



**TC02606**

**Appeal number: TC 2012/03969**

**INCOME TAX – ASSESSMENT - LOSSES - *Whether trade losses can be set off against general income – whether the trade was commercial in the years in question – Not commercial in years 2007/08 and 2008/09 – Commercial in 2009/10 – Appeal allowed in part - amendment to self assessment 2007/08 and assessment for 2008/09 confirmed – amendment to self assessment 2009/10 quashed.***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHARLES ATKINSON**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE  
RICHARD CORKE FCA**

**Sitting in public at Appeals Service St Catherines House, 5 Notte House, Plymouth on 6 December 2012. The Tribunal re-convened in Birmingham on 28 February 2013 in the absence of the parties to consider its decision.**

**The Appellant appeared in person and assisted by Mr Nicholas John Bowman  
ACA CTA**

**Brian Skelley of Appeals and Reviews Unit for HMRC**

## DECISION

### The Appeals

1. The Appellant appealed against HMRC's decisions on 10 October 2011 to amend his self assessment tax returns for 2007/08 and 2009/10, and to issue a further  
5 assessment for tax in 2008/09. HMRC's decisions resulted in a revised figure for tax due in each of the years in question, namely, £4,647.89 (2007/08), £6,556.96 (2008/09), and £6,069.20 (2009/10).

2. The issue is whether the Appellant was entitled to set off the trading losses in tax years 2007-08, 2008-09 and 2009-10 from his Yacht Charter business as a sole  
10 proprietor against his other income.

3. The Appellant contended that his business was carried out on a commercial basis with a reasonable expectation of the realisation of profit. In those circumstances the trading losses in each year could be set off against his general income for the year in question. HMRC disagreed, stating that the Appellant's trade was not commercial  
15 within the meaning of section 66 of the Income Tax Act (ITA) 2007. Thus the Appellant was entitled to carry forward the trading losses incurred in the Yacht Charter Business and set them against any future profit in the same trade but not permitted to set off the losses against general income in the years in question.

4. The Tribunal heard the Appeal on 6 December 2012 but unfortunately there was  
20 insufficient time to hear the Appellant's final submissions. The Tribunal directed the Appellant to supply his submissions in writing by 4 January 2013 with HMRC having a right of reply. The parties complied with the directions. The Appellant supplied with his final submissions witness statements from his neighbours regarding the mooring of *Josefine*, the ship chartered by the Appellant. The Tribunal is not permitted to  
25 admit these statements after the evidence has been closed. The Tribunal, however, did not consider that the statements added to the Appellant's case. The Tribunal stated that it would reconvene in the absence of the parties and determine the Appeal on the evidence already received and the closing statements. The Tribunal indicated that it would endeavour to release its decision by no later than 18 March 2013. The Tribunal  
30 met on 28 February 2013.

### The Law

5. Section 83 of ITA 2007 enables a person who has made a loss in a trade in a tax year to claim relief for that loss by carrying it forward to reduce later income of the same trade.

35 6. Section 64 of ITA 2007 enables a person who carries on a trade in a tax year, and makes a loss in that trade to claim earlier relief by setting off that loss against any other income of that tax year in which the loss is incurred or of the previous year or if the loss is large enough of both tax years.

7. The relief under section 64 of ITA 2007 is not available unless the trade in which the loss has been incurred is commercial. Section 66 of ITA 2007 provides as follows:

**“Restriction on relief unless trade is commercial**

- 5 (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—
- 10 (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.
- 15 (4) If the trade forms part of a larger undertaking, references to profits of the trade are to be read as references to profits of the undertaking as a whole.
- (5) If there is a change in the basis period in the way in which the trade is carried on, the trade is treated as carried on throughout the basis period in the way in which it is carried on by the end of the basis period.
- 20 (6) The restriction imposed by this section does not apply to a loss made in the exercise of functions conferred by or under an Act.
- (7) This section applies to professions and vocations as it applies to trades”.
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**The Facts**

8. The Appellant was a highly skilled blacksmith who had set up a blacksmith business under the trading name of *Iron Awe* in 1992. The Appellant supplied bespoke iron works and traditional restoration to a range of eminent customers, including the Colleges of the University of Oxford, English Heritage, The National Trust, Princess Diana’s Private Secretary, and Sophia, Queen of Spain. The Appellant needed three years before he was able to realise a profit in his blacksmith business. Around 1999 the Appellant decided to sell *Iron Awe*, and look for a business where the project would stay with him, and not reliant on employees who required long apprenticeships. In the meantime the Appellant had renovated derelict buildings on a former mixed use farm which enabled him to set up an office rental business. Mr Bowman described the Appellant as a serial entrepreneur.

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9. The Appellant came from a naval family and had been sailing since boyhood. His grandfather, Gordon Carter, was the youngest serving Lieutenant in the Royal Navy at the battle of Jutland. The Appellant’s search for a new project naturally turned towards the sea where after extensive research he identified a gap in the market, namely the chartering of traditional wooden hull sailing ships.

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10. The Appellant took some time in identifying the appropriate ship. Eventually he acquired *Josefine*, a gaff rigged ketch of 66 feet in length which was first registered in 1931 and constructed by Anderson and Ferdinandsen in Denmark. Her first forty years were spent fishing in the Baltic and North Sea. From 2000 to 2002 *Josefine* was completely rebuilt and refitted on the South Coast and relocated to Gibraltar. In 2003 the Appellant purchased *Josefine* for around £70,000 which comprised £50,000 from a re-mortgage of his home and £20,000 from the sale proceeds for *Iron Awe*.

11. In May 2006 the Appellant qualified as a RYA Commercially Endorsed Yachtmaster which enabled him to skipper a commercial vessel of up to 24 metres waterline length with a weight of 200 tonnes. The training for this qualification was extensive and required the Appellant to have completed at least 50 days at sea covering a minimum of 2,500 nautical miles which included five passages over 60 nautical miles. The Appellant was also required to have had five days experience as skipper and to have passed the Yachtmaster Offshore practical exam. The Appellant took the exam on *Josefine*.

12. *Josefine* had to conform to the UK Maritime and Coastguard Agency (MCA) Codes of Practice before it could be used on a commercial basis or ply for hire in UK waters. In August 2006 *Josefine* was accredited as an MCA Code 2 vessel which allowed it to sail 60 miles off-shore and carry a maximum 12 day passengers during the day or seven passengers overnight. *Josefine* has had to be maintained to a high standard to keep its MCA accreditation.

13. Before commencing a charter business the Appellant devised a business plan with his accountant where he identified a break even point of 20 day charters per annum. The Appellant estimated that the ship would be available for charter on 137 days per annum of which 122 days would be in the season of April –October.

14. The Appellant's prices were £720 per day for a private charter (£60 per person), and £840 per day (£70 per person) for a corporate charter. *Josefine* had a maximum capacity of 12 passengers per day. The Appellant fixed his prices having regard to the charges made by his competitors.

15. From August 2006 to May 2009 the Appellant operated out of Watchet, West Somerset, a classic yacht charter business for private customers. The business offered the opportunity of skippered classic boat charter for periods of half day or longer.

16. The Appellant organised the charter business by setting up a company, B Original Ltd, of which the Appellant was the sole director and shareholder. To handle the corporate charters. The Appellant as a sole trader carried out the private charters. The Appellant believed that a corporate image was better suited to corporate clients.

17. The website and the material advertising the charters were under the name of *sailjosefine.com* which was the trading name of B Original Ltd. Also all charter bookings were made through *sailjosefine.com*.

18. An agreement was made on 1 April 2007 between the Appellant and B Original Ltd. The agreement gave

- (1) The company the right to film production, corporate charter and corporate marine services.
- 5 (2) Mr Atkinson the rights to private charter work and private marine services.
- (3) Mr Atkinson responsibility for insurance and general upkeep of the vessel.
- (4) Both parties the responsibility to keep the vessel in proper seaworthy condition.

10 19. The agreement also specified that ongoing expenses relating to maintenance, repairs or renewals including staff costs/overheads would be fairly apportioned and billed to B Original Ltd from time to time.

20. B Original Ltd employed a Personal Assistant /Secretary to the Appellant in his capacity as Managing Director of B Original Ltd trading as sailjosefine.com.

15 21. The Appellant's personal tax returns for years ending 31 March 2007, 2008, 2009 and 2010 showed the following turnover and business expenses for the Appellant's charter business in his capacity as a sole proprietor for the years in question:

<b>Year to</b>	<b>Boat Service Turnover (£)</b>	<b>Total Expenses (£)</b>	<b>Profit (loss) (£)</b>	<b>Net profit (loss) for tax purposes (£)</b>
31/03/2007	706	31,243	(30,537)	(42,889)
31/03/2008	1,681	15,982	(14,301)	(22,468)
31/03/2009	860	15,090	(14,230)	(26,957)
31/03/2010	5,437	17,941	(12,504)	(22,935)

20 22. The trading and profit and loss accounts for B Original Ltd for the same years showed the following entries:

<b>Year to</b>	<b>Turnover (£)</b>	<b>Cost of sales (£)</b>	<b>Other operating Costs (£)</b>	<b>Profit (loss) (£)</b>	<b>Net profit (loss) for tax purposes (£)</b>
31/03/2007	2,416	0	10,808	(8,392)	(8,392)
31/03/2008	15,334	5,055	5,320	4,959	4,959
31/03/2009	7,702	7,302	5,226	(4,826)	(4,826)
31/03/2010	0	0	0	0	0

23. The combined figures for the Appellant and B Original Ltd were as follows:

<b>Totals (£)</b>	<b>Turnover (£)</b>	<b>Expenses (£)</b>	<b>Loss (£)</b>	<b>Appellant's Loss (£)</b>
31/03/2007	£3,122	£42,048	(38,929)	(52,000)
31/03/2008	£17,015	£26,357	(9,342)	(4,000)
31/03/2009	£8,562	£27,618	(19,056)	(11,000)
31/03/2010	£5,437	£17,941	(12,504)	(8,500)

24. The tables under paragraphs 21 and 22 gave two figures for profit/loss. The first set of figures represented the commercial profit and loss, namely, the profits in the accounts after depreciation and interest before capital allowances. This set of figures was the relevant one for the purposes of section 66 of ITA 2007. The second set of figures represented the tax loss claimed by the Appellant, which would have included the capital allowances in respect of the purchase of *Josefine*.

25. The table in paragraph 23 provided the combined picture for the Appellant and B Original Ltd. The loss cited was the commercial loss. The table contained a column setting out what the Appellant said was the loss, which he referred to as the tax loss. The Tribunal sets out its findings below on the discrepancies between HMRC's and the Appellant's figures. The Tribunal also considers that the Appellant has not applied uniformly the definition of tax loss across the years in question. The Tribunal is of the view that the Appellant has included the amount claimed for capital allowances in the figure given for the year ended 31 March 2007 but not in subsequent years.

26. The Appellant disputed the turnover and operating costs for B Original Ltd in the year ended 31 March 2007 arguing that there was no corporate charter work before 31 March 2007. The figures in the row for the year ended 31 March 2007 were taken from B Original's Financial Statements for the year ended 31 March 2008, in which the detailed Profit and Loss Account recorded the figures for 2007. In any event the Tribunal was not concerned with the year ended 31 March 2007. HMRC did not make an enquiry in time in respect of the Appellant's self assessment return for 2006/07 which meant that the question of the Appellant's set off of trade losses against general income for that year was not before the Tribunal.

27. The Appellant in his analysis of *Errors in Facts as understood by HMRC*<sup>1</sup> cited lower figures for the total expenses of the sole proprietorship and B Original for the three years under Appeal. In the years ended 31 March 2008 and 2009 the expenses cited by the Appellant were respectively about £5,000 and £7,000 less than those relied upon by HMRC. The Tribunal finds that the expenses given by HMRC were accurate being derived from the Appellant's self assessment returns and B Original's published Financial Statements. In the year ended 31 March 2010 the Appellant's self assessment return showed expenses to the value of £17,941, whilst the Profit and Loss

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<sup>1</sup> See pages 124 & 125 of the bundle

Account for the charter business recorded expenses totalling £13,938. The Tribunal on balance prefers the evidence supplied in the Appellant's self assessment return because this was declared as correct by the Appellant.

5 28. On 23 March 2009 the Appellant ceased using B Original Limited for the yacht chartering business. In May 2009 the Appellant relocated the business to Plymouth, and chartered *Josefine* as a sole proprietor.

29. The Appellant's reasons for transferring the business to Plymouth and bringing it under the umbrella of sole proprietorship were as follows:

10 (1) Watchet marina experienced a higher incidence of being silted up which limited the opportunities for charters.

(2) Plymouth presented a more attractive business proposition with its Naval history connections, good transport links, an active business community and large visitor base.

15 (3) A substantial reduction in overheads and fixed costs of about £10,000 by running the charters under the one umbrella of the sole proprietorship.

20 30. The Appellant supplied figures for the yacht chartering business for the year ended 31 December 2011 which were £8,000 (turnover), £4,500 (expenses) and £3,500 (profit). The Tribunal is not convinced that these figures represented an accurate position of the Appellant's business as at 31 December 2011. First, the period covered was different from the accounting period used in other years with a year ended 31 March rather than 31 December. Second the Appellant did not provide the Tribunal with the documentation to support the figures given. Finally the Appellant's Trading and Profit and Loss Account for the year ended 31 March 2011 showed £589 (turnover), £13,079 (expenses) and £12,409 (loss).

25 31. The Appellant supplied from *Josefine's* log book the detail of the numbers and frequencies of the charters for the year ended 31 March 2008. The log book showed that there were 18 occasions when *Josefine* sailed with guests of which the total number carried was 143. There were four occasions when *Josefine* sailed with the permitted maximum of 12 guests. The total distance travelled for those 18 charters  
30 was 878 nautical miles. There were just three private charters during the year ended 31 March 2008, as compared with at least 15 corporate charters.

35 32. HMRC pointed out that there were ten occasions during the year ended 31 March 2008 when *Josefine* sailed without guests. The Appellant explained that these occasions related to days spent on systems testing, crew training, and travelling to and from places for the charter.

40 33. HMRC also suggested that the Appellant's trips to Brixham (Devon) and Paimpol (France) took place for the Appellant's private use. The Appellant disagreed. The Appellant stated that *Josefine* took part in the Brixham Trawler Race as a marketing exercise and only after his booking with the owner of the hotel, *Buckland tout Saints*, fell through. Similarly *Josefine* was booked for a private charter at the Paimpol maritime festival which was not fulfilled because of gearbox failure.

34. The parties supplied no analysis of the log book for the years ended 31 March 2009 and 2010. The Tribunal estimates from the income received in those years that there were one or two private charters in 2009, and around nine in 2010. The number of corporate charters in 2009 was around nine with none in 2010 following the  
5 Appellant's decision to bring the entire chartering business within the sole proprietorship.

35. The Appellant stated that the poor performance of the chartering business was due to the recession and the recent unpredictable summer weather conditions characterised by heavy rainfalls. The Appellant argued that he could not have  
10 anticipated an economic meltdown and the adverse weather conditions when he set up the business in 2006.

36. The Appellant produced extracts of weather statistics from the UK Meteorological Office but did not provide a detailed analysis of the information supplied. HMRC noted that the records showed a relatively consistent level of  
15 summer sunshine and mean temperature in the South West England and South Wales for the years under Appeal. The Tribunal observes that the Meteorological Office recorded wet summers in England and Wales for 2008 and 2009, whilst 2010 was the driest year since 2003.

37. The Tribunal makes the following findings of fact:

20 (1) The Appellant was an experienced entrepreneur.

(2) The Appellant ensured that his ship, *Josefine*, met the rigorous requirements for carrying passengers on a commercial basis. *Josefine* was maintained at all times to those high standards. The Appellant also invested significant time and resources in gaining the necessary qualifications to skipper  
25 a commercial ship.

(3) The Appellant took professional advice on a business plan for the yacht chartering venture prior to start up. He also researched competitors' pricing, which informed his prospective income profile for his new business.

(4) In 2007/08 and 2008/09 the Appellant split the yacht chartering business  
30 between two separate legal entities. The Appellant as sole proprietor traded in charters to private individuals. B Original Limited, of which the Appellant was the sole director and shareholder, was responsible for the charters sold to corporate bodies.

(5) An agreement made on 1 April 2007 between the Appellant and B Original Ltd governed the commercial relationship between the two entities. A key term of that agreement was that ongoing expenses relating to maintenance, repairs or renewals including staff costs/overheads would be fairly apportioned between them. The agreement also stated that the Appellant would  
35 bill B Original Ltd from time to time for its share of the expenditure.

(6) The advertising for the yacht chartering business and its website were under the trading name of B Original Limited, *sailjosefine.com*. The charter bookings in 2007/08 and 2008/09 were made through *sailjosefine.com*.  
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(7) In 2009/10 the Appellant ran the yacht chartering business as a sole trader. This decision was taken with a view to reducing the overheads associated with the organisation of the business as two separate entities.

5 (8) In May 2009 the Appellant relocated the business from Watchet in North Somerset to Plymouth. The move was motivated by commercial considerations. Plymouth had the benefits of a developed infrastructure and a wider market, particularly corporate clients.

10 (9) The number of charters secured by the Appellant in the years under Appeal was below the Appellant's identified break even of 20 charters per annum. The number of secured charters was 18 in the year ended 31 March 2008, about 11 in the year ended 31 March 2009, and about nine in the year ended 31 March 2010. The charters won in the year 31 March 2008 did not operate at all times to the maximum number of passengers. In that period there were only four occasions when *Josefine* carried 12 passengers. The Appellant's  
15 break even of 20 charters per annum was calculated on the basis of carrying the maximum number of passengers on each charter.

20 (10) In years 2007/08 and 2008/09 the Appellant as a sole proprietor secured three and about two private charters respectively. In contrast the number of corporate charters for B Original Limited in those years was 15 and around nine. The Appellant, however, incurred higher overheads, maintenance and running costs than B Original Ltd during those two years despite earning less income from the chartering of *Josefine* than what B Original Limited earned.

25 (11) The apportionment of the expenses associated with the chartering of *Josefine* between the Appellant and B Original Limited bore no relationship to their respective uses of *Josefine* for charters.

(12) There was no evidence that the Appellant billed B Original Limited for the use of his asset, *Josefine*.

30 (13) In the three years under Appeal (2007/08, 2008/09 and 2009/10) the Appellant trading as a sole proprietor did not achieve a profit. The expenses in those years exceeded the income by a multiple of 9.5 in 2007/08, 17.5 in 2008/09, and 3.3 in 2009/10.

35 (14) B Original Limited made a profit of £4,959 in 2007/08 but a loss of £4,826 in 2008/09. The combined venture of the Appellant and B Original Limited, however, suffered a loss in each of those years with the loss increasing in 2008/09 by almost 104 per cent on the previous year.

(15) The Appellant's decision in 2009/10 to bring the yacht chartering business under the umbrella of the sole proprietorship coupled with the relocation reduced the combined business expenses by £9,677 or 35 per cent.

40 (16) The Appellant provided satisfactory explanations for *Josefine* sailing without passengers. The Tribunal accepted that the Appellant's trips to Brixham (Devon) and Paimpol (France) in 2007/08 were for commercial purposes, and that the promised charters at these venues did not take place because of circumstances beyond the Appellant's control.

(17) There was no persuasive evidence of the Appellant using *Josephine* for his private use.

(18) The Tribunal accepts that the recession and the weather had an adverse impact on the profitability of the yacht chartering business. The Appellant, however, did not provide a detailed analysis of the precise effect of these variables on the business. The Tribunal was not convinced that the recession and weather were the sole reasons for the low take up of private charters, particularly in 2007/08, and 2008/09.

### Consideration

38. The issue in this Appeal is whether the Appellant in respect of his sole proprietorship business was entitled to set off the trading losses incurred in 2007/08, 2008/09 and 2009/10 against general income for the years in question. Section 66 of ITA 2007 prohibits such set offs where the trade was not “commercial”. In this respect the Tribunal is examining the commerciality of the Appellant’s sole proprietorship not the combined venture with B Original Limited.

39. Section 66 ITA 2007 does not prevent the Appellant from carrying forward the trading losses to reduce later income from the same trade. Section 66 ITA 2007 simply limits the options available to the Appellant for managing his trading losses. The ability to carry forward losses goes some way to meeting the Appellant’s observation that all businesses require a start up period before becoming profitable.

40. It is also important to note that HMRC did not challenge the character of the Appellant’s expenses for the years in question as expenditure wholly and exclusively incurred for the purposes of trade. HMRC made no private use adjustment of the expenses claimed by the Appellant. The question of whether the Appellant had purchased *Josefine* primarily for his private use appeared to be an underlying theme throughout the Appeal, and as a result deflected attention away from the principal issue in this Appeal. The Tribunal is satisfied that the Appellant’s purchase of *Josefine* was for business purposes. There was no evidence that the Appellant had used *Josefine* for private use. The issue in this Appeal was whether the Appellant’s business was “commercial”.

41. The commercial test in section 66 ITA 2007 involves two distinct elements which both have to be satisfied in order to meet the test. The two elements are set out section 166(2) ITA 2007 which provides as follows:

“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”.

42. Mr Justice Robert Walker in *Wannell v Rothwell* (1996) 68 TC 719 explained the meaning of commercial basis at page 733 B to D:

5 “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 the 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 cost of the enterprise) or because the way in  
10 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 a serious trader who,  
whatever his shortcomings in skill, experience or capital, is seriously  
interested in profit, and the amateur or dilettante. There may well be  
15 many borderline cases for the Commissioners to decide, and such  
borderline cases could as well occur in Bond Street as at a car boot  
sale”.

43. The second element of the test *with a view to the realisation of profits*, is expanded upon in section 66(3) of the ITA 2007 which states that

20 “if at any time a trade is carried on so as to afford a reasonable  
expectation of profit, it is carried on at that time with a view to the  
realisation of profits”.

44. The Special Commissioner in *Walls v Livesey* (Inspector of Taxes) [1995] STC  
(SCD) 12 referred to section 384(1) of ICTA 1988, the predecessor to section 66 ITA  
25 2007, and decided that *with a view to the realisation of profits* and *a reasonable  
expectation of profit* comprised two separate requirements in respect of the second  
element of profit in section 66(2). The Special Commissioner ruled that the former  
was a subjective test, whilst the latter was an objective one. The Special  
Commissioner at paragraphs 5 and 6 said:

30 “5. The issues in this appeal come to this, whether the taxpayer can  
satisfy, firstly, the words 'with a view to the realisation of profits'  
which appear in s 504(2)(a) (so as to be entitled to treat his letting  
activities as a trade for tax purposes) and in s 384(1) (so as to be  
entitled to obtain relief for losses under s 380); and, secondly, the  
35 words 'in such a way that profits in the trade ... could reasonably be  
expected to be realised in that period or within a reasonable time  
thereafter' (so as to be entitled to obtain relief for losses under s 381).

6. These two statutory expressions are not the same and in my opinion  
they provide two tests. The first is a subjective test and the second an  
40 objective test. So, whilst a taxpayer might well be found to be trading  
with a view of the realisation of profits, it could be found that he failed  
the objective test. However, in considering the latter test one has to  
bear in mind that the statute presupposes that losses could well be  
suffered for four years when an individual begins trade and, according  
45 to the nature of the trade and the economic circumstances it may be  
that losses could be suffered over a longer period but if so, one has to  
consider whether profits could reasonably be expected to be realised

within a reasonable time afterwards having regard to the way in which the trade was carried on”.

45. This Tribunal is not convinced by the Special Commissioner’s reasoning that *with a view to the realisation of profits* and *a reasonable expectation of profit* comprised separate requirements. In the Tribunal’s view, the structure of section 66 suggests that the wording of *a reasonable expectation of profit* in section 66(3) is intended to be an amplification of the meaning of *with a view to the realisation of profits* and imports an objective quality to the profit element of the commercial test in section 66(2) of ITA 2007.

46. Under section 66(4) ITA 2007 where a trade forms part of a larger undertaking, the Tribunal is entitled to consider the profits of the trade as referring to the profits of the undertaking as a whole. Section 66(4) provides a sharp dividing line between the treatment of the two elements of the commercial test. Thus in the Appellant’s case, the “commercial basis” element can only be considered from the perspective of the Appellant’s sole proprietorship, whereas the “realisation of profits” element can take account of the profits for both the sole proprietorship and B Original Limited.

47. Finally section 66 ITA requires the Tribunal to examine the commercial test throughout the basis period for the tax year. Thus the test has to be considered afresh for the basis period of each tax year, which in the Appellant’s case was the period from 1 April to 31 March in 2007, 2008 and 2009.

48. Turning to the facts found in this Appeal, although the Tribunal is required to consider each year in dispute, the Tribunal intends to deal with 2007/08 and 2008/09 together since the relevant circumstances for each year were virtually identical. The Tribunal starts with the question of whether the Appellant carried on his sole proprietorship in the private chartering of *Josefine* on a “commercial basis”.

49. The Tribunal acknowledges that in both years the Appellant approached the private charters in a business like manner in respect of his training as a skipper of a commercial vessel, maintaining the vessel to the standards required for the carrying of fare paying passengers, the formulation of business plans and the pricing of charters based on research of his competitors. These facts were, however, outweighed by the organisation of the venture with the split between private and corporate charters which were delivered by separate legal entities, the Appellant and B Original Limited. The allocation of business expenses between the two entities did not reflect a fair attribution in accordance with their respective uses of *Josefine*. The Appellant failed to observe the terms of the agreement with B Original Limited by not billing the company from time to time for the outgoings and others expenses associated with the vessel. The higher trading profile given to B Original Limited in respect of the website, advertising and invoicing which had the effect of minimising the business opportunities for the Appellant.

50. The Tribunal is required to assess whether the Appellant’s business as a sole proprietorship was carried out on a “commercial basis”. The Tribunal finds that the Appellant’s arrangements with B Original Ltd were such that the Appellant was

starved of business and used for the offsetting of expenditure. Thus the Tribunal is satisfied that in 2007/08 and 2008/09 the sole proprietorship was not being run in such a way that a profit could be made and ,therefore, the Appellant did not meet the “commercial basis” element of the test as laid down in section 66(2) ITA 2007.

5 51. In view of its finding in paragraph 50 above there is no obligation on the Tribunal to consider whether the “view to the realisation of profits” element was met in regard to the undertaking of the whole in 2007/08 and 2008/09. The Tribunal finds that in each year an overall loss was made with an increased loss in 2008/09. Also the  
10 combined income for both entities fell significantly far below the total annual outgoings of provisioning, crewing, maintaining and running *Josefine*. The expenses were also inflated by the decision to have two separate legal entities delivering the business. The Tribunal is, therefore, satisfied that if the Appellant and B Original were to be regarded as a larger undertaking, the undertaking as a whole had no reasonable expectation of being profitable in 2007/08 and 2008/09. As the sole  
15 proprietorship already fails the “commercial basis” test this latter test is of no consequence for those years.

52. The Tribunal considers that different circumstances applied to the situation for the year 2009/10. The Appellant dispensed with B Original Limited for the supply of corporate charters, and ran the business under the one umbrella of the sole  
20 proprietorship. In so doing the Appellant reduced the business expenditure by over a third, raised the trading profile of the sole proprietorship and ensured the proper allocation of business costs. The Appellant also relocated the business to Plymouth which was a far better trading proposition than Watchet with its more developed infrastructure and bigger visitor and corporate markets. The Tribunal finds that these  
25 changes enabled the Appellant to carry out its chartering business on a “commercial basis”.

53. The issue in 2009/10 is also whether the Appellant’s business was carried out with “a reasonable expectation of profit”. The Appellant did not make a profit in that year which was principally due to another fall in the number of charters. The  
30 Appellant, however, reduced the scale of losses from the previous year as a result of the costs reduction programme associated with the relocation and running the business under the one umbrella.

54. The Tribunal formed the view on the evidence that despite the Appellant making a loss in 2009/10 that the Appellant had a reasonable expectation of making  
35 a profit from his chartering business in that year. The costs reduction programme brought down the break even point between income and expenditure. Had the Appellant achieved the level of sales in 2007/08 he would have made a small profit. The relocation to Plymouth should have resulted in more business. The fact it did not may well have been due to factors outside the Appellant’s control. The Tribunal notes  
40 that the Meteorological Office reported that July 2009 was the wettest July on record in England and Wales. The Tribunal is, therefore, satisfied that the Appellant’s business in 2009/10 was commercial within the meaning of section 66 ITA 2007.

## Decision

55. The Tribunal finds that

(1) In the years 2007/08 and 2008/09 the Appellant's trade in chartering a yacht was not "commercial" within the meaning of section 66(2) of ITA 2007.

5 (2) In the year 2009/10 the Appellant's trade in chartering a yacht was "commercial" within the meaning of section 66(2) of ITA 2007.

(3) In the years 2007/08 and 2008/09 the Appellant was not entitled to set off his trade losses in chartering a yacht against his general income for those years.

10 (4) In the year 2009/10 the Appellant was entitled to off his trade loss in chartering a yacht against his general income for that year.

56. In view of its findings the Tribunal allows the appeal in part. The amendment to the Appellant's self assessment for 2007/08 resulting in tax due of £4,647.89 and the assessment of tax for 2008/09 resulting in tax due of £6,556.96 are confirmed and stand good. The amendment to the Appellant's self assessment 2009/10 producing a figure for tax due of £6,069.20 is cancelled.

57. 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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**MICHAEL TILDESLEY OBE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 20 March 2013**