[2015] UKFTT 0584 (TC)

TC04730

Appeal number: TC/2014/04691

Income tax - ITTOIA 2005 ss12(4) and 335 - ITA 2007 ss67(2) and (3) - claim by farmer for trade loss relief against income received from excavation licence - whether wayleave income - no - trade losses made consecutively in previous five years - whether reasonable expectation of profit - no - whether sideways relief allowable - no - appeal disallowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN HENDERSON **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER PATRICIA GORDON

Sitting in public at Mays Chambers, 73 May Street, Belfast on 4 June 2015

Mr Iain Lundie of Fitch Chartered Accountants for the Appellant

Mr John Corbett Officer of HM Revenue and Customs for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr John Henderson ("the Appellant") against an HMRC Closure Notice following an enquiry into his self-assessment return for the year ended 5 April 2012, and assessments for the years ended 5 April 2010 and 2011.

2. The point at issue is whether farming losses claimed by the Appellant in his self-assessment return, for the three years ended 5 April 2010, 5 April 2011 and 5 April 2012, can be claimed, either generally if property income he received from an excavation licence was part of his farming/trade income, or if not, 'sideways' against that property rental income under s 64 ITA 2007.

3. The Appellant says that if the property income is regarded as an integral part of his farming business, his profits after taking into account the trade losses, are significantly less than those assessed by HMRC.

4. HMRC say that firstly the property income is not trading income and therefore cannot be included as part of the Appellant's farming accounts, and secondly that the provisions of s 64 ITA 2007, which allow sideways relief, is denied under s 67(2) ITA 2007 where, as in this case, losses calculated without regard to capital allowances have been made in the taxpayer's trade in each of the previous five tax years. HMRC say that, having taken into account all the circumstances and the nature of the Appellant's farming activities, the exception to this under s 67(3), where there is a reasonable expectation of profit, does not apply.

Background

5. If a person's business income is derived from various elements and one of those elements is loss-making, then of course those losses may be taken into account in the computation of overall profits. Further, under s 64 ITA 2007, if a person who carries on a business makes a loss from trading, those trade losses may be offset against other general income (or a chargeable gain) received in the same year or preceding year. It may also be possible to carry trade losses back to earlier years, or forward to subsequent years.

6. Claims to trade loss relief against general income (or gains) are, under ITA 2007 s 66, restricted to businesses that trade on a commercial basis with a view to making a profit throughout the basis period of the tax year. Sideways relief is not allowed for losses where the trade demonstrably lacks commercial inspiration. The trade must be carried on throughout the basis period for the tax year with a reasonable expectation of profits. If a trade is not actually being carried on, no tax relief is available.

7. Other loss relief restrictions may apply where losses have been sustained in the course of farming or market gardening. Because losses are often generated by 'hobby farmers', in 1967 the 'five year test' was introduced and is now set out in ITA 2007 s 67. Under this, if a loss has been incurred by a farmer or market gardener in each of

the last five years, then the loss incurred in the sixth year cannot normally benefit from sideways set off against general income; it can only be carried forward to set against future farming profits. The loss here is the tax adjusted loss; in other words it is calculated without regard to capital allowances. If a profit is made in the sixth year, the five year clock is reset.

8. Section 68 ITA 2007, sets out the 'reasonable expectation of profit' test by reference to the 'expectations of a competent farmer'. The test is met where:

a. a competent person carrying on the farming activities in the current tax year would reasonably expect future profits; but

b. a competent person carrying on the activities in the last five years could not reasonably have expected the activities to become profitable until after the end of the current tax year.

9. In practical terms, when deciding whether a competent farmer would reasonably expect future profits, it is necessary to consider the nature of the whole of the farming activities and the way in which those activities are carried out.

10. HMRC recognise that certain specialised activities, for example stud farms, may take a long time to establish. It is therefore accepted by concession that in such cases HMRC would not invoke s 67 ITA 2007 until eleven years after the start of the trade, rather than the usual five. However the trade still needs to be potentially profitable in the future to withstand a challenge under s 66.

11. The Appellant undertakes general farming activities but unfortunately has done so on a loss making basis since 2002-03. His income was however supplemented by rental income that he received from a lease of part of his farm so that the tenant could quarry the land and excavate gravel. The initial lease granted on 16 November 1998 was for a term of ten years commencing on 1 January 1999 and expiring on 31 December 2008, at a rental for the first five years of £450 per month and for the remaining five years at £550 per month. The lease included standard covenants on the part of the landlord and tenant of a type that are normally found in a lease of land. These included a covenant on the part of the tenant to pay rates taxes assessments duties or other outgoings relating to the property, and not to assign or underlet without the permission of the landlord. The tenant was granted exclusive possession of the property and the landlord covenanted that the tenant would enjoy peaceful possession without interruption by the landlord. In other words the lease contained all the usual constituent parts of a standard lease of land.

12. The lease was extended under a reversionary lease dated 13 September 2001, for a further ten years, on expiration of the term of years granted by the initial lease, at a rental of £650 per month for the first five years and £750 per month for the remaining five years.

13. On 14 December 2010 the Appellant granted the tenant an option to take a further lease for a fifteen year term on expiration of the term of years granted by the reversionary lease in consideration of the premium of £2,500.

14. The Appellant submitted self-assessment returns in respect of his farming business for each of the years ending 5 April 2010, 2011 and 2012, claiming relief in respect of his trade losses against the income he received from the rented land and capital gains arising from a sale of part of his farm. Up to 2011-12, the income had previously been returned as rental income, but the Appellant now says that was an error and that the revenue should in fact have been returned as trading income to be set against his farming losses which (after capital allowances) amounted to £38,381.

15. HMRC opened an enquiry into the Appellant's return for 2012 under s 9A TMA 1970 to specifically look at the losses claimed. They concluded that the Appellant's claim for loss relief could not be accepted because, under s 67(2) ITA 2007, he had made losses in the previous five years and whilst not questioning the commerciality of the Appellant's farming business, the exception under s 67(3) is reserved for business where there is a reasonable expectation of profit.

16. The Appellant's agent replied to advise that the Appellant was not a 'hobby farmer' and that he had been ill, having contracted 'farmer's lung' following many years working in farming. He also suffered from other debilitating conditions, which seriously impacted upon his ability to farm successfully. The agent provided a copy letter from the Appellant's consultant respiratory physician which recorded that the Appellant suffered from idiopathic pulmonary fibrosis and had undergone a bilateral lung transplantation in January 2005, following which he had suffered from recurrent pulmonary emboli, for which he was treated with warfarin long-term. He had also had a total hip replacement in November 2014 and sufferes from diabetes mellitus.

17. The agent explained that the Appellant had, without success, tried to downsize his holding in an attempt to make a profit. He said that the income returned as property income was in reality part of the profits of the Appellant's farming business and should previously have been returned as such. He said that the property income should be treated as wayleave income and part of the profits of the farming business pursuant to s 22 Income Tax (Trading and Other Income) Act 2005 ('ITTOIA 2005').

18. HMRC disagreed with the agent's contentions and as the parties had reached an impasse concluded their enquiry by issuing a Closure notice under s 28A (1) and (2) TMA 1970, together with discovery assessments claiming additional tax on the added back losses as claimed by the Appellant in his self-assessment returns as follows:

Year	Nature	Amount	Issued
2009-10	Discovery Ass	£ 530.60	09/12/2013
2010-11	Discovery Ass	£ 401.80	09/12/2013
2011-12	Discovery Ass	£8,606.82	10/12/2013

Legislation

19. The relevant legislation is set out in ITA 2007 and ITTOIA 2005.

ITA 2007

Section 64 *Deduction of losses from general income*

(1) A person may make a claim for trade loss relief against general income if the person—

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

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

(2) The claim is for the loss to be deducted in calculating the person's net income—

(a) for the loss-making year,

(b) for the previous tax year, or

(c) for both tax years.

(8) This section needs to be read with—

(b) sections 66 to 70 (restrictions on the relief),

Section 66 *Restriction on relief unless trade is commercial*

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

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

(a) on a commercial basis, and

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

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

(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.

(7) This section applies to professions and vocations as it applies to trades.

Section 67 *Restriction on relief for "hobby" farming or market gardening*

(1) This section applies if a loss is made in a trade of farming or market gardening in a tax year ("the current tax year").

(2) Trade loss relief against general income is not available for the loss if a loss, calculated without regard to capital allowances, was made in the trade in each of the previous 5 tax years (see section 70).

(3) This section does not prevent relief for the loss from being given if—

(a) the carrying on of the trade forms part of, and is ancillary to, a larger trading undertaking,

(b) the farming or market gardening activities meet the reasonable expectation of profit test (see section 68), or

(c) the trade was started, or treated as started, at any time within the 5 tax years before the current tax year (see section 69 below, as well as section 17 of ITTOIA 2005).

Section 68 *Reasonable expectation of profit*

(1) This section explains how the farming or market gardening activities ("the activities") meet the reasonable expectation of profit test for the purposes of section 67.

(2) The test is decided by reference to the expectations of a competent farmer or market gardener (a "competent person") carrying on the activities.

(3) The test is met if—

(a) a competent person carrying on the activities in the current tax year would reasonably expect future profits (see subsection (4)), but

(b) a competent person carrying on the activities at the beginning of the prior period of loss (see subsection (5)) could not reasonably have expected the activities to become profitable until after the end of the current tax year.

(4) In determining whether a competent person carrying on the activities in the current tax year would reasonably expect future profits regard must be had to—

(a) the nature of the whole of the activities, and

(b) the way in which the whole of the activities were carried on in the current tax year.

(5) "The prior period of loss" means—

(a) the 5 tax years before the current tax year, or

(b) if losses in the trade, calculated without regard to capital allowances, were also made in successive tax years before those 5 tax years (see section 70), the period comprising both the successive tax years and the 5 tax years.

Income Tax (Trading and Other Income) Act 2005

[The purpose of the ITTOIA 2005 was to rewrite income tax legislation relating to trading, property and investment income so as to make it clearer and easier to use. It did not generally change the underlying law. It imposed charges to income tax under - Part 2 (trading income), Part 3 (property income), Part 4 (savings and investment income), and Part 5 (certain miscellaneous income). The Act applies for income tax only and brings the charging and calculation rules for the different sorts of income together in updated classifications, such as property income, trading income and savings and investment income. It repealed, for income tax purposes, the only remaining Schedules A, D and F.]

Profits of mines, quarries and other concerns

S12. (1) Profits or losses arising out of land in the case of a concern to which this section applies are calculated as if the concern were a trade.

(2) Any profits arising out of the land are charged to income tax as if the concern were a trade carried on in the United Kingdom.

(4) The concerns to which this section applies are—

(a) mines and quarries (including gravel pits, sand pits and brickfields),

……..

(5) This section does not apply to a concern if section 10 (commercial occupation of land other than woodlands) applies to the occupation of the land out of which the profits or losses arise.

Payments for wayleaves

S22.(1) This section applies if—

(a) a person ("the trader") carries on a trade on some or all of the land to which a wayleave relates,

(b) rent is receivable, or expenses are incurred, by the trader in respect of the wayleave, and

(c) apart from any rent or expenses in respect of a wayleave, no other receipts or expenses in respect of any of the land are brought into account in calculating the profits of any property business of the trader.

(3) If rent for the wayleave would otherwise be brought into account in calculating the profits of a property business of the trader, or

(a) expenses incurred by the trader in respect of the wayleave would otherwise be so brought into account,

(b) the trader may instead bring both the rent and expenses into account in calculating the profits of the trade.

(4) In this section "wayleave" means an easement, servitude or right in or over land which is enjoyed in connection with—

(a) an electric, telegraph or telephone wire or cable,

(b) a pipe for the conveyance of any thing, or

(c) any apparatus used in connection with such a pipe.

Overview of Part 3 ITTOIA 2005

S260.(1) This Part imposes charges to income tax under—

(a) Chapter 3 (the profits of a UK property business or an overseas property business),

(b) Chapter 7 (amounts treated as adjustment income under section 330),

(c) Chapter 8 (rent receivable in connection with a UK section 12(4) concern),

Meaning of "generating income from land"

S266.(1) In this Chapter "generating income from land" means exploiting an estate, interest or right in or over land as a source of rents or other receipts.

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

(3) "Other receipts" includes—

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

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

(c) rentcharges and other annual payments reserved in respect of, or charged on or issuing out of, land.

Activities not for generating income from land

S267 For the purposes of this Chapter the following activities are not carried on for generating income from land—

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

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

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

Amounts not brought into account as part of a property business

S273 (1) The rules for calculating the profits of a property business need to be read with the following provisions of Part 2 (trading income) -

(d) section 22(3) (payments for wayleaves).

(2) Those provisions secure that amounts which would otherwise be brought into account in calculating the profits of the business are, or may be, brought into account instead in calculating the profits of a trade.

Charge to tax on rent receivable in connection with a UK section 12(4) concern

S335 Income tax is charged on rent receivable in connection with a UK section 12(4) concern.

Meaning of "rent receivable in connection with a UK section 12(4) concern"

S336 (1) For the purposes of this Chapter rent is receivable in connection with a UK section 12(4) concern if—

(a) it is receivable in respect of an estate, interest or right in or over land in the United Kingdom, and

(b) the estate, interest or right is used, occupied or enjoyed in connection with a concern listed in section 12(4).

(2) For the purposes of this Chapter rent is also receivable in connection with a UK section 12(4) concern if—

(a) it is receivable in respect of an estate, interest or right in or over land in the United Kingdom,

(b) the lease or other agreement under which it is receivable provides for its recoupment by reducing royalties or payments of a similar nature, and

(c) the reduction applies if the estate, interest or right is used, occupied or enjoyed in connection with a concern listed in section 12(4).

(3) In this Chapter "rent" includes—

(a) a receipt mentioned in section 266(3), and

(b) any other receipt in the nature of rent.

The Appellant's case

20. The Appellant's grounds of appeal as stated in his Notice of Appeal to the Tribunal are:

> "We believe that HMRC should properly consider the trading income received from the exploitation of land as farming trade income.
> This income is not properly classified as income from property and is derived from land used wholly or mainly for the purposes of farming and is situated in the UK.
> HMRC will not allow this aggregation of turnover and as such the farming trade is deemed to have made a loss for five consecutive years and as such losses would not be available for utilisation against capital gains of the same year.
> We argue that this is farming income and that the trade did not make a loss in each of these five years.
> We would rely on HMRC treatment of wayleaves, sporting rights, tree sales and licences given to treasure seekers. All of these forms of income will be allowed as farming.
> We would further seek to rely on the reasoning in *Lowe (HM. Inspector of Taxes) v J. W Ashmore ltd*. (1) (1967-71) 46 TC 597 with regard to the extension of definition of farm land and farming income."

21. It initially appeared clear from the Appellant's agents early correspondence with HMRC that the Appellant, although asserting that the property income was part of his overall farming trade profits/losses, in the alternative, he claimed relief under s 67(3)(b) ITA 2007. However at the appeal hearing Mr Lundie said that he did not wish to pursue that aspect of the appeal. He did however maintain his view that the Appellant is not a hobby farmer, which the legislation at ss64 - 70 ITA 2007 is intended to catch. He said that there was no need to consider the reasonable expectation of profit test in s 68 ITA 2007. Nonetheless he submitted details of the Appellant's medical conditions and prescribed medication. In our view therefore the Appellant relies on two grounds of appeal:

- Either, that his property income is part of his farming income, with the result that he has not made a loss during the years in question but income as returned, and not as assessed by HMRC.

- Or, if his property income is not part of his farming income, s 67(3)(b) ITA 2007 applies to allow 'sideways' relief against his farming losses by reason that he meets the reasonable expectation of profit test as set out in s 68 ITA 2007.

22. At the hearing, Mr Lundie said that the property rent was income derived from land wholly or mainly used for the purposes of farming and that it should be treated as farming trade income. He said that the property rent should be treated as wayleave income and be taken into account in computing the profits/losses of the farming

business under ss22(3) and 273 ITTOIA 2005. The reason the Appellant let out the land was to maintain the profitability of his farming business which otherwise, because of his medical conditions, would become unprofitable. If the rents could be said to be part of the Appellant's trade, he had not made losses in the years in question and it would not be necessary to consider ss66 – 68 ITA 2007. He referred to HMRC's PIM 1060 where it is advised:

> "Sporting rights include rights of fowling, shooting or fishing, or of taking or killing game, deer, rabbits, etc. Income from sporting rights is chargeable as property income, since income from allowing such activities comes from the recipient exploiting an interest or rights in or over land. It includes for example income from the grant of fishing licences and shooting permits.
>
> Exceptionally, the commercial exploitation of the sporting facilities may amount to trading. In such a case the income from the sporting rights may be included in the trading computation. An Inspector should handle claims that income from sporting rights is trading income because of the level of commercial exploitation.
>
> Income from sporting rights may be included as trading receipts in farming cases, provided that the amounts involved are small."

23. He referred to the case of *Elmas v Trembath* [1934] 19TC72 where it was held that "receipts from the sale of trees planted on farmland should be included as part of the farm receipts".

24. Mr Lundie also referred to Lowe *(HM. Inspector of Taxes) v J. W Ashmore Ltd. Ch.D.1970 46TC59.* In that case, a farming company received payments from contractors for the right to remove turf from the farm. The payments were assessed to income tax. The company appealed contending that the payments were capital receipts. The Ch. Div. rejected this contention and upheld the assessments. Megarry J in deciding that the receipts were revenue rather than capital, and that they were derived from farming, said:

> "The Act is somewhat less than explicit on the meaning of the word "farming". By section 526 (1), except so far as is otherwise provided or the context otherwise requires, "farm land" means "land in the United Kingdom wholly or mainly occupied for the purposes of husbandry, not being market garden land, and includes the farmhouse and farm buildings, if any, and "farming" shall be construed accordingly. In relation to what I am concerned with in this case, the meaning of "farming" thus principally depends on the meaning of "husbandry": and as one of the ordinary meanings of "husbandry" is "farming", here again there is some degree of circularity. "Market garden land", which is excluded from "farm land" and so from the meaning of "farming," is defined by section 526, (1) as meaning "land in the United Kingdom occupied as a nursery or garden for the sale of the produce (other than land used for the growth of hops) and 'market gardening' shall be construed accordingly." Thus neither by inclusion nor by exclusion is much assistance provided.
>
> I therefore propose to assume that the word "farming" means "farming" in the sense of the carrying on of activities appropriate to land recognisable as farm land. It must at least include the raising of beasts, the cultivation of land and the growing of crops; and the words "wholly or mainly" seem to me to be of some importance. I do not think that

> a farmer ceases to farm merely because he arranges for others to reap instead of himself. Nor do I think that it depends upon whence the initiative comes. Both the nature of annual crops and economic pressures usually force the farmer to take the initiative: but if there were to be a race of wholesalers who made the initial approach to farmers, I cannot see that this would mean that the farmers ceased to farm. No doubt it is material to consider the person who reaps and the person who initiates, but I do not think that these considerations can be decisive. One still has to consider whether the sums are profits or gains of what can fairly be called farming.
>
> Where, as here, one has a company admittedly carrying on the trade of farming upon what is admittedly a farm, and the company is achieving profits from selling what is growing on the farm (in this case, grass), then I do not think that the fact that the grass is sold together with the earth in which it is rooted prevents the transactions from falling under the head of "farming". Nor does it seem to me to matter that the taxpayer was not producing turf for resale. I say nothing about the sale of topsoil alone; here it seems to be of the essence of what is sold that it should be growing grass, with the roots embedded in enough soil to enable it to continue to grow elsewhere. In my judgment, the requirements of the third head are satisfied. Accordingly, as all three heads are satisfied (or at any rate the relevant two), the taxpayer is liable to tax under Case I."

25. Mr Lundie says that whilst accepting that the case related to the sale of turf, the principles recognised by the court are equally applicable in this appeal and that the income received by the Appellant from the exploitation of a proprietary interest in his land was no different to wayleave income.

HMRC's Case

26. The land let under the lease ceased to be farmland on 1 January 1999, since when a tenant has occupied it for the extraction of gravel. The income of a tenant where derived from quarrying land is included in s 12 (4)(a) of Part 2 ITTOIA 2005 and taxed as trade income, whereas the rents received by the Appellant are chargeable to tax under s 335 of Part 3 of that Act as property income.

27. HMRC accept that there are some types of income, such as wayleave income, that can be treated as trading income and this is provided for in s 273 ITTOIA 2005. However there is no provision for income arising from a concern included in s 12 (4) to be treated as trading income and these *remain* chargeable under s 335.

28. *Lowe (HM Inspector of Taxes) v J W Ashmore Ltd* is not relevant as it did not consider rental income from leased land. The issue in that case was whether moneys received for selling turf was revenue income or capital. The monies received flowed from a commercial trading activity and was not rental income. The reasoning in that case does not therefore support the Appellant's contentions. The case considered a number of points relating to the chargeability of income and the criteria to consider in determining the correct treatment of income from land, but does not assist the Appellant in this case.

29. Mr Corbett for HMRC said that the first step is to consider farming and what may fairly be included under that source. The Appellant's rental income cannot be

regarded as farming income and therefore cannot be set off against his farming losses. The income was not derived from profits or gains of what can fairly be called farming as there is no raising, cultivation or growing. The rental income was not an integral part of the Appellant's farming activities and cannot be set off against his trading losses.

30. HMRC's decision that the Appellant cannot avail himself of sideways relief is based on the provisions of s 67 ITA 2007. The only avenue for allowing the Appellant's claim to set off farming losses sideways, where losses have been made in the previous five years, is by virtue of ss67(3)(b), and the farming activities meet the 'reasonable expectation of profit' test as set out in s 68. The Appellant has provided no evidence to show that he was farming with a view to the realisation of profit.

31. The point is further explained in HMRC's BIM75640:

> "The restriction is dis-applied only if a competent person carrying on the activities at the beginning of the prior period of loss (see subsection (5)) could not reasonably have expected the activities to become profitable until after the end of the current tax year. That is, the farmer has engaged in 'specialised activities'."

In this case the Appellant's activities are not 'specialised activities' and in fact the argument, although referred to at length by the Appellant's agent in early correspondence, is not now pursued by him in any meaningful way.

32. In any event, the claim to set off losses in the Appellant's self-assessment return for the year ended 5 April 2009, was 'out of time'. It was also erroneous, but because the mistake in claiming set off was considered to be careless, HMRC did not seek to charge a penalty.

33. HMRC submit that the Appellant has not discharged the onus upon him to demonstrate that the assessments have not been calculated correctly.

Conclusion

34. ITTOIA 2005 s 12 provides that profits arising from land in respect of certain concerns (for example, mines, quarries, etc.) should be taxed as if they were from trades even though the source of the profits is from land (and therefore ought to come within the scope of ITTOIA 2005 Pt 3 (property income)). The list of these concerns is found in s 12(4) and comprise, amongst other activities, quarrying and the excavation of gravel pits. That is the basis on which the *tenant's* income will be taxed.

35. Where rent is receivable in respect of such concerns, income tax is charged under s 335 ITTOIA 2005 (Pt 3 - property income)). The scope of the charge is extended to any form of rent receivable in respect of any interest over land which is used, occupied or enjoyed in connection with a s 12(4) concern (ITTOIA 2005 s 336(1)). The meaning of 'rent', in this context, is extended by ITTOIA 2005 s336 (3) to include:

- any receipt that would otherwise be a receipt of a UK property business, and

- any other receipt in the nature of rent.

36. The rents received by the Appellant plainly fall into this category and therefore remain chargeable to tax under s 335 ITTOIA 2005, as property income. The income received by the Appellant cannot be regarded or treated as part of his trading income.

37. Amounts received from wayleaves may be taken into account in calculating the profits of a trade – ss22(3) and 273 ITTOIA 2005. However the property income received by the Appellant is rent. It is not wayleave income. The Appellant's land is leased to a tenant who works the mineral rights. A wayleave is a non-possessory right which, as with an easement, entitles another to certain rights over land. The right of the tenant to quarry and extract gravel from the Appellant's land is akin to a profit a prendre which gives a person the right to take from land produce or minerals. In legal terms however the tenant had a lease. He enjoys possession of the land. He does not enjoy wayleave rights.

38. Income from sources such as sporting rights may be included in the farm trading accounts but only small amounts. In any event however, the income received by the Appellant under the lease is entirely different in nature from a payment which is made for non-occupational rights over land such as sporting rights.

39. With regard to sideways set off, a commercial trader should be able to demonstrate that he intends to make a profit from the business. He may for example evidence this by business plans and profit projections, but the Appellant has provided no evidence of this nature whatsoever.

40. It is accepted that traders can have unexpected losses which arise for reasons outside their control. Mr Lundie said that the Appellant tries to make a profit but had been unable to do so because of ill-health. He had been getting by on the rental income and by selling off parts of his land. Although the Appellant clearly suffered from illness which would have affected his ability to successfully farm his land, it cannot be said, that taking the whole nature of his activities and the way in which they were carried out, he can be regarded as a person who had a reasonable expectation of profit. In fact there appears to have been a recognition on the part of the Appellant that he could have no realistic expectation of profit from his farming business. We have some sympathy for the Appellant and accept that he is not the type of hobby farmer at which the ITA 2007 legislation was targeted. However, he is nonetheless caught by the restrictions on sideways relief contained in s 67.

41. The Tribunal finds that the Appellant has not discharged the onus upon him to show that the amendments to his self-assessment returns for 2009-10, 2010-11 and 2011-12 are incorrect.

42. For the above reasons we dismiss the appeals and confirm HMRC's assessments.

43. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 25 November 2015