



33TACD2019

Between/

APPELLANT

Appellant

-v-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Matter under Appeal

1. This matter comes before the Tax Appeals Commission as an appeal against Notices of Amended Assessment for the tax years 2010 to 2014 inclusive, in the amounts of €2,159.80, €2,990, 3,068.80, €4,18.40 and €5,202.80 respectively, which were issued by the Respondent on the 13th of December 2016.
2. The Notices of Amended Assessment were issued by the Respondent on foot of its refusal to allow the Appellant's claim for trade losses against the Appellant's PAYE income for the years under appeal.

B. Facts relevant to the Appeal

3. The Appellant is a shop assistant who also carries on the trade of farming. He began farming alongside his father in 1998 and in 2001 he inherited 26 acres of land from his father which he continues to farm to this day. He gave evidence that there was a

family dispute in relation to his inheritance which took some 12 or 13 years to resolve, but there is no doubt but that the Appellant was farming the lands from at least 2007 onwards.

4. The Appellant gave evidence, which I accept as truthful and accurate, that the lands were in very poor condition when he inherited them. Since his inheritance, he has done what he can over the years to improve the lands and to build up his farm trade to a point where it would become profitable and produce for him a return on the money and time he has invested.
5. I accept the Appellant's evidence that among the improvement works he has carried out, he has:-
 - (i) built a slatted shed and silage slab;
 - (ii) fenced the boundaries of the land;
 - (iii) purchased a tractor and farm machinery;
 - (iv) re-seeded some 10 acres of the lands;
 - (v) taken out a stocking loan from Bank of Ireland to buy sheep to eat the new grass, which has now been repaid;
 - (vi) taken out a farm improvement loan in the sum of €6,000; and,
 - (vii) built up the stock on the land from an initial number of 2 to 34 in 2016 and 40 in 2018.
6. The Appellant gave evidence that a stock figure of 40 to 45 is his goal for the farm, and he believes that a stock figure of 40 would enable his farm trade to become profitable. While he did reach that stock number in 2018, he was unlucky and two of the animals died, which meant that he did not generate a profit.
7. Notwithstanding the Appellant's work and expenditure in improving the farm and building up the farm trade, he has not yet been able to generate a profit from the trade. I note from the Respondent's submissions that the Appellant has claimed losses and capital allowances in every year from 2007 to 2014, ranging from €4,415 in 2007 to €26,014 in 2014.
8. The Appellant's returns for 2010, 2011, 2012 and 2013 were selected for a Revenue desk audit in February 2015. Having examined the submissions received, the Respondent formed the view that the provisions of section 662(2)(b) of the Taxes Consolidation Act, 1997, as amended (hereinafter referred to as "TCA1997") applied



for the years in question and they disallowed the losses claimed by the Appellant. The Respondent further disallowed the Appellant's claim for losses in respect of the 2014 tax year, and assert that the Appellant has not shown that the Appellant is carrying on the trade of farming on a commercial basis and with a view to the realisation of profits in the trade.

9. The Respondent accordingly issued in December 2016 the Notices of Amended Assessment the subject matter of this appeal.

C. Legislation and Revenue Materials

8. The first two subsections of section 381 of TCA1997 provide as follows:-

“(1) Subject to this section and section 381A, where in any year of assessment any person has sustained a loss in any trade, profession or employment carried on by that person either solely or in partnership, that person shall be entitled, on making a claim in that behalf, to such repayment of income tax as is necessary to secure that the aggregate amount of income tax for the year ultimately borne by that person will not exceed the amount which would have been borne by that person if the income of that person had been reduced by the amount of the loss.

“(2) This section shall not apply to any loss sustained in any year of assessment by the owner of a stallion from the sale of services of mares by the stallion or of rights to such services or by the part-owner of a stallion from the sale of such services or such rights.”

10. Section 662 of TCA1997 is the key section relevant to the determination of this appeal and its first two subsections provide as follows:-

“(1) In this section –

“prior 3 years”, in relation to a loss incurred in a year of assessment, means the last 3 years of assessment before that year;

“prior period of loss” means the prior 3 years or, if losses were incurred in successive years of assessment amounting in the aggregate to a period longer than 3 years (and ending when the prior 3 years end), that longer period.



(2) (a) Any loss (including any amount in respect of allowances which by virtue of section 392 is to be treated as a loss) incurred in a trade of farming or market gardening shall not be available for relief under section 381 unless it is shown that, for the year of assessment in which the loss is claimed to have been incurred, the trade was being carried on a commercial basis and with a view to the realisation of profits in the trade.

(b) Without prejudice to paragraph (a), any loss (including any amount in respect of allowances which by virtue of section 392 is to be treated as a loss) incurred in any year of assessment in a trade of farming or market gardening shall not be available for relief under section 381 if in each of the prior 3 years a loss was incurred in carrying on that trade.

(c) For the purposes of this section, the fact that a trade of farming or market gardening was being carried on at any time so as to afford a reasonable expectation of profit shall be conclusive evidence that it was then being carried on with a view to the realisation of profits.

(d) This subsection shall not restrict relief for any loss or any capital allowance where it is shown by the claimant –

(i) that the whole of the claimant's farming or market gardening activities in the year following the prior 3 years are of such a nature, and carried on in such a way, as would have justified a reasonable expectation of the realisation of profits in the future if those activities had been undertaken by a competent farmer or market gardener, and

(ii) that if such farmer or market gardener had undertaken those activities at the beginning of the prior period of loss, such farmer or market gardener could not reasonably have expected those activities to become profitable until after the end of the year following the prior period of loss.

(e) This subsection shall not restrict relief where the carrying on of the trade forms part of and is ancillary to a larger trading undertaking.”



D. Submissions of the Parties

- 11.** The Notice of Appeal submitted on behalf of the Appellant states that the relevant legislation is section 662(2)(a) and (d), quoted above. Referring to a letter of the 19th of December 2016 which details the work the Appellant had done to improve the farm and build up the farm trade (which is summarised in paragraph 5 above), it was submitted that the Appellant had built up the farm over a number of years, having inherited it in a very poor condition. It was submitted that the expenditure incurred by the Appellant on land, equipment and livestock and the time committed by the Appellant to the farm trade clearly illustrated an intention to receive a positive return on the Appellant's investment. It was further submitted that the Appellant's farming activities were, although conducted on a part-time basis, clearly carried out on a purely commercial basis with a view to the realisation of profits, and that the continuity of farming activity showed it was not carried on in a 'hobby' or 'pastime' manner.
- 12.** The Notice of Appeal further stated that the Appellant questioned the rationale or logic behind the singling out of farming and market gardening for this tax treatment; the consistency of such tax treatment in circumstances where a person working two jobs and realising extra income thereby would pay progressively more tax; and the availability of these losses for offset against subsequent income.
- 13.** These latter arguments do not fall within the ambit of the jurisdiction of the Tax Appeals Commission. It is not appropriate for me to embark upon a consideration of why a particular decision on tax policy was taken and given statutory effect by the legislature; instead, my role is to determine the relevant and applicable legislation and ensure that it has been correctly interpreted and applied by the Revenue Commissioners to the facts of the appeal before me. I therefore will not consider further this aspect of the Appellant's case or reach any determination thereon.
- 14.** The Statement of Case submitted on behalf of the Appellant made reference to section 662(2)(b) and contends that the refusal by the Respondent to allow losses for all of the 5 years under appeal was incorrect. It submits that the correct interpretation of the section means that losses incurred should be allowed for the first three years but any loss incurred in the fourth year should be disallowed. After year 4 (*i.e.* in years 5



to 7, although the Statement of Case refers to years 4 to 6), the taxpayer should again be allowed to claim losses for offset against other income.

- 15.** At the hearing before me of the appeal, the Appellant's agent submitted that he was now relying on section 381 of TCA1997 in support of the Appellant's position. He submitted that section 381(1) conferred a general right to offset the losses of a taxpayer's trade, profession or employment against the taxpayer's other income for the relevant year of assessment. It was submitted that the only limitation on this general right was that contained in section 381(2), which disappplies the relief to losses incurred in relation to stallion stud fees. It was argued that the absence of any reference to section 662 in section 381 meant that the Respondent was not entitled to have regard to or apply the provisions of section 662 when determining the Appellant's entitlement to claim the losses from his trade as a farmer against his PAYE income. The Appellant's agent stated that in the event that I did not agree with his interpretation of section 381, he accepted that the Respondent's interpretation of section 662 was correct.
- 16.** The position of the Respondent in relation to the section 381 argument advanced on behalf of the Appellant at the hearing is that section 662(2)(a) and (b) both make express reference to section 381 ("*...shall not be available for relief under section 381...*"), and that the general right to relief conferred by section 381 is limited by section 662 when the latter section applies to a taxpayer.
- 17.** In relation to section 662, the Respondent submits that the Appellant has not shown that his farm trade was carried on during the years under appeal on a commercial basis and with a view to the realisation of profits in the trade, as required by section 662(2)(a). The Respondent further submits that the farming trade losses incurred by the Appellant in the tax years 2007 and onwards trigger the application of section 662(2)(b), so that the Appellant's losses in the years under appeal are not available for relief.



E. Analysis and findings

- 18.** It is appropriate to deal first with the legal argument advanced on behalf of the Appellant at the hearing of this appeal in relation to the interaction of section 381 and 662. I cannot accept as correct the submission made by the Appellant's agent that the absence of any reference to section 662 in section 381 means that section 381 should be read in isolation or on a stand-alone basis, and that the only limitation on the relief conferred by section 381 is that contained in section 381(2).
- 19.** While the Appellant's agent is correct in his submission that section 381 confers a general right to relief in appropriate circumstances, it is open to the legislature to limit or circumscribe the general right to relief contained in the section. The legislature has done so by the enactment of section 662 which contains, in section 662(2)(a) and section 662(2)(b), an express and unambiguous statement that the relief under section 381 shall not be available in the circumstances described in those subparagraphs.
- 20.** I therefore find that the general right to relief conferred by section 381 of TCA1997 is expressly limited by the provisions of section 662, and that the Appellant must satisfy the requirements of section 662 in order to succeed in his appeal.
- 21.** Turning to the requirements of section 662, having carefully considered the evidence of the Appellant, I am satisfied and find as a material fact that during the years under appeal, and indeed in the years preceding that, his time, work and financial investments were all intended to improve the farm and develop the farm trade to a point where it became profitable. There is no doubt that the Appellant was aware that this was going to take a significant number of years but his personal circumstances were such that he could not devote more time or spend more money in moving the trade to the point of profitability. Nonetheless, I am satisfied that it was always his wish and intention that his farming trade would ultimately become profitable, and that he carried on the trade of farming on a commercial basis.
- 22.** I therefore find that the Appellant satisfied the requirements of section 662(2)(a) for the years under appeal.



23. However, notwithstanding the Appellant being *prima facie* eligible for relief by reason of his having met the criteria in section 662(2)(a), section 662(2)(b) limits the entitlement to claim losses as a relief for year when a loss has been incurred in carrying on the trade during each of the prior three years.
24. Unfortunately for the Appellant, his farm trade made a loss during every year from 2007 to 2014 inclusive. This means that for each of the five years under appeal, the Appellant had made a loss in each of the prior three years; for example, in respect of 2010, the Appellant had made a loss in 2007, 2008 and 2009, and in respect of 2014, the Appellant had made a loss in 2011, 2012 and 2013.
25. I do not accept the argument made on behalf of the Appellant that once losses have been disallowed in respect of a year because of continuous losses in the preceding three years, the 'clock is reset' and the Appellant can once again begin to claim relief in respect of any losses in the following three years. I do not believe that the wording of section 662(2)(b) can properly be read as providing or even implying that losses can only be disallowed once in every four-year period.
26. Accordingly, I find that section 662(2)(b) is *prima facie* applicable to the Appellant for the years under appeal and will, if applicable, preclude him from claiming relief in respect of his losses incurred in the farm trade during those years.
27. Section 662(2)(d) contains a saving provision, and states in essence that section 662(2) shall not limit relief where a claimant shows that his activities in the year following three years of losses are of such a nature and carried on in such a way as would justify a reasonable expectation of profits in the future if those activities had been undertaken by a competent farmer or market gardener, and that if the farmer or market gardener had undertaken those activities at the beginning of the loss-making period, he could not reasonably have expected the activities to become profitable until after the end of the year following the prior period of loss.
28. I note that the Respondent's Notes for Guidance on Part 23 of TCA1997 state the following in relation to section 662(2)(d):-
"Relief may exceptionally be continued even where losses had been incurred for 3 years or more. This is designed to meet the genuine case of the farmer or market gardener who sets out on an undertaking realising that losses will be incurred for a



substantial initial period but with a justifiable expectation of building up a profitable operation in the long run (for example, a farmer trying to regenerate marginal land over a long period)."

- 29.** I am satisfied on the evidence before me, and find as a material fact, that the farming activities of the Appellant during each of the years under appeal were of such a nature and carried on in such a way as would justify a reasonable expectation of future profits if they had been undertaken by a competent farmer. I am further satisfied, and find as a material fact, that if the Appellant had carried out the farming activities he undertook during each of the years under appeal, he could not reasonably have expected those activities to become profitable until after the end of the years following the years under appeal.
- 30.** In reaching these findings of fact, I have had regard to the uncontroverted evidence of the Appellant that:-
- (a)** the land was in a very poor state when he inherited it;
 - (b)** he did not inherit any stock or machinery with the land;
 - (c)** he has slowly but continuously improved the land, built a shed and silage slabs, acquired machinery and built up his stock levels over the years under appeal;
 - (d)** constraints on the Appellant's time and financial resources have limited the amount of work he could do and investment he could make during each of the years under appeal;
 - (e)** he nonetheless made incremental improvements to the farm over the years, knowing that the initial years would be loss-making but with a view to ultimately being able to realise a profit; and,
 - (f)** the Appellant is now at a point where his farm trade may become profitable in the imminent future, and indeed would have been profitable in 2018 were it not for the death of two of his stock.
- 31.** I accept as correct the view expressed in the Respondent's Guidance Notes that the continuation of relief under section 662(2)(d) will only be allowed in exceptional circumstances, but I am satisfied that such exceptional circumstances exist in the instant appeal.
- 32.** I therefore find that, notwithstanding the provisions of section 662(2)(b), the Appellant is, by virtue of the provisions of section 662(2)(d), entitled to claim relief



pursuant to section 381 in respect of the losses he incurred in his trade as a farmer during the years under appeal.

F. Conclusion

33. For the reasons outlined above, I find that:-

- (a)** During each of the years under appeal, the Appellant was carrying on the trade of farmer on a commercial basis and with a view to the realisation of profits in the trade.
- (b)** Notwithstanding that the losses made by the Appellant during the years 2007 and onwards would ordinarily prevent the Appellant from claiming relief pursuant to section 381 by reason of the provisions of section 662(2)(b), the Appellant meets the criteria detailed in section 662(2)(d) and accordingly the limitation on relief contained in section 662(2)(b) does not apply to the Appellant.
- (c)** The Appellant is accordingly entitled to claim relief pursuant to section 381 in respect of the losses he incurred in his trade as a farmer during each of the years under appeal.

34. I therefore allow the Appellant's appeal and find in accordance with section 949AK(1) of the Taxes Consolidation Act, 1997, as amended, that the Appellant has been overcharged to tax in respect of the years 2010, 2011, 2012, 2013 and 2014 by the Notices of Amended Assessment issued in respect of those tax years on the 13th of December 2016, and determine that those Notices of Amended Assessment should be reduced accordingly.

MARK O'MAHONY
APPEAL COMMISSIONER
21 June 2019

