[2013] UKUT 0226 (TCC)
Appeal number: FTC 77/2012

CAPITAL GAINS TAX – s 162 TCGA – roll-over relief on transfer of a business as a going concern to a company in exchange for shares – whether activities of appellant in relation to a property divided into let flats amounted to a business – whether approach of First-tier Tribunal was correct in law

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ELISABETH MOYNE RAMSAY **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at Bedford House, 16-22 Bedford Street, Belfast BT2 7FD on 27 March 2013

Richard Ramsay, the Appellant's son, for the Appellant

Christopher Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mrs Ramsay, appeals, with the permission of this Tribunal, against the decision of the First-tier Tribunal ("the FTT") (Judge Huddlestone and Mr Hennessey) released on 25 January 2012.

2. The issue before the FTT was whether Mrs Ramsay had, on 16 September 2004, transferred to a company, TPQ Developments Limited ("TPQ"), a business as a going concern in exchange for shares issued by TPQ, so as to qualify for roll-over relief in accordance with s 162 of the Taxation of Chargeable Gains Act 1992 ("TCGA").

3. The FTT decided that what Mrs Ramsay transferred to TPQ was not a "business" within the meaning of s 162, and that accordingly the transfer did not qualify for relief. It is from that decision that Mrs Ramsay now appeals.

The issue

4. Although there are a number of conditions to be satisfied in order that s 162 TCGA can apply, the only issue is whether Mrs Ramsay was, at the date of the transfer to TPQ, carrying on in respect of what was transferred a business as a going concern. Indeed, there was no particular issue as to the going concern element of this requirement. The question is: was what was transferred to TPQ a business?

The law

5. The conditions for the obtaining of roll-over relief in these circumstances are set out in s 162(1) TCGA which provides:

> This section shall apply for the purposes of this Act where a person who is not a company transfers to a company a business as a going concern, together with the whole assets of the business, or together with the whole of those assets other than cash, and the business is so transferred wholly or partly in exchange for shares issued by the company to the person transferring the business …

6. The relief is applied by reducing the chargeable gain that would otherwise arise on the disposal of relevant assets. The amount of the reduction depends on whether the whole consideration, or only part of the consideration, for the transfer of the business is provided in the form of shares. Where, as in this case, the consideration is wholly in the form of shares, the relief given is generally the full amount of the chargeable gain. The corollary, and the reason this is a roll-over relief, is that the base cost of the shares is reduced by a corresponding amount, so that the gain will be brought into charge on a relevant disposal of the shares.

7. If the relief does not apply, the gain on the disposal of the relevant assets to the company is chargeable. HMRC raised an assessment in this respect on Mrs Ramsay for the tax year 2004/05 in the sum of £19,538.77.

The facts

8. There was no material dispute on the facts before the FTT.

9. Mrs Ramsay inherited a one-third share of Moat House, Moatland, Old Holyrood Road, Belfast ("the Property") in 1987. The Property is a single large building, divided into 10 flats, of which five were occupied at the relevant time.

10. In February 2003 Mrs Ramsay made a gift to her husband of one-half of her own one-third share. In February 2004, Mrs Ramsay purchased the remaining two-thirds share of the Property from her brothers with the assistance of a bank loan.

11. On 16 September 2004, each of Mr and Mrs Ramsay transferred the Property, subject to the then existing bank loan, to TPQ in exchange for shares in TPQ. On 1 August 2005 each of Mr and Mrs Ramsay made a gift of all the shares in TPQ to their son, Mr Richard Ramsay, who became the sole shareholder and director of the company.

The activities conducted by Mrs Ramsay at the property

12. The FTT summarised the activities carried out by Mrs Ramsay in connection with the Property at [18]. Although the FTT referred to this summary as being of chains of correspondence and assertions made on behalf of Mrs Ramsay, there was no dispute on any of the matters listed, and I accept these as findings of fact by the FTT. The summary was as follows:

(1) Upon taking over the administration of the Property in 2002, Mrs Ramsay and her husband arranged to meet each of the then five tenants to explain that the rent must be paid on time and to the accountant (who was at that time responsible for dividing the income amongst the various owners).

(2) Mr and Mrs Ramsay took responsibility for the checking and payment of quarterly electricity bills for the communal areas.

(3) Upon acquisition of the Property outright (after the acquisition of the remaining two-thirds share), Mr and Mrs Ramsay took responsibility for cancelling previous insurance policies and arranging a new policy in Mr and Mrs Ramsay's sole names.

(4) Mrs Ramsay attended the Property to unblock the drains (five in number).

(5) Mrs Ramsay and her son oiled and re-attached steel wires on some of the garage doors belonging to the flats, and cleared the debris from previous tenants which had accumulated in other garages.

(6) Mr and Mrs Ramsay took responsibility for returning post for previous tenants to the various senders.

(7) They confirmed with Belfast City Council compliance with fire regulations and installed/replaced fire extinguishers where applicable.

(8) A post and wire fence and hedging was erected at the rear of the Property to segregate it from adjacent land.

(9) A flower bed was created in front of the hedge.

(10) The shrubs around the Property were pruned and leaves swept up and discarded in the local refuse tip.

(11) The back garden and car park were weeded on a regular basis.

(12) The flagstones to the rear of the building were bleached to ensure removal of algae.

(13) The communal areas were vacuumed and dusted on a regular basis and the mahogany staircase polished.

(14) Mr and Mrs Ramsay frequently, when passing the Property, checked the security of the windows and doors at the rear of the building.

(15) On occasion Mrs Ramsay found rubbish dumped in the car park of the building which she took to the Council tip.

(16) Vacated flats were cleaned and cleared of furniture abandoned by previous tenants in preparation for new tenants.

(17) Additional assistance was provided in particular to one elderly tenant, including dealing with telephone calls from the tenant regarding alleged faulty electricity supply, replacement of a broken window and liaising with social services in relation to her care package.

13. Overall, it was not disputed by HMRC that Mrs Ramsay and her husband had spent approximately 20 hours per week carrying out these various activities. Furthermore, HMRC accepted that neither Mr nor Mrs Ramsay had any other occupation during the relevant period. The Property was their only activity of this nature.

Redevelopment and refurbishment project

14. As the FTT found, prior to purchasing her brothers' interests in the Property, Mrs Ramsay and her husband instructed a surveyor to conduct a survey of the Property and took the advice of a local estate agent.

15. After that, and before the transfer of the Property to TPQ, Mrs Ramsay and her husband instructed a firm of surveyors to prepare plans for refurbishing and redeveloping the Property. In preparation for the refurbishment and redevelopment, Mrs Ramsay's husband, through the surveyors instructed by Mr and Mrs Ramsay, successfully applied for planning permission for a two-storey extension, a single-storey extension and other alterations. Listed building consent was also obtained. Bank funding was obtained both for the acquisition of the outstanding two-thirds share in the Property, but also for the proposed works.

16. No actual building works were carried out before the transfer of the property to TPQ.

The FTT decision

17. The FTT described, at [2], what it regarded as the essential question before it, namely "whether the activities of [Mrs Ramsay], as a landlord, are sufficient to distinguish the property letting business carried out by her from a normal Schedule A taxable concern". It referred, at [3], to s 15 and Schedule A of the Income and Corporation Taxes Act 1988 ("ICTA") in drawing a distinction between income assessable under Schedule A and income from a "trade or business" which, the FTT said, would otherwise be assessable under Schedule D.

18. Having recited s 15 ICTA alongside s 162 TCGA as legislation covering the issue at hand, the FTT then listed, at [34], a number of case law authorities, some of which I will consider later. It referred in particular to *American Leaf Blending Co Sdn Bhd v Director General of Inland Revenue* [1979] AC 676, and to the judgment of Lord Diplock I will come to, before at [36] discussing *Rashid v Garcia* (SpC 348).

19. From the authorities the FTT drew two propositions which it described at [42] and [43]. First, it said that the case law established that where an individual asserts that a business arises, there is a presumption that unless proof of sufficient activity is established, that is not a business. This is, at one level, a statement of the burden of proof, which clearly does rest on Mrs Ramsay in this case. But it also makes the point, as was made by the special commissioner in *Rashid v Garcia*, that there must be "sufficient" activity; in other words that whether a property rental is an investment or a business is a matter of degree.

20. Secondly, the FTT said that the activities which are required – in order to satisfy the test that there be sufficient activity – are "those which are over and above the ones which might be required or expected as incidental to the ordinary maintenance, repair and development of an investment property".

21. At [47] the FTT concluded:

> "The Tribunal finds that the activities which have been cited by [Mrs Ramsay] are those which are normal and incidental to the owning of an investment property. They are not of a unique nature and applying the principles set out in *Rashid v Garcia* are those which arise by necessity when one owns a property, such as this, which is let out in flats."

22. The FTT dealt with an argument on scale by saying, at [52], that this did not convert the activities undertaken by Mrs Ramsay into a business. The Property was a single investment property, albeit comprised of 10 apartments, and the FTT found that the scale of activities were simply commensurate with the size of the Property and the number of occupied apartments. It concluded that the scale of the building, of itself, did not convert the ownership of the Property into a business.

23. Finally, at [54], the FTT dealt specifically with the activities surrounding the proposals for refurbishment and development. It made the finding that, in the main, these were carried out by TPQ after incorporation. The FTT accepted that these activities were commenced by Mrs Ramsay and her husband at an earlier stage, but found that they were undertaken to maintain or enhance an existing investment

property and thereby to enhance the available returns by increased rents and have less vacancies than previously.

24. It followed from its analysis of the law and the facts that the FTT decided that Mrs Ramsay was not carrying on a business in relation to the Property when she transferred it to TPQ, and that the roll-over relief under s 162 TCGA did not apply.

The meaning of "business"

25. As Mr Stone pointed out, the word "business" has been described, by Lord Diplock in *Town Investments v Department of the Environment* [1978] AC 359 at p 353, as "an etymological chameleon; it suits its meaning to the context in which it is found." That case concerned whether a lease to a government ministry, where the premises were occupied by civil servants was a business tenancy within the meaning of then-applicable counter-inflation legislation. By reference to the mischief of those provisions, "business" was construed broadly, so as to have no less wide a meaning than that applicable in covenants regarding the use of demised premises.

26. That construction followed from *Rolls v Miller* (1884) 27 Ch D 71, where Lindley LJ pointed out (at p 88) that the dictionary meanings of "business", where the word means almost anything which is an occupation, as distinguished from a pleasure, or anything which is an occupation or duty which requires attention, were not of great assistance. The word must be construed according to its ordinary sense, having regard, in that context to the object of the covenant, and in this to the purpose of the legislation.

27. There is no direct authority on the meaning of business in the context of s 162 TCGA. In the capital gains context generally, I was taken to *Harthan v Mason* 53 TC 272, a case concerned in part with whether the taxpayer had disposed of a business for the purpose of obtaining relief from a charge to CGT under s 34 of the Finance Act 1965. That provision, known as "retirement relief", provided relief where an individual who had attained the age of 60 years disposed of a business, subject to certain conditions. The relief was nevertheless confined to "chargeable business assets", which excluded assets held as investments.

28. In *Harthan v Mason*, the taxpayer and his sister owned a row of terraced houses which they simply let to tenants. There were few facts found concerning the management of the properties, the judge in the High Court (Fox J) commenting merely (at p 276) that he had no doubt that the owners also did various work in finding tenants and doing repairs and in dealing with the various other matters to which an owner of a property would normally attend. The judge held that the decision of the General Commissioners that the activity of the taxpayer and his sister in relation to the property was not a business was a matter of fact, and a conclusion to which they could reasonably have come on the facts.

29. *Harthan v Mason* provides little assistance on the question of construction of "business" in the context of this case. Equally, reference to cases in other contexts may lead to a misunderstanding of the proper approach in the context of a relief from

CGT on the transfer to a company. Thus, for example, the distinction drawn between a trade taxable under Schedule D, Case 1, on the one hand, and property income taxable under Schedule A is not material to the construction of "business" for this purpose.

30. Thus, in *American Leaf Blending Co*, a case relied upon by the FTT, and to which I have already referred, the Privy Council made clear that dicta to be found in some of the speeches in the House of Lords in *Salisbury House Estate Ltd v Fry* 15 TC 266, which suggested that the letting of land does not constitute a trade, had no relevance to the question in that case, namely whether the letting of land by a company amounted to the carrying on of a "business" within the meaning of the applicable Malaysian legislation. The Privy Council held (at [1979] AC 676, 684) that "business" is a wider concept than "trade".

31. The Privy Council went on to draw a distinction between the case of a private individual merely receiving rents and a company doing the same. Giving the judgment, Lord Diplock said (at p 684):

> "In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their lordships' view, in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business. Where the gainful use to which a company's property is put is letting it out for rent, their Lordships do not find it easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in doing so it was carrying on a business.
>
> The carrying on of "business", no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long periods of quiescence in between. In the instant case, however, there was evidence before the special commissioners of activity in and about the letting of its premises by the company during each of the five years that had elapsed since it closed down its former tobacco business. There were three successive lettings of the warehouse negotiated with different tenants; there was removal of machinery from the factory area which made it available for use for storage and a separate letting of that area to a fresh tenant; and as recently as October 1968 there was the negotiation of a letting to a single tenant of both the factory area and the warehouse."

32. Mr Richard Ramsay, appearing for Mrs Ramsay, argued that the reference to "some" activity in this passage indicated that only a modest degree of activity was required. I do not accept that submission. The Privy Council was making the point, simply, that mere passive receipt of rent would not normally be regarded as the carrying on of a business, and that it had to be accompanied by some activity, even if that activity were not continuous. It was not setting a quantitative test as to the degree of activity required to cross the threshold; that remains a question of fact.

33. On the other hand, it is clear from the judgment of the Privy Council that no qualitative distinction should be drawn between activities that are carried out in the course of a passive investment activity, and those carried out in the course of a business. The activities of the company to which the Privy Council referred were all of a nature that might be expected to have been carried out by any property owner in receipt of rent; that did not prevent the Privy Council from finding that the evidence of such activity reinforced the prima facie inference that the company was carrying on a business.

34. The distinction between a business and a trade was also clearly expressed in *Griffiths v Jackson; Griffiths v Pearmain* 56 TC 583.There the taxpayers, who were both practicing accountants, owned 11 properties parts of which were occupied by rent controlled tenants, but which were mainly let furnished to students and other short term occupiers. The taxpayers provided various amenities and services, and spent much of their spare time in collecting rents, inspecting properties, arranging lettings and ironing out tenants' problems. In finding that this did not amount to a trade, Vinelott J in the High Court took the view that the general commissioners must have been misled into thinking that because the taxpayers could fairly be said to have been carrying on a business of letting furnished rooms and providing services to the occupiers, they were carrying on a trade. He concluded (at p 593):

> "I may perhaps be permitted to add that I am not without sympathy for the taxpayers. It is a peculiar feature of United Kingdom tax law that the activity of letting furnished flats or rooms, while it may be a business and, in this case, a demanding and time-consuming business, is not a trade. Formerly the principle operated in favour of the taxpayer whose liability to tax on the proceeds of exploitation of his proprietary rights was exhausted by the Schedule A assessment. Now the proceeds of letting are taxable under Schedule A and the rule operates to the disadvantage of the taxpayer; his income is not earned income and he is not entitled to capital allowances and to the rollover relief for capital gains tax purposes afforded to a person carrying on a trade. The business may, as in this case, occupy much of the taxpayer's free time or even be one which required his whole time attention. The taxpayer may put as much or more work into his business as, for instance, someone whose business consists in arranging licences to fix vending machines on the property of others and who daily or at less frequent intervals collects the proceeds and replenishes the machines. It is not too easy to see why in the modern world a business consisting of the exploitation of the right of property in land should be treated differently from a business consisting of the exploitation of other assets. However, the principle is now too deeply embedded in the law to be altered except by legislation."

35. Moving away from the cases that have been concerned with whether an activity was a trade, there have been a number of cases on the meaning of "business" in relation to VAT. As Mr Stone and Mr Ramsay both accepted, that again is a rather different context to the one in which this case falls to be determined. In particular, the use of the term "in the course or furtherance of any business" which now appears in s 4 of the Value Added Tax Act 1994 ("VATA"), is part of the UK implementation of

the definition of "taxable person" now contained in Article 9 of EU Council Directive 2006/112/EC, meaning any person who, independently, carries out in any place "any economic activity, whatever the purpose or results of that activity". Article 9 itself provides that the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis is, in particular, regarded as an economic activity. That this is a term of wide meaning is clear from the case law of the ECJ; see, for example, *D A Rompelman and E A Rompelman-Van Deelen v Minister van Financiën* (Case 268/83) [1985] ECR 655, from which it is clear that the mere letting of immovable property is regarded as the exploitation of that property.

36. There is no such basis for the meaning of "business" in the TCGA. Nonetheless, whilst acknowledging the caveat to be attached to consideration of cases concerning VAT, the discussion in certain of those cases is useful to note. One such is *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238 where the question largely resolved itself around whether the sharing of the costs of what was otherwise an activity (a shoot) for pleasure and social enjoyment by itself turned that activity into a business.

37. In that case, in the High Court, Gibson J discussed the judgment of the Court of Session in *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1. Firstly, there can be no exhaustive definition of "business" for VAT purposes. Based on the definition of "business" for those purposes, which is now contained in s 94(1) VATA, and which provides that "business" includes any trade, profession or vocation, it is clear that a wide meaning of "business" is intended. Secondly, it is necessary to consider the whole of the activity as it is carried on.

38. The judgment goes on to describe certain criteria identified by counsel for the Crown in *Lord Fisher*, largely by reference to *Morrison's Academy*, as relevant for determining whether an activity is a business. As Gibson J made clear, however, these were not principles which, if satisfied, would in all cases demonstrate that an activity must be regarded as a "business" for VAT purposes. The test is a statutory test, for which the identified criteria are no substitute. The criteria were set out at p 245 of Gibson J's judgment as follows:

> "… the aspects of that activity which are to be considered, as being indicia or criteria for determining whether the activity is a business, are six in number and were listed by counsel for the Crown as follows: (a) whether the activity is a 'serious undertaking earnestly pursued', a phrase derived from the judgment of Widgery J in *Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 1 All ER 262 at 266, [1967] 2 QB 65 at 76, or 'a serious occupation, not necessarily confined to commercial or profit-making undertakings', a phrase derived from the speech of Lord Kilbrandon in *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813 at 835, [1978] AC 359 at 402, both of them cited to and referred to by the tribunal in their decision; (b) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity: per Lord Cameron in *Morrison's Academy* [1978] STC 1 at 8; (c) whether the

> activity has a certain measure of substance as measured by the quarterly or annual value of taxable supplies made: again per Lord Cameron (at 8); (d) whether the activity was conducted in a regular manner and on sound and recognised business principles: again per Lord Cameron (at 10); (e) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration: per the Lord President (at 6); (f) lastly, whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them: per the Lord President (at 6) and per Lord Cameron (at 10)."

39. Business property relief provides relief from inheritance tax. There have therefore been a number of cases concerning that relief (in s 105 of the Inheritance Tax Act 1984 ("IHTA")), principally in relation to the provision, in s 105(3), that a business or an interest in a business is not relevant business property if the business consists wholly or mainly of making or holding investments.

40. In this connection, I was referred to two decisions of the special commissioners (in each case Sir Stephen Oliver QC), both of which were heard in January 1995. In the first, *Martin and another (executors of Moore deceased) v IRC* [1995] STC (SCD) 5, the deceased owned and let industrial units on three-year leases at fixed rents. The deceased sought and chose tenants, granted and renewed leases, complied with landlord's covenants and managed the premises. It was accepted by the Revenue that these activities constituted a business. Likewise, in *Burkinyoung (executor of Burkinyoung deceased) v IRC* [1995] STC (SCD) 29, it was accepted that the activities of the deceased in relation to a house he had owned, which was divided into four furnished flats let on assured shorthold tenancies, constituted a business. The evidence was that running the flats involved maintenance of them and their common parts to a standard that would attract tenants to take and renew tenancies. Getting possession or redress from tenants was a difficult and onerous task.

41. These are cases therefore where the question for the tribunal was not whether there was a business (which was conceded), but whether the business was one that consisted wholly or mainly in the making or holding of investments. Those cases cannot therefore, in my judgment, assist the determination of this case.

42. In another case on the question of relevant business property that I was not referred to, the First-tier Tribunal (Judge Barlow and Mrs Stott) did have to consider the question whether the activities of the deceased amounted to a business. In *Revenue and Customs Commissioners v Lockyer and another (as personal representatives of Pawson deceased)* [2012] UKFTT 51 (TC), the deceased owned a bungalow which was let as a holiday cottage. Various services were provided, including cleaning and gardening, and for example hot water was turned on before the arrival of guests. The cottage was advertised for letting. The tribunal found that this was a business. It relied on the criteria referred to in *Lord Fisher*, in particular that this was a serious undertaking earnestly pursued, there was reasonable continuity and the activities had a measure of substance. That conclusion was not challenged on the appeal to the Upper Tribunal (where the Revenue's appeal was allowed on the basis

that the tribunal had been wrong to find that the property was not held mainly as an investment).

43. The question whether an activity, and relevantly to this case activity connected with the letting of property, can amount to a business has also been considered, again at the level of the special commissioners, in a national insurance context. In *Rashid v Garcia* (SpC 00348; 11 December 2002) Mr Rashid claimed to be a self-employed earner for Class 2 national insurance purposes. The definition of "employment" for this purpose was contained in s 122(1) of the Social Security Contributions and Benefits Act 1992 as including "any trade, business, profession, office or vocation". The question, therefore, was whether the activities of Mr Rashid in connection with his ownership and letting of four properties constituted a business. A number of activities were carried out, including maintenance, advertising for tenants, making credit checks, compiling and checking inventories, drawing up tenancy agreements, collecting rent, cleaning the common parts and maintaining the garden. With members of his family it was estimated that between 18 and 28 hours was spent on these activities each week.

44. The special commissioner (Dr Avery Jones) decided (although acknowledging that the case was near the borderline) that he was not satisfied that there was sufficient activity for a business to be constituted. He held that the property holding was an investment which by its nature required some activity to maintain it, rather than a business. In doing so, the special commissioner referred to the particular definition of "employment" as the context. He took the view that because business had been included along with trade, profession, office or vocation in that definition, that implied activity in contrast to mere investment. He referred to a property rental business as one example of an investment business, and concluded that whether property rental business is a business in any particular case is a matter of degree.

45. It is clear from this that the special commissioner based his conclusions on the particular context applicable to national insurance, and in particular on the alignment in the relevant legislation of business with trade, profession, office or vocation. He appears to have treated that context as providing particular colour to the meaning of "business" in determining the level of activity that would require to be found to distinguish it, in a national insurance context, from mere investment.

46. There is no such context for the purpose of s 162 TCGA. There is no statutory definition of "business" in that respect. Business is not aligned as a concept with trades or professions, and there is nothing in that respect to colour its meaning. Nor is any special exception created for cases where the business comprises wholly or mainly the holding of investments. What there is, on the other hand, is a requirement that a person who is not a company transfers a business as a going concern to a company. The logic, and perceived purpose, of s 162 is to defer a charge to capital gains tax when the only change that has taken place is the form in which the business is operated (from non-corporate to corporate), and to the extent that the consideration consists of shares in the company. The legislation is looking at business in the context of something that is or may be carried on both by, for example, an individual

and by a company. In my judgment the proper approach in that context is to construe "business" broadly, according to its unvarnished ordinary meaning.

The role of the Upper Tribunal

47. The right of appeal to this Tribunal is a statutory one, provided by s 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), "on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision". Mr Stone submitted that the question addressed by the FTT in this case was one of fact. He argued that the question whether certain activities are of sufficient degree to constitute a business is an example of a value judgment reached by the FTT after a multi-factorial assessment of a number of primary facts. The Upper Tribunal, he submitted should be slow to interfere with such a judgment reached by the FTT, which heard and considered all the relevant evidence.

48. In support of his submissions, Mr Stone referred me to the recent discussion of the relevant authorities in this Tribunal (Arnold J) in *Okolo v Revenue and Customs Commissioners* [2012] UKUT 416 (TCC). I need not set out the relevant passages in full. The position can, I think, be summarised as follows:

(1) If the case contains anything which on its face is an error of law and which bears upon the determination, that is an error of law (*Edwards v Bairstow and another* [1956] AC 14, per Lord Radcliffe at p 36).

(2) A pure finding of fact may be set aside as an error of law if it is found without any evidence or upon a view of the facts which could not reasonably be entertained (*Edwards v Bairstow*, per Viscount Simonds at p 29).

(3) An error of law may arise if the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal (*Edwards v Bairstow*, per Lord Radcliffe, *op cit*.)

(4) It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. The nature of the factual enquiry which an appellate court can undertake is different from that undertaken by the tribunal of fact. The question is: was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? (*Georgiou v Customs and Excise Commissioners* [1996] STC 463, per Evans LJ at p 476).

(5) For a question of law to arise in those circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted is a roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong (*Georgiou*, per Evans LJ, *op cit*.)

(6) An appeal court should be slow to interfere with a multi-factorial assessment based on a number of primary facts, or a value judgment. Where the application of a legal standard involves no question of principle, but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation. Where a decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, this will fall within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle (*Proctor v Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, per Jacobs LJ at [9] – [10]; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, per Lord Hoffman at p 2423).

(7) Where the case is concerned with an appeal from a specialist tribunal, particular deference is to be given to such tribunals, for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker. Those tribunals are alone the judges of the facts. Their decisions should be respected unless it is quite clear they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently (*AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678, per Baroness Hale at [30]).

49. When referring to what Baroness Hale had to say with regard to specialist tribunals, Mr Stone recognised that, although having an appellate function, this Tribunal too is specialist in nature. That is of some significance, as appears from the judgment of Lord Carnwarth in the recent decision of the Supreme Court (released after the hearing in this case) in *Jones (by Caldwell) v First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, indicating a flexible approach to "points of law" to include other points of principle or even factual judgment of general relevance to the specialised area in question. Lord Carnwarth suggests (at [46]) that a specialist appellate tribunal, even though its jurisdiction is limited to errors of law, should be permitted to venture more freely into the "grey area" separating fact from law, than might an ordinary court. Arguably, he says, "issues of law" in this context should be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. In other words, expediency requires that, where Parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law and practice in that field.

Discussion

50. In this case, even allowing for the remarks of Lord Carnwarth in *Jones*, there would in my view be no basis upon which the decision of the FTT could be revisited purely on the question whether, as a matter of fact, the activities of Mrs Ramsay constituted a business. Although Mr Ramsay had carried out extensive and impressive research on the decided cases, and submitted on that basis that Mrs Ramsay had carried out more activity than was apparent in other cases, and so should be regarded as falling on the right side of any borderline, such a comparison cannot be

decisive on where the tribunal is called upon to make a value judgment in the individual circumstances of the case before it.

51. On the other hand, a finding of fact may be vitiated if it has been based on an error of law or principle.

52. Considering the decision of the FTT as a whole, it is clear to me that its finding was based on an error, or errors, of law. The question it had to address was the straightforward one of whether the activities of Mrs Ramsay in relation to the Property constituted a business. That, as I have explained is a very different question from whether an activity is a trade, or taxable under Schedule A. Yet the FTT's starting point, at [3] of its decision, was to describe the essential question as being whether the activities of Mrs Ramsay went beyond those of a Schedule A business, such that, as the FTT noted at [4], it would be assessable under Schedule D.

53. The FTT continued with this theme when, at [33], it made express reference to s 15 ICTA and to the Schedule A charge, and further, when recording its decision, at [48], when it remarked that "in terms of historic treatment, it is informative to note that Mrs Ramsay and then Mr and Mrs Ramsay both returned all of their income as Schedule A income (with appropriate deductions for expenses where they arose)."

54. As well as referring to the income tax treatment of the activities, the FTT also expressed its view on the question whether business property relief for IHT would have been available to Mrs Ramsay under s 105 IHTA. It took the view that such relief would not have been available, relying on *Moore deceased*, one of the IHT cases I referred to earlier. But as well as being irrelevant to the question before it, *Moore* was a case where the Revenue accepted that the deceased's activities constituted a business; relief was denied not on the basis that there was no business, but because the business consisted wholly or mainly of making or holding investments. That test is not present in s 162 TCGA.

55. Mr Stone accepted that, as he put it, the FTT's decision referred to factors of "limited relevance" to determining whether Mrs Ramsay's activities constituted a business within the meaning of s 162, but he submitted that reference to those factors did not vitiate the key finding of fact, namely (as appeared in the FTT's decision refusing permission to appeal) that the FTT had concluded that the building or the activities surrounding it fell closer to being a passively held investment than an actively managed business.

56. I do not agree. In my judgment, the FTT adopted the wrong approach. Its focus was on matters that were not applicable to the determination it was required to make, and those errors bore on that determination.

57. Whilst I accept that the question whether activities in relation to property investment constitute a business is one of degree, that evaluation by the FTT was coloured by its references to trade and Schedule A, in particular. It also placed significant reliance on *Rashid v Garcia*, a decision in which, as I have described, the meaning of "business" in that context took its colour from an association, in the

statutory definition, with trades, professions and vocations. Whilst that might have been applicable to the particular statutory provision concerning national insurance at issue in that case, it is not appropriate to the analysis under s 162 TCGA.

58. Furthermore, the FTT directed itself (at [43]) that the activities which would have to be found in order to establish a business were those over and above the ones that might be required or expected as incidental to the ordinary maintenance, repair and development of an investment property. It found (at [47]) that Mrs Ramsay's activities were not of a unique nature, and that, applying what it described as the principles set out in *Rashid v Garcia*, the activities were those which arise of necessity in relation to a let property.

59. As I have described, reliance on *Rashid v Garcia* to this extent was, in my view, misplaced. But the FTT was wrong in any event to find that there was a qualitative test by which if the activities undertaken are ordinarily associated with management of an investment property, they are not to be regarded as referable to a business, which requires something of a different or even unique nature. As I described earlier, that there is no such qualitative test appears from *American Leaf Blending*.

60. In my judgment, the FTT made a similar error when it said (at [52]) that the scale of the activities undertaken by Mrs Ramsay was simply commensurate with the size of the property and the number of occupied apartments. Whilst there can be no quarrel with the FTT's finding (at [53]) that the scale of the building could not, of itself, convert the ownership of a property into a business, the FTT was wrong, in my view, to disregard the scale of the activities, simply because they could be explained by reference to the size of the Property and its lettings.

61. That approach, into which I consider the FTT was led by its application of a qualitative test, failed properly to assess the degree of activity undertaken by Mrs Ramsay. It is the degree of activity as a whole which is material to the question whether there is a business, and not the extent of that activity when compared to the number of properties or lettings. If an individual undertaking the letting of properties increases his portfolio, and as a result increases activities of a business nature in relation to his properties, those activities will not be prevented from being a business merely because the activity has only proportionally increased along with the enlargement of the portfolio, and so can be described as commensurate with the property holdings.

62. The FTT's reasoning in relation to the work undertaken by Mrs Ramsay in relation to the proposed refurbishment and redevelopment work on the Property can likewise be subject to criticism. At [54] the FTT found that those activities were undertaken to maintain or enhance an existing investment property and to thereby enhance the available returns by increased rents and having less vacancies. No explanation is given of the significance, or otherwise, of the property being an existing investment property, nor why such activity would not equally be compatible with Mrs Ramsay carrying on a business.

63. For all these reasons, I am satisfied that the FTT made an error of law in reaching its conclusion that the activities of Mrs Ramsay did not amount to a business for the purpose of s 162 TCGA. The proper course therefore is for this appeal to be allowed and the decision of the FTT to be set aside. As this is a case where there is no dispute on the facts, and all the relevant facts have been found by the FTT, there is no reason for the case to be remitted to the FTT. I propose therefore to re-make the decision of the FTT in accordance with s 12(2) TCEA.

64. As I have described it earlier, in my judgment the word "business" in the context of s 162 TCGA should be afforded a broad meaning. Regard should be had to the factors referred to in *Lord Fisher*, which in my view (with the exception of the specific references to taxable supplies, which are relevant to VAT) are of general application to the question whether the circumstances describe a business. Thus, it falls to be considered whether Mrs Ramsay's activities were a "serious undertaking earnestly pursued" or a "serious occupation", whether the activity was an occupation or function actively pursued with reasonable or recognisable continuity, whether the activity had a certain amount of substance in terms of turnover, whether the activity was conducted in a regular manner and on sound and recognised business principles, and whether the activities were of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them.

65. In my judgment, taking the activities of Mrs Ramsay as a whole, I am satisfied that these tests are satisfied. Certain of the individual activities by themselves have little impact on the issue, but overall, taking account both of the day-to-day activities, and the work undertaken by Mrs Ramsay in respect of the early refurbishment and redevelopment proposals, I conclude that the activities fall within the tests described in *Lord Fisher*.

66. There remains, however, the question of degree. That is relevant to the equation because of the fact that in the context of property investment and letting the same activities are equally capable of describing a passive investment and a property investment or rental business. Although resolution of that issue will be assisted by consideration of the *Lord Fisher* factors, to those there must be added the degree of activity undertaken. There is nothing in the TCGA which can colour the extent of the activity which for the purpose of s 162 may be regarded as sufficient to constitute a business, and so this must be approached in the context of a broad meaning of that term.

67. Applying these principles, in this case I am satisfied that the activity undertaken in respect of the Property, again taken overall, was sufficient in nature and extent to amount to a business for the purpose of s 162 TCGA. Although each of the activities could equally well have been undertaken by someone who was a mere property investor, where the degree of activity outweighs what might normally be expected to be carried out by a mere passive investor, even a diligent and conscientious one, that will in my judgment amount to a business. I find that was the case here.

Decision

68. For the reasons I have given, I allow this appeal.

ROGER BERNER

UPPER TRIBUNAL JUDGE

RELEASE DATE: