UT Neutral citation number: [2026] UKUT 00219 (TCC)

UT (Tax & Chancery) Case Number: UT/2025/000028

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL

Heard on: 3, 5 and 6 March 2026
Written representations: 13 March 2026
Judgment date: 12 June 2026

CAPITAL GAINS TAX – limited liability partnership – whether carrying on business with a view to profit – section 59A Taxation of Chargeable Gains Act 1992 – yes – appeal dismissed

PROCEDURE – whether issues raised in a respondents' notice required permission to appeal – no – discovery assessment – section 29 Taxes Management Act 1970 – whether discovery made – yes – respondents' cross-appeal dismissed

Before

MR JUSTICE EDWIN JOHNSON

JUDGE ASHLEY GREENBANK

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

(1) GCH CORPORATION LIMITED
(2) GCH ACTIVE LLP (IN LIQUIDATION) BY GREGORY HUTCHINGS
(3) G F HUTCHINGS CHILDREN'S SETTLEMENT
(4) G F HUTCHINGS NO. 1 SETTLEMENT
(5) G F HUTCHINGS NO. 3 SETTLEMENT

Respondents

Representation:

For the Appellants: Sarah Black, Counsel, and Susanna Mockford, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

For the Respondents: Oliver Marre, Counsel, instructed by PB Associates

DECISION

INTRODUCTION

1. This is an appeal by the Commissioners for His Majesty's Revenue and Customs ("HMRC") against a decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 17 October 2024 (the "FTT Decision")[1].

2. The Respondents are GCH Corporation Limited (the "Company"), GCH Active LLP (the "LLP") (now in liquidation), and three trusts, the G F Hutchings Children's Settlement (the "Children's Trust"), the G F Hutchings No.1 Settlement (the "No.1 Trust"), and the G F Hutchings No.3 Settlement (the "No.3 Trust"). We refer to the Children's Trust, the No.1 Trust, and the No.3 Trust together as the "Trusts". At the time of the transactions that are relevant to this appeal, the Company and each of the Trusts were members of the LLP.

3. The substantive issues in this appeal concern the tax treatment of a "tax mitigation scheme" (to adopt the words of the FTT). The scheme was designed to reduce or eliminate tax on capital gains accruing on the redemption of certain loan notes, which the Company and the Trusts acquired in exchange for shares which they sold as part of the takeover of another company in which they had invested. The key steps in the scheme involved the contribution of the loan notes by the Company and the Trusts to the LLP and the subsequent redemption of the loan notes by the LLP after it had been put into liquidation.

4. In the FTT Decision, the FTT allowed the Respondents' appeals against closure notices issued to the Company and the LLP and against discovery assessments issued to each of the Trusts. We have set out details of the issues before the FTT below. In summary, the FTT allowed the Respondents' appeals on the grounds that, at the time of the transfer of the loan notes to the LLP, the LLP was to be treated as a partnership for the purpose of tax on capital gains because the LLP was, at that time, carrying on a business with a view to profit (section 59A(1) Taxation of Chargeable Gains Act 1992 ("TCGA")). HMRC appeals the FTT Decision with the permission of the FTT.

5. Before the FTT, the Respondents also argued that the LLP was carrying on a trade at the time of the transfer of the loan notes to the LLP. In the FTT Decision, the FTT concluded that the LLP was not carrying on a trade. The Respondents challenge that conclusion as part of this appeal. The FTT also dismissed the Trusts' appeals against the discovery assessments on the grounds that the conditions in section 29 Taxes Management Act 1970 ("TMA") for the issue of the discovery assessments were not met. The Trusts seek to challenge that conclusion of the FTT. There is a question for this tribunal as to whether the Trusts require permission to appeal in order to do so, and if so whether permission should be granted.

RELEVANT LEGISLATION

6. It will assist our explanation of the issues on this appeal, if we first set out some of the relevant legislation.

[1] The FTT Decision is reported with neutral citation number [2024] UKFTT 00922 (TC) and at [2025] SFTD 661. In this decision notice, we refer to paragraphs in the FTT Decision in the format "FTT [xx]". The paragraph numbers are taken from the version of the decision that was in our bundles and was issued by the FTT. The numbering of the paragraphs in the SFTD version correctly follows that version. There are some discrepancies in published versions with the neutral citation.

7. As we have described above, the treatment of the contribution of the Loan Notes to the LLP turns on whether the LLP is treated as a partnership for the purpose of tax on capital gains. The relevant provision is in section 59A TCGA. It provides as follows:

> **59A Limited liability partnerships**
>
> (1) Where a limited liability partnership carries on a trade or business with a view to profit–
>
> (a) assets held by the limited liability partnership are treated for the purposes of tax in respect of chargeable gains as held by its members as partners, and
>
> (b) any dealings by the limited liability partnership are treated for those purposes as dealings by its members in partnership (and not by the limited liability partnership as such);
>
> and tax in respect of chargeable gains accruing to the members of the limited liability partnership on the disposal of any of its assets shall be assessed and charged on them separately.
>
> (2) For all purposes, except as otherwise provided, in the enactments relating to tax in respect of chargeable gains–
>
> (a) references to a partnership include a limited liability partnership in relation to which subsection (1) above applies,
>
> (b) references to members of a partnership include members of such a limited liability partnership,
>
> (c) references to a company do not include such a limited liability partnership, and
>
> (d) references to members of a company do not include members of such a limited liability partnership.
>
> (3) Subsection (1) above continues to apply in relation to a limited liability partnership which no longer carries on any trade or business with a view to profit–
>
> (a) if the cessation is only temporary, or
>
> (b) during a period of winding up following a permanent cessation, provided–
>
> (i) the winding up is not for reasons connected in whole or in part with the avoidance of tax, and
>
> (ii) the period of winding up is not unreasonably prolonged,
>
> but subject to subsection (4) below.
>
> (4) Subsection (1) above ceases to apply in relation to a limited liability partnership–
>
> (a) on the appointment of a liquidator or (if earlier) the making of a winding-up order by the court, or
>
> (b) on the occurrence of any event under the law of a country or territory outside the United Kingdom corresponding to an event specified in paragraph (a) above.
>
> (5) Where subsection (1) above ceases to apply in relation to a limited liability partnership with the effect that tax is assessed and charged–
>
> (a) on the limited liability partnership (as a company) in respect of chargeable gains accruing on the disposal of any of its assets, and
>
> (b) on the members in respect of chargeable gains accruing on the disposal of any of their capital interests in the limited liability partnership,

it shall be assessed and charged on the limited liability partnership as if subsection (1) above had never applied in relation to it.

(6) Neither the commencement of the application of subsection (1) above nor the cessation of its application in relation to a limited liability partnership shall be taken as giving rise to the disposal of any assets by it or any of its members.

8. In relation to the appeals by the Trusts, we will also need to refer to the circumstances in which HMRC may issue a discovery assessment. The conditions for the issue of a discovery assessment are set out in section 29 TMA 1970. At the material time, it provided, so far as relevant, as follows:

29 Assessment where loss of tax discovered.

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) …

(3) …

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment ; or

(b) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) …

BACKGROUND

9. The FTT set out its findings of fact in considerable detail at FTT [22]-[129]. Those findings were based on an "Agreed Statement of Facts" provided by the parties and additional facts found by the FTT from the evidence before it.

Summary of facts

10. The parties do not challenge the FTT's fundamental findings of fact – although they do dispute some of the evaluative conclusions of the FTT based on those findings. We will need to refer to various aspects of the FTT's findings in more detail in the course of this decision. However, for present purposes, the summary that we have set out below should be sufficient for an understanding of the issues that arise on this appeal. It is not comprehensive.

11. Mr Gregory Hutchings is a businessman, with extensive business experience, including senior positions at Tomkins plc ("Tomkins"), and at Lupus Capital plc. Following his departure from Lupus Capital in 2009, he established the Company in March 2010 to acquire and manage industrial businesses. (FTT [45]-[53])

12. Mr Hutchings was, at all material times, the trustee of each of the Trusts. He was also a director and shareholder of the Company. Ms Cassandra Hutchings, his daughter, was also a director and shareholder of the Company. (FTT [23]-[24])

13. As of June 2010, the Company and the Trusts held substantial shareholdings in Tomkins. The Company held 5,364,223 shares; the No.1 Trust 637,925 shares; the No.3 Trust 1,853,180 shares; and the Children's Trust 530,984 shares. (FTT [25])

14. On 27 July 2010, Pinafore Acquisitions Ltd ("Pinafore") announced that it was in discussions with Tomkins concerning a possible takeover at a price of 325 pence per share. (FTT [26])

15. On 18 August 2010, solicitors for Mr Hutchings sought counsel's advice regarding the sale of the shares in Tomkins held by the Company and the Trusts. Counsel delivered his advice on 25 August 2010. (FTT [27])

16. On 25 August 2010, Mr Hutchings contacted a broker, Marshall Securities Ltd, requesting information on yields and current prices for a variety of shares. (FTT [28])

17. On 26 August 2010, the LLP was incorporated. Its initial members were Mr Hutchings and the Company. Mr Hutchings was acting as nominee for the No.1 Trust and No.3 Trust. (FTT [29])

18. Also on 26 August 2010, the LLP purchased shareholdings in five listed companies: National Grid; RSA Insurance Group; Royal Dutch Shell; Scottish & Southern Energy; and United Utilities. Each shareholding cost approximately £40,000. (FTT [30]). The purchases were funded by a loan from Mr Hutchings (see [23(4)] below).

19. On 1 September 2010, the LLP disposed of its holdings in Royal Dutch Shell and Scottish & Southern Energy, in each case, at a profit. (FTT [31])

20. The takeover of Tomkins by Pinafore was completed on 24 September 2010. The Company exchanged 1,000,000 of its shares in Tomkins for Floating Rate Cash Secured Notes 2015 (the "Loan Notes") issued by Pinafore at 325 pence per share and sold its remaining 4,364,222 shares for cash. The Trusts exchanged all their Tomkins shares for Loan Notes. (FTT [32]- [33])

21. The Loan Notes paid interest at "the higher of 0.8% below LIBOR and 0%". At all relevant times, LIBOR remained below 0.8% for the period during which the Loan Notes were in issue and so no interest was paid. (FTT [34])

22. After the takeover, the Loan Notes held by the Company and the Trusts were as follows: the Company £3,250,000; the No.1 Trust £2,073,256; the No.3 Trust £6,022,256; and the Children's Trust £1,725,698. (FTT [35])

23. On 18 May 2011:

> (1) A partnership agreement was executed, under which Mr Hutchings (as nominee for the Children's Trust) was admitted as an additional member of the LLP. In the agreement, the LLP's business was defined as "acquiring, holding and selling shares, securities and other assets with a view to profit, which commenced on 26th August 2010… which is to be continued in accordance with this deed". (FTT [36(1)])
>
> (2) The Company and the Trusts sold their Loan Notes to the LLP at a 2% discount to their face value. The consideration was left outstanding as an interest-free loan. (FTT [36(2)])
>
> (3) At the Company's request, the LLP granted a charge over the Loan Notes to secure payment obligations relating to a separate purchase by the Company of shares in a company called HK Timbers (Holdings) Ltd. (FTT [36(3)])
>
> (4) A facility agreement was drawn up under which Mr Hutchings agreed to provide to the LLP an unsecured on-demand loan facility of £200,000. The agreement stated that the facility had been made available on 25 August 2010 and advanced on that day (FTT [36(4)]). (Mr Hutchings's evidence was that he was "unsure" whether the money to fund the LLP came from his own bank account, the Trusts or the Company, but the subsequent loan facility was drafted on the basis that the loan was made by Mr Hutchings. (FTT [91]))

24. On 21 May 2011, the LLP entered into a deed of variation under which it became the substituted chargor in respect of 1,100,000 of the Loan Notes in favour of the sellers of shares in HK Timbers (Holdings) Ltd. (FTT [37])

25. On 7 June 2011, Mr Hutchings signed a declaration of solvency for the LLP. (FTT [38])

26. On 10 June 2011, the LLP entered into a members' voluntary liquidation. (FTT [39])

27. The scheme was disclosed to HMRC under Part 7 Finance Act 2004 (the "DOTAS rules") at or around the time that the LLP was put into liquidation. (FTT [69], [78])

28. On 13 June 2011, the LLP (in liquidation) redeemed the Loan Notes. (FTT [40])

29. On 21 June 2011, the LLP (in liquidation) sold its shares in National Grid, RSA and United Utilities, in each case, at a profit. The LLP also received dividends during the period it held the shares. (FTT [41]-[42])

30. We have summarized the transactions undertaken by the LLP above. At no point did the LLP have a bank account of its own. All these transactions were carried out using Mr Hutchings's personal bank account. (FTT [43])

Mr Hutchings's and Ms Hutchings's evidence

31. The FTT reviewed the evidence of Mr Hutchings and Ms Hutchings at FTT [45]-[107]. It drew the following conclusions from that evidence (at FTT [108]):

(1) The LLP was likely to have been established primarily for the purpose of implementing the tax mitigation scheme, however we find that it was also established as a vehicle for Mr Hutchings' intended "hedge fund" type business.

(2) Mr Hutchings spent some time researching the markets before the LLP acquired its shares and some time researching the markets in the period after those shares were acquired up to a time before the LLP was liquidated.

(3) Mr Hutchings' claim to have spent an average of 3-4 hours per day on LLP business was improbable given (a) the lack of evidence as to his research, (b) the lack of any apparent written business plan – formal or informal, and (c) the limited number of transactions entered into by the LLP over the duration of its existence.

(4) Mr Hutchings' involvement in the LLP's business reduced in the period leading up to its liquidation as he became more involved with the Company's business and issues relating to Ms Hutchings' health.

(5) It is likely that the LLP was liquidated primarily to give effect to the tax mitigation scheme, although the timing of the liquidation was likely to have been driven by the fact that Mr Hutchings was too busy with the Company to dedicate sufficient time to the LLP's business.

(6) The Loan Notes were likely to have been transferred to the LLP in anticipation of its subsequent liquidation rather than to provide capital for the LLP's business given the significant amount of time between issue of the Loan Notes and their transfer to the LLP, the short amount of time between that transfer and the LLP being put into liquidation, and the timing of the instructions to place the LLP into liquidation.

The procedural history

32. The FTT set out the procedural history at FTT [130]-[151]. Most of that history is not disputed and is not particularly relevant to the issues on appeal except for the history of the issue of discovery assessments to the Trusts. We will deal with those aspects of the procedural history in more detail when we address the Grounds of Appeal, but we have summarized the key points below.

(1) The Trusts submitted "voluntary" tax returns for the tax year ending 5 April 2012. (FTT [138]). The tax returns were "voluntary" in the sense that they were not submitted in response to a notice from HMRC.

(2) Following an enquiry into those tax returns, HMRC issued the Trusts with closure notices under section 28A TMA, which assessed the Trusts to tax on capital gains on the transfer of the Loan Notes to the LLP. (FTT [140]-[141])

(3) The Trusts appealed against the closure notices to HMRC. As part of the statutory review which then followed, HMRC accepted that the closure notices were invalid because the voluntary tax returns could not be enquired into (following the decision in *Patel v HMRC* [2018] UKFTT 185 (TC)). (FTT [142]-[144])

(4) On 3 July 2020 HMRC issued new assessments to tax under section 29 TMA (the "Trust Discovery Assessments") to the Trusts for the tax year ended 5 April 2012, which again assessed the Trusts to tax on capital gains on the transfer of the Loan Notes to the LLP. The Trusts appealed against the Trust Discovery Assessments.

(5) Following a statutory review, the assessment issued to the Children's Trust was confirmed and the assessments made on the No.1 and No.3 Trusts were varied.

(6) On 25 May 2021, the Trusts notified the appeal against the Trust Discovery Assessments to the FTT.

THE INTENDED TAX TREATMENT

33. The transactions that we have described above include the steps in a tax mitigation scheme. In summary the steps involved in that scheme, and the intended tax treatment, were as follows.

> (1) Following the transactions involved in the takeover of Tomkins, the Company and the Trusts held Loan Notes issued by Pinafore. As a consequence of those steps, capital gains that had accrued on their holdings of shares in Tomkins were deferred and would arise on a disposal or redemption of the Loan Notes by the Company or the trustees of the Trusts.
>
> (2) The LLP would be treated as a partnership for the purpose of tax on capital gains provided that the LLP was carrying on a trade or business with a view to profit (section 59A TCGA 1992). The aim was that the LLP would be taxed as a partnership at the time of the contribution of the Loan Notes to the LLP. If that was the case, the parties agree that no gain would accrue to the Company and the Trusts on the transfer of the Loan Notes to the LLP. Instead, the transfer would be treated as a contribution to the LLP for tax purposes.
>
> (3) On the appointment of a liquidator, the LLP would no longer be treated as a partnership (section 59A(4) TCGA) with the effect that tax would be charged and assessed on the LLP (as a company) for the purpose of tax on capital gains (section 59A(5) TCGA). Accordingly, the LLP would be subject to tax on the redemption of the Loan Notes. However, for those purposes, the LLP would be treated as having acquired the Loan Notes at a price paid by the LLP with the effect that gains accruing on the Loan Notes prior to their contribution to the LLP would be eliminated.

THE ISSUES BEFORE THE FTT

34. The Closure Notices issued to the Company and the LLP and the Trust Discovery Assessments issued to the Trustees brought into charge to tax the gains accrued on the Loan Notes. This was on the basis that the LLP was not carrying on a trade or business with a view to profit at the time of the transfer of the Loan Notes to the LLP.

35. Before the FTT, the Respondents relied on two Grounds of Appeal.

> (1) The first ground was that the closure notices issued to the Company and the LLP and the Trust Discovery Assessments issued to the Trusts were invalid because at the time of the contribution of the Loan Notes to the LLP, the LLP satisfied the conditions of section 59A(1) TCGA i.e. the LLP was carrying on a trade or business with a view to profit. The FTT refers to this Ground of Appeal in the FTT Decision as the "Substantive Ground".
>
> (2) The second ground was that the requirements of section 29 TMA were not satisfied in respect of the Trust Discovery Assessments. The FTT refers to this Ground of Appeal as the "Procedural Ground".

36. It was common ground that, if the LLP was within section 59A(1) at the time of the contribution of the Loan Notes to the LLP (i.e. if the Respondents succeeded on the Substantive Ground), no additional tax would be due from any of the Respondents. (FTT [17]-[18])

THE FTT DECISION

37. We will discuss various aspects of the FTT Decision in more detail when we address the various issues that are before this tribunal. But we have set out in the following paragraphs the main conclusions of the FTT in its decision and an outline of its reasoning.

38. As regards the Substantive Ground, the FTT turned first to the question of whether the LLP was carrying on a trade at the time of the contribution of the Loan Notes to the LLP (FTT [171]-[200]).

(1) The FTT reviewed the relevant case law (including the decision of the Court of Appeal in *Ingenious Games and others v HMRC* [2021] EWCA Civ 1180 ("*Ingenious Games*")) and identified the need to adopt a "multifactorial approach". (FTT [178])

(2) Having considered various aspects of the facts in this case – including the limited frequency and low volume of transactions carried out by the LLP, the subject matter of the LLP's transactions (being for the most part dividend-paying listed securities), the lack of organized or systematic trading operations, and the informal nature of the LLP's financing arrangements (FTT [179]-[197]), the FTT concluded that the LLP was not carrying on a trade. (FTT [198]-[200])

39. The FTT then considered whether the LLP was carrying on a business for the purposes of section 59A(1) TCGA.

(1) The FTT reviewed the case law concerning the meaning of "business" in various statutory contexts by reference to the review of the case law by the Upper Tribunal ("UT") in its decision in *GE Financial Investments v HMRC* [2023] UKUT 00146 (TCC). From that review, the FTT identified: the critical importance of the statutory context to the meaning given to the term "business" in any particular case.

(2) The FTT considered the background to the introduction of section 59A TCGA. Having done so, the FTT concluded that "business" in section 59A(1) should be given a relatively broad meaning:

(a) "business" was a broader concept than "trade" (FTT [235]);

(b) "business" in section 59A(1) should be "construed in accordance with its ordinary commercial usage and not excluding from its scope investment business" (FTT [252]).

(3) The FTT then sought to apply that meaning to the facts of this case. It concluded that the LLP was carrying on a business at the time of the contribution of the Loan Notes to the LLP (FTT [262]-[263]).

40. Finally, in relation to the Substantive Ground, the FTT found that the LLP was carrying on that business "with a view to profit" within section 59A(1) TCGA (FTT [264]-[267])

(1) With reference to the decision of the Court of Appeal in *Ingenious Games*, the FTT concluded that the "view to profit" test is subjective, and requires a genuine profit-seeking purpose, but it does not require that profit be the sole or dominant motive (FTT [265]-[266]).

(2) On the facts, the LLP had such a purpose and it made some modest profit. The requirement was therefore satisfied (FTT [267]).

41. For those reasons, the FTT found that the LLP met the requirements of section 59A(1) at the time of the contribution of the Loan Notes to the LLP (FTT [268]). That conclusion on the Substantive Ground was sufficient to determine the appeals in the Respondents' favour. However, the FTT went on to give its views on the Procedural Ground.

42. As regards the Procedural Ground, the FTT rejected the Respondents' argument that there had been no valid "discovery" by an HMRC officer within section 29(1) TMA. On the evidence of Ms

Marks and Mr Young, the FTT found that Ms Marks had made a discovery and that the requirements of section 29(1) TMA were met. (FTT [271]-[276])

THE ISSUES BEFORE THIS TRIBUNAL

43. The FTT granted permission to appeal on the following grounds:

> (1) the FTT erred in its interpretation of "business" within the context of section 59A TCGA ("Ground 1");
>
> (2) the FTT erred in its application of "business" to the specific facts of this case in concluding that the LLP carried on a business ("Ground 2"); and
>
> (3) the FTT erred in failing to provide any, or any adequate, reasoning for determining that the LLP was carrying on a business "with a view to a profit", and erred in so concluding ("Ground 3").

In this decision notice, we refer to the issues arising from Ground 1 and Ground 2 together as the "business issue" and the issues arising from Ground 3 as the "profit issue".

44. In their Respondents' Notice, the Respondents challenged various aspects of the FTT Decision.

> (1) The Respondents submitted that, on the facts as found by the FTT, the FTT should have found that the LLP was carrying on a trade with a view to profit at the time of the contribution of the Loan Notes to the LLP (the "trading issue").
>
> (2) The Respondents also submitted that the FTT erred in law in dismissing the Procedural Ground (the "procedural issue"). The Trusts applied for permission to appeal against the FTT Decision on the grounds that:
>
> > (a) first, the FTT gave inadequate reasons for dismissing the Procedural Ground and erred in law in its approach to the evidence as a matter of law;
> >
> > (b) second, the FTT erred in its construction of section 29 TMA; and
> >
> > (c) third, the FTT came to a decision on the facts relating to the issue of discovery assessments that could not be reasonably entertained.

45. As we mentioned above, the FTT approached the various issues by addressing first the Substantive Ground before turning to the Procedural Ground. We prefer to address the procedural issue (relating to section 29 TMA) before turning to the substantive issues (relating to section 59A TCGA) as that seems to us the more logical order. If the Trusts succeed on the procedural issue, the discovery assessments are not valid assessments and so the substantive issues do not arise in relation to the Trusts' appeals.

THE PROCEDURAL ISSUE

The Trusts' application for permission to appeal

Background

46. As we have mentioned above, the Trusts applied for permission to appeal the FTT Decision on the procedural issues in the Respondents' Notice.

47. Mr Marre's starting point, however, was that neither the Respondents' challenge to the FTT conclusion that the LLP was not trading nor the Trusts' challenge to the procedural issue required

permission to appeal. The application that had been made in the Respondents' Notice in relation to the Trusts' appeals on the procedural issue was made out of an abundance of caution.

48. Ms Black did not contest Mr Marre's submission in relation to the trading issue. So the only questions before us in relation to permission were whether the Trusts required permission to appeal in relation to the procedural issue and, if so, whether permission should be granted.

The relevant legislation and procedural rules

49. Section 11 of the Tribunal, Courts and Enforcement Act 2007 ("TCEA") sets out the right of any party to appeal from the FTT to the Upper Tribunal ("UT"). It provides, so far as relevant, as follows:

> **11 Right to appeal to Upper Tribunal**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
>
> (2) Any party to a case has a right of appeal…
>
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave).
>
> (4) Permission (or leave) may be given by–
>
> (a) the First-tier Tribunal, or
>
> (b) the Upper Tribunal,
>
> on an application by the party.

50. The ability of either party to appeal the decision of the FTT to the UT can only be exercised with the permission of either the FTT or the UT following an application by the relevant party.

51. Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("UTR") governs responses by a respondent to a notice of appeal. It provides, once again so far as relevant, as follows:

> **24 Response to the notice of appeal**
>
> (1) …
>
> (1A) Subject to any direction given by the Upper Tribunal, a respondent may, and if paragraph (1B) applies must, provide a response to a notice of appeal.
>
> (1B) In the case of an appeal against the decision of another tribunal, a respondent must provide a response to a notice of appeal if the respondent—
>
> (a) wishes the Upper Tribunal to uphold the decision for reasons other than those given by the tribunal; or
>
> (b) relies on any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal.
>
> (1C) If paragraph (1B) applies, to the extent that the respondent needs any permission, including permission to appeal to the Upper Tribunal, the response must include an application to the Upper Tribunal for such permission.
>
> (2) Any response provided under paragraph (1A) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received—

(a) if an application for permission to appeal stands as the notice of appeal, no later than one month after the date on which the respondent was sent notice that permission to appeal had been granted;

(ab) …; or

(b) in any other case, no later than 1 month after the date on which the Upper Tribunal sent a copy of the notice of appeal to the respondent.

(3) The response must state—

(a) the name and address of the respondent;

(b) the name and address of the representative (if any) of the respondent;

(c) an address where documents for the respondent may be sent or delivered;

(d) whether the respondent opposes the appeal;

(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds

(i) to uphold the decision for reasons other than those given by the tribunal; or

(ii) on which the respondent was unsuccessful in the proceedings which are the subject of the appeal;

(ea) the reasons why any permission applied for under paragraph (1C) should be given; and

(f) whether the respondent wants the case to be dealt with at a hearing.

(4) If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.

(5) When the Upper Tribunal receives the response it must send a copy of the response and any accompanying documents to the appellant and each other party.

(6) …

52. As can be seen from the above extract, UTR rule 24 sets out requirements for the contents of a any response to a notice of appeal made by the respondent. It includes, in rule 24(3)(e), requirements for the respondent to identify the grounds on which the respondent relies. These include: any grounds on which the respondent wishes the UT to uphold the decision of the FTT for reasons other than those given by the FTT; and any grounds on which the respondent was unsuccessful before the FTT which are the subject of the appeal. In addition, under UTR rule 24(1C), the respondent must include in the response an application for permission to appeal in respect of any grounds for which it requires permission.

The parties' arguments in outline

53. Before us, Mr Marre submitted that the Trusts only required permission to appeal from a "decision" of the FTT. Permission was not required where a respondent to an appeal was seeking to uphold the decision of the FTT, but on different grounds to those that had been relied upon by the FTT, but which had been advanced at the hearing before the FTT (see *Price v HMRC* [2015] UKUT 164 (TCC) ("*Price*") at [35]).

54. In his submission, the arguments in relation to the procedural issue fell into the category of unsuccessful arguments rejected by the FTT, which achieved the same result as the FTT's decision. The proceedings before the FTT concerned several appeals brought by several different taxpayers.

The question was what was the result of each appeal? The result of each appeal was that each appeal was allowed in full. That was the "decision" of the FTT. The Trusts' arguments in relation to the procedural issue, if determined in the Trusts' favour, would only lead to the same decision i.e. that each individual Trust's appeal was allowed in full and no tax was due. It was only out of undue caution that an application for permission to appeal was made in the Respondents' Notice.

55. Ms Black submitted that permission to appeal was required in relation to the procedural issue. The question was not limited to the end result that tax was not due. The "decision" of the FTT also included the mechanism by which that result was achieved. The "decision" that was made by the FTT was that no liability to tax arose because the conditions in section 59A(1) TCGA were fulfilled. The decision on the procedural issue was a separate matter on which the FTT reached a separate (obiter) decision that the Trust Discovery Assessments were valid and that the conditions in section 29 TMA were met.

56. At the hearing, the parties conducted their arguments primarily by reference to the judgment of Rose LJ in *HMRC v SSE Generation Limited* [2021] EWCA Civ 105 ("*SSE*"), to which we refer below. We asked the parties to provide further case law authorities after the hearing and to identify relevant passages in the decisions in those cases which illustrate the application of the principles in Rose LJ's judgment. In their subsequent submissions, all parties referred us to the decision of the UT in *HBOS & Lloyds Banking Group Plc v HMRC* [2022] UKUT 139 (TCC) ("*HBOS*"). Mr Marre, for the Respondents, also referred us to the decision of the UT in *Fanning v HMRC* [2022] UKUT 21 (TCC) ("*Fanning UT*"), for which, on this point, the Court of Appeal refused permission to appeal (see *Fanning v HMRC* [2023] EWCA Civ 263 at [22]). Ms Black, for HMRC, also referred us to the decision in *Murphy v HMRC* [2025] UKUT 165 (TCC) ("*Murphy*").

Discussion

57. As we have mentioned above, the parties referred us to the judgment of Rose LJ (as she then was) in *SSE*. That case concerned the availability of capital allowances on the construction of a hydro-electric power plant. The FTT allowed the taxpayer company's appeal against the disallowance by HMRC of some items of expenditure, but upheld HMRC's assessment in relation to others. In particular, the FTT found that certain types of expenditure incurred on the fabrication on site of certain "cut and cover" conduits did not qualify for allowances. HMRC appealed to the UT, which decided that the allowances were available in full, accepting the argument of the company, which had been rejected by the FTT, that the expenditure in relation to the "cut and cover" conduits should not be excluded.

58. On HMRC's appeal to the Court of Appeal, the Court of Appeal agreed with HMRC that the company required permission to appeal to the UT in relation to the question of whether the fabrication expenditure for the "cut and cover" conduits qualified for allowances, which it did not have.

59. Rose LJ said this at *SSE* [77]:

> 77. ... I agree with HMRC's submission that rule [24(3)(e)] cannot obviate the need for permission set out in section 11 TCEA. The grounds referred to there are the grounds on which the party relies in its character as a respondent to appeal. Certainly if the respondent succeeded on an issue before the FTT because the FTT accepted one of a number of arguments while rejecting other arguments for the same result, the respondent can raise those unsuccessful arguments if its success is challenged on appeal by the opposing party. But the respondent cannot raise an issue which it lost before the FTT unless it obtains permission to appeal for itself.

60. She continued at *SSE* [80]

> 80. In considering whether a point raised in a respondent's notice can only be made if permission to appeal is granted, one must identify what decision of the FTT is being challenged. The outcome in relation to the 'cut and cover' conduits was the consequence of the Upper Tribunal having identified an error of law in the FTT's interpretation of the word 'aqueduct' in List B Item 1. That issue was before it because the grounds of appeal raised by HMRC in its appeal from the FTT to the Upper Tribunal challenged the FTT's decision that the headrace was not an aqueduct. In its response to the appeal filed with the Upper Tribunal, SSE submitted that the FTT should have concluded that the conduits and tailraces were not aqueducts. The conclusion that the drill and blast conduits, the uncovered channel conduits and the headrace are not aqueducts leads to the same result as the FTT arrived at for other reasons - the expenditure on them is allowable in full. Applying the narrower definition of 'aqueduct' to the 'cut and cover' conduits leads to a different result because the FTT allowed only part of the costs. The decision challenged here is not as to the meaning of the word 'aqueduct' but as to whether HMRC's closure notice was correct in disallowing the capital expenditure incurred on the 'cut and cover' conduits. The Upper Tribunal's decision increased the amount of allowable expenditure, but that result could only be achieved if SSE had sought permission to do better than the partial allowance. No such permission had either been sought or granted and in my judgment HMRC are right to say that the Upper Tribunal erred in concluding at [161] that the expenditure was recoverable in full.

61. The decision of the Court of Appeal in *SSE* concerned the application of a version of the UTRs that required permission to appeal to be sought, in the first instance, from the FTT. That version of the UTRs did not permit a respondent to an appeal to apply for permission to appeal in a respondent's notice. Some of the decisions to which we were referred by the parties (*Fanning UT* and *HBOS*) concern the same version of the UTRs. The current version of the UTRs allows an application for permission to be made by a respondent in a respondent's notice without permission first having been sought from the FTT and indeed, where permission is required, provides that the application must be included in that notice (UTR rule 24(1C)). However, the principles as to when permission is required remain the same.

62. As regards those principles, we draw the following from the judgment of Rose LJ in *SSE* and the decisions of the UT to which we have been referred.

> (1) Respondents should not assume that they are free to raise, in a respondent's notice, any arguments they choose to the effect that a decision of the FTT should be upheld for reasons additional to, or different from, those of the FTT. Some such arguments will require permission to appeal (*Fanning UT* [28(1)]).
>
> (2) Permission to appeal is required where the respondent is seeking to exercise a right of appeal (*SSE* [77], section 11 TCEA). The respondent will be exercising a right of appeal if, by making the argument, the respondent is seeking a different "decision" from that made by the FTT (*Price* [33]-[34]).
>
> (3) It is therefore necessary to identify the "decision" of the FTT to which the respondent's arguments relate. The focus is on the FTT's decision, not on arguments it accepts or rejects on the way to making that decision (*SSE* [80], *Fanning UT* [28(2)], *Price* [39]).
>
> (4) The "decision" of the FTT will be determined by reference to the question that the FTT is required to answer and its answer to that question (see *Price* [39]-[47]).
>
> (5) Permission is not required, if the respondent is not seeking to exercise a right of appeal. The respondent will not be exercising a right of appeal if, by making an argument, the respondent is not seeking a different "decision" from that made by the FTT. For example, where the respondent has succeeded on a particular issue before the FTT because the FTT

accepted one of a number of arguments while rejecting others, the respondent does not need permission to appeal to raise those other unsuccessful arguments (*SSE* [77]).

63. In this case, section 31(1)(d) TMA gave the Trusts rights of appeal against the Trust Discovery Assessments. On notification of their appeals to the FTT, the FTT was obliged to "decide the matter in question" (section 49G(4) TMA), which was "the matter to which the appeal relates" (section 49I(1) TMA). The matter to which the appeal related, in each case, was the Trust Discovery Assessment. On that appeal, the FTT was required, if it decided that the relevant Trust was overcharged by the assessment, "to reduce the assessment accordingly"; and, if it decided that the Trust was undercharged by the assessment, "to increase the assessment accordingly" (section 50(6)-(8) TMA). The FTT's "decision" was therefore as to the correctness or otherwise of the Trust Discovery Assessments.

64. The FTT's conclusion of the matters before it is found at FTT [278]. The FTT said this:

> 278. For the reasons given above we find that the LLP was carrying on a "business" with a view to profit and so satisfied s.59A(1) TCGA at the relevant time and there is therefore no tax to assess.

Conclusion

65. In our view the FTT's "decision" for the purposes of section 11 TCEA was that the Trusts (and the other Respondents) were overcharged by the assessments and "there is… no tax to assess". That was the answer to the question before it. The reason that it reached that decision was that the conditions in section 59A(1) TCGA were satisfied. If the Trusts had succeeded on the procedural issue the "decision" would have been the same. In their Respondents' Notice, the Trusts are not asking the UT to make a different decision. The Trusts are seeking to raise before us arguments on which they were unsuccessful before the FTT as part of their case that the FTT's decision was correct. They were entitled to do so by way of the Respondents' Notice and do not need permission to appeal.

66. In our view, that conclusion is not inconsistent with the authorities to which we have been referred.

(1) In *SSE* itself, the taxpayer company by including the argument concerning the expenditure on "cut and cover conduits" in its respondent's notice was seeking a different decision from that of the FTT because it could lead to a decision that the taxpayer was overcharged by a different amount. Permission was required.

(2) In *Fanning UT*, HMRC was seeking to revive an argument that had proved unsuccessful before the FTT, but, if successful, would have justified the same tax result. No permission was required.

(3) In *Murphy*, HMRC sought to revive an unsuccessful argument that would lead to the same tax result. However, that argument – that an inquiry under Schedule 1A TMA was valid – was requesting a different decision because it was an answer to the correctness or otherwise of a different assessment. Permission was required.

(4) In *HBOS*, there were two issues that HMRC sought to raise before the UT. The first was an alternative argument that had not been successful before the FTT, but which would have supported the FTT's decision that interest was not payable under section 78 Value Added Tax Act 1994. The second was an issue that had not been determined by the FTT, but, if HMRC were successful would lead to a worse result for HMRC. No permission was required for either argument.

The procedural issue

67. On that basis, we shall turn to the procedural issue.

Background

68. The Trusts' case is that the discovery assessments were invalid because the conditions for the issue of the discovery assessments in section 29 TMA were not met. In summary, the Trusts say that the FTT erred in finding that, on the evidence before it, HMRC had discharged their burden of proof to show that a discovery had been made by an HMRC officer that a chargeable gain which ought to have been assessed to capital gains tax had not been assessed or that an assessment to tax was or had become insufficient.

69. The Trusts' grounds of appeal also included an argument, in the alternative, that the FTT erred in not determining that the discovery assessments made by HMRC were invalid because any discovery that was made by HMRC had become stale and did not possess the element of newness required to form the basis of a discovery assessment within section 29 TMA.

70. In this latter respect, the Trusts relied on the decision of the Court of Appeal in *HMRC v Tooth* [2019] EWCA Civ 826 ("*Tooth CA*"). Mr Marre acknowledged that the Supreme Court in *HMRC v Tooth* [2021] UKSC 17 ("*Tooth SC*") had found that there was no doctrine of staleness. The Supreme Court decision in *Tooth SC* on this point was obiter and technically not binding. However, the UT in *Harrison v HMRC* [2023] UKUT 000038 (TCC) decided that the UT should follow the reasoning of the Supreme Court. For that reason, Mr Marre did not advance this argument before us. However, he reserved the right to argue the point that the decision of the Court of Appeal in *Tooth CA* was to be preferred if this case progressed any further.

The procedural history

71. We have outlined the procedural history above, but, for present purposes, we need to expand upon our earlier description and provide more of the factual background to the issue of the Trust Discovery Assessments. In doing so, we refer to the facts as found by the FTT as well as some of the documentary evidence that was before the FTT to which we were taken by Mr Marre.

72. On 29 April 2013 the Trusts submitted "voluntary" tax returns for the tax year ending 5 April 2012 (FTT [138]). The tax returns were "voluntary" in the sense that they were not submitted in response to a notice from HMRC.

73. On 6 September 2013 HMRC gave notice of intention to enquire into the returns. At the completion of the enquiry, on 11 May 2017, HMRC issued the Trusts with closure notices under section 28A TMA. (FTT [139]-[140])

74. The closure notices were issued by an HMRC officer, Ms C S McVicar. In the closure notice issued to the Children's Trust, Ms McVicar stated:

> "…During the above period loan notes acquired as a result of the takeover of Pinafore Acquisitions PLC by Tompkins Acquisitions Ltd were transferred to GCH Active LLP as part of a disclosed avoidance scheme with the reference number 17420994. The disclosure was made to HMRC on 25 May 2011.
>
> The trust is a member of GCH Active LLP. The trust transferred £1,725,698 loan notes to GCH Active LLP. Having reviewed all of the documents and information supplied in conjunction with the legislation, guidance and case law I find that GCH Active LLP was not carrying on a trade or business with a view to a profit between incorporation on 26 August 2010 and liquidation on 10 June 2011. As a consequence it did not meet

> the requirements of Section 59A TCGA 1992 which would have allowed the transfer of loan notes to be treated as a capital contributions by its members as opposed to a capital disposal by them.
>
> As such the limited liability partnership is not regarded as transparent for tax purposes but instead opaque and thus chargeable to corporation tax. Consequently the transfer of the loan notes to the Limited Liability Partnership on 18 May 2011 represents a capital disposal for Capital Gains Tax purposes."

75. The closure notices issued to the No.1 Trust and the No.3 Trust contained wording in identical terms with the exception of references to the nominal amount of the Loan Notes that were transferred by each Trust to the LLP.

76. The Trusts appealed against the closure notices to HMRC. HMRC sent their view of the matter letter to the Trusts and offered a statutory review, which the Trusts accepted. On 16 May 2018, the Trusts introduced a new ground of appeal. This ground was that the closure notices were invalid as voluntary tax returns could not be enquired into (following the decision of in *Patel v HMRC* [2018] UKFTT 185 (TC)). (FTT [141]-[143])

77. The internal HMRC documentation relating to the review process shows that the AAB (Anti-avoidance board) had approved the issue of the closure notices, but that the voluntary returns argument had not been considered. As part of the review process, TALA (the Tax Administration, Litigation and Advice department) advised that the closure notices should be cancelled.

78. On 21 May 2020, following the conclusion of the review process, the closure notices were cancelled (FTT [144]). The letters to the Trusts informing them of the conclusion of the review and the cancellation of the closure notices was sent by the HMRC officer conducting the review, Mr Jonathan Philip Martindale. In his letter, Mr Martindale stated:

> "My conclusion does not prevent HMRC from issuing a discovery assessment to give effect to their conclusions in the absence of a valid return from the settlement. If it is deemed appropriate to issue a discovery assessment, this will carry its own appeal rights."

79. On 3 July 2020 HMRC issued new assessments to tax under section 29 TMA (the Trust Discovery Assessments) to the Trusts for the tax year ended 5 April 2012. The Trust Discovery Assessments were issued by another HMRC officer, Ms Francesca Marks. In her covering letter to each of the Trusts, Ms Marks stated:

> "Following the outcome of the independent review that was concluded on 21 May 2020 in which it was determined that the section 9A TMA70 open enquiry notice issued on 25 April 2014 was found to be invalid, the subsequent closure notice issued under section 28A TMA70 on 11 May 2017 has therefore been cancelled.
>
> The decision contained in the closure notice was based on HMRC's view that GCH Active LLP was not carrying on a trade with a view to a profit which would have resulted in a chargeable gain arising at the point in which the loan notes were transferred from the trust to GCH Active LLP on 18 May 2011."

80. Later in her letter, she continued:

> "I am making the assessment because HMRC's view remains the same as stated in the previous closure notice which issued on 11 May 2017."

81. The letter continued with paragraphs which were in the same terms as those contained in the closure notices issued by Ms McVicar on 11 May 2017 to which we have referred above.

82. The Trusts appealed against the Trust Discovery Assessments. Following a statutory review, the assessment issued to the Children's Trust was confirmed and the assessments made on the No.1 and No.3 Trusts were varied to include capital gains arising on the transfer of the Loan Notes to the LLP.

83. On 25 May 2021 the Trusts notified their appeals against the Trust Discovery Assessments to the FTT.

The evidence of HMRC's witnesses

84. The circumstances surrounding the issue of the Trust Discovery Assessments was addressed in the evidence from HMRC's witnesses: Ms Francesca Marks, the HMRC officer responsible for dealing with matters relating to the Company, the LLP and the Trusts; and Mr Andrew Young, the officer responsible for "Wealthy and Midsize Business Compliance, Assets" at HMRC.

85. In her witness statement for the hearing before the FTT, Ms Marks stated:

> "39. On reviewing the facts of the cases, I noted the following salient points:
>
> (GCH Active LLP Review Conclusion – Box 5 & Box 8.3)
>
> • GCH Active LLP purchased and sold listed shares on only two days from its incorporation to liquidation
>
> • GCH Active LLP purchased just five listed shareholdings during that time
>
> • All the listed shareholdings were purchased on the same day
>
> • Two of the shareholdings were sold in their entirety on the same day
>
> • GCH Active LLP did not have its own bank account but instead Mr Hutchings made funds available to allow GCH Active LLP to buy the listed shares
>
> 40. Considering these facts, I concluded that that GCH Active LLP was not carrying on a trade or business with a view to a profit for the following reasons: (GCH Active LLP Review Conclusion – Box 8.3)
>
> • There was no repetition of purchases and sales
>
> • The total number of purchases and sales made is very low
>
> • There was no continuity of business activities
>
> 41. I reviewed the above points along with relevant legislation section 59A TCGA92 and guidance from Statement of Practice D12. I concluded that section 59A TCGA92 did not apply because I considered that GCH Active LLP was not carrying on a trade or business with a view to a profit. Consequently, this resulted in a chargeable gain arising at the point in which the loan notes were transferred from the Trusts to GCH Active LLP which had not been assessed due to the previous enquiries being found to be invalid on conclusion of the respective independent reviews."

86. In the FTT Decision, the FTT recorded the main points that it took from the evidence of Ms Marks and Mr Young at FTT [109]-[128]. They included the following:

> (1) Ms Marks considered all the available evidence in reaching her decision to issue the Trust Discovery Assessments. (FTT [110])
>
> (2) Ms Marks consulted Mr Young before making her decision to issue the Trust Discovery Assessments. (FTT [111])

(3) In Ms Marks's opinion, the LLP was not carrying on a trade or business with a view to profit and because of this a taxable gain had arisen on the transfer to it of the Loan Notes. From her review of the file, it was evident to her that the gain had not been assessed. (FTT [112])

(4) Ms Marks's view on the position of the LLP corresponded with the views of the previous officer responsible for the matter, Ms McVicar. Ms Marks had no reason to believe that the previous decisions were made centrally within HMRC and not by Ms McVicar. (FTT [114])

(5) Ms Marks came to the view that the Trust Discovery Assessments were appropriate as the Trusts' tax returns had been submitted on a voluntary basis. (FTT [115])

(6) When Ms Marks stated in her letters accompanying the Trust Discovery Assessments that she was "making the assessment because HMRC's view remains the same as stated in the previous closure notice which was issued on 11 May 2017", her reference to "HMRC's view" remaining the same was a reference to a view that she had come to personally albeit that she was speaking for HMRC. (FTT [116])

(7) Ms Marks's letters to the Trusts used the same wording as the previous assessment letters and Closure Notices. This was not, however, a consequence of her not having made an independent determination of the issues. It was instead a consequence of her decision that it was unnecessary to re-word the relevant content of the previous correspondence which was clear and remained correct. (FTT [117])

(8) Ms Marks's view of the arrangement was consistent with the central anti-avoidance group within HMRC. However, there was no obligation on her to accept the views of the HMRC technical group. The ultimate decision had to be made by her as the HMRC officer responsible. (FTT [118])

(9) Mr Young's role was to provide a high-level review of Ms Marks's decision. In performing that role, he had to review the information available and form his own view as to whether or not it was reasonable to proceed on the basis that Ms Marks proposed. He was required to give, in his words, an "overarching view". He was not performing the same task as Ms Marks. (FTT [127]-[128])

The FTT Decision

87. On this point, the FTT noted that it was not necessary for it to reach a conclusion on the Procedural Ground given its conclusions on the Substantive Ground, but it set out its views as it had heard extensive evidence on the issue.

88. The FTT rejected Mr Marre's submissions that the requirements of section 29 TMA were not met because Ms Marks, the officer with responsibility for issuing the Trust Discovery Assessments, did not reach her own conclusion as to the tax liability that she sought to assess, but had simply adopted HMRC's internal view; and (ii) that the correspondence and other documentation was evidence of HMRC having formed that internal view, which view had then simply been followed by Ms Marks and her predecessor (FTT [273]-[275]).

89. The FTT concluded (at FTT [276]-[277]):

> 276. We found Ms Marks to be a credible and reliable witness who was able to clearly explain both how she had arrived at her conclusions and why she did not see the need to amend the precise wording used by her predecessor to set out the technical position. Mr Marre's submission also requires us to disbelieve the evidence provided by Mr

> Young as to the content of his supervisory meeting with Ms Marks. We also found Mr Young to be a reliable and credible witness who was able to explain clearly the approach he had taken, the steps taken to prepare for his meeting with Ms Marks and the content of what was discussed.
>
> 277. We find accordingly, on the balance of probabilities, that the "discovery" requirement under s.29 TMA was duly satisfied by HMRC.

Discussion

90. Before us, Mr Marre conceded that the Trust Discovery Assessments were issued in time. However, he submitted that the burden was on HMRC to plead and to prove that the conditions for the making of a discovery assessment had been met (*Burgess v HMRC* [2015] UKUT 578 (TCC)). It was therefore for HMRC to prove that a discovery had been made. Mr Marre argued that the FTT's conclusion that HMRC had discharged that burden was "irrational" on the evidence that was before it. This argument was based on the principles set out by the House of Lords in *Edwards v Bairstow* [1956] AC 14 (per Lord Radcliffe at p36). Mr Marre acknowledged that there was a high bar to its success. However, he submitted that the evidence supported that conclusion on this appeal.

91. There were two central pillars to Mr Marre's argument.

> (1) First, by reference to the documentary evidence to which we have referred above, Mr Marre submitted that the FTT's conclusion that Ms Marks had made the relevant discovery could not be supported by the evidence. He referred to the judgment of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) ("*Gestmin*") in support of his assertion that the FTT should have placed greater weight on the documentary evidence, which, contrary to the witness evidence of Ms Marks, demonstrated that Ms Marks had not made a discovery, but had simply processed the decisions of others. The FTT's conclusion, which was based on a discovery having been made by Ms Marks, was not supportable on the evidence.
>
> (2) Second, Mr Marre submitted that Ms Marks did not make a "discovery" of a kind falling within section 29 TMA. By reference to the Supreme Court decision in *Tooth SC* and the House of Lords decision in *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782 ("*Cenlon*"), he argued that a discovery assessment could not be made where the discovery related to a procedural error made by HMRC. Ms Marks, he argued, had discovered a procedural error by HMRC not an amount of tax that had not been assessed and so section 29 could not apply.

92. We reject those submissions. We have set out our reasons below.

93. As regards the first of these lines of argument, Mr Marre's case was that the FTT had made an error of law on the basis of the principles set out by the House of Lords in *Edwards v Bairstow*. In order to fall within those principles, Mr Marre would have to show that the FTT's finding – that Ms Marks made a discovery within section 29 TMA – was one that "no person acting judicially and properly instructed as to the relevant law could have come to" whether that be because the FTT's conclusion was one which there is no evidence to support, or one with which the evidence is inconsistent, or one in which the true and only reasonable conclusion contradicts the FTT's determination. In our view, in the present case, that assertion is untenable.

94. As a starting point, the documents to which we were taken by Mr Marre do not contradict the evidence of Ms Marks. At best, they offer grounds for a challenge to Ms Marks's evidence at the hearing before the FTT that she had made a discovery in that they might be said to demonstrate that Ms Marks simply issued the Trust Discovery Assessments pursuant to the work done in relation to

the closure notices by Ms McVicar, or during the statutory review by Mr Martindale. Ms Marks was cross-examined on her evidence before the FTT, but the cross-examination failed to undermine the evidence of Ms Marks. The FTT found her "to be a credible and reliable witness who was able to clearly explain both how she had arrived at her conclusions and why she did not see the need to amend the precise wording used by her predecessor to set out the technical position" (FTT [276]).

95. The question of whether Ms Marks's evidence was credible or was undermined by the contemporaneous documents was clearly a matter for the FTT. The FTT heard all the relevant oral evidence and read the relevant documentary evidence. The present case could not be further away from *Edwards v Bairstow*. Plainly, there was ample evidence to support the finding of the FTT that Ms Marks made a discovery; notably the evidence of Ms Marks, supported by the evidence of Mr Young. It is not possible to say that the only reasonable conclusion open to the FTT was that HMRC had failed to prove that Ms Marks made a relevant discovery.

96. As we have mentioned above, Mr Marre argued that the FTT should have preferred the evidence of the relevant documents to the evidence of Ms Marks. In this respect, Mr Marre referred us to remarks made by Leggatt J (as he then was) in *Gestmin* concerning the limitations of oral evidence in commercial disputes (at *Gestmin* [15]-[22]). The passage is well-known and we will not recite it here.

97. We do not, however, accept that the remarks of Leggatt J in *Gestmin* provide any basis to question the approach of the FTT to the evidence in this case.

> (1) First, in *Gestmin*, Leggatt J does not purport to lay down any rule that documents must be preferred to the testimony of a witness. The question of what evidence is to be preferred is, ultimately, one for the court or tribunal to make in any particular case, on the basis of a consideration of all the relevant evidence in that case. Leggatt J's judgment in *Gestmin* provides valuable guidance to a court or tribunal on the approach to the assessment of oral evidence against contemporaneous documentary evidence. But it does not lay down absolute rules.
>
> (2) Second, as Ms Black pointed out, the guidance given by Leggatt J in *Gestmin* is geared towards the particular evidential problem of resolving conflicts of evidence over what was said in meetings and conversations (see *Gestmin* [22]). The present case falls into a different category. Ms Marks was giving evidence of the process by which she had come to issue the Trust Discovery Assessments. No other witness gave evidence to contradict her account. Nor was Ms Marks seeking to recall evidence of what was said in a particular meeting or conversation.
>
> (3) Third, this argument assumes that the relevant documents contradict the evidence of Ms Marks. They do not. As we have said, the documents provide, at best, a basis for a challenge to Ms Marks's evidence that she made her own discovery.

98. Mr Marre's second strand of argument was that any discovery that had been made by Ms Marks was not of a kind that fell within section 29 TMA. We questioned whether this submission was a separate challenge to the FTT Decision on the procedural issue on the grounds that the FTT had made an error of law in its interpretation of section 29 TMA. But Mr Marre insisted that this argument formed part of his wider assertion that the FTT had reached a conclusion that was irrational on the evidence before it.

99. Mr Marre's argument was that a discovery assessment cannot be made under section 29 TMA in circumstances where the discovery relates not to an amount of tax that was not included in a closure

notice but to a procedural or technical problem with a closure notice itself. As we have mentioned, Mr Marre referred us to the wording of section 29(1) which refers, so far as relevant, to cases where HMRC discover "chargeable gains which ought to have been assessed to capital gains tax have not been assessed" (paragraph (a)) or that "an assessment to tax is or has become insufficient" (paragraph (b)). He also referred us to passages from the joint judgment of Lord Briggs and Lord Sales in *Tooth SC* and to a passage from the judgment of Viscount Simonds in *Cenlon* in support of his argument.

100. The relevant passage from the joint judgment of Lord Briggs and Lord Sales in *Tooth SC* is at *Tooth SC* [73]:

> [73] Viscount Simonds ([1962] 1 All ER 854 at 859, [1962] AC 782 at 794), with the agreement of the other members of the appellate committee, approved the judgment of Lord Normand in the decision of the Court of Session in *IRC v Mackinlay's Trustees* 1938 SC 765, (1938) 22 TC 305 and added, 'I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.' Lord Denning observed ([1962] 1 All ER 854 at 863, [1962] AC 782 at 799), '[e]very lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes'.

101. That passage is referring to the judgment of Viscount Simonds in *Cenlon* (at p794) where he said:

> I come to the second question which turns upon the true construction of section 41 (1) of the Act. That subsection provides: [His Lordship read the subsection and continued:] In the present case the single question is whether the word " discovers " covers the case where no new fact has come to light but the revenue authorities have formed the opinion that upon a mistaken view of the law the taxpayer has been undercharged in his original assessment. Upon this question the Court of Appeal followed a previous decision of the court in *Commercial Structures Ltd. v. Briggs*. In that case the court, preferring a decision of Finlay J. in Williams v. Grundy's Trustees 9 to that of Rowlatt J. in *Anderton and Halstead Ltd. v. Birrell*, and following a decision of the Court of Session, *Inland Revenue Commissioners v. Mackinlay's Trustees* held that discovery had the wider meaning for which the Crown contended and contends in this case. I think that that decision was clearly right and find the judgment of Lord President Normand wholly convincing. I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.

102. Mr Marre sought to persuade us that the references in these passages to tax being "undercharged" support his assertion that section 29(1) is limited to cases where HMRC discover tax that has not been assessed and does not extend to cases where HMRC discover that there has been a technical error in the process of assessment by HMRC.

103. We are not persuaded that these extracts support Mr Marre's submissions. In our view, the references in Viscount Simonds's judgment in *Cenlon* (to which Lord Briggs and Lord Sales refer in *Tooth SC*) to tax being "undercharged" are not intended to place any such limitation on the scope of section 29(1). Indeed, Viscount Simonds's statement that the wording of the section is "apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged" (our emphasis) supports a broader interpretation. We acknowledge that the precise wording of section 29(1) and its predecessors have changed materially over time – indeed the wording of the section that was in force at times relevant to this appeal has since been amended – but we see nothing in the

wording of section 29(1) or the judgments in *Cenlon* or *Tooth SC* which lends support to Mr Marre's submission. In our view, even if, in the present case, the only new fact which presented itself to Ms Marks was the fact that the 2017 closure notices had turned out to be invalid, that was sufficient to constitute a discovery for the purposes of section 29(1).

104. All the analysis above assumes, however, that the only discovery made by Ms Marks was that there was a technical problem with the issue of the closure notices in 2017. That was not the evidence that she gave. Ms Marks's evidence was that she conducted an analysis of the entire tax position. She did not simply note that the earlier closure notices issued to the Trusts in 2017 had been cancelled. She carried out an analysis of the relevant transactions carried out by the LLP. This resulted in her conclusion that the LLP had not been carrying on a trade or business with a view to a profit, with the consequence that a chargeable gain accrued to each of the Trusts on the transfer of the Loan Notes. Ms Marks then went on to note that those chargeable gains had not been assessed to tax by reason of the cancellation of the earlier, procedurally defective, closure notices. The entirety of this analysis was the basis of her decision to issue the Trust Discovery Assessments. The FTT accepted that evidence.

105. The Trusts can only succeed on this ground if they can establish that the only reasonable conclusion open to the FTT on the evidence before it was that Ms Marks, contrary to her own evidence, made no discovery of any kind, but simply adopted the discovery of another officer within HMRC. The Trusts attempted to establish this case at the hearing before the FTT and failed. Given the clear terms of Ms Marks' evidence, that failure was not surprising. Nor was it surprising that the FTT accepted the evidence of Ms Marks. The question of whether to accept Ms Marks's evidence was a question for the FTT. We can find nothing in its approach to that question that discloses an error of law or anything approaching an error of law. The reality is that the Trusts are attempting to re-litigate, in this tribunal, their failed challenge to the credibility of Ms Marks's evidence. They should not be permitted to do so.

Conclusion

106. We dismiss this ground of appeal.

THE ISSUES ON HMRC'S APPEAL

107. We therefore turn to the substantive issues. We will address first HMRC's Grounds of Appeal before addressing the cross-appeal by the Respondents on the trading issue.

Ground 1

108. By Ground 1, HMRC say that the FTT erred in law in its interpretation of the meaning of "business" in section 59A(1).

The FTT Decision

109. We will begin by reviewing, in a little more detail, the FTT's approach to the interpretation of section 59A(1) and its application of its conclusions to the facts of this case. This summary is relevant to both Ground 1 and Ground 2.

(1) The FTT identified that:

(a) there is no statutory definition of "business" that applies to section 59A(1) (FTT [201]);

(b) the meaning had to be determined by reference to the case law (FTT [202]).

(2) The FTT acknowledged the importance of the statutory context in determining the meaning of "business" where it appears in legislation. The FTT said this (at FTT [203]):

> 203. It is also clear from case law that in determining its meaning, account must be taken of its statutory context.

(3) The FTT then reviewed the case law on the meaning of "business" in various statutory contexts, primarily by reference to the decision of the UT in *GEFI UT* in order to determine if any common principles could be found (FTT [205]-[226]). From that review, the FTT identified:

> (a) the critical importance of the statutory context to the meaning given to the term "business" in any particular case (FTT [203], [209(1)], [213(1)]);
>
> (b) the principle that the gainful use of a company's assets would ordinarily be treated as a "business" ([FTT [209(2)], [217] and *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1979] AC 676 ("*American Leaf*") at p684);
>
> (c) the principle that a business would normally involve some form of activity, although, depending upon the nature of the business, the activity may be intermittent (FTT [209(4)], *American Leaf* p684);
>
> (d) case law considering whether the receipt of income could amount to a "business" (referring, in particular to *Commissioners of Inland Revenue v Korean Syndicate Limited* [1921] 3 KB 258 ("*Korean Syndicate*"), *Inland Revenue Commissioners v Westleigh Estates Company Limited* [1924] 1 KB 390 ("*Westleigh Estates*"), *Commissioners of Inland Revenue v The Tyre Investment Trust, Ltd* (1924) 12 TC 646 ("*Tyre Investment*"), *Jowett v O'Neill and Brennan Construction* [1988] STC 482 and *HMRC v Salaried Person Postal Loans* [2006] EHWC 763 (Ch)) (FTT [212]-[220]);
>
> (e) the case law of the meaning of "business" for VAT purposes (*Customs and Excise Commissioners v Lord Fisher* [1981] STC 238 ("*Lord Fisher*")); and
>
> (f) case law discussing the meaning of "business" in TCGA (by reference to the decision of the UT in *Elisabeth Moyne Ramsay v HMRC* [2013] UKUT 0226 (TCC) ("*Elisabeth Moyne Ramsay"*), which considered the meaning of "business" in section 162 TCGA).

(4) The FTT then sought to determine the meaning of "business" in the context of section 59A(1) TCGA, guided by the principles derived from the case law. The FTT summarized its approach at FTT [227]:

> 227. Taking the principles identified by the UT in [*GEFI UT*] as a guide, we have adopted the following approach to determining the question of whether the LLP was carrying on a business at the time the Loan Notes were transferred to it:
>
> (1) To first determine the requirement of the statute and find whether additional colour is to be given to the meaning of "business" by its statutory context.
>
> (2) To then apply to the facts those principles which we consider relevant and to consider whether the activities carried out by the LLP meet the statutory requirement.

(5) The FTT then turned to consider the purpose of section 59A(1). It concluded that the purpose of section 59A(1) was to determine the circumstances when an LLP should be put on the same footing for tax purposes as a general partnership notwithstanding its corporate status (FTT [228]). It found support for this conclusion in the statutory context

of section 59A(1), the background to its introduction in the Limited Liability Partnerships Act 2000 ("LLPA") and with reference to the Explanatory Notes to LLPA and the commentary in the Explanatory Notes (FTT [229]-[230]). It commented that that purpose – of aligning the treatment of LLPs with general partnerships – was not "an anti-avoidance purpose" (FTT [231]).

(6) The FTT then went on to consider the meaning of "business" in the specific statutory context of section 59A(1).

> (a) The FTT had regard to the similarities between the definition of "business" in section 18 LLPA (as including "every trade, profession and occupation") and the definition of "business" in section 45 of the Partnership Act 1890 ("every trade, profession or occupation") (FTT [233]-[234]).
>
> (b) The FTT noted that "'business' in section 59A(1) must be broader than 'trade'" (FTT [235]).
>
> (c) The FTT addressed an argument of HMRC that the meaning of "business" was coloured by association with the reference to "trade" which also appears in section 59A(1), and so "business" must be given "a narrower meaning requiring a degree of activity and so excluding passively held investments". The argument was advanced by reference to the decision of the Special Commissioner in *Rashid v Garcia (Status Inspector)* SpC 348 ("*Rashid*"). The FTT dismissed the argument.

The FTT concluded that "business" in section 59A(1) should be given its ordinary commercial meaning and should not exclude investment business (FTT [244]).

(7) The FTT considered an argument from HMRC – to which we will turn later in this decision – that a purposive construction of the term "business" in section 59A(1) (by reference to case law following *WT Ramsay Ltd v Inland Revenue Commissioners* [1981] STC 174) (the "*Ramsay* principle") would dictate that the LLP was not carrying on a trade or business in this case. The FTT found that the *Ramsay* principle did not require "any additional requirements to be read into the statute or to require any element of the transactions carried out to be disregarded or viewed differently" (FTT [250]).

(8) The FTT then summarized the key principles that it regarded as relevant:

> (a) "business" in section 59A(1) should be "construed in accordance with its ordinary commercial usage and not excluding from its scope investment business" (FTT [252]);
>
> (b) the activities in question were carried out "by an LLP rather than by an individual" which was "pursuing the very purpose for which it was established" (FTT [253]).

(9) Having done so, the FTT sought to apply those principles to the facts of this case. The FTT noted that:

> (a) a corporate entity (such as the LLP) "established for a business purpose should prima facie be regarded as carrying on a business to the extent that it is carrying on activities in pursuance of that purpose" (with reference to the judgments of Lord Sterndale MR in *Korean Syndicate* at p272-273 and Pollock MR in *Westleigh Estates* at p409 (FTT [253]-[256]);
>
> (b) an investment business was "likely to be more passive than a non-investment business" but the test only required a "low threshold of activity"

(referring to the decision of Rowlatt J in *Commissioners of Inland Revenue v The Tyre Investment Trust, Ltd* (1924) 12 TC 646 at p655) (FTT [257]-[261]).

(10) On the facts, the LLP was pursuing its stated purpose of acquiring, holding and selling securities with a view to profit; it undertook transactions consistent with that purpose; and the degree of activity was sufficient to amount to the carrying on of an investment business The FTT concluded in the following terms (FTT [262]–[263]):

> 262. Taking these principles into account and applying them to the facts that we have found, we find that the LLP was carrying on a business for the purpose of s 59A TCGA.
>
> 263. We note in particular the following:
>
> (1) The LLP was established (albeit partly) for the purpose of making a return from dealings in high yielding public company shares – whether by buying, selling or receiving dividend income or a combination thereof. This was Mr Hutching's business plan and the LLP's "business" was accordingly defined in the LLP Deed as: "acquiring, holding and selling shares, securities and other assets with a view to profit, which commenced on 26th August 2010 and which is to be continued in accordance with this deed".
>
> (2) The LLP's activities, although limited, were consistent with that business purpose. It acquired listed shares, sold some of them at a profit and also received dividend income.
>
> (3) Although we are not convinced that the time spent by Mr Hutchings on LLP business amounted to 4-5 hours per day, we have found that he did spend some time researching and evaluating the equities market prior to and after acquisition by the LLP of the equities. As we have outlined above, in the context of s.59A(1) TCGA , the meaning of "business" should not exclude investment business which by its nature can be relatively passive.
>
> (4) The fact that the LLP was in part set up to facilitate the Loan Note tax mitigation scheme is not sufficient to alter the fact that the LLP it was carrying on a business.

The parties' submissions in outline

110. For HMRC, Ms Black's principal argument was that the FTT failed properly to apply the accepted principles of statutory construction in reaching its view on the meaning of "business" for the purposes of section 59A(1). As a result, the FTT adopted an impermissibly wide definition of "business". She submitted that it was clear that Parliament intended to align the tax treatment of LLPs with those of general partnerships only if and when the LLP was operating a business in a similar manner to a partnership.

111. Under this heading, Ms Black raised various specific criticisms of the FTT's approach:

(1) the FTT failed to apply the established principles of statutory construction and in particular the *Ramsay* principle in reaching its view on the meaning of business;

(2) the FTT failed properly to take into account the statutory context in reaching its view;

(3) in its reference to the case law authorities on the meaning of "business", the FTT did not properly consider the context in which "business" was used in those cases.

112. Ms Black also argued that the FTT failed to give adequate reasons for its conclusion that the LLP was carrying on a business at the time of the transfer of the Loan Notes to it.

113. For the Respondents, Mr Marre supported the FTT Decision on the business issue. He submitted that:

(1) the FTT adopted the correct two-stage process: a purposive construction of the statute and its application to the facts viewed realistically;

(2) the FTT was correct to find from its analysis of the statutory context that the purpose of section 59A(1) is to create tax neutral treatment as between LLPs and partnerships; it is not an anti-avoidance provision;

(3) the FTT was correct in its interpretation and its view of the meaning of "business" in section 59A(1); "business" is wider than "trade" and can include investment business.

Discussion

114. We will address each of Ms Black's criticisms in turn. However, we should say at the outset that we can find no material error of law in the FTT's approach.

Statutory construction: the Ramsay principle

115. On the issues of statutory construction, Ms Black spent some time setting out the correct approach to statutory construction in support of her argument. She referred us to the summary of the principles of statutory construction in the judgment of Miles LJ in *Watts v HMRC* [2025] EWCA Civ 1615 ("*Watts*") (at *Watts* [37-39]), which reflected the judgments of the Supreme Court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690, [2021] UKSC 16 ("*Rossendale*") (*Rossendale* [9]-[17]).

116. There was no material dispute between the parties over the principles that must be applied. There is no need for us to repeat them here. They require a purposive construction of the statute – taking into account its context and where necessary, the history of its introduction and objectives – and its application to the facts viewed realistically.

117. There can be little doubt that the FTT was aware of these principles. The FTT set out its approach to the *Ramsay* principle at FTT [246]-[250].

> [246] Mr Dixon also submitted that it was necessary to take a purposive approach to s59A TCGA together with a realistic view of the facts in accordance with the principle established in Ramsay and related cases, summarised as follows by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454 at 468:
>
> > 'The driving principles in the *Ramsay* line of cases continue to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate questions is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'
>
> [247] He submitted that if the principle was applied to the facts of this case and we took a realistic view of the whole arrangement we should determine that the LLP was not carrying on a trade or a business with a view to profit.
>
> [248] Mr Marre reminded us that *Ramsay* is a principle of statutory construction which in this case involves first ascertaining, on a purposive construction, what transaction answers to the statutory description and second, deciding whether the transaction in question does so. He submitted that following this approach, s59A(1) TCGA asks simply whether there is an LLP, if so is it carrying on a trade or a business and is that trade or business carried on with a view to profit. These are the only questions asked by the statute.
>
> [249] We agree with Mr Marre.
>
> [250] Given the clarity of the legislation and the fact that there is no dispute as to the transactions carried out by the LLP – there has not, for example, been any accusation

> of sham – it is difficult to see how there can be scope for the *Ramsay* principle to apply either to allow any additional requirements to be read into the statute or to require any element of the transactions carried out to be disregarded or viewed differently in order to be assessed realistically.

118. Ms Black argued that the FTT declined to apply the *Ramsay* principle, and thereby failed to ask itself what she submitted was the crucial question: would Parliament have intended the treatment of the LLP as a partnership by section 59A(1) to apply to an LLP, whose only real world function was to receive the Loan Notes just before a planned liquidation, not to fund any trading or business, but to engineer the hoped for tax effect of a tax mitigation scheme?

119. In our view, it is clear, on a fair reading of FTT [246]-[250], that the FTT did not decline to apply the *Ramsay* principle. To the contrary, the FTT sought to apply the *Ramsay* principle. In these paragraphs, by reference to the arguments put to it, the FTT identified, correctly, the questions to be answered in relation to the substantive issues before it and accepted the need for a purposive construction of section 59A, in line with the *Ramsay* principle (FTT [248]).

120. Ms Black placed particular emphasis on FTT [250] in support of her case that the FTT declined to apply *Ramsay*. She submitted that the concept of "sham" plays no part in the application of the *Ramsay* principle and the reference to that concept in this paragraph demonstrates that the FTT declined to apply the *Ramsay* principle or failed to apply it correctly.

121. We disagree with Ms Black's reading of FTT [250]. In FTT [250], the FTT is simply making the point that section 59A(1) is clear in its terms. It was not that the *Ramsay* principle did not apply to the construction of section 59A(1).

122. Although the FTT may perhaps have expressed itself differently, given that the test in section 59A is a simple one, we think the FTT's observations can be justified. In considering the transactions carried out by the LLP, and in considering whether the LLP was carrying on a business, the test of business was not one to which further requirements could be added. The FTT was not considering a complex chain of transactions where, on a realistic view, particular steps in the chain could be seen to have no purpose other than tax avoidance – such as that considered by the House of Lords in *Inland Revenue Commissioners v Scottish Provident Institution* [2004] UKHL 52 [2005] 1 All ER 325. The question which the FTT was seeking to answer in this case – whether the transactions carried out by the LLP amounted to a "business" within section 59A(1) – concerned the tax status of the LLP as a whole. It was not focused on or limited to the transactions involving the Loan Notes, which gave rise to the potential tax advantage. The answer to Ms Black's question (at [118]), which she accused the FTT of failing to determine, had to be determined by reference not only to the transactions in the Loan Notes, but after considering all the transactions undertaken by the LLP.

123. The reference to "sham" in FTT [250] was a reference to the fact that there is no dispute in this case about the transactions undertaken by the LLP. The FTT was not seeking to imply that the *Ramsay* principle was confined to cases involving sham transactions. It was simply saying that this case was not one where it was being alleged that any of the relevant transactions were sham transactions. So, in considering whether the transactions undertaken by the LLP amounted to the carrying on of a business by the LLP, the case was not one where HMRC were saying, or were able to say, that any of those transactions were not what they purported to be. The transactions undertaken by the LLP had to be considered as they were.

Statutory construction: the purpose of section 59A(1)

124. Ms Black also criticizes the FTT for failing to give full effect to the statutory context as part of its construction of the meaning of section 59A(1). She says that, if the FTT had fully appreciated the

statutory context, it would have recognized that Parliament's intention in enacting section 59A(1) was that an LLP should be treated as a partnership for tax purposes only when it is behaving as a partnership.

125. Once again, we can find no material error in the FTT's approach.

126. The FTT was clearly aware of the importance of the statutory context. It refers to context at the beginning of its analysis (FTT [203]) and repeatedly throughout its review of the case law. Having conducted its review, the FTT sets out its approach at FTT [227], reminding itself of the importance of the statutory context.

127. The FTT considered the purpose of section 59A(1) at FTT [228]-[231]. It referred expressly to the passages from the Explanatory Notes to the LLPA upon which Ms Black relied in support of her submissions that the purpose of the provision is to determine the circumstances in which the tax treatment of LLPs should be aligned with that of general partnerships. The FTT identifies the same purpose (FTT [228]).

128. Ms Black also referred us to certain provisions of the Partnership Act 1890 ("PA 1890"). These included: section 1(1) PA 1890 which defines a partnership as "the relation which subsists between persons carrying on business in common with a view to profit"; and section 45 PA 1890 which contains the definition of "business" to which we have referred above. She argued that, given the purpose of section 59A(1) and the similarity of the wording, the circumstances in which an LLP should be treated as "transparent" by the provisions of section 59A should be limited to the circumstances in which a general partnership would be regarded as in "business" for the purposes of PA 1890.

129. We agree. However, it is clear that the FTT was cognisant of this point. The FTT expressly refers to section 45 PA 1890 and notes its relevance (FTT [234]) as part of its assessment of the statutory context and in particular the relevance of the inclusion of the term "trade" in section 59A(1). It says this at FTT [232]-[245])

> 232. In s.59A(1) TCGA the term "business" is used in the same context as the term "trade" – as the statutory enquiry is whether an LLP carries on "a trade or business".
>
> 233. Given the intention of the legislation we consider that the definition of "business" in s. 18 LLPA has relevance. This provides that:
>
> " 'business' includes every trade, profession and occupation"
>
> 234. Additionally, given the legislative intention and similarity in wording, we consider that definition of "business" in PA 1890 also has relevance, s.45 of that Act providing that:
>
> "The expression 'business' includes every trade, occupation or profession"
>
> 235. We consider it clear therefore that "business" in the context of s.59A(1) TCGA is broader than "trade".
>
> 236. Mr Dixon submitted that *Elizabeth Moyne Ramsay* indicates a distinction between a wider general use of the term "business" and a narrower one, in which the term is "coloured" by the term "trade". He saw "business" in s.59A(1) TCGA as coloured in this way.
>
> 237. He cited in support of his submission Judge Berner's view at [57] that "business" was not in the statutory context he was considering (s.162 TCGA) "associated" with

"trade, profession or vocation" or similar whereas it had been so associated in *Rashid*, with such association giving colour to its meaning in that case.

238. Mr Dixon sought to identify in Judge Berner's comments a principle that where "business" is associated in a statutory definition with "trade", the approach taken in Rashid should be followed and "business" given a narrower meaning requiring a degree of activity and so excluding passively held investments. His submission appears to rely on the fact that s.59A(1) TCGA refers to "business" together with "trade" as did the statutory definition in *Rashid*.

239. We do not agree with Mr Dixon. As Mr Marre pointed out, *Rashid* must be seen in the context of the legislation considered in that case and this was acknowledged specifically by Judge Berner.

240. First, *Rashid* was concerned with the interpretation of "business" within a definition of "employment" – specifically the definition in s.122(1) of the Social Security Contributions and Benefits Act 1992 which provided that:

" 'employment' includes any trade, business, profession, office or vocation' "

241. The judge in *Rashid* approached this in the following terms:

"The context here is that business is included along with trade, profession, office or vocation in the definition of employment, implying activity in contrast to mere investment, although of course there can be a business of investment, as in the definition of "investment company" for corporation tax; 'any company whose business consists wholly or mainly in the making of investments'. [12]

242. He also recognised, earlier in the same paragraph, that:

"…. one must be careful about applying the meaning of 'business' in other contexts"

243. Second, Judge Berner stated in *Elizabeth Moyne Ramsay* that the approach adopted in Rashid was not of general application, noting at [57]:

"Whilst that might have been applicable to the particular statutory provision concerning national insurance at issue in that case, it is not appropriate to the analysis under s 162 TCGA:

244. Accordingly, *Rashid* is not in our view, guidance on the meaning of "business" in the context of s.59A(1) TCGA . We consider that "business" should instead be given its ordinary commercial meaning and that it should not, as in Rashid , exclude "investment" business.

245. From a practical perspective we note also that a logical consequence of Mr Dixon's submission would be that LLP's established to hold investments on a non-active basis would inevitably be opaque for tax purposes. This cannot be the intention of the legislation.

130. Ms Black also takes issue with the FTT's analysis of the decisions in *Rashid* and *Elisabeth Moyne Ramsay* in the above passage.

131. *Rashid* was a case before the Special Commissioner concerning whether a taxpayer was a "self-employed earner" for the purposes of the Social Security Contributions and Benefits Act 1992 ("SSCBA"). In that case, the Special Commissioner decided that property letting transactions undertaken by the taxpayer were an investment and not a "business" for that purpose. *Elisabeth Moyne Ramsay* also concerned property letting, but in the context of the meaning of "business" for the purposes of "incorporation relief" in section 162 TCGA. In that case, the UT refused to adopt the same approach on the grounds that the statutory context was different. The UT found that the property letting activity conducted by the taxpayer could amount to a "business" for the purposes of section 162 TCGA.

132. As can be seen from the extract from the FTT Decision, the FTT declined to follow *Rashid* on the grounds that the UT in *Elisabeth Moyne Ramsay* decided that the meaning of "business" in *Rashid* was, in the words of the FTT, "not of general application" (FTT [244]). The FTT refers to a passage from the decision of the UT in *Elizabeth Moyne Ramsay* in support of this conclusion. The actual words used by the UT in *Elisabeth Moyne Ramsay* when referring to the meaning of "business" in *Rashid* are that it was "not appropriate to the analysis under s 162 TCGA" (*Elisabeth Moyne Ramsay* [57]).)

133. Ms Black says that the FTT was wrong to dismiss the decision in *Rashid* so peremptorily. She points out that, as can be seen from the extract from the FTT Decision above, the relevant provision in SSCBA - the definition of employment in section 122(1)) - refers to "employment" as including "any trade, business, profession, office or vocation". Section 59A(1) contains similar language. The UT in *Elisabeth Moyne Ramsay* distinguished *Rashid* on the grounds that the meaning of "business" in the SSCBA "took its colour from an association, in the statutory definition, with trades, professions and vocations" whereas "business" in section 162 TCGA did not (*Elisabeth Moyne Ramsay* [57]). And yet the FTT relies on the decision in *Elisabeth Moyne Ramsay* as authority to distinguish *Rashid* in this case. Furthermore, the FTT then reverts to a broad definition of business similar to that adopted by the UT in *Elisabeth Moyne Ramsay*.

134. There is some merit in Ms Black's argument. However, in our view, it does not undermine the correctness of the FTT's conclusions based on the statutory context that "business" in section 59A(1) should be given its ordinary commercial meaning and should not exclude investment business (FTT [244]). Our reasons are as follows.

(1) First, as the UT recognized in the *Elisabeth Moyne Ramsay*, the decision in *Rashid* is shaped by the particular context applicable to national insurance, which the Special Commissioner treated as providing colour to the meaning of "business" within the definition of "employment" in determining the level of activity that would require to be found to distinguish it, in a national insurance context, from mere investment (see *Elisabeth Moyne Ramsay* [44]-[45]).

(2) Second, the context of section 59A(1) is very different. As Ms Black argued and as the FTT found, the purpose of section 59A(1) is to define the circumstances in which the capital gains tax treatment of transactions undertaken by an LLP should be aligned with those of a general partnership. That purpose suggests that the meaning of "business" in section 59A(1) TCGA 1992 should be aligned with and informed by the concept of "business" in partnership legislation (and, in particular, PA 1890).

(3) Third, such an approach suggests that the meaning of "business" in section 59A(1) should be a broad one: it has to extend to all forms of activity that persons can undertake in partnership. In our view, "business" in section 59A(1) should therefore take its ordinary commercial meaning and should encompass an investment business if it is carried on as a commercial activity.

(4) Within that statutory context, some guidance can be obtained from the case law.

(a) In the leading case, *American Leaf*, Lord Diplock suggests that "any gainful use to which [a company incorporated for the purpose of making profits for its shareholders] puts any of its assets prima facie amounts to the carrying on of a business" (*American Leaf* p684C). He also identifies that the carrying on of business "usually calls for some activity on the part of whoever carries it on, though, depending upon the nature of the business, the activity may be intermittent with long intervals of quiescence in between" (*American Leaf*

p684D-E). *American Leaf* concerned the activity of a Malaysian company. There is no reason to consider that these principles should not apply equally to an LLP established to make profits for its members.

(b) The UT in *Elisabeth Moyne Ramsay* (at *Elisabeth Moyne Ramsay* [64]-[66]) suggested that, for the purpose of the definition of "business" in section 162 TCGA, regard should be had to the factors referred to in *Lord Fisher* (with the exception of the specific references to taxable supplies, which are relevant to VAT) and to the degree of activity undertaken. We would adopt a similar approach in relation to section 59A(1).

These principles are identified by the FTT in the course of its review.

135. For these reasons, we agree with the conclusion of the FTT at FTT [244] (which is repeated at FTT [252]). We too would distinguish *Rashid*. The very different context and the statutory purpose of section 59A(1) dictate that "business" must have a broader meaning in section 59A(1) and is not constrained by the reference to "trade" which also appears in the section. As we have discussed above, we might not express our reasons in the same terms as the FTT, but that does not detract from the conclusions reached by the FTT nor its analysis of the statutory context and its implications for a purposive construction of section 59A(1).

Statutory construction: the relevance of the case law

136. Ms Black's criticism of the FTT's treatment of the decisions in *Rashid* and *Elisabeth Moyne Ramsay* were part of a wider submission regarding the FTT's analysis of the case law on the meaning of business. Ms Black submitted that the FTT relied "wholeheartedly on cases referring to companies and the meaning of business for a company without acknowledging the difference in context".

137. As we have noted above, the FTT prefaced its review of the case law by noting: that there is no statutory definition of "business" for the purposes of section 59A(1); that its meaning had to be determined by reference to the case law; and that it was clear from the case law that account had to be taken of the statutory context. It then began a review of the case law, which was derived from the case law that had been examined by the UT in *GEFI UT*. (The decision of the UT in *GEFI UT* has since been the subject of an appeal to the Court of Appeal (see *GE Financial Investments v HMRC* [2025] EWCA Civ 797 ("*GEFI CA*"). The Court of Appeal in *GEFI CA* allowed the appeal on other grounds, but the Court of Appeal decision does not cast any doubt on the analysis of this issue by the UT in *GEFI UT*.) There were no other authorities referred to the FTT by counsel. There was no suggestion before us that the FTT failed to take into account any relevant authorities.

138. We have summarized the FTT's approach to the case law at [109(3)] above. It is found in the FTT Decision at FTT [206]-[226]. We will not set it out in full. It is sufficient to note that the FTT's analysis is organized by reference to statutory context and infused with references to statutory context. At the completion of its case law analysis, the FTT directs itself to re-examine the principles that it has derived from the case law against the particular purpose and statutory context of section 59A(1) (FTT [227]). We therefore find it difficult to fault the FTT's approach to the case law. The FTT was evidently aware of the context in which the cases to which it referred were decided and took that context into account.

139. As regards the particular criticism that the FTT relied principally on cases referring to companies, as we understood it, there were two aspects to Ms Black's submission. The first was a more general point regarding the FTT's approach to the meaning of "business" in section 59A(1) as a whole. The second was a more specific point concerning references in the FTT Decision to the principle – derived from cases such as *Korean Syndicate* and *Westleigh Estates* – that a company

established for a particular business should, prima facie, be regarded as carrying on a business to the extent that it is carrying on activities in pursuance of that purpose. We address that more specific point later in this decision. As regards the more general point, we reject it. In our view, it is clear that the FTT had the context of the various authorities well in mind throughout the decision. The FTT addressed the case law that had been referred to it by the parties. There was no suggestion that the FTT failed to take into account any case law, equivalent to the company cases, dealing with the question of whether a general partnership or LLP was carrying on a business. Nor was there any suggestion at the hearing before us that there was other relevant case law that was critical to the analysis.

Inadequate reasons

140. Ms Black also submits that the FTT had failed to give adequate reasons for its conclusions on the meaning of business in section 59A(1).

141. The relevant principles, when considering the adequacy of reasons, are set out in the judgment of Lord Phillips MR (as he then was) in *English v Emery Reimbold* [2002] EWCA Civ 605 [2002] ("*Emery Reimbold*"). He said this (at *Emery Reimbold* [26]):

> 26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the Judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this Court, in the light of *Flannery in Ludlow v National Power PLC* 17 November 2000 (unreported). If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing, or to direct a new trial.

142. We should also refer to comments of Popplewell LJ in *DPP Law v Greenberg* [2021] IRLR 1016 ("*Greenberg*"), where he explained what is required in terms of reasons in decisions (at *Greenberg* [57]):

> …
>
> (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek*-compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in Union of Construction Allied Trades and Technicians v Brain [1981] IRLR 224 (at 227), [1981] ICR 542 (at 551):
>
> 'Industrial Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law … their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given.'

143. Ms Black's focus was on the paragraphs in the FTT Decision, at FTT [244]-[245], to which we have referred at [129] above. She submitted that FTT [245] was a conclusion without reasons. She referred us, by way of example, to the decision of the UT in *Mark Glenn Ltd v Revenue and Customs Commissioners* [2026] UKUT 34 (TCC) ("*Mark Glenn*"), which was relied upon by Ms Black as a

case illustrating the distinction between the conclusion of a tribunal and the reasons given for that conclusion by the tribunal.

144. We disagree. As noted at FTT [238], HMRC had submitted to the FTT that "business" should be given a narrow meaning in section 59A(1) requiring a degree of activity that would exclude "passively held investments". In support of this submission, Mr Dixon, for HMRC, sought to rely upon *Rashid* and *Elisabeth Moyne Ramsay*. As we have discussed, the FTT did not accept that argument for the reasons it gave at FTT [239]-[244]. Those reasons are shortly stated, but clear, and are based on the analysis of the statutory context, which begins at FTT [228]. The conclusion, which follows from the reasons given by the FTT and its analysis, is that "business", in section 59A(1), should not be read as excluding investment business; see the second sentence of FTT [244]. This is not a case that comes anywhere close to the facts of *Mark Glenn*. To adapt the language of Lord Phillips MR (in *Emery Reimbold*) and Popplewell LJ (in *Greenberg*), it is apparent from the FTT Decision why the FTT reached the decision that it did; HMRC know why they lost.

145. At FTT [245], the FTT is primarily affirming the conclusion that it reached in FTT [244], which it repeats at FTT [252]. The FTT, we assume relying on its own experience that partnerships and LLPs are widely used as investment vehicles, comments that it would therefore be surprising if Parliament had legislated in a way that would distinguish between the tax treatment of partnerships and LLPs in relation to investment activity. In the context of the discussion which had preceded this comment (including the analysis of the statutory context), the comment makes sense. We accept that the reference to holding investments "on a non-active basis" brings into question the degree of activity required to amount to a "business". It is clear from the authorities to which the FTT refers earlier in the FTT Decision that, in most contexts, "business" requires some degree of activity (see, for example, *American Leaf* per Lord Diplock at p684D). We address the question of the degree of activity later in this decision. However, we think that the comment must be read in the light of the conclusion in FTT [244]. We do not regard it as part of the essential reasoning of the FTT for reasons to which we shall return later in this decision.

Conclusion

146. For the reasons that we have given, we reject HMRC's various criticisms of the FTT's approach to the interpretation of the meaning of "business" in section 59A(1). Looking at this part of the FTT Decision as a whole, it seems to us that the FTT conducted a careful and holistic analysis and reached the correct conclusion (at FTT [244] and [252]).

147. We dismiss this ground of appeal.

Ground 2

148. By Ground 2, HMRC say that the FTT erred in its application of "business" to the specific facts of this case in concluding that the LLP carried on a business.

The parties' submissions in outline

149. We have set out our summary of relevant parts of the FTT Decision at [109(9)] and [109(10)] above.

150. In relation to this ground of appeal, Ms Black, for HMRC, submits that the FTT erred in its application of "business" to the specific facts of the present case, which, in turn, caused the FTT incorrectly to conclude that the LLP was carrying on a business within the meaning of section 59A(1). Her main arguments were, in summary, as follows:

(1) Although the determination of whether the LLP was carrying on a "business" was an evaluative conclusion, the FTT failed to provide adequate reasons to justify its conclusions by reference to the facts.

(2) In effect, the FTT applied a rule that where a corporate entity is established for a particular business purpose, and conducts activities, however limited, in pursuit of that purpose, it should be regarded as carrying on a business. There is no such rule (see *GEFI CA* at [140]). The FTT were wrong to apply such a rule to an LLP that was established and liquidated as part of a tax mitigation scheme.

(3) As a result of adopting that approach the FTT placed incorrect weight on various factors as part of the evaluative exercise. In particular, it placed too much weight on the purpose for which the LLP was stated to be established and too little weight on the degree of activity undertaken by the LLP.

(4) The FTT failed to address the arguments of HMRC, in reliance upon *Rashid*, that passively held investments do not amount to a business.

151. Mr Marre, for Respondents, once again supports the FTT Decision. In summary, he submits:

(1) This ground is, in effect, an attack on an evaluative conclusion of the FTT. It cannot succeed unless HMRC can show that the FTT Decision was irrational.

(2) HMRC's submissions fall short of establishing any irrationality on the part of the FTT. The finding was open to the FTT on the evidence. There are no grounds for this tribunal to reopen the FTT's conclusion.

(3) The FTT did not treat the case law (*American Leaf*, *Korean Syndicate*, *Westleigh Estates*) as creating any rigid rule.

(4) The FTT addressed the decision in *Rashid* and was right to distinguish it.

Discussion

152. On this issue, we should begin by stating our conclusion.

153. This question, as HMRC concedes, was an evaluative one for the FTT to decide. It is well established that an appellate court or tribunal should act with caution in such cases. This tribunal should not intervene with such a conclusion unless it is irrational or plainly wrong in law (*Fage UK Limited & Another v Chobani UK Limited* [2014] EWCA Civ 5 per Lewison LJ at [114], *AH & Others (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 per Baroness Hale at [30]). It is not relevant that the appellate court or tribunal may or may not have reached a different conclusion on the facts as it understands them. In the present case, the decision of the FTT was not irrational or plainly wrong in law. It was entitled to conclude as it did.

154. We will address each of Ms Black's submissions in turn.

Inadequate Reasons

155. We can deal with this submission very briefly.

156. We have set out above extracts from the judgments of Lord Phillips MR in *Emery Reimbold* and Popplewell LJ in *Greenberg*. Those extracts set out the requirements of decisions in terms of providing adequate reasoning.

157. In this context, Ms Black submits that the FTT erred in this respect. Ms Black's submissions focus on FTT [262]-[263] which we have set out above. She submits that there is nothing in these

paragraphs which references the specific transactions entered into by the LLP, their frequency or other identifying features which links them to the conclusion (in FTT [262]) that the LLP is carrying on the business. For example, there is no cross-reference to the factors in *Lord Fisher* which the FTT identifies at FTT [222] or to how those factors are met on the facts of this case.

158. We acknowledge that the passage in the FTT's Decision which precedes these concluding paragraphs (in particular FTT [251]-[261]) does not refer back to the underlying findings of fact. It deals primarily with the application of the "presumption" that a corporate entity established to carry on business activities may be presumed to be carrying on a business if it undertakes those activities and the level of activity required of an investment business. However, these paragraphs cannot be divorced from the extensive findings of fact made by the FTT earlier in the FTT Decision (see for example, the summary of the findings in relation to the witness evidence of Mr Hutchings and Ms Hutchings at FTT [108]). Those findings when combined with the reasoning set out at FTT [262]-[263] can leave HMRC in no doubt as to why it lost this case. In short, the FTT decided that the LLP was carrying on a business because (i) it was formed and established in order to carry on a business, (ii) it undertook the transactions set out in the findings of fact in pursuance of that purpose, (iii) Mr Hutchings was engaged in a certain level of activity to support those transactions and (iv) the LLP's participation in a tax mitigation scheme should not disturb that conclusion. The FTT decided that that was a sufficient level of activity to amount to a business for the purposes of section 59A(1). HMRC may disagree with that conclusion. However, the reasons why the FTT reached those conclusions are clear.

The FTT's approach

159. Ms Black's principal argument on this ground is that the FTT adopted the wrong approach. She says that, rather than evaluating all of the possible factors to determine whether or not the LLP was carrying on a business, the FTT started from a presumption that an LLP, as a corporate entity, that was established for a particular business purpose and which conducts activities in pursuit of that purpose, must be regarded as carrying on a business (see FTT [263]).

160. The background to this point is found in the FTT Decision at FTT [253]-[256]. At FTT [253], the FTT says this:

> 253. Second, it is material that we are assessing activities carried out by an LLP rather than by an individual. Specifically, we consider it relevant that the LLP is pursuing the very purpose for which it has been established.

161. The FTT then refers to the judgment of Lord Sterndale in *Korean Syndicate* (at p272) and Pollock MR's judgment in *Westleigh Estates* (at p409) as authority for this principle. The FTT then concludes at FTT [256] in the following terms:

> 256. We consider, therefore, that a corporate entity established for a particular business purpose, should prima facie be regarded as carrying on a business to the extent that it is carrying on activities in pursuance of that purpose. We see no reason why this assumption should not extend to LLPs. If anything it may, as Mr Marre submitted, be stronger given that LLPs and partnership are expressly contemplated by statute to be formed for the basis of carrying on a trade or business.

162. Ms Black says that this is a "flawed premise". There is no such rule. She refers to the comments, albeit obiter, of Falk LJ in *GEFI CA*. In that case, which concerned the application of provisions of the UK/US double taxation treaty, Falk LJ, in a judgment with which both Whipple LJ and Arnold LJ agreed, said this (at *GEFI CA* [140]) in relation to the commentary provided by Lord Diplock in *American Leaf* on the judgment of Pollock MR in *Westleigh Estates*:

> 140. Expanding on that last point, GEFI placed reliance on the focus in *American Leaf* and the earlier cases on whether the activity was pursuant to the objects of the company. Mr Brinsmead-Stockham suggested that Lord Diplock's comment on what Pollock MR said in *Westleigh* (see [132] above) amounted to saying that a company undertaking its principal object must be carrying on business. I would not read Lord Diplock's judgment as intending to establish any such rule …

163. As can be seen from this passage, Falk LJ refers to a rule that a company carrying out an activity which is pursuant to the principal object of the company in its memorandum must be regarded as carrying on a business. There is clearly no such rule: it begs the question as to what the relevant object is and what activity is actually carried on by the company. Lord Dipock in *American Leaf* (at p683G) states that it is "far too broad a proposition". However, in any event, that is not what the FTT says at FTT [256]. What it says is that a corporate entity (including an LLP) "established for a particular business purpose, should prima facie be regarded as carrying on a business to the extent that it is carrying on activities in pursuance of that purpose".

164. Ms Black criticises that approach. She says that it created a presumption that the LLP was carrying on a "business" which had to be rebutted. The effect was to distort the conduct of the evaluation exercise that was involved in determining whether the LLP was carrying on a business. She points to the conclusion at FTT [262] and the summary of the reasons for that conclusion in FTT [263] and notes the absence of reference to other factors which may have been relevant given the FTT's analysis of the case law earlier in the FTT Decision.

165. In our view, the FTT Decision does not betray a distortion of the evaluative exercise. The FTT regards the facts that the LLP was established to carry on the business of dealing in public company shares and that it undertook several transactions which are consistent with that purpose as "relevant" (FTT [253]). We do not understand Ms Black to dispute that they were relevant factors for the FTT to take into account. The FTT then refers (at FTT [256]) to the LLP being "prima facie" regarded as carrying on business as a result. But, it is simply part of the weighing of the factors. Those facts are reflected in FTT [263(1)]-[263(2)]. However, they are not the only factors that the FTT refers to having taken into account (see FTT [263(3)]-[263(4)]).

166. Furthermore, the FTT made extensive findings of fact in the FTT Decision. The conclusions and reasons at FTT [262]-[263] are stated briefly. In the absence of an indication to the contrary, we must assume that it has taken its findings from the evidence into account. In this respect, we return to our initial comments on this ground. This was an evaluative decision for the FTT. It is not open to this tribunal to disturb that conclusion unless we are satisfied that the FTT's conclusion is irrational or wrong in law. We are not so convinced. We also bear in mind that where a tribunal has identified the correct legal principles, an appellate court or tribunal should be equally cautious to conclude that the FTT has not correctly applied them (see Popplewell LJ in *Greenberg* at [48]). In this case, the FTT identified the correct principles and, in our view, adopted the correct interpretation of the meaning of "business" in section 59A(1). In the absence of an indication that the FTT has failed to apply those principles, we should presume that the FTT has followed them.

The Special Commissioner's decision in Rashid

167. In the context of Ground 2, Ms Black relied in particular on the decision of the Special Commissioner in *Rashid* as authority that "business" should not extend to passively held investments. For the reasons that we have given above, in our view, the FTT was right to distinguish *Rashid* in its discussion of the interpretation of the meaning of business in section 59A(1). As to the question as to whether passively held investments can be regarded as amounting to a business in any particular case, that is a matter for the FTT to decide as part of its consideration of the overall level of activity that is

required to amount to a business within section 59A(1). However, we note that, in this case, the LLP's business was not simply passive. The LLP did not make a profit simply by holding shares and receiving dividend income. It made its profit by buying and selling shares. In addition, the LLP – through Mr Hutchings – did some, albeit limited, research to identify and monitor investments. In our view, it was open to the FTT to reach the conclusion that it did that that level of activity combined with the other elements that the FTT identified, was sufficient degree of activity to amount to a business in this context.

Conclusion

168. For these reasons, we dismiss this ground of appeal.

Ground 3

169. By Ground 3, HMRC say that the FTT failed to provide any, or any adequate, reasons for concluding that the LLP was carrying on a business "with a view to profit".

The FTT Decision

170. The FTT deals with this issue, the profit issue, in four short paragraphs at FTT [264]-[267]. We have set them out below.

> 264. Having determined that a business was being carried on it is then necessary to consider whether it was carried on for a profit.
>
> 265. This requirement was the subject of detailed consideration by the Court of Appeal in *Ingenious*. In essence the Court found that there must be a genuine purpose to earn a profit although that need not be the main purpose, and the test to be applied is a subjective one (see [119] of *Ingenious*) although "profit" has an objective meaning [123].
>
> 266. There is no specific requirement for the quantum of profit, and in determining whether there is a view of profit no purely quantitative test is applied, the amount of profit being one of several factors to consider.
>
> 267. Here the business purpose of the LLP included, as we have found, the intention to make a profit and it did in fact make a profit, the existence or level of which has not been challenged. This requirement is, therefore, satisfied.

The parties' submissions in outline

171. Ms Black, for HMRC, says that the FTT's conclusion on the profit issue (which is stated at FTT [267]) is inadequately reasoned. Furthermore, the FTT Decision could be read as implying that the profit issue was not challenged before the FTT, which she contended it was.

172. Mr Marre says that the profit issue was not argued as a separate and distinct issue before the FTT by HMRC. He says, in any event, the FTT's reasoning meets the test set out by Lord Phillips MR in *Emery Reimbold* when seen in the context of the FTT Decision as a whole.

Discussion

173. It is not necessary for us to seek to resolve the dispute between the parties as to whether the profit issue was argued before the FTT as a separate and distinct issue. The FTT was clearly seized of the issue and provided an answer to it.

174. We have set out, in the context of our discussion of the business issue, the requirements for decisions in terms of adequacy of reasons. They are found in the judgment of Lord Phillips MR in *Emery Reimbold* to which we refer at [141] above. In summary when an appellate court or tribunal is

faced with a challenge on these grounds, it is instructed to review the judgment, in the context of the material evidence and submissions at the trial, and determine whether "when all of these are considered, it is apparent why the judge reached the decision that he did".

175. In the present case, the FTT reached its conclusion that the LLP carried on a business "with a view to profit" at FTT [267]. The reasons for its conclusion, taking into account its previous findings of fact and analysis in the remainder of its decision, are stated at paragraphs [265] to [267].

> (1) The FTT refers to its conclusion that the LLP was carrying on a business (FTT [264]). The reasons for that conclusion are set out in detail in the earlier parts of the FTT Decision.
>
> (2) The FTT summarized the principles from the decision of the Court of Appeal in *Ingenious* at FTT [265]. Ms Black accepted that the FTT did not misstate the law in this respect.
>
> (3) Ms Black also accepted that the FTT's statement of principles at FTT [266] did not misstate the law.
>
> (4) At FTT [267], the FTT referred to its findings, on the evidence, (i) that the business purpose of the LLP included the intention to make a profit, and (ii) that the LLP did in fact make a profit, the existence or level of which had not been challenged. These findings are still not challenged by HMRC.

176. These paragraphs therefore contain the FTT's conclusions and the reasons for it, referring, where necessary, to its previous findings and conclusions which are necessary for dealing with the profit issue. Ms Black did not identify in her written or oral submissions, or when asked at the hearing to do so, any element of the reasoning or any necessary finding that was missing from the decision. There is none. With reference to the words of Lord Phillips MR in *Emery Reimbold*, it is apparent why the FTT reached the decision that it did. To adopt the words of Popplewell LJ in *Greenberg*, HMRC knew why they lost.

177. In this context we should also refer to the terms of the Practice Direction, issued by the Senior President of Tribunals on 4 June 2024 on reasons for decisions, which sets out basic and important principles for the giving of written reasons for decisions in the FTT. Paragraphs 6 and 7 state as follows:

> 6. Providing adequate reasons does not usually require the First Tier Tribunal to identify all of the evidence relied upon in reaching its findings of fact, to elaborate at length its conclusions on any issue of law, or to express every step of its reasoning. The reasons provided for any decision should be proportionate, not only to the resources of the Tribunal, but to the significance and complexity of the issues that have to be decided. Reasons need refer only to the main issues and evidence in dispute, and explain how those issues essential to the Tribunal's conclusion have been resolved.
>
> 7. Stating reasons at any greater length than is necessary in the particular case is not in the interests of justice. To do so is an inefficient use of judicial time, does not assist either the parties or an appellate court or tribunal, and is therefore inconsistent with the overriding objective. Providing concise reasons is to be encouraged. Adequate reasons for a substantive decision may often be short. In some cases, a few succinct paragraphs will suffice. For a procedural decision, the reasons required will usually be shorter.

178. In our view, FTT [264]-[267] comprise a commendably concise statement of the reasons for the conclusion of the FTT on the profit issue, of the kind contemplated by the Practice Direction.

Conclusion

179. We dismiss this ground of appeal.

THE TRADING ISSUE

180. We turn finally to the trading issue.

181. By this ground, the Respondents say that the FTT erred in law in finding that the LLP was not carrying on a trade at the time of the contribution of the Loan Notes to the LLP.

The FTT Decision

182. In summary, the FTT approached the trading issue in the following way:

> (1) The FTT identified that there was no statutory definition of a "trade" and so it was necessary to refer to the case law authorities for guidance on its interpretation. (FTT [171])
>
> (2) The FTT considered the decision of the Court of Appeal in *Ingenious* as a useful starting point given that it included a review of earlier authorities and that review was conducted in the context of the application of the case law to an LLP that was involved in a tax mitigation scheme. (FTT [172])
>
> (3) Having referred to the Court of Appeal's treatment of the case law, with particular reference to the judgment of Lord Wilberforce in *Ransom v Higgs* [1974] 1 WLR 1594, the FTT identified the need to adopt a "multifactorial approach". (FTT [178])
>
> (4) As regards the relevant factors to take into account, the FTT had regard to the "badges of trade" identified by Nicholas Browne-Wilkinson VC in *Marson v Morton* [1986] 1 WLR 1343 (FTT [179]-[180]). However, the FTT acknowledged that the badges of trade were "not decisive" (FTT [181]) and that ultimately it was necessary to "step back and look at the circumstances holistically" (referring to the decision of Sir Terence Etherton in *Eclipse Film Partners No.35 LLP v HMRC* [2015] EWCA Civ 95 at [112]). (FTT [182])
>
> (5) The FTT then considered various aspects of the facts in this case – including the limited frequency and low volume of transactions carried out by the LLP, the subject matter of the LLP's transactions (being for the most part dividend-paying listed securities), the lack of organized or systematic trading operations, and the informal nature of the LLP's financing arrangements. (FTT [184]-[197])
>
> (6) The FTT concluded that the LLP was not carrying on a trade at the time of the contribution of the Loan Notes to the LLP. It said this (at FTT [198]-[200]):
>
> > 198. The badges of trade are, as we have acknowledged, simply indicators to assist our determination.
> >
> > 199. Taking that analysis as a starting point and looking holistically at the circumstances, we have little hesitation in concluding that the LLP's activities were not sufficient to amount to a trade.
> >
> > 200. Our conclusion is based primarily on our assessment of the LLP's activities and the way in which they were implemented. Our view is irrespective of the fact that the LLP was, as we have found, set up partly as a vehicle for the tax mitigation scheme that Mr Hutchings intended to effect.

The Respondents' submissions in outline

183. Mr Marre does not criticise the FTT's identification of the relevant principles (at FTT [171]-[182]). However, he submits that the FTT erred in its application of those principles. In short, he says

that the FTT applied the badges of trade mechanically and failed to step back and consider the facts holistically as it directed itself to do (at FTT [182]).

184. Mr Marre submits that, in doing so, the FTT failed to follow the approach of the House of Lords in *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655 ("*Ensign*") and the Court of Appeal in *Ingenious* and focus on what the LLP actually did. What it did was to expend capital in the purchase of shares for resale, put its capital assets at risk, and later turn a profit on selling the shares that it had purchased. That was, Mr Marre submits, clearly a trading activity. The LLP made a profit. This was not a case, as in *Ingenious*, where it was necessary to establish that the LLP was carrying on a trade for the members to benefit from a loss.

Discussion

185. We will deal with this point briefly, not least, because, as Mr Marre acknowledged, the concept of trade is narrower than that of business. The business issue presents a much lower bar for the Respondents. It is difficult to see how this issue will affect the determination of this appeal unless we remit the appeal to the FTT (which given our conclusions on HMRC's grounds of appeal, we will not).

186. In this case, as Mr Marre accepts, the FTT identified the correct principles of law and directed itself appropriately. In such a case, the case law authorities are clear: an appellate court or tribunal should be slow to conclude that, having identified the correct legal principles, the FTT failed to apply them faithfully. We referred earlier in this decision to the comments of Popplewell LJ in his judgment in *Greenberg* at *Greenberg* [58]. We set it out in full below.

> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.

187. In the present case, the correct principles were identified by the FTT, and the FTT can be expected to have applied them unless the contrary is clear from the language of the FTT's decision.

188. There is nothing in the FTT Decision to suggest that it did not apply those principles. Rather, the language of the FTT decision suggests that it did.

189. We will deal briefly with two specific criticisms made by Mr Marre.

190. Mr Marre suggested that the FTT paid only lip-service to its self-direction at FTT [182] to step back and look at the facts holistically. But that is not correct. Having considered the relevant factors identified by reference to the "badges of trade", the FTT once again referred to the need to look at the facts holistically (FTT [198]-[199]). Its conclusion is expressed to be made by reference to its assessment of the LLP's activities as a whole and the way in which they were implemented (FTT [200]).

191. Mr Marre also suggested that the FTT failed to take into account the judgment of Lord Templeman in *Ensign*. But the FTT conducted its analysis by reference to the Court of Appeal's decision in *Ingenious*, to which the FTT referred as considering "some of the key authorities". *Ensign* is referred to extensively in *Ingenious*. It is inconceivable that the FTT did not take it into account. In any event, there is nothing in the FTT Decision to suggest that it ignored the decision in Ensign. Indeed, the reasoning in the decision is consistent with the judgment of Lord Templeman in *Ensign*.

Conclusion

192. For these reasons, we conclude that, following the direction of Popplewell LJ in *Greenberg*, there is no good reason for this tribunal to disturb the findings of the FTT.

193. We dismiss the Respondents' cross-appeal in relation to the trading issue.

DISPOSITION

194. For the reasons that we have given above:

(1) we dismiss HMRC's appeals in relation to the business issue on all grounds;

(2) we dismiss the Trusts' appeals in relation to the procedural issue;

(3) we dismiss the Respondents' appeals in relation to the trading issue;

MR JUSTICE EDWIN JOHNSON
JUDGE ASHLEY GREENBANK

RELEASE DATE: 12 JUNE 2026