



## DECISION

### Introduction

- 5 1. This is, in form, an appeal by the original Appellant, the partnership T J Charters  
LLP (“TJC”), against the decision of the Respondents (“HMRC”) to deny income tax  
relief for losses (which included capital allowances) claimed by TJC – that is, £90,329  
in the year ended 5 April 2009; £140,264 in the year ended 5 April 2010; and £76,646  
in the year ended 5 April 2011. That decision was communicated in a closure notice  
10 dated 23 July 2013, sent by D.K. Butson, HM Inspector of Taxes to Mr Anthony  
Rowbottom, as nominated partner of TJC. Mr Rowbottom gave oral evidence at the  
hearing of the appeal.
2. During the hearing of the appeal, Mr O’Grady, for HMRC, handed up to us a  
Revised Statement of Case. From that document it appears that although HMRC had  
15 formerly taken the point that TJC did not operate a trade, HMRC now accepts that  
TJC was indeed operating a trade during the periods in dispute, that trade being one of  
boat hire.
3. The Revised Statement of Case is prepared on the basis that there remain two  
issues for decision.
- 20 4. The first is whether trade loss relief is available in respect of losses from TJC’s  
trade against the general income of Mr Rowbottom and his wife, Mrs Julia  
Rowbottom, as partners in TJC, pursuant to section 64 Income Tax Act 2007 (“ITA”).  
This issue turns on whether the restriction on relief provided by section 66 ITA  
applies – that is, whether the trade carried on by TJC in which the trade losses arose  
25 was ‘commercial’ throughout the relevant periods. TJC submits that it was; HMRC  
submit that it was not.
5. The second issue is whether, assuming the restriction on relief provided by section  
66 ITA does not apply, ‘sideways relief’ is available to Mr and Mrs Rowbottom in  
respect of so much of the losses as derive from trade leasing allowances, having  
30 regard to the restriction in section 75 ITA requiring an individual seeking to benefit  
from such ‘sideways relief’ to meet the ‘time commitment test’.
6. During the hearing of the appeal, Mr Middleton, for TJC, accepted that HMRC  
were correct that that the ‘time commitment test’ in section 75 ITA had not been met.  
He said, however, that section 75 had no application to this case because it could only  
35 apply when a trade was a trade of leasing plant or machinery. He submitted that the  
trade carried on by TJC was not such an asset leasing trade, but was instead  
something more, and that besides hiring out a boat, TJC provided ancillary services,  
and this made the trade not one which was (for the purposes of section 75 ITA) the  
provision of the boat for leasing.
- 40 7. We say at this stage that it appears to us that neither issue is properly raised by  
this appeal as it stands. The closure notice disallows the losses to the partnership,  
TJC. It says nothing about the availability of losses for sideways relief to the partners

in TJC. The issues between the parties, as it seems to us, need to be raised in an appeal brought by Mr and Mrs Rowbottom, and not by TJC. We have power under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) to substitute a party if the wrong person has been named as a party. We consider that TJC is the wrong person to have been named as appellant in the appeal and Mr and Mrs Rowbottom should have been named as appellants instead (or in addition to TJC). We consider, however, that we have before us the necessary evidence and submissions to decide the real issues between the parties – viz: whether or not the trade losses of TJC are available for relief against the general income of Mr and Mrs Rowbottom. We also consider that it would be in accordance with the overriding objective of the Rules (to deal with cases fairly and justly) to direct a substitution pursuant to rule 9 of the Rules. Accordingly, in order that the real issues between the parties can be decided, we direct the substitution of Mr and Mrs Rowbottom for TJC as appellants in the appeal and proceed accordingly.

15 **The law**

8. We were referred to section 83 ITA, which provides for carry-forward trade loss relief – that is, for an unrelieved trade loss to be available to be carried forward and set against profits from the trade in subsequent periods. HMRC accept that the trade losses of TJC which are in dispute in this appeal are available to be carried forward under section 83 ITA.

9. However, Mr and Mrs Rowbottom claim to be able to set the trade losses of TJC against their general income. The relevant provisions of ITA which were the subject of submissions at the hearing of the appeal are sections 64, 66 and 75 ITA. We set them out, so far as relevant, as follows.

25 **Section 64 ITA: 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.(See Step 2 of the calculation in section 23.)
- ...
- (8) This section needs to be read with –
  - ...
  - (b) sections 66 to 70 (how relief works),
  - ...
  - (d) sections 75 to 79 (restrictions on the relief and early trading losses relief in relation to capital allowances) ...’

40 **Section 66 ITA: 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-

- 5 (a) on a commercial basis and  
(b) with a view to the realisation of profits in the trade.

10 (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.

...'

**Section 75 ITA: Trade leasing allowances given to individuals**

15 (1) Sideways relief is not available to an individual for so much of a loss as derives from a trade leasing allowance unless the individual meets the time commitment test.

(2) A trade leasing allowance is an allowance made under Part 2 of CAA 2001 in respect of-

- 20 (a) expenditure incurred on the provision of plant or machinery for leasing in the course of a trade, ...

...

(4) To meet the time commitment test conditions A and B must be met.

25 (5) Condition A is that the individual must carry on the trade for a continuous period of at least 6 months beginning in the basis period for the tax year in which the loss was made ("the loss-making basis period").

(6) Condition B is that substantially the whole of the individual's time must be given to carrying on the trade-

- 30 (a) for a continuous period of at least 6 months beginning or ending in the loss-making basis period (if the individual starts or permanently ceases to carry on the trade in the tax year (or does both)), or

(b) throughout the loss-making basis period (in any other case).'

35 10. The issues of law in this appeal arising from our decision from these provisions are whether or not the trade carried on by TJC was carried on on a commercial basis and with a view to the realisation of profits in the trade (section 66(2) ITA) and whether or not the trade was one of asset leasing, so that it could be said that the expenditure incurred on the boat acquired by TJC (and, so HMRC submit, some safety equipment and a coffee maker) was expenditure incurred on the provision of these assets 'for  
40 leasing in the course of a trade' (section 75(2)(a) ITA).

**The evidence**

45 11. Oral evidence was given by Mr Anthony Rowbottom. We also had before us a Witness Statement which Mr Rowbottom had made for the purposes of another appeal to this Tribunal, namely appeal number TC/2013/02795. That appeal was against an assessment to VAT made by HMRC in respect of output tax due to recognise private use by Mr and Mrs Rowbottom of the boat in issue, a Sealine T50 yacht called "Lady Louise". The Witness Statement contained evidence which was relevant also to the current appeal. Appeal TC/2013/02795 came before Judge Poole and Miss Owen on 8 and 9 May 2014. The Tribunal's decision in that appeal, allowing it in part, was

released on 16 September 2014 under reference TC04011, reported at [2014] UKFTT 896 .

12. Besides the evidence described above, we had before us 4 bundles of documents (3 provided by HMRC and 1 by TJC).

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### **The facts**

13. From the evidence we found facts as follows – these to some extent are the same as the facts found by the Tribunal in appeal TC/2013/02795, and, to that extent we repeat the findings made in that appeal.

10 14. Mr Rowbottom had been engaged in property letting and development through a company called Leaton Estates Limited (“Leaton”) and, in 2007, he decided to use some of the profits he had made from that activity to buy a motor cruiser (having “always enjoyed boats and being out on the water”). At a time when he had had no prior sailing experience (as stated in the Appellant’s Statement of case in this appeal), he bought a 42 foot boat called “Oscar Blue” in May 2007 for some £300,000. It was  
15 registered jointly in his and his wife’s names. It was a purely private purchase, intended for personal pleasure.

15. Having initially moored Oscar Blue at Chichester, Mr Rowbottom (who lived in the Midlands at all relevant times) moved her to Southampton, where he had a berth at the mouth of the marina. He noticed other boats setting out from there with charter  
20 parties on board and, after some discussion with friends and contacts, he formed the idea that he would like to use Oscar Blue partly to carry on a similar business, as well as having her available for personal use from time to time. He understood that another luxury vessel he saw being used in this way was being hired out for as much as £3,000 to £4,000 per day. He rapidly established that Oscar Blue was too small for  
25 such a business and decided to upgrade to a larger vessel. He saw a 50 foot boat at the Boat show in September 2007 and decided she would be suitable. He finally placed an order with Sealine, the manufacturer, in February 2008 and paid a deposit.

16. Mr Rowbottom incorporated TJC on 19 May 2008. Mr and Mrs Rowbottom became members of TJC on incorporation, and Mr Rowbottom’s company, Leaton,  
30 became a member on 21 May 2009.

17. On 28 May 2008 Sealine invoiced TJC for the purchase of the new vessel, called “Lady Louise”. The total invoice amount was £469,671 plus VAT of £82,192.47 (total: £551,863.47). It was paid for as to just over 50% by Leaton and as to the  
35 balance by Mr and Mrs Rowbottom, partly by trading in Oscar Blue against the new vessel. Lady Louise was delivered then or shortly afterwards. It so happened that Mr Rowbottom was about to go away on holiday for three weeks, so Lady Louise lay unused at Ocean Village Marina, Southampton, for a while. It took until 9 October 2008 to get the vessel appropriately licensed by Southampton City Council for charter use, so effectively TJC had “missed” the 2008 season, by the time she was ready.

18. Lady Louise was/is a high specification luxury vessel. The purchase price included the provision of real leather saloon seating, a surround sound theatre entertainment system and high specification televisions.

5 19. Mr Rowbottom's evidence was that he saw an opportunity to charter Lady Louise for parties of about 12 people to go out for a day, or perhaps a weekend. He said that there was a vibrant market in such charters in 2007 to 2008. Such charters were typically taken by corporate entities to host a promotional day for clients. Often the charterers were banks. Mr Rowbottom contacted established charter companies to ask if he could 'join in with them' and use their website for promoting Lady Louise. He  
10 expected to realise a profit 'within a few years'. Unfortunately, the business with banks dried up after the Lehman Brothers crash in September 2008. Mr Rowbottom told us that if he had been able to anticipate the crash he 'would have stuck with the boat he had before'.

15 20. The chartering business was not a success, as indicated by the losses which are the subject of this appeal. It was/is a seasonal business, essentially confined to the summer months. By the time Lady Louise was ready for charter in 2008, as we have said, that season had been missed and also the economy had entered a severe recession.

20 21. The only charter during the 2009 season was one day, generating a fee of £1,200 plus £180 VAT. We saw the invoice relative to this fee (dated 25 July 2009). TJC invoiced Mamarine and the narrative of the invoice read: "Boat Hire Lady Louise. Skipper Mr B Simpson JK Marine and hand. Agreed Cowes and Newtown Creek IOW". Mr Rowbottom's evidence was that Mr Simpson was a skipper that he had  
25 appointed. For this, and all the other charters of Lady Louise, there was no documentation produced, apart from the invoice.

22. Mamarine was an entity to which Mr Rowbottom had been introduced through a friend in Southampton. Its full name (according to the Charter Agreement entered into with TJC (through Mr Rowbottom) and dated "May 2009") is Mamarine.com LLP. This Charter Agreement provided as follows:

30 TJC and Mamarine were to 'deliver mutual and reciprocal marketing and logistical support whilst working as independent charter companies'.

Mamarine was to market Lady Louise as a vessel available to their clients, while TJC was to market another vessel "Zoe Due" as a vessel available to their clients.

35 Each of TJC and Mamarine was to have the right to market and feature each vessel as part of their "offering".

A call centre Freephone number was to be made available to clients of each party.

Both vessels were to 'provide support to each other;' in the event of either vessel having a charter and being unable due to mechanical defect to fulfil its obligations.

5 The parties agreed to entering into joint charters 'working under each other's marketing banner'.

Mamarine undertook to be 'responsible for preparing Lady Louise for charter and returning her "charter read"'. Mamarine undertook in that connection that 'crew employed will be fully qualified and experienced and will treat your vessel with respect'.

10 It was agreed that both vessels should be insured and coded for charter.

There was a provision that action in respect of damage (described as 'minor scuffs and scratches' particularly to the exterior) would not be taken against the skipper or crew but that 'our only redress for such damage would have to be the Charter [*sic*] seeking redress from the organiser of the charter'. There was also  
15 agreement for 'working together and good will with final recourse to the respective insurance policies'.

Finally, there was agreement that 'payment should be made on receipt of cleared funds by [TJC]/Mamarine'.

23. Things improved a little in 2010, when there was 9 days' charter business. We  
20 had before us 6 invoices (numbered 2 to 7) from 2010 covering these days' business. The first 5 invoices were made out to Mamarine and the last to Marine Events. On invoice 2, dated 24 February 2010, it was stated that the invoice was 'For Bareboat Charter'. The narrative stated that it was for 'Boat Hire – Fuel to Cowes and return – No Skipper'. The fee charged by TJC was £750 plus VAT. Invoice 3 was dated 29  
25 July 2010. The invoice stated 'For Charter'. The narrative was 'Boat Hire – Lady Louise – Mamarine to provide skipper and fuel' and the fee charged was £1,021.27. Invoice 4, dated 5 August 2010 was similar. It stated 'For Charter' and was for 4 days' hire and stated 'Mamarine to provide skipper and fuel'. The fee charged was £4,085.10 plus VAT. Similarly, invoice 5, dated 20 September 2010, made out to  
30 Marine Events, stated 'For Charter' and was for one day's hire 'Marine Events to provide skipper and fuel'. The fee charged was £900 plus VAT. Marine Events was a business owned by a Mr Stephen Denham who, Mr Rowbottom told us, had contacts – Mr Denham skippered boats himself. TJC had no formal contract with Marine  
Events.

35 24. It appears that in 2011 there was 17½ days' charter business. We had before us 8 invoices relating to that year. They were numbered 9 to 16 but two invoices were numbered '12' and there was no invoice numbered '13'. We noticed that we had not seen an invoice numbered '8'. The 8 invoices do not obviously cover 17½ days' hire. Two (the invoices numbered '12') were made out to Mamarine. They relate to 'boat  
40 transfers to Cowes and back' and are dated 8 and 12 September 2011. Three (the invoices numbered 9, 10 and 11, dated 1 and, apparently, 2 August 2011) are made

out to Marine Events. The narrative on all of them states that Mamarine was to provide the skipper. Invoice 14, dated 12 October 2011 is made out to ET Environmental and relates to the 'transfer of passengers to Cowes from Ocean Village and back inc fuel and skipper'. Invoice 15, dated 12 October 2011 is made out to  
5 'Compact fork Trucks' and relates to 'Boat Show Charter 24<sup>th</sup> September'. Invoice 16, dated 1 November 2011 is made out to 'Mr Edwards' and is for a charter deposit.

25. According to the accounts, the turnover for the year ended 30 September 2011 was £14,500 (compared with £7,293 in the year ended 30 September 2010), the turnover for the year ended 30 September 2012 was £18,525 and the turnover for the  
10 year ended 30 September 2013 was £17,535.

26. The accounts of TJC for the period from 19 May 2008 to 30 September 2009 show a loss of £68,936, adjusted for tax purposes by adding back depreciation and motor costs of £61,615 and claiming capital allowances of £132,944, to reach an adjusted tax loss of £140,265.

15 27. The accounts of TJC for the year ended 30 September 2010 showed a loss of £47,903. The loss adjusted for tax purposes was £76,646.

28. The accounts of TJC for the years ended 30 September 2011, 2012 and 2013 respectively showed losses of £44,604, £36,557 and £27,274. The losses adjusted for tax purposes for those years were respectively £59,990, £34,885 and £32,204.

20 29. A significant item of expenditure taken into account in calculating the losses per the accounts was 'vehicle leasing costs' of £14,390 in the period from 19 May 2008 to 30 September 2009 and £15,120 in the year ended 30 September 2010, £21,311 in the year ended 30 September 2011, £21,311 in the year ended 30 September 2012 and £6,191 in the year ended 30 September 2013. The trading and profit and loss account  
25 for the year ended 30 September 2013 shows 'skipper costs' of £3,888. No similar item appears in any of the accounts for any of the previous periods.

30. The invoices we were shown did not match up with the sales figures reported in the accounts. The difference may be due to Mr Rowbottom's private use of the Lady Louise, which he paid for, but for which no invoices were issued.

30 31. Mr Rowbottom told us that pursuant to TJC's agreement with Mamarine, Mamarine would provide the contacts in the corporate market, which he did not have, and would deal with customers wishing to hire Lady Louise. TJC (through Mr Rowbottom) provided the fuel, the insurance and the mooring. Mr Rowbottom said that Mamarine did not always provide the skipper, but it appears from the evidence of  
35 the invoices we have seen that in 2009 and 2010 they did so on all but one occasion – the first hire, when TJC provided "Skipper Mr B Simpson JK Marine and hand". We also note in this connection, that no entry for 'skipper costs' was made in the accounts of TJC before those for the year ended 30 September 2013.

40 32. Mr Rowbottom's evidence was that he would agree with clients obtained for TJC by Mamarine (and, we assume, Marine Events) the route to be taken by Lady Louise. Mr Rowbottom would negotiate with Mr John McKenzie, the partner acting on behalf

of Mamarine, the price which TJC would charge for the charter, including fuel for the agreed route. Mr Rowbottom told us that when TJC chartered Lady Louise, he would take her to Hamble, where he would meet the clients who had been obtained by Mamarine and would wait in Southampton for the vessel to return at the end of the charter.

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33. His evidence was that the combination of the financial downturn following the collapse of Lehman Brothers in September 2008 and the unusually bad weather experienced in the Solent in 2009 had had a catastrophic effect of the prospects for TJC's business.

10 34. He accepted that he did enjoy sailing in Lady Louise. His wife did not enjoy it. But he said that he was a natural businessman and had had a 'gut feeling' that the chartering business could do well.

15 35. We were shown a document, probably compiled by Mr Rowbottom at the start of 2008 before Lady Louise was delivered, called: "T J Charters LLP – projected Profit and Loss Account for the first Year of Trading". This document anticipated turnover of £49,600, and expenses totalling £39,750, yielding a projected profit of £9,850. Among the expenses budgeted for was the hire of a skipper (£2,000), but no motoring expenses were budgeted for. Mr Rowbottom told us that he had spoken to charter companies who had assisted him in making this projection. The anticipated income of 20 £49,600 was projected as the total of 15 day charters at £1,600 per day, 8 half-day charters at £800 per day and 12 days of private use at £1,600 per day. The projection assumed that a skipper would be hired for the day charters and that no other crew would be necessary 'as Mr Rowbottom has the necessary qualification and experience to carry out the remaining crew functions himself'. In fact, Mr Rowbottom told us, he 25 never actually carried out any crewing activities.

36. Mr Rowbottom's evidence was that he cleaned the vessel after most of the charters had taken place. Sometimes he went to the vessel beforehand and even stayed the night on the vessel.

#### **The parties' submissions**

30 37. Mr Middleton submitted that the trade carried on by TJC was not a trade of the leasing of a boat and equipment because Mr Rowbottom's involvement showed that ancillary services were provided which made it inaccurate to describe the trade in this way. He referred especially to Mr Rowbottom's function in meeting the end client (who had been found by Mamarine or Marine Events), his discussion of the route the 35 end client would take (whether with the end client or with Mamarine or Marine Events) and his discussion of the fee to be charged (with Mamarine or Marine Events). He stressed that Mr Rowbottom retained control and possession of the vessel, insured it, licensed it and gave permission as to the route to be taken. TJC also had the right to appoint crew, and where crew were appointed by Mamarine, this was with 40 the agreement of TJC.

38. On the point of whether the trade was commercial, Mr Middleton made a point that the admission of Leaton to the partnership of TJC had reduced the percentage of

TJC's losses which would be available for relief against the income of Mr and Mrs Rowbottom and, by reference to the reasoning of the Tribunal in the appeal of *Charles Atkinson v HMRC* TC 02606, he submitted that so far from the business being structured artificially to produce losses for relief against the income of Mr and Mrs Rowbottom, that possibility had been reduced by the introduction of Leaton as a partner in TJC.

39. He acknowledged that the vehicle lease agreements were private agreements by Mr Rowbottom, which had been introduced into the business accounts of TJC, but he said there had been a private use adjustment in respect thereof, for tax purposes.

40. His overall submission was that Mr Rowbottom, being an experienced and successful business man, approached the venture in a business-like fashion, even at the level of a 'gut feeling' for business. It was not a hobby business, as could be demonstrated by the fact that Mrs Rowbottom did not enjoy sailing in the vessel and, indeed, Mr Rowbottom does not have the time to use her extensively for pleasure. There was a sound commercial basis for the business which could well have been profitable in the medium term but for the banking collapse in 2008 and the bad weather in 2009, both of which were unforeseeable factors.

41. Mr O'Grady submitted that, in deciding whether TJC carried on the trade on a commercial basis, we should have regard to the guidance of Robert Walker J (as he then was) in *Wannell v Rothwell* [1996] STC 450 that the distinction to be drawn is between the serious trader, seriously interested in profit, and the amateur or dilettante. Mr O'Grady submitted that Mr and Mrs Rowbottom should be viewed in this context as dilettantes or 'dabblers'. They had shown no serious planning before the trade commenced. The projected profit and loss account for the first year of trading assumed 15 full day charters at £1,600 per day and 8 half-day charters at £800 per half day. Yet only a maximum of £1,000 for a full day's charter was achieved. He also pointed to the relatively small amount of business that was actually done. He suggested that the explanation that this was caused by the unforeseeable banking crash should not be accepted. He pointed out that the Government's response to the crash by introducing quantitative easing 'has actually served to raise property and equity prices, increasing the disparity between rich and poor and actually benefitting those people who already own substantial assets, if doing little for the real economy'.

42. Mr O'Grady submitted that the delay in coding the vessel (4 months after her acquisition in June 2008) showed an amateur approach to the business, particularly as it caused TJC to miss the 2008 season. He submitted that there was no evidence of any attempt to advertise the vessel on a wider scale than a website which required potential customers to know the name of the vessel, Lady Louise. He also submitted that the level of expenditure was such that profits would not have been achieved even if the projected sales of £49,600 had been realised in the first year. Making reference to *Stephen Kitching v HMRC* [2013] UKFTT 384, he submitted that the business was not being run in such a way that it could support the proprietors and that this was a further indication of the trade not being carried on on a commercial basis. He contended that because the trade cannot support Mr and Mrs Rowbottom, the Tribunal could conclude that they were not seriously interested in the trade making a profit.

43. Mr O’Grady deployed the same arguments to support his submission that the trade was not being carried on in any period up to September 2010 with a view to the realisation of profits, which he interpreted as in such a way as to afford a reasonable expectation of profit. He relied on *Macdonald v Dextra Accessories Ltd* [2005] UKHL 47 for the proposition that the Tribunal must look for a realistic expectation of profit. He submitted that if the trade continued to be run in the same way as it was run up to 30 September 2010, then there is no reasonable expectation that a profit could ever have been made.

44. HMRC’s contention was that the evidence as a whole showed that Mr and Mrs Rowbottom purchased the Lady Louise primarily as a pleasure craft for themselves, with a view to chartering the vessel when they were not using it, in order to offset costs, rather than with a view to the realisation of profit. Mr O’Grady cited *Brown v Richardson* [1997] STC (SCD) 233 in support of this contention.

45. On the question of whether the trade carried on by TJC was a trade of leasing plant or machinery, Mr O’Grady submitted that the evidence pointed to the trade being a trade of bareboat chartering, which was such a leasing trade. The evidence relied on included the agreement between TJC and Mamarine and the evidence that Mamarine or Marine Events provided the crew and skipper for charters, while TJC provided the vessel. Mr O’Grady referred to *Forbes v HMRC* [2011] SFTD 1143, where Judge Khan had held that where a vessel was hired out without a skipper it was provided for leasing in the course of a trade.

**Discussion and Decision**

46. The issues for our decision under section 66 ITA are whether the trade was carried on throughout the basis periods for the tax years 2008/2009, 2009/2010 and 2010/2011, that is, from its commencement in May 2008 until 30 September 2010 (TJC’s accounting date) on a commercial basis and with a view to the realisation of profits in the trade. We consider that the second issue – whether the trade was carried on in the relevant period with a view to the realisation of profits in the trade – is primarily a subjective issue, namely was that the view of those carrying on the trade, but that the test can be satisfied in relation to any particular time if objectively it is shown that at that time the trade was being carried on so as to afford a reasonable expectation of profit.

47. The first issue – whether the trade was carried on in the relevant period on a commercial basis – in our view raises an objective test.

48. As was said in *Wannell v Rothwell* (*ibid.* at p.461):  
‘... 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 shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante. There will no doubt be many difficult  
5 borderline cases well for the commissioners to decide [*sic*]; and such borderline cases could as well occur in Bond Street as at a car boot sale.'

49. It seems clear to us that the question of whether or not the trader in question is a 'serious trader ... seriously interested in profit' is to be answered by reference to objective factors, such as whether the pricing is commercial and the trade is otherwise  
10 conducted in a commercial fashion.

50. We are in broad agreement with Mr O'Grady that TJC has not shown that its trade was carried on up to 30 September 2010 on a commercial basis. In particular, we agree that the projected profit and loss account does not represent a business plan such as we would expect to be produced in advance of a business which would involve the  
15 purchase of an asset for £469,671 plus VAT. It seems to us to show a lack of serious research and not to correspond with the way the business was actually conducted. In relation to this last point, we refer to budgeting for the hire of a skipper – but in fact the evidence is that a skipper was hired only once – and the assumption that Mr Rowbottom would carry out crew functions, when he never actually did so. Further,  
20 we note that the projected profit and loss account includes no budgeted motor expenses, yet the accounts of TJC feature substantial 'vehicle leasing costs' as detailed above.

51. The projected profit and loss account does not envisage the arrangement which was actually come to with Mamarine in May 2009 (which, we recognise, was entered  
25 into over a year after the projected profit and loss account was put together). Although that arrangement (as appears from the Charter Agreement which we refer to above) envisaged a form of mutual support between TJC and Mamarine, whereby Mamarine would help TJC obtain charters of Lady Louise, while TJC would help Mamarine obtain charters of Zoe Due, there was no evidence that TJC ever did assist  
30 in the chartering of Zoe Due, and the evidence was that Mr Rowbottom had no contacts in the corporate market and needed Mamarine to find customers to charter Lady Louise. In reality, we regard this Agreement as a one-way arrangement, under which TJC would provide Lady Louise and Mamarine would do the rest – find the customers and find the skipper and crew.

52. In this regard, we consider that the projected profit and loss account was  
35 unrealistic as to the prospect of the number of charters that could be obtained and, just as importantly, as to the fees that could be charged. The evidence shows that the level of fees actually obtained in the off-season (February 2010 – invoice 2) was £750 for the hire of Lady Louise (without a skipper) for a voyage to Cowes and return, which  
40 we take to be a day's charter, and of the order of £1,020 in the high season (July and August 2010 – invoices 3 and 4). £900 for a day's charter was obtained in late September 2010, which we regard as not being high season (see: invoice 5). These figures fall far below the projected fees of £1,600 per day in the projected profit and loss account.

53. The explanation offered for the shortfall was that the market had collapsed with the financial crisis beginning in the autumn of 2008. While we accept that the financial crisis probably did have a depressing effect on the business (and we do not accept Mr O’Grady’s suggestion that the policy of quantitative easing would have positively helped the trade), we regard this as too vague an explanation for the difference between the projected and actually achieved prices to enable us to conclude that the projection demonstrated that the trade was being carried on on a commercial basis. In particular, the only evidence as to the fees obtainable before the financial crisis hit was Mr Rowbottom’s understanding that another luxury vessel he saw being used in this way was being hired out for as much as £3,000 to £4,000 a day. If this was a reliable estimate of the expected turnover, then it is surprising that the projected profit and loss account assumed a daily charter rate of £1,600.

54. We accept Mr O’Grady’s point that the delay in coding the vessel is evidence that the trade was not being carried on on a commercial basis. This was a very valuable vessel, and a main reason for the delay, which caused the 2008 season to be missed, was that Mr Rowbottom was about to go on holiday soon after the delivery of Lady Louise. In our view, significant delay for such a reason demonstrates an uncommercial approach to the intended trade.

55. We do not consider that it is necessary, in order to show that a trade is being carried on on a commercial basis, that it must be shown that the business is run in such a way that it could support the proprietors, particularly in a case, such as this, where it is clear that Mr and Mrs Rowbottom have other significant sources of income. However, we regard the inclusion of very significant motoring costs attributable to Mr Rowbottom’s leasing of a vehicle, in the trading account as indicative of the fact that the trade was not being carried on on a commercial basis.

56. Our decision that the trade of TJC was not being carried on on a commercial basis up to 30 September 2010 is sufficient for us to dismiss the appeal. However, since they were argued before us, we shall address shortly the other two issues, namely whether the trade was carried on with a view to the realisation of profits in the trade, and whether the trade was a trade of the provision of plant for leasing.

57. As we have already said, the second issue – whether the trade was carried on in the relevant period with a view to the realisation of profits in the trade – is primarily a subjective issue, namely, was that the view of those carrying on the trade. But the test can be satisfied in relation to any particular time if objectively it is shown that at that time the trade was being carried on so as to afford a reasonable expectation of profit.

58. As Judge Cannon pointed out in *Stephen Kitching*, the way in which the trade is carried on in the basis periods in issue in the appeal must be examined to determine whether objectively the trade was being carried on so as to afford a reasonable expectation of profit. It is not relevant if it can be said that at some future date the way in which the trade is carried on will or may change, enabling profits to be generated in the future.

59. Looking at the period from May 2008 to 30 September 2010, the period during which, as we have found, the trade was not being carried on on a commercial basis, we consider that it cannot be said that objectively the trade was being carried on so as to afford a reasonable expectation of profit. We derive support for this conclusion from the factors referred to above, which have persuaded us that the trade was not being carried on on a commercial basis in that period. In the period in question, the total turnover featuring in the accounts of TJC was £21,793 giving rise to an accounting loss of £116,839. The aggregate loss adjusted for tax purposes in the period was £216,911. In the face of these figures it is impossible, in our view, to conclude that the trade was being carried on so as to afford a reasonable expectation of profit – in the absence of some extraordinary factor outside the partnership’s control which impaired the trade’s profitability. Mr Middleton suggested that the impact of the financial crisis and the bad weather in 2009 were such extraordinary factors, but we do not accept that suggestion. We consider that the evidence does not establish that, absent those factors, the trade was being carried on so as to afford a reasonable expectation of profit. Having regard to all the facts we have found, we conclude that it has not been shown objectively that TJC was carrying on its trade in the relevant period so as to afford a reasonable expectation of profit.

60. Indeed, we did not understand Mr Middleton to be attaching great weight to the argument that objectively TJC was carrying on its trade in the relevant period so as to afford a reasonable expectation of profit. Rather, we understood him to be relying chiefly on the submission that subjectively Mr Rowbottom, as the principal partner in TJC, was carrying on the trade with a view to the realisation of profits in the trade. Again, the impact of the financial crisis and the bad weather in 2009 were relied on to show why, in fact, profits had not been achieved, but much stress was put on the fact that Mr Rowbottom was an experienced and successful businessman and that he had had a ‘gut feeling’ that the chartering business would do well. However, Mr Rowbottom’s evidence was not that he expected to realise a profit in the period up to 30 September 2010, but that he expected to realise a profit ‘within a few years’. The evidence of Mr Rowbottom’s ‘gut feeling’ is not sufficient in our view to establish that he was carrying on the trade with a view to the realisation of profits. We conclude that subjectively TJC, through Mr Rowbottom, was not carrying on the trade in the period from May 2008 to 30 September 2010 with a view to the realisation of profits in the trade.

61. Finally, we consider whether, for the purposes of section 75 ITA, the trade carried on by TJC was a trade of leasing plant or machinery. Here, the distinction is between a trade of making available assets for leasing – the vessel and some ancillary equipment – and a trade of providing a service involving the use of the vessel which is more than simply making the vessel and the ancillary assets available.

62. Mr Middleton submitted that having regard to Mr Rowbottom’s personal involvement in the trade, the trade of TJC was more than simply making the assets available for leasing. He referred to the evidence that Mr Rowbottom met the ‘end client’ – that is the clients found for TJC by Mamarine or Marine Event – discussed the route to be taken by the Lady Louise with them and negotiated or discussed the fee to be charged with Mamarine or Marine Events.

63. It is true that the one charter made during 2009 was a day charter for which TJC provided the skipper and crew (“Skipper Mr B Simpson JK Marine and hand”), and that charter amounted to a trading operation which was more than a leasing of plant or machinery. However the 9 days’ charter business in 2010 (all before 30 September 2010) were, according to the invoices, hirings of the vessel without crew, and were sometimes referred to on the invoices as ‘bareboat charters’.

64. Mr Rowbottom’s, and TJC’s involvement, in meeting the ‘end client’, discussing the route, negotiating the fees and, indeed, providing the fuel, insurance and mooring, do not, in our view amount to the provision of services such as to make a charter of the vessel without crew a trade which was not simply a trade of the leasing of assets. In determining the nature of the trade, one has to consider what the customer was obtaining from TJC in return for the fee paid. The customer was not, in reality, obtaining the services of Mr Rowbottom in meeting him (them), nor in discussing the route or negotiating the fee, nor indeed in insuring the vessel or providing the mooring. The customers in 2010 were obtaining the use of the vessel (with fuel). We regard the charters carried out in 2010 as transactions in the course of a trade of leasing of assets. Therefore we consider that, for the purposes of section 75 ITA, TJC carried on a trade of leasing assets in 2010, although we accept that in 2009 the trade carried on was more than a trade of leasing assets.

65. However, for the reasons given above, the appeal is dismissed and the decisions appealed against are confirmed.

66. 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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**JOHN WALTERS QC**

**TRIBUNAL JUDGE**

**RELEASE DATE: 7 JANUARY 2016**

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