[2016] UKUT 0349 (TCC)

Appeal number: UT/2015/0030

INCOME TAX – appeal against closure notice disallowing certain losses – loss relief – section 66 Income Tax Act 2007 – whether growing asparagus for sale is farming or market gardening – if market gardening, whether horse breeding and asparagus business single composite trade- decision of First-tier Tribunal set aside and case remitted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

JUDITH THORNE

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Sarah Falk

Sitting in public in London on 27 June 2016

Michael Firth, counsel, instructed by Kent & Sussex Accountancy Services, for the Appellant

Kate Balmer, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns a claim by the Appellant ('Mrs Thorne') for 'sideways' loss relief under section 64 of the Income Tax Act 2007 ('ITA') which she claimed on her 2008-09 self-assessment return in respect of trading described as "Equestrian breeder & Farming". The activities included in that description were breeding and rearing of event horses with a view to selling them ('the equestrian activity') and growing and selling asparagus ('the asparagus business'). The Respondents ('HMRC') refused the claim on the basis that the equestrian activity and the asparagus business were a single composite trade and, viewed as such, it was not carried on in 2008-09 on a commercial basis with a view to the realisation of profits. HMRC issued a closure notice disallowing Mrs Thorne's claim for losses arising in the tax year 2008-09. Mrs Thorne appealed to the First-tier Tribunal ('the FTT').

2. In a decision released on 30 July 2014, [2014] UKFTT 0730 (TC), ('the Decision'), the FTT (Judge Alison McKenna and Ms Gill Hunter) held that the equestrian activity and asparagus business were a single, composite trade because Mrs Thorne had submitted a composite tax return in which she made an amalgamated claim for tax relief in respect of both activities. Considering the two activities together, the FTT found that the composite trade was not operated on a commercial basis or with a view to the realisation of profits. For those reasons, the FTT concluded that the restriction in section 66 ITA applied and sideways loss relief was not available. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

3. Mrs Thorne now appeals, with the permission of the Upper Tribunal, against the Decision on the ground that the FTT erred in concluding that the equestrian activity and the asparagus business were a single composite trade. Mrs Thorne contends that the FTT should have found that the equestrian activity and the asparagus business were separate trades and that she was entitled to deduct the losses relating to the asparagus business from her general income. For the reasons given below, we allow the appeal, set aside the Decision and direct that the case be remitted to a differently constituted First-tier Tribunal.

Factual background

4. There is no challenge to the findings of fact by the FTT in this case. The facts are set out principally at [7] to [17] of the Decision. There were no witness statements, as such, before the FTT but Mrs Thorne's evidence was incorporated in a document entitled "Summary of the case for the Appellant" which contained an indiscriminate mix of facts and submissions. It is clear that the FTT's findings of fact were based on HMRC's statement of case, the written summary of Mrs Thorne's case and her evidence to the FTT at the hearing. At the hearing before us, Ms Balmer accepted and relied on some of the facts in Mrs Thorne's summary which we have included in our description of the material facts below.

5. Yew Tree Farm consists of a farmhouse, outbuildings and 38 acres of land. Mrs Thorne has lived there since December 1995. Mrs Thorne has always used much of the land as pasture for her horses. At some point before April 2004, Mrs Thorne carried out a substantial amount of work on the outbuildings to turn them into stables, a feed room,

a tack room and foaling boxes. In April 2004, Mrs Thorne started to trade as a horse breeder. This was her evidence as recorded in [9] and it appears to have been accepted by the FTT although HMRC had submitted that Mrs Thorne had been trading since she occupied Yew Tree Farm in December 1995.

6. In 2008, Mrs Thorne embarked on a new venture of growing asparagus for sale. At some point before 6 April 2009, Mrs Thorne incurred expenditure of £33,270 on equipment, including a tractor, solely for use in relation to asparagus growing. In April 2009, five and a half acres of land at Yew Tree Farm were dedicated to growing asparagus. Mrs Thorne purchased 250,000 asparagus crowns and planted four acres of asparagus in 2009. In 2010, she planted a further one and half acres of asparagus. Asparagus crowns take three years for the crop to reach its full yield. Once the crowns are established, the harvesting season for asparagus lasts eight weeks as each crown can be cropped repeatedly. Mrs Thorne engaged the services of an experienced agricultural worker, Wayne Lawrence, to tend the asparagus crop and to support the pickers by driving the tractor at harvest time. At harvest time, Mrs Thorne employed four workers under the seasonal agricultural workers scheme to pick the asparagus. The asparagus is produced without using artificial fertilisers, herbicides or pesticides. It is packaged and branded as a premium product. The asparagus is sold to restaurants, retailers and wholesalers. Mrs Thorne had never registered for VAT while she was only carrying on the equestrian activity but she registered for VAT after starting to grow and sell asparagus. The asparagus business, viewed in isolation, was run on a commercial basis with a view to the realisation of profits.

7. Mrs Thorne made a claim for loss relief in respect of a trade described as "Equestrian breeder & Farming" under section 64 ITA in her 2008-09 tax return. The financial statements for the year showed that, in relation to "Asparagus Farming", Mrs Thorne had purchased a tractor, a twin leg subsoiler, a trailed chain harrow and a chainsaw for £33,270. The total losses, including capital allowances, were shown in the return as £79,424. Mrs Thorne elected to set the losses against her declared income from her employment, on which tax had been deducted at source, which gave rise to an overpayment of tax of £31,767.60. By letter dated 21 April 2010, HMRC opened an enquiry into the 2008-09 return. HMRC later extended the enquiry to cover the returns for 2006-07 and 2007-08.

8. On 29 September 2012, HMRC issued a closure notice amending the 2008-09 return to disallow the losses of £31,767.60 and show tax of £2.00 as due. The closure notice stated that farming was not being carried out on a commercial basis. Mrs Thorne appealed against the conclusions set out in the closure notice and the consequential amendment to the 2008-09 return.

9. HMRC also made discovery assessments which disallowed the losses claimed in relation to the equestrian activity in 2006-07 and 2007-08 and resulted in further tax being due for those years. Mrs Thorne appealed against the discovery assessments but HMRC decided to withdraw them before the hearing of the appeal by the FTT.

Legislation

10. The relevant legislation is set out in an appendix to this decision but the material provisions may be summarised as follows.

Definition of farming and market gardening

11. Section 996(1) ITA defines farming as the occupation of land wholly or mainly for the purposes of husbandry, which is specifically stated to include the breeding and rearing of horses and the grazing of horses in connection with those activities. Farming, as defined, does not include market gardening which section 996(5) defines as the occupation of land as a garden or nursery for the purpose of growing produce for sale.

Treatment of farming and market gardening as trade

12. Section 9 of the Income Tax (Trading and Other Income) Act 2005 ('ITTOIA') provides that farming or market gardening in the UK is treated as the carrying on of a trade or part of a trade whether or not the land is managed on a commercial basis and with a view to the realisation of profits. The section further provides that all farming (but not market gardening) in the UK carried on by a person is treated as a single trade, unless carried on as part of another trade.

Set off against general income

13. Section 64 ITA allows a person to make a claim for loss relief against general income in the year the loss is made or for the year preceding the year of loss or both. Section 64(8)(b) ITA states that section 64 needs to be read with sections 66 to 70 ITA (restrictions on the relief).

14. Section 66 ITA precludes loss relief if the trade is not conducted on a commercial basis with a view to the realisation of profits. It applies to losses arising in any type of trade and not just farming. Section 66(3) provides that 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. It appears that in correspondence and in submissions before the FTT, HMRC placed no reliance on sections 67 to 70 ITA which are a separate set of restrictions on relief for losses arising from 'hobby' farming or market gardening.

The hearing before the FTT

15. The only issue in the appeal to the FTT was whether Mrs Thorne was entitled to claim sideways loss relief under section 64 ITA for the year 2008-09 for losses incurred in the course of her equestrian activity and asparagus business.

16. HMRC did not dispute that Mrs Thorne carried on a trade. HMRC's case was that the equestrian activity and asparagus business were a single trade of farming because they were not legally separate businesses and both had been included in one self-employment return with an amalgamated claim to sideways loss relief. HMRC also relied on section 9(2) ITTOIA which provides that all farming carried on by a person in the UK is treated as a single trade. HMRC further contended that the farming trade was not carried on in 2008-09 on a commercial basis and with a view to the realisation of profits. Accordingly, loss relief was precluded by section 66 ITA.

17. Ms Thorne's case was that the farming trade was carried on with a reasonable expectation of profit. As is recorded in [35], it was submitted on behalf of Mrs Thorne at the hearing that the asparagus growing fell under the heading of market gardening for tax purposes and should be treated differently from the equestrian activity, ie the breeding and rearing of horses, which was farming by virtue of section 996 ITTOIA.

Market gardening is specifically excluded from the ambit of farming by section 996(1) ITA and the loss relief for 2008-09 should be split into two categories.

The FTT's decision

18. Having found the facts, the FTT decided, so far as is relevant to this appeal, in [37] to [41] as follows:

> "37. … As an amalgamated claim to tax relief was made in respect of the equestrian and asparagus trades, we conclude that HMRC was correct to consider the Appellant's claim to relate to one composite trade for the purposes of applying s. 66 ITA. We also conclude that this analysis requires us to apply the statutory test across both businesses as a composite whole. We reject Mr Bottrill's submissions that the asparagus and equestrian businesses qualify for separate tax treatment in this case. It seems to us that it is now too late to present those arguments, having submitted a composite return for the year in question, although there may be ways to establish that the trades should be treated separately in future returns.
>
> …
>
> [The FTT then refers to the test in section 66]
>
> 39. Applying this test, we do not find that the Appellant's trade (comprising both elements) was carried on on a commercial basis in the relevant period. We note that in the five years up to the tax return in this appeal, the equestrian breeding business had made a nil profit and faced escalating costs. … We find that during the period in question the Appellant's equestrian breeding trade bore the characteristic hallmarks of an amateur or *dilettante* venture, run by someone who clearly loved her horses but who was not seriously interested in profit. The asparagus venture appears to have the hallmarks of a more professional enterprise and we accept, from the little that is known about its operation in 2008 - 2009, that it was run on a commercial basis. However, as we have found above, we are required to assess the two ventures as a composite whole and we find that, taken as a whole, the Appellant's trade was not run on a commercial basis because it included the uncommercial element that we have described above.
>
> 40. Turning to the question of whether the trade was made with a view to the realisation of profits, we find that this was not so in the period in question. …
>
> [The FTT then set out its reasons for reaching this conclusion in relation to the equestrian activity.]
>
> 41. We find on the basis of the evidence that the Appellant did have a view to the realisation of profits in relation to the asparagus venture, albeit that it was at a very early stage in the year in question. However, looking at the composite return, it is difficult to see how she could have had a view to the realisation

> of profits for the two businesses taken together, in view of the escalating losses of the equestrian venture and taking into account the anticipated delay before any asparagus crop could be sold."

19. For those reasons, the FTT confirmed the closure notice and amendments to the 2008-09 return and dismissed Mrs Thorne's appeal.

20. Mrs Thorne now appeals against the Decision on the ground that the FTT erred in law in concluding in [37] that the equestrian activity and asparagus business were a single, composite trade. Mrs Thorne contends that FTT should, instead, have considered the nature of her various activities and how they interrelated, applying the dicta of Rowlatt J in *Scales (Inspector of Taxes) v George Thompson & Co Ltd* 13 TC 83 at 87 ('*Scales*') and *River Estates Sdn Bhd v Director General of Inland Revenue* [1984] STC 60.

21. Mrs Thorne has not appealed against the FTT's conclusion that the equestrian activity was not operated on a commercial basis or with a view to the realisation of profits. Mrs Thorne accepts that the effect of section 66 ITA is that sideways relief was not available in relation to losses arising from her equestrian activity. Nor has Mrs Thorne appealed the FTT's finding that, if the equestrian activity and the asparagus business were a single trade, that trade was not operated on a commercial basis or with a view to the realisation of profits.

Issues in this appeal

22. The only issue in this appeal is whether the FTT erred in law in concluding, at [37], that Mrs Thorne's equestrian activity and the asparagus business were a single, composite trade. In this appeal, Mrs Thorne asks the Upper Tribunal to allow her loss to the extent that it related to her asparagus business, which she estimated to be around 70% of the loss claimed. This appeal is on a point of principle only and, if the appeal is allowed, the parties will attempt to agree the amount of the loss.

23. Section 996 ITA provides that the breeding and rearing of horses is farming. Further, section 9 ITTOIA provides that farming and market gardening are treated as the carrying on of a trade whether or not they are carried on a commercial basis with a view to the realisation of profits. Both parties were clear that we should proceed on the basis that the equestrian activity was farming and that the sole question was whether it was part of a single trade that also included the asparagus business. Accordingly, we have not considered the classification of the equestrian activity in detail and did not hear any argument on it. Section 9 ITTOIA deems all farming (but not market gardening) carried on by a person in the UK to be a single trade. It follows that, if Mrs Thorne's asparagus business is properly regarded as farming then that activity and the equestrian activity must be regarded as a single trade for tax purposes. If the asparagus business was not farming but market gardening then section 9 ITTOIA does not deem there to be a single trade but it does not necessarily follow that the asparagus business and the equestrian activity are separate trades.

24. Ms Balmer submitted that the FTT's conclusion that there was a single trade was based on a finding of fact by the FTT that the asparagus business was farming. It followed that the FTT would have been bound to have reached the conclusion that they did because section 9 ITTOIA treats all farming carried on by a person in the UK as a

single trade. She further submitted that, even if the FTT had not found that the asparagus business was farming and thus section 9 did not apply, the conclusion that there was one composite trade was a finding of fact that the FTT were entitled to make and that could not be interfered with on appeal except on the grounds described in *Edwards v Bairstow* [1956] AC 14 which were not made out in this case.

25. Mr Firth submitted that the FTT had implicitly accepted that the asparagus growing was market gardening by referring, in [37], to the possibility that the trades could be treated separately in future returns. This followed on from the submission, noted at [35], on behalf of Ms Thorne that asparagus growing fell under the heading of market gardening for tax purposes.

26. It was not disputed that the FTT had applied the wrong test for determining whether Mrs Thorne's equestrian activity and asparagus business were a single trade. The test is not whether the taxpayer has submitted a composite return or made an amalgamated claim for loss relief. Leaving section 9 ITTOIA to one side, both parties accepted that the correct approach was to be found in *Scales* and the cases that followed it.

27. It seems to us to be clear that the FTT did not make any specific finding that the asparagus growing was market gardening and it would not be appropriate to infer one when the point is never discussed in the Decision. Similarly and notwithstanding Miss Balmer's valiant attempts to persuade us that we should infer that the FTT had found that the asparagus business was farming, we do not think that it would be right to do so. It is correct, as Ms Balmer pointed out, that the FTT used the term "asparagus farming" in [16] and [37] but they also used the terms "asparagus trade", "asparagus venture" and "asparagus business" even more frequently. Apart from the reference in [35] to the submission that the asparagus growing was market gardening, there is no discussion in the Decision of whether the asparagus growing was farming or market gardening. We conclude that the FTT either did not consider the question or considered that it was not relevant to determining whether Mrs Thorne carried on a single, composite trade. In our view, whether the asparagus business was farming or market gardening was a relevant matter and the failure to consider the question and reach a conclusion on it was an error of law.

28. We do not accept that the FTT's conclusion that Mrs Thorne's equestrian activity and asparagus business were a single trade can stand. While we accept that the primary facts found by the FTT cannot be disturbed, the inferential finding that there was a single trade was based on consideration of irrelevant factors (the submission of a composite return and an amalgamated claim) and without proper regard to relevant matters, in particular the potential application of section 9 ITTOIA and the sorts of features described by Rowlatt J in *Scales*. That was an error of law of the type described by Lord Radcliffe in *Edwards v Bairstow*.

29. Section 12(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 provide:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal –

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either -

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision."

30. We have found that there are errors of law in the Decision. We consider that those errors cast doubt on the conclusion of the FTT that there was a single trade comprising the equestrian activity and the asparagus business. Accordingly, we set aside the Decision.

31. As was pointed out by Lord Carnwath in *Pendragon Plc v HMRC* [2015] UKSC 37 ('*Pendragon*'), where an error of law has been established (whether on the application of the *Edwards v Bairstow* principle or because of some other kind of error of law), the Upper Tribunal may exercise its power under section 12 of the TCEA 2007 to re-make the decision of the FTT. In doing so, the Upper Tribunal may make such findings of fact as are appropriate (section 12(4)). Although the Upper Tribunal should respect the FTT's findings of fact, it is not bound by them and can either make its own findings, if it has sufficient information to do so, or remit the case to the FTT if it does not.

32. We must now consider whether to remake the decision on the material before us or remit the case to the FTT. In order to decide whether to remake the decision or remit the case, we must first identify the issues that arise for determination in this case and what facts are required to make the decision. We must then consider whether the facts as found by the FTT or admitted by the parties are sufficient to enable us to determine the issues. If those facts are not sufficient then we must consider whether we can and should make our own findings of fact. If we cannot remake the decision on the basis of those facts then we must remit the case.

33. There are two questions which must be answered in order to decide this appeal, namely:

(1) Was the asparagus business, as carried on by Mrs Thorne in 2008-09, market gardening?

(2) If the asparagus business was market gardening, were the equestrian activity and asparagus business nevertheless a single, composite trade as a matter of fact?

34. Ms Balmer sought to persuade us to remake the decision on the basis of the facts found by the FTT. Mr Firth submitted that we did not have sufficient facts to decide whether the asparagus growing was market gardening or whether there was a single trade and urged us to remit the case to the FTT for a fresh hearing. We now consider each issue and the facts available to us that relate to it.

Was the asparagus growing farming or market gardening?

35. Section 996 ITA defines farming as the occupation of land wholly or mainly for the purposes of husbandry but states that it does not include market gardening. Husbandry is not defined in any of the Tax Acts but has been widely interpreted by the courts to include the raising of beasts, the cultivation of land and the growing of crops:

Lowe (Inspector of Taxes) v J W Ashmore Ltd (1970) 46 TC 597 at 605. Market gardening is defined by section 996(5) as "the occupation of land as a garden … for the purpose of growing produce for sale". The fact that section 996 specifically excludes market gardening from being farming suggests that, absent such exclusion, market gardening would or, at least, could be considered to be husbandry and thus farming. Moreover, and significantly, the fact that the definition of market gardening refers to growing produce for sale means in our view that market gardening is clearly within the normal meaning of husbandry given the breadth of that concept. The close link between the two activities is also shown by the fact that husbandry is specifically deemed to include hop growing (see section 996(2)(a) ITA).

36. It follows that growing produce, such as asparagus, for sale is farming unless it falls within the description 'market gardening'. In order to come within the statutory definition of market gardening, Mrs Thorne must have occupied land as a garden or nursery for the purpose of growing asparagus for sale. As it is not suggested that Mrs Thorne grew asparagus in a nursery and HMRC accept that she grew it for sale, the issue of whether the asparagus business was market gardening turns on whether the land on which the asparagus was grown was a garden for the purposes of section 996(5) ITA.

37. The leading case on the meaning of 'garden' in the context of income tax is the decision of the House of Lords in *Bomford v Osborne (Inspector of Taxes)* [1942] AC 14 ('*Bomford'*). Mr Bomford occupied a mixed farm of 536 acres. It included two acres of asparagus although neither party placed any reliance on that fact. The General Commissioners of Income Tax decided that the arable portion (excluding that used for growing hops) amounting to 229 acres should be assessed to tax under rule 8 of Schedule B to the Income Tax Act 1918 as "lands occupied as … gardens for the sale of produce" while the remainder was assessed as used for farming. It was common ground that the fields which the Commissioners assessed as gardens were scattered over the whole property and interspersed with fields used for farming. The case eventually reached the House of Lords where the outcome turned on the meaning of the word "gardens" in Schedule B.

38. Viscount Simon, at 18, said that he was prepared to accept that:

> "… a defined area may be a garden … even though it is not fenced round, as long as it is a distinct and separate unity devoted to gardening. … a field, or fields, of farming land should not be called a 'garden' merely because they grow products which used to be characteristic products of gardens, or even products which are still mainly or largely found in gardens. The main test … is that the defined area should be subject to that nature and intensity of treatment which is characteristic of horticulture."

Viscount Simon also stressed at 21 – 22 that a garden must have a certain permanence or "degree of fixity and local continuance and cannot come and go over different portions of the area according to the system of rotation employed."

39. Viscount Maugham (with whom Lord Russell of Killowen agreed) considered that it was impossible to define in precise language the meaning of the word "gardens" but he identified various characteristics of gardens such as the fact that they are prima facie

an area which is enclosed and distinct and normally have some permanency of character. He also stated at 33:

> "…the most important distinctive quality which differentiates 'gardens' within the rule from a farm taxable under rule 1 is the mode of cultivation employed. It is the character and nature of the operations on the land which mainly determine whether or not it is within the phrase 'gardens for the sale of produce.' I agree with Scott LJ [in the Court of Appeal below] that the distinction between 'farm' and 'gardens' may be expressed in general words as the difference between lands cultivated by agricultural methods and lands on which horticultural methods are employed. Produce which requires the attention of skilled men would generally be found grown in a garden. The use of the plough in such a place would be something of a rarity. The soil in the garden would usually be prepared by the employment of the homely spade and the tiresome operation of trenching and digging in manure. At any rate I am confident that that was the case when the words 'gardens for the sale of produce' were employed in the early Acts relating to income tax. Certainly, hand labour would usually be employed, and it would be very unusual if (as in this case) the land was for the most part both machine-planted and machine-hoed."

40. We think that the emphasis on the distinction between hand labour and machine work needs to be treated with caution today when even the humblest gardener is able to deploy a range of machines almost beyond imagining in 1941. Lord Wright recognised that changes in society meant that agricultural methods were starting to be used even on lands occupied as gardens. While acknowledging that the methods of cultivation and the nature of the produce grown were factors to be taken into account when considering whether particular lands are gardens or farm land, Lord Wright considered that they were not a general criterion for distinguishing the two. He also considered, at 41, that the essential characteristic of a garden is that it should be a defined unit of cultivation in relation to space and it should have a substantial and relatively permanent unity of character and purpose. In the context of that case, he held that gardens must be distinct and separate from the farm.

41. At 46 to 47, Lord Porter stressed four matters to be considered when determining whether a particular portion of land was occupied as a garden. Those four matters were:

> "(a) the unit to be considered, i.e., was the whole land worked by the same methods and the same staff, or was there some clear distinction in its treatment; (b) the method of cultivation, i.e., was it intensive and under skilled labour or not; (c) what crops were grown there; and, I think (though its importance is slight), (d) the size of the unit."

42. Lord Porter went on to state that he considered that the fact that the cultivation was effected by mechanical means would not, provided it was shown to be intensive, make it impossible to hold that the land was occupied as "gardens". He also acknowledged that methods of cultivation change so that what was once only accomplished by the spade may be carried out by mechanical means but, nevertheless,

he considered that "the large-scale operations of a farm are still likely to be distinguishable from the more individual cultivation of a garden crop".

43. Later in the same year that the House of Lords gave its judgment in *Bomford*, the Court of Session considered the meaning of "gardens" in *David Lowe & Sons Ltd v Commissioners of Inland Revenue* 24 TC 105 (*'David Lowe'*). In *David Lowe*, the taxpayer operated a farm of 137 acres of which 39 acres were used for growing vegetables which were sold in wholesale vegetable markets. Ordinary farm labour and modern farming equipment were employed and no part of the farm was cultivated by spade work. The whole of the ground was suitable for growing vegetables and there was rotation of crops, including vegetables, over the entire holding so that the vegetables were grown on different parts of the farm in different years. The General Commissioners held that the dominant purpose for which the holding was occupied was as a garden for the sale of produce and that it was worked and should be assessed as one unit. On appeal, the Court of Session, applying the tests laid down in *Bomford*, held that the facts did not support the Commissioners' conclusion. The Lord President (Normand), at 112, stated:

> "… I think that the conclusion to be drawn from their [Lordships'] speeches is that the main test is the nature and intensity of the cultivation, because intense treatment is characteristic of horticulture as compared with ordinary agriculture."

44. Lord Normand noted that not all of the members of the House of Lords in *Bomford* accepted that this test was conclusive and referred to the opinions of Lord Wright and Lord Porter. Lord Normand also laid stress on the size of the area under cultivation when considering whether land was used as a farm rather than a garden. Lord Moncrieffe agreed that the main test is whether the land has been intensively cultivated, as in a garden, or by methods of husbandry, as on a farm.

45. Lord Fleming, at 114 to 115, commented as follows:

> "As I read the judgements in the House of Lords, while the most important test is method of cultivation, it may be legitimate to consider other matters such as the nature of the crops which are produced on the holding. Are the crops such as are usually found in a market garden? Here a practical difficulty emerges because it seems clear that the same kind of crop may be found either in a market garden or on a farm. As is pointed out in the speeches of their Lordships in *Bomford* agriculture is not a static industry and from time to time there are developments both as regards the kind of crops raised and the methods of cultivation adopted on ordinary agricultural holdings."

46. We have not found it easy to discern the meaning of "garden" in section 996 ITA and how it should be applied in this case from the guidance given in *Bomford*. All but one of the five Law Lords gave an opinion. Although there seemed to be general agreement about what characteristics distinguished a garden from farming land, each of their Lordships emphasised different factors, albeit that we accept that a majority agreed that the main test related to the method of cultivation. Further, the discussion in *Bomford* must, we think, be seen in the context of the facts of that case (a mixed farm

with scattered fields used for different purposes and crops throughout) and its place in time. As Viscount Simon acknowledged at 17 and Lord Porter recognised at 46 – 47, the distinction between a garden and farm and the methods of cultivation in each change over time. In our view, what was regarded as a market garden in 1941 may not be the same thing as the market garden of 2016. We also recognise that farming methods have changed and that today they can be very intensive and are often highly skilled.

47. We also do not consider that much assistance can be gleaned from seeking to understand the policy behind the distinction between farming and market gardening. As explained by Lord Porter in *Bomford* at 44, the original policy distinction between farming and market gardening seems to be that market gardening was taxed on a trading basis albeit under what was, at the time of *Bomford*, rule 8 of Schedule B. Farmers could elect for a trading basis of computation by electing for Schedule D but the default under Schedule B was a land value based calculation, which was thought likely to produce too low a number for market gardeners given the higher profit per acre from market gardening. The focus on intensive methods makes sense in that context, but makes less obvious sense now given that both are deemed to be trades and the restrictions on the use of losses against general income apply in the same way to each.

48. It appears to us that the factors or characteristics that are relevant in determining whether land is occupied as a farm or as a market garden include the following:

(1) A garden must be a distinct and defined area. Although it need not be fenced or hedged, there should be some form of separation from land used for other purposes, especially farm land. This might be demonstrated by fencing or hedging or by some other physical feature, whether a wall, a ditch, a tree belt, an uncultivated area or otherwise.

(2) There must be a unity to the garden, so individual fields scattered among others used as farm land are not capable of being aggregated as a single garden.

(3) An area used as a garden must have a degree of permanence and continuity of function. This means that land cannot be used as a market garden in one year and as a farm field in the next.

(4) The methods of cultivation, ie labour, equipment and techniques, used on the land must be consistent with market gardening as distinct from farming. That does not mean that machinery cannot be used to grow and harvest produce but we consider that there is a distinction between a highly mechanised operation planting, tending and harvesting crops in fields and a smaller scale, although still at least to some extent mechanised, business of growing produce in a market garden. The methods of cultivation used in a market garden will generally be more intense and require a higher level of skill on the part of those working there than the methods and labour used in farming. We would expect plants to receive at least some level of individual attention in a garden, whereas on a farm the crops would usually be cultivated in a group, typically using agricultural machinery. Although there can be no bright line test, we consider that it should be possible for a tribunal to distinguish between the agricultural methods used by a farm and the horticultural methods used by a market garden notwithstanding the fact that, in modern times, even the latter are likely to use machines to a considerable extent.

(5) Scale is of some relevance, although this may be little more than an aspect of the preceding point: more intensive methods associated with market gardening

will be more likely to be carried out on a smaller scale. Caution is required however: for example, in *Monro and Cobley v Bailey* 17 TC 607 a finding that a bulb farm of around 200 acres was a garden was upheld on appeal.

(6) The produce grown on the land is a factor to be taken into account but is not usually of significant weight. Although there may be some crops, e.g. wheat, that are clearly not garden produce, many crops are grown both on farms and in market gardens and are thus of little use in determining whether the land falls within one category or the other.

(7) It may also be relevant to look at the history of the use of the land. If land was previously in use as farm land, there will need to be evidence to establish when the land acquired the characteristics of a garden and that the change in use had the necessary degree of permanence described above.

49. It is clear from the above that the test for determining whether land is occupied as a farm or as a market garden is a multifactorial one and that no element is conclusive. Factors other than those listed above may be relevant to the circumstances of a particular case. Equally, some of the factors listed above may not indicate, one way or another, whether land is a market garden in every case. It is necessary to consider all the potentially relevant factors separately. Having considered them, it is then necessary to stand back and determine whether, taking all the relevant factors into account and giving each appropriate weight, the land is a market garden or farming land.

50. At one stage in argument Ms Balmer argued that market gardening was a carve out or exception from the definition of farming in section 996 ITA and, on that basis, should be interpreted strictly. We agree with Mr Firth that there is no basis for such an argument either as a matter of general principle or on the wording of section 996.

51. Mr Firth contended that the correct conclusion on the facts would be that the asparagus growing was market gardening but his primary submission was that we should remit the case to the FTT. He submitted that although we had all the material that was before the FTT in the hearing bundle, we had not heard the evidence of Mrs Thorne and could not make a decision on whether the land used for the asparagus business was (and is) a garden.

52. Ms Balmer submitted that we had sufficient evidence, when combined with HMRC's acceptance, for the purposes of this appeal, that the asparagus was grown in fields that were separated from the other land by hedges, to decide that the asparagus was not grown in a garden and thus the asparagus business was farming. Ms Balmer contended that the asparagus was grown on land which, prior to April 2009, had been used as general farm land or pasture for Mrs Thorne's horses. The asparagus land was not enclosed or separate. The land was farmed in an agricultural, as opposed to horticultural, manner because a tractor was used to tow machinery for preparing the fields prior to planting the asparagus, planting it, weeding and, after the harvest, cutting back the asparagus fern. Apart from Wayne Lawrence, the staff engaged to work the land were also seasonal agricultural labourers. The land was, therefore, plainly not a "garden".

53. The question of whether land is a "garden" (and potentially a market garden if occupied for the purpose of growing produce for sale) is a matter of fact, to be decided in each case having regard to the factors described above. We consider that the facts as

found by the FTT or admitted by the parties do not enable us to decide with confidence whether the asparagus business was market gardening or farming. We consider that we do not have sufficient information about some relevant factors to decide whether the land on which the asparagus was grown was a garden. We do not have a clear understanding of the extent to which the land used for growing the asparagus was separate and distinct from the other land at Yew Tree Farm. Although Ms Ballmer was prepared to accept, for the sake of argument, that there were hedges separating the asparagus from the pasture, there was also mention of a rabbit-proof fence. We consider that more detail about the physical separation of the land is required. Also, we do not have a sufficient understanding of the methods of cultivation used to grow the asparagus. We consider that we would need to have a detailed understanding of the use of the tractor and other machinery and also the level of skill required to grow and harvest the asparagus. It may also be necessary to have some understanding of asparagus growing more generally in order to establish whether the distinction between farming and market gardening is a relevant one in relation to asparagus growing. Accordingly, we conclude that the case should be remitted to the FTT to consider afresh whether the land on which the asparagus was grown was a garden and thus the asparagus business was market gardening or farming.

54. As the further hearing will require a completely different approach to that taken in the Decision, involving consideration of different issues and new evidence, we consider that it is appropriate that the case should be remitted to be determined by a differently constituted tribunal. We have in mind that the previous hearing was only one day in length and appeared to focus mainly on the equestrian activities rather than the asparagus business, so we do not think that this is a case where there would be any significant advantage in having an identically constituted Tribunal consider the facts, in contrast to the position discussed in *Rank Group plc v HMRC* [2013] STC 420 at [30].

Were the equestrian activity and asparagus business a single, composite trade?

55. In view of our decision to remit the issue of whether the asparagus business was market gardening or farming, we do not consider that it would be appropriate to decide whether the equestrian activity and the asparagus business were a single composite trade as a matter of general principle. First, if the asparagus growing is farming then the question will be determined by the application of section 9 ITTOIA. If the asparagus growing is market gardening, the question of whether the appellant is carrying on one trade or two is a question of fact not law as is made clear by Rowlatt J in *Scales*. In that case, we consider that the evidence that has been heard in relation to the question of whether the land on which the asparagus is grown is a garden or farm land may also be relevant to the issue of whether there is one trade or two. This is because factors such as the degree of separation of the asparagus land from the pasture, the methods of cultivation and the interchangeability or otherwise of staff may shed light on the extent, if at all, to which the activities had the required inter-dependence or unity to amount to a single trade.

Disposition

56. For the reasons given above, Mrs Thorne's appeal against the Decision is allowed. The Decision is set aside and we remit the case to a differently constituted First-tier Tribunal to consider whether the asparagus business was market gardening or farming and to determine whether there was a single, composite trade.

Greg Sinfield
Upper Tribunal Judge

Sarah Falk
Upper Tribunal Judge

Release date: 28 July 2016

Appendix

Income Tax (Trading and Other Income) Act 2005

9 Farming and market gardening

(1) Farming or market gardening in the United Kingdom is treated for income tax purposes as the carrying on of a trade or part of a trade (whether or not the land is managed on a commercial basis and with a view to the realisation of profits).

(2) All farming in the United Kingdom carried on by a person, other than farming carried on as part of another trade, is treated for income tax purposes as one trade.

…

Income Tax Act 2007

64 Deduction of losses from general income

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

(a) carries on a trade in a tax year, and
(b) makes a loss in the trade in the tax year ("the loss-making year").

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

(a) for the loss-making year,
(b) for the previous tax year, or
(c) for both tax years.

…

(8) This section needs to be read with-

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

…

Restriction on relief for uncommercial trades

66 Restriction on relief unless trade is commercial

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

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

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

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

(4) If the trade forms part of a larger undertaking, references to profits of the trade are to be read as references to profits of the undertaking as a whole.

…

996 Meaning of "farming" and related expressions

(1) In the Income Tax Acts "farming" means the occupation of land wholly or mainly for the purposes of husbandry, but does not include market gardening (see subsection (5)).

(2) In subsection (1) "husbandry" includes—

(*a*) hop growing, and

(*b*) the breeding and rearing of horses and the grazing of horses in connection with those activities.

(3) For the purposes of the Income Tax Acts the cultivation of short rotation coppice is regarded as husbandry and not as forestry.

(4) In the Income Tax Acts "woodlands" does not include land on which short rotation coppice is cultivated.

(5) In the Income Tax Acts "market gardening" means the occupation of land as a garden or nursery for the purpose of growing produce for sale.

…