



Neutral Citation: [2023] UKFTT 281 (TC)

Case Number: TC08755

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

North Shields

Appeal reference: TC/2020/03362

INCOME TAX – returns from share transactions – whether trading activity – no – whether carried on commercially – no – appeal dismissed

Heard on: 24 October 2022
Judgment date: 8 March 2023

Before

**TRIBUNAL JUDGE ANNE FAIRPO
NOEL BARRETT**

Between

NICHOLAS HENDERSON

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: Ms M Shone

For the Respondents: Mr K Brooke, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

Introduction

1. This is an appeal against closure notices issued on 2 February 2020 for the tax years ended 5 April 2016, 2017 and 2018. The appellant, Mr Henderson, claimed loss relief on losses arising from share trading activities on the basis that these were deductible trading losses. HMRC took the view that the activities did not amount to a trade or, if they did, that the trade was not carried out on a commercial basis.

Background facts

2. The following was not in dispute, and so we find the following as facts.

3. Mr Henderson was a partner in a professional firm. In his personal capacity he bought and sold shares for a number of years, from early 2006, before the tax years under appeal. These transactions were treated as capital for tax purposes. The transactions were carried out in two ways:

(1) some were carried out on his behalf by financial advisers on a discretionary basis with no input from Mr Henderson;

(2) the rest were carried out on an 'execution only' basis, with Mr Henderson making decisions as to which shares to buy or sell.

4. He did not undertake any transactions in the 2013 and 2014 tax years.

5. In mid 2014, Mr Henderson inherited a substantial amount of money. Approximately a year later, he gave notice to the partnership that he intended to leave. He retired on 31 January 2016, having been on 'garden leave' from 1 December 2015.

6. Mr Henderson placed the majority of his inheritance in a discretionary investment account, where the investment decisions were made by fund managers with no input from Mr Henderson. The returns from these investments are not part of this appeal.

7. He resumed making execution-only share transactions at some point between receiving his inheritance and handing in his notice to the partnership. It was agreed that there was no record of precisely when the trading activity recommenced. It is the returns from these investments which are the subject of this appeal.

8. The transactions were all on Mr Henderson's own account: he was not a registered or regulated trader and did not buy or sell shares on behalf of third parties. Mr Henderson held shares for between a few days and several months. Shares were not always sold in the same blocks as purchased.

9. Mr Henderson did not discuss these share transactions with his accountants and did not consider the tax consequences of the transactions until his tax return for the year ended 5 April 2016 was being prepared in January 2017.

10. The number of transactions undertaken by Mr Henderson on an execution only basis were:

(1) 2006/7 - 22 sales

(2) 2007/8 - 15 sales

(3) 2008/9 - 0

(4) 2009/10 - 55 sales

(5) 2010/11 - 56 sales

- (6) 2011/12 - 26 sales
- (7) 2012/13 - 0
- (8) 2013/14 - 0
- (9) 2014/15 - 13 sales
- (10) 2015/16 - 31 sales, 28 purchases
- (11) 2016/17 - 54 sales, 53 purchases
- (12) 2017/18 - 19 sales, 7 purchases

(No information was provided to the Tribunal as to purchases made before 2015/16).

11. Mr Henderson made losses on the transactions undertaken in the 2015/16 and 2016/17 tax years. He made a profit in the 2017/18 tax years, although this was smaller than his aggregate losses for the previous two years.

12. Between leaving the partnership and May 2017 Mr Henderson was not employed and, ignoring for the time being the share transactions in dispute, had no self-employment.

13. Mr Henderson took up a new employment in May 2017 in part because he was offered an interesting position but also because he had concluded that the income from his share transactions was not increasing quickly enough to support his outgoings. By 5 April 2018 he had sold all but three of the shareholdings.

Evidence

14. The Tribunal was provided with records from Mr Henderson's broker, and his accounts as prepared for tax purposes.

15. Mr Henderson provided a witness statement and gave oral evidence at the hearing.

16. He stated that he had had an interest in shares for many years, as shown by the transactions prior to 2013. He agreed that he had generally made losses overall on share transactions in those years.

17. The inheritance allowed him to consider focusing on making a living from buying and selling shares, which he considered he was unable to do whilst still a partner in a professional firm. He therefore retired from the firm in order to have more time to devote to his share trading activities. It was accepted for Mr Henderson that he could not be precise as to the start date of these trading activities because he was "turning what previously been an activity ... carried on out of interest into a trade".

18. Mr Henderson stated that he aimed to generate enough profit to pay his outgoings, although he was aware that it might take some time to achieve this position and that income from his other investments would be needed to cover any shortfall in the meantime. He had no written plan for the share trading activities, although he aimed to achieve an average profit of £5,000 per month. This was the amount he thought he would require to cover his outgoings and thought he could achieve this with the funds available to him for share trading. He agreed that this figure was "more of a desire than the result of any calculations".

19. Mr Henderson did not consider the tax consequences in this calculation and was more concerned with the top line figure. He had not taken any accountancy advice before he resumed his share dealing.

20. Mr Henderson explained that he knew he would have to pay tax but that he did not think about it, as that was something to be dealt with "at the end". He considered that, to make £5,000 per month after tax, he would need to target "roughly" £6,000 in profit per

month. He agreed that he did not consider the tax position until he received his draft tax return for 2015/16 and had not previously thought that the tax consequences would be different to those on his earlier share dealings.

21. He accessed his execution only account initially by telephone and eventually by email to a central inbox to enable the instructions to be executed more quickly. He had access to a live feed of share prices and subscribed to company information on listed companies which was available to him via the internet on his computer and mobile phone. He carried out research by reading company accounts, reviewing regulatory news releases from companies, reading the financial press and investment magazines and websites. He had a particular interest in oil and gas shares, as he considered that these could provide a considerable profit in a short space of time when there was evidence of new discoveries and followed news of oil and gas discoveries as well as relevant industry blogs. He considered that he spent approximately 1-2 hours per day doing research and checking prices. Having left a busy professional firm he did not want to take on another full-time activity and considered that this was a reasonable amount of time to devote to share trading, leaving enough time to do other things.

22. Mr Henderson stated that he did not follow a specific pattern of work across a week. He had a watch list of shares, checked the news for likely information that could impact the share price, read investment reports and relevant news, and would look at share discussion platforms to see what others were considering, when deciding whether to invest. He said that it was easy to track share prices.

23. He would check the news first thing in the morning and then, depending on the time available to him that day, would look at company investment information and blog. Later in the afternoon he would log in to see if there had been any movements in prices. He was actively trying to work fewer hours, having moved away from practice.

24. Mr Henderson explained that he carried out transactions when appropriate, being led by research rather than a need to carry out a particular volume of purchases or sales. He had access to the reports from his trading account online and considered that he did not need anything else to understand his trading performance.

Submissions and discussion

25. There was no particular dispute between the parties as to the facts or indeed the relevant law and case law: the dispute was as to how those facts should be interpreted in the context of the law.

Relevant law

26. s64 Income Tax Act (“ITA”) 2007 provides, as relevant:

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

(a) carries on a trade in a tax year, and

(b) makes a loss in the trade in the tax year (“the loss-making year”).

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

(a) for the loss-making year,

(b) for the previous tax year, or

(c) for both tax years ...

27. s66 ITA 2007 provides:

- (1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.
- (2) The trade is commercial if it is carried on throughout the basis period for the tax year—
 - (a) on a commercial basis, and
 - (b) with a view to the realisation of profits of the trade.
- (3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits.
- 4) If the trade forms part of a larger undertaking, references to profits of the trade are to be read as references to profits of the undertaking as a whole.

28. Mr Henderson had claimed loss relief on the basis that the activity was carried on in a non-active capacity as he could not demonstrate that he had spent more than 10 hours per week on average across the tax year on the activity. The sideways loss relief claims had therefore been restricted to £25,000 in accordance with s74A ITA 2007.

Whether undertaking a trade

29. It was agreed that the question of what amounts to a trade is not usefully defined in the legislation, and so it is necessary to consider the interpretation provided by case law and the “badges of trade” identified by the Royal Commission on the Taxation of Profit and Income Tax. These are not determinative but might be of assistance (*Jerome Anderson* [2018] UKUT 159 (TCC) at [66]). In the context of share dealing, case law has held that the badges of trade have limitations and that the overall impression is more indicative (*Salt v Chamberlain* [1979] 53 TC 143)). The Court of Appeal reached a similar conclusion that the badges provide common sense guidance and that each case required the Tribunal to stand back and look at the picture (*Eclipse Film Partners No 35 LLP* [2015] STC 1429).

30. In *Salt v Chamberlain*, the High Court concluded that (at [1979] STC 750 at 760) “Where the question is whether an individual engaged in speculative dealings in securities is carrying on a trade, the prima facie presumption would be as Pennycuick J suggested in the Lewis Emanuel case, that he is not. It is for the fact-finding tribunal to say whether the circumstances proved in evidence or admitted take the case out of the norm.”

31. The question for us therefore is whether the circumstances are such that the prima facie presumption that Mr Henderson was not trading has been displaced. Whilst the badges of trade have limitations, we consider that relevant badges can nevertheless provide a useful framework within which to consider the circumstances, or the ‘picture’ as indicated in *Eclipse 35*.

Number and frequency of the transactions

32. The number of transactions undertaken by Mr Henderson in the years under appeal amounted to 194. This was, on average, just over one transaction per week during the period of activities (stated to be April 2015 to April 2018 on Mr Henderson’s tax returns).

33. Mr Henderson contended that these transactions were carried out when appropriate, led by research and information rather than by a requirement to make a particular volume of sales. The number of transactions undertaken was not a deciding factor in whether or not a trade was being carried on. For example, the case of *Rutledge* (1929) 14 TC 490 had involved one purchase and one sale of a very large quantity of toilet rolls.

34. Whilst we agree that the number of trades carried on is not conclusive, the comparison to Rutledge is not persuasive; the taxpayer in that case was on a business trip to Berlin and purchased one million toilet rolls as bankrupt stock, which he re-sold before delivery. It may have been a single transaction, but the nature of the transaction was such that it could not reasonably be considered to be for personal use, investment or another non-trade purpose.

35. HMRC noted that in *Manzur* [2010] UKFTT 580 (TC), the taxpayer made between 240 and 300 trades per year and the Tribunal in that case considered that, although the number or frequency of transaction alone could not establish a trade, that level of transactions amounted to the management of a portfolio of investments rather than trading. The Tribunal in that case also took into account in reaching this conclusion that the time spent on the activity (2 hours per day), the fact that the taxpayer took the advice of brokers as well as rely on his own expertise and also that the activities were not characteristic of established share dealers, as the taxpayer and no customers and was dependent on market movements to make a profit. HMRC contended that there were substantial parallels between the facts in *Manzur* and those in this case.

36. Looking at the number of transactions in this case, we note that there is no significant increase in the number of sales made by Mr Henderson in the tax years under appeal in comparison with the two most active years in which he made similar investments before he retired from the partnership. The returns from those years were declared as capital gains.

37. Although only sales figures were provided for the earlier years, these indicated that Mr Henderson had undertaken 55 sales in 2010 and 56 sales in 2011, before he reduced and paused his share activities for family reasons. In the tax years under appeal, he made 31 sales in 2015/16; in 2016/17, he undertook 54 sales and in 2017/18 when closing the activity he undertook 19 sales.

38. From the records provided, across the periods under appeal, Mr Henderson undertook an average of just over one trade per week, with a maximum of nine trades in a single week and several weeks with no trades. We do not agree that this pattern is clearly indicative of a trade in share dealing. We note, for example, that Mr Henderson undertook rather fewer trades than those undertaken by the taxpayer in *Manzur*, who was also held not to be trading.

Time spent on activity

39. Mr Henderson's evidence was that he spent 1-2 hours per day on activities connected with the share transactions and that he did not follow any specific pattern of work. The claim for sideways loss relief had been restricted out of caution, as he could not prove that he was spending more than ten hours per week on such activities, although he thought he did spend a little more than ten hours each week.

40. HMRC submitted that, as described in *Manzur*, this was a very part-time peripheral activity. Whilst fewer than ten hours per week might be sufficient for some trades, HMRC contended that it was unlikely in the case of share trading, where a close watch on the markets would need to be kept in order to know when to buy and sell.

41. Mr Henderson contended that his position was closer to that in *Wannell* which also involved a taxpayer who had given up their employment in order to undertake share dealing activities. It was submitted that he had ceased his professional activities in order to have more time to undertake research to support his share dealing.

42. HMRC submitted that the taxpayer in *Wannell* had continued to work full days and had previously worked as a commodities broker, so that he had relevant experience and training. Even so, the Tribunal had only concluded 'by a hair's breadth' that he was trading. Mr

Henderson worked part-time and his own evidence was that he did not want to work at the activity full-time, he had no formal relevant training or experience.

43. We note that Mr Henderson's evidence was that, although he generally checked the news in the morning, other activity would depend on what else he was doing as it would depend on the time available to him. We note also that his evidence was that part of his reason for retiring from the partnership and undertaking the share transactions was that he wanted to have time to do other things. As such, we do not consider that his situation was clearly comparable with that of the taxpayer in *Wannell*, who under the share dealing activity on a substantially full-time basis.

44. We consider that the time spent by Mr Henderson does not support the contention that he was trading. We consider that it is more consistent with investment activity to manage a portfolio, fitting in the relevant activity with the other things that Mr Henderson considered important rather than being a particular focus of his activities.

Organisation and commerciality

45. Although the question of whether a person is trading and whether any trade is carried on on a commercial basis are separate, with the question of commerciality only arising if a person is trading, there is some overlap between the question of whether a person's activity is organised in a way which is characteristic of trading and the question of commerciality, and so we have considered the evidence in this area below.

46. Mr Henderson's business plan was described, in a call with HMRC, as being to purchase shares which he thought would appreciate in value in the short term so that he could sell them at a profit. We have already noted above that Mr Henderson did not devote the majority of this time to these activities but, instead, fitted them in around other things that he wanted to do.

47. His evidence as to his activities also do not indicate any significant degree of organisation. Whilst no significant infrastructure is required to deal in shares, we do consider that a person who was intending to undertake a trade in share dealing would have a more considered and systematic approach (such as that in *Ali* ([2016] UKFTT 8 (TC)), for example) and would spend more time on the activity. We note also that, although Mr Henderson's evidence was that he was interested in oil and gas shares because of the returns that he considered could be made when oil and gas discoveries were announced, his share transactions encompassed a number of non-oil and gas shares and there was no evidence provided as to any research into other areas of business, nor why these shares were purchased.

48. We do not doubt that Mr Henderson thought that he could generate returns by buying and selling shares, but we consider that he did not take a particularly organised or effective approach to the activity. For example, notes of a meeting between Mr Henderson, his representative and HMRC in November 2017 indicated that Mr Henderson was 'hoping' to make a profit of £45-48,000 in the 2016/17 tax year. This is rather less than the £5,000-£6,000 per month mentioned in the hearing and, in practice, we had no evidence that Mr Henderson had made any concrete plans as to how these returns were to be achieved. Mr Henderson's evidence indicated that this was the amount he thought he needed and hoped to achieve; it was not an amount that was calculated as achievable from any particular plan.

49. The Tribunal were provided with no records from Mr Henderson that showed how or to what extent he tracked the amounts coming in from these activities. We were provided with the broker account records. It appears from those records that the maximum funds employed in the share dealing at any given time did not exceed £100,000 (on the basis that funds were

reinvested and purchases were at least partly funded by earlier sales). A return of £6,000 per month on funds employed of £100,000 seems ambitious and there was no indication that any serious thought had been applied to how this would be achieved.

50. We acknowledge, of course, that people do embark on trades with high hopes which may not be realised. However, in this case, we consider that Mr Henderson had not seriously planned or considered his actions in that way that would be expected if he were approaching the activity as a business or trade.

Overall

51. Standing back, to look at the picture overall, we consider that the activities do not amount to a trade in dealing in shares.

52. We consider that Mr Henderson's evidence cannot be considered to support the contention that he was trading, nor (if we are wrong as to whether he was trading) that he was undertaking the activity in any organised or commercial manner. We consider that the activity was one of management of a portfolio of investments, an activity which was subordinate to his other activities, having retired from practice, and which he hoped would generate returns to supplement the income from other investments.

53. We consider that it would have been clear to Mr Henderson quite quickly that he was not going to achieve an income in the region of £6,000 per month (or, indeed, even the £45-48,000 per year mentioned to HMRC). There was no evidence that Mr Henderson changed his approach to the activities in response to the accumulating losses, although he had stated in a telephone call with HMRC that if he made higher profits in one month then he would look to make lower profits in the following month. We consider that someone who was undertaking this as a serious activity, as a trade, would have made changes to the activity when faced with these accumulating losses.

54. We therefore conclude that Mr Henderson was not undertaking a trade. We consider that he was managing a portfolio of personal investments, albeit for growth rather than income. It was submitted that Mr Henderson was not managing a portfolio as he did not seek dividend income from the shares and received very little dividend income. However, we consider that a portfolio may be managed for growth as well as, or instead of, income. The fact that growth, rather than dividend income, is sought does not mean that the activity becomes one of trading.

Conclusion

55. For the reasons given above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 08th MARCH 2023