



[2012] UKUT 148 (TCC)

Appeal number: FTC/55/2011

*INCOME TAX – section 221 ITTOIA 2005 – averaging of farming profits –  
treatment of losses – whether inability to average losses is discriminatory –  
no – appeal dismissed*

**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**PERCY GEORGE DONAGHY**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE ALEKSANDER (Chairman)  
                  JUDGE SADLER**

**Sitting in public at 45 Bedford Square, London on 5 March 2012**

**Patrick Quinn of Patrick Quinn & Co, accountants, for the Appellant**

**Richard Adkinson, of counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

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## DECISION

1. This is an appeal on behalf of Mr Donaghy (the taxpayer) against a decision of the First Tier Tribunal. Mr Donaghy was represented by his accountant, Mr Quinn. HMRC were represented by Mr Adkinson.

### Background

2. The issue in this appeal relates to the averaging of farming profits. Mr Donaghy is a farmer and agricultural contractor. In the year 2005/6 Mr Donaghy had a trading profit from his farming business of £20,244. In the subsequent year, 2006/7, he suffered a loss of £10,315. Part of the reason for this marked fluctuation in the results for the two tax years was because he sold farm machinery towards the end of 2005, and bought replacement machinery in 2006 (after the commencement of the 2006/7 tax year). Mr Donaghy sought to apply averaging under chapter 16 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") to both the 2005/6 profit and the 2007/8 loss, calculating that his taxable profit for both 2005/6 and 2006/7 was £5,964.50 in each year  $((£20,244 - £10,315)/2)$ .

3. Following an enquiry. HMRC determined that this averaging calculation was incorrect as averaging only applies to profits, not losses, in any given year. This results in Mr Donaghy having taxable profits for both 2005/6 and 2006/7 of £10,122  $((£20,244 + £0)/2)$ . In addition Mr Donaghy has a trading loss of £10,315 in 2006/7 which can be set against the 2006/7 profit (as so averaged), leaving a small loss of £193 to be carried forward to 2007/8.

4. Mr Donaghy appealed to the First Tier Tribunal against this decision, and on 10 June 2010 the First Tier Tribunal released its decision dismissing that appeal. Mr Donaghy now appeals against that decision to the Upper Tribunal.

### Issues

5. Mr Quinn, representing Mr Donaghy, accepts that the calculation of taxable profits of £10,122 for each of 2005/6 and 2006/7 is in accordance with Chapter 16 of ITTOIA. He does not argue that the computation of Mr Donaghy's profits by HMRC is otherwise than in accordance with the requirements of the legislation. Indeed, he agrees that section 221(5) ITTOIA is absolutely clear in providing that if there is a loss in any year, then for the purpose of the averaging calculation it must be assumed that there are profits of nil for that year.

6. His complaint is more fundamental. He argues that the effect of Chapter 16 is discriminatory and breaches Mr Donaghy's human rights, and that to remedy this breach, farming losses should be treated (in effect) as negative profits and included in the averaging calculation – notwithstanding section 221 ITTOIA.

7. This is a hopeless argument. Farmers are under no obligation to claim averaging under Chapter 16 of ITTOIA: the provision confers on farmers (and those whose profits are derived from creative works, who are also within this provision) a

benefit not available to the general body of business taxpayers, and a claim under these provisions is entirely a matter of choice. It is hard to conceive how a provision which both confers a benefit and is optional could be discriminatory – if anything it discriminates in favour of farmers.

5 8. It is always open to a farmer to be taxed on his un-averaged profits (in the same way as other traders). If Mr Donaghy had chosen to be taxed on his un-averaged profits he would have taxable profits in 2005/6 of £20,244 and in 2006/7 of nil. He would have in addition trading losses to carry forward to 2007/8 of £10,315. He benefits from claiming averaging, as his taxable profits for 2005/6 reduce to £10,315,  
10 and his taxable profits for 2006/7 (after claiming loss relief) are nil. In addition he has a small loss of £193 to carry forward. The net result for him of the averaging provision as properly applied is to allow him to utilise virtually all his losses arising in 2006/7 against profits which (but for the averaging provision) would be taxable in 2005/6. That is a significant benefit. We therefore find that the effect of Chapter 16  
15 is to discriminate in favour of farmers (and the other trades identified in the provisions) and not against them.

9. Mr Quinn acknowledges that Mr Donaghy is better off as a result of claiming averaging. But his argument is that this does not go far enough to compensate Mr Donaghy from the effects of extreme fluctuations in profits (which Chapter 16 is  
20 intended to address). He draws an analogy with the requirements under general anti-discrimination legislation to install ramps to allow access to buildings to wheelchair users. Mr Quinn says that it is all very well to install a ramp – but the ramp is useless if the entrance door is not also widened to ensure that a wheelchair can get through. So it is, he submits, with regard to Chapter 16 – unless losses can be included in the  
25 averaging calculation as negative profits, the averaging calculation does not provide sufficient relief to farmers to address the difficulties they can suffer from extreme swings from profit into loss. In essence Mr Donaghy wants to be able to carry-back losses through the use of averaging under Chapter 16 (although as we have referred to above, in his circumstances he effectively achieves that under the provisions as they  
30 apply)– something, we note, that is not available to other taxpayers (save in some very specific circumstances).

10. It has long been the complaint of taxpayers that reliefs given by Parliament for particular activities or expenses need to be bigger or better in order properly to address the mischief that Parliament had identified. Mr Donaghy's complaint is no  
35 different – and is not one capable of remedy by an appeal. It is better addressed to his MP than litigated through the tribunals.

11. We would add that even if there was any merit to Mr Quinn's argument that the effect of Chapter 16 is discriminatory, it is not the kind of discrimination that is protected by law.

40 12. Mr Quinn agrees that the only characteristic in respect of which there could be discrimination is the fact that Mr Donaghy is a farmer. Mr Quinn could not give us any examples of any provisions in the laws of the various jurisdictions of the United Kingdom under which an individual was protected from discrimination on the

grounds that he (or she) was a farmer. Instead Mr Quinn sought to rely on Article 14 of the European Convention of Human Rights (incorporated into UK law by the Human Rights Act 1998). It is debateable whether this Article provides protection from discrimination against farmers – but even if it did, it is not a free-standing right but controls how other rights granted by the Convention are to be secured without discrimination. As no other Convention right has been infringed, Article 14 is not engaged.

**Conclusions**

13. For the reasons given above, we consider that the First Tier Tribunal reached the right conclusion for the right reasons. We therefore dismiss the appeal.

14. No order for costs was sought by HMRC, and no order is made.

15. The Appellant has a right to apply for permission to appeal against this decision in accordance with rule 44 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Any such application must be made in writing and sent or delivered to the office of the Upper Tribunal so that it is received within one month after the date on which this decision is released.

**NICHOLAS ALEKSANDER  
UPPER TRIBUNAL JUDGE**

**EDWARD SADLER  
UPPER TRIBUNAL JUDGE**

**RELEASE DATE: 11 May 2012**