TC04187

Appeal number: TC/2010/01549

INCOME TAX — discovery assessment relating to 2002-03 — amendment to self-assessment for 2003-04 — whether various properties appellant's principal private residence or trading assets — principal private residence in respect of property sold in 2002-03 but property sold in 2003-04 a trading asset —appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

TREVOR ANTHONY HARTLAND **Appellant**

- and –

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

TRIBUNAL: JUDGE COLIN BISHOPP
MS RUTH WATTS DAVIES

Sitting in public in London on 2 September 2014

The appellant appeared in person

Mr Graham Conway, presenting officer, for the respondents

DECISION

Introduction

1. In this appeal Mr Trevor Hartland challenges a discovery assessment made by the respondents, HMRC, in respect of the tax year 2002-03, and an amendment to his return and self-assessment for the year 2003-04 made by means of a closure notice. The underlying substance of the dispute between the parties is whether, during those years, various property transactions undertaken by Mr Hartland amounted to ventures in the nature of trade, and if so whether they formed part of another trade, of plant hire, carried on by him. In addition, HMRC imposed a penalty on Mr Hartland because, they said, he had negligently submitted an incorrect tax return. However, the penalty assessment was later withdrawn and we need not deal with it.

2. Mr Hartland represented himself at the hearing, and HMRC were represented by a presenting officer, Mr Graham Conway. We had the oral evidence and two witness statements of an HMRC officer, Mrs Lesley Shakles, who dealt with the enquiries to which we come below and who made the assessment and amendment, and the oral evidence and two witness statements of Mr Hartland. We were also provided with helpful skeleton arguments, a statement of agreed facts and a bundle of the relevant documents.

3. There was little dispute about the chronology and bare facts of the events relevant to the appeals; the parties differ about the detail behind the bare facts, and about the interpretation to be placed on that detail. It is convenient to begin, we think, with what was undisputed.

4. For a lengthy period, including the whole of the two tax years with which we are concerned, Mr Hartland has been self-employed, running a plant hire business. His business premises were on land near to a property known as Rosedale, in Redditch, which was and, we understand, still is Mr Hartland's parents' home. It is not agreed between the parties whether Rosedale was also Mr Hartland's home at any time after 1996, but it is not disputed that he continued to use it as his correspondence address for various purposes. It is also the address which appears on the annual accounts of his plant hire business. As we observe below, some of the documents we saw suggested that the house belonged to Mr Hartland and that he was keeping it in order that his parents could live in it, but elsewhere it was denied that he had any proprietary interest in the house. We do not, however, need to reach any conclusion on that point.

5. It is also agreed that from at least 2000 to the present time Mr Hartland has undertaken minor repair work to domestic properties owned by his customers, and that the scale of that work has increased as Mr Hartland's skill and experience have developed.

6. On 10 January 1996 Mr Hartland bought a property known as Wood View, at Bromsgrove, for £70,000. He obtained planning permission for an extension in March 1996, and the extension was complete by 1999. Mr Hartland sold this property on 26 January 2000 for £181,000.

7. Two days later Mr Hartland acquired a property known as Primrose Cottage, near Redditch, for £200,000. He was registered with the local authority as the person responsible for payment of council tax on the property, and he claimed the discount available to single adult occupiers of residential property. He sold Primrose Cottage on 25 July 2002 for £550,000.

8. On 23 September 2002 Mr Hartland acquired another property, Grey Cottage, at Hopwood, for £170,000. He sold it on 27 February 2004 for £625,000.

9. In the meantime, on 5 January 2004, Mr Hartland acquired Nineveh House, at Mickleton, for £335,000. It is agreed that the property was in a poor state of repair when Mr Hartland bought it. He offered it for sale at £975,000 between 1 September and 1 December 2005.

10. Mr Hartland asserts that all four of those properties were, successively, his homes, that he bought them for the purpose of living in them, that he did live in them, and that the properties were not assets in which he was trading. For that reason he had not made any reference to the purchases and sales in his tax returns for the relevant years.

11. Mr Hartland accepts that certain other transactions he entered into at about the same time were undertaken in the course of trade. In May 2003, jointly with a Mr Palmer, he bought some land at Rowney Green which had the benefit of planning permission for the erection of two bungalows. Mr Hartland's share of the purchase price was £87,806. He sold his interest in the property to Mr Palmer in December 2003 for £100,000, before the development had been completed. The difference between the two prices was declared as a chargeable gain in Mr Hartland's tax return for 2003-04. In March 2005 Mr Hartland, alone, bought a property known as Coppers at Chipping Campden for £340,000, selling it in September 2006 for £424,500. In the following month he acquired The Vineyard, at Broadway, for £288,000. The property was condemned when he bought it, but Mr Hartland repaired and improved it, and then sold it in February 2008 for £623,000.

12. Mr Hartland submitted his 2003-04 tax return on 17 September 2004. On 10 May 2005 HMRC opened an enquiry into the return in accordance with s 9A of the Taxes Management Act 1970 ("TMA"). The enquiry related to several aspects of the return, most of which have since been agreed between the parties. We can ignore those aspects for present purposes, and focus on what remains in dispute. What HMRC learnt during the course of the enquiry into the 2003-04 return led them to the view that Mr Hartland's 2002-03 return was also incorrect. As the enquiry window for that return had expired on 31 January 2005 HMRC could not open an enquiry into it, but they argue that they made a discovery within the meaning of s 29(1) of TMA (to which we come below) and that they were in consequence able to make an assessment in respect of that year. The outcome of HMRC's investigation, shortly stated, was that they came to the conclusion that all of Mr Hartland's various purchases and sales of property described above, and particularly those falling within the years 2002-03 and 2003-04, had been made in the course of property trading activities, and that the profits Mr Hartland had earned were taxable accordingly.

13. The assessment for 2002-03 and the closure notice by which HMRC amended Mr Hartland's 2003-04 return were both issued on 30 January 2009. The amount of tax assessed for 2002-03 was £67,822.03 (after correction of an error in the assessment relating to the amount for which Primrose Cottage was sold) and the amendment for 2003-04 resulted in an increase in the tax payable of £112,350.50; there was in addition a determination that national insurance contributions of, in all, £6,519.84 were due. As the incidence of national insurance contributions follows the incidence of tax, we shall not deal further with them. We should add for completeness that although HMRC accept that the intended sale of Nineveh House did not take place in 2005-06, and that no adjustment to Mr Hartland's self-assessment for that year is required, they maintain that Nineveh House was a trading asset, that what Mr Hartland did in relation to that property amounted to a continuation of his property trading activities, and that the admitted trading transactions shed light on what went before.

14. Mr Hartland's case, in short, is that because the two properties he sold in 2002-03 and 2003-04—Primrose Cottage and Grey Cottage—were his homes the profits he made on his disposals of them do not attract either income tax or capital gains tax. There is no income tax because the purchases and sales were not trading transactions, and the profit is not subject to capital gains tax because of the exemption from tax of disposals of principal private residences for which s 222 of the Taxation of Capital Gains Act 1992 ("TCGA") provides. It was for those reasons that he had not referred to the purchases and sales in his tax returns. Alternatively, he says, if the purchases and sales were trading transactions they were part of his existing trade of plant hire, and the profits earned by the disposal of Primrose Cottage have been assessed in the wrong year; HMRC accept that if there was a single trade, this argument is correct. The same objection does not arise in relation to the amendment of the 2003-04 return.

The evidence

15. Mr Hartland's evidence was that until 1996 he had lived with his parents at Rosedale, conducting his business from there and from his nearby storage facility. He was by then 30 years of age, and wanted his own home. He bought Wood View in order to live in it. He already had an interest in property improvement, and spent both money and his own time on improving the property, by the construction of an extension and garage, while he lived in it. He had not bought the property with an eventual sale in mind.

16. However, in late 1999 Mr Hartland was offered Primrose Cottage, then owned by a neighbour of his parents, which, he said, was already in good condition and well equipped, and had the advantages of being away from a busy road and close to his business premises. He had by then become a father, and was hoping that a move would persuade his girlfriend, as she then was, to move in with him so that they could live together as a family. She did not move in at the time, but as we explain below she has since done so. For those reasons the property was much more attractive to him than Wood View and he also thought its purchase would represent a significant step up the property ladder. He therefore sold Wood View, after four years of ownership, at little true profit.

17. Mr Hartland told us that Primrose Cottage consisted of a very old part with charm and character, and a much more recent addition which he considered to be unsightly. Although the house was quite habitable he decided to remove the newer part and replace it with something more in keeping with the original building. He engaged an architect, who designed what amounted to an extension, including the creation of three new bedrooms in place of two of the three which were present when he bought the house; the end result was therefore a larger four-bedroom house. The works were beyond Mr Hartland's capability and he had been obliged to have some of them carried out by builders. However, they were carried out in a manner which allowed him to continue living in the property, and it had been his home throughout his period of ownership. He had used its address for most of his correspondence, but had not changed the address used for some purposes (which remained at Rosedale) because, he said, he had not needed (for example) to consult his doctor or dentist for many years, and he retained Rosedale as his business address to avoid confusion.

18. Mr Hartland sold Primrose Cottage reluctantly, partly because his girlfriend was still unwilling to come to live with him but, it seems, mainly because he was concerned about the size of the mortgage he had taken on in order to finance the extension and because he was offered what he considered to be a good price. Even so, he said, the decision to sell was one he had regretted almost as soon as the sale was complete. After the sale he had no home of his own and returned to live with his parents.

19. However, there was only a short interval between the sale of Primrose Cottage in July 2002 and Mr Hartland's purchase of Grey Cottage in September. This property, Mr Hartland said, was in very poor condition, and for that reason its price was one he could afford without borrowing. He thought, also, that it had considerable potential, and was in an area which he thought might persuade his girlfriend to move in with him. It turned out that the condition of the property was so poor that the most suitable solution was to demolish it and build a replacement. By the time Mr Hartland had obtained planning permission for that development he had also discovered that the farmer from whom he had bought the property was intending to construct a plant for rendering animal waste only 500 yards away. He told us that he decided to complete the work and sell the property as quickly as possible. As he had no other home Mr Hartland lived on the site in a static caravan while the building was constructed. Fortunately he was able to find a buyer for it as soon as it was finished, although it was not until February 2004 that the sale was completed. Mr Hartland did not tell us that he had ever lived in the completed property.

20. After he had found a buyer for it, but before the sale of Grey Cottage was completed, Mr Hartland bid successfully at auction for Nineveh House. He felt confident that the sale of Grey Cottage would proceed to completion (as it did) and he was willing to take the risk of committing himself to the purchase of Nineveh House although, as he explained, delays in the completion of the sale of Grey Cottage led to considerable financing problems. We shall need to touch at various points in what follows on the manner in which Mr Hartland has arranged to finance his purchases and the works he has carried out, and on what he has said to lenders.

21. Nineveh House, too, was demolished and rebuilt and, again, Mr Hartland lived in a static caravan on site while the work was undertaken, although he moved into the house as soon as it was habitable. He told us that he used the address of Nineveh House for his personal correspondence throughout his period of ownership, while retaining Rosedale as his business address.

22. While still occupied in the construction of Nineveh House Mr Hartland decided to buy Coppers. His girlfriend moved into it a few months later (there was independent evidence that she did so in July 2005), though Mr Hartland did not; he remained at Nineveh House, with the intention of making that his and his girlfriend's home once the work on it was complete. A local estate agent offered to sell Nineveh House and, despite his intentions, Mr Hartland agreed to its being offered for sale at what he considered was a very optimistic price, in order to test the market. In fact, there was little interest at that price and in December 2005 the house was taken off the market. Soon after, Mr Hartland's girlfriend finally agreed to move in with him at Nineveh House, and he began refurbishment work on Coppers, in which he has never lived, and which he has also since sold at (he said) a loss. Mr Hartland has also since been compelled to sell Nineveh House, in part (he said) because of the continuing investigation into his tax affairs, and he, his partner (as she now is) and their children are living in more modest accommodation.

23. Mrs Shakles told us that it was she who had decided to open the enquiry into Mr Hartland's 2003-04 return; the enquiry was into the return as a whole, and not one focussed on Mr Hartland's property transactions. She asked for various documents, which were supplied by Mr Hartland's accountants, and which revealed some discrepancies in the return. As we have said, the parties have resolved most of those discrepancies and we need not deal with them. Mr Hartland told us that he had declared the difference between what he paid for his share of the land at Rowney Green and what he received for it from Mr Palmer as a capital gain on the advice of his then accountants; he did not himself realise that this was incorrect. It was only after he had changed his advisers that it became accepted that what he had earned was a trading profit. It was, however, this transaction in particular which led Mrs Shakles to make further enquiries into Mr Hartland's purchases and sales of property.

24. Some of those enquiries were addressed to Mr Hartland and his accountants, but in addition Mrs Shakles visited the local planning authority to examine for herself its records of the planning applications Mr Hartland had made. She discovered that he had made a substantial number of applications, some successful and others refused, in respect of the properties we have mentioned above. Those discoveries led to a meeting between Mrs Shakles and Mr Hartland and his accountant, then a Mr MacDonald, in December 2005, at which the principal topic of discussion was what Mrs Shakles by this stage viewed as property trading activities.

25. She learnt during the course of the meeting that the works at Primrose Cottage had been completed in November 2001, and that Mr Hartland had put it on the market in the same month. She also established that the property was vacant when it was offered for sale. Mr Hartland said that he had removed his

furniture because it was of poor quality and he thought the house would look better without it, and be easier to sell. In a letter of 22 February 2006 written by Mr MacDonald to Mrs Shakles he added that Mr Hartland had sold Primrose Cottage because he was concerned about the level of his debts, an explanation repeated in a later letter as well as in Mr Hartland's evidence to us.

26. Mrs Shakles also established at the December 2005 meeting that the work of rebuilding Grey Cottage was complete by July 2003, and that the property was put on the market at the beginning of September. The reason given for the sale was that Mr Hartland was concerned about noise from a nearby road; no mention was made of other nearby developments until September 2006. Mrs Shakles later established from Mr MacDonald that the refurbishment of Nineveh House was completed in January or February 2005 to the extent that Mr Hartland could then move into the property while continuing with the work; it was completed in September 2005. She accepted that the marketing of the property in late 2005 was an exercise in testing its value rather than a serious attempt at sale.

27. With Mr Hartland's permission Mrs Shakles made enquiries of his bank, which gave her various pieces of information. One fact Mrs Shakles discovered was that within 18 months of the sale of Primrose Cottage Mr Hartland had incurred debts exceeding £400,000 secured on his property. She thought that a significant factor, in the light of his claim that he had sold Primrose Cottage in part at least because he was concerned about the level of his debts. The material disclosed by the bank also showed that Mr Hartland was anxious to obtain loans which enabled him to pay off the balance owed within a year or so of drawing down the loan without early redemption charges. Thus the applications he had made for loans were consistent, Mrs Shakles thought, with his wishing to borrow money on a short-term basis and upon the assumption that he would sell the property on which the borrowing was secured very quickly after he had completed the works the borrowing was to finance.

28. Mrs Shakles' main concern stemmed from the difference which she detected between the declared profits in Mr Hartland's tax returns and the income figures which he had claimed when making mortgage applications to his bank. In his application for a mortgage in relation to Coppers, for example, it was stated that his profits before tax were £165,212 for 2003 and £143,818 for 2004, yet his unadjusted declared profits on his self-assessment returns were £7,770 and £14,419 respectively for those years. Mr Hartland also stated in that application that he was expecting to receive £250,000 from the sale of another property. At this time the only property he had told HMRC he owned was Nineveh House; but in his mortgage application he also stated that his residence was at Rosedale, where he had been living since January 2002, and indeed he claimed ownership of it. We observe also that Mr Hartland gave his occupation as a builder rather than hirer of plant and machinery.

29. There was another meeting between Mrs Shakles and Mr MacDonald on 22 February 2007; Mr Hartland did not attend. The meeting was unproductive, and shortly afterwards Mr Hartland appointed a new accountant, Accounting by Design ("ABD"). In a letter of 4 October 2007, evidently written some weeks after their appointment, ABD agreed that the sale of the land at Rowney Green

should have been declared as a trading transaction rather than as a capital gain, and that Mr Hartland's dealings with Coppers were also trading. It was also said in the letter that Mr Hartland had undertaken only minor repairs and refurbishment at Wood View, yet Mrs Shakles had established from her enquiries of the local authority that he had constructed a two storey extension; as we have said, that was also Mr Hartland's evidence to us.

30. The letter repeated the explanation for the sale of Grey Cottage, namely that it was close to a noisy road; and ABD added that the schools catchment area in which Grey Cottage was situated was also a matter of concern. Although the further explanation for the sale, that there was to be development in the area had been made over a year before, it was not mentioned in the letter.

31. Mrs Shakles also made some enquiries of colleagues about Mr Hartland's claims for reimbursement of VAT incurred in redeveloping Nineveh House, enquiries which suggested that the estimate of the cost of the works which ABD had put forward was exaggerated. She also noticed that on his VAT refund application Mr Hartland said that he occupied Nineveh House from 1 August 2005 yet in a mortgage application in respect of that property which he made on 3 August 2005 he said the property was insured by specialist insurers because it was empty.

32. The view Mrs Shakles formed from the information she had was that Mr Hartland's claim that the three properties (Primrose Cottage, Grey Cottage and Nineveh House) were his principal private residences was unsustainable because the properties were all acquired and sold, or in the case of Nineveh House taken into personal ownership, as part of a property development business. She was particularly influenced by her discovery that both Primrose Cottage and Grey Cottage had been owned by Mr Hartland for a very short period before he put them up for sale, that the offers for sale were made immediately or almost immediately after the works of renovation or development were completed, and that the properties when sold had both been vacant. Her conclusions were reinforced by her perception of the manner in which the properties were financed, by the nature of the information provided by Mr Hartland to the intended lenders to support his applications, by the absence of what she considered to be satisfactory evidence that any of the three properties had been Mr Hartland's home in the true sense of the term, and by his use of Rosedale as his address, including a claim in some documents that it was his own property.

33. Mrs Shakles translated those conclusions into the closure notice and the assessment. In her witness statement she explained how she had determined the profits earned from the property trading business, as she viewed it. Mr Hartland has challenged her approach, though without offering any alternative calculation of his own, and we will return to this issue when we have dealt with the question whether Mrs Shakles was right to view the relevant transactions as trading activities, and the further question whether, if so, they represent a continuation or extension of Mr Hartland's plant hire business, or a separate activity.

The relevant legislation

34. It is not disputed, nor realistically could it be, that if Mrs Shakles is right in her view of the nature of Mr Hartland's activities it was properly open to her to amend his 2003-04 return. If she was right, Mr Hartland had failed to include in that return details of the profits he had earned from his property development activities, and on closing the enquiry she was obliged by s 28A(2)(b) of the Taxes Management Act 1970 ("TMA") to amend the return accordingly. We shall deal with the amount of the amendment after we have considered whether Mrs Shakles was right in her conclusions about the nature of Mr Hartland's activities, and in her belief that those activities constituted a business separate from his plant hire business.

35. The notice of appeal submitted on Mr Hartland's behalf by ABD, who have since ceased to represent him, does not argue that Mrs Shakles was not in a position to make an assessment in respect of 2002-03, and Mr Hartland did not raise the point at the hearing. We think, however, that it is appropriate that we should explain why we are satisfied that it was open to her to adopt the course of making what is commonly referred to as a discovery assessment, in accordance with s 29 of TMA. So far as material in this case, that section is in these terms:

> "(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 …
>
> 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 …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection …
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) 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 taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer 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.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return …."

36. If one assumes, as before, that Mrs Shakles is right in her conclusions about Mr Hartland's activities, it is plain that his income from those activities ought to have been assessed to tax but that it was not so assessed because no account of it was taken in Mr Hartland's self-assessment for 2002-03, and equally plain that Mrs Shakles "discovered" that to be the case in the course of her enquiry into his 2003-04 return. It may be that the failure to bring the income from those activities into account was attributable to Mr Hartland's carelessness, in which case the first of the two conditions to which the section refers is met; but even if there was no carelessness on his part, the second condition, that Mrs Shakles could not have been aware of the insufficiency of the self-assessment when the enquiry window for the 2002-03 return closed, was plainly satisfied: there is no evidence that any officer of HMRC was aware at that time that Mr Hartland was engaged in property trading. It follows, therefore, that as long as Mrs Shakles was right in her conclusion that Mr Hartland was engaged in that activity at the material time, the assessment for 2002-03 was validly made.

Whether Mr Hartland was trading

37. It is, we think, worth mentioning as a starting point that although we are concerned in this appeal only with Mr Hartland's dealings with Primrose Cottage (sold in July 2002) and Grey Cottage (sold in February 2004) as they are the only properties of which he disposed during the two years which are the subject of the appeal, we agree with Mr Conway that it is necessary to view those transactions in their context of Mr Hartland's successive purchases of properties followed by their substantial redevelopment, in some cases extending to demolition and replacement, and then immediate or almost immediate sale. Mr Hartland did not disagree with that proposition, though he did point out that what he had done was consistent with his having started with the intention of improving his own home and later undertaking development work as a trade when he found that he had the skill to do it.

38. Mr Hartland emphasised that in the eight years between his purchase of Wood View in January 1996 and his sale of Grey Cottage in February 2004 he had lived at only three properties which, he said, was by no means an excessive number. It was, he suggested, typical of a person moving up the property ladder. He did not disagree that the Rowney Green venture and some of his later purchases and sales represented trading transactions, but maintained that all three of the earlier properties (that is, Wood View, Primrose Cottage and Grey Cottage) had been bought and used as his principal private residence, that he had lived in them or at least on their sites, and that in each case it had been his hope and

intention that the house would become his family home. As he was a builder it should come as no surprise that he had used his skills to improve his own homes, and what he had done to Primrose Cottage and Grey Cottage should be viewed in that light.

39. Mr Conway pointed to the fact that there was little difference between what Mr Hartland had done in respect of the earlier properties and those he acquired later and which were accepted to be trading assets. In each case there was extensive work, and a sale immediately or almost immediately following its completion, save in the case of Nineveh House, which Mr Hartland had in fact occupied. Even in this case, however, he had offered the house for sale; and although the asking price might have been excessive the fact of the marketing of the house pointed to a willingness to sell rather than use the house as Mr Hartland's principal private residence. The fact that in his mortgage applications Mr Hartland described himself as a builder, and declared income far greater than that shown in the accounts of his plant hire business was clear evidence that he regarded what he earned from the development of properties as trading income rather than the incidental benefit of trading up from one principal private residence to another.

40. In *Marson v Morton and others* [1986] STC 463, (1986) 59 TC 381 Sir Nicholas Browne-Wilkinson V-C said, at p 470,

> "It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another … I would emphasise that the factors I am going to refer to 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."

41. He then went on to list nine such features or badges. But, as he indicated, they do not represent a comprehensive list, they are unlikely to be decisive, and they may not be relevant in any particular case. Thus although, as Mr Conway argued and we accept, the so-called "badges of trade" he identified offer some help, and have been adopted in many cases, they do not represent a test which must be applied in each case in which it is necessary to decide whether an activity amounts to a trade. The Vice-Chancellor made this point himself at p 471:

> "I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question—and for this purpose it is no bad thing to go back to the words of the statute—was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?"

42. A similar approach is to be derived from the observation of Mummery J in *Hall v Lorimer* [1992] STC 599 at p 611, later approved by Nolan LJ at [1994] STC 23 at p 29:

> "In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."

43. The approach we adopt, therefore, is not to examine the "badges of trade" one by one, in part because we consider them of little real assistance in this case, but to stand back from the facts as we have set them out above, and relating not only to the two years of assessment with which we are concerned but also to the periods before and after, and ask ourselves whether the picture they paint, viewed from a reasonable distance, is of a man making improvements to his home before selling it and moving on to repeat the exercise, on the one hand, or of a person setting out to earn a living by buying run-down houses, or at least houses with development potential, then improving, extending or rebuilding them, in order to make a profit to be utilised in the next venture.

44. We also agree with Mr Conway's submission that what matters is not the intention at acquisition, but what the person concerned did; and what the person did cannot be considered in isolation if it is part of a course of conduct: see *Leach v Pogson* (1962) 40 TC 585. It is also clear that the picture must be viewed objectively; thus although the intentions of the person concerned may be illuminating, they do not represent the test. As Lord Buckmaster said in *O'Kane & Co v Commissioners of Inland Revenue* (1920) 12 TC 303 at p 347,

> "… the intention of a man cannot be considered as determining what it is that his acts amount to; and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause the profits that accrued to be profits arising from a trade or business?"

45. Applying those principles, and bearing in mind that intention is not determinative, we are willing to accept that Mr Hartland bought Wood View with the intention of making it his and, if she would join him there, his partner's home, and that the work he undertook there, extensive though it was, was undertaken for personal rather than for business reasons. Thus what Mr Hartland intended in relation to this property is reflected in what he did as a matter of fact. In other words, we accept that such profit as Mr Hartland made on its disposal was neither a trading profit nor a chargeable gain (because of s 222 of TCGA). We are willing, too, to accept his evidence that he acquired Primrose Cottage with the

intention of making that his home, as a step up the property ladder, and that he acquired it in the renewed hope that his partner would join him there.

46. By contrast, we are satisfied that the acquisition, demolition, rebuilding and sale of Grey Cottage were undertaken in the course of a property development trade. It does not seem to us that Mr Hartland could realistically have thought that Grey Cottage, when he bought it, was fit for family occupation even if he had not fully appreciated that the only practical course was to demolish and reconstruct it. The evidence shows that he sold it almost as soon as the works were complete and there is no evidence that he ever lived in it. Indeed, the selling agents' particulars, which were included in the bundle of documents produced for the hearing, show that the property was offered as newly built, and there is no hint in them that the house had previously been occupied. Mr Hartland's application for mortgage facilities in respect of Grey Cottage describes him as a self-employed builder, with income of £80,000—considerably more than the turnover of £33,422 and taxable profit of £5,794 declared by Mr Hartland on his tax return for the relevant year, although rather less than the levels of income he claimed in later applications. The address he used in the application was Rosedale, and we saw no example of a letter or other communication addressed to him at Grey Cottage. It is impossible to accept that Grey Cottage was ever Mr Hartland's principal private residence; rather, the inescapable conclusion is that he bought the property in order to develop it and sell it at a profit.

47. The question which next arises is whether, despite his intentions when he bought it, Primrose Cottage ceased to be Mr Hartland's principal private residence and became a business asset to be exploited by way of trade before he sold it. That a change of that kind is relevant emerges from what was said by Lord Wilberforce in *Lionel Simmons Properties Ltd v Inland Revenue Commissioners* [1980] 1 WLR 1196 at 1199:

> " …Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock—and, I suppose, vice versa.…"

48. The evidence is not all one way. As we have said, the property was sold immediately, or very soon, after the work on it was completed. The claimed reason for the sale changed. However, there was evidence that Mr Hartland used Primrose Cottage as his correspondence address, at least for some purposes, that he paid council tax as a single occupant, that he paid for energy supplies (with a closing account sent days after the sale) and that he insured both the building and its contents. There is nothing before us to suggest that these arrangements changed before he sold it. We have some, even if not much, photographic evidence that the property contained furniture while Mr Hartland owned it, and we can accept his explanation of why it was removed before sale. We are satisfied, on balance, from this evidence that, even though he undertook quite

extensive works on it, Primrose Cottage remained Mr Hartland's principal private residence throughout his period of ownership and that accordingly the profit, or gain, he made when he sold it is not chargeable to tax.

One business or two

49. This issue is now largely academic, in view of our conclusions about Primrose Cottage, but we shall deal with it briefly in case we are found elsewhere to be in error.

50. Mr Hartland produced accounts for his plant hire business which were, we understand, submitted with his tax returns (or, at least, made available to HMRC). They do not describe the nature of his business directly, but they are consistent with its being a plant hire business (for example, the accounts to 31 May 2003 contain a list of fixed assets consisting of plant, machinery and motor vehicles) but not consistent with its being a property development business, since the disclosed assets at no time include any property in the course of development. In interviews by HMRC officers Mr Hartland (as he accepted) described his business as one of plant hire and minor building works; he did not claim that his activities included property development.

51. While we are willing to accept that Mr Hartland thought that his property trading activities need not be disclosed, it is inherent in the proposition that they were not trading activities that they amounted to something separate and distinct from his plant hire business. Put another way, it seems to us to be logically impossible to argue that activities do not form part of an existing trade because they are quite distinct and are not trading at all and then, once it has been demonstrated that they do in fact amount to trade, to argue that they are not distinct at all and form part of the existing trade. Accordingly, were this a live issue before us, we would conclude that Mrs Shakles was right in her view that Mr Hartland was carrying on two businesses.

The amount of tax

52. The amendment to Mr Hartland's 2003-04 return includes tax on the profits from what he now accepts to be trading transactions, that is the dealings in the land at Rowney Green and in Grey Cottage. Mrs Shakles explained how she arrived at the amendment—increasing the tax due by £112,350.50. Mr Hartland challenged her conclusions, by asserting that the profits on which they were based seemed too good to be true, but he did not dispute the arithmetic which led to those conclusions, or put forward any substantiated alternative base figures. As the burden is on Mr Hartland of showing that the tax assessed is excessive and that some other amount should be assessed instead, and he provided us with no material from which any other amount might be ascertained, we are unable to disturb Mrs Shakles' calculation. We note that the notice of appeal, submitted as we have said by Mr Hartland's then advisers, does not seek to challenge the calculations.

Conclusions

53. We are satisfied that the discovery assessment for 2002-03 must be discharged, because the sale of Primrose Cottage did not result in a taxable profit or gain, but that the amendment to Mr Hartland's self-assessment for 2003-04 was properly made because his purchase, reconstruction and sale of Grey Cottage were carried out in the course of trade as were (as he accepts) his dealings in the land at Rowney Green, in Coppers and in Nineveh House before he took it into personal ownership. The amount of tax payable is determined as £110,298.73, to which must be added the appropriate amount of national insurance contributions, which we were told amount to £4,807.81; these figures take account of some agreed amendments not in issue before us.

54. 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.

COLIN BISHOPP
TRIBUNAL JUDGE

RELEASE DATE: 16 December 2014