[2016] UKFTT 0565 (TC)

TC05314

Appeal number: TC/2013/00496

Income tax – losses – trading in footballer development –discovery- reasonable basis for belief tax under assessed – held –valid discovery under s 29(1) – activity investment not trade.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr Jerome Anderson **Appellant**

- and -

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

TRIBUNAL: JUDGE Rachel Short
Mrs Rebecca Newns

Sitting in public at Royal Courts of Justice, Strand, London on 16 – 20 May 2016

Mr Gordon of Temple Tax Chambers instructed by Wilson Wright LLP for the Appellant

Ms Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Anderson claimed losses of £3,002,772 in his personal income tax return for the 2008-9 tax year on the basis that those losses arose from trading activities, described as football development.

2. This is an appeal against HMRC's decision that these losses, arising from activities undertaken to develop and bring young South African foot balling talent to the European football market are not allowable.

3. HMRC raised an assessment on Mr Anderson on 2 May 2012 refusing to allow these losses because in their view the losses did not arise from a trading activity and/or were losses arising from activities whose main purpose was to obtain a tax advantage.

4. The assessment made on Mr Anderson on 2 May 2012 was made outside the usual enquiry window, which closed on 28 January 2011, on the basis that a "discovery" had been made under s 29(1) Taxes Management Act 1970 ("TMA 1970").

5. The onus is on HMRC to demonstrate that the specific conditions at s 29 TMA 1970 have been fulfilled and that the "discovery" assessment is valid. Mr Anderson argues that those conditions have not been met because at the time when the assessment was made HMRC did not have a reasonable basis for concluding that he had paid insufficient tax for the 2008-9 tax year.

6. The onus of proof is on Mr Anderson to demonstrate on the balance of probabilities that the trading losses claimed in his tax return for the 2008-9 tax year are losses arising from his trading activities.

Main points at issue

7. Was the discovery assessment issued to Mr Anderson 2 May 2012 valid for the purposes of s 29 TMA 1970?

8. Are the losses claimed by Mr Anderson allowable under s 64 Income Tax Act 2007 (Deduction of losses against general income) or s 72 Income Tax Act 2007 (Relief for losses for individuals in the first four years of trading) as trading losses.

Background facts

9. Mr Anderson is a well known football agent. He has worked as a football agent for thirty years and represented some well known players. His work as a football agent is carried out through his company, Jerome Anderson Management Limited.

10. Mr Anderson was introduced to a soccer academy in South Africa run by Bafana Soccer Developments Limited, a Jersey company ("Bafana") firstly by Mr Steptoe, who set up Bafana and later, as an business opportunity, by Mr Caisley, an independent financial adviser. Bafana had been set up as a training scheme in South Africa to nurture young footballing talent and to promote their prospects in the lucrative European footballing leagues and make money by the successful transfer of talented players.

11. Bafana was financed by external individuals such as Mr Anderson, who were given the opportunity in return for providing finance to pick players who were being trained at Bafana, securing an interest in any future transfer fees made by Bafana from the players picked.

12. In his personal capacity Mr Anderson put £2,943,000 into Bafana in January 2009 and picked 3 players in July 2009 from the Bafana academy; Ayanda Patosi, Devon Saal and Armien Campbell, from a list of twenty players provided by Bafana.

13. Mr Anderson's investment was financed through a loan to him from a Jersey based entity, Maddox Limited. That loan was entered into on 6 January 2009 for an amount of £2,850,000. First and second repayments were due in March 2009 and June 2010 equal to one and two nineteenths respectively of the amount borrowed.

14. Mr Anderson's tax return for the 2008-9 tax year, filed on 28 January 2010 included a claim for £3,002,772 of losses described as in relation to "Bafana Soccor" and a business of football development, which commenced on 6 January 2009.

15. Bafana went into administration in 2011. Mr Anderson did not make any significant profits from the Bafana Scheme.

16. HMRC identified six footballers who had participated in what they described as an "undisclosed tax avoidance scheme" in 2008-9 involving a football academy in South Africa, the "Bafana Scheme". HMRC became aware of Mr Anderson's involvement in the Bafana Scheme in the course of its enquiries into other scheme participants.

17. HMRC raised a discovery assessment on 2 May 2012 under s 29 TMA 1970 which disallowed all of the £3,002,772 losses claimed by Mr Anderson.

18. Mr Anderson appealed to this Tribunal on 28 May 2012.

Was the discovery assessment issued on Mr Anderson on 2 May 2012 valid?

19. The relevant legislation which applies to the discovery assessment raised on Mr Anderson for the 2008-9 tax year is s 29 Taxes Management 1970 and in particular:

20. S 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 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"

21. Subsection (3) provides that if a taxpayer has made a return for the relevant year, as Mr Anderson had, an assessment cannot be made under s 29 unless one of two conditions is fulfilled. The relevant condition in Mr Anderson's case is the second condition set out at s 29(5):

"*s 29(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) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have reasonably been 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."

22. We were referred to various authorities which considered the application of the discovery rules at s 29 TMA 1970:

(1) *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193

(2) *Corbally-Stourton v HMRC* [2008] STC(SCD) 907

(3) *Charlton v Revenue & Customs Commissioners* [2011] UKFTT 467

(4) *Charlton v Revenue & Customs Commissioners* [2012] UKFTT 770

(5) *Sanderson v Revenue & Customs Commissioners* [2012] UKFTT 207 (TC)

(6) *Sanderson v HMRC* [2014] STC 915

(7) *Sanderson v Revenue & Customs Commissioners* [2016] EWCA 19

(8) *Hargreaves v HMRC* [2015] STC 905

(9) *Hargreaves v HMRC* [2016]EWCA Civ 174

23. The Appellant based his case primarily on whether there had been a reasonable basis for the raising of a discovery assessment under s 29(1), recognising that recent decisions, including *Sanderson*, gave them a slim chance of winning their case by arguing that the condition at s 29(5) had not been met.

Evidence

We heard oral evidence at the Tribunal from:

Mr Old for HMRC

24. Mr Old provided a witness statement dated 20 October 2015, gave oral evidence to the Tribunal and was cross-examined by Mr Gordon.

The relevant officer

25. Mr Old explained that he had oversight of Ms Annis Lampard who was the "relevant HMRC officer" for s 29(1) purposes. He believed that Ms Lampard's level of experience was appropriate to her role in the investigation of Mr Anderson's tax affairs and explained that in the light of the *Charlton* decision HMRC were aware of the need to ensure that they acted promptly to issue an assessment when a discovery had been made. He resisted the suggestion that the timing of Mr Anderson's assessment had been driven by Ms Lampard's decision to move to a new role.

HMRC approach to BAFANA

26. While the Bafana Scheme was not technically notifiable under the "Disclosure of Tax Avoidance Schemes" rules, Mr Old said it had the hallmarks of an "undisclosed avoidance scheme"; it involved a non-recourse loan, a business with nil turn-over and a large loss had been claimed.

27. Mr Old accepted that the mere existence of a large early year loss did not necessarily indicate tax avoidance, but pointed out that HMRC knew that this was a centrally managed scheme and therefore expected that all participants in the scheme were likely to be in a similar situation. In his view, the fact that the advisers' opinions on the scheme referred to tax not being driver suggests that this was an avoidance scheme.

28. Mr Old accepted that Bafana was a real academy with staff and players in South Africa but reiterated HMRC's view that Mr Anderson's losses were not due because he had not provided evidence of a trade being carried on; if a trade was being carried on, it was not on commercial basis and not with a view to the realisation of profits.

Basis for discovery

29. Mr Old provided details of HMRC's contacts with Mr Anderson's advisers before issuing the discovery assessment on Mr Anderson. He explained that the information which HMRC had about Mr Anderson's involvement in the Bafana Scheme was set out in:

(i) the internal quarterly report compiled by Ms Lampard of 30 March 2012 which referred to Mr Anderson as a 9th participant in the scheme;

(ii) Ms Lampard's memo dated 20 April 2012 outlining the basis on which the discovery assessment was raised including by reference to the talent allocation sheet received on 1 September 2011 and the loan documents received under the Schedule 36 Notices on 24 February 2012 "*which established that Mr Anderson has personally entered into arrangements with Bafana*"; and

(iii) the notes of HMRC's meeting of 13 July 2012 referring to the email traffic which they held in relation to Mr Anderson.

30. Mr Old told us that at the end of April 2012 HMRC's evidence of the amount of time which Mr Anderson had spent working with Bafana was the 27 May 2010 email from Mr Steptoe of Kemp Thornton to Mr Lerner, (Mr Anderson's accountant) stating that "*Jerome has logged plenty of hours by visiting the website and meetings all over Europe, but we are a bit concerned that he had not yet been out to Cape Town and don't know what HMRC would make of it if they lodged an enquiry."*

31. Mr Old stressed that Mr Anderson's involvement in the Bafana Scheme was in itself sufficient to justify the discovery assessment, even if this Tribunal concluded that there had been no tax avoidance.

32. Mr Old accepted some shortcomings in HMRC's letters concerning the discovery assessment; He agreed that HMRC's letter of 27 April 2012 missed a step to explain the basis of the discovery assessment and did not refer to evidence of Mr Anderson's actual time spent with Bafana and HMRC's review letters of 13 December 2012 included insufficient details of why HMRC did not consider that a genuine trade was being carried on by Mr Anderson. Mr Old acknowledged that HMRC had no direct contact with the participants themselves in the Bafana Scheme.

33. In response to suggestions that settlement discussions with other participants in the Bafana Scheme were on the basis that a trade had been carried on, Mr Old said that these discussions were on a "without prejudice" basis and could not be used to infer anything about Mr Anderson's case.

Mr Nicholson

34. We also saw a written witness statement from Mr Nicholson dated 25 August 2015. Mr Nicholson did not give oral evidence to the Tribunal. Mr Nicholson is a tax partner at Wilson Wright LLP, advisers to Mr Anderson. His witness evidence concerned the documents provided by HMRC under the Directions issued on 12 December 2013 requiring HMRC to provide the documents on which their discovery assessment on Mr Anderson was based. Mr Nicholson's witness statement lists the 21 documents provided by HMRC under those Directions.

35. We also saw the following documentary evidence relevant to the discovery issue:

(1) HMRC SA Notes dated 27 April 2011 concerning Mr Anderson.

(2) Schedule 36 Notices for Jerome Anderson Management Company Limited, Kemp Thornton and ProVision Financial Consultants dated 27 January 2012.

(3) HMRC Summary of information received under Schedule 36 Notices (undated).

(4) Copy information received under the Schedule 36 Notices including;

(i) Letter to Jerome Anderson from Kemp Thornton with loan agreement of 6 January 2009 in an amount of £2,850,000.

(ii) Email of 27 May 2010 from Mr Steptoe to Mr Lerner about Mr Anderson's involvement in Bafana and the amount of time he has spent on the project;

> "*although Jerome has logged plenty of hours by visiting the website and meetings all over Europe, we are a bit concerned that he hasn't yet been out to Cape Town and don't know what HMRC would think if they lodged an enquiry*"

(iii) Email of 20 July 2010 from Mr Steptoe to Chris Clay:

> "*As you are aware Jerome was due to make his second repayment on 6 June 2010. As I understand it to date payment has not been received by Maddox. I also understand that because of his personal tax situation his accounts were submitted in January together with a huge capital gain which he paid tax on. According to Dion who works for Michael Lerner they have had no contact with HMRC since January which leads me to believe that Jerome has already had the benefit of the loss in Bafana against tax that would otherwise been due. That being the case he should honour the agreement*"

(iv) Email of 21 July 2010 from Mike Steptoe to Carole Dodge about Mr Anderson's failure to make the loan repayment to Maddox on 6 June 2010 "*Jerome has already invested £300,000 and has obtained a benefit with HMRC to the tune of £1.2 million*"

(v) Emails of 28 and 29th July 2010 between Mr Steptoe and Mr Caisley concerning amounts owed by Mr Anderson to Maddox Limited and Mr Anderson's response to a letter requesting the second loan repayment:

> "*I explained that the letter needed to be officious for Revenue purposes. He [Mr Anderson] said he is not paying anything until he has discussed it with Mr Lerner..... He did say that he had no information on how the Academy was running, what was happening with the players etc*"

(vi) Copy of time logs compiled by Mr Anderson setting out his time spent on Bafana Scheme activities from January to April 2009 and the player allocation list showing the three players allocated to him; Patosi, Saal and Campbell.

(5) HMRC email trail of 10 April 2012 and internal letter of 11 April 2012 enclosing emails about Mr Anderson from March and April 2011.

(6) HMRC quarterly report of 30 March 2012

(7) HMRC memo of 20 April 2012

(8) HMRC discovery assessment letter of 27 April 2012

(9) HMRC notes of meeting of 13 July 2012

(10) HMRC review officer letters of 13 December 2012

(11) HMRC disclosure in compliance with Directions of December 2013.

(12) Various correspondence between HMRC and the Appellant's representatives.

Appellant arguments

S 29(1)

36. The Appellant argues that HMRC's discovery assessment was not valid because on the basis of the information which was available at the time when the discovery assessment was made, the officer making the assessment, Ms Lampard, did not have a reasonable basis for believing that Mr Anderson had been under-assessed to tax.

37. It is settled law that that the officer who makes a discovery under s 29 must have a reason for doing so as made clear in *Sanderson* in the Upper Tribunal, referring to *Charlton* "*All that is required is that is has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment*" [para 21]

38. However the Appellant says that knowledge of the existence of the Bafana Scheme and how it had been implemented by other parties to the scheme was not enough to form a reasonable belief by Ms Lampard that Mr Anderson was not entitled to the losses he had claimed. HMRC had reason to suspect there might be a loss of tax, but not sufficient information to form a reasonable belief.

39. The Appellant relies on statements from the *Sanderson* decision in the Upper Tribunal to suggest that knowledge that losses arose from a tax scheme does not justify the making of a discovery assessment:

> "*It seems to me that the tax return might have alerted the hypothetical officer to the fact that Mr Sanderson was seeking to take advantage of a tax scheme, but it did not contain enough information to make the officer aware of an actual*

insufficiency or to justify the making of an assessment. Mr Yates said that any assessment would have been based on a mere whim. It would at any rate have been speculative. The mere fact that Mr Sanderson's loss was attributable to a tax scheme would not have meant that it was open to challenge" [para 50].

40. According to the Appellant, HMRC's discovery assessment was "out of the blue". HMRC should have raised more questions through Schedule 36 notices and/or done more research online before issuing their assessment. HMRC rushed to make the discovery assessment because of Ms Lampard's imminent departure from HMRC and concerns about "stale" discovery assessments.

41. There is nothing in the evidence provided by HMRC in response to the Tribunal's directions in December 2013, or in the evidence provided by Mr Old which related to Mr Anderson specifically. If Ms Lampard had information specific to Mr Anderson, she had not made that clear in correspondence including the discovery assessment itself, which Mr Old had accepted omitted information.

S 29(5)

42. In the alternative, there was enough information on Mr Anderson's tax return for the 2008-9 tax year to make HMRC aware of Mr Anderson's involvement in the Bafana Scheme and no additional information relevant to Mr Anderson was provided subsequently which could be treated as newly discovered information.

HMRC arguments

S 29(1)

43. HMRC say that the discovery assessment was valid; while it is not sufficient for a valid discovery merely to point to an avoidance scheme in which a particular taxpayer has participated, at the relevant time Ms Lampard knew that Mr Anderson was involved in the Bafana Scheme, that it had implementation issues and had information about its implementation by Mr Anderson from the emails which had been provided under the Schedule 36 Notice of 27 January 2012.

44. HMRC were aware of an insufficiency in Mr Anderson's tax payments for the 2008-9 tax year because they knew about the Bafana Scheme and knew that he was in the scheme. This was a centrally managed scheme and so it was reasonable to conclude that all participants would have contributed in the same way.

45. The earliest time when HMRC were aware of Mr Anderson's involvement in Bafana was on 1 September 2011, when they received the "student allocation sheet" including Mr Anderson's name. HMRC had later also obtained emails derived from the Schedule 36 Notice of 27 January 2012, including information about Mr Anderson's loan agreements and his failure to pay Maddox, his payments to Bafana and the allocation of players to him and the fact that he had not been to South Africa.

S29(5)

46. The information provided in Mr Anderson's 2008-9 tax return was not sufficient to alert HMRC to an underpayment of tax; Mr Anderson's return made a reference to "Bafana Soccor" and claimed losses but gave no other information.

Findings of fact relevant to discovery issue

47. On the basis of the evidence provided to the Tribunal we make the following findings of fact:

(1) HMRC were first aware of the Bafana Scheme in March 2010.

(2) Mr Anderson's tax return of 28 January 2010 referred to Bafana Soccor, but no further details were stated in the "white space" *"Box 78 loss to be carried back to 2007/8 pursuant to ITA 2007 s 64(2) (b)"*.

(3) HMRC were first aware of Mr Anderson's potential involvement in the Bafana Scheme from 1 September 2011 as a result of the receipt of the student allocation sheet referring to Mr Anderson as a participant.

(4) Schedule 36 third party notices were issued on 27 January 2012, to J Anderson Limited, Kemp Thornton and ProVision. Responses were received by HMRC which confirmed that Mr Anderson was a participant in the Bafana Scheme on 24 February 2012, including emails referring to Jerome Anderson and his late payment of a second loan instalment to Maddox and concerns that he had not yet been to South Africa to visit Bafana (the email between Mr Lerner and Mr Steptoe of 27 May 2010).

(5) HMRC did not refer in any of their correspondence with the Appellant to the evidence which they had which suggested that Mr Anderson had not spent sufficient time working on Bafana to substantiate his claim for trading losses.

Decision on the discovery issue

S29(1) – Has there been a "discovery"

48. The hurdle for the making of a discovery, set out in *Langham v Veltema* and *Corbally-Stourton* is that HMRC should have a "reasonable belief" that there is an insufficiency in an assessment. As made clear in *Charlton* this can arise even though there has been no new information, there only needs to have been a *"new appreciation of the facts"*.

49. Nor does there need to be a certainty that there has been an under-assessment, but there has to be a reasonable belief that this is the case: *Charlton* "*All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in the assessment*" [para37].

50. There is no dispute that the s 29(1) test applies to the relevant HMRC officer, Ms Lampard, and what she knew at the time when the discovery assessment was issued on 2 May 2012. There is no question that Ms Lampard was not acting honestly. The Appellant's case however is that she did not act reasonably; it was unreasonable for her to issue an assessment on Mr Anderson on the basis of the information which she had about his involvement in the Bafana Scheme in May 2012.

Information at the time of the assessment about Mr Anderson

51. Our view is that HMRC did have sufficient information at the time when the discovery assessment was made to form the basis of a reasonable belief that the losses claimed by Mr Anderson were not due.

52. The Appellant suggested that Ms Lampard did not know at this stage whether Mr Anderson had fulfilled the specific requirements of ss 64 and 72 Income Tax Act 2007 on which his claim for losses was based and that therefore it was not reasonable to assume that there had been an under-assessment. We do not consider that HMRC are required to be certain of all relevant facts in order to have a reasonable belief for the purposes of s 29(1). They just need to be sure of enough facts to enable them to determine a reasonable conclusion by the application of logic.

53. The premise of the discovery legislation is that HMRC have not been given sufficient information from the taxpayer in the first place to be sure what the correct assessment is. The "reasonable belief" required for the purposes of s 29(1) is something more than a suspicion but less than certain knowledge. This is made clear in *Corbally-Stourton:*

> *"It seems to me clear that both these judges and the legislation do not require the inspector to be certain beyond all doubt that there is an insufficiency; what is required is that he comes to the conclusion on the information available to him and the law as he understands it, that it is more likely than not that there is an insufficiency. I shall call this a conclusion that it is probable that there is an insufficiency. It is clear however that mere suspicion, something short of a conclusion that it is probable that there is an insufficiency, is not enough*". [para 42 – 43].

54. At the time when the discovery assessment was issued HMRC knew about the Bafana Scheme: It is correct, as the Appellant argues, that a discovery has to be about an under-assessment for this particular taxpayer, Mr Anderson. However it is our view that facts about other taxpayers can indicate something about Mr Anderson's tax position, if there is a reason to believe that he is a member of a group of taxpayers all of whom have done the same thing; which was true here.

55. HMRC had evidence of orchestration and central planning of the Bafana Scheme and knew that Mr Anderson was a participant. It was not unreasonable for HMRC to conclude that scheme had been sold to and implemented by all participants in a similar way. The fact that ultimately facts relating to Mr Anderson's participation in

the scheme turned out to be different than other footballing participants is not relevant to the reasonableness of HMRC's conclusion at this time.

56. HMRC also knew some facts about Mr Anderson's involvement in the scheme from the list of student talent provided in September 2011, which was confirmed by emails received under the Schedule 36 notices of January 2012. At this stage they did not know all the details of Mr Anderson's implementation of the scheme, but they knew from the email of 27 May 2010 that Mr Anderson's advisers had concerns about how much time he had spent in South Africa, suggesting that like other participants in the Bafana Scheme, Mr Anderson's involvement also suffered from implementation issues.

57. We do not accept the Appellant's extrapolation from the statements made in the *Sanderson* case, which were made in the context of the test in s 29(5) not the test in s 29(1), that for the purposes of s 29(1) knowledge of involvement in a tax planning scheme cannot be enough to form a reasonable basis for a discovery assessment.

What HMRC told the Appellant they knew

58. The Appellant argues that even though evidence about Mr Anderson's implementation of the Bafana Scheme might have been available to Ms Lampard, there is no evidence that her discovery assessment was based on this information, either in her discovery letter of 27 April 2012 or in the information provided by HMRC under the Directions of December 2013. It was accepted by Mr Old that HMRC's discovery letter lacked some information.

59. We saw the Schedule 36 Notices which led to the production of information about Mr Anderson's involvement in the Bafana Scheme, which were signed by Ms Lampard and her subsequent notes and memos which refer to the information provided including the information about Mr Anderson's implementation of the scheme.

60. In our view it is not fatal to HMRC's case that they do not list all of the information on which their discovery assessment was based in correspondence with the Appellant or internal mails. The statutory question is what Ms Lampard knew at the time, not what she subsequently told the Appellant she knew at the time. Any issues with the content of HMRC's discovery letters give rise not to issues under s 29 TMA 1970 but to issues under administrative law about the exercise of HMRC's powers.

61. The Appellant pointed to the documents which were provided by HMRC after the Directions hearing in November 2013, which did not include some of the email evidence on which HMRC later relied to support the discovery assessment. This additional information was made available to the Appellant in October 2015 when Mr Old's witness statement was served. The Appellant did not object to the inclusion of these emails as evidence at this hearing.

62. Any issues which the Appellant had with this additional evidence are essentially procedural points which the Appellant seems to have conceded by not objecting to the inclusion of these emails as evidence before the Tribunal.

Should HMRC have obtained more information?

63. Our view is that the Appellant's suggestion that HMRC could have done more (by issuing Schedule 36 notices or carrying out online research) is not a defence to the discovery assessment. The only question for this Tribunal is whether HMRC were reasonable in acting on the information which they had at the time when the assessment was issued. The relevance of information which might have been obtained before or after a discovery assessment is issued is dealt with in *Sanderson* at paragraph 27 of the first-tier Tribunal decision approved in the Upper Tier at paragraph 24:

> "*the fact that Mr Thackeray may have had sufficient evidence to reach a conclusion that there was an insufficiency of tax sooner than he did, does not, in our judgment, preclude him from reaching that conclusion and making a discovery at a later date*"

64. There is only one way for the taxpayer to defeat a discovery assessment and that it to appeal against the assessment. If the hurdles in s 29 are passed, which are intended to be a statutory limit on HMRC's powers, it is hard to see on what other basis HMRC could be said to have overstepped the mark or acted unreasonably.

Conclusion on s 29(1)

65. The core of the Appellant's case is that whatever Ms Lampard knew about the Bafana arrangements and the other participants in the Bafana Scheme, she did not know enough about Mr Anderson's own involvement in the scheme to have a reasonable belief that he had been under-assessed for the 2008-9 tax year.

66. The Appellant says that the discovery assessment was based on a suspicion not a belief. A suspicion becomes a belief when it is based on logical conclusions derived from what is known. Our view is that even on the basis that all HMRC knew in early May 2012 was that the Bafana Scheme existed, that it was an orchestrated scheme, that its participants included Mr Anderson and that the scheme had implementation issues, that was sufficient to form the basis of a "reasonable belief" that there had been an under-assessment. It was a reasonable and logical conclusion on the basis of what HMRC knew about the Bafana Scheme and Mr Anderson's participation in it, that Mr Anderson had claimed losses derived from the scheme to which he was not entitled.

67. In fact, contrary to what the Appellant tried to suggest, Ms Lampard did have some specific information about Mr Anderson's own implementation of the Bafana Scheme derived from the emails sent during the summer of 2010 (in particular the email from Mr Steptoe of 27 May 2010) to support her belief that Mr Anderson, like the other participants in the scheme, had claimed trading losses which were not due.

Other aspects of discovery

S 29(5)

68. The Appellant made some attempt to argue that the information which HMRC had in May 2012 was in substance no different than the information which was contained in Mr Anderson's tax return, but our view is that while there might have been some indications in that tax return about Mr Anderson's involvement in Bafana, there was nothing in that return to clearly signal to HMRC that the Bafana Scheme was a tax planning technique which might not be effective to obtain the losses which were claimed.

69. In applying the test at s 29(5) the "hypothetical" HMRC officer is not assumed to have any more information than that actually provided in Mr Anderson's tax return. As made clear in *Langham v Veltema*

> "*the Inspector is only to be shut out from making a discovery assessment ..... when the taxpayer or his representative in making an honest and accurate return.....have clearly alerted him to the insufficiency of the assessment, not where the Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessment in question*"[para36].

70. This is reiterated in the *Sanderson* decision which concludes that knowledge that a tax-payer has participated in a tax planning scheme does not lead to the hypothetical officer being expected to infer that HMRC would have more information about that scheme.

71. Our view is that the information which was obtained by HMRC after the submission of Mr Anderson's tax return and before the discovery assessment was raised provided sufficient additional information to allow HMRC to move from an assessment on a "mere whim" to an assessment based on a reasonable conclusion from the facts which were known.

Procedural points around discovery assessment

Is a decision on the discovery issued required before the Tribunal considers the substantive issue ?

72. This appeal has already been to Upper Tribunal (*Jerome Anderson v Commissioners for HMRC* [2015] UKFTT 0191(TC)) and back to First-tier Tribunal on the question of whether there should be a preliminary hearing on this discovery point. The Upper Tribunal decided that both the discovery point and the substantive issue of the availability of the losses should be heard by the First-tier Tribunal as one appeal. This was for two reasons; because of the potential for overlapping evidence and to ensure that time and costs were not wasted.

73. Despite this, the Appellant put forward a number of arguments before us which seemed to us to be an attempt to achieve the result which had been denied by the Upper Tribunal; by arguing that at this hearing we could not consider substantive issues without first giving a discrete decision on the discovery point. We disagreed with this approach.

74. In making this point the Appellant relied particularly on the Court of Appeal decision in *Hargreaves* and the statement by Lady Justice Arden in that case;

> "*Even though the appeal raises other issues, Mr Hargreaves could, at the end of HMRC's case, if HMRC open, submit that there was no case no answer on that conduct/officer condition. If he won on that, there would be no valid [discovery assessment]*" [para 42]

We do not consider that this statement can bear weight put on it by Appellant, especially in circumstances in which the request for a preliminary hearing has already been rejected. We accept that the discovery issue is a threshold issue, but given that Upper Tribunal has decided that it should be heard as part of one appeal with the substantive issue, it seems counter to this approach to allow what would effectively be a preliminary hearing of this issue within this appeal.

75. The Judge in the Upper Tier decision in Anderson was clear on this point; "*It appears to me that the potential advantages of dealing with the discovery issue as a preliminary issue are far outweighed by the disadvantages, especially the risk of delay and increased costs*" [para 24].

76. The Appellant suggested that he had a right to have a decision on the preliminary issue before the Tribunal continued to hear the substantive appeal. We do not agree.

77. Other than the references in *Hargreaves*, we are not clear what "right" the Appellant was asserting. The Appellant has a right to a fair hearing but we cannot see how this could be prejudiced by our approach of reserving our decision on the s 29 issue and hearing the substantive case. The parties were already prepared for the hearing of the substantive issues and witnesses were at the Tribunal. There might be an advantage to both parties in terms of time and costs if at this stage the Tribunal could decide that there had been no valid discovery, but the Tribunal had made it clear that it was unrealistic to expect an extempore decision on that point, which was in danger of consuming more legal argument than the substantive case.

78. Our view is that, as was suggested by Nugee J in *Hargreaves*, this is the Appellant attempting "*a procedural manoeuvre to have two separate bites at the cherry*". If there is any advantage to be gained by the Appellant, it is to delay the hearing of the substantive case. The Appellant has no right to delay proceedings, on the contrary, the Tribunal and the parties have an obligation to deal with the matters without occasioning further delay.

79. The Tribunal decided that it would hear both discovery and substantive issues as part of the five days listed for the hearing without being obliged to give an interim decision on the discovery issue.

Do HMRC need to demonstrate that all elements of a discovery assessment are based on a "reasonable belief"?

80. The Appellant argued that the test in s 29(1) TMA 1970 which applied to the basis for HMRC's discovery assessment had to be applied not just at the level of the discovery assessment itself, but also applied to each element of the case which HMRC now seek to argue. In the Appellant's view this protects a taxpayer from having to defend itself against "numerous spurious claims" made by HMRC as part of a discovery assessment.

81. We think this can be answered on a number of levels: The *Ingenious* decision (*Ingenious Games LLPs & Others v Revenue and Customs Commissioners* [2015] UKUT 105(TCC)) makes it clear that the onus, even in this situation, is on the taxpayer:

> "*No burden lies on HMRC to establish that the businesses were not carried on with a view to profit. It is for the Appellant to adduce such evidence as they think fit with a view to discharging the burden which throughout lies on them".* [para 64]

82. Second, the statute is clear that the only way of appealing a discovery assessment is to appeal against the assessment itself. Any issues with the way in which HMRC have used their powers under s 29 is an administrative law issue not part of the assessment appeal. It might be said that this means that a taxpayer is put at disadvantage as compared to HMRC, but that is no different from the general case in which the onus is always on a taxpayer to disprove an assessment and it is worth bearing in mind that it is an a priori condition of a valid discovery assessment that there is a reasonable belief that there has been a loss of tax.

Other procedural issues

Who should put their case first ?

83. The Appellant argued, referring to *Amis v Colls* (*HM Inspector of Taxes*) ([1960] 39 TC 148) and *Hurley* v *Taylor* ([1998] STC 202) that since the s 29 issue was a threshold issue, and HMRC had the burden of proof under s 29, HMRC should put their case first.

84. HMRC said that the ordinary course of proceedings should be followed to avoid the Appellant effectively treating this hearing as another preliminary hearing, which had already been disallowed by the Upper Tribunal. HMRC accepted that they had the onus of proof under s 29 but resisted the conclusion that this meant them opening the case. Ms Nathan referred us to *Hurley* v *Taylor* setting out the "*normal procedure*"

> "*It is well settled by authority that this places the onus of discharging the assessment on the taxpayer..... further, it is still true, if, as an exception to the normal procedure, the Revenue rather than the taxpayer open*" [pg17]

and to *Blumenthal v Revenue and Customs Commissioners* [2012] UKFTT 497 (TC) "*Nothing turns on the order in which these matters are considered*". Both parties referred us to the Court of Appeal decision in *Hargreaves* on this point and in particular the comments of Arden LJ at paragraphs 40 – 43.

85. Our conclusion is that there is no definitive guidance in the authorities for what the order of proceedings should be when a case involves arguments in which the onus of proof shifts between parties, even taking account of *Hargreaves*. The statements of Arden LJ in that case suggest that the question comes down to one of case management and the overall obligation of the Tribunal to deal with cases fairly and justly, which would usually mean that the party with the burden of proof should open the case.

86. We decided that HMRC should open on the s 29 point, and that we should then proceed to hear the substantive appeal unless, which we made clear we considered to be unlikely, there was no real doubt in our mind at the end of the s 29 evidence and submissions on s 29 that there had been no valid discovery.

No case to answer/putting to election

87. We also considered the correct procedure if, as Mr Gordon on behalf of the Appellant suggested he would, the Appellant argued that there was no case to answer having heard HMRC's arguments and evidence on the discovery issue under s 29 TMA 1970. Ms Nathan attempted to persuade us that in those circumstances the Appellant had to be "put to his election" that is, asked whether he intended to call any evidence. If his answer to that was no, that was the end of the matter in respect of both the s 29 issue and the substantive issue.

88. We concluded that while the Appellant might be put to his election in respect of the s 29 issue that should not preclude him from calling evidence in respect of the substantive issue, as made clear in the Court of Appeal decision in *Hargreaves*:

> *"Mr Hargreaves could at the end of HMRC's case, if HMRC open, submit that there was no case to answer on the conduct/officer condition. If he won on that, there would be no valid [discovery assessment]. If he lost on that, he could then call his evidence on the substantive issues in the appeal, including s 29(2)".* [para 42]

Other miscellaneous points on the evidence

89. The Appellant requested shortly before the start of the hearing that video conferencing facilities were provided so the Tribunal could consider evidence about the activities of Bafana in South Africa. The Tribunal rejected this evidence on the basis that it was late and had no obvious critical relevance to the points in dispute between the parties.

90. A second witness statement from Mr Nicholson was also served late. HMRC did not object to its lateness but asked for it to be excluded on grounds of relevance. The Tribunal agreed that the subject matter of Mr Nicholson's second witness statement

was not relevant to the points in dispute between the parties and excluded this evidence.

Substantive issue – the losses for the 2008/9 tax year

Law

91. S 64 Income Tax Act 2007 sets out the circumstances in which a person can claim to set trading losses off against general income:

"S64 Deduction of losses from general income

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

(a) carries on a trade in the 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."

92. Section 64 is subject to specific restrictions set out in s 66 which impose a condition that for the losses to be available the trade must be commercial:

"S 66 Restriction on relief unless trade is commercial

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

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

(a) on a commercial basis, and

(b) with a view to the realisation of profits of the trade.

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

(4).....

(5).....”

93. It is HMRC’s view that the restrictions in s 66 apply to Mr Anderson’s activities under the Bafana Scheme; the losses which he claims are not available either because no trade was being carried on, or, if there was a trade, it was not commercial.

94. S 72 sets out the circumstances in which someone carrying on a trade can claim losses for the early years of the trade and includes particular conditions at s 74:

S 72 Relief for individuals for losses in first 4 years of trade

(1) An individual may make a claim for early trade losses relief if the individual make a loss in a trade –

(a) in the tax year in which the trade is first carried on by the individual, or

(b) in any of the next 3 tax years.

(2)

(3)

(4)

(5) This section needs to be read with –

(a) .....

(b) section 74 (restrictions on relief unless trade is commercial etc).

The restrictions at s 74 state that:

“74 Restrictions on relief unless trade is commercial etc

(1) Early trade loss relief for a loss made by an individual 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) *in such a way that profits of the trade could reasonably be expected to be made in the basis period or within a reasonable time afterwards*”

There are further restrictions at s74B which prevent loss relief if trading is carried on in a non-active capacity and the losses arise in connection with tax avoidance arrangements;

“***74B No relief for tax-generated losses***

(1) This section applies if –

(a)during a tax year an individual carries on a trade, otherwise that as a partner in a firm, in a non-active capacity (see section 74C),

(b)the individual makes a loss in the trade in that tax year, and

(c)the loss arises directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements.

(2) No sideways relief or capital gains relief may be given to the individual for the loss .....

(3) In subsection (1) "relevant tax avoidance arrangements" means arrangements made by the individual the main purpose, or one of the main purposes, of which is the obtaining of a reduction in a tax liability by means of sideways relief or capital gains tax relief"

The meaning of "non-active capacity" is given by s 74C:

"***74C Meaning of non-active capacity for the purposes of sections 74A and 74B etc***

(1)For the purposes of sections 74A and 74B an individual carries on a trade in a non-active capacity during a tax year if the individual –

(a)carries on the trade at a time during the year, and

(b)does not devote a significant amount of time to the trade in the relevant period for the tax year.

(2)For the purposes of this section an individual devotes a significant amount of time to a trade in the relevant period for a tax year if, in the relevant period, the individual spends an average of at least 10 hours a week personally engaged in the activities of the trade and those activities are carried on –

(a)on a commercial basis, and

(b)with a view to the realisation of profits as a result of the activities.

It is HMRC's position that these restrictions are applicable to Mr Anderson and mean that the losses claimed by him from his activities under the Bafana Scheme are not allowable because Mr Anderson was trading in a non-active capacity and the losses arose in connection with tax avoidance arrangements.

95. We were referred to a number of case authorities which are relevant to the question of whether Mr Anderson carried on a trade:

(1) *Ransom (HM Inspector of Taxes) v Higgs* [1974] 1WLR 1594

(2) *Marson v Morton* [1986] 59 TC 381

(3) *Wannell v Rothwell* (*HM Inspector of Taxes*) [1996] STC 450

(4) *Samarkand Film Partnership No 3 v HMRC* [2011] UKFTT 610(TC)

(5) *Samarkand Film Partnership No 3 v HMRC* [2015] STC 2135

(6) *Acornwood LLP & Others v HMRC* [2014] UKFTT 416 (TC)

(7) *Acornwood LLP & Others v HMRC* [2014] SFTD 694

(8) *Eclipse Film Partners No 35 LLP v HMRC* [2015] EWCA 95.

(9) *Degorce v HMRC* [2013] UKFTT 178 (TC)

(10) *Degorce v HMRC* [2015] UKUT 447 (TCC)

Evidence

Mr Bold

96. Mr Bold gave oral evidence to the Tribunal and a witness statement dated 29 July 2015. Mr Bold was cross-examined by Ms Nathan.

97. Mr Bold is a partner in TFO Tax LLP. Mr Bold told us that he was not involved in finding participants for the Bafana Scheme but was present at meetings with Mr Anderson's financial adviser Mr Caisley. His role was limited to feeding comments into counsel's instructions about the Bafana Scheme and managing HMRC enquiries into participants. Mr Bold explained that HMRC enquiries were expected into participants in the Bafana Scheme because of the size of the losses claimed.

Mr Lerner

98. Mr Lerner gave oral evidence to the Tribunal and a witness statement dated 6 August 2015. Mr Lerner is a chartered accountant and senior partner at Wilson Wright LLP. Wilson Wright have acted for Mr Anderson since 2004. Mr Lerner described himself as an "*ordinary accountant*" who did not give tax advice. Mr Lerner also acted for one other participant in the Bafana Scheme.

99. Mr Lerner told us that he had not advised Mr Anderson in respect of earlier investments made by him which included film schemes. He was adamant that he would not allow Mr Anderson to invest in "*wholly tax driven schemes*", he had looked at and rejected other investment opportunities for Mr Anderson.

100. He said that he had been careful to take detailed advice that the Bafana Scheme was a genuine opportunity. Mr Lerner believed that the Bafana Scheme provided good synergy with Mr Anderson's other businesses. Mr Lerner explained that he attended meetings with Mr Anderson, Mr Bold, Mr Caisley and Mr Steptoe. He was persuaded that the Bafana Scheme was a genuine commercial trade motivated by profit and understood that a tax credit on the expenditure to set up the business would help with cash flow.

Mr Steptoe

101. Mr Steptoe gave oral evidence to the Tribunal and provided a witness statement dated 21 August 2015. Mr Steptoe is a director of Kemp Thornton Limited which was the UK agent for Bafana.

102. Mr Steptoe was described by HMRC as the Bafana Scheme promoter. Mr Steptoe described himself as putting together the whole Bafana Scheme. Mr Steptoe told us that he first talked to Mr Anderson about Bafana in 2007 or 2008 before Mr Caisley was involved. He explained that originally he wanted Mr Anderson involved in Bafana because of his marketing ability. Mr Anderson's decision to put money into the Bafana Scheme came later.

103. Mr Steptoe often travelled to South Africa and was involved in the day to day operations of Bafana. He was also responsible for obtaining the external loan finance through Maddox for the Bafana Scheme and dealing with the lawyers who drafted the package of documents for the Bafana Scheme. He was not involved in drafting the "Investment Opportunity" document, which was drafted by Mr Caisley.

104. Mr Steptoe described Bafana as a commercial venture which only failed when HMRC stopped paying tax rebates and due to the credit crisis and liquidity issues in 2010. Tax rebates paid to Bafana Scheme funders were important but not paramount: Bafana's commercial efficiency depended on the tax relief.

105. Mr Steptoe explained how Bafana operated in South Africa. A pool of talent (numbering about 3,000 players) was selected by Bafana and a first cut of the players was done by Bafana staff in South Africa to decide which players should obtain a place at the academy. Once selected, the young players stayed for two years of training. Bafana's trainees had a high success rate; of the 19 on the talent list for 2009 all but 2 went to professional teams in South Africa or elsewhere.

106. Mr Steptoe's only relationship with Mr Anderson was to deal with Bafana. He had numerous meetings with Mr Anderson to talk about the Bafana Scheme, starting in January 2009 and provided him with DVDs and a log in for an interactive website so that Mr Anderson could monitor the talents and developments at Bafana. Mr Anderson was Bafana's largest investor and so had the pick of 20 players selected for the first tranche for development in 2009, from the list sent on 4 July 2009.

107. In Mr Steptoe's opinion the time recorded in Mr Anderson's logs spent watching DVDs to select players was realistic. However, there was some confusion in the evidence given by Mr Steptoe about the correct dates in Mr Anderson's log for watching DVDs. Mr Steptoe agreed with HMRC's comment that 18 hours recorded for watching the DVD of the under 17s Uefa matches in Turkey was too long and suggested that that this entry should have referred to DVDs of the Bafana players, but these were not given to Mr Anderson until March 2009, so could not have been watched in February. Mr Steptoe said the logs were created on behalf of Mr Anderson by his son who worked with him in the business, counter to what Mr Anderson said.

108. Mr Steptoe described Mr Anderson's contribution to the sourcing and developing of Bafana recruits as watching the DVDs which were provided and making his selection of players to support, plus providing placement services through an "awareness programme" with his extensive contacts in the European footballing world.

Mr Anderson

Bafana

109. Mr Anderson gave oral evidence to the Tribunal and provided two witness statements dated 21 August 2015 and 6 October 2015. He was cross-examined by Ms Nathan.

110. Mr Anderson said that he was introduced to the Bafana opportunity by Neil Caisley a financial adviser who worked with high profile soccer personalities, who gave him marketing material and introduced him to Mr Bold. Mr Anderson put nearly three million pounds into the Bafana Scheme in early 2009 on the basis of assurances from Mr Caisley and Mr Bold. It did not cross his mind that this was a tax avoidance scheme.

111. Mr Anderson told us that he was committed to the Bafana Scheme and the idea of nurturing footballing talent in South Africa. His involvement in the Bafana Scheme was something he believed in for which he could use his experience to select talent. His input was sourcing players to go into the Bafana academy through his contacts in Africa and trading the South African players when they were ready to be transferred. He did not get involved in coaching the players selected by Bafana; this was done by the Bafana staff in South Africa. He had not visited Bafana but had previously spent a lot of time in South Africa and travelled to other parts of Africa.

112. The three players which were picked by him out of the talent pool of twenty were allocated at or around July 2009 when Mr Anderson indicated his choices on the list provided to him (dated 4 July 2009). He got first choice of players because he was the biggest investor in Bafana and because of his distribution skills.

Time spent

113. The logs which he kept recording his time spent on the Bafana Scheme were an under-estimate of the time he spent he spent on Bafana. The logs were originally created by his personal assistant and added to subsequently by him. Mr Anderson was adamant that there was no central management of the compilation of the logs by Mr Steptoe or his firm.

114. Although he did not go to South Africa to visit Bafana, he did spend significant amounts of time finding opportunities to market Bafana to his European contacts, for example the meeting in Milan referred to in his logs of 13-14 January 2009.

115. In response to questions from Ms Nathan, Mr Anderson explained that he had not needed to have meetings or conversations with anyone in Africa as part of his

sourcing role for Bafana, conversations were through European agents. Mr Anderson accepted that he had not successfully placed any players which he had sourced at Bafana.

116. Mr Anderson explained that he received agency fees in a different capacity as well as the transfer fees which he was entitled to receive as part of the Bafana Scheme.

117. As for the time spent watching DVDs, he spent a significant amount of time watching them, playing them more than once and looking at playing talent and evidence of the personality and character of the young players.

118. Mr Anderson could not explain why his name was not mentioned in any of the Bafana Scheme marketing material. The marketing which he did for Bafana was done by providing DVDs of the players he had picked.

119. The meetings which were included in his logs, such as the one in Milan, might have discussed matters which were relevant to Mr Anderson's role outside Bafana, but the main focus of the meetings was selling and making people aware of the incredible Bafana opportunity.

Financial advice

120. Mr Anderson said that he knew Mr Steptoe before he met Mr Caisley who he described as a financial adviser for sports people who packaged investments.

121. Mr Anderson explained that he did not look in detail at the loan agreements or guarantee and indemnity agreement which were part of the Bafana Scheme documents. He did not see the tax counsel's opinion. He relied on the advice of Mr Lerner and Mr Caisley that this was a commercial venture. He did not pay attention to the fact that his first loan repayment arose in March 2009 before he could have made money from picking talent, because he was so confident that over time the scheme would be successful. He would have made payments out of his own funds if necessary, which he did for both the first and second loan repayments. He did not see the emails of 29 July 2010 between Mr Steptoe and Mr Caisley chasing him for payment and could not recall saying that he knew nothing about how the Bafana academy was being run.

Profitability

122. According to Mr Anderson he had a "professional gut feeling" that the Bafana Scheme would work. He did not carry out any detailed checks or projections. He knew that if one good player was sourced, he would make money on all later transfers, which would justify his initial payment into the scheme. If one of the players which he picked, Patosi, had been not been injured, he would have made significant fee income.

123. The Tribunal asked Mr Anderson to provide some details about his "star" player, Patosi, his footballing style, the position he played on the field and the injury which

he suffered. Mr Anderson could not recall whether Patosi had suffered an injury to his right or left leg, said that as a player he was equally good with both feet and was not very clear when asked which position he would have taken were he to have played for Arsenal.

Other evidence seen

124. Bafana documents:

(1) Bafana Soccer Developments Brochure.

(2) Bafana Soccer Academy Investment Opportunity, stating:

"*Please note that this is NOT a tax based scheme like a film finance or technology partnership, which have had problems over the past few years. This is an actual investment into an actual business in which you will need to get involved.*

If you decide to invest you will need to travel to South Africa for a week..... You will be involved in the coaching of the boys in the Academy and you will also be encouraged to recommend young talents which you may be aware of from your own country.....

The reason for this involvement is that whilst this is a business opportunity it is designed to give you back income tax you have paid over the last couple of years. This is just a bonus. The main reason for this investment opportunity is to allow Professional Footballers to put something back into the game and to nurture the young raw talent available in different parts of the world"

(3) Summary of Bafana Soccer Academy contractual structure – dated September 2008.

(4) Bafana funding structure diagram- undated.

(5) Term Loan Agreement – dated 6 January 2009 between Mr Anderson and Maddox Limited in an amount of £2,850,000. The First Repayment Date is defined as 31 March 2009. The Second Repayment Date is defined as 18 months after the date when the loan is advanced under the Loan Agreement.

(6) Letter setting out the agreement about the distribution of Mr Anderson's tax repayment, between Mr Anderson and Mr Lerner – undated.

(7) Agreement for Services – dated 3 April 2009 between Bafana Soccer Developments and unidentified party. Stating in its recital that:

"*The Customer wishes to contract with the Supplier for the provision of the services of a football academy in South Africa to nurture talented African footballers, to source such talented footballers and to put a certain number of such individuals in each of the next four years through the academy and register them to the Registered Club*"

"*Customer's Return" is defined as "any amount received by the Customer from the Supplier under the terms of Clause 9:1 and/or 9:2 on the sale or transfer of any of the Talent and/or their registration with the Academy and/or the Football Club"*

Clause 9 obliges the Supplier to pay the Customer 40% of any transfer fee or other fee paid on the sale or transfer of the Specified Talent, but with a condition that 60% of any fees received are used to repay the Lender Advance (the Term Loan Agreement).

Clause 5.13 states that the Supplier will enter into the Income Warranty in favour of the Customer (The Income Warranty and Indemnity).

(8) Introducer's Agreement – dated 3 April 2009 between Bafana Soccer Developments and Bafana Introductions Limited.

(9) Guarantee – dated 3 April 2009 between Bafana Soccer Developments and Maddox Limited.

(10) Income Warranty and Indemnity – dated 3 April 2009 between Bafana Soccer Developments and unidentified party. This states in its recitals at (c) that:

"*In order to obtain the best possible fee available for the services being provided under the Development Services Agreement, the Warrantor (Bafana Soccer Developments Limited) has agreed to warrant the amount of income that will be paid to the Customer over a period of 10 years from the Commencement Date*"

The warranty at clause 2 warrants to the Customer that 60% of the payments made by Bafana Soccer Developments Limited will be equal to the LIBOR interest payable under the Term Loan Agreement and the fixed amount repayable under the Term Loan Agreement.

The indemnity at clause 3 indemnifies the Customer for any failure by Bafana Soccer Academy to make a payment under the Warranty.

Clause 4 provides that a percentage of the fee paid by the Customer shall be paid by Bafana Soccer Developments Limited to a deposit holder. That deposit holder is a Guernsey entity: Rigi Garco Limited.

(11) Assignment of Income Warranty and Security Interest Agreements – dated 3 April 2009 – between Maddox Limited and unidentified party.

(12) Deposit Agreement – dated 3 April 2009 between Bafana Soccer Developments Limited and Rigi Garco Limited.

(13) Security Agreement in respect of Deposit Account – dated 3 April 2009 between Bafana Soccer Developments, Maddox Limited and an unidentified third party.

125. Emails and letters between Mr Anderson, Neil Caisley and Mike Steptoe September 2009 – October 2010 including those set out above and;

(1) Letter of 9 February 2009 from Mr Steptoe to Mr Anderson attaching 6 DVDs "*This set of DVDs will be useful to watch in the near future with regard to the intake of boys into the Cape United Soccer School of Excellence. The DVDs show footage of 5 matches in the Uefa Under-17 Championship in Turkey, May 2008. They give you an idea of the standard of football seen in top European Under-17 teams and thus the intended standard at Cape United*"

(2) Letter of 4 January 2010 relating to the Talent Allocation Process and attaching a list dated 4 July showing the payers picked by Mr Anderson.

(3) Email of 12 July 2010 referring to additional fees payable to Mr Anderson for placing Bafana players in Europe "*As agreed, we would offer you first option on placing them but we do need to know what terms that would be before we can instruct*".

126. Mr Anderson's two logs of the time he spent on Bafana from January to April 2009; "LOG – Jerome Anderson" and "Jerome Anderson BAFANA time log".

Appellant arguments

127. The Appellant argues that the disputed losses are allowable as losses from a trade carried on by him as a sole trader in the relevant period. The losses are available either under s 66 or 72 Income Taxes Act 2007 ("ITA 2007"). It is self-evident that Mr Anderson's activities under the Bafana Scheme constitute a trade; the development of three young footballers for a share in any transfer fees.

Mr Anderson's activities

128. Mr Anderson's involvement in the Bafana Scheme was a commercial venture for him. He could not do the physical training of the young footballers, this was done for him by the Bafana staff, but he was involved in (i) selecting the three players that he wanted to develop in the initial period (ii) "exploiting" their talent by talking to contacts in the European football world.

129. Mr Anderson's involvement was evidenced by the logs which he kept of the time spent on this work during this period which included (i) Watching DVDs – of similar youth players in Turkey (the UEFA junior championship matches); (ii) meetings with Mike Steptoe to talk about Bafana; (iii) meetings with other football contacts (in London and Italy) to talk about the Bafana opportunity.

130. Mr Anderson had not visited the Bafana academy in South Africa but had committed as much time and effort as he possibly could to supporting Bafana and his players. He genuinely believed in this opportunity and was passionate about developing African footballing talent and the financial opportunities which this offered. He took every step available to make a profit from this venture and was actively involved in it.

Badges of trade

131. The Appellant argues that there is no such thing as "normal" trading activities, a wide range of activities can connote a trade, as made clear in *Ransom v Higgs*. A genuine trade was obviously being carried on by Mr Anderson. The availability of any tax losses was an ancillary consideration.

132. Applying the badges of trade to Mr Anderson's activities as set out in *Marson v Morton;* (i) the Bafana Scheme was intended to run for a number of years with a repeated pattern of transactions; (ii) there was synergy with Mr Anderson's other activities; (iii) the players' talents could be turned to profit; (iv) the trading was done in way which was typical in this market (at a distance and by looking at DVDs); (v) profits were expected from the Bafana Scheme in a short time; (vi) work was done on the commodities being traded (the young footballers were trained); (vii) the intention was to make a profit in the medium term; (viii) the Bafana Scheme framework was set up for serious money making, not for enjoyment; (ix) the badge which refers to dividing items for sale is not relevant to the Bafana Scheme.

133. Overall, eight of the nine badges of trade are satisfied by Mr Anderson's activities under the Bafana Scheme.

Commerciality: s 74(1) and s 66 ITA 2007

134. The Appellant argues that these activities are commercial as required by s 66 and s 74(1) ITA 2007. The trade was set up in a commercial manner, relying on advice from professional advisers and Mr Anderson's own expertise in selecting players. Its particular subject matter and lack of specific customers does not mean that there is no trade. As stated in *Wannell v Rothwell*

> "*Out of numerous reported decisions on profitable transactions which have been held to be taxable as trading activities, I was not shown any (with the exception perhaps of Graham v Green) in which a lack of commercial approach to organisation has enabled the trader to escape liability as a trader..... In general a substantial degree of organisation (a very imprecise term especially across the whole range of trading activities)is neither a necessary nor a sufficient condition for carrying on a trade*". [Pg 12]

135. The Appellant suggests that HMRC are attempting to apply the tests suggested by tax counsel to Mr Anderson's activities, which is not appropriate. Mr Anderson's position is not the same as the footballer investors.

Profit motive – s74(2) and s 66(2) ITA 2007

136. Mr Anderson invested significant sums into this venture with a view to making a profit within a reasonable time. Although he did not consider the details of the loan and guarantee and indemnity agreements himself, he relied on the advice of Mr Lerner and Mr Bold that this was a genuine commercial opportunity.

137. Mr Anderson lost six hundred thousand pounds of his own money in this venture. Other "investors" who were footballers were in a different position because only Mr Anderson had actual experience as a footballing agent.

138. A profit would have been achieved by Mr Anderson when Ayandi Patosi was transferred had he not been injured and had HMRC not interfered with the funding of Bafana by refusing to pay the tax credits which were due.

Anti-avoidance rules

139. The anti-avoidance rules at s 74B ITA 2007 are not in point for Mr Anderson; the main purpose of the Bafana Scheme is not to obtain a reduction in Mr Anderson's tax liability and Mr Anderson did not carrying on the trade in a "non-active" capacity as the logs of his time spent demonstrate.

140. The two main objects of the Bafana Scheme for Mr Anderson were the generation of profit and the development of South African footballers.

Investment

141. The fact that the Bafana Scheme marketing documents and other material refer to it as an investment is not determinative. The test is what was actually done by Mr Anderson and his activities were trading not investing.

Capital payment for indemnity & guarantee agreement

142. Mr Anderson's position can be distinguished from the situation in *Acornwood* in which a payment was characterised as a capital payment for a stream of income; the Bafana Scheme is not a "fig leaf" to disguise what is really an investment. The Bafana Scheme is a substantial operation offering a share in footballing talent with no guarantee of income. The financing arrangements do not impact the character of the transaction.

HMRC arguments

143. HMRC say that while it might be correct that for tax purpose "trade" has no fixed meaning, Mr Anderson has not provided any description of the "trade" which he says was actually being carried on; both s 64 and s 72 ITA 2007 require a trade.

144. HMRC argue that while Bafana was a genuine operation in South Africa, Mr Anderson's involvement in it (i) was not carried on as a trade; (ii) was not carried on on a commercial basis;(iii) the main motive for Mr Anderson's involvement was to obtain losses to set-off against his income tax for 2008-9; (iv) Mr Anderson's involvement was more akin to an investment than a trade and (iv) the money invested was to acquire a capital asset (the rights under the Warranty and Indemnity Agreement) not for trading purposes.

Mr Anderson's activities

145. HMRC say that there is no evidence that Mr Anderson spent significant time on Bafana Scheme activities in the UK during the relevant period. The evidential value

of the logs kept by Mr Anderson recording his time spent on Bafana is questionable. Much of the time allocated is not directly referable to that business and of questionable quality (for example the 18 hours spent watching the DVDs of the Uefa under 17's football matches which were played in Turkey).

146. HMRC point out that Mr Anderson accepted that he did not train the players. Also that any "exploitation" of the players which Mr Anderson did carry out must have occurred after the date when they were allocated. Mr Anderson's players were allocated in July 2009 at the earliest (and possibly not until January 2010) so Mr Anderson could not have been spending time developing them in 2008-9. If Mr Anderson was carrying on a trade, it was later than 2008-9.

147. The documents suggest that Mr Anderson was also entitled to an agency fee in a different capacity for placing players in Europe in addition to his cut of the transfer fees from the Bafana Scheme. It is unclear whether his activities for Bafana relate to his own agency profits or profits of his Bafana sole trade.

148. There is a discrepancy between the terms of the Service Agreement entered into between Mr Anderson and Bafana and what was actually done in practice; for example Mr Anderson did not actually source players from other places for Bafana.

149. Mr Anderson's role for Bafana was too remote and too passive to amount to a trading activity.

Badges of trade

150. HMRC refer to the description of a trade given in *Ransom v Higgs* as "*operations of a commercial character by which a trader provides to customers some kind of goods or services"* and say that the cases relied on by the Appellant to establish that Mr Anderson's activities fulfil the "badges of trade" are not relevant to his activities for Bafana, the more relevant case authorities are those dealing with services rather than commodities. As in *Eclipse Film Partners,* the badges of trade are not sufficiently analogous to the activities under consideration here to be indicative.

151. In order to be carrying on a trade the individual "trader" should understand the essential features of the activity and not just the tax implications of it, as made clear in *Degorce v HMRC "In our view, Mr Degorce's only activity was to participate in a scheme suggested to him..... without any real understanding of it*" [para 163]. Mr Anderson did not have any real understanding of what was going on at Bafana.

Commerciality –s 74(1) and 66 ITA 2007

152. If Mr Anderson had a trade, it was not carried on in a commercial way; HMRC refer to the description of the difference between a commercial and an uncommercial undertaking in *Wannell v Rothwell*: "*The distinction is between the serious trader who, whatever his shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante*" [Robert Walker J at pg 13].

153. Mr Anderson was not a "serious trader"; he invested a large amount of money, £3 million, but did not invest much of his own time in ensuring that profits were made and relied on his advisers to a great extent to make sure the opportunity worked. He had a cavalier attitude to the use of the money and the implementation of the transaction.

154. Mr Anderson showed no serious commitment to the transaction and did not behave in a business like way. He was not actively involved in sourcing the players and did not get directly involved with the players which he selected to invest in. His only involvement was through watching the DVDs provided.

Profit motive – s74(2) and 66(2)ITA 2007

155. In order for a business to be conducted with a view to profit a business must be carried on with a view that a real commercial profit will be generated within a reasonable time after commencement as made clear in the First-tier decision in *Samarkand:* "*We conclude that, principally because the present value of the composite transaction was negative..... they were not carried on on a commercial basis even though in pure arithmetic terms, they yielded an excess of income over expenditure over their 15 year period*". [para 230]

156. Mr Anderson's involvement in the Bafana Scheme was not with a view to a real commercial profit. Any profit earned by Mr Anderson was contingent on the success of the players he had picked but Mr Anderson did not provide any evidence that he had taken steps to assess the potential for making profit before putting money into the scheme or had any direct involvement in the development of the players in South Africa.

157. If Mr Anderson did have a view to a profit, there was no expectation that those profits would be realised within a reasonable time of Mr Anderson financing Bafana. If there was a view to profit it was more of a hope than a reasonable expectation.

Anti-avoidance rules

158. HMRC say that Mr Anderson's claim for loss relief is caught by the anti-avoidance rules at s 74B ITA 2007. Mr Anderson fails both the test at s 74B(1)(a), the logs provided by him do not provide sufficient proof that he spent more the 10 hours a week personally involved in Bafana activities and at 74B(1)(c) because the scheme was structured with a view to generating tax losses for Mr Anderson; the tax repayment was intended to fund the second repayment on the loan from Maddox due in June 2010. One of Mr Anderson's main purposes for investing in the Bafana scheme was to generate tax losses to shelter his taxable income for the 2008-9 and 2007-8 tax years.

Investment not trade

159. In HMRC's view the language in the Bafana Scheme brochures suggests (i) that this was an investment opportunity (ii) that it was critical to the opportunity that tax was reclaimed from HMRC as part of the so called "the tax back arrangements" and

(iii) statements about tax not being the driving force were self-serving: the transaction was tax motivated.

Capital transaction

160. According to HMRC, the money spent by Mr Anderson under the Agreement for Services, viewed realistically, was not spent on the footballers or their development, but on the right to a guaranteed income stream under the Income Warranty and Indemnity at clause 5.13 of the Agreement for Services.

161. That was payment for a capital asset and so was not deductible under s 33 Income Tax (Trading and Other Income) Act 2005. This is in line with the analysis on which the court relied in *Acornwood* in which a payment was characterised as a capital payment because it gave the payer the right to obtain a guaranteed income stream.

162. This transaction falls foul of the tax motivation test in s 74B and 74C. The main purpose of the arrangements was to get tax back for Mr Anderson.

Findings of fact on the trading loss issue

163. On the basis of the evidence the Tribunal makes these findings of fact on the trading loss issue*:*

(1) Mr Anderson was a football agent, not a professional footballer or a football coach.

(2) Bafana undertook genuine training and coaching of young players in South Africa. Young players usually spent 2 years at Bafana before they started their commercial careers and before any transfer fees could be made from them.

(3) Mr Anderson was important to Bafana because of his expertise for marketing and managing football players.

(4) Mr Anderson was also paid in a different, independent, capacity for placing Bafana players in the European market.

(5) Mr Anderson did not visit Bafana in South Africa.

(6) A pre-selection of players who were put into the pool of talent for Bafana Scheme participants to pick from was done by staff in South Africa. A short list of 20 was presented in July 2009 for Mr Anderson to pick his three players.

(7) Mr Anderson selected three players from the Bafana talent pool in mid 2009, one of those, Patosi, was signed by a European club in 2011 but his career was cut short by injury.

(8) Mr Anderson's first repayment on his term loan from Maddox to finance his participation in the Bafana scheme was due on 31 March 2009, before he had selected any players for development.

(9) Mr Anderson's second loan repayment was due on 30 June 2010. At that date Mr Anderson had not visited Bafana in South Africa and told Mr Caisley in July 2010 that he did not know what was going on at the Bafana Academy.

Decision on the trading loss issue

Was Mr Anderson carrying on a trade?

164. We accept that there is no reason in principle why the activities of the kind carried on by Mr Anderson in the Bafana Scheme cannot amount to a trade. Whether or not they do depends on the facts in any particular case.

165. Mr Anderson told us that his "trading" activities were the selecting and "exploiting" or developing of talent from Bafana.

Mr Anderson's activities

166. The tests under both s 64 and 72 ITA 2007 and the common law tests of what amounts to trading have both a qualitative element (was the trade carried on on a commercial basis and with a view to the realisation of profits) and a quantitative element, specifically under s 74B (was time actively spent and did it amount to more than ten hours per week).

167. The logs retained by Mr Anderson are critical evidence in this regard. While, despite some contradictions about how they were created, we have accepted that they provide an indication of the time which Mr Anderson allocated to the Bafana Scheme, we share HMRC's scepticism about the quality of the time spent by Mr Anderson.

(i) *Watching DVDs*

168. According to Mr Anderson's logs he spent a total of 30 hours watching DVDs during March and April 2009 in order to help him select talented players from Bafana. The bulk of his time was recorded in watching the DVDs of the Uefa Under-17s matches in Turkey. This did not include coverage of any of Bafana's own players but according to Mr Steptoe was useful to give Mr Anderson an idea of the standard required at Bafana. Mr Anderson recorded 18 hours watching these DVDs.

169. Despite what Mr Anderson told us, we are not convinced that this amount of time was really required in order to make the decisions which Mr Anderson was required to make as part of his activities for Bafana or that, if that amount of time was required, the subject matter of the DVD's was relevant. Mr Anderson told us that he was an experienced football agent and therefore in our view it is reasonable to assume that he already had a fair idea of the standard expected of an under 17's team in Europe.

170. Even if Mr Anderson needed some guidance on the standards required, given that none of these players recorded in these DVDs were in any way connected with

Bafana, we cannot understand why Mr Anderson needed to spend 18 hours watching these matches. Mr Anderson told us that when he watched DVD's of potential talent for Bafana, he watched the same player over and over again to pick up information about skills and temperament, but none of the players in these DVDs were potential Bafana talent.

171. Mr Anderson did record a further 12 hours of watching DVDs provided by Mr Steptoe which were of Bafana players given to him on 2 March 2009.

(ii)*Business meetings with other foot balling contacts.*

172. Mr Anderson told us that in these meetings he spent his time talking about Bafana opportunities. Our view is that realistically given the different footballing roles which Mr Anderson had, while Mr Anderson might have spent some of his time at these meeting discussing Bafana, it is unlikely that this was all that was discussed and likely that these meetings also covered other aspects of Mr Anderson's football agent business.

173. In addition, at the time when these meetings occurred in January and February 2009 Mr Anderson had not yet selected any particular players from the Bafana talent pool so that at this stage any conversations which did occur could not have related to the prospects for any particular individuals.

(iii) *Meetings with Mr Steptoe.*

174. Mr Steptoe told us that his only interactions with Mr Anderson were to talk about Bafana. HMRC suggested that in the time included for these meetings we should exclude any time spent which was allocated to eating and drinking which should not be treated as time spent on business. Counter to HMRC's contentions, we accept that it is possible and common for business people to multi-task by eating and discussing business matters at the same time.

175. We have accepted that two of the three meetings recorded with Mr Steptoe were to discuss specific Bafana related business, but have excluded the third meeting at which the DVD relating to the European under 17s matches was discussed (on the 9 February)

176. (iv)*Time difference*. In addition to these reservations, we have also taken account of a significant discrepancy between the time when we know Mr Anderson picked his three players from the Bafana talent pool (July 2009) and the time when the activities recorded in these logs are being pursued (January to March 2009). If Mr Anderson's main skill was selecting and developing these young players, this could not have been done until after the end of the 2008-9 tax year.

177. On balance the Tribunal does not consider that Mr Anderson provided sufficiently specific evidence to demonstrate that the time recorded in his logs was time spent seriously pursuing core profit making activities relating only to the Bafana Scheme.

Badges of trade

178. By reference to badges of trade, we agree that there is no reason why managing footballing talent cannot be the subject matter of a trading activity and that in this context it could be the kind of ongoing, repeated activity which could form the basis of a trade.

179. However, we are less convinced that there was a real synergy between Mr Anderson's experience as a football agent and the skills which were required to make a profit from the Bafana Scheme. It is correct that work was done to improve Bafana's footballing talent as a commodity and to generate profits for their skills, but this was done by Bafana staff in South Africa, not Mr Anderson.

180. Nor did we see any evidence other than from Mr Anderson himself, that his mode of "remote" trading (watching videos and having meetings in Europe) was typical in this market. On the contrary, the evidence from Mr Anderson's advisers was that they were very keen that he should visit South Africa and concerned that he had not done so.

181. As far as any intention to make a profit is concerned, Mr Anderson attempted to suggest that he was the only investor who had the skills to select players rather than just being a footballer himself. However, we note in particular that Mr Anderson did not visit the Bafana academy in South Africa and was apparently the only one of the investors who did not. This is at odds with any suggestion that he was in a better position that the other investors to be able to profit from the Bafana Scheme by selecting talent.

182. We find it hard to believe that it would not have greatly improved Mr Anderson's ability to pick talented players from Bafana and improve his chances of making a profit if he had spent time in South Africa rather than watching DVDs of European footballers at home. We do not agree that the framework within which Mr Anderson operated was one which suggested that serious money making was the intention.

183. We take the Appellant's point that the badges of trade should not be treated as a check list and that it is necessary to look at the overall circumstances of the activities being carried on. From that perspective Mr Anderson's actual input into the activities of Bafana is not in line with the large amount of money which he put into the venture. The activities described in his logs which he did carry out at home and in meetings in Europe are at worst tangential and at best not clearly wholly referable to any core profit making activities for the Bafana Scheme.

184. If we had to categorise Mr Anderson's activities for the Bafana Scheme recorded in his logs we would describe them as rather non-specific additions to his existing footballing activities in which he did not demonstrate that he separately invested large amounts of quality time.

Commerciality – s 74(1) and s 66

185. Mr Anderson spent a significant amount of money on his Bafana Scheme opportunity and we believed him when he said he thought there was a real prospect of making profit by bringing young African players to Europe. However we did not see sufficient evidence that his activities through the Bafana Scheme were commensurate with that level of expenditure or profit expectation. Nor did we consider that his attitude to the documents and commercial arrangements, especially the loan repayments, were the actions of a businessman who was seriously involved in a commercial trading enterprise with a significant sum of his personal money.

186. While we would not describe Mr Anderson's actions as that of a "dilettante" neither do we think they fulfil the description suggested in *Wannell v Rothwell* as a "*serious trader seriously interested in profits*". Our conclusion is that Mr Anderson's activities do not fulfil the conditions at s 74(1) and s 66 ITA 2007 that his trade was carried on on a commercial basis.

Profit Motive – s 74(2) and 66(2)ITA 2007

187. HMRC attempted to persuade us that even if a trade was being carried on, Mr Anderson had no realistic expectation of making a profit from his activities with the Bafana Scheme within a reasonable amount of time. The Appellant pointed to the real prospect of making a profit through the transfer of Patosi had other circumstances not intervened.

188. Mr Anderson told us that he had relied on his professional advisers as far as the details of the financing and any financial projections for the Bafana Scheme were concerned. He invested and knew that the Bafana Scheme would be successful on the basis of his gut feel for the potential of African players and what was being done at Bafana.

189. We accept that someone in Mr Anderson's position, a football agent rather than a financial expert, might well rely on professional advisers to understand the finer details of how the financing of the Bafana Scheme was intended to work. However, we would expect that someone in Mr Anderson's position would have made sure that he employed the skills which he did have to make his participation in the scheme profitable.

190. Mr Anderson convinced us that he believed passionately in the potential for football in Africa including South Africa and in the merits of developing and supporting talent in the way that Bafana did. He did not convince us that, aside from this high level enthusiasm and support, he provided much specific value or expertise to the Bafana Scheme in a way which we would expect of a businessman seriously engaged in pursuing profit from a particular activity.

191. In order to be successful Bafana had to train, and Mr Anderson had to pick, the cream of the crop of South African footballing talent. Our view is that if Mr Anderson

had really wanted to ensure that these plans came to fruition he would have visited Bafana in South Africa, both to make sure that Bafana was operating as it said it was and to give himself the best chance of picking players with potential by meeting them and seeing them play.

192. Our conclusion is that Mr Anderson's activities did not fulfil the conditions at s 74(2) that a trade should be carried on in such a way that profits could reasonably be expected within a reasonable time or at s 66(2)(b) that the trade should be carried on with a view to the realisation of profits.

Anti -avoidance rules – s 74B(3)ITA 2007

193. Having decided that Mr Anderson does not fulfil the threshold condition at both s 64 and 72 of carrying on a trade, there is no need for us to consider the application of s 74B, but there is a significant overlap between tests at 74B(1)(a) (individual carries on a trade in a non-active capacity) and the common law tests for trading. For reasons already cited concerning Mr Anderson's the activities recorded by Mr Anderson not amounting to a trade, we must also conclude that his activities fail the test at s 74C.

194. Our conclusion is that Mr Anderson has not demonstrated that he fulfilled the requirement of s 74B ITA 2007 that he spent a minimum of 10 hours a week specifically on a trade relating to the Bafana Scheme for the 2008-9 tax year.

195. Neither party concentrated on the definition of "relevant tax avoidance arrangements" in s 74B (3). Mr Anderson and Mr Steptoe attempted to convince us that ethical motivation to invest in South African footballers and an eye for profit was paramount in this transaction and that any tax considerations were ancillary. The documentation and emails exchanged between advisers suggest otherwise; Mr Steptoe wrote on 21 July 2010

> "*Jerome [Mr Anderson] has already invested £300,000 and has obtained a benefit with HMRC to the tune of £1.2 million. The terms of his contract clearly state that the second payment should be made by the 6 June. Failure to make the payment puts him in breach of his contract whereby the Income Warranty kicks in and he has a tax liability of 50% of £2,700,000. I would be surprised if the payment is not made in a reasonable time frame*".
>
> Mr Caisley responded "*Jerome rang me last night to discuss the letter ..... I explained that the letter needed to be officious for Revenue purposes..... He did say he had no information on how the academy was running or what was happening with players etc"*

In our view this exchange reflects a transaction in which the tax implications as understood by Mr Anderson's agents and as communicated to him are at least as significant if not more significant that what is actually going on at Bafana.

196. We agree with HMRC that the evidence suggests that availability of tax losses was a significant consideration for Mr Anderson's being involved in the Bafana

Scheme and that the marketing material and the presence of Mr Bold at initial meetings support this. Mr Steptoe might well have been interested in Mr Anderson's involvement for his agency contacts, but this is not a sufficient explanation for his later investment.

197. For both of these reasons our conclusion is that Mr Anderson's activities as part of the Bafana Scheme do not pass the hurdles at s 74B (a) or (c) ITA 2007.

Investment not trade

198. Our view is that best description of Mr Anderson's involvement with Bafana is as an investor, with knowledge of the market in which he was investing (young African footballers) but no substantial active day to day involvement in the activity. We do not accept that in these circumstances Mr Anderson can be treated as trading through the agency of Bafana. If there was a prospect of making money from Bafana, little of that depended on the efforts of Mr Anderson, much more of that was dependent on the staff on the ground in South Africa who were not under Mr Anderson's direction or control. Mr Anderson had little expertise in the training which was undertaken at Bafana and little knowledge of what was going on at Bafana, at least in July 2009.

199. We consider that Mr Anderson's activities are more analogous to an investor who is picking stocks to invest in, rather than a trader who is creating the value in those stocks by adding value to a company on a day to day basis.

Capital not revenue

200. Finally, we do not agree with HMRC's analysis of the main purpose of Mr Anderson's expenditure as a capital payment for the right to an income stream; the guarantee and indemnity contained in the Agreement for Services. There is nothing in the evidence which we saw which suggests that this was at the forefront of Mr Anderson's mind when he made the investment. On the contrary, it is not clear that Mr Anderson understood the full ramifications of the documents which he signed. Mr Anderson was clear in the oral evidence which he gave to the Tribunal that he intended to pay what was due under the loan agreement with Maddox out of his own funds if necessary rather than rely on any indemnification or warranty.

Conclusion

201. For these reasons we reject the Appellant's arguments that the losses claimed by him in his income tax return for 2008-9 are allowable losses arising from trading activities and confirm HMRC's assessment of 2 May 2012 denying those losses.

Costs

202. The parties confirmed that they had opted out of the costs regime for complex cases under Rule 10 of the Tribunal Procedure Rules (First-tier Tribunal) (Tax Chamber) Rules 2009.

203. 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.

RACHEL SHORT

TRIBUNAL JUDGE
RELEASE DATE: 10 AUGUST 2016