[2016] UKFTT 008 (TC)

TC04816

Appeal number: TC/2014/05593

Income tax –appellant (individual) buying and selling listed shares with view to profiting from short term movements in prices – whether a trade – yes – whether trade was commercial – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AKHTAR ALI **Appellant**

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON
MRS REBECCA NEWNS

Sitting in public at Fox Court, London on 10 June 2015

The Appellant in person

Mrs Gill Carwardine, Officer of HMRC, for the Respondents

DECISION

1. The appellant used the proceeds of his successful pharmacy business to buy and sell publicly listed shares. The issue in the appeal was whether the losses stemming from the appellant's share-related activities were losses of a trade that was commercial, such that they could be set against the profits of the pharmacy business.

The appeal

2. By notice of appeal dated 13 October 2014, the appellant appealed against the following (set out, for convenience, in tabular form – a blank box indicates that the item in question is not applicable to the tax year in question):

Year	Additional tax per closure notices issued on 22 September 2014 under s28A(1) & (2) Taxes Management Act 1970	Penalty assessment notified on 12 September 2014 under Schedule 24 Finance Act 2007	Penalty determination issued on 22 September 2014 under s95(1)(a) Taxes Management Act 1970
2006-07			£3,258.00
2007-08			£2,806.00
2008-09		£9,176.61	
2009-10	£24,486.40	£3,672.96	
2010-11	£115,751.80	£17,362.77	
2011-12	£34,837.00	£5,225.55	
2012-13	£103,568.22	£15,535.23	

3. The penalty determinations for 2006-07 and 2007-08 were charged at the rate of 10% and were said by HMRC to arise for negligently delivering to an officer of HMRC incorrect returns under s8 of the Tax Management Act 1970.

4. HMRC's "penalty explanation" letter and schedule in relation to the years 2008-09 to 2012-13 inclusive indicated that these were "inaccuracy" penalties; that the "potential lost revenue" was £61,177.40 for 2008-09 and, for the remaining tax years, the figure for that year shown in the table above in the column headed "Additional tax per closure notices…" etc; that the penalty percentage was 15%; and that the amount of penalty suspended was nil.

5. The amounts shown in the column "Additional tax per closure notices …" etc in the table above reflect differences, as between the appellant's tax returns and HMRC's closure notices, as to the amount of income of the appellant on which tax was due. Those different amounts are shown in the second and third columns of the table below. The amounts in the third column (HMRC's revised figures) are very close to the amount of profit from the appellant's pharmacy business for the tax year

in question. The differences between the amounts in the second and third column are principally attributable to HMRC's disallowance of losses generated by the appellant's share activities, in the amounts shown in the fourth column below.

Year	Total income on which tax due based on appellant's returned figures	Total income on which tax due based on HMRC's revised figures	Amount of loss disallowed by HMRC
2009-10	£145,029	£206,245	£61,216
2010-11	£2	£280,091	£273,614
2011-12	£178,647	£248,321	£69,674
2012-13	£4,931	£256,806	£243,770

6. The closure notices and penalties appealed against, were the culmination of correspondence and discussion between the appellant and HMRC as to whether the losses deriving from his share activity were deductible against his general income.

Evidence

7. We were given three documents bundles and an "appellant's documents bundle". We heard evidence on oath from the appellant. We permitted the appellant to be assisted in presenting his case at the hearing by his accountant and by his son.

8. The appellant had a successful business running a pharmacy and had, since the 1990s, been buying and selling publicly listed shares, latterly via the internet, in addition to his pharmacy business. We shall refer to this latter activity as the appellant's "share activities".

9. For the tax years up to 5 April 2005 the appellant's tax returns dealt with the profits or losses from his share activities under capital gains tax rules. For the years 2004-05 and 2005-06, the appellant made late claims for losses from his share activities to be treated as trading losses and set against his general income. HMRC refused these claims as they were out of time and this was eventually accepted by the appellant. From the year 2006-07 onwards the appellant treated his share activities as a separate trade (on the self-employment pages in his tax return) and losses were claimed in that and succeeding tax years. By notice of appeal dated 17 February 2012, the appellant commenced an appeal (under reference TC/2012/03303) with regard to decisions made in a letter from HMRC dated 23 January 2012 relating to further assessments made by HMRC for the years 2006-07 to 2008-09 inclusive disallowing trading losses from his share activities, but the appeal was later withdrawn (confirmed in a letter from HM Courts & Tribunal Service to HMRC dated 15 October 2013).

Share activities up to 2005

10. The appellant came to the UK when he was 10 years old. He could not then speak English, but he went on to do GCSEs and A levels and study pharmacy at university. He bought a pharmacy before he graduated from university and has run it as a successful business for nearly 30 years. His ability in mathematics and to use computers and excel spreadsheets led him to an interest in stocks and shares. He learned about these matters by reading newspapers and journals such as The Times, the Financial Times and the Investors Chronicle. He had also attended some courses. In later years, he undertook research on the internet.

11. He described his share activities in the period from 1995 to 2002 as "investing" in shares, as he would buy shares and hold them for a few months. His early losses gradually turned to profits. In 2000, he made around £200,000. This increased his confidence and he gradually increased the scale of his activities with regard to buying and selling shares. During this period he started to "trade options", using one of the strategies he had learned. He described himself as gradually building up expertise in buying and selling shares.

12. The appellant said he was looking for a use for the profits of his successful pharmacy business. For religious reasons, he did not want to put the funds on deposit and earn interest. Because he had a child with special needs, he needed to be at home and felt he could not, like some of his friends and relatives, put his money into property. He told us he wanted to take up trading shares in a professional matter, as a second business in addition to his pharmacy business.

13. The appellant said that between 2000 and 2005 his activities moved from "investing" to "trading" in shares. He started buying large amounts of shares and writing call options against them. He said he realised he needed to devote himself full time to this activity.

Share activities from 2005

14. The appellant stated that around 2005 he decided to become a "day trader" by buying and selling shares whose prices were moving rapidly on the market. He had access to "live" prices through a software system called "Synergy". He said he undertook this activity on a commercial basis, to make a profit. At this stage, he did not enter into derivatives such as call options to hedge his positions; rather he bought and sold shares within short time periods. He began employing locums at his pharmacy to free up his time for "day trading." He carried on his activities in an upstairs office in the same building as the pharmacy.

15. The appellant referred to a letter he received from an officer of HMRC following a VAT visit to his pharmacy in April 2006. The letter, dated 11 August 2006, included the following paragraph:

> "2. Dealing in Shares
> You have advised that in the past you have dealt and made substantial amounts of money from dealing in shares. As you are a sole proprietor this income would

need to be declared through your VAT return would you continue to make any money this way. Trading in shares is actually Exempt from VAT and as such should you continue to trade and incur expenses in relation to this you may not be able to recover VAT on some of your expenses. If you continue to trade in this manner you would be deemed to be a Partially Exempt company for VAT purposes and would be required to carry to quarterly and annual Partial exemption calculations …"

16. The appellant stated that this letter made him more confident about his "day trading" activity: it was from around this time that he started employing a locum for his pharmacy business, so he could devote more time to his share activities.

17. The appellant stated in a letter to HMRC of 19 December 2013 that "share trading came as a natural extension to my proven business acumen in buying and selling pharmaceutical products … for my pharmacy."

Typical share transactions; number and frequency

18. When asked in correspondence with HMRC exactly how a typical transaction came about and how it was made, the appellant responded (letter of 19 December 2013): "I sit there watching the share price over the day. If I see an opportunity where a stock looks cheap or is overbought, I would act to buy or sell online instantly. Then over the next hours or days, I would realise my position to generate a profit or loss."

19. The appellant had an online non-advisory share dealing account with NatWest Stockbrokers Ltd. As an example of the appellant's activities in this period, we were shown a transactions statement from that account which showed that on 8 June 2009 the appellant bought 50,000 Cable & Wireless shares at a price of £1.28361, at a cost of about £65,000, using the NatWest credit line, and that on the next day, 25,000 Cable & Wireless shares were sold at a price of £1.2859. We were told this was typical of the size and frequency of the appellant's share transactions.

20. The appellant told us that he focused on certain shares that he knew, for example pharmaceutical shares (like Alizyme), and fast-moving shares. The appellant considered that his background as a pharmacist gave him a better understanding of shares in the pharmaceutical sector. He said the Synergy software enabled him to identify fast-moving shares. He gave, as examples of shares he specialised in, the Victoria Oil & Gas shares and Reneuron shares that were bought and sold on 8-9 June 2009. His statements from NatWest Brokers indicated a wide range of shares being bought and sold, including household names such as Barclays, Lloyds Banking Group and GlaxoSmithKline.

21. The appellant stated that, from around 2005, he would hold shares for a few hours, for a day, or for two days. He said that a typical pattern was that he would buy in the early morning before 9 am; sell around 11 am; and sometimes buy back and sell again. In correspondence with HMRC, he said he held shares for 1-5 days (letter of 20 September 2013).

22. The total number of transactions carried out by the appellant in six of the seven tax years in question was as follows:

	Yearly	Weekly (average)	Daily (average)
2006-07	980	21	4
2007-08	950	21	4
2008-09	1,370	30	6
2009-10	1,825	40	8
2010-11	2,320	50	10
2011-12	775	17	3

23. The appellant said that his "day trading" activity decreased in 2011-12 because it was becoming evident that HMRC did not agree with his tax position and he needed to liquidate his positions to pay tax "on account". The appellant estimated that the figures for 2012-13 would be similar to those for 2011-12, for the same reason. In correspondence with HMRC (letter of 18 October 2013), the appellant stated that he ceased his share activity altogether in 2013.

24. The dividend income which the appellant derived from his share activities over the tax years in question was minimal.

Time spent by appellant on share activity

25. The appellant said that from around 2009 he was doing his "day trading" effectively full time, 35 to 40 hours a week, as he was employing a locum to run his pharmacy. On cross examination by HMRC, the appellant stated that he would also have devoted part of his time to care for his son with special needs. In correspondence with HMRC, he said he spent 4-5 hours a day trading, or 20-35 hours a week (letter of 20 September 2013); and 10 hours per week on research. He said in correspondence that he spent on average 25 hours a week in the pharmacy business, over the period from 6 April 2009; that time taken off from the pharmacy business had increased from 5 hours off a week (when he first commenced his share activities) to approximately 35-40 hours a week from around 2009 (letter of 19 December 2013).

26. In the same correspondence with HMRC the appellant described a typical day as follows:

> "0600 Wake up
>
> 0630 On the computer reading and watching pre market news and information sources eg Bloomberg, CNN, ADVFN [a financial market website]
>
> 0800 Market opens, start opening or closing positions
>
> (Depending on pharmacy schedule, I would trade. If I had to go to work, I would have a screen and access to the markets at the pharmacy. Most days would be spent trading as I would be working evenings and Saturdays)
>
> 1930 Pharmacy closes

2000 Dinner

2300 Before bed, some research and catch upon the markets in the day"

Funding of the appellant's share activity

27. The personal assets which the appellant used to fund his share activity were those he described as "riskable", in contrast to his other personal assets – his property, his pension, his pharmacy business, and certain other long term investments in shares. He used his own money (principally generated by his pharmacy business) to fund his day trading activity, although he also had a short term credit line from NatWest of around £200,000 (in cross examination by HMRC, the appellant accepted he may not have used the whole of this credit line).

Business plan

28. The appellant asserted in correspondence with HMRC (letter of 19 December 2013) that he had a business plan in respect of his share activity, but not a written one (which was also the case, he said, for his pharmacy business). He told us at the hearing that his strategy was to buy and sell fast moving stocks to make a profit. He believed he had acquired the ability to make profits from such transactions; it was his intention to do so. He saw his share activities as part of a longer term plan over 15 years – the losses he incurred did not cause him to cease the activity, because he felt he was getting better at it and that the activity would turn profitable. He could sustain the losses he made, in anticipation of making profits later. He felt he was learning from his mistakes. He told us that the financial crisis, from 2008, was partly to blame for his lack of success - the stock markets had become more unpredictable and volatile, he said.

Key findings of fact

29. Our key findings of fact are as follows:

(1) The appellant bought and sold publicly listed shares in significant volumes with the intent of making a profit based on short term movements in the price of the shares. He held the shares for short periods of time. The volume of his share transactions waxed and waned over the tax years in question (see table at paragraph 22 above) but throughout these years he was engaged in an endeavour to make money from short term dealing in shares (another word for which, as used in the case law discussed below, is "speculation" in shares).

(2) Whether this endeavour yielded profit or loss over a tax year was entirely dependent on the appellant's success in anticipating short term movements in the prices of shares – the appellant did not, in the tax years in question, undertake "hedging" transactions which could have counterbalanced the effect of other transactions he was undertaking.

(3) The appellant was self-taught in this field. He had experience of buying and selling shares going back to the 1990s, and in 2000 he made a considerable

profit. He conducted regular research into the stock market. His research and experience informed his strategies for profiting from short term movements in the price of shares. He had never worked for a financial institution and had no formal qualifications or regulatory permissions relating to his share activities (and none were required).

(4) The appellant conducted his share activity with minimal expense and formality. He carried it on alongside his pharmacy business, spending up to 40 hours a week on his share activities when he was hiring locums for the pharmacy. He engaged no staff or outside consultants for his share activity. He used an office above the pharmacy. He had no written business plan, drew up no separate accounts, and had no formal process to review the performance of his share activities.

(5) The appellant continued his share activities, despite making overall losses in each of the seven tax years in question, because he believed he was all the time getting better at anticipating short-term price movements, and so would generate net profits. The appellant funded his share activity himself, from what he called his "riskable funds". This meant that he could sustain the losses he incurred in the tax years in question – but there was an upper limit on the money he was prepared to put into the endeavour, as he did not want to put at risk certain key personal assets such as his pharmacy business, his pension, and certain long term investments.

The law

Statute

30. Section 64(1) of the Income Tax Act 2007 provides as follows:

"A person may make a claim for trade loss relief against general income if the person –

(a) carries on a trade in the tax year, and

(b) makes a loss in the trade in the tax year ….".

31. Section 66(1) to (3) of the Income Tax Act 2007 provide as follows:

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

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

(a) on a commercial basis, and

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

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

32. "Trade" in the Income Tax Act 2007 includes any venture in the nature of trade (s989 of that Act).

Outline facts and decisions in key cases

33. In *Wannell v Rothwell* [1996] STC 450, the taxpayer gave up his salaried employment as a commodities trader and began dealing, on his own account, from his home. He bought and sold shares and commodity futures, buying and selling within a short time and financing his purchases with a combination of borrowing and taking advantage of deferred settlement arrangements. He had no clients of his own and used only very basic equipment. He sustained losses on his commodity dealings and his claims for tax relief were refused by the Inland Revenue (as it then was) on the basis of provisions similar to those now found in s66 of the Income Tax Act 2007. The deputy Special Commissioner dismissed the appeal on the ground that since the taxpayer's activities were so close to the borderline of what would amount to a trade because of his lack of commercial organisation, his activities were bound to fail a test of a trade carried out on a commercial basis as per the statutory test. On appeal to the High Court, Robert Walker J dismissed the taxpayer's appeal, but made clear that the external phenomena of "organisation" – office, accommodation and equipment and staff – should not carry great weight in deciding whether a trade was carried on on a commercial basis. In this particular case, however, he was not satisfied that the decision of the Special Commissioner was wrong in law, as the taxpayer had admitted, in cross examination, matters which might have indicated a lack of internal or mental organisation.

34. In *Cooper v C & J Clark Ltd* [1982] STC 335, the taxpayer company (a shoe manufacturer) placed a temporary cash surplus with a merchant bank which invested in a variety of securities. It incurred a loss which it treated as arising from a separate trade of dealing in securities – the Inland Revenue disallowed the claim but the General Commissioners allowed the taxpayer's appeal. The High Court held that it could not interfere with the Commissioners' decision, as it was not clearly wrong.

35. In *Salt v Chamberlain* [1979] STC 750, the taxpayer sought to use his expertise in computer technology for forecasting share movements by engaging personally in speculation on the stock market. He effected around 200 purchases and sales of stocks over a few years but the transactions were not profitable. The Inland Revenue disallowed his claim for relief in respect of the loss and, on appeal, the General Commissioners found as a fact that the transactions he entered into did not constitute a trade. On appeal to the High Court, it was held that the prima facie presumption was that an individual engaged in speculative dealings in securities was not carrying on a trade. It was for the fact finding tribunal to say whether the circumstances, proved in evidence or admitted, took the case out of the norm. In this case it was clearly open to the Commissioners, on the facts before them, to conclude that the taxpayer was not trading.

36. In *Lewis Emanuel & Son, Ltd v White* (1965) 42 TC 369, the taxpayer company started to buy and sell Stock Exchange securities in addition to its other activities as a fruit and vegetable importer. Additional staff was engaged and separate books of account were opened. The taxpayer sought adjustment of its liability by reason of losses which it contended were incurred in carrying on a separate trade of dealing in securities. The Commissioners decided that the company did not carry on the separate trade of dealing in securities, but this was overturned on appeal to the High Court. The judge did, however, put considerable weight on the fact that the taxpayer in the case was a company rather than an individual, and made it clear that he was not expressing any view one way or the other as to the position of an individual who carries out comparable transactions.

37. In *Cooper v Stubbs* [1925] 2 KB 753, the Commissioners had found that the taxpayer's profits from his speculation in cotton futures were neither profits of a trade taxable under Case I of Schedule D (the dealings were insufficiently habitual and systematic) nor (because they were what the Commissioners called "gambling transactions") annual profits or gains taxed under Case VI of Schedule D. The Court of Appeal, by a majority, upheld the Commissioners' decision that the taxpayer was not trading (this being a question of fact as to which the court's jurisdiction to overturn the Commissioners was very limited), but allowed the appeal against their determination that he was not taxable under Case VI (on the ground that the Commissioners had erred in law by finding that the profits arising from the taxpayer's dealings could not be "annual profits or gains" because they were found by the Commissioners to be "gambling transactions").

38. In *Graham v Green* [1925] 2 KB 37, [1925] AER 690, the taxpayer's sole means of livelihood for many years had been betting on horses from his private residence with bookmakers. It was held in the High Court that the taxpayer was not following a vocation within Case II of Schedule D, nor were his winnings profits or gains within Case VI. The judgement makes clear that the principles underlying the decision on Case II would apply equally to taxation under Case I (trading).

Appellant's arguments

39. The appellant's case was that his share activities in the tax years in question comprised the carrying on of a trade; and that the trade was commercial in the terms of s66 Income Tax Act 2007.

40. The appellant distinguished his circumstances from those in *Dr K M A Manzur v HMRC* [2010] UK FTT 580 (TC), a decision of this tribunal. There, the taxpayer, a retired surgeon, incurred losses on transactions in stocks and shares he conducted online using NatWest Stockbrokers; HMRC refused his claim to set off the losses against general income and the taxpayer appealed; and the Tribunal dismissed the appeal, holding that the transactions were investment activity. The appellant contrasted that taxpayer's 240-300 transactions per year with his own greater numbers (see paragraph 22 above); and, unlike the appellant, the taxpayer in *Manzur* appeared

to have had no experience of share dealings, prior to his retirement from medicine, and needed to take advice from a professional brokerage firm.

41. The appellant submitted that the distinguishing factors of his case were the high frequency of his transactions in short periods; and the amount of time and effort he put in over an extended period to give him knowledge and experience about share trading. He submitted that his share activities satisfied the badges of trade. He further submitted that he may not have been good at trading, but he was nonetheless trading.

42. Regarding penalties, the appellant submitted that these were unfair and unjust because the calculation of PLR (potential lost revenue) took no account of the fact that the appellant had made payments of tax in respect of the disputed assessments. As he put it, his tax payments "on account" should have been "allocated" before PLR was calculated. On this basis, the PLR would have been zero. The appellant said that after receiving HMRC's letter of 12 December 2011, indicating their disagreement with the appellant's position that he was trading, he began to make arrangements to pay the disputed amount of tax "on account" (although he continued to submit tax returns on the basis that he was trading). The appellant submitted that if tax is paid in advance, there cannot be any PLR.

HMRC's arguments

43. HMRC submitted that the appellant's share activities were no more than speculative investment over a prolonged period, with a view of increasing the value of his investments. *Salt v Chamberlain* indicates that share transactions by an individual fall within the charge to capital gains tax; and the appellant has not illustrated why his share dealings should be treated, exceptionally, as trading. In addition, given the sustained period of losses, HMRC submitted that it was questionable if the activity was carried out commercially for the purposes of s66 of the Income Tax Act 2007.

44. Reiterating the arguments made by HMRC in *Wannell v Rothwell* 68 TC 719 at 721, Mrs Carwardine submitted there was a category of activity that did not amount to a trade, could not be described as an investment, but can be described as "gambling".

45. HMRC do not regard their letter to the appellant of August 2006 regarding VAT as relevant to the matters under appeal: VAT treatment of expenses is not determinative of the income tax treatment of an enterprise. Trading in shares is exempt from VAT, as the August 2006 letter states – that is not the same as accepting that there is a trade.

46. Concerning the penalties charged, HMRC said in correspondence (letter of 22 September 2014 to the appellant) that the reason for charging penalties was that, having previously returned his share-related activities as capital transactions, the appellant made later tax returns on the basis that those activities were in the nature of a trade. HMRC asserted in that correspondence that the appellant was negligent and failed to take reasonable care to ensure his returns were correct, taking into account all the facts relating to the activities. As a result, HMRC contended, the returns contained inaccuracies.

Discussion

47. We first have to decide whether, in engaging in his share activities during the tax years in question, the appellant was carrying on a trade. As can be seen from the cases summarised above, the higher courts have on a number of occasions considered whether the buying and selling of listed securities for short-term gain is a trade; the outcomes have varied, reflecting both differences in the precise facts and the limited jurisdiction of the courts to overturn factual decisions of the Commissioners. Clearly, the activity in which the appellant engaged sits in the "no-man's land of fact and degree" (to use the phrase coined by Lord Simon of Glaisdale in *Ransom v Higgs* 50 TC 1 at 96) where it is for ourselves as the fact-finding tribunal to evaluate whether it amounts to trade.

48. Our starting point is that the appellant's activities bore classic hallmarks of "trading". Over an extended period of time, he bought assets (his "stock") with the intention of selling them on, in short order, at a profit. That is a classic pattern of trade. This is further reflected by applying the time-honoured "badges of trade" set out, some 60 years ago, in a report of the Royal Commission on the Taxation of Profits and Income (Cmd 9474) at para 116: four of the badges - the length of the period of ownership, the frequency or number of similar transactions by the same person, the circumstances that were responsible for the realisation, and motive - point firmly in favour of trading. The other two badges - subject matter of the realisation and the supplementary work on or in connection with the property realised - go in the other direction, but, on balance, the badges of trade in our view support a finding of trading. HMRC argued that the appellant was carrying on a form of investment activity through short-term speculation in shares. We are unable to accept this submission as we see none of the hallmarks of investment in the appellant's share activities.

49. However, this is only a starting point, as it is clear from the cases that the courts are wary of awarding "trading" status to an individual speculating in shares. As Oliver J said in *Salt v Chamberlain* (at p154):

> "Where the question is whether an individual engaged in speculative dealings in securities is carrying on a trade, the prima facie presumption would be, as Pennycuick J suggested in the *Lewis Emanuel* case, that he is not. It is for the fact-finding tribunal to say whether the circumstances proved in evidence or admitted take the case out of the norm."

50. To understand what it is about individuals speculating in shares that caused the courts to institute this "prima facie presumption", it is instructive to look at the passage in Pennycuick J's judgement in *Lewis Emanuel* (at p377) underpinning Oliver J's statement. We present it in bold type below - we have added (in ordinary type) Pennycuick J's immediately preceding and following observations, which we find particularly relevant to this case:

"Having regard to the number and size of the purchases and sales, and to the rapid and continuous turnover, I agree with [counsel for the taxpayer] that the only legitimate conclusion is that the Company was carrying on the trade of a dealer in securities. To quote the words of Pearce LJ in *JP Harrison (Watford) Ltd v Griffiths* 40 TC 281 at page 288

> "….if it is not trade, what is it?"

….

[Counsel for the Crown] does not contend that the Company acquired the Stock Exchange securities by way of investment. He contends that the Commissioners could legitimately answer the question, "If it is not trade, what is it?", by finding that, in carrying out these transactions, the Company was speculating on the Stock Exchange. **The word 'speculation' is not, I think, as a matter of language, an accurate antithesis either to the word 'trade' or to the word 'investment': either a trade or an investment may be speculative. On the other hand, it is certainly true, at any rate in the case of an individual, that he may carry out a whole range of financial activities which do not amount to a trade but which could equally not be described as an investment, even upon a short-term basis. Those activities include betting and gambling in the narrow sense. They also include, it seems to me, all sorts of Stock Exchange transactions. For want of a better phrase, I will describe this class of activities as gambling transactions:** see *Graham v Green* 9 TC 309, for an analysis of these transactions in relation to an individual who made a living from betting.

It seems to me, however, that in general it is much more difficult to bring the activities of a company within this class of gambling transactions. An individual may do as he pleases: a corporation must act within the limitations of its memorandum of association."

51. What Pennycuick J tells us here is that the activity of speculating in shares can look very much like trading, and yet not constitute a trade, because it really consists of "gambling transactions". He does not spell out what it is about "gambling transactions" that negates trading status, though he does say that individuals are more prone to "gambling transactions" than companies because an individual "may do as he pleases." We find much overlap between our case and the situation addressed in these dicta of Pennycuick J. First, the appellant's activities, like those before the court in *Lewis Emanuel*, bear many classic hallmarks of trading. Second, the appellant's circumstances were such that he could very much do as he pleased: he was self-funded and so had no banks or investors to answer to; neither did he have customers to please or employees to manage. In modern business parlance, he had no external stakeholders. Hence, it was certainly open to the appellant to engage in "gambling transactions" if he so chose. But did he?

52. To answer this we need to consider further what "gambling transactions" are. We put the phrase in inverted commas as Pennycuick J clearly had in mind a class of transactions with common features with gambling, a wider category than "gambling" per se. He referred to *Graham v Green*, where Rowlatt J considered what it was about

someone who made a living out of successfully betting on horses, that prevented the activity from being a trade. The important feature in the judge's eyes seemed to be that his bets were "individual operations" which did not merge into a greater "trade". This was fundamentally different from the bookmaker, who "organised his efforts" based on an analysis of what would secure him a profit. Nourse J in *Cooper v Clark* came to what we regard as a similar articulation of this test when, in summarising previous cases where a series of purchases and sales of marketable securities are made, he said (at p340) that such a series "may sometimes, if carried out pursuant to a deliberate and organised scheme of profit-making, amount to a trade." This was in fact one of five principal considerations which Nourse J derived from earlier authorities, but it is the one we find most germane to the facts here (as it indeed it was to the facts of *Cooper v Clark* itself)).

53. On the facts as we have found them, the appellant had a simple – even unsophisticated – business plan: to make money from short term movements in share prices, based on strategies he developed through his own research and experience. That business plan is, in a nutshell, the appellant's answer to the presumption that he was undertaking "gambling transactions". Whilst we readily agree he was not "gambling" in the narrow sense - his share activities were not impelled by addiction or habit (as was the placer of bets in Rowlatt J's judgement in *Graham v Green*) – several aspects of the appellant's circumstances suggest at the least the possibility of "gambling transactions" in the wider sense:

(1) His share activities entailed a high degree of risk: he was not entering into hedging transactions, and his success entirely dependent on his ability to anticipate movements in share prices.

(2) He persevered with his share activities, over the seven loss-making tax years in question, on the basis of a belief in his own abilities in the field that, with the benefit of retrospect, may appear inflated.

(3) He was self-taught in his chosen field of endeavour.

(4) He operated informally from an office above his pharmacy with considerable flexibility as to how he divided his day between his share activities and his pharmacy business.

(5) He was self-funded and so, essentially, could do as he pleased.

54. The question we ask ourselves is this: do the above circumstances, when combined with an unsophisticated business plan, add up to "gambling transactions" in the broad sense?

55. The easiest of these circumstances to deal with is the informality of the appellant's operations: the fact that he operated "on a shoe string" from above his pharmacy, a world away from the sophisticated financial markets. It is clear from decades-old cases that the external physical accoutrements required by a dealer in securities are minimal (see *Lewis Emanuel* at p379 and *Wannell v Rothwell* at 460h to 461a), and we consider this is all the more so true in the age of the internet. A trader

needs to "organise his efforts" (in the expression used by Rowlatt J in *Graham v Green*) – but this means a degree of internal organisation (a "deliberate and organised scheme" in Nourse J's formulation) – which we find that the appellant had.

56. As for the facts that the appellant was "self-taught", confident of his own abilities to a degree that (in retrospect) looks like over-confidence, and undertook considerable risk: we are unable to find that these circumstances moved the appellant's business plan outside the sphere of trading – these are not uncommon qualities of self-made business entrepreneurs and so very much appropriate to a "trading" activity. On the particular points of the appellant's lack of formal qualifications, and dividing his time between share activities and his pharmacy - we find that, operating in a field that was unregulated, required no professional qualification and where relevant information was readily accessible, the appellant could (and did) amass sufficient knowledge and ability, through his experience and research, to develop a business plan.

57. As for the fact of the appellant's being able to fund himself, and so able to do as he pleased – as we have noted, such circumstances are an indicator that the underlying share activity may be non-trading. However, we are again unable find that the circumstance moved the appellant's business plan outside the remit of trading – in our view, a business plan that is sufficiently "trading" will be so whether it is funded by third parties or whether it is self-funded.

58. Our answer, then, to the question posed at paragraph 54 above is: No. The appellant's business plan, unsophisticated as it was, is the decisive fact here (along with our finding that he pursued it in a sufficiently organised manner), dislodging the "prima facie presumption" that individuals engaging in this kind of speculation in shares, are not trading. For the same reasons, we find that the appellant did indeed have a deliberate and organised scheme of profit-making. We conclude that, on the facts as we have found them, the appellant was carrying on a trade in undertaking his share activities during the tax years in question.

59. We next need to decide whether this trade was commercial for the purposes of s66 Income Tax Act 2007.

60. HMRC submitted that the sustained period of losses made it questionable if the appellant's activities were carried out commercially for the purposes of s66. This may be so, but the question (once raised by the facts as they are) can of course be answered by applying the words of the statute interpreted in line with decided cases. In this regard, Robert Walker J gave guidance in *Wannell v Rothwell* (at 461b) as to the meaning of the first limb of s66(2), requiring that throughout each of the tax years in question, the trade was carried on "on a commercial basis":

> "I was not shown any authority in which the court has considered the expression 'on a commercial basis,' but it was suggested that the best guide is to view 'commercial' as the antithesis of 'uncommercial', and I do find that a useful approach. A trade may be conducted in an uncommercial way either because the terms of trade are uncommercial (for instance, the hobby market-

gardening enterprise where the prices of fruit and vegetables do not realistically reflect the overheads and variable costs of the enterprise) or because the way in which the trade is conducted is uncommercial in other respects (for instance, the hobby art gallery or antique shop where the opening hours are unpredictable and depend simply on the owner's convenience). The distinction is between the serious trader who, whatever his shortcoming in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante. There will no doubt be many difficult borderline cases well for the commissioners to decide; and such borderline cases could as well occur in Bond Street as at a car boot sale".

61. We have discussed the appellant's business plan, and his surrounding circumstances, at paragraphs 53 to 57 above. It may have been an unsophisticated endeavour, but it does not seem to us "uncommercial": transactions took place at market prices and a business plan was pursued with sufficient application. We do not consider that the circumstances of the appellant discussed at paragraph 56 above – that he was "self-taught", arguably over-confident of his own abilities, and undertook considerable risk - caused his trade to be 'uncommercial', for essentially the same reasons as we give in that paragraph: these are indicia of the risk-taking entrepreneur, not of 'uncommercial' activity along the lines of Robert Walker J's examples, where the terms of the trade were uncommercial, or the trade was conducted in an uncommercial way. The appellant in our view answers to Robert Walker J's description of a "serious trader…seriously interested in profit". His lack of success in the trade seems to us attributable not to insufficient application – like the amateur or dilettante mentioned by the judge – but rather (with the benefit of hindsight) at least in part to one of three "shortcomings" mentioned by the judge as irrelevant to the question of "commerciality" – namely, a shortcoming in "skill".

62. The second limb of s66(2) requires that throughout each of the tax years in question, the trade was carried on "with a view to the realisation of profits of the trade." We have found as a fact that the appellant carried on the trade with a view to making profits in each of the tax years in question; the fact that he was willing (and able, due his self-funded status) to persevere through year after year of losses, does not, in our view, countervail this finding – it merely confirms that the appellant continued to believe that profit-making strategies would prove successful.

63. It is unnecessary for us to consider s66(3), which we interpret as a deeming provision to be considered only where s66(2)(b) has not been satisfied on its own terms. In this respect we take the same approach to this provision as was taken by this tribunal in *Kitching v HMRC* [2013] UKFTT 384 (TC) at [27].

64. We therefore find that both limbs of s66(2) are satisfied and so the appellant's trade was commercial for the purposes of s66 for each of the tax years in question. It follows from this and our conclusion at paragraph 58 above that we shall allow the appeal. It is unnecessary for us to consider in detail the parties' arguments as to the negligence and inaccuracy penalties under appeal: we have concluded that that the underlying tax returns of the appellant were correct, and so the appeals against all the penalties will be allowed.

65. For completeness, we record our agreement with HMRC that the letter received by the appellant in 2006 relating to VAT has no bearing on the issues in this appeal.

Conclusion

66. We allow the appeal against all of the additional tax and penalties set out in the table in paragraph 2 above.

67. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 6 JANUARY 2016