Appeal number: TC/2011/02843

INCOME TAX –Losses – whether losses relating to purchase and resale of commercial properties by appellant attributable to appellant's UK property business (s264 Income Tax (Trading and Other Income Act) 2005) or whether the losses were trading losses – losses were trading losses – whether "discovery amendment" under s30B(1) Taxes Management Act 1970 ("TMA 1970") to partnership statement reclassifying trading losses as property losses fell within conditions in s30B(1) TMA (which required that profits that ought to be included had not been included or that profits were or had become insufficient) on basis "profit" included negative amounts – s30B(1) TMA 1970 not applicable on this basis – appeal allowed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALBERMARLE 4 LLP **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at Bedford Square, London on 17 July 2012

Zizhen Yang, counsel, instructed by Shelley Stock Hutter LLP, chartered accountants for the Appellant

Kim Sukul, HMRC officer, for the Respondents

DECISION

Introduction

1. The issue in this appeal is whether losses incurred by the appellant relating to the purchase and re-sale of three commercial properties are losses attributable to the appellant's UK property business (as defined in s 264 of the Income Tax (Trading and Other Income) Act "ITTOIA 2005") or whether the losses were trading losses. The tax years in issue are 2005-06, 2006-07, and 2007-08.

2. The appellant contends that at the time it bought the properties, which were untenanted, its intention was to improve the value of the properties by securing tenants and then to sell the properties on within a period of 3 to 6 months. This intention did not change throughout the relevant years.

3. HMRC contends that the appellant's intention was to continue to hold the properties once tenants had been secured in order to receive rental income. The lack of an intention to trade was consistent with the way the appellant had compiled its balance sheets and completed its tax returns for the relevant years. The losses were therefore not trading losses but losses attributable to the appellant's UK property business.

4. While appeals by the members of the appellant in relation to their own tax positions are not before the Tribunal, the significance of the nature of the losses is that if the losses are determined to be UK property business losses the members of the appellant are not then able to set the losses against their general income.

5. For the tax year 2005-06, the appellant further contends that even if HMRC are right that the losses were UK property business losses instead of trading losses, HMRC had no statutory basis under either s29 of the Taxes Management Act 1970 ("TMA 1970") or s30B TMA 1970 to amend the appellant's tax return. HMRC say s30B TMA 1970 provides a basis for the amendment.

Evidence

6. The tribunal had 2 bundles of documents before it consisting of:

(1) Tax returns and financial statements for the appellant.

(2) Information relating to the properties, this included the sale and purchase agreement, draft letting agreement, offer letter in relation to bank loan, facility letter, correspondence in relation to a letter of credit, and minutes showing the activities of the appellant's letting agent.

(3) Correspondence between HMRC and the appellant and the appellant's agent.

(4) Closure notices, and notices of appeal.

(5) Correspondence between certain members of the appellant.

(6) Witness statements from two of the individual members of the appellant, Geoffrey Egan and Stuart Wallis.

The Tribunal heard evidence from Mr Egan and Mr Wallis. Both witnesses were cross-examined by HMRC.

Facts

Background

7. The appellant, Albermarle 4 LLP was formed as a limited liability partnership in December 2002. The property transactions which are the subject of this appeal relate to the purchase and sale of three commercial properties which were formerly Kwik-save stores ("the Kwik-save properties") during the period April 2005 to 2011.

8. Both parties made submissions which drew comparisons with other transactions the appellant carried out namely the purchase and sale of five neighbourhood retail parades in 2003 and 2004, and the purchase of a retail store let to Wilkinsons in April 2005 which was later sold. Findings of fact in relation to these transactions are also set out.

9. At the time of the Kwik-save transactions the LLP had 4 individual members, Geoffrey Egan and his wife Vanessa Egan, Stuart Wallis and his wife Mrs E M Wallis, and a corporate member, the Black Isle Property Company Ltd.

10. Mr and Mrs Egan's combined holding in the LLP was one third, Mr and Mrs Wallis' combined holding was also one third, and Black Isle Property Company Ltd. held the remaining third.

11. The individual members and the representative of the corporate member, (Mr Allan Thomson) were well known to each other and had also been members of various other LLPs carrying out activities in property which have "Albermarle" contained in their name ("the Albermarle syndicates"). These other LLPs have a larger number of members (between 20 to 50 or so) than the number of members in the appellant.

Sale and purchase of the neighbourhood parades

12. In early 2003, the appellant bought five fully-let neighbourhood retail parades. The neighbourhood retail parades were disposed of in or around September 2004. The properties were acquired through bank lending from Bank of Scotland on a basis of 80% loan to value. The balance of 20% funding was provided by the members of the appellant. The total cost of the properties was £15,771,000 and these properties generated a rental income of £1,243,709. A valuation was received of around £18million and a decision was made to dispose of the properties. In late 2004 the properties were disposed of, the bank debt was repaid and the balance of funds distributed to the members of the appellant.

13. Mr Egan and Mr Wallis were involved in this transaction.

14. When the appellant was involved in the Kwik-save transaction the composition of its membership (as set out at [9] above) was different to the composition of its membership when it carried out the transaction relating to the neighbourhood retail parades.

The Kwik-save and Wilkinson store transactions

15. On 17 March 2005 Mr Egan wrote to the other members setting out plans for the deal:

> "Re: Kwiksave Portfolio
>
> I attach a copy of the information in respect of the above which we can purchase at what I believe to be substantial discount provided we exchange by the end of the month, which could be quite simple. Completion would then take place in about 6-8 weeks from exchange…Basically the three units are all ex Kwiksaves which will be re-let by the developers at which point they will receive a top up payments from ourselves. I have agreed a matrix as shown on the attached sheet which shows that we purchase for, at best 7% for a prime tenant for a 15 year plus lease but a discount going up to 8.5% if they are forced after say 6 months to accept a poorer tenant. They are in discussions with the likes of Argos, Wilkinsons and Netto and I believe that they will be successful within the next month or two once the units have been closed down and marketed.
>
> As you can see from my figures the up side is circa £1m in a period of I would suggest 3-6 months. At that point we could turn them into Albermarle's, gear them up and take our equity out or just sell them and take the profit…"

16. The attached schedule as well as setting out the matrix described states:

> Purchase prices.
>
> Rent free, capital contributions no more than 6 months rent equivalent.
>
> All fit out costs, fees, rent fees etc. come out of development profit.
>
> All yields net of 5.75% fees.
>
> Interest rolls on money at 7% per annum, and deducted from development profit.

Newcastle	Purchase	£1.62m	Sale £1.9m
Sale	Purchase	£1.42m	Sale £1.65m
Rawtenstall	Purchase	£2.36m	Sale £2.75m
		£5.4m	£6.3m

17. On 23 March 2005, Sue Thomas, a property finance manager at Bristol & West wrote to Mr Egan to confirm that, in response to his recent enquiry she would be pleased to recommend a proposal to the bank's Credit Committee on the basis set out in the letter. This included the following terms:

> Amount: £3,700,000
>
> Term: 1 year
>
> Interest Terms: Cost of funds, either fixed or floating plus 1.75% on a balance of £2,220,000, cost of funds either fixed or floating plus 0.5% on a balance of £1,480,000
>
> Security: First Legal Charge over the subject property. Assignment of rental income (when let). Charged Deposit Account of £175,000…Minimum Bank Guarantee of £1,480,000 and guarantee to provided by a recognised high street bank.
>
> General comments: The proposal assumes that the properties are in good condition and that the valuer is able to confirm that they will relet within a timeframe of circa 6 months. Estimated market value upon reletting is £5.5m.

18. The letter then stated "Once let, we will be happy to renegotiate the terms on a longer basis".

19. On 31 March 2005 the LLP concluded a contract with Chatham Estates Ltd. ("Chatham") to buy three Kwik-save stores in Newcastle-under-Lyme, Rawtenstall and Sale for the following amounts:

(1) the Newcastle-under-Lyme Property: £900,000

(2) the Rawenstall Property: £1,500,000

(3) the Sale Property: £1,300,000.

20. The Kwik-save properties were bought without tenants and each of them was sold to the appellant at a discount by Chatham. At or around the same time the LLP entered into a Letting Agreement with Chatham. Under the agreement the LLP appointed Chatham to procure the letting of the Kwik-save properties and undertook to pay an amount of remuneration to Chatham upon the properties being successfully let. The Letting Agreement was for a period of 12 months.

21. On 13 April 2005, Mr Egan e-mailed Mr Thomson and Mr Wallis to report that contracts had been exchanged and that completion would take place on 30 April 2005. The e-mail went on to discuss financing, equity share, and Mr Egan's discussions with the developer. The interpretation of what was meant by the contents of the e-mail is a matter of dispute and is discussed further at [112] to [119] below.

22. On 26 April 2005, Bristol & West offered a mortgage advance of £2,220,000 to the appellant with a repayment term of 1 year. The interest rate was 1.75% plus "cost of money" as defined in the terms of the offer (in broad terms this amounted to LIBOR) subject to a clause which enabled payment of interest at a fixed rate if the parties agreed.

23. The loan from Bristol & West funded 60% of the purchase price of £3.7 million for the three properties. The members of the appellant contributed the remaining 40%.

24. The Bristol & West loan was for a period of one year.

25. On 12 May 2005 Coutts & Co. made a Standby Letter of Credit in favour of Bristol and West available for a period of 12 months to Mr Egan in the amount of £175,000.

Extensions to repayment date

26. The final repayment date of the mortgage advance was extended periodically to 28 March 2006, 28 January 2007, 1 March 2007, 30 June 2007, and then to 28 September 2007. The extensions were contingent on the letter of credit from Coutts & Co. being renewed.

The Wilkinson Property

27. In April 2005, the LLP entered into a further transaction to buy a "Wilkinson" store in Barry, Wales. The Wilkinson property when bought by the LLP was already pre-let to Wilkinson Hardware Stores Ltd for a term of 20 years at an initial rent of £165,000 to be reviewed every 5 years. The purchase price for the Wilkinson property was approximately £2.6 million.

28. The purchase of the Wilkinson Property was funded, 75% by a loan from Bristol & West with the remaining 25% being contributed by the partners individually. The loan term was 5 years. The rate of interest was 1.2% above the "cost of funds" with a clause converting the variable rate to a fixed rate if 5 year money exceeded 5.8%.

Attempts to sell

29. In relation to the property located in Sale, this was included in a property auction on 25 February 2010 at a reserve price of £975,000 but was not sold. In the period October 2009 to April 2010 there were two proposed sales to specific buyers in relation to that property which did not go through.

Sale of properties

30. No suitable tenants were found for the Kwik-save properties and they were sold at a loss.

31. A small income of £7000 was in place on the Newcastle-under-Lyme property when it was bought. Part of the property located in Sale was let.

32. The Newcastle-under-Lyme property was sold in April 2007 for £780,000. The Rawtenstall Property was sold in late 2007 for £1,400,000. The Sale Property was sold early in 2011 for £900,000.

Balance sheets

33. In the balance sheets submitted with the 2005-06 and 2006-07 returns the properties were included under "fixed assets". No balance sheet pages were submitted with the 2007-08 return.

The LLP's tax returns

34. In its partnership tax return for the tax year 2005-06 the LLP returned an amount of £252,751 as loss from a trade.

35. In its partnership tax return for the tax year 2006-07 the LLP returned an amount of £235,356 as loss from a trade. The sale of the Newcastle-under-Lyme property was shown as a disposal of a chargeable asset.

36. For both the above years the description of trade was given as "property investment".

37. In its partnership tax return for the tax year 2007-08 the LLP returned an amount of £206,477 as "loss on UK property". The sale of the property located in Sale was shown as a disposal of a chargeable asset.

Enquiries, closure notices, review and appeals

38. In relation to 2006-07 and 2007-08, HMRC opened enquiries into the LLP's tax return under s12AC of the Taxes Management Act 1970 ("TMA 1970"). Closure notices under s28B TMA 1970 were issued by HMRC to the LLP on 30 December 2010.

39. For 2006-07 the conclusion contained in the closure notice was that HMRC were not satisfied that the LLP carried on a trade in the period from 1/4/2006 to 31/3/2007 and that accordingly the Case I loss of £235,751 "was in fact a Property Income loss" of the same amount. HMRC amended the LLP's partnership tax return to reflect their conclusion.

40. For 2007-08 the closure notice concluded that HMRC did not need to make an amendment to the partnership return.

41. In a letter dated 31 December 2010, in relation to tax year 2005-06 HMRC stated they were not satisfied that the LLP carried on a trade in that tax year and the loss of £252,751 was in fact a property loss. The letter stated:

> "..I have made a discovery amendment to the 2005-2006 Partnership Statement classifying the £252,751 Case 1 loss returned as a Property Income loss. The purpose of this amendment is to protect the HMRC position following your careless behaviour in submitting a 2005-2006 Partnership Tax Return for Albermarle 4 LLP which is considered to be incorrect."

42. On 24 January 2011 the LLP appealed against determination notices issued on 31 December 2010 in respect of 2005-06, 2006-07 and 2007-08. The LLP requested an internal review of HMRC's decisions. The review was concluded on 11 March 2011 and upheld HMRC's decisions.

43. On 8 April 2011 the LLP appealed to the Tribunal against the HMRC decisions.

Law

44. Section 5 ITTOIA 2005 charges to income tax the profits of a "trade". Schedule 4 of ITTOIA which contains an index of defined expressions and which has effect under s885 ITTOIA 2005 defines "trade" by reference to s989 of the Income Tax Act 2007 ("ITA 2007") which in turn states " 'trade' includes any venture in the nature of trade". For completeness I note that this definition is relevant to 2007-08. For 2005-06 and 2006-07 the definition of "trade" in Schedule 4 ITTOIA 2005 referred to s832(1) Income Corporation Taxes Act 1988 ("ICTA 1988") which in turn defined "trade" as including "every trade, manufacture, adventure or concern in the nature of trade". Nothing in this appeal turns on the different wording of the definition.

45. Section 264 ITTOIA 2005 provides:

> **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.

46. Sections 266 and s267 ITTOIA 2005 provide:

> **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 of the exercise of any other right over land, and
>
> (c) rentcharges and other annual payments reserved in respect of, or charged on or issuing out of, land.
>
> (4) For the purposes of this section a right to use a caravan or houseboat at only one location is treated as a right deriving from an estate or interest in land.

267 Activities not for generating income from land

For the purposes of this Chapter the following activities are not carried on for generating income from land—

(a) farming or market gardening in the United Kingdom (but see section 9 (UK farming or market gardening treated as trade)),

(b) any other occupation of land (but see section 10 (certain commercial occupation of UK land treated as trade)), and

(c) activities for the purposes of a concern to which section 12 applies (profits of mines, quarries etc).

47. For the relevant years s863 ITTOIA and s118ZA ICTA 1988 specify certain treatments to follow if a limited liability partnership carries on a "trade profession or business with a view to profit" for income tax and corporation tax purposes respectively. It is not in dispute that the appellant fulfilled this condition.

Appellant's arguments

48. These are set out in more detail in the discussion section below. In respect of 2005-06 the appellant argues are that there was no proper basis under the relevant statutory provisions for making the discovery amendment. In respect of all years under appeal it argues that there is evidence of an intention to trade. This is shown by a variety of factors such as the way the transaction was financed, the work done to improve the asset through trying to get a long term tenant, the inclusion of a personal guarantee of the bank loan by Mr Egan, and the way in which the properties were disposed of. The appellant argues the necessary intent to trade is demonstrated by the witness' evidence and documents from around the time the transactions were entered into.

Respondents' arguments

49. Again, these are set out in more detail in the discussion section of this decision below. In summary HMRC say that the "discovery amendment" for 2005/6 was properly made. They say the evidence and factors relied on by the appellant are consistent with the making of a risky investment and an intention to find a long term tenant and then to hold on to the property. The appellant has not discharged the burden of proof on them to displace the assessment.

Discussion

Statutory basis for discovery amendment for 2005-06?

50. For tax year 2005-06 HMRC's position is that they have made a discovery amendment to the 2005-06 partnership statement classifying the £252,751 as a Property Income loss instead of as the Case 1 loss returned. HMRC's letter to the appellant of 31 December 2010 did not cite which statutory provision this was made under but their skeleton referred to s29 TMA 1970.

51. On behalf of the appellant, Ms Yang submitted this could not be right as s29 TMA 1970 provides for discovery assessments to be made only in relation to a tax return made and delivered under s8 TMA 1970 (personal return) or s8A TMA 1970 (trustee's return), not a partnership tax return. As no such personal or trustee's returns were in issue, s29 TMA 1970 could not provide the basis for amending the partnership statement. At the hearing Ms Sukul for HMRC, did not take issue with this.

52. As of 31 December 2010, the date of the letter containing HMRC's revised partnership statement, s29 TMA 1970 provided as follows:

> "**29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,
>
> the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made…"

53. I agree with the conclusion that s29 TMA 1970 does not provide a basis for the amendment HMRC stated it made to the appellant's partnership statement. Section 29 TMA 1970 enables the officer to make an assessment in the amount or further amount which ought in his opinion to be charged. No such assessment was made; rather the officer stated he was making an amendment to the partnership statement.

54. Ms Yang drew the Tribunal's attention to s30B TMA 1970 which did allow a "discovery amendment" to be made to a partnership return, but argued that this too could not provide a proper basis for HMRC to amend the appellant's partnership tax return.

55. At the time the amendment was expressed to be made s30B TMA 1970 provided as follows:

> **30B Amendment of partnership statement where loss of tax discovered**
>
> (1) Where an officer of the Board or the Board discover, as regards a partnership statement made by any person (the representative partner) in respect of any period—
>
> (a) that any profits which ought to have been included in the statement have not been so included, or
>
> (b) that an amount of profits so included is or has become insufficient, or
>
> (c) that any relief or allowance claimed by the representative partner is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (3) and (4) below, by notice to that partner so amend the partnership return as to make good the omission or deficiency or eliminate the excess.
>
> (2) Where a partnership return is amended under subsection (1) above, the officer shall by notice to each of the relevant partners amend—
>
> (a) the partner's return under section 8 or 8A of this Act, or
>
> (b) the partner's company tax return,
>
> so as to give effect to the amendments of the partnership return
>
> (3) Where the situation mentioned in subsection (1) above is attributable to an error or mistake as to the basis on which the partnership statement ought to have been made, no amendment shall be made under that subsection if that statement was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.
>
> (4) No amendment shall be made under subsection (1) above unless one of the two conditions mentioned below is fulfilled.
>
> (5) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by—
>
> (a) the representative partner or a person acting on his behalf, or
>
> (b) a relevant partner or a person acting on behalf of such a partner.
>
> (6) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the representative partner's partnership return; or
>
> (b) informed that partner that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(7) Subsections (6) and (7) of section 29 of this Act apply for the purposes of subsection (6) above as they apply for the purposes of subsection (5) of that section; and those subsections as so applied shall have effect as if—

(a) any reference to the taxpayer were a reference to the representative partner;

(b) any reference to the taxpayer's return under section 8 or 8A were a reference to the representative partner's partnership return; and

(c) sub-paragraph (ii) of paragraph (a) of subsection (7) were omitted.

(8) An objection to the making of an amendment under subsection (1) above on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the amendment.

(9) In this section—

"profits"—

(a) in relation to income tax, means income,

(b) in relation to capital gains tax, means chargeable gains, and

(c) in relation to corporation tax, means profits as computed for the purposes of that tax;

"relevant partner" means a person who was a partner at any time during the period in respect of which the partnership statement was made.

(10) Any reference in this section to the representative partner includes, unless the context otherwise requires, a reference to any successor of his.

56. One of the circumstances set out in s30B(1)(a), (b) and (c) of TMA 1970 must apply, but Ms Yang says none of them do.

57. First, any failure by the appellant to include the relevant losses as part of the LLP's UK property business would have had the effect of *increasing* the profits of that business. This rules out s30B(1)(a) and (b) which refer to profits which ought to have been included not being included, and the amount of profit being insufficient respectively.

58. Second, there is no challenge to any relief or allowance claimed by the representative partner of the LLP. This rules out s30B(1)(c) applying which deals with reliefs or allowance becoming excessive.

59. For HMRC, Ms Sukul did not argue there was a challenge to any relief or allowance but argued "profit" can be a negative figure. HMRC say that either a profit (the negative figure of a loss) was not included when it ought to have been included or

that the amount of trading profit in the return is insufficient. I have some difficulty following the argument but if I have understood it correctly it amounts to saying either that an amount of property business profit (albeit a negative figure) ought to have been included but was not, or that the appellant through stating a trading profit (in the form a negative figure) has understated profits which ought to be a higher figure (presumably zero). To this the appellant says HMRC's argument relies on there being a trade whereas HMRC's case is that there is no trade.

60. In response to HMRC's argument that profit can be a negative figure, Ms Yang further submitted that if this was the case the distinction between sub paragraphs a) and b) would fall away. Subsection a) deals with the situation where no profits are declared and b) deals with the situation where some profit is declared but it is not enough. In other words in a) the profit number is zero but it should be a positive figure. In b) it is a positive figure but it should be more positive. My understanding of this argument is it is saying that if in a) the profit can be less than zero then there is no need for subparagraph b) ie sub paragraph a) serves the function of capturing increases from whatever starting point, there is not then the need for b) which also covers insufficiency of amount.

61. Also Ms Yang drew attention to s30B9(a) TMA 1970. In so far as income tax was relevant this defined "profit" in s30B TMA 1970 as "income". The references to profit were clearly about under declaration of a positive number. Subparagraph c) dealt with negative numbers.

62. Ms Sukul submitted that just because subparagraph c) deal with negative numbers this did not mean subparagraphs a) or b) could not also deal with negative numbers.

63. Ms Yang argued in addition that if UK property business profits were to be viewed as underdeclared because no loss to the property business was attributed then there would be double taxation if HMRC disallowed the trading loss as s30B TMA 1970 did not provide a means to decrease property business profits by allocating the loss to the UK property business.

Discussion on discovery amendment point

64. My starting point is that the interpretation the appellant seeks falls within the plain meaning of the words of s30B TMA 1970. This is not a situation where profits or income have not been included when they ought to be included, or where profits or income have been included which are or have become insufficient. Conversely the interpretation HMRC seeks departs from the ordinary meaning of the words "profit" and "income" so as to encompass negative amounts. Beyond asserting that the provisions may be read in that way, HMRC have not put forward reasons which persuade me that "profit" /"income" in the particular context of this provision should be read in that way. On the contrary the interpretation HMRC suggest appears to me to be at odds with the preceding provisions in TMA 1970 dealing with partnership returns and partnership statements which take care to specify whether amounts are net and which specifically mention losses in distinction to income.

65. Section 12AA TMA 1970 which provides the basis for the partnership return refers in s12AA(1) to establishing the amount each partner is chargeable to income tax and then goes on in s12AA(1A) to specify that this is a net amount which take into account any relief or allowance for which a claim is made. Section 12AB TMA 1970 which requires the partnership return to include a partnership statement refers in s12AB(1)(a)(i) to the amount of "income or loss". Given the approach in these preceding provisions, if "profit" in s30B TMA 1970 were intended to cover negative amounts I would have expected the drafting to have dealt with this explicitly.

66. The heading of s30B TMA "Amendment of partnership statement where loss of tax discovered", although only indicative, helpfully belies the purpose of the provision in my view. In contrast to the wider power of amendment to make corrections (under s12AB TMA 1970) the provision's purpose is to enable amendment where a loss of tax is discovered. That will clearly be the case where positive amounts of profits not been declared or are under-stated, or if reliefs or allowances are excessive. Given the underlying purpose I have considered whether, if the appellant is correct and s30B TMA 1970 does not provide a statutory basis for the amendment, whether that result would undercut the purpose so significantly as to support HMRC's more expansive interpretation of "profit".

67. I do not think it does. If HMRC are correct that the loss is a property business loss and not a trading loss, it is not that fact by itself which means there is a tax loss but the fact of whether and to what extent a partner seeks to relieve the loss against other income. The issue of whether any tax loss would arise in this way if HMRC are correct, or the ability or otherwise for amendments to be made to the partners' personal returns is not before me. It is sufficient for the purposes of the issue before me to note that a conclusion that s30B TMA 1970 does not apply does not give rise to an obvious gap in the statutory provisions which, given its underlying purpose, cannot have been intended.

68. The appellant's argument that there is no statutory basis for the amendment accords with the plain words of the provisions in s30B TMA 1970, it is consistent with the drafting of other provisions where specific mention is made when losses are intended to be included, and it is not inconsistent with the underlying purpose of the provision. On that basis I agree s30B TMA 1970 does not apply so as provide a basis for HMRC's stated amendment. I do not therefore deal with Ms Yang's specific submissions made in reply to HMRC's arguments grateful though I was for them.

69. The amendment is ineffective and the appeal in relation to the amendment of the partnership statement for 2005-06 is therefore allowed.

Legal test to be applied

70. It was not in dispute that during the relevant years the LLP carried on "a trade profession or business with a view to profit" and that accordingly under s863 ITTOIA that the activities of the LLP are treated as carried on in partnership by its members. The principal dispute between the parties concerns whether the appellant's activities in relation to the Kwik-save properties constitute a UK property business within the

meaning given in s264 ITTOIA. While the outcome of that determination will affect the individual tax positions of the partners (given that where the appellant carries on UK property business the losses are not available to each partner to set off against his or her general income) as mentioned above the appeals by the partners in relation to the tax they owe are not before the Tribunal.

71. If the appellant's activities in relation to the Kwik-save properties constituted activities which were a trade or an adventure in the nature of trade they could not also be a UK property business.

72. While HMRC had mentioned various cases in its skeleton argument, (which the appellant were submitted were irrelevant), HMRC did not set out its submissions on those cases but was content to proceed on the footing that the question of whether the activities in relation to the Kwik-save properties were a trade or an adventure in the nature of trade was a question of fact to be determined on all the evidence before the Tribunal.

73. The parties were further in agreement that in approaching this question there were certain features or "badges" mentioned in the case-law in relation to the activities which may point to one conclusion rather than the other. The significance of such badges to the question for the Tribunal was not in dispute.

74. In *Marson v Morton* [1986] 1 WLR 1343 Sir Nicholas Browne Wilkinson V-C stated in relation to the factors set out in the authorities that they:

> "…are in no sense a comprehensive list of all relevant matters, nor is any one of them, so far as I can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate."

75. It was also not in dispute that the Tribunal should look to ascertain the intention of the appellant at the time the properties were acquired. As the appellant submitted trading requires an intention to trade and normally the question to be asked is whether this intention existed at the time of the acquisition of the asset, (*Lionel Simmons Properties Ltd v CIR* [1980] 53 TC 461 at 491 per Lord Wilberforce). Nor was it in dispute that it was possible for a single one-off transaction to be an adventure in the nature of trade (*Marson* pg 1347 at H).

76. What was in contention was the conclusion to be drawn from the facts and circumstances surrounding the appellant's activities. Did the facts and circumtances disclose a trading intention in relation to the Kwik-save properties as the appellant argued? Or, were the facts and circumstances such that the activities were for the purpose of generating income through exploiting the appellant's estate or interest in the Kwik-save Properties as a source of rents or other receipts, as HMRC argued?

77. Although, following my determination above on the lack of a basis for the amendment to the partnership statement for 2005-06, the issue of trading intention is not relevant for that year; it is still relevant to establishing the nature of losses in respect of the amendments to the appellant's return for 2006-07 and 2007-08.

78. The appellant has put forward a number of factors which they say are relevant. I discuss these, HMRC's responses where made, and my conclusions on the relevance of these factors below.

Properties bought untenanted and empty

79. The properties were bought untenanted and empty. The appellant argues this is consistent with an intention to turn properties to profit by a sale and inconsistent with intention to carry on business for exploiting its estate or interest in those properties as a source of rents or other receipts. The lack of tenants is to be contrasted with the appellant's activities in relation to the neighbourhood retail parades and the Wilkinson property purchase. These properties were bought pre-let, and yielded immediate rental income.

80. I approach this factor and the comparisons made with previous transactions with some degree of caution. The fact the properties were bought untenanted is consistent with the appellant's argument that its intention was to buy the properties, let them and then sell them on. But, equally, the lack of an existing tenant for the Kwik-save transaction does not preclude the possibility that the Kwik-save transaction was entered into with a view to getting a tenant in and then benefitting from a rental income stream from that tenant. The difference between the previous transactions and the Kwik-save ones is not wholly irrelevant in that it may provide context for better understanding the evidence of the witnesses and the documents passing between the members of the appellant but I find it to be of limited help in showing that the appellant intended to sell the property upon letting it rather than continuing to hold it.

81. I am similarly wary of placing much store by the comparisons with the profile of other transactions the appellant has undertaken. The appellant points to Mr Egan's evidence that Kwik-save transaction was different from the other transactions. Those transactions said to be investment transactions tended to be for 5 year terms or more and with 50 or so members. The Kwik-save transaction was with a handful of members, and the appellant says, an intended duration of 3 to 6 months.

82. I note however that the Wilkinson property purchase was for a 5 year term but that as with the Kwik-save transactions the appellant was constituted with a handful of members rather than 50 or so members. In any case, the tax treatment of the appellant's other transactions and any typical features they may or may not have had does not help with the issue in this appeal which is the nature of the activities in relation to the Kwik-save properties. As indicated above the relevance, if any, of the other transactions lies in providing context for better understanding evidence put forward on behalf of the appellant.

Financing structure

83. The appellant argues the financing structure of its purchase of the Kwik-save properties is strongly supportive of its intention to resell quickly rather than retain the properties as an investment. It contrasts the differences in duration and interest rate between the loan to buy the Kwik-save properties with the duration and interest rate

of the loan to buy the Wilkinson property. The loan for the Kwik-save purchase was for 1.75% above cost of funds which was 0.55% higher than the rate of interest for the Wilkinson loan (1.2% above cost of funds). Financing for short-term and high rate of interest, say the appellant, supports a finding that the transaction entered into on a short-term basis for purpose of making profit out of purchase and sale. I was referred by the appellant in this regard to the Court of Appeal decision in *Wisdom v Chamberlain* [1969] 1 WLR 275.

84. As it turned out, the Kwik-save properties were not sold in the short-term. The appellant also highlighted that the extensions it obtained for the Kwik-save loan were short-term and did not exceed 6 months. This was, it was said, consistent with the appellant wanting to sell the properties. Further the fact the Kwik-save loan was only 60% of the purchase price whereas the Wilkinson loan was 75% of the purchase price was indicative that the Kwik-save transaction was higher risk and was consistent with buying and selling in the short-term.

85. HMRC say the short term duration of the loan and the higher interest rate are consistent with entry into a risky financial investment in the form of the high rental yielding commercial property market. While they accept the financing was of a short term nature they say the arrangements were put in place in order to take the appellant up to the point of letting the properties not up to the point of selling the properties. In addition, HMRC submitted there was little difference between a long term loan and a short term loan that has express provision for renegotiation once the property was let. While there was no express term in the loan HMRC drew attention to the in principle offer letter from the bank to Mr Egan (set out at para [17])which after setting out the terms of the loan went on to say: "Once let we will be happy to renegotiate the terms on a longer basis."

86. The appellant says this statement was in no way binding and there was no guarantee that the one year term would be extended. It was nothing more than an invitation by the bank for the appellant to talk to the bank again about financing once the property was let. It was consistent with other evidence given my Mr Egan and in the documentary evidence that an alternative to selling the property was to realise a trading profit and then bring in other investors so that the appellant operated in a similar way to the other Albermarle property syndicates.

87. I do not agree that the statement in the bank's letter as to renegotiation on a longer term basis has the significance that HMRC seeks to place on it and I prefer the appellant's interpretation of the statement. It indicates no more than that the bank was interested in putting itself in the frame for more business from its point of view should the properties be let. It does not indicate to me that the appellant's intention was to hold on to the properties and let them out.

88. HMRC also suggest that the fact that the security provisions of the loan include assignment of rental income is compatible with a longer term property investment. I did not have the deed of assignment of rental income before me and cannot make any finding as to what length of term over which it contemplated capturing rental income. In any event it is clear from the loan documents before me that the assignment of rent

was not instrumental to the provision of the loan. Other security such as a charge over a deposit account or a letter of credit to the value of £175,000 was required.

89. However, returning to the appellant's broader submissions, I am not persuaded that the attributes of the financing structure of the loan for the Kwik-save properties in terms of its duration, interest rate and loan to value help on the issue before me. I accept (and I did not understand HMRC to take any point on this) that the financing was for a short term and for high interest. But, while those attributes are consistent with the appellant's case that the intention was to sell the properties, or to turn a trading profit and reconstitute its membership, once it found a long term tenant, those financing attributes are in my view just as consistent with the appellant deciding to hold onto the properties with the long term tenant in place and then obtain longer term and cheaper finance at that point.

90. To the extent there is anything to be drawn from comparisons with other transactions, the different financing attributes of the Kwik-save loan when compared with the loan for the Wilkinson property are just as likely to derive from the fact the Kwik-save property was bought untenanted whereas the Wilkinson property did have a tenant.

91. In the *Wisdom* case which was referred to by the appellant, transactions in silver bullion were found to be in the nature of a trade. The purchase of bullion was financed by loans at a high interest rate. That fact formed part of the factual matrix underpinning the decision that the transactions were in the nature of a trade but (there was no suggestion it was decisive or to be accorded special weight). The point is I think of limited assistance here where there is another possible explanation for why the financing was short term and high interest namely that longer term and cheaper financing may have been found once a long term tenant was found. The financing structure of the Kwik-save loan does not go as far as pointing one way or the other whether, once long term tenants were found, the appellant's intention was to sell the properties or to hold on to them and refinance the loans.

92. The fact that there were many short term extensions to the financing does not help either. These may also be a function of the property lacking a long term tenant. They do not indicate one way or the other what the appellant's intention was once the tenant was found.

Personal guarantee

93. The appellant highlights the fact that the Kwik-save transaction is the only one of the transactions carried out by the appellant where a personal guarantee to the bank was given, and further that Mr Egan would not have been willing to give a guarantee if it were intended the property would be held for more than a few months. It should be clarified that when the term "personal guarantee" was being used by the appellant in its submissions and by Mr Egan in his evidence at the hearing I have understood this as a shorthand for arrangements under which a Standby Letter of Credit from Mr Egan's bank, Coutts & Co. was issued to the lending bank Bristol & West and under

which Mr Egan would become liable to Coutts & Co. for sums drawn down pursuant to the letter of credit.

94. I am not persuaded that the fact that Mr Egan took on personal liability in the Kwik-save arrangements but not in other arrangements, or that apart from the Kwik-save transaction, members of the appellant did not agree to be liable in similar fashion helps. The fact the bank required the security in this way to cover interest in the loan was, it appears to me, as much a function of there being no rental income from a confirmed tenant. The presence of such guarantee arrangements and Mr Egan's propensity to take them on only if it they were short term is equally consistent with a scenario under which the properties were to be retained and let once a tenant was found and the financing rearranged.

95. The appellant also sought to place significance on evidence Mr Wallis had given that he had put in £700,000 into the Kwik-save transaction and this was greater than the amount he would normally put in, and that he did not have money to put this amount in long term. While I accept Mr Wallis' evidence on this point it does not in my view indicate that the appellant's intention was to sell the properties. It is again in my view equally consistent with the properties being retained and let once a tenant was found and with the financing being rearranged at that stage.

Changes made to asset to enhance saleability

96. The appellant referred to *IRC v Livingston* [1927] SC 251, a case involving an isolated transaction where a cargo vessel was bought and then converted into a steam drifter. The decision there was that profit arising from "the expenditure on the subject purchased…for the purpose of making it marketable at a profit" seemed in the Lord President's view "to be the very essence of trade". Similarly the appellant argued it had expended funds in actively pursuing tenants for the purpose of making the properties more marketable at a profit.

97. I am satisfied from the evidence shown to me on the activities of the letting agent, and the arrangements for their remuneration that the appellant had expended resource and made efforts to secure long term tenants, further that the presence of long term tenants would enhance the saleability of the properties. Further, I do not disagree that the enhancement of saleability is an indication of trading. But, the issue here is whether there was an intention to sell the property once a tenant was found or to hold onto it. Causing work to be done to secure suitable tenants is equally consistent with an intention to let the property once the tenant is found. I therefore do not accept that this argument helps the appellant.

Letting agreement short term

98. The appellant argues that the fact that the letting agreement entered into between the appellant and Chatham was for 12 months indicates it was the appellant's intention not to hold the Kwik-save properties for any extended period of time.

99. One of the main purposes of the letting agreement appears to be to put an obligation on Chatham to seek long term tenants (the agreement referred to getting leases for 15 years, with the possibility of shorter leases of 10 years or 5 years if after 6 months a 15 year lease had not been achieved). It is to my mind not surprising that an agreement directed towards getting a long term tenant into the property (as opposed to managing the tenancy once the tenant is in) is for duration of 12 months. I do not therefore agree that the 12 month duration indicates the appellant did not intend to hold the properties for any extended period of time. While the duration is not inconsistent with the appellant's case it is equally consistent with the appellant holding on to the properties once they had been let.

Properties sold in a way typical of trading organisations

100. The appellant argues the properties were sold in a way typical of trading organisations. Two of them it is said were sold in or just after auctions, the other was sold to the owner of adjacent premises. HMRC say the method of sale is also consistent with getting out of bad long term investment. I agree with HMRC. The method of sale in the circumstances of this case throws no further light on the determination of the issue.

Evidence given by witnesses as to intent

101. Both Mr Egan and Mr Wallis gave evidence which was relevant to the issue of the appellant's intent. Both witnesses came across to me as seasoned participants in commercial property and investment activities. I found both Mr Egan and Mr Wallis to be credible witnesses. In relation to Mr Egan an issue was raised by HMRC which, although not expressed explicitly in such terms by HMRC, had the potential to go to his credibility. There is also an e-mail from Mr Egan where I take a different view to that expressed by Mr Egan and Mr Wallis as to the meaning of the e-mail. These issues are discussed further at [116] and [129] but the outcome on those issues is that they do not detract from my view that Mr Egan was a credible witness.

102. In his evidence Mr Egan stated that it was always the intention of the members of the appellant to dispose of the Kwik-save properties in the short term and that intention did not change. He explained that if the properties had been successfully let it may then have been decided to retain the properties resulting in a change of intention of the members and that if that was the case then "the transaction would have become a "traditional" Albermarle transaction", other members would have been invited into the LLP and it would be refinanced with longer term funding such as the 5 year funding agreed for the Wilkinson property. He said that "at that point the original members would have realised their trading profit".

103. Mr Wallis states in his evidence that after late 2004 he was contacted by Mr Egan in relation to an opportunity which existed to acquire 3 Kwik-save stores which Mr Egan believed were available at a discount and could be sold with a time-frame of 3-6 months for a profit. He stated he was "aware at the outset that the properties were un-let and that this was an opportunity to market the properties correctly and with some general maintenance and cosmetic improvement allowing the properties to be

let and then sold at a profit in a short time-frame". Mr Wallis also stated he had spoken with the representative of the corporate member Black Isle and that "we all understood [the property bought] was for selling".

104. While the credibility of Mr Egan and Mr Wallis was not in issue I am conscious that they are speaking to one transaction amongst many that they were involved in, and that the transaction happened around 7 years ago. I take this into account in weighing their evidence.

105. Before seeing whether any findings can be made as to the nature to the appellant's intent on the basis of this evidence I also need to consider the documentary evidence from the time of the Kwik-save transaction. Essentially HMRC argue this is insufficient to displace their view that the relevant intention was to hold onto the properties in order to let them. The focus of the documents, they say is on letting the property and says very little about selling them. The appellant argues the documentary evidence is consistent with the trading intent they say existed and continued to exist.

Documents contemporaneous with Kwik-save acquisition

Schedule headed "Albermarle 4 LLP"

106. According to a letter dated 27 July 2010 from the appellant's representative, Shelley Stock Hunter LLP, to HMRC which enclosed the schedule the schedule was prepared in March 2005. It is however not clear who prepared the schedule and who if anyone it was sent to at that time. It sets out details of the members and shares and the equity they were to put in and financing for the Kwik-save and Wilkinson's purchases. It states at the bottom "Intention to finance with Bristol and West Building Society and refinance taking out some equity once 3 Kwiksaves let."

107. I accept that the document was prepared when it was stated to be. From this document I note there is no reference to selling the properties. The reference to taking out some equity is consistent with Mr Egan's and Mr Wallis' explanation that as an alternative to selling the property they would bring in new investors, refinance and take a profit.

Letter dated 17 March 2005 from Mr Egan to Mr Wallis and Mr Thomson headed "Kwiksave portfolio"

108. The relevant parts of this letter are set out at [15] above. The letter clearly mentions the alternatives of selling the properties or taking the equity out. Mr Egan refers in it to an "up side" of "circa £1m in a period of I would suggest 3-6 months." The reference to "turning them into Albermarle's" is consistent with the explanation given by Mr Egan and Mr Wallis that if the property was to be held on to there would be a change in membership. The letter supports the evidence of Mr Egan and Mr Thomson as to their intent, and supports the appellant's contention that its intention was to realise a profit over the short term.

109. I also note what the detail of the letter does not cover. While details are provided of the hoped for profit over the short term, the percentage due to Chatham depending on what kind of tenant was found, beyond the reference to a deduction of 5.75% from yields, there is no detail set out of the anticipated rental income or yield over the length of the term. If the appellant's intention was to let the properties over the long term it seems surprising to me (taking into account the contributions by the members were not insignificant) that no details were provided of the expected rental yields. On the face of it the absence of such information is consistent with the appellant's case that its intention was not to hold on to the properties to let them out. However given there was nothing to suggest the documentation put before me represented the totality of what was communicated between the members at the relevant time I do not place any significant weight on the absence of details about long term yields and it is more a point I make in passing.

Letter dated 4 April 2005 from Mr Egan to C Robinson, Atis Real

110. This letter encloses information relating to the Kwik-save properties and the Wilkinson property. It mentions the Kwiksave transaction is already exchanged that completion will take place at the end of the month. It refers to the matrix of figures which set out how much Chatham would get depending on the tenant it secured. It encloses a letting report from Bolton Birch.

111. I did not receive evidence on who C Robinson, or Atis Real were and what their role was in the transaction. The letter is consistent with an intention that the appellant wanted to get a tenant for the property but I do not find anything in it that shows an intention to sell the property once let.

E-mail dated 13 April 2005 from Mr Egan to Mr Wallis and Mr Thomson

112. The interpretation of this e-mail is disputed. The e-mail stated:

> "Bristol & West are giving us £3.7m but they require additional security for 40% i.e. around £1.5m (plus 1 years in less deposite say £200,000). They are happy with some form of guarantee or deposit for this level. Meanwhile I have met with the developers and they are is (sic) discussions with Argos & Wilkinsons in Rawtenstall and Poundstretcher in Newcastle. Hopefully we will be able to get one away in the next month or so and that would cover most of the interest for them all. We would then be able to take some long term money on that one and reduce our guarantee pro rata
>
> ….The question is how do we share and split. I would prefer the equity to be an equal 3 way split and can put in my one third of any long term equity required for all four (which should come down once we let the Kwiksave)….. The suggestion was therefore that I do £100,000 and yourself and Stuart do £700,000 each but that interest is rolled at mezzanine rate say 8% per annum. I believe it will only for for (sic) 3-6 months, and reducing as we get the units away…"

113. HMRC's case, which Ms Sukul put to Mr Egan in cross-examination was that when Mr Egan stated "Hopefully we will be able to get one away" and later in the e-mail "I believe it will only for for 3-6 months and reducing as we get the units away" he was referring to letting the Kwik-save properties not selling one of them. Mr Egan denied this was the case.

114. Despite Mr Egan's denial taking into account the other contents of the e-mail I think HMRC's view is the better one. There was nothing to suggest that the mention of Argos, Wilkinsons and Poundstretcher was in relation to those parties were being lined up as potential purchasers rather than potential tenants and, given the appellant's stated strategy of finding a tenant first and then selling it seems to me far more probable that that these parties were brought up in discussions as potential tenants. The time scale of "the next month or so" as of 13 April 2005, when the e-mail was sent seems to me to be unlikely for a sale (particularly if no tenants had been found) but possible for a let. The later reference to "once we let the Kwiksave" also seems to me to indicate that "get one away" was referring to the letting of a property.

115. However, the fact that the e-mail refers to letting rather than sale is and that there is no indication of an intention to sell in my view of limited relevance. Whether the appellant's intention was letting the properties long term or selling them after letting them, the focus of the appellant at this point in time would need to be on getting a tenant in so it is not surprising that this is what the e-mail referred to.

116. I have considered whether the fact I have preferred HMRC's interpretation of the e-mail over Mr Egan's evidence has any implications for the credibility of his other evidence. I am satisfied it does not. I take into account that the e-mail was written just over 7 years before the hearing and that in my view Mr Egan's answer was more a reflection of what he thought the e-mail must have meant looking at it afresh, rather than a recollection of what he actually meant when he wrote it just over 7 years ago.

117. HMRC also suggested that the references to "long-term money" and "long term equity" indicated that the appellant was to hold on to the properties and let them out long-term. They say the reference to "long term money" would not make any sense on a property which was sold. Both Mr Egan and Mr Wallis explained that any refinancing on a longer term basis would in their minds entail a change in members of the appellant, and a declaration of profit. Mr Egan gave evidence of another LLP he was aware of, Albermarle 5, where this had happened.

118. I find those explanations plausible and I do not think the excerpts from the e-mail referred to by HMRC necessarily have the significance HMRC seek to place on them.

119. The upshot is that while this e-mail is consistent with the appellant being concerned to find a tenant it does not indicate one way or the other what was to happen after the tenant was found.

Relevance of certain documents being redacted when sent to HMRC

120. In the course of correspondence between the parties prior to the appeal the appellant sent copies of various documents to HMRC. A letter dated 27 July 2010 from Shelley Stock Hunter LLP to Mr Henderson at HMRC enclosed documents which included copies of documents which had certain sections blacked out (ineffectually it appears as Mr Henderson was, it seems from a letter dated 18 August 2010 to read the blacked out parts of the documents.) Mr Henderson's note of a telephone conference with Mr Egan and Mr Churchill of Shelley Stock Hunter LLP on 14 December 2010 records that the blacking out of the documents was discussed.

121. It was put to Mr Egan that the redaction of the documents was misleading and it was submitted that his explanation that he did not think the redacted parts were relevant was unconvincing. Mr Egan gave evidence that he did not carry out the redaction. HMRC submits that this is not consistent with the note of the telephone conference. They say the appellant was unwilling to disclose documents which supported the view that they were not carrying out a trading activity.

122. The appellant argues that the redaction of documents is irrelevant to the issue for determination in this appeal. The Tribunal had before it the clear versions of the documents and HMRC were able to conduct their case on the basis of those versions.

123. I agree with the appellant that the redaction of the documents is not relevant to the issue of whether the appellant's activities were a trade or whether they were property business. At best even it were established that Mr Egan did redact the documents and that this was not because he thought it was irrelevant, this would simply be evidence that he thought the blacked out parts were harmful to the appellant's case. It would not shed light on whether the excerpts were in fact harmful or not.

124. Although it was not put in such terms by HMRC there does appear to be an issue of whether any of the submissions HMRC make go to Mr Egan's credibility. The appellant considers there is no merit in this but it is I think a point I need to deal with as Mr Egan's evidence is relevant to the question before me.

125. The note of a conversation between Mr Henderson of HMRC, Mr Egan and Mr Churchill of Shelley Stock Hutter LLP which took place on 14 December 2010 included the following:

> "…Mr Egan's letter of 17 March 2005 was discussed. i) Mr Egan did not consider that the "blacked out" part of that letter was cause for concern. His sole purpose in "blacking out" part of this letter, other letters and e-mails was merely to remove elements which he considered to be irrelevant to the enquiry. ii) As Henderson had previously stated in correspondence the "blacked out" element of the 17 March 2005 letter read as follows:
>
> "As you can see from my figures the upside is circa £1m in a period of I would suggest 3-6 months. At that point we could then turn them into Albermarle, gear them up and take out equity or just sell them and take a profit."

> …The summary headed "Albermarle 4 LLP" which, Mr Churchill had previously reported was prepared in March 2005 before the purchases were made was discussed. i) Mr Egan said that the "blacking out" of the following passage from this document had been done to remove information irrelevant to the enquiry: "Equity invested / underwriting attracts interest at 8% per annum whilst outstanding. Intention to finance with Bristol & West Building Society and refinance taking out some equity once the three buildings were let. ii) The "blacked out" section again referred to the possibility of transferring one or more of the building to one of the other Albermarle investment vehicles."

126. On re-examination Mr Egan said he did not say that the blacked out parts were not relevant. He said he would have left it to Mr Churchill to make this point.

127. In its submissions HMRC drew attention to the inconsistency between what was said in evidence and Mr Henderson's note of a telephone meeting. The notes of the telephone call were sent under cover of letter dated 15 December 2010 to Shelley Stock Hutter LLP. Mr Egan said he could not remember whether he received the notes. I accept the appellant's submission to the effect there is nothing particularly surprising about this given the length of time that has since passed. There was no indication that there was an intention for the note to be agreed as an accurate record.

128. Given a copy of the note was sent out the day after the telephone conversation took place it had been prepared promptly. It was detailed and on the whole carefully drafted. (I did note a discrepancy between the words stated in the note to be blacked out and the words which were actually blacked out in the copies put before me (the words "As you can see from my figures the up side is circa £1m in a period of I would suggest 3-6 months" were not blacked out in the copies before me)). The note distinguished between what Mr Churchill said and what Mr Egan said, but at some points reported them both as saying something. Although the note distinguishes between what Mr Churchill and Mr Egan said the statement "his sole purpose" does not say in terms that Mr Egan blacked out the draft although that would appear to be Mr Henderson's assumption. It seems to me from the note that Mr Henderson's primary concern was to understand why the excerpts had been blacked out rather than establish who had blacked the documents out although I can only speculate as there was no evidence before me from Mr Henderson speaking to the document or to his recollection of the conversation.

129. I am not satisfied that the note of the conversation without more provides me with a sufficiently solid basis to find that Mr Egan made the redaction in the face of Mr Egan's denial that this was the case. In any case, in relation to any allegation that HMRC seek to make, that Mr Egan's denial that he made the redaction is untruthful in view of the note of the telephone conversation the allegation was not put to Mr Egan in cross-examination. Mr Egan was not therefore given an opportunity to respond to any such allegation. To the extent HMRC were seeking to question Mr Egan's credibility on the basis that his denial at the hearing that he made the redaction is inconsistent with the note of the telephone conversation I reject any such submission.

Relevance of previous returns / balance sheets and whether appellant considering negligence claim against former accountants

130. HMRC argued there was an inconsistency between the way the appellant's returns and balance sheets had been prepared and the appellant's argument that its activities amounted to trade. The balance sheets showed the properties as fixed assets and the sales of the properties were shown as disposals of chargeable assets. HMRC disagreed with the appellant's argument that this was just an issue of "labelling".

131. I too do not agree that the way the transactions were treated in the returns and balance sheets is wholly irrelevant. All other things being equal it might be expected that an appellant with an intention to trade would have prepared its balance sheets and returns on an accountancy and tax basis consistent with that. I note though that the returns for 2005-06 and 2006-07 did return a trading loss, so it is not the case that the way the returns were filled out was wholly inconsistent with the appellant's case. To the extent the elements of the return and chargeable assets that HMRC point to are inconsistent with the appellant's case; I find this to be of limited assistance given the internal inconsistency within the returns and balance sheets. For 2007-08 I take some account of the appellant returning the loss as a property income loss although I think its relevance should not be overstated. If the returns and balance sheets had been completed in a way which was wholly consistent with the appellant's case that would similarly be of limited relevance to the issue of whether in fact an appellant had the requisite trading intent.

132. The evidence from Mr Egan and Mr Wallis was that for 2005-06 and 2006-07 once it became apparent to them that the accountancy firm they were using was not competent to prepare the tax returns an alternative firm was appointed. Mr Egan's evidence was that the tax return for 2007-08 was prepared on the assumption that the previous returns were correctly prepared when it was now obvious that this was not the case. His evidence was that the members of the LLP had prepared a case against the former representative to recover losses as a result of negligence, that the representative had been notified of this and that he was aware the representative had notified its professional indemnity insurers.

133. No documentary evidence was put before me in relation to such proceedings. At best I take from Mr Egan's and Mr Wallis' evidence on the point that they are considering proceedings against the former representatives.

134. However, the point is in my view tangential to an issue itself of tangential importance. It relates to the issue of how much weight is to be given to the tax returns and balance sheets and as discussed above, for 2005-06 and 2006-07 the tax returns and balance sheets are of limited assistance.

135. In relation to 2007-08 any proceedings against the former representative do not detract from the account I take of the approach to the 2007-08 return where the former representatives were not involved. In relation to Mr Egan's explanation of how the 2007-08 return came to be completed inconsistently with the appellant's case, I note that he also gave evidence that his primary role was as a chartered surveyor, that his expertise was in property investment and property dealing and that he relied on his

advisors in matters outside his expertise. The explanation in relation to the completion of the 2007-08 return is supposition on Mr Egan's part as to how the new representative completed the return. The completion of the 2007-08 return in a way which was inconsistent with the appellant's case is a matter which weighs in HMRC's favour, albeit in a limited way.

Weighing the factors / evidence

136. In relation to each of the factors put forward by the appellant which are said to be indicative of a trading intent (properties bought untenanted, financing structure, presence of personal guarantee, changes to asset, duration of letting agreement, and method of sale), I have reached the view that while these factors are not inconsistent with the appellant's case they are equally consistent with HMRC's view that the appellant's intention was to hold on to the property and let them out. While I have considered them, these factors do not assist in the determination of the issue.

137. There remains the evidence relating to the approach taken to preparing the tax returns and balance sheets, which in relation to 2007-08 weighs, albeit in a limited way, in HMRC's favour. Further there is the evidence given by Mr Egan and Mr Wallis as to the intention of the appellant and evidence in the form of documents contemporaneous with the transaction. There is a dispute between the parties as to the significance and interpretation of the documents. Although I have concluded that one document (the e-mail of 13 April 2005) cannot be read in the way that Mr Egan was suggesting, the documentary evidence was not in my view inconsistent with the appellant's case and one of the documents (the letter dated 17 March 2005 from Mr Egan to Mr Wallis and Mr Thomson headed ("Kwiksave portfolio) I found was supportive of it. On balance, the documentation points more towards a finding that the appellant's intention was to get a long term tenant into the property in order to sell the property for profit or to achieve a profit through reconstituting the LLP with new members than it does to the appellant's intention being that of holding onto the properties in order to receive rental income.

138. The consistency of the contemporaneous documents with Mr Egan's and Mr Wallis' evidence on the appellant's intent mitigates the concerns I would otherwise have had over according significant weight to their recollections when viewed in isolation (see [104]).

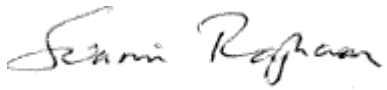
139. I am satisfied that the combination of Mr Egan's and Mr Wallis' evidence and the evidence provided by the contemporaneous documents more than outweighs the point I have taken in HMRC's favour in relation to the completion of the 2007-08 tax return. On balance I find the appellant's intention was to trade in the properties not hold onto them to earn rental income from them. The evidence before me did not suggest that this intention changed during the period up to the eventual sale of the properties.

140. Accordingly in relation to the appeals for 2006-07 and 2007-08 the losses in issue were trading losses not property income losses.

141. In the event my conclusion in relation 2006-07 is wrong and the amendment which gave rise to the appeal for that year does have a statutory basis it would follow from my conclusions above that the relevant losses for that year were trading losses as opposed to property income losses. (The appellant confirmed that apart from the arguments it on lack of statutory basis that it had already raised it was not disputing that the other statutory pre-conditions to the application of the amendment provisions in s30B TMA 1970 were not fulfilled).

142. I am asked by the parties to reserve the issue of the quantum. The appellant's appeal is allowed in principle. If the parties are unable to agree figures they are at liberty to revert to the Tribunal.

143. 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.



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