for the failures being 'deliberate', we agree with Judge Morgan in *Clynes v HMRC* when she said that:

> '[82] … for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way. …'
>
> '[86] … depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so….'

223. We find the appellant to be shrewd and methodical in his consistent efforts in rendering returns that contained the errors with the set purpose of obtaining a fiscal advantage over a protracted period. The appellant is an experienced accountant and with his tax knowledge, he has acted consciously in a considered way when he submitted those returns to claim the reliefs for income tax and VAT which are not due.

224. The observations in *Clynes* are apt to the circumstances that gave rise to the inaccuracies in the appellant's SA and VAT returns for the said years, which we do not accept to be 'careless', given the personality and acumen of the appellant as we have found. We uphold the assessment of the failures being 'deliberate' for the purpose of setting the penalty percentage.

Conclusion on Schedule 24 penalty assessments

225. HMRC have already given full mitigation against the penalty percentage to reduce it to the minimum of 35% for disclosure. Although we are of the view that the appellant's disclosure is not of a quality that merits full mitigation, we confirm the minimum penalty percentage, noting that it is in the appellant's favour.

Issue 4: VAT Surcharges

226. The appellant has not disputed that he failed to make payments for the relevant periods, or that he did receive the surcharge letters notifying him of the defaults. The appellant's ground of appeal is that he has withheld payments for the default periods because HMRC have blocked his VAT repayment claims in other periods.

227. The commissioners' refusal to make the earlier input VAT repayments was lawful, and the refusal does not give rise to a legitimate ground for the appellant to withhold payment of a

liability in other periods. The legal position in this respect is clearly set out through applying European jurisprudence by Lightman J in *Tradecorp* at p153:

> 'The commissioners' investigations are the appropriate means to verify whether or not there exists a valid claim to deduction. Until the claim is accepted or established, there is no right to payment.'

228. The appellant has not provided a reasonable excuse for his failure to pay his declared liabilities. As a matter of fact, the appellant's output VAT liabilities were the results of the invoices issued to Wildin & Co. In terms of cashflow, the appellant's argument just does not hold water, given the fact that Wildin & Co had already obtained the full benefit by claiming the input VAT on Mr Wildin's invoices for record storage to reduce its VAT liabilities for those related periods. Accordingly, we confirm the VAT surcharges of £801.92.

DISPOSITION

229. The conjoined appeals are accordingly all dismissed. The income tax, VAT, Schedule 24 penalty assessments and the VAT surcharge under appeal with the respective amounts as tabulated under §4 of this Decision are confirmed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

230. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 3 FEBRUARY 2022

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 10 February 2022 to remove typographical slips and omissions.

ANNEX

LEGISLATION

2. The following provisions from Taxes Management Act 1970 ('**TMA**') relevant to this appeal are set out in the Annex.

(1) Sections 9A and 28A for the Notice of enquiry and Closure notice assessment.
(2) Sections 29 and 34 for the requisite conditions for a valid discovery assessment, and the ordinary time limit for a discovery assessment to be made within 4 years after the end of the year of assessment to which it relates.
(3) Section 50 provides for the Tribunal's jurisdiction on an appeal.

3. In relation to the capital allowances claims, the relevant provisions under the Capital Allowances Act 2001 ('**CAA**') are:

(1) Sections 11 to 13 on: (a) General conditions as to the availability of plant and machinery allowances; (b) Expenditure incurred before qualifying activity being carried on; (c) Use for qualifying activity of plant and machinery provided for other purposes.
(2) Section 15 on the list of 'Qualifying activities', and s 17 on 'UK furnished holiday lettings businesses'.
(3) Sections 205 and 206 concerns the 'Reduction of annual investment allowance and first-year allowances', and 'Single asset pool' etc.
(4) Section 247 defines 'Trades' for capital allowances purposes.

4. In relation to the income tax loss relief claims, the relevant provisions are under:

(1) Income Tax (Trading and Other Income) Act 2005 (**ITTOIA**) with the relevant provisions being:
   (a) Sections 5 and 7 on 'Charge to tax on trade profits' and 'Income Charged'
   (b) Section 34 on 'Expenses not wholly and exclusively for the trade and unconnected losses'
   (c) Section 57 on 'Pre-trading expenses'
   (d) Section 264 on 'UK property business'
   (e) Section 266 on the 'Meaning of "generating income from land"'
   (f) Section 323 on the 'Meaning of "commercial letting of furnished holiday accommodation"'
   (g) Section 324 on the 'Meaning of "relevant period" in ss325 and 326'
   (h) Section 325 on the 'Meaning of "qualifying holiday accommodation"'
   (i) Section 327 on 'Capital allowances and loss relief: UK property business'.

(2) Income Tax Act 2007 (**ITA**) with the relevant provisions being:
   (a) Section 23 on 'The calculation of income tax liability'
   (b) Section 24 on 'Reliefs deductible at Step 2'
   (c) Section 24A on 'Limit on Step 2 deductions'
   (d) Section 64 on 'Deduction of losses from general income'
   (e) Section 66 on 'Restriction on relief unless trade is commercial'
   (f) Section 83 on 'Carry forward against subsequent trade profits'
   (g) Section 127 on 'UK furnished holiday lettings business treated as trade'
   (h) Section 989 on 'Definition of trade'.

5. In relation to the input VAT claims, the relevant provisions are under:

(1) The Value Added Tax Act 1994 ('**VATA**') with the relevant provisions being:
   (a) Section 24 on Input tax and output tax

(b) Section 25 on Payment by reference to accounting periods and credit for input tax against output tax
(c) Section 26 on Input tax allowable under section 25
(d) Section 59 on Default surcharge
(e) Section 70 on Mitigation of Penalties
(f) Section 71 on Construction of Sections 59 to 70
(g) Section 73 on Failure to make returns etc.
(h) Section 94 on Meaning of "business" etc.

(2) The Value Added Tax Regulations 1995 (the '**VAT Regulations**') with the relevant provisions being:
(a) Regulation 29 on Claims for input tax
(b) Regulation 40 on Submission of Returns and Payment

6. In relation to the status of leisure complex in the context of planning regulations, the primary and secondary legislation being referred to in this appeal are under:

(1) The Licensing Act 2003 ('**LA2003**'):
(a) Section 1 on Licensable activities and qualifying club activities
(b) Section 14 on Meaning of 'supply of alcohol'
(c) Section 192 on Meaning of 'sale by retail'

(2) The Town and Country Planning (General Permitted Development) Order 1995 (SI/1995/418) ('**GPDO 1995**'):
(a) Regulation 3 on Permitted Development
(b) Schedule 2, Part 1 on Development within the curtilage of a dwelling house.

7. In relation to the penalty assessments for inaccuracies in returns, Schedule 24 to the Finance Act 2007 ('**Sch 24**') contains the relevant provisions.

8. In relation to the status of Sports complex in the context of planning regulations, the primary and secondary legislation being referred to in this appeal are under:

(1) The Licensing Act 2003 ('**LA2003**'):
(a) Section 1 on Licensable activities and qualifying club activities
(b) Section 14 on Meaning of 'supply of alcohol'
(c) Section 192 on Meaning of 'sale by retail'

(2) The Town and Country Planning (General Permitted Development) Order 1995 (SI/1995/418) ('**GPDO 1995**'):
(a) Regulation 3 on Permitted Development
(b) Schedule 2, Part 1 on Development within the curtilage of a dwelling house.

CAA 2001

Part 2 of the CAA 2001 provides for the conditions for capital allowances to be available, of which the relevant sections for present purposes are as follows:

11 General conditions as to availability of plant and machinery allowances

(1) Allowances are available under this Part if a person carries on a qualifying activity and incurs quality expenditure.

(2) "Qualifying activity" has the meaning given by Chapter 2.

(3) Allowances under this Part must be calculated separately for each qualifying activity which a person carries on.

(4) The general rule is that expenditure is qualifying expenditure if –

(a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and

(b) the person incurring the expenditure owns the plant or machinery as a result of incurring it.

(5) But the general rule is affected by other provisions of this Act, and in particular by Chapter 3.

12 Expenditure incurred before qualifying activity carried on

(1) For the purposes of this Part, expenditure incurred for the purposes of a qualifying activity by a person about to carry on the activity is to be treated as if it had been incurred by him on the first day on which he carried on the activity. […]

15 Qualifying activities

The definition of qualifying activities is given under s15 of CAA, and includes: (a) a trade, (b) an ordinary UK property business, (c) a UK furnished holiday lettings business …

> 'but to the extent only that the profits or gains from the activity are, or (if there were any) would be, chargeable to tax'.

17 UK furnished holiday lettings business

Section17(2) CAA provides that all such commercial lettings of furnished holiday accommodation made by a particular person or partnership or body of persons are to be treated as one qualifying activity.

ITTOIA 2005

34 Expenses not wholly and exclusively for trade and unconnected losses

(1) In calculating the profits of a trade, no deduction is allowed for –

(a) expenses not incurred wholly and exclusively for the purposes of the trade, or

(b) losses not connected with or arising out of the trade.

(2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense, which is incurred wholly and exclusively for the purposes of the trade.

57 Pre-trading expenses

(1) This section applies if a person incurs expenses for the purposes of a trade before (but not more than 7 years before) the date on which the person starts to carry on the trade ("the start date").

(2) If, in calculating the profits of the trade –

(a) no deduction would otherwise be allowed for the expenses, but

(b) a deduction would be allowed if they were incurred on the start date, the expenses are treated as if they were incurred on the start date (and therefore a deduction is allowed for them).

264 UK property business

A person's UK property business consists of –

(a) every business which the person carries on for generating income from land in the United Kingdom, and

(b) every transaction which the person enters into for that purpose otherwise than in the course of such a business.

266 Meaning of "generating income from land"

(1) In this Chapter "generating income from land" means exploiting an estate, interest or right in or over land as a source of rents or other receipts.

(2) "Rents" includes payments by a tenant for work to maintain or repair leased premises which the lease does not require the tenant to carry out.

(3) "Other receipts" includes –

(a) payments in respect of a licence to occupy or otherwise use land,

(b) payments in respect the exercise of any other right over land, and

(c) rent charges and other annual payments reserved in respect of, or charged on or issuing out of, land. […]

323 Meaning of "commercial letting of furnished holiday accommodation"

(1) A letting is a lease or other arrangement under which a person is entitled to the use of accommodation.

(2) A letting of accommodation is commercial if the accommodation is let –

(a) on a commercial basis, and

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

(3) A letting is of furnished holiday accommodation if –

(a) the person entitled to the use of the accommodation is also entitled, in connection with that use, to the use of furniture, and

(b) the accommodation is qualifying holiday accommodation (see sections 325 and 326).

324 Meaning of "relevant period" in sections 325 and 326

' … "the relevant period" for accommodation let by a person in a tax year is … 12 months beginning with the first day in the tax year on which it is let by the person as furnished accommodation …'

325 Meaning of "qualifying holiday accommodation"

(1) Accommodation which is let by a person during a tax year is "qualifying holiday accommodation" for the tax year if the availability, letting and pattern of occupation conditions are met.

(2) The availability condition is that, during the relevant period, the accommodation is available for commercial letting as holiday accommodation to a public generally for at least 210 days.

(3) The letting condition is that, during the relevant period, the accommodation is commercially let as holiday accommodation to members of the public for at least 105 days. […]

326 Under-used holiday accommodation: averaging elections

[…]

326A Under-used holiday accommodation: letting condition not met

[…]

Income Tax Act 2007

66 Restriction on relief unless trade is commercial

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

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

(a) on a commercial basis, and

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

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

127 UK furnished holiday lettings business treated as trade

(1) This section applies if, in a tax year, a person carried on a UK furnished holiday lettings business.

(2) "UK furnished holiday lettings business" means a UK property business which consists of, or so far as it includes, the commercial letting of furnished holiday accommodation (within the meaning of Chapter 6 of Part 3 of ITTOIA 2005).

(3) For the purposes of this Part (but as modified below) the person is treated instead as carrying on in the tax year a single trade –

(a) which consists of every commercial letting of furnished holiday accommodation comprised in the person's UK furnished holiday lettings business, and

(b) the profits of which are chargeable to income tax. …

989 The definitions for the purposes of the Income Tax Acts:

– "trade" includes any venture in the nature of trade

Value Added Tax Act 1994

94 Meaning of "business" etc

(1) In this Act "business" includes any trade, profession or vocation.

(2) Without prejudiced to the generality of anything else in this Act, the following are deemed to be carrying on of a business –

(a) the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members; and

(b) the admission, for a consideration, of persons to any premises. […]

CASE LAW

The authorities not included by the parties are marked with an asterik.

(1) *The Comrs of Inland Revenue v Livingston and Others* [1926] 11 TC 538 ('*Livingston*')

(2) *Scales v George Thompson & Co Limited* [1927-28] 13 TC 83 ('*Scales v Thompson*')

(3) *Ransom (Inspector of Taxes) v Higgs* [1974] STC 539 ('*Ransom v Higgs*')

(4) *Webb v Conelee Properties Ltd* [1982] BTC 368 ('*Webb v Conelee*')

(5) *Griffiths (Inspector of Taxes v Pearman; Griffiths (Inspector of Taxes v Jackson* [1983] BTC 68 ('*Griffiths v Pearman*')

(6) *Marson (Inspector of Taxes) v Morton and Others* [1986] 59 TC 381 ('*Marson v Morton*')

(7) *Rompelman and Another v Minister van Finacdiën* (Case C-268/83) [1985] 2 BVC 200157, EU:C:1985:74 ('*Rompelman*')

(8) *BLP Group Plc v C&E Commissioners* (Case C-4/94) [1995] STC 424 ('*BLP*')

(9) *Ian Flockton Developments Ltd v Customs and Excise Commissioners* [1987] STC 394 ('*Flockton*')

(10) *Customs and Excise Commissioners v Rosner* [1994] STC 228 ('*Rosner*')

(11) *Wannell v Rothwell (Inspector of Taxes)* [1996] 68 TC 719 ('*Wannell v Rothwell*')

(12) *R (oao UK Tradecorp Ltd) v C&E Commissioners* [2005] STC 138 ('*R Tradecorp*')

(13) *Mansell v Revenue and Customs Commissioners* [2005] STC (SCD) 605 ('*Mansell*')

(14) *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] STC 226 ('*Ensign Tankers HL*'); [1989] STC 705 ('*Ensign Tankers HC*')

(15) *Revenue and Customs Commissioners v Trinity Mirror plc v* [2015] UKUT 421 (TCC) ('*Trinity Mirror*')

(16) *Samarkand Film Partnership No 3 and Others v Revenue and Customs Commissioners* [2017] STC 926 ('*Samarkand*')

(17) *Grove (Surveyor of Taxes) v Young Men's Christen Association* [1903] 4 TC 613 ('*Grove v YMCA*')

(18) *Auxilium Project Management Limited c HMRC* [2016] UKFTT 249 (TC) ('*Auxilium*')

(19) *Hull City (Tigers) Ltd v HMRC* [2017] UKFTT 629 (TC) ('*Hull City*')*

(20) *CIR v Dowdall O'Mahoney & Co Ltd* [1952] 33 TC 259 ('*CIR v Dowdall O'Mahoney*')*

(21) *Miah & Ors v Khan* [2000] UKHL 55 ('*Miah v Khan*')*

(22) *Eclipse Film Partners (No 35) LLP v R&C Comrs* [2015] EWCA Civ 95, [2015] STC 1429 ('*Eclipse*')

(23) *Clynes v HMRC* [2016] UKFTT 369 (TC) ('*Clynes*')*