Appeal number: UT/2017/0169

Inheritance tax – business property relief – s.105 Inheritance Tax Act 1984 – livery business – whether wholly or mainly consisting of the making or holding of investments – whether FTT applied an incorrect test – whether FTT's conclusion disclosed an error of law – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

-and-

THE PERSONAL REPRESENTATIVES OF THE ESTATE OF MAUREEN M VIGNE (DECEASED) **Respondents**

TRIBUNAL: **JUDGE KEVIN POOLE**
JUDGE ASHLEY GREENBANK

Sitting in public at the Royal Courts of Justice, London on 13 July 2018

Christopher McNall, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr Patrick Vigne, one of the Respondent executors, appeared in person

DECISION

Introduction

1. This is the appeal of the appellant Commissioners from the decision of the First-tier Tribunal ("FTT") (Judge Geraint Jones QC and John Adrain FCA), neutral citation [2017] UKFTT 0632 (TC). In that decision ("the FTT Decision"), the FTT allowed the appeal of the respondent executors, holding that the late Mrs Maureen Vigne's livery business ("the Business") did not consist wholly or mainly of making or holding investments and accordingly was "relevant business property" thereby qualifying for business property relief under the Inheritance Tax Act 1984 ("IHTA 84").

2. The appellants appeal against the FTT Decision with permission of the Upper Tribunal (Judge Roger Berner).

The FTT Decision

3. The FTT made the following findings of fact (at [1] and [22] to [37] of the FTT Decision):

> "1. The late Mrs Maureen Vigne died on 29 May 2012. At that time she was the sole owner of approximately 30 acres of land which throughout this appeal has been referred to as Gravelly Way livery stables, Penn Bottom, Penn, Buckinghamshire. She did not reside in a residence on that land, but elsewhere.
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> …
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> 22. … Instead of us setting out a list of findings of fact, we make it clear that where we summarise the evidence given by [the witnesses], we are summarising factual evidence which we accept as the truth.
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> 23. We have so far said very little about the use to which the deceased's 30 acres (or thereabouts) was put. Mr.Vigne's evidence was that after his late father's death in 2005 his now deceased mother took over the running of what, at that time, was a DIY livery business. He explained that in the equestrian world there are commonly four levels of livery in this country, being:
>
> > (a) Grass livery – where a horse has a right to reside in a field, but is not provided with a stable.
> >
> > (b) DIY livery – where the horse, in addition to having the right to reside in a field, is additionally provided with a stable with day to day care wholly provided by the horse's owner.
> >
> > (c) Part livery – where day-to-day care for the horse is shared between the livery operator and the horse owner.
> >
> > (d) Full livery – where the day-to-day care of the horse and all its associated needs are supplied by the livery operator.

24. Mr Vigne explained that after his late father's death a decision was taken to let the entire land to Mr John Lye. He remained in occupation until sometime in 2008 when he ceased to be the tenant or licensee of the land, but agreed to become the Yard Manager for the business which the deceased then decided to operate. It was implicit in what Mr Vigne said in evidence that the operation of a livery business by his father had come to an end sometime in 2005 when Mr Lye took over the land and that once he handed it back (to use the expression used in evidence) the deceased began to run a livery business on and from the land.

25. Mr Vigne's evidence was that from 2008 the business operated on or from the land, whilst coming under the general heading of "a livery", did not fit neatly into any of the four categories mentioned at paragraph 23 above. That, he said, was because when the livery was relaunched in 2008 it was decided that in a bid to give the business a competitive advantage, services over and above those which would usually be included in grass livery and/or DIY livery would be included in the package offered by the business. The evidence was that the package was to and did include:

> (1) The provision of worming products, including administering them where and when necessary (if an owner was unable and/or unwilling so to do), on a quarterly basis.
>
> (2) Providing the horses with hay feed during the winter months when the grass might not provide a sufficient food source. A hay crop was grown on part of the land referred to as the hayfield.
>
> (3) Removing horse manure from the fields in which the horses spent most of their time.
>
> (4) Undertaking a daily check of the general health of each horse.

26. It is necessary to understand the relevance or significance of each of the foregoing. Mr Vigne explained that an efficient and consistent worming programme was essential for two reasons. The first, rather obviously, relates to the general well-being and health of each individual horse. The second is that it helps to protect the goodwill of the business because if a horse develops certain kinds of illness because of a lack of regular worming, there is a significant risk of other horses being adversely affected and becoming sick. That would reflect badly upon the livery operator. The evidence is that the business sourced the appropriate worming products which, we were told, would vary from time to time (upon professional advice), but each horse owner would usually administer the worming product although the livery staff would do so if a particular owner failed to do so for any reason whatsoever (including absence on holiday or an inability to administer the appropriate medication).

27. The provision of hay during the winter probably speaks for itself. Like humans, horses need an adequate diet. When grass does not grow

in the winter months the food supply has to be supplemented. Ordinarily, in a grass livery or DIY livery situation that would be the responsibility of each individual horse owner; not that of the livery operator. There is an obvious attraction to each horse owner in having the livery staff provide this additional feed as it obviates the need for regular attendance upon the horse, if it is known that its dietary requirements are being met as a result of somebody else providing the appropriate food.

28. The third service was said to be the removal of manure from the fields. In answer to a question from me, Mr Vigne explained that usually each individual horse owner would be responsible for clearing away the manure deposited by his/her horse in his/her section of the livery field. Perhaps naïvely, I asked how each horse owner would know which pile of manure had been deposited by his/her horse. It was then explained that the horses would not usually mix communally in a single field but would be in a subdivided field so that each horse would have its designated area. The subdivision might be as rudimentary as the provision of a couple of strands of wire or tape but would be sufficient to keep each horse within its designated area. In that way each horse owner would know which part of the field had to be cleared of manure by him/her. Mr Vigne gave evidence that the removal of manure is, in some respects, contrary to the interests of an investment landowner because the manure, being organic material, would serve to fertilise the land and contribute to its maintenance or improvement. He explained that the reason for removing the manure was that if left in significant quantities, it has the potential to impact adversely upon animal health. Thus, he explained, the livery owned a manure removal machine (much like a very large vacuum cleaner) which hoovered up the manure before it was deposited onto a manure heap. The livery then paid a local farmer to take the manure away.

29. Mr Vigne explained that the livery also undertook a daily health check of each horse. He explained that this would, initially, be a visual inspection of the horses at large, where, to the trained eye, any obvious problems such as lameness, cuts or abrasions or bloating should be readily apparent. If, upon such visual inspection there was cause for concern in respect of any individual horse, then a closer hands on inspection would be undertaken. The evidence was that if the condition of any given horse required veterinary attention the livery would contact the appropriate owner and seek his/her permission to call the vet (because that owner would be responsible for the vet's fees), save in the case of an emergency where the livery contract provided for the livery itself to call for a vet to attend (again with the horse owner being responsible for the vet's fees).

30. So far as employment is concerned, Mr Vigne's evidence is that Mr Lye, who was a self-employed Yard Manager, did not remain for long and so he, Mr Vigne acted as Yard Manager himself prior to Jo being taken on as the Yard Manager in April 2010. She left in May 2011 and handed over to Barbara, who left in December 2011 and the job then went to Zoe. Each of those Yard Managers was self-employed and part-time.

That each was remunerated is reflected in the business accounts. The evidence is that they worked about 20 hours per week.

31. A Business Plan dated 20 August 2009 records that the business intended to expand so as to provide part livery (in the sense described above) as well as providing DIY livery for those who wished to care for their own horses. It records that although there were only 11 stables at that time, planning permission existed for further stables and storage rooms to be erected.

32. At about the same time, in 2009, the business applied for planning permission to erect a temporary dwelling for its yard manager. The Chiltern District Council refused that planning permission on 27 October 2009. In our judgement, the significance of the application, regardless of it being unsuccessful, is that it indicates the expansion of the business and the perceived need for the Yard Manager to be resident on site. That is inconsistent with a business operating a grass or purely DIY livery arrangement. The provision of on-site security is not part and parcel of grass or DIY livery and the provision of accommodation for an on-site manager cannot be explained on that basis.

33. We were referred to the accounting summary for the Gravelly Way business for the period 1 June 2010 - 31 May 2012. It includes reference to various contractors to whom payments were made, totalling £17,400. Mr Vigne explained that labour was usually posted to the appropriate category of work with, for example, the removal of manure being posted under 'property maintenance'.

34. For the year ended 31 March 2011 we note that the turnover was shown as £20,921. The gross profit was extremely modest at just £63 after expenses, including horse care, feed and bedding, utilities, property maintenance, insurance, professional and accountancy fees and depreciation were taken into account. The lack of profitability for this year is in large part explained by the one off cost, in excess of £3000, referable to legal and planning costs in respect of the failed planning application to which we have referred above. The expenditure that we have identified was not reflected in the expenditure up until either 2005, or 2008, from which time, as we find, the business developed beyond being a purely DIY livery into a livery providing the services to which we have referred, albeit falling short of part livery.

35. During cross-examination, Mr Vigne also explained that the livery ensures that strip grazing takes place by positioning fences or subdivisions in the fields at appropriate places, with the intention of preventing anyone horse from over grazing. Apparently, horses, just like humans, will often over eat if the opportunity arises.

36. The foregoing is a summary of the evidence given by Mr Vigne, in chief. When cross examined he described worming as a necessary activity for a reputable livery business with particular reference to maintaining the goodwill of the business (as discussed above). He explained that the Yard Manager would have (or be expected to have) a

> BHS stage 4 (or similar) qualification in equine management, which, we are satisfied, would not be necessary for grass or DIY livery provision.
>
> 37. Mr Vigne was asked questions about the business' records because part of his case was that several horse owners attended the premises irregularly or, at least, insufficiently regularly to give his/her horse the degree of care and attention normally required by a horse. Mr Vigne acknowledged that the horses at Gravelly Way were not thoroughbred or delicate horses, but, rather, more robust beasts who would not always require night-time stabling, provided that, in very cold weather, blankets (something akin to horse coats) were available to keep out the harshness of very low temperatures."

4. Before the bulk of its findings of fact, the FTT set out extracts from the relevant statutory provisions, followed (at [9] to [19] of the FTT Decision) by a discussion of the meaning of those provisions in the present context, in the light of the various cases to which it had been directed.

5. After summarising the appellant Commissioners' submissions before it, the FTT set out the basis of its decision at [44] to [46] of the FTT Decision as follows:

> "44. … The essential question requires us to begin by asking the simple question: was the deceased carrying on a business, wholly or mainly, of holding investments. It is not correct to start with the preconceived idea that in any given situation, the business is wholly or mainly one of holding investments and then to ask whether there are factors that result in that preliminary view being altered. The proper starting point is to make no assumption one way or the other, but to establish the facts and then to determine whether, taken together, they indicate that the business is wholly or mainly one of holding investments.
>
> 45. We are left in no doubt that the Gravelly Way business was a genuine livery business which, from 2008 onwards, was developed so as to be a recognisable livery business offering significantly more than the mere right to occupy a particular parcel of land. We are satisfied that any objective observer who had visited the site 2008 – 2012 would have concluded that a business was being run from and on the land which did provide services to those who kept their horses on the land and that no properly informed observer could or would have said that the deceased was in the business of "*holding investments*". That, in our judgement, would have been a wholly artificial analysis. We agree with the *obiter dicta* of Mr Justice Deeny to the effect that if the provision of services is inconsistent or incompatible with the operation of a business of "holding investments", then it is highly likely that the proper analysis is that there is no business of "holding investments" which, in our judgement, must be *sui generis* with the rather obvious investment businesses earlier identified in section 105(3) of the 1984 Act.
>
> 46. That leaves us with a consideration of the additional statutory word "*mainly*". The first observation is that this does not require a consideration of whether any identified services or business activity contribute more to the income generated and/or profitability than the

> ability of a third party to occupy any part of the land. The central issue is whether the "business" is mainly one of holding investments. We do not dissent from the view that looking at the proportion of income derived from the use and occupation of land, as opposed to the provision of services, is irrelevant any more than it is irrelevant to consider the reality of what takes place on and in association with the land. In our judgement that reality is the provision of enhanced livery, albeit stopping short of part livery (as defined by Mr Vigne), but nonetheless providing a level of valuable services to the various horse owners, which prevents it being properly asserted that the business was mainly one of holding investments."

6. Accordingly, the FTT allowed the appeal.

7. In granting permission to appeal, the Upper Tribunal (Judge Roger Berner) said this:

> "… [HMRC] have put forward five grounds of appeal which tend to overlap to a large extent… In refusing permission to appeal, the FTT expressed the view that, contrary to HMRC's case, set out in particular in Ground 4 of the grounds of appeal, the FTT had firmly in mind that the relevant question, according to the statutory test, was whether [the business] was a business consisting *mainly* of holding an investment. By reference to the FTT's decision as a whole, and in particular paragraph 46, there is force in that view. But I do not consider that would detract from HMRC's overall case. In *Revenue and Customs Commissioners v Pawson* [2013] UKUT 050, Henderson J (as he then was) found that the tribunal had correctly focussed on the "mainly" criterion; it was nonetheless open to him to find on appeal that the tribunal had reached an untenable conclusion. That, in my judgment, is also a matter open to argument in this case."

The legislation

8. This appeal is concerned with business property relief. The legislation provides (in relevant part) as follows:

> "**104 The relief**
>
> (1) Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced –
>
> > (a) in the case of property falling within section 105(1)(a)… below, by 100 per cent;
> >
> > …
>
> **105 Relevant business property**

> (1) Subject to the following provisions of this section…, in this Chapter "relevant business property" means, in relation to any transfer of value, –
>
> (a) property consisting of a business or an interest in a business…
>
> …
>
> (3) A business or interest in a business, or shares in or securities of a company, are not relevant business property if the business or, as the case may be, the business carried on by the company consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments."

9. There was no dispute that the deceased carried on a business; the issue was whether that business consisted "wholly or mainly of making or holding investments".

The Arguments

10. On behalf of HMRC, Mr McNall identified five grounds of appeal, which can in very broad terms be summarised as follows:

> (1) The FTT had incorrectly applied the principles to be derived from *IRC v George* [2003] EWCA Civ 1763 and *McCall v HMRC* [2009] NICA 12. In essence, by reference to those decisions, it was clear that the deceased was carrying on a business which was wholly or mainly an investment business; if similar accommodation and services were provided to humans rather than horses, that would clearly have been the case and it was anomalous that the result should be different simply because the accommodation and services were provided for horses.
>
> (2) The FTT had erred in law in regarding the "critical question" posed in *HMRC v Pawson* [2013] UKUT 50 as "transposing the statutory test"; if it had followed the approach in *Pawson* (which it was bound to, as a matter of binding precedent) then it would necessarily have dismissed the appeal.
>
> (3) No tribunal, acting judicially and properly instructed as to the relevant law, could have come to the conclusion that the deceased's business qualified for relief; the only conclusion reasonably open to the FTT on the facts of the case was that the livery land and stables were held mainly as an investment. This challenge, based on *Edwards v Bairstow* [1956] AC 14, was effectively an extension of Mr McNall's first ground of appeal.
>
> (4) The FTT had erred in law in framing 'was this a business of holding investments?' as the 'ultimate essential question'. In doing so, the FTT had formulated a new, incorrect, test and in consequence reached an incorrect conclusion.

(5) The FTT had placed various different glosses on the statutory language, all of which were wrong in various different ways, and this had led it to reach the wrong conclusion. This was effectively an extension of the fourth ground of appeal.

11. Mr Vigne argued essentially that:

(1) Any errors of law in the FTT Decision were minor and not material to the ultimate decision; it was clear when the decision was read as a whole that the FTT had applied the correct test. In addition, the decision did not give a comprehensive account of all the services that had been provided, as was apparent from a brief consideration of the evidence before the FTT; the four particular services identified in the decision were only the ones which the FTT had identified as critical in tipping the balance.

(2) The comparison between a property letting activity such as the holiday home, industrial unit or holiday park cases and the present case was a false one. A better parallel would be a child nursery business, which would clearly not be an investment activity.

(3) When comparing the turnover of the Business with the rental potentially achievable on a letting of the land, it was clear that the extent of additional activities was sufficient to take the Business outside the realm of simple "investment"; and the growth in both turnover and expenses of the Business from the earlier times when it had been a simple DIY livery business demonstrated the same thing.

(4) Taken in the round, there was more than adequate evidence before the FTT to enable it to reach the conclusion that it had, which therefore ought not to be disturbed.

Discussion

The Upper Tribunal's jurisdiction on an appeal

12. The Upper Tribunal's jurisdiction on an appeal from the FTT is conferred by section 11 of the Tribunals, Courts and Enforcement Act 2007, which provides that any party has a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal …". Thus appeals to the Upper Tribunal are limited to questions of law only, that is to say, whether the FTT made an error of law in its decision which needs to be corrected.

13. Errors of law can take a number of forms. The most obvious is where a tribunal simply misinterprets the law and therefore reaches a wrong conclusion, even though there is no dispute about the facts upon which it based its decision. More subtle errors of law have however been recognised by the courts, which stray away from the area of pure law and into the area of findings of fact.

14. At the very extreme, it is well established that even findings of primary fact by the FTT (for example, a finding that a particular event took place) can be overturned on

appeal if "the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it" (per Lord Normand in *Commissioners for Inland Revenue v Fraser* [1942] 24 T.C. 498, 501, approved by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14). A fact-finding tribunal (such as the FTT) will often draw inferences from findings of fact that it makes, and where those inferences are themselves inferences of primary fact (for example "because we have found that events A and B happened, we infer that event C must also have happened"), they are susceptible to challenge on appeal only on the same basis.

15. A commonly cited statement of the law on this area was given by the Court of Appeal in *Georgiou v Customs and Excise Commissioners* [1996] STC 463. Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. … It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure … to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

16. Once a tribunal has made its findings of primary fact, it will generally have to decide whether those facts answer to some particular description or satisfy some particular test. So, for example, the General Commissioners in *Edwards v Bairstow* had made findings of primary fact as to what the taxpayer had done, then reached a determination that those actions did not amount to "an adventure in the nature of trade"; the VAT and Duties Tribunal in *Proctor and Gamble UK v Revenue & Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 made findings of primary fact about the characteristics of Pringles, then decided that they were therefore "similar to potato crisps and made from the potato"; and in the present case the FTT made findings of primary fact about the nature of the deceased's Business and decided that

on the basis of those findings it was not a business which consisted wholly or mainly of making or holding investments.

17. In *Edwards v Bairstow,* Lord Radcliffe said this (at p 36):

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. *But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. [Emphasis added]* I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

18. He went on to say this:

> "If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade."

19. In other words, after examining the primary facts as found by the General Commissioners, he concluded that they had made an error of law in finding that those facts did not amount to "an adventure in the nature of trade".

20. In *Proctor & Gamble*, Jacob LJ in the Court of Appeal said this:

> [9] Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment—what is commonly called a value-judgment.
>
> [10] I gathered together the authorities about this in *Rockwater v Technip* [2004] EWCA (Civ) 381, [2005] IP & T 304:
>
> > '[71] … In *Biogen v Medeva* [1997] RPC 1 at p 45 Lord Hoffmann said when discussing the issue of obviousness:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation…"
>
> [72] Similar expressions have been used in relation to similar issues. The principle has been applied in *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 at 613–614 (per Robert Walker LJ) in the context of a decision about "fair dealing" with a copyright work; by Hoffmann LJ in *Re Grayan Building Services Ltd (in liquidation)* [1995] Ch 241 at 254, [1995] 3 WLR 1 at 12 in the context of unfitness to be a company director; in *Designer Guild v Russell Williams (Textiles) Ltd* [2001] IP & T 277, [2001] 1 All ER 700 in the context of a substantial reproduction of a copyright work and, most recently in *Buchanan v Alba Diagnostics Ltd* [2004] UKHL 5 in the context of whether a particular invention was an "improvement" over an earlier one. Doubtless there are other examples of the approach.
>
> [73] It is important here to appreciate the kind of issue to which the principle applies. It was expressed this way by Lord Hoffmann in *Designers Guild*:
>
> > "Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle" '.
>
> [11] It is also important to bear in mind that this case is concerned with an appeal from a specialist tribunal. Particular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker; see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at [30], [2008] 4 All ER 190 at [30], [2008] 1 AC 678 cited by Toulson LJ."

21. Mummery LJ made similar observations:

> "[73] The tribunal's decision in favour of Her Majesty's Revenue and Customs ('HMRC') was not an absolute answer to a pure question of fact

> or to a pure question of law. It was a judgment of mixed fact and law on the classification of Regular Pringles for value added tax ('VAT') purposes. 'Similar to' and 'made from' are loose-textured concepts for the classification of the goods. They are not qualified by words such as 'wholly' or 'substantially' or 'partly' which have crept into the legal arguments. Those words are not in the legislation itself. The tribunal's conclusions were on matters of fact and degree linked to comparisons with other goods and related to the composition of the goods themselves. Some aspects of the similarity of Regular Pringles to potato crisps are close to the centre, others are on the fringes. This exercise in judgment is pre-eminently for the specialist tribunal entrusted by Parliament with the task of fact finding and with using its expertise to make the first level decision, subject only to appeal on points of law.
>
> [74] For such an appeal to succeed it must be established that the tribunal's decision was wrong as a matter of law. In the absence of an untenable interpretation of the legislation or a plain misapplication of the law to the facts, the tribunal's decision that Regular Pringles are 'similar to' potato crisps and are 'made from' the potato ought not to be disturbed on appeal. I cannot emphasise too strongly that the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the tribunal entitled to reach its conclusions?* It is a misconception of the very nature of an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the tribunal."

22. In the present case, in deciding whether the Business carried on by the deceased consisted wholly or mainly in making or holding investments, the FTT was carrying out its own multi-factorial assessment, on the basis of the primary facts which it had found.

23. None of the relevant primary facts found by the FTT are disputed by the appellant. It is therefore clear that the Upper Tribunal can only overturn the FTT's decision if we are satisfied that the FTT applied the wrong legal test, or if it plainly misapplied the correct legal test to the facts which it found.

Did the FTT apply the wrong legal test?

24. Mr McNall criticises the FTT for having either mis-stated or placed a gloss on the statutory test in the following key paragraphs of the FTT Decision:

> (1) Paragraph [11], in which, after reciting that the statutory language should be applied "without any artificial gloss", the FTT immediately did so by restating the statutory question as being "was the deceased operating an investment business"?
>
> (2) Paragraph [16], where it expressed the view that "section 105 of the 1984 Act is essentially driving at businesses which can properly be characterised as investment businesses, that is, where there is little or no element of trading or the provision of services in consideration of monies received." In the same

paragraph, it also explicitly took account of "any manifestations on the part of the landowner as to whether the relevant land is being held purely as a long or medium term investment."

(3) Paragraph [18], in which it referred to "the ultimate essential question: was this a business of holding investments?". In doing so, it disregarded the "wholly or mainly" part of the statutory wording.

(4) Paragraph [43], where the FTT expressed the view that the accounts of the Business "do not bear the hallmarks of the accounts of a purely investment business", implying that section 105(3) would only disapply relief if this were the case (taking no account of the disapplication that should also follow if the Business were "mainly", rather than "purely" an investment business).

(5) Paragraph [44], where the FTT appeared to contradict a key passage in the judgment of Henderson J in *Pawson*, by accusing him of "transposing the statutory test" by posing as "the critical question… whether these services *[i.e. the services that were provided in association with the letting of a holiday letting property]* were of such a nature and extent that they prevented the business from being mainly one of holding Fairhaven as an investment."

(6) Paragraph [45], where it stated that "no properly informed observer could or would have said that the deceased was in the business of 'holding investments'.

25. We agree that there are parts of the FTT Decision in which the FTT failed to include reference to the "wholly or mainly" part of section 105(3) IHTA 84 in its various repetitions of the statutory test. When the decision is read as a whole, however, it is clear that the FTT had fully in mind the "wholly or mainly" requirement, indeed in its final conclusions in paragraph [46] it explicitly addressed the point, concluding that it was "the provision of enhanced livery, albeit stopping short of part livery (as defined by Mr Vigne), but nonetheless providing a level of valuable services to the various horse owners, which prevents it being properly asserted that the business was mainly one of holding investments."

26. In a similar way, although the reference to the "properly informed observer" in paragraph [45] is perhaps unfortunate, it is clear that from the remainder of paragraph [45] and paragraph [46] that the FTT is applying the correct test by considering the business as a whole and all of the services provided to horse owners.

27. As to the FTT's apparent contradiction of Henderson J in *Pawson*, we do not consider there to be anything in the point. It must be remembered that Henderson J's comments were made in the context of his preliminary statement at [42] that

> "I take as my starting point the proposition that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. Further, it is clear from the authorities that such an investment may be actively managed without losing its essential character as an investment".

28. The FTT's statement at [44] of the FTT Decision to the effect that Henderson J's comments cited at [24(5)] above were a transposition of the statutory test, whilst somewhat unhappily expressed, does not in our view amount to an error of law which undermines the FTT Decision as a whole. It is clear that in effect the FTT was simply taking the view that the proposition expressed by Henderson J as being an appropriate "starting point" for a managed holiday let property business was not necessarily also appropriate for a livery business of the type under consideration in this appeal, which it considered to be fundamentally different. Accordingly, as the FTT did not consider the deceased to have been owning the land "in order to obtain an income from it", the "presumption of investment activity" referred to in the comments of Henderson J was quite simply inapplicable to the present case, and accordingly the statutory wording should be applied *de novo* and without any presumption of the type referred to by Henderson J in *Pawson*. Mr McNall's arguments appeared to be based on a submission that any business involving exploitation of land should, as a matter of law, be assumed to be wholly or mainly a business of investment unless the taxpayer could establish otherwise. This clearly overstates the position; *Pawson* makes it clear that such an assumption only applies to "owning and holding land in order to obtain an income from it", a much more restricted proposition. We also note that Briggs LJ in the Court of Appeal, in refusing permission to appeal in *Pawson*, said this:

> "I accept Mr Gordon's submission… that there is no presumption that requires to be rebutted, that a business, which consists of the exploitation of land for profit, is an investment business. Of course it must be looked at in the round."

29. Accordingly we are satisfied that when the FTT Decision is read as a whole, the FTT applied the correct legal test.

Did the FTT misapply the test to the facts in reaching its decision?

30. The question that then arises is whether, given the facts of the case as the FTT found them, its conclusion that the Business was not "wholly or mainly… making or holding investments" was one which it was entitled to reach. It is important to recognise that as set out above, the function of this Tribunal is not to reach its own conclusion on the point, but to decide whether, on the evidence before it, the FTT was entitled to reach the conclusion that it did.

31. Deciding whether the particular activities of the deceased amounted wholly or mainly to a business of making or holding investments in our view is an exercise which in our view clearly "involves the application of a not altogether precise legal standard to a combination of features of varying importance" (see Lord Hoffmann in *Designers Guild* referred to at [20] above) and "a multi-factorial assessment based on a number of primary facts" (see Jacob LJ in *Proctor & Gamble*, *ibid*). As such, it is clear that this Tribunal should be "slow to interfere" and should not reverse the FTT's decision unless it has "erred in principle".

32. Mr McNall's main criticisms were that the services offered as part of the Business in association with the right to occupy land were no more extensive than those offered to holiday home guests in *Pawson* and were less extensive than those offered

in a number of other FTT decisions relating to holiday accommodation, self-catering accommodation and business centre tenancies where the activities of the property owner were all found to be "wholly or mainly the making or holding of investments"; in reaching the conclusion which it had, the FTT had clearly therefore applied the wrong legal test to the facts found by it and this Tribunal ought to intervene in order to ensure the adoption of a consistent approach by the FTT.

33. He had a number of other criticisms, all of which were addressed to the weight which he submitted should or should not have been given to various factors in the FTT's deliberations.

34. In *George*, Carnwath LJ (at [12]) endorsed the Special Commissioner's comment that:

> "[T]here is a spectrum at one end of which is the exploitation of land by granting a tenancy coupled with sufficient activity to make it a business, which may be activity in granting tenancies rather than activity in relation to the tenancy once granted. At the other end of the spectrum, while land is still being exploited, the element of services means that there is a trade, such as running a hotel, or a shop from premises owned by the trader."

35. He also confirmed (at [13]) that it is necessary to look at the business "in the round" in establishing where on this spectrum it lay.

36. We consider that all Mr McNall's criticisms of this aspect of the FTT's decision are effectively either based on the presumption that the Business was essentially one which, involving the exploitation of land, fell at the "investment" end of the spectrum (a presumption which the FTT declined, and was not required, to make) or they amount in effect to an assertion that the FTT placed inappropriate weight on the various factors identified by it when making its multi-factorial assessment of whether the Business consisted wholly or mainly of making or holding investments. In particular, he argued that if the Court of Appeal's analysis in *George* were applied properly, and the Business were regarded as an "actively managed letting business (with the guests being horses and not people)", then the additional services provided were not of a sufficient nature and extent to allow the Business to qualify for the relief.

37. We do not consider there is enough in these criticisms to justify any interference with the conclusion which the FTT reached. There is no clear bright line between businesses which qualify for the relief and those that do not. We are satisfied that the FTT applied the correct legal test and that the conclusion it reached was one which it was entitled to reach on the basis of the evidence before it. It is irrelevant whether we, or another panel of the FTT, might have reached a different conclusion.

Disposition

38. We accordingly find that none of the grounds of appeal is made out. The appeal is therefore DISMISSED.

Costs

39. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

UPPER TRIBUNAL JUDGE KEVIN POOLE
UPPER TRIBUNAL JUDGE ASHLEY GREENBANK

RELEASE DATE: 31 OCTOBER 2018