Hilary Term
[2025] UKPC 17
Privy Council Appeal No 0096 of 2023

JUDGMENT

Marie Henri Dominique Galea (Appellant) *v* The Assessment Review Committee and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Sales
Lord Leggatt
Lord Stephens
Lady Rose
Dame Philippa Whipple

JUDGMENT GIVEN ON
8 April 2025

Heard on 26 February 2025

Appellant
Johanne Hague
Medina Torabally
Bilshan Nursimulu
(Instructed by Etude Guy Rivalland (Mauritius))

Respondent
Philip Baker KC
Dilpreet K Dhanoa
Kritananda Naghee Reddy
(Instructed by RWK Goodman LLP (London))

DAME PHILIPPA WHIPPLE:

Introduction

1. This appeal relates to claims by the appellant, Mr Galea, to deduct losses incurred by the Société Agricole de Mont sur Mont ("SAMM"), of which he is an associé, against other gross income he received in tax years 2005/6 and 2006/7 (the "relevant tax periods"). He argues that SAMM was an undertaking conducted "with a view to profit" so as to meet the definition of a "business" contained in section 2 of the Mauritian Income Tax Act 1995 ("ITA"). This appeal is resisted by the second respondent, the Director-General of the Mauritius Revenue Authority ("MRA"), who maintains that SAMM was not a business for tax purposes in the relevant tax periods because its activities were not conducted with a view to profit. The first respondent is the Assessment Review Committee ("ARC") which has played no part in this appeal.

2. The ARC heard Mr Galea's first appeal, and the Supreme Court of Mauritius heard his second appeal. Both decided in favour of the MRA and dismissed Mr Galea's appeals.

3. The Board has concluded that the ARC and the Supreme Court erred in their construction of the words "with a view to profit" as they appear in the ITA, that their error was material, and that both decisions below must in consequence be set aside. The parties invited the Board to remake the decision if it reached that conclusion. On the evidence available, the Board concludes that SAMM's activities were conducted with a view to profit in the relevant tax periods. This appeal is therefore allowed.

Law

4. Section 20(1) of the ITA provides a right of set off against income of losses incurred in the production of gross income. "Gross income" is defined by section 10(1)(b) of the ITA to include "any gross income derived from any business".

5. Section 2 of the ITA provides that:

> "'business' includes any trade, profession, vocation or occupation, manufacture or undertaking, or any other income earning activity, carried on with a view to profit."

6. It is now common ground that the test of whether a business is "carried on with a view to profit" is one of subjective intention. In support of that agreed position, the parties

referred to a number of authorities. The first is *Grieve v Commissioner of Inland Revenue* (1984) 6 NZTC 61,682 (CA), [1984] 1 NZLR 101. In that case, the New Zealand Court of Appeal construed section 2 of the New Zealand Land and Income Tax Act 1954 ("the New Zealand Act") which defines "business" to include "any profession, trade, manufacture, or undertaking carried on for pecuniary profit". That definition of business is similar to the definition contained in section 2 of the ITA. The facts in *Grieve* have some similarity to the facts of this appeal, because in that case the appellants were a husband and wife who purchased a run-down farm and incurred losses for many years. The Commissioner disallowed the losses in two tax years on grounds that the appellants were not carrying on a business. The appellants lost their case at first instance but they won their appeal. The appeal court (Richardson J, with whom McMullin and Casey JJ agreed) rejected the proposition that the applicable test involved an objective element of establishing a reasonable prospect of profit, holding instead that to meet the statutory test, it was sufficient for the taxpayer to establish a genuine intention to make a profit:

> "… while the Courts are justified in viewing circumspectly a claim that a taxpayer genuinely intended to carry on a business for pecuniary profit when looked at realistically there seems no real prospect of profit, an actual intention once established is sufficient. The legislation sensibly allows for deductions and allowances to be claimed even where the overall result is a trading loss. It is not for the Courts or the Commissioner to confine the recognition of businesses to those that are always profitable or to do so only so long as they operate at a profit. In my view there is no warrant in the definition of business in its statutory context for reading in a requirement that there must be a reasonable prospect of profit before the gross income derived is assessable under s 88(1)(a) [of the New Zealand Act] and the deductions sought are allowable under s 111(b) [of the New Zealand Act] and under the specific deduction provisions requiring the taxpayer concerned to be carrying on a business.
>
> It follows from this analysis that the decision whether or not a taxpayer is in business involves a two-fold inquiry—as to the nature of the activities carried on, and as to the intention of the taxpayer in engaging in those activities. Statements by the taxpayer as to his intentions are of course relevant but actions will often speak louder than words. Amongst the matters which may properly be considered in that inquiry are the nature of the activity, the period over which it is engaged in, the scale of operations and the volume of transactions, the commitment of time, money and effort, the pattern of activity, and the financial results. It may be helpful to consider whether the operations involved are of the same kind and are carried on in the same way as those which are characteristic of ordinary trade in the

> line of business in which the venture was conducted. However, in the end it is the character and circumstances of the particular venture which are crucial. Businesses do not cease to be businesses because they are carried on idiosyncratically or inefficiently or unprofitably, or because the taxpayer derives personal satisfaction from the venture." (Page 110 of the case report, lines 24-52.)

7. The second case is *Backman v The Queen* 2001 SCC 10, [2001] 1 SCR 367, decided by the Supreme Court of Canada. In that case, the appellant taxpayer claimed a deduction of losses assigned to him and other Canadians by a third party. The claim depended on whether there was a partnership under Canadian law, which in turn required the appellant to establish that the business was carried on with a view to profit (see para 17). The Court (by Iacobucci and Bastarache JJ) considered the meaning of "view to profit". They said that the determination of whether there exists a "view to profit" requires an inquiry into the intentions of the parties entering into an alleged partnership, and that intention "is a person's objective or purpose in acting" (see para 22). They also held that the taxpayer's overriding intention is not determinative and that "It will be sufficient for a taxpayer to show that there was an ancillary profit-making purpose" (see para 23). The appellant failed on the facts, because there was no evidence of any intention to make a profit (see para 28).

8. The third case is *Ingenious Games LLP v Revenue and Customs Commissioners* [2021] EWCA Civ 1180, [2021] STC 1791, where, in the context of a tax avoidance scheme involving film financing, the Court of Appeal of England and Wales (per Henderson, Phillips LJJ and Sir David Richards in a joint judgment) recorded the agreement by the parties that the words "with a view to profit" contained in s 863(1) of the Income Tax (Trading and Other Income) Act 2005 imported a wholly subjective test which contained no objective element (see paras 119 and 122), and endorsed the proposition that profit does not need to be the predominant aim (see para 123).

9. The parties' agreed approach based on these authorities can be summarised as follows:

(i) The test applicable in the present context (where the statute defines "business" by reference to the words "with a view to profit") is one of subjective intention.

(ii) The aim to make a profit does not need to be the sole or main aim; it can be ancillary.

(iii) The taxpayer's asserted intention to make a profit can justifiably be viewed with circumspection in a case where, looked at realistically, there seems no real prospect of profit.

Facts

10. SAMM is a form of partnership under Mauritian law. It is fiscally transparent so that each associé (partner) is liable to tax on their share of the société's income, whether distributed or not. The associés bear losses incurred by SAMM in proportion to their ownership share.

11. SAMM was formed on 18 January 1993. Mr Galea is the owner of 92% of SAMM and the other associé, Mr Piat, owns 8%. It was common ground before the ARC that Mr Galea's evidence about his intentions and plans reflected the intentions and plans of SAMM, and that in all material respects Mr Galea spoke for SAMM.

12. In 1993 SAMM purchased two plots of land at Baie du Cap in Mauritius, totalling 234 Mauritian Arpents (ie approximately 200 acres). The purchase price of the land was approximately 4 million Mauritian Rupees ("Rs"). The land is mountainous and, at the time of purchase, was abandoned. A forest of Chinese guavas was growing there. The land includes a small house which is fenced off.

13. In 1997, 35 deer were introduced onto the land. Deer numbers grew over time to 250-300 and in 1999 SAMM started a deer shoot ("chassée"). Since 1999, SAMM has organised three or four deer hunting expeditions a year. For each expedition, there are approximately 22-23 hunters, 12-13 of whom pay to participate by annual contribution but the others, who bring dogs trained for hunting, are not charged. Around 80 deer each year are killed, which roughly matches the number that are born each year, so the deer population remains stable. SAMM gives some of the meat to the beaters on the shoots who are otherwise unpaid and sells the rest to local butchers. The chassée therefore provides two sources of income: annual payments by the members of the chassée and income from sales of venison.

14. SAMM has at times also sold live monkeys. These sales brought in income in the early years (1996/97 and 1997/98). There was no income from monkey sales between 1998/99 and 2001/02. Income from these sales recommenced in 2002/03 and continued into the relevant tax periods. The sale of monkeys was interrupted because of a prohibition on such sales by the law of Mauritius. But when permitted, SAMM received income from the sale of live monkeys.

15. SAMM also has costs. Its main cost is wages and allowances for its employees. It also incurs the cost of repairs and maintenance of the land, as well as other costs (running vehicles, bank charges, insurance and other overheads).

16. SAMM's profit and loss accounts show losses in every tax year from 1996/7 (the earliest tax year for which any information is available) to 2006/7 (the last year on record). The underlying trend has been for income to increase, from Rs 15,110 in 1996/7 to around Rs 700,000 in each of 2005/6 and 2006/7. However, costs have also increased during those years. SAMM has incurred net losses of between Rs 522,000 and Rs 1m for each year on record.

Appeal to the ARC

17. On 13 March 2007, the MRA initiated an investigation into Mr Galea's tax affairs for the relevant tax years. On 25 June 2009, the MRA issued assessments to Mr Galea in respect of those years, denying his claims to offset losses incurred by SAMM against his gross income earned from other sources. On 20 July 2009, Mr Galea objected to those assessments. By notice dated 17 November 2009, the MRA maintained the assessments. Mr Galea appealed to the ARC. On 11 November 2013, the ARC dismissed Mr Galea's appeal.

18. The case stated by the ARC for Mr Galea's further appeal to the Supreme Court indicates that Mr Galea gave evidence about the chassée. He accepted that other chassées were less expensive to participate in and said that SAMM's chassée was very small by comparison with some others in Mauritius. He said that the deer meat was sold to a butcher at a price fixed by the Mauritius Meat Authority, and that the less good parts of meat were given to the beaters. The number of hunters could not be increased because the land by its size could only contain 250-300 deer. Although some hunters did not pay to shoot deer, those hunters brought trained hunting dogs with them. The hunters without dogs did have to pay.

19. He also confirmed SAMM's involvement in the sale of live monkeys, which was, at the time he gave his evidence, interrupted because the law of Mauritius prohibited that activity.

20. He referred to the expenses incurred by SAMM. As to salaries, he said that SAMM has a watchman, a driver, a labourer and three women who do the maintenance; there had previously been two watchmen. SAMM has to buy fertilisers and herbicides. It incurs the costs of maintenance such as repairs of fencing. SAMM keeps a vehicle to transport the staff, the meat and the fertilisers, needed because the chassée is situated about 3km from a public road. SAMM also has other small expenses.

21. Mr Galea said that SAMM had tried other activities such as rearing wild boar in an enclosure but that did not work and the animals died. He said that SAMM was trying to launch, "tourisme de chasse" for tourist hunters, rather than hunters living on the island, which was a new concept in Mauritius. SAMM was also trying to promote eco-tourism by renting the small house on its land and allowing the picking of Chinese guavas.

22. Mr Galea said that his intention was to undertake profitable activity on SAMM's land and not to make a loss.

23. He was cross-examined by the then legal representative of the MRA. He was questioned about SAMM's accounts and he accepted that there were losses in every year. But he maintained that SAMM had the characteristics of a commercial enterprise and was not a mere hobby. It does not appear from the case stated that the genuineness of his intention was challenged in cross-examination.

24. Mrs Bissessur, Team Leader of the MRA, gave evidence of her view that SAMM's losses were not incurred in the course of business because there was no profit-making motive in SAMM's case. It was put to her by Mr Galea's lawyer that the MRA accepted that other loss-making companies were in business, but she pointed to SAMM's losses over ten years and maintained her position.

25. The ARC was referred to a number of authorities dealing with the term "business" in different contexts. Neither party now relies on those authorities. The MRA's case was that SAMM's activities were not carried out in a way reasonably to expect a profit; that no reasonable businessman would have sustained such high losses and still stayed in business; that SAMM was more of a club for hunting; and that in consequence, Mr Galea was not entitled to deduct the losses.

26. In its conclusions, the ARC agreed with SAMM's submission that an activity which qualifies as a hobby can still be a business for the purposes of the statute. The ARC noted the MRA's "main qualm", which was the fact of SAMM's losses over ten years, which losses amounted to more than Rs 8m. The ARC reminded itself of the terms of section 2 of the ITA and concluded that SAMM did not carry on a business for the purposes of section 2, giving these reasons for dismissing Mr Galea's appeal (internal page 30, lines 16 to 31):

> "It is clear from Section 2 that the list of activities that can constitute a business is not exhaustive. Any income earning activity can be a business. However, 'with a view to profit' seems to be a sine qua non condition for an activity to be considered a business. Of course, 'with a view to profit' does not mean immediately profit; but it means an activity carried

> on with a reasonable expectation of making a profit in [the] near future. A business activity may not make profits during the first few years. But the aim of the activity must necessarily be to make profit.
>
> In the present case, the Committee finds that as at 2006/07 the 'Chassée' has continuously incurred losses to the tune of about Rs 8 million. It can hardly be said to be an income earning activity carried on with a view to profit. Furthermore, the Committee bears in mind that Mr Galea bought the land for about Rs 4 million and made losses of about Rs 8 million in the following 10 years. He cannot, in these circumstances, seriously contend that he is doing a business activity in the 'Chassée'; at least not for the purpose of the Income Tax Act. The sale of meat and monkeys was not done in the course of business but as a means of disposal and as a means to reduce costs."

Appeal to the Supreme Court

27. Mr Galea appealed to the Supreme Court of Mauritius which heard his appeal on 11 July 2016. It dismissed his appeal by a judgment dated 15 March 2023. This set out the two key paragraphs from the ARC's reasons for its decision (quoted at para 26 above) and concluded (internal page 6, line 24):

> "We endorse the above reasoning and findings of the Committee. It is incumbent on the appellant to establish that the Committee's decision is erroneous in law. On the facts admitted or found proved before the Committee, we are unable to say that the inferences or conclusions made from those facts are unsupported by, or contradictory with, the evidence or are unreasonable or perverse. The Committee was entitled to reach the conclusions that it did. Its interpretation of the law and its application to the undisputed facts cannot be faulted."

28. With the leave of the Supreme Court dated 4 September 2023, Mr Galea appealed to the Board.

29. As can be seen, there have been lengthy delays in these proceedings. The assessments go back to losses incurred by SAMM in 2005/6 and 2006/7. No explanation for these delays has been given to the Board.

Grounds of Appeal to the Board

30. Mr Galea originally advanced six grounds of appeal from the decision of the Supreme Court. He abandoned two of those grounds before the hearing before the Board. Of the remaining four, only the first remains in issue. By that ground, Mr Galea contends that the Supreme Court (and, inferentially, the ARC before it) erred in law when it concluded that "with a view to profit" in section 2 of the ITA meant an activity carried on with a reasonable expectation of making a profit in the near future.

31. As noted above, the parties are now in agreement as to the legal test. However, that agreement came about late in the day. The subjective nature of the statutory test was raised for the first time in Mr Galea's written case for this appeal (prepared by Maîtres Hague, Torabally and Nursimulu, none of whom was instructed below). Their submissions were supported by the authorities referred to above, none of which was cited to the ARC or the Supreme Court. The MRA's written case (prepared by Mr Baker KC and Ms Dhanoa, neither of whom was instructed below) agreed with the new proposition that the statutory test was one of subjective intention. This was not the position adopted by the MRA before the ARC or the Supreme Court.

32. Although the legal test is now common ground, the parties do not agree about the implications for the disposal of this appeal. Me Hague submitted that the ARC and the Supreme Court erred in directing themselves that the test was whether Mr Galea had a reasonable expectation of profit, which was wrongly to apply an objective test; that their error was compounded by the ARC asking whether Mr Galea had a reasonable expectation of profit in the near future, when the timing of expectation of profit formed no part of any applicable test; and that those errors vitiated the decisions of both courts below. She invited the Board to set aside both decisions and to remake the decision in Mr Galea's favour on the basis of the available evidence which showed that SAMM had intended to make a profit in the relevant tax periods.

33. Mr Baker submitted that the ARC had not applied an objective test and that Me Hague was taking parts of the ARC's judgment out of context when she suggested that the ARC had erred in law; rather, the ARC had applied the correct test of subjective intention, manifest from the ARC's conclusion that Mr Galea "cannot … seriously contend that he is doing a business activity in the Chassée" (see the second paragraph of the ARC's conclusions, quoted at para 26 above). Alternatively, if the Board concluded that there had been an error of law, that error was not material because the ARC (and in turn the Supreme Court) would inevitably have reached the same conclusion on the evidence anyway. In the further alternative, and if the Board were minded to set aside the decisions below and remake the decision, the Board should reject Mr Galea's case, noting in particular: the accumulated losses of SAMM which were more than twice the original cost of the land, the size of the land which restricted the number of deer that could be bred on the land and in turn restricted the number of hunters and expeditions each year, that

not all hunters paid a contribution, and that some of the meat was given away. In summary, Mr Galea's asserted intention that SAMM make a profit in the relevant tax periods was not credible. Future intentions were not relevant. Mr Galea had failed to discharge the burden which was on him to prove his case and the appeal should be dismissed.

34. The Board is grateful to counsel and their supporting legal teams for their assistance. Although it came late in the day, their agreement on the legal test is a welcome development, which narrows the scope of this appeal significantly.

Issue 1: Is there a material error of law?

35. The ARC held that "with a view to profit" meant "with a reasonable expectation of making a profit in the near future" (first paragraph from the passage quoted at para 26 above). The Board agrees with Me Hague that the ARC was here in error for two reasons. The main reason is that the ARC was directing itself to apply an objective test, measured according to the reasonableness of the expectation of profit. This was not the right test. The second reason is that the ARC suggested that profit had to be made in the near future, when the timing of any profit which might be anticipated forms no part of the legal test (although a lack of likely profit in the near future might well be relevant to an assessment of the evidence, applying the correct test of subjective intention).

36. The Board rejects Mr Baker's suggestion that the ARC applied a subjective test, or something close to it. Read in context, the statement that Mr Galea could not "seriously … contend" that SAMM was involved in business activity (second paragraph from the passage quoted at para 26 above) was an expression of the ARC's conclusion that there was no reasonable expectation that SAMM would make a profit in the near future, which was to apply an objective (and incorrect) legal test.

37. It is convenient to address at this point Mr Baker's further submission, that the ARC's conclusion (at the end of the same paragraph) that the sale of meat and monkeys was a means to reduce costs rather than being done in the course of business, should be preserved as a finding of fact. That submission is also rejected. The whole of the second paragraph follows from the first and contains the ARC's reasons for rejecting Mr Galea's case, by reference to the wrong legal test. No part of it can be preserved.

38. The ARC made a material error of law. The decision of the ARC, and the decision of the Supreme Court upholding it, must be set aside. Me Hague succeeds on her first ground.

Issue 2: how should the Board remake the decision?

39. In the event that the Board concludes, as it does, that the decisions of the Supreme Court and the ARC are vitiated by an error of law, both parties invited the Board to remake the decision itself rather than remit the case to the ARC. To explain the approach taken to this exercise, some preliminary observations may be made. First, the Board has only limited evidence before it. The key matters of evidence contained in the ARC's case stated have already been set out. The Board lacks information which might be relevant, for example, about Mr Galea's other business interests, about whether the other members of the chassée are friends or colleagues of Mr Galea, whether Mr Galea is himself one of the members of the chassée and if so, whether he paid to participate. Secondly, the ARC placed reliance on two facts, in particular. The first was that the losses were almost double the cost of the land; the second was that SAMM had never made a profit in the ten years on record (see the second paragraph from the passage quoted at para 26 above). The Board doubts the relevance of the first of those matters, particularly when there is no evidence of the value of the land and whether or to what extent it has been increased by SAMM's investment. In any case, a business may suffer losses which are much larger than its initial investment, and still aim to make a profit. That may typically be the case where a business purchases property at substantial cost at the outset, and then invests in that property with a view to generating profit in the longer run. The fact that SAMM had never made a profit is certainly relevant. But a business may make losses for many years in a row, and still intend to make a profit. That was the case in *Grieve* where the taxpayer made losses for many years but was still held to be in business.

40. Me Hague uses the factors referred to in *Grieve* as her framework for submissions. The first factor is the nature of the activity undertaken. Me Hague reminds the Board that SAMM had two income-generating activities in the relevant tax periods. The first was deer hunting which followed the introduction of deer in 1997. Since then, deer numbers have increased to the maximum sustainable on the land. From the deer, SAMM has generated income from members' subscriptions to join the chassée and sales of meat. The second source of income was the sale of live monkeys, which the accounts show to be a valuable source of income in those years when it was permitted. Mr Galea tried other ventures too: he had tried rearing wild boar in an enclosure, he had tried to launch the concept of ecotourism by renting out the house on the land, and he was trying to launch hunting tourism. Thus there were various activities undertaken by SAMM on its land, some of which were successful in generating income, others less so. To look after the land, SAMM has throughout employed staff (currently numbering six) and incurred maintenance and other costs. All of this was reflected in the profit and loss accounts, prepared according to ordinary business standards. Me Hague said that this was evidence of a commitment to running SAMM on sound business principles and seeking to make a profit from the land. The trend of SAMM's income over the ten years for which records exist was generally upwards (although expenses also increased throughout that time).

41. The second factor is the period over which SAMM had been involved in these various ventures. The land was purchased in 1993 and since then SAMM has invested significantly in the land. In the early years, many trees were cut and grass was planted. Then deer were introduced in 1997 and deer hunting started in 1999, continuing to date.

Other ventures were undertaken too. This, said Me Hague, showed continual activity on the land, consistent with a view to generating profit. Thirdly, the Board was asked to consider the scale of the operations and the volume of transactions. Deer hunting is undertaken at a maximum level consistent with maintaining a stable deer population. The other source of income was from live monkey sales when permitted. This, said Me Hague, was evidence of exploiting the land, with constraints on business growth coming from factors outside SAMM's control. Fourthly, she reminded the Board of the evidence of the significant commitment in terms of time, money and effort to SAMM's business. Six members of staff (previously seven) were employed throughout the year and costs were incurred in the upkeep of the land. Last, Me Hague pointed out that the financial results showed income on an upwards trajectory. The scale of SAMM's annual losses hit a peak in 2002/03, and by the relevant tax periods were coming down, so that profitability, although not achieved, was closer than it had been in previous years.

42. The Board accepts the evidence on these points as far as it goes. Certainly, SAMM invested in the land and attempted various ventures which had the potential to generate income, some of which were successful to some degree.

43. Mr Baker relies on aspects of the evidence to cast doubt on Mr Galea's case. He draws attention to SAMM's losses which were substantial and persistent; he notes that the land was limited in the income it could produce, because it was never going to support more extensive deer hunting and the export of live monkeys could only take place when permitted by law. These points were put to Mr Galea in cross examination as part of the MRA's case, as it then was, based on the reasonableness standard.

44. However, Mr Baker goes further, as he must do to meet the test which is now agreed, by inviting the Board to reject Mr Galea's evidence about his intention as lacking credibility when weighed against the other evidence in the appeal. One problem with that submission is that, at the hearing before the ARC, that evidence does not appear to have been challenged. As far as appears from the ARC's decision and case stated for the appeal to the Supreme Court, the ARC did not take issue with the credibility of Mr Galea's asserted intention. As a matter of basic fairness, Mr Galea should have been given the opportunity to address that issue if a submission was to be made that his evidence should be disregarded as lacking credibility. But in any event, Mr Galea's evidence is consistent with other evidence in the case, most notably the different avenues SAMM has investigated for making income from its land over time. The Board concludes that, on the material available to it, Mr Galea's evidence of intention should be accepted as credible.

45. In determining the outcome for the two relevant tax periods, Mr Baker submits that the Board should take no account of SAMM's intended plans and that it should confine its review to the income in fact received and plans in fact evidenced in those periods. The Board is not persuaded that the review should be limited in that way. There is evidence on record of intended plans for generating income, even if not contained in

any formal document or on any stated timescale. Future intentions are relevant to the question of whether SAMM intended to make a profit, as that test falls to be applied in the relevant tax periods.

46. In conclusion, on the available evidence, the Board is satisfied that SAMM intended to make a profit in the relevant tax periods and was in business, as that word is defined by section 2 of the ITA.

Conclusion

47. The Board allows this appeal.