[2017] UKUT 1 (TCC)

Appeal number: UT /2016/0061

INCOME TAX–sideways loss relief- loss-making dairy farm business- accepted that farmer was competent - test to be applied in order to determine whether reasonable expectation of profit- ss 67 and 68 ITA 2007-appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BRYAN SCAMBLER and REBECCA SCAMBLER **Appellants**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Thomas Scott

Sitting in public at The Royal Courts of Justice, Strand, London WC2A 2LL on 23 November 2016

Andrew Gotch, CTA (Fellow), for the Appellant

Marika Lemos, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Bryan Scambler and his wife, Rebecca Scambler, ("Mr and Mrs Scambler") appeal against a decision by the First-tier Tribunal ("FTT") (Judge Short and Mr William Haarer) released on 14 April 2016 ("the Decision"). The FTT dismissed Mr and Mrs Scambler's appeals against amendments to their self-assessment tax returns for the year 2010/2011. The amendments refused to allow losses of £149,649 claimed by each of Mr and Mrs Scambler against capital gains tax and income tax for that year because of the restrictions on "sideways loss relief" contained in s 67 Income Tax Act 2007 ("ITA 2007").

2. The FTT found that the profitability of Mr and Mrs Scambler's dairy farming business was uncertain because the farm gate price of milk was volatile in April 2005 and was likely to remain so over the next five years. Consequently, the FTT found that a competent farmer carrying on the activities of Mr and Mrs Scambler as they were carried on in April 2005 would not have had a reasonable expectation that no profit would be made for the next five years and therefore would not satisfy the reasonable expectation of profit test set out in s 68 (3) ITA 2007. As a result, the FTT held that sideways loss relief could not be given in respect of the dairy farming activities for the tax year ended 2010/2011 and the amended assessments were confirmed.

3. The FTT held that their answer would have been the same had they applied the test, as HMRC submitted would be the correct approach, by considering whether if the dairy farming activities as they were carried on in April 2010 had been carried on in April 2005 Mr and Mrs Scambler would not have had a reasonable expectation that no profit would be made for the next five years.

4. Permission to appeal against these findings was given by Judge Herrington in the Upper Tribunal on 18 May 2016.

The Facts

5. The FTT set out some background facts at [4] to [11] of the Decision. In summary, Mr and Mrs Scambler owned a dairy farm in Devon which was profitable until the 2005/2006 tax year. The business suffered from a drop in milk prices in 2006 which had recovered to an extent by 2008. Efforts were made to address the losses by rebuilding the dairy herd, installing a robotic milking shed and selling land to repay borrowings. A farm consultant concluded in 2010 that with the sale of this land it was realistic to bring the farm back into profit but although things were financially more positive by 2011 Mr and Mrs Scambler decided to sell the business in that year.

6. The FTT summarised the evidence before it at [16] to [21] of the Decision, and in particular Mr Scambler's explanation that the milk price fluctuated over time and he had no way of predicting the milk market.

7. On the basis of this evidence the FTT made the following findings of fact at [41] of the Decision:

> (1) The main factor which influenced the profitability of the Scamblers' farming business was the farm gate price of milk.
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> (2) The Scamblers had little means of controlling the price which they received for the milk which they produced.
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> (3) The average farm gate price of milk for the five years prior to 2005 varied significantly but was higher in 2004 and 2005 than it was in all but one of the four previous years. The price paid by Dairy Crest to Mr and Mrs Scambler showed a similar pattern.
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> (4) In 2005 Mr and Mrs Scambler believed that the farm gate price of milk was likely to stay low, but could not predict what would actually happen to the farm gate price of milk.

The Law

8. Chapter 2 of Part 4 ITA 2007 makes provision for trade loss relief against general income. The relief is known as sideways relief and operates by permitting a claim for trade loss relief against general income which may be deducted in calculating a person's net income for the loss-making year, for the previous tax year or for both tax years: see s 64 ITA 2007.

9. Section 66 ITA 2007, however, provides that trade loss relief against general income from a loss made in a trade in a tax year is not available unless the trade is commercial. This section provides that the trade is commercial if it is carried on throughout the basis period for the tax year on a commercial basis and with a view to the realisation of profits of the trade. HMRC have at no time contended that Mr and Mrs Scambler did not carry on their dairy farm on a commercial basis.

10. There is a further restriction on sideways relief in the case of farming or market gardening. This is set out in s 67 ITA 2007 which provides as follows:

> "(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").
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> (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 each of the previous 5 tax years (see section 70).
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> (3) This section does not prevent relief for the loss from being given if-
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> > (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 profits 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)."

11. Section 68 ITA 2007 explains how the reasonable expectation of profits test is to be met. Section 68 (2) states that the test is decided by reference to the expectations of a competent farmer carrying on the activities. Section 68 (3) then provides:

> "The test is met if –
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> (a) a competent person carrying on the activities in the current tax year would reasonably expect future profits (see subsection (4)), but
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> (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 those activities to become profitable until after the end of the current tax year."

12. Section 68 (4) makes it clear that regard must be had to the nature of the activities carried on. It provides:

> "(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 –
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> (a) the nature of the whole of the activities, and
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> (b) the way in which the whole of the activities were carried on in the current tax year."

13. Section 68(5) defines the "prior period of loss" as

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

14. It should be noted that ss 67 to 70 ITA 2007 are set out under the heading "restriction on relief for "hobby" farming or market gardening", although there is no reference to that term in any of the relevant provisions. For our purposes the "beginning of the prior period of loss" is April 2005. The "current tax year" is the 2010-11 tax year.

15. It was common ground that these provisions should be interpreted and applied in accordance with the purposive approach set out by the House of Lords in *Barclays Mercantile Business Finance Limited v Mawson* [2004] 76 TC 446. Therefore, whether the statutory provisions enable Mr and Mrs Scambler to obtain sideways loss relief for the year 2010/2011 is a question to be considered by having regard to the purpose of the provisions and interpreting their language, so far as possible, in a way which gives best effect to that purpose so as to determine whether the provisions were intended to apply to the facts found, viewed realistically.

16. Both parties in this case submitted that there was a real difficulty in interpreting the literal words of the statute, that is the question as to whether the phrase "the activities" as used in s 68 (3) (b) was intended to refer to the activities as carried on at the beginning of the prior period of loss (in this case April 2005) or as carried on in the current tax year (in this case 2010/2011). Mr Gotch submitted that this ambiguity could be resolved by reference to relevant passages in Hansard, relying on the authority in *Pepper v Hart & Others* [1992] 65 TC 421. Ms Lemos submitted that the ambiguity could be resolved by reference to the relevant statutory provisions which were replaced by Chapter 2 of Part 4 ITA 2007 on the basis that ITA 2007 was enacted as part of the Tax Law Rewrite Project which was a consolidating statute. She relies on *Shirley v HMRC* [2014] UKFTT 1023 (TC) and the authorities referred to therein which in her submission permit reference to the earlier version of the legislation. We return to the submissions on these points later.

17. The point of difficulty referred to at [16] above has been considered in three comparatively recent decisions of the FTT to which we were referred.

18. The first of these decisions is *French and French v HMRC* [2014] UKFTT 940 (TC) ("French").

19. In *French*, Mr and Mrs French carried on a dairy farming business in partnership. From 1998, the business ceased to be profitable due to the fall in milk prices. In 2000, the couple sold their cattle and subsequently let the farm to a neighbouring farmer who began arable farming on the land. Mr and Mrs French resumed operating the farm in 2004, but continued to make losses although they were reducing. In the tax years 2008-09 to 2010-11, Mr and Mrs French claimed relief for these losses against their other income (derived from letting buildings on the farm). HMRC rejected the claim on the basis that relief was precluded by s 67 ITA 2007 and the exceptions in s 68 did not apply. Specifically, HMRC contended that "the activities" in s 68(3)(b) referred to arable farming conducted by Mr and Mrs French in 2008-09 to 2010-11 and the reasonable expectation of profit condition fell to be applied by considering whether a competent farmer carrying on such activities in 1998 could not reasonably have expected them to become profitable until after the years in which loss relief was claimed. The FTT (Judge Nowlan and Mr Thomas) found that there was a cessation of trade when Mr and Mrs French let the land. Accordingly, the relevant years of losses only started when Mr and Mrs French started trading again in 2004 and HMRC appear to have accepted that the competent farmer would need seven years for the new farming operation to become profitable (and there had not been five years of losses preceding 2008-09 anyway). The FTT allowed Mr and Mrs French's appeal on that ground. In case they were wrong on that point, they also considered HMRC's submission that the competent farmer in 1998 must be regarded as carrying on the same farming activities as were actually carried on by Mr and Mrs French in in 2008-09 to 2010-11, i.e. arable farming, notwithstanding the fact that Mr and Mrs French had been engaged in dairy farming at that time. The FTT rejected this submission. Its reasoning was set out at [49] of the decision as follows:

> "Our conclusion is that the reference to 'the activities' in paragraph (b) of section 68(3) can be read to refer not just to arable farming

> activities in the present context, but to the activities that the actual farmer was conducting at the start of the period of losses. It refers to 'a competent person carrying on the activities at the beginning of the prior period of loss', and the activities then conducted were the dairy farming activities. It is not as if [section 68(3)(b)] referred to 'those activities', which would clearly have been a reference back to the activities referred to in [section 68(3)(a)], namely arable farming activities. The more sensible interpretation is therefore to treat the reference to 'the activities' as being a reference, at any relevant time, to the activities conducted at that time by the actual farmer. In the 'later period of loss', those activities happen indeed to be 'arable farming activities' so that that is what must be attributed to the notional competent farmer. At the start of the run of losses, however, 'the activities' sensibly refer again to whatever the actual farmer was doing at that time. In terms then of achieving the realistic level playing field between the actual farmer and the notional farmer, the notional farmer would then be treated as facing three remaining years as a dairy farmer, making losses, to be followed by 10 years in building up to anticipation of profits in arable farming, exactly as the actual farmer. Accordingly, consistent with the fact that the notional farmer was no more competent than the actual Appellant, both would start at the same point [undertaking the same activity], and both would finish at the same point, and a coherent result would be achieved."

20. As the FTT had already concluded that the appeal should be allowed, the FTT's reasons on this point are *obiter*. As we shall see, the predecessor legislation to s 68 (3) (b) did refer to "those activities" but it is clear that point was not brought to the attention of the FTT and no argument was made that the FTT should have regard to the wording of the predecessor legislation.

21. The second case is *Erridge v HMRC* [2015] UKFTT 89 (TC) ("*Erridge*").

22. In *Erridge*, Mr Erridge was a dentist who also farmed in partnership with his wife. Mr and Mrs Erridge enlarged their existing farming business by buying other farms. The purchases were financed by bank loans. The partnership made losses in every tax year from 2005-06 to 2012-13. Mr Erridge claimed sideways loss relief in his self-assessment for 2010-11 which HMRC disallowed. On appeal, Mr Erridge contended that the farming activities met the reasonable expectation of profit test. He submitted that, among other reasons, the losses were caused by the bank which made the loans subject to a punitive breakage fee and the banking crisis in 2008 which made proposed sales of land for housing unfeasible. After the banking crisis, in 2010, Mr Erridge commissioned a farm review and the business was projected to become profitable within a short time, which it did. He argued that the "activities" in section 68 (3) (b) ITA 2007 should include the expansion of the business and the increase in borrowing to fund that expansion. The FTT (Judge Scott and Mr Sheppard) rejected that submission. Its reasoning was set out at [42] to [46] of its decision as follows:

> "42. We need to look at the 2010/11 current activities but in the context of the beginning of the period of loss, namely 5 April 2005.

> 43. In our view, the core farming activity has expanded in scale but remained essentially unchanged in the period with which we are concerned. What did change were the financing costs and, as a result of the banking crisis, there was an inability to sell assets as quickly as anticipated. Does that matter? In our view, from a taxation perspective only, the answer is no. Why?
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> 44. The answer is extremely simple. In 2005, as the appellant and HMRC both state the banking crisis was beyond prediction. As the appellant told us, he was an optimist then. After the banking crisis he was deeply cynical, yet he projected achieving a profit within a short timescale in 2010, and achieved it. In the brighter economic climate of 2005 he did certainly expect to achieve a profit within a very short timeframe. In 2005, if the partnership had had the same land bank as in the "current year" we find that on the balance of probabilities, he not only would not have anticipated a problem in disposing of the land bank but the same profit expectations which he produced in 2010/11 would have been even more optimistic.
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> 45. The case law to which we have been referred to, other than where we comment thereon herein, whilst interesting, is all decided on its own facts and is not directly in point with the facts in this case.
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> 46. In summary, whilst we, and HMRC, have sympathy with the appellant in the distressing situation in which he and his wife find themselves because of the alleged behaviour of the bank in question, nevertheless they took the commercial decision (albeit with little choice) to fund their land purchase as they did. That undoubtedly delayed their move into profit. The anticipation of profit in subsection (3)(b) could not possibly have taken into account the banking crisis and alleged miss selling by the bank in question since that would have been entirely unforeseeable by either the appellant or the notional "competent person" in 2005."

23. *French*, which was decided a few weeks before *Erridge* was heard, was cited to the FTT but it is clear that the FTT in *Erridge* took a different view as to the correct interpretation of s 68 (3) (b) to that taken by the FTT in *French*, although it stated at [45] of its decision that it did so on the basis of a different factual scenario. It is clear, however, that in *Erridge* the FTT considered what expectations of profit the competent farmer would have had at the start of the period of losses if the business had been in the same position as it was in the tax year when the loss relief was claimed, in circumstances where the nature of the activities carried on had not changed over the relevant period but had been subject to unforeseeable external events. The FTT in *French* took a different view in circumstances where the nature of the activities had changed during the relevant period, in circumstances where the FTT clearly felt that the alternative interpretation would produce an unjust result. It would appear, however, that since the appellant in *Erridge* had in 2005 expected to achieve profitability within a short timescale even if the alternative interpretation had been applied his appeal would have been unsuccessful.

24. The third case is *Silvester v HMRC* [2015] UKFTT 532 (TC) ("*Silvester*").

25. In *Silvester* the appellant had carried on a sheep farming business which had made losses in each year since 2000/2001 with the result that HMRC denied sideways

relief for the farming losses in 2008/2009 and 2009/2010. Mr Silvester attempted to improve profitability in 2005 by changing the type of sheep to breeds suitable for the meat market, expanding the flock and acquiring more land. Theft of stock damaged the business, which resulted in the land from which the stock been stolen being sold and replaced by other land which was closer to the farm and less vulnerable to theft, resulting in the business incurring further costs. Matters had stabilised by 2010 and the business was by then profitable.

26. The FTT (Judge Sinfield and Mr Tym Marsh) regarded the different conclusions reached in *French* and *Erridge* to have occurred due to the different factual scenarios: see [44] of the decision. It then followed the approach in *French* to the interpretation of s 68 (3) (b), its reasoning being set out at [45] of its decision as follows:

> "We consider that "activities" has the same meaning in paragraphs (a) and (b) of section 68(3) ITA. We do not agree with HMRC's view that "activities" means the farming activities carried on by the person claiming the loss in the year of the claim. In our view, "activities" in section 68(3) refers to the activities that constitute the trade of farming in respect of which the loss relief is claimed. We reach this view because section 67(1) refers to the trade of farming in relation to which the loss was made. Section 67(3)(b) applies the reasonable expectation of profit test not to the trade of farming but to the farming activities which must mean the activities of the trade of farming. Section 68(3)(a) explicitly refers to the farming activities carried on in the current tax year, ie the year in which the loss relief is claimed. Section 68(3)(b) refers to "the activities at the beginning of the prior period of loss" but does not explicitly state that "the activities" are those that the person claiming loss relief carried on in the year of the claim. In our view, "the activities" does not have a special meaning, ie does not mean the farming activities in the current tax year, because the legislation does not define it as having that meaning and we do not consider that it can be read as having it without being so defined. We consider that "the activities" should have its normal meaning which, in the context, is the activities that constitute the trade of farming in respect of which the loss relief is claimed. Reading section 68(3)(b) in that way means that the competent farmer condition is less artificial and more straightforward to apply because it is applied to known rather than assumed facts. The known facts are the nature of the farming activities at the beginning of the prior period of loss and the circumstances in which they were carried on. Even though known in the year in which the loss relief is claimed, the competent farmer cannot be assumed to have been aware of unforeseeable events in the intervening years."

27. Applying this test to the facts, the FTT then concluded at [48] as follows:

> "What expectations of profit would the competent farmer, carrying on the same sheep farming activities as the partnership actually carried on, have in July 2000? We regard Mr Silvester as a proxy for the competent farmer. On the basis of the evidence presented to us, we find that Mr Silvester is a highly competent sheep farmer and HMRC have never suggested otherwise. Mr Silvester told us (and we accept) that it would not have been possible for anyone else to get into profit sooner than he did but that is not the test. Mr Silvester was an experienced and successful businessman as well as a competent sheep farmer. We find that he did not farm sheep as a hobby but sought to do so as a

> profitable, commercial business. From his evidence, we conclude that, in 2000, Mr Silvester considered that the sheep farming activities carried on at that time could become profitable as, in fact, they had been in the year ending 30 June 2000. It was only in 2005 that Mr Silvester accepted that the business was unlikely to make a profit without radical change. The test is not, however, what expectations Mr Silvester or the competent farmer had in 2005 but what those expectations were in July 2000. Given his commercial background, experience and commitment to sheep farming, we consider that Mr Silvester did not expect (and could not reasonably have expected) in 2000 that the sheep farming activities would not become profitable until after the end of the tax years 2009-10 or 2010-11. That would require Mr Silvester to have predicted unforeseeable events such as the foot and mouth outbreak, two episodes of lamb rustling and land being despoiled by wild boars. Had Mr Silvester, in July 2000, expected the activities to be loss making for the next nine or ten years, we have no doubt that he would have changed the business model with a view to making it profitable, as he did in 2005 when he accepted that the existing business was unlikely to become profitable. From that, we infer that, in July 2000, Mr Silvester, and thus the competent farmer for whom he is a proxy, could not reasonably have expected (and did not expect) that the sheep farming activities would not make a profit until 2009-10 or 2010-11. Accordingly, we conclude that Mr Silvester did not meet the reasonable expectation of profit test in section 68(3)(b) ITA."

28. Although a different test was applied to that in *Erridge*, the same conclusion resulted, namely that the intervention of unforeseen events affecting a business which did not change its nature during the relevant period could not affect the position where the competent farmer could not at the commencement of the prior loss period have had a reasonable expectation that the activities would not become profitable until after the end of the current tax year. We also observe that the FTT took it as read that Mr Silvester was a competent farmer but that was not the overriding factor. We also observe that it does not appear that any submissions were made to the FTT as to whether it should have regard to the wording of the predecessor legislation in construing s 68 (3) ITA 2007, a question which, as we have said, we will return to when considering the parties' submissions.

The Decision

29. The FTT recorded at [22] to [25] of the Decision the agreed matters between the parties. In particular, it was accepted that Mr and Mrs Scambler were "competent farmers" for the purpose of ss 67 and 68 ITA 2007 and that s 68 (3) (a) was satisfied. Accordingly, the Decision was made on the basis that Mr and Mrs Scambler were, as in *Silvester*, to be regarded as a proxy for the competent farmer for the purpose of the application of the test and that Mr and Mrs Scambler reasonably expected future profits from the activities that they carried on in the "current tax year", that is 2010/2011.

30. As the FTT recorded at [26] of the Decision, the only issue in dispute was whether Mr and Mrs Scambler could rely on s 68 (3) (b) ITA 2007 for the 2010/2011 tax year to take them outside the provisions of s 67 ITA 2007 which would otherwise deny them sideways loss relief for that year.

31. The FTT accepted HMRC's argument that there is some ambiguity in the wording of s 68 (3) (a) and (b) ITA 2007 and that it is permissible to refer to earlier versions of the legislation as an aid to its interpretation: see [42] of the Decision. Nevertheless, it held at [43]:

> "Despite that, our view is that the Appellants' interpretation of the application of s 68(3)(a) and (b) is the only one which gives rise to a sensible result; that the activities referred to by s 68(3)(b) are the activities carried on by Mr and Mrs Scambler in 2005, the start of the loss period. As stated in *French*: "*By locking the actual activity of the actual farmer to that of the notionally competent farmer, it (the test in s 68(3)(b)) then ensures there is a level playing field comparison between their progressions to profitability*" paragraph 42. Equally, if the activities referred to in s 68(3)(a) and (b) are the same activities (in this case the 2010 activities) it is hard to see how both of those tests could ever be passed at the same time."

32. The FTT then considered the weight to be given to the competence of the farmer in question and made some reference to the nature of the activities carried on being a relevant factor. It said at [45] to [49] of the Decision:

> "45. The point was made in *French*, and we agree, that if the farmer in question has been accepted as competent, as Mr and Mrs Scambler have been, it makes it more difficult to see how they could fail the test at s 68(3)(b). At first glance, it seems to us that the concept of competence in this context must incorporate a sensible approach to profitability over the medium term (five years in this case) test period and that the two aspects of s 68(3)(b) must stand or fall together; only an incompetent farmer would carry on a business which had no reasonable prospect of making profits within five years. However, we think that there are two objections to the suggestion that all that needs to be demonstrated here is competence.
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> 46. The test in s 68(3)(b) envisages that it is possible for a competent farmer, in at least some circumstances, to not reasonably expect profits for five years. Although the Appellants resisted this approach, we have to agree with HMRC that those circumstances only seem likely on the part of a competent farmer if there is some established long term strategy envisaged for the business, within the farmer's control, which is going to take a period of time to come to fruition and generate profits. The Appellant pointed to the specific provision for start-ups in s 67(3)(c) to suggest that s 68(3)(b) could not also be applying to that type of situation, but we think that there are situations other than start-ups where investment is required in a farming business which will take time to bear fruit.
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> 47. The other objection is that the test in s 68(3)(b) is set out in two stages; as Mr Gotch pointed out, there has to be evidence both of competence and of the reasonableness of the profit expectation. Therefore it is possible for a farmer to be competent but nevertheless have an unreasonable expectation of profits. The question for us is whether it was reasonable for Mr and Mrs Scambler, as competent farmers, to have no expectation of making profits for the next five years.
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> 48. One of the reasons why this test is difficult to apply is that an expectation over a five-year time period is difficult to sustain however much knowledge

might be available in year one to a competent farmer. There is bound to be an element of uncertainty. In addition, it is hard to avoid the line of reasoning which suggests that if a competent farmer thought that he was going to make losses for the next five years, he would have done something about it, as indeed Mr and Mrs Scambler did. Nevertheless, while the actions taken by Mr and Mrs Scambler in the intervening years might influence a conclusion about their competence as farmers, they cannot, as both parties accepted, have any influence on the s 68(3)(b) test which rests entirely on expectation.

49. HMRC said that the Appellant needed to show a specific reason why profits would not be made for the loss period, despite the business being run on a competent basis. We agree with this approach. Did the Appellants provide this explanation? We do not think that they did."

33. Having referred at [51] of the Decision to the fact that it was difficult to apply the test in s 68 (3) (b) to a farming business where such a significant component of the business's profitability (the milk price) is outside the farmer's control the FTT said this at [52]:

"We do not think that this is sufficient to pass the test at s 68(3)(b); The Scamblers' business profits were uncertain because the farm gate price of milk was volatile as shown by the [Department for Environment, Food & Rural Affairs] and the Scamblers' own figures for the 2000 – 2005 period. The future milk price was unknown, but that did not mean that it was reasonable to expect no profits for the next five years; it was, on Mr Scambler's evidence, equally possible that the milk price would go up at some stage in the next five years. We were not provided with any evidence about Mr and Mrs Scambler's margins, or at what farm gate milk price they would break even."

34. The FTT reinforced this point at [56] and [57] as follows:

"56. We do not consider that an assumption that the milk price was only likely to move downwards over the next five years was a reasonable assumption in these circumstances. The only reasonable assumption, based on the Scamblers' knowledge of the milk market in the UK supported by the DEFRA figures which we saw, was that the price of milk was volatile and could move either up or down over that period.

57. For these reasons we agree with HMRC that a competent farmer carrying on the activities of Mr and Mrs Scambler as they were carried on in April 2005 would not have had a reasonable expectation that no profit would be made for the next five years."

35. The FTT then considered whether its decision would have been different had it adopted the alternative interpretation of s 68 (3) (b) contended for by HMRC, which would involve it applying the test by reference to the activities carried out by Mr and Mrs Scambler in 2010 as if they had been carried on in 2005. In that regard, the FTT noted the changes that had been made by the business during the five-year period in an attempt to make it more efficient and consequently more likely to be profitable. Having considered those matters, the FTT's conclusion was set out at [60] as follows:

> "However, our view is that the answer to the s 68(3)(b) test must be the same whether the 2010 or the 2005 activities are considered for the loss period; if the main variable in predicting losses is the milk price, and that itself is essentially unknown as Mr Scambler told us, it is impossible to conclude that there was a reasonable expectation of nothing but loss for the five-year loss period whether one looks at the activities which were being carried on in 2005 or 2010."

36. It appears to us that what lies behind the FTT's reasoning is an acceptance that if the competent farmer, looking at the question in 2005 as to whether the business can be profitable by 2010 (whether he does so by looking at the activities as they were carried on in 2005 or in 2010), believes that profitability is uncertain because of the volatility of the milk price then such a belief is not sufficient to satisfy the test.

37. It seems to us that, in effect, the FTT was saying that in circumstances where the main factor as to whether a dairy farming business will be profitable or not is the level of the milk price, then unless the competent farmer believes that it is more likely than not that the milk price will stay for the whole period below the point at which the business can be profitable and such a belief is reasonable then the test cannot be met. On the basis of the findings of fact it made at [41] of the Decision the FTT clearly found that Mr and Mrs Scambler did not have that belief.

Grounds of Appeal and issues to be determined

38. The grounds of appeal advanced by Mr and Mrs Scambler can be summarised as follows:

(1) The reference to "hobby farming" in the cross-heading to ss 67 to 70 ITA 2007 indicates that construed purposively the provisions were designed to address that activity;

(2) The reference to "the activities" as used in s 68 (3) (b) ITA 2007 refers to the activities carried on in 2005;

(3) The FTT at [46] and [47] wrongly formulated the statutory test as a negative and severed it from the activities thereby asking the wrong question. The statutory question is simply an evaluation of the activities in the eyes of a competent person;

(4) The FTT did not have regard to the purpose of the provisions which is to allow relief to competent farmers regardless of extraneous factors over which they have no control. A competent farmer could have no expectation about extrinsic events that might influence profitability;

(5) By taking account of extraneous factors, the FTT failed properly to consider the concept of "reasonable expectation"; and

(6) The FTT was wrong in stating that Mr and Mrs Scambler needed to show a specific reason why profits could not be made.

39. In the light of these grounds, in our view the appeal can be determined by considering the following three issues:

(1) What is the correct construction of s 68 (3) (b) ITA 2007 as regards which year's activities are to be taken into account in applying the test?;

(2) Is it necessary in order to satisfy the test in s 68 (3) (b) ITA 2007 that a farmer, who is accepted to have been farming competently throughout the relevant period, must demonstrate why, looking at the nature of the activities as carried on in the year in respect of which the test is to applied, the activities could not reasonably be expected to be profitable by the end of the relevant period or is it sufficient to demonstrate that the competent farmer did in that period all that could be reasonably expected of a competent farmer carrying on the activities in question to endeavour to make the business profitable?; and

(3) Applying the provisions, properly construed, to the facts of this case, was it the case that Mr and Mrs Scambler carrying on the relevant activities in April 2005 could not reasonably have expected those activities to become profitable until after April 2011?

Discussion

40. We shall deal with each of the three issues summarised at [39] above in turn as follows.

The proper construction of s 68 (3) (b) as regards the relevant year's activities to be taken into account

41. As we have mentioned, both parties submitted that there was a real difficulty in interpreting the literal words of s 68 (3) (b), that is the question as to whether the phrase "the activities" as used in s 68 (3) (b) was intended to refer to the activities as carried on at the beginning of the prior period of loss (in this case April 2005) or as carried on in the current tax year (in this case 2010/2011). As we have seen, whilst in *Erridge* the FTT took the view that the intention was to refer to the activities as carried on in the current tax year, in *French* and *Silvester* the FTT took the view that the intention was to refer to the activities as carried on at the beginning of the prior period of loss. In our view the words of the statute are reasonably capable of bearing either interpretation.

42. Mr Gotch submitted that adopting the interpretation that "the activities" as that phrase is used in s 68 (3) (b) required the activities as carried on in the current year to be transposed back to the beginning of the loss period gave rise to a manifest absurdity, because the test could never be passed.

43. We reject that submission. Ms Lemos gave us a number of examples of how the legislation would work if the interpretation referred to at [42] above were adopted. In certain circumstances, that interpretation would give relief where the alternative interpretation would not and vice versa. She gives the example of a farmer who began to trade as a dairy farmer on 6 April 2007, but decided to switch to a stud farm starting from 6 April 2010 (that is in the fourth year of the relevant period) and continued with that type of farming from then on. In those circumstances, HMRC would apply the test to the stud farming activities and not to those of dairy farming, as those are "the activities" it considers to be in question. HMRC's guidance, which is

that sideways loss relief is only available at the end of the five-year loss period in respect of activities that by their nature only become profitable in the long term, such as stud farming, would result in the loss relief claim being allowed. If Mr and Mrs Scambler's proposed construction was instead applied, the farmer would not get the benefit of the extended relief because the test would be carried out by reference to the dairy farm activities (which do not inherently take a long time to become profitable) rather than the stud farm activities. However, if HMRC's preferred interpretation had been applied in *French* then that case would have been decided differently; there was nothing inherently long-term in nature in either dairy or arable farming so on HMRC's interpretation loss relief would not be available after 5 years, since a competent farmer carrying on the activity of arable farming at the beginning of the prior period of loss could not reasonably have expected it not to be profitable.

44. We therefore agree with the parties that the wording is ambiguous. Ms Lemos submitted that the ambiguity could be resolved by reference to the relevant statutory provisions which were replaced by Chapter 2 of Part 4 ITA 2007.

45. Ms Lemos relies on *Shirley v HMRC* [2014] UKFTT 1023 (TC). In that case the FTT had to construe a provision of the Income Tax (Trading and Other Income) Act 2005 which, like ITA 2007, was enacted as part of the Tax Law Rewrite Project. It was submitted by HMRC that it was not the intention of the rewrite to change the law, and that it was permissible to consider the previous law when interpreting a rewrite statute.

46. The FTT (Judge Alexander and Mr Michael Sharp) set out at [38] the approach to be taken in construing a Tax Law Rewrite statute as stated by Sales J in *Eclipse Film Partners (No 35) LLP v HMRC* [2013] UKUT 639 (TC) at paragraph 97:

> "The law regarding the approach to construction of a consolidating statute was explained by the House of Lords in *Farrell v Alexander* [1977] AC 59 and is well settled. When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions: see *Farrell v Alexander* [1977] AC 59, 73B-C (Lord Wilberforce), 82B-D and 83D-H (Lord Simon of Glaisdale) and 97B-E (Lord Edmund-Davies). An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if, in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them. Therefore the court's main task in this case must be to construe the ITTOIA without reference back to section 18 ICTA and Schedule D. However, where, after undertaking such an exercise, a provision which falls to be applied is found to be ambiguous, a subordinate presumption comes into play, namely that it is presumed that there was no intention to change the meaning of the provision which has been repeated in the same language in the consolidated code. In such circumstances, it may be relevant to try to determine the meaning of the relevant provision by looking to see what it meant when it was previously enacted: see [1977] AC 59 at 73B (Lord Wilberforce), 84D-H (Lord Simon of Glaisdale) and 97B (Lord Edmund-Davies)."

47. The FTT then reviewed other judgments dealing with the approach to be taken to the interpretation of consolidation statutes, namely *Farrell v Alexander,* which is referred to in the passage from Eclipse set out at [46] above, and *IRC v Joiner* [1975] 1 WLR 1701 and concluded from those judgments the following as the approach to be taken to the construction of a Tax Law Rewrite Statute at [56] of its decision:

> "(1) We first examine the actual language used in the Act itself without reference to any of the statutes which it has replaced.
>
> (2) In interpreting the language of the Act, we adopt the usual canons of statutory interpretation – giving consideration to the "clear words" of the legislation. What are "clear words" is to be ascertained upon normal principles; these do not confine us to literal interpretation. We must consider the context and scheme of the relevant Act as a whole, and its purpose.
>
> (3) In undertaking this exercise, we are only permitted to adopt an interpretation that the statutory language is reasonably capable of bearing.
>
> (4) Only when there is a real and substantial difficulty in interpreting the provisions, or there is an ambiguity which classical methods of construction cannot resolve, can the recourse be had to the antecedent legislation."

48. We agree with that approach and respectfully adopt it.

49. We have also considered in this context Mr Gotch's submission that regard should be had to the cross heading to ss 67 to 70 ITA 2007 (which we refer to at [14] above) as an aid to the purpose of the provisions. Mr Gotch observes that the heading appeared for the first time in ITA 2007 and that the only reasonable inference is that, in the interests of providing clarity, the true focus of the legislation was being indicated by this heading and it should not be construed in a manner which precluded sideways loss relief for genuine competent farmers as opposed to hobby farmers.

50. The approach to the effect of the cross heading on construing s 68 (3) (b) was considered in *Silvester* at [27] to [31] as follows:

> "27. Mr Silvester contends that as the cross-heading to sections 67 to 70 ITA refers to hobby farming and he is not a hobby farmer, the section does not apply to him and, even if it does, his farming activities pass the reasonable expectation of profit test in section 68. Mr Silvester submitted that section 67 is immediately preceded by the heading "Restriction on relief for 'hobby' farming or market gardening". Mr Silvester argued that this is clearly not applicable to his farming activities. Mr Silvester submitted that, from the outset, HMRC's website stated quite clearly that the legislation in sections 67 to 70 relates to hobby farming and, as such, it did not apply to him at the time of submitting his tax returns. HMRC's website now says that the sections apply to all farmers but Mr Silvester was unaware of this until the dispute that led to this appeal.
>
> 28. Mr Mason, for HMRC, contended that the mention of hobby farming in the cross-heading does not of itself mean that the legislation is restricted to hobby farmers. He submitted that headings in statutes are not

relevant to the construction of legislative provisions and the wording of section 67 is clear; it refers to "carrying on a trade of farming or market gardening" and makes no reference to the trade being a hobby. In support of this view, Mr Mason relied on the decision of the First-tier Tribunal (Tax Chamber) ('the FTT') in *French and French v HMRC* [2014] UKFTT 940 (TC) ('*French'*). In *French*, the appellants contended that section 67 ITA did not apply at all to the professional or commercial farmer. The FTT did not accept this submission and, at [21], stated as follows:

> 'We agree, however, with HMRC that, while that may be the broad thrust of the section 67, and the accompanying exception in section 68(3), we have clearly got to apply the provisions by reference to their strict wording. Once, therefore, there have been 5 years of losses, section 67 is potentially engaged, and it is impossible to contend that section 67 is totally inapplicable to some commercial category of farmer.'

29. We respectfully agree with the views of the Tribunal in *French*. Support for this approach can be found in *Bennion on Statutory Interpretation* (6th edition, 2013) at page 694 in section 255 of the Code which states:

> "A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached."

30. In the comment on section 255 of the Code, the learned author of *Bennion* states

> "… a heading is of very limited use in interpretation because of its necessarily brief and inaccurate nature. Any heading can only be an approximation, and may not cover all the detailed matters falling within the provision to which it is attached. Furthermore it may fail to get altered when some amendments made in Parliament to those provisions would justify this. Lord Reid said:
>
> > 'A cross-heading ought to indicate the scope of the sections which follow it but there is always a possibility that the scope of one of the sections may have been widened by amendment'.[1]
>
> …
>
> Where a heading differs from the material it describes, this puts the court on enquiry. However it is most unlikely to be right to allow the plain

> literal meaning of the words to be overridden purely by reason of a heading."

> 31. In our view, the heading can be an aid to the construction of the sections that follow it but it is no more than that and cannot govern the language used in the sections. The reference to hobby farming in the cross-heading to section 67 to 70 ITA is clearly only meant as a shorthand term for or brief description of the contents of the sections that follow and does not restrict the scope of those sections. We consider that the limited role of the word 'hobby' is made clear by the fact that the Parliamentary draftsman has placed it in single quotation marks within the heading, the term is nowhere defined and it is not used in the sections that follow the heading. Accordingly, we consider that we must apply the words of section 67 using their ordinary meaning considered in the context of the relevant statutory provisions taken as a whole and with regard to their general purpose."

51. In our view we cannot usefully add to that analysis and we respectfully adopt it. Accordingly, we place no weight on the cross heading in construing the relevant provisions.

52. Ms Lemos referred us to the Explanatory Notes to ITA 2007. In relation to s 68 the relevant Note states that "it is based on [the predecessor legislation]". Ms Lemos took us to other Explanatory Notes which refer specifically to provisions being new or making a change to existing legislation. From those Notes and the language used in the Note to s 68 we infer that there was no intention to change the meaning of the legislation in the rewrite.

53. Accordingly, having determined that the wording is capable of bearing either of the alternative interpretations, whether or not the purpose is, as HMRC submit, to allow sideways relief after the end of the five-year period only in respect of farming ventures which by their nature only become profitable in the long term, since the wording is ambiguous in our view we are entitled to refer to the predecessor legislation in order to establish whether that will resolve the ambiguity.

54. Legislation to restrict the availability of sideways relief for all types of trade was originally enacted in the Finance Act 1960 and the provisions were tightened in respect of farming or market gardening activities in the Finance Act 1967. They were re-enacted in the Income and Corporation Taxes Act 1970. They were re-enacted again in section 397 (3) of the Income and Corporation Taxes Act 1988 and that is the provision to which we will refer in order to assist with our interpretation of s 68 (3) (b) ITA 2007. Section 397 (3) of the 1988 Act provided as follows:

> "(3) Subsections (1) and (2) above shall not restrict relief for any loss or for any capital allowance, if it is shown by the claimant–
>
> > (a) that the whole of the farming or market gardening activities in the year next following the prior five

> years are of such a nature, and carried on in such a way, as would have justified a reasonable expectation of the realisation of profits in the future if they had been undertaken by a competent farmer or market gardener, but
>
> (b) that, if that farmer or market gardener had undertaken **those** activities at the beginning of the prior period of loss, he could not reasonably have expected the activities to become profitable until after the end of the year next following the prior period of loss."

55. We have emphasised the use of the word "those" in sub-paragraph (b) which does not feature in s 68 (3) (b). We accept Ms Lemos's submission that the reference to "those" activities in the second limb of the test more clearly indicates that the legislation is referring back to the first limb of the test and the activities carried on in the current year. Indeed, in the passage from *French* that we have set out at [19] above, the FTT indicated that if s 68 (3) (b) had referred to "those activities" then its approach would have been different.

56. The rewrite in ITA 2007 has also separated the reference to the nature of the activities carried on from the test in s 68 (3) (b) in a way which the predecessor legislation did not. This, together with the removal of the word "those", has unfortunately created the ambiguity.

57. In our view the ambiguity is resolved by reference to the predecessor legislation and accordingly it must be construed by applying the test to the activities as they were carried on in the current tax year and not as they were carried on at the start of the prior loss period. That inevitably means that the question as to whether the nature of the activities carried on was such that the competent farmer could not reasonably have expected those activities to become profitable until the end of the current tax year must be determined by reference to the nature of the activities as they were carried on in that current tax year, so that if there was a change in the nature of those activities it is the nature of those activities as they are carried on in that final year to which the test must be applied.

58. Consequently, in our view the FTT was wrong to have applied the test by reference to the activities as they were carried on at the beginning of the prior loss period. We shall therefore determine this appeal by reference to what we have found to be the correct interpretation as set out at [57] above.

59. As we have been able to resolve the ambiguity by reference to the predecessor legislation, there is no need for us to consider whether it would have been permissible to refer to the relevant passages in Hansard, as Mr Gotch submitted that we should. We can, however, briefly say that whilst the first two conditions laid down in *Pepper v Hart*, namely that the legislation is ambiguous and the material relied upon consisted of one or statements by a Minister were clearly satisfied, in our view the

third condition, that the statements relied upon were clear would not have been and it emerged during argument that the parties did not dispute that conclusion.

How to approach the test

60. The essence of Mr Gotch's submissions is that the test is "all about competence". He submits that the test would always be failed by an incompetent farmer, because he would not be carrying on the business in a way that a competent farmer would do and it would be reasonable to expect that something could be changed or remedied by a competent farmer that would give rise to a reasonable expectation that the activities would become profitable. It is, however, a test that would be passed in all circumstances by a competent farmer, because he would already be doing everything that a competent farmer would do to be profitable, notwithstanding that losses were being made, and so it would not be reasonable to expect anything other than losses in the foreseeable future based on the activities as they were at the time.

61. Therefore, Mr Gotch submits, if Mr and Mrs Scambler had a reasonable basis for their expectations of not making a profit at the relevant times then the test is satisfied. An interpretation requiring future events to be taken into account in assessing reasonable expectations for the purposes of the legislation would be wrong. Section 68 is a relieving provision that operates by way of a test that should be impossible for competent farmers to fail and impossible for incompetent farmers to pass. The test preserves losses for competent farmers doing their best, while restricting them for the target population of incompetent farmers. The test does not penalise activities that are being conducted competently and could be profitable but are unprofitable for extrinsic reasons beyond a farmer's control, such as prices, weather, or the nature of the particular type of farming carried on. If losses are arising from extrinsic factors, any expectation that the activities will become profitable within a certain period can be no more than a guess and is unreasonable. The test is whether at the start of the loss period the farming was being done competently and in a way that could be profitable but for extrinsic factors over which the farmer had no control. If that were the case, then s 68 (3) (a) then asked whether at the end of the loss period profits will be made in the future: an incompetent farmer unconcerned with making profits will fail the test; but a competent farmer who is working to combat extrinsic difficulties and turn his business round in the intervening years will pass it.

62. Mr Gotch submits that in the current case, at the beginning of the prior loss period, the competent farmer would have known that losses were arising due to falling farm gate milk prices, which was an extrinsic factor over which Mr and Mrs Scambler had no control, that that price was likely to stay low but could not be predicted and consequently a competent farmer would not be able to have any reasonable expectation other than that, with matters as they were at the beginning of the prior period of loss, the activities would not become profitable until after the end of the current tax year.

63. We reject the premise behind Mr Gotch's submissions that s 68 (3) is all about competence. That may be true of s 68 (3) (a) but Mr Gotch's submissions effectively

place no weight on s 68 (3) (b). The use of the word "but" between sub-paragraph (a) and sub-paragraph (b) makes it clear that the starting position in (a) is that a competent farmer seeking sideways loss relief for the current tax year must reasonably expect future profits (whenever they may occur) but his right is restricted to the extent that he has already had five years of losses allowed but cannot now demonstrate that he could not reasonably have expected the activities as they are now carried on to become profitable by the end of the current tax year. In making that observation we emphasise that the burden is on the taxpayer to show that the statutory conditions for the relief are met; that deals with Mr Gotch's submission that the provision should be construed restrictively.

64. In our view, bearing in mind our analysis as to the activities which are to be taken into account in applying the test, in order to obtain the relief after the prior period of losses the competent farmer would need to be able to make the following statement in the circumstances of this case:

> "Looking at the activities in 2010/2011, and taking account of the nature of the activities and the way they are carried on, I would reasonably have expected them to become profitable at some stage, but if you had asked me on 6 April 2005 to look at those 2010/11 activities in the same way, I could not reasonably have expected them to become profitable until after 5 April 2011."

65. Therefore, in relation to extrinsic factors over which the competent farmer has no control, such as the volatility of the milk price, the question would be whether the competent farmer could reasonably have said that the milk price will stay at a low level throughout the period such that the activities as they were carried on in 2010/2011 could not have been profitable until after 5 April 2011. In other words, there has to be a positive belief on the part of the competent farmer that the price will remain below the level at which it is possible to make a profit for the whole of the period in question. We therefore reject the way that Mr Gotch formulates the test as we have recorded at [62] above.

66. Therefore, in relation to the questions we posed at [39 (2)] above, in our view the correct answer is that the competent farmer would need to demonstrate why, looking at the nature of the activities as they were carried on in 2010/2011 they could not reasonably be expected to be profitable until after the end of the current tax year.

Application of the test to the facts

67. In our view on the basis of the FTT's findings of fact the FTT was correct to conclude that sideways loss relief was not available to Mr and Mrs Scambler for the year 2010/2011.

68. On the basis of our conclusion at [66] above, in our view the FTT was correct to conclude at [49] of the Decision that Mr and Mrs Scambler needed to show a specific reason why profits would not be made for the loss period, despite the business being run on a competent basis.

69. The evidence recorded at [16] to [21] of the Decision does not refer to how long the activities might take to become profitable. The FTT made a clear finding of fact at [41] of the Decision that Mr and Mrs Scambler believed that the farm gate price of milk was likely to stay low, but could not predict what would actually happen to the farm gate price of milk. On the basis of that finding, in our view the FTT was right in stating at [51] of the Decision that the test could not be passed simply on the basis that the milk price was unpredictable. The FTT recorded Mr Scambler's evidence that it was equally possible that the milk price would go up as much as it might go down in the next five years. On that basis, there was no error of law in the FTT's conclusions at [56] and [57] of the Decision.

70. As the FTT found at [60] of the Decision, its conclusions would have been no different had it considered the 2010 rather than the 2005 activities for the loss period, as we have found it should have done. Whilst we would not have expressed the test the way the FTT did (it stated that it was impossible to conclude that there was a reasonable expectation of nothing but loss for the five-year loss period) on the basis of the FTT's findings of fact it is clear that Mr and Mrs Scambler had not demonstrated that they could not reasonably have expected the activities to become profitable until after the end of the loss period.

71. It therefore follows that there is no basis on which we should interfere with the Decision.

72. We have considered whether our conclusions are consistent with the purpose of the legislation. It follows from our analysis that we do not accept that the purpose of the legislation was to ensure that competent farmers doing everything they could within their control to address profitability were entitled to sideways loss relief indefinitely. We should stress that normal loss relief against future losses of the trading question are still available for farming trades in the same way as they are for any other trade. There are a number of instances in the tax legislation where farming has its own special tax rules, some of which are relatively generous when compared to other businesses. It is also the case that farming is sometimes carried on as more of a hobby than a trade and the provisions reflect that. However, in our view, it is clear that the purpose of the legislation reflects a policy that unless there is something in the nature of the farming activities concerned that means that they cannot reasonably be expected to become profitable except in the long-term then the period of sideways loss relief should be limited by time in normal circumstances.

Disposition

73. The appeal is dismissed.

(Signed on original)

TIMOTHY HERRINGTON **THOMAS SCOTT**
UPPER TRIBUNAL JUDGES
RELEASE DATE: 10 January 2017