Case No: CH/2005/APP/0839
(SC 3097/2004)

Neutral Citation No: [2006] EWHC 763 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE SPECIAL COMMISSIONERS
(Dr John Avery Jones)

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, April 7, 2006

Before
MR JUSTICE LAWRENCE COLLINS

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Appellant

and

SALARIED PERSONS POSTAL LOANS LIMITED
Respondent

JUDGMENT

Mr Michael Gibbon (instructed by the Solicitor for HM's Revenue and Customs)
for the Appellant

Mrs Felicity Cullen (instructed by Auerbach Hope (Chartered Accountants))
for the Respondent

Hearing: March 14, 2006

Mr Justice Lawrence Collins:

I Introduction

1. This is an appeal by the Revenue from a decision of the Special Commissioner (Dr J Avery Jones), holding that for the purposes of "small companies' rate" and in particular for the purposes of section 13(4) of the Income and Corporation Taxes Act 1988 ("the 1988 Act"), Malcolm Muir Ltd ("MML"), did not carry on a trade or business in the years ended July 31, 1998 to July 31, 2001.

2. The point arises in this way:

   (1) By section 13(1) of the 1988 Act:

   > "Where in any accounting period the profits of a company which—
   >
   > (a) is a resident in the United Kingdom, and
   >
   > (b) is not a close investment-holding company (as defined in section 13A) at the end of that period,
   >
   > do not exceed the lower relevant maximum amount, the company may claim that the corporation tax charged on its basic profits for that period shall be calculated as if the rate of corporation tax (instead of being the rate fixed for companies generally) were such lower rate (to be known as the 'small companies' rate') as Parliament may from time to time determine."

   (2) Section 13(2) provides for the reduction of corporation tax for companies whose profits exceed what is called the lower relevant maximum amount and do not exceed the upper relevant maximum amount; and section 13(3) provides that the lower and upper relevant amounts are £300,000 and £1.5 million where the taxpayer company has no associated company, and

   > "(b) where the company has one or more associated companies in the accounting period, the lower relevant maximum amount is £300,000 divided by one plus the number of those associated companies, and the upper relevant maximum amount is £1,500,000 divided by one plus the number of those associated companies."

   (3) By section 13(4):

   > "In applying subsection (3) above to any accounting period of a company, an associated company which has not carried on any trade or business at any time in that accounting period (or, if an associated company during part only of that accounting period, at any time in that part of that accounting period) shall be disregarded and for the purposes of this section a company is to be treated as an 'associated company' of another at a given time if at that time one of the two has control of the other or both are under the control of the same person or persons.
   >
   > In this subsection 'control' shall be construed in accordance with section 416."

3. The effect of the legislation in section 13(3) is to divide the available amount of small companies' relief between relevant companies where a company has associated companies. It is the Revenue's case that the purpose of the legislation is to prevent the avoidance of tax through the exploitation of small companies' rate which could arise if a company with a successful business fragmented its activities such that each activity was then carried on by other associated companies.

4. The Revenue has supplied a helpful memorandum to show how the section works. This is substantially agreed by the Respondent, except that the Respondent says that the worked examples are not likely to arise in practice and are at the extreme end of the theoretical spectrum.

5. The Revenue's example is of a company, A Ltd, which has profits of £1.6 million chargeable to corporation tax in an accounting period. The profits of £1.6 million are above the upper relevant maximum amount specified in section 13(3)(a) of £1.5 million ("URMA"). Therefore, the full amount of the profits are chargeable at the full corporation tax rate of 30%, and the corporation tax liability of A Ltd will be £480,000.

6. If A Ltd is able to fragment its business such that it retains one separate trade or business, and has 15 other associated companies (B Ltd - P Ltd) each of which carries on one other separate trade or business, then the profits of each company are £100,000 giving an aggregate profit for all 16 companies of £1.6 million. Each of the 16 companies, A Ltd - P Ltd, would have the same liability: applying section 13(3)(b), the value of URMA would be: URMA £1,500,000/(1 + 15) = £93,750 which is lower than the company's profit of £100,000. Corporation tax liability on profit of £100,000 @ 30% is £30,000. A Ltd and the 15 similar companies would have an aggregate corporation tax liability of £30,000 x 16 = £480,000.

7. If the provisions of section 13(3)(b) were absent or could be circumvented, the value of the URMA and the lower relevant maximum amount ("LRMA") would not be adjusted despite the fact that each company had 15 associated companies. URMA would remain at £1,500,000, and LRMA would remain at £300,000. Corporation tax profits of A Ltd are £100,000 and this level of profit is less than LRMA. Corporation tax liability is £100,000 @ 20% = £20,000. A Ltd and the 15 similar companies would have an aggregate corporation tax liability of £20,000 x 16 = £320,000. In the absence of the provisions of section 13(3), or if A Ltd were able to circumvent them, A Ltd would have reduced its corporation tax liability by £160,000 by having fragmented its business into several companies each under the control of the original shareholders of A Ltd.

8. There is not, in theory, a finite amount of tax reduction which fragmentation can achieve. Where Z Ltd makes £3,200,000 of profits chargeable to corporation tax in an accounting period, the corporation tax of Z Ltd will be computed as follows: profits of £3,200,000 are above URMA, and therefore, the full amount of the profits are chargeable at the full corporation tax rate of 30%, i.e. £960,000.

9. If Z Ltd is able to fragment its business such that it retains one separate trade or business and has 31 other associated companies each of which carries on one other separate trade or business, each with a profit of £100,000, then there is an aggregate profit of £3,200,000. If section 13(3)(b) applies, the aggregate corporation tax liability would be the same as if Z Ltd had not fragmented its business, namely £960,000. According to the Revenue, however, if the provisions of section 13(3)(b)

were absent (which is not the case) or could be circumvented, the value of URMA and LRMA would remain at £1,500,000 and £300,000 respectively, despite the fact that each company had 31 associated companies. Corporation tax profits of Z Ltd are £100,000 and this level of profit is less than LRMA. Corporation tax liability is £100,000 @ 20% = £20,000. Z Ltd and the 31 similar companies would have an aggregate corporation tax liability of £20,000 x 32 = £640,000. In the absence of the provisions of section 13(3), or if Z Ltd was able to circumvent them, Z Ltd would have reduced its corporation tax liability by an amount totalling £320,000 by having fragmented its business into several companies each under the control of the original shareholders of Z Ltd.

II The facts

10. Salaried Persons Postal Loans Ltd, the Respondent ("SPPL"), Salaried Staff London Loan Co Ltd ("SSLL"), Managers Limited ("ML") and MML are four companies under the control of Mr R Selig within the meaning of section 416 of the 1988 Act.

11. SPPL, SSLL and ML are private limited companies registered in England and are resident, for tax purposes, in the United Kingdom. MML is a private limited company registered in Scotland and is resident, for tax purposes, in the United Kingdom.

12. The following facts were agreed. Until 1966 MML carried on the trade of making personal loans from its premises at West Regent Street, Glasgow. MML owned the Scottish equivalent of the freehold of these premises.

13. In 1966, MML vacated its West Regent Street premises and let them to a tenant, J B & G Forsyth. MML moved to new premises (which it leased) at 111 Union Street, Glasgow and continued to carry on its trade from these new premises. MML shared these premises with SPPL.

14. MML carried on its trade of making personal loans from the Union Street premises until November 30, 1995. It then ceased trading.

15. In the year ended July 31, 1996 MML surrendered its licence under the consumer credit legislation, and MML and SPPL vacated the premises at 111 Union Street, Glasgow.

16. MML continued to own the premises at West Regent Street, Glasgow from which it receives a net rental income twice a year. A cheque for the full rent payable less commission (i.e. for net rent) is sent directly to ML which acts as banker for SPPL, MML, and SSLL.

17. The income from the West Regent Street premises has been MML's sole source of income since it ceased trading on November 30, 1995, in its financial year ended July 31, 1996. MML's lease of the Union Street premises expired in April 1998.

18. MML has incurred modest agent's fees in respect of the letting of the West Regent Street premises.

19. Since MML ceased trading and disposed of all of its assets other than the premises at Union Street and West Regent Street, Glasgow:

(1) MML has not had its own bank account but has maintained an inter-company balance with ML, the group's banker;

(2) MML has had two directors but has had no employees;

(3) MML has not paid any directors' fees or salaries;

(4) MML has not paid any dividends nor made any distributions;

(5) MML has not purchased any assets or disposed of any assets;

(6) MML has neither received nor paid any interest on its inter-company balance with ML; there is a small amount of interest shown in the accounts to July 31, 1998. This was a supplement on tax which was paid early;

(7) MML has not negotiated any rent reviews. Rent reviews have taken place automatically by reference to a pre-existing formula providing for 20% increases in rentals at the review dates and there has been no communication with the agents since 1995 other than a short telephone call approximately seven years ago when Mr Selig simply acceded to a request to proceed with a rent review of the West Regent Street premises;

(8) MML has not sought to let the West Regent Street premises or any part of them to a new tenant. MML has, since 1966, let the premises to the same tenant, JB & G Forsyth;

(9) SPPL, MML, ML, and SSLL have produced accounts.

20. The small companies' rate of corporation tax available to SPPL under section 13 of the 1988 Act was restricted by the Revenue under section 13(3) and (4) for each of the accounting periods to which the appeal related on the grounds that in the respective years to July 31, 1998, 1999, 2000 and 2001 SPPL had three and not two (as the taxpayer contended) relevant associated companies, i.e. excluding MML.

21. The lease of the West Regent Street premises was also before the Special Commissioner and before me. The premises comprise five rooms on the first floor. The lease is from November 11, 1990 to November 10, 2006. The rent is £7,000 pa. From November 11, 1992 and every third year thereafter the landlord may give the tenant notice before the review date proposing a fair market rent which, failing agreement, is to be determined by an independent surveyor at the tenant's cost, but which is not to be less than 20 per cent more than the rent for the previous period. There was no evidence about compliance with the terms of the lease but the Special Commissioner deduced that MML performed its obligations, including therefore insuring and collecting the insurance premiums from the tenant. He also preferred the description of the rent review process in the lease to that summarised in paragraph 19(7) above.

22. I have been provided with a memorandum on the practical consequences in the present case:

(1) If all 4 companies are carrying on any trade or business and so not excluded by section 13(4), then for the purposes of section 13(3)(b) URMA and LRMA are reduced by 1 plus the number of associated companies (in this case 3). Revised

URMA and LRMA are £375,000 and £75,000. The limits apply to each associated company.

(2) Where, however, in any accounting period the profits of a company exceed LRMA but not URMA marginal small companies' relief (MSCR) applies. This relief is calculated by reference to the formula at section 13(2). To ensure accuracy in this and the following examples MSCR has been calculated where required.

	SPPL £	SSLL £	ML £	MML £
Taxable Profit	402361	330437	84621	9576
CT@30%	120708.30	99131.11	25386.30	
CT@20%				1915.20
Marginal Relief	NIL	(1114)	(7259.46)	(24.36)
CT	120708.30	98017.10	18126.84	1890.84
Total CT for all four companies	**£238743.08**			

(3) If it is the case that MML is not carrying on any business then it is disregarded for the purposes of section 13(3) because of section 13(4). Section 13(3)(b) URMA and LRMA are reduced by 1 plus 2 associated companies. Revised URMA and LRMA will be £500,000 and £100,000 for each associated company. It is now possible for both SPPL and SSLL to have profits up to £500,000 and still benefit from marginal relief. The rate at which MML pays tax is determined by another point which is not before the court. For the purposes of the following examples the rate at which MML pays tax is assumed to be 30% .

	SPPL £	SSLL £	ML £	MML £
Taxable Profit	402361	330437	84621	9576
CT@30%	120708.30	99131.11		2872.80
CT@20%			16924.20	
CT@10%				
Marginal Relief	(2440.98)	(4239.07)		
CT	118267.32	94892.04	16924.20	2872.80
Total CT	£232956.36			

(4) There is an overall reduction in the corporation tax due of £5,766.72. All companies other than MML benefit from an increase in marginal relief.

(5) The position can be summarised as follows:

CT due if:	SPPL £	SSLL £	ML £	MML £	Total CT due £	Total Reduction in CT due £
All Associated	120708.30	98017.10	18126.84	1890.84	**238743.08**	
Three Associated	118267.32	94892.04	16924.2	2872.80	**232956.36**	**(5766.72)**

III The authorities

23. Section 13 has been considered by Park J in *Jowett v O'Neill* [1998] STC 482, and in two reported decisions of the Special Commissioners, *John M Harris (Design Partnership) Ltd v Lee* [1997] STC (SCD) 240 (D A Shirley) and *Land Management Ltd v Fox* [2002] STC (SCD) 152 (Dr N Brice).

24. But the starting point is the decision of the Privy Council in *American Leaf Blending Co SDN BHD v Director-General of Inland Revenue* [1979] AC 676. This was a decision on appeal from the Federal Court of Malaysia. Under the Malaysian Income Act 1967 it was only against income from a "source consisting of a business" that adjusted losses from a business for previous years of assessment could be set off. The issue was whether rents received by the taxpayer company for letting its premises to other persons for use for storage were income from a "source consisting of a business". The company had a cigarette making factory and a bonded warehouse for storing tobacco and cigarettes. Its business proved to be unprofitable, and it eventually abandoned its manufacturing business and its trading business. It still owned its factory and warehouse, and let the premises to various licensees.

25. The Malaysian Special Commissioners had decided ([1979] AC at 683) that because the letting of its property was one of the objects of the company set out in its Memorandum of Association, in law that was conclusive that in making any letting of its premises it was carrying on a business.

26. That was rejected by the Privy Council. Not every isolated act of a kind which was authorised by the Memorandum if done by a company necessarily constituted the carrying on of a business. But dicta in *Fry v Salisbury House Estate Ltd* [1930] AC 432 which suggested that the letting of land did not constitute a "trade" did not have any relevance to the question whether the letting of land by the company in the present case amounted to the carrying on of a "business". "Business" was a wider concept than "trade".

27. Lord Diplock said (at 683-684):

> "So it is clear that 'rents' …. may nevertheless constitute income from a source consisting of a business if they are receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent.
>
> …

> …. [W]hether the company … was carrying on a business of letting out its premises for rents … is one of fact …
>
> 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 intervals 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 the removal of the 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.
>
> As has been mentioned, the question whether the company was carrying on a business of letting out its premises for rent was one of fact for the special commissioners; …"

28. But the Special Commissioners did not apply their minds to that question because of their mistake of law as to the effect of the presence in the Memorandum of Association of the power to let its premises. But it was not necessary for the case to be remitted to the special commissioners because, on the evidence, there was only one conclusion of fact which any reasonable commissioners could meet, namely that there was nothing in the evidence capable of rebutting the prima facie inference that the company was carrying on a business of letting out its premises for rent.

29. In *John M Harris (Design Partnership) Ltd v Lee* [1997] STC (SCD) 240 Mr Harris, an architect, owned more than 75% of the taxpayer company (John M Harris (Design Partnership) Ltd). He also owned all the shares in John M Harris (Properties) Ltd ("Properties Ltd"). Mr Harris wished to purchase a holiday home in France and was advised that the property should, for French legal reasons and especially because of the laws of inheritance, be owned by a limited company, and he decided that it should be held by Properties Ltd. It was used exclusively by Mr Harris and his family, and was never let. It was held that Properties Ltd should be disregarded for the purposes of calculating relief pursuant to section 13(4) since it had not carried on any trade or business at the relevant time. Although the main object of Properties Ltd in its Memorandum of Association was that of an investment company, it did not follow that it had carried on that business when it acquired any property. Although a company might be carrying on a business of investment even though its investments were such as to provide no income, that did not mean that a company had to be carrying on a business merely because it owned property. *American Leaf* was applied

and it was held that only Mr Harris and his family used the property, the company paid no bills, and the family paid no rent. The property was not for sale and was not bought for gain.

30. *Jowett v O'Neill* [1998] STC 482 (Park J) was also a case as to whether an associated company "carried on any trade or business" for the purposes of section 13(4). The associated company, Wynchgate Construction Ltd ("WCL"), commenced a trade in 1994 of providing the services of British construction workers to a contractor operating in Germany. The trade only lasted for about 5 months. WCL discontinued it in May 1994 but had not received payment, or "full payment" for its services. In October 1994 WCL received a payment of just over £100,000 and put it on deposit at the bank. It also had a current account which contained a small credit balance of £300 or so. In the relevant period, 1995, WCL: (i) carried on no trade; (ii) closed its current account and transferred the small credit balance to the deposit account; (iii) paid a corporation tax liability; and (iv) earned interest on its deposit account. The special commissioner decided that the receipt of bank interest credited to the deposit account was not the business of investment, nor was it the carrying on of any "trade or business" in 1995. It had power to carry on another trade or business, and to deal with money not required for the purposes of its business, under its Memorandum. But it did not follow that in exercising that power in the circumstances it necessarily followed that it consequently carried on another trade or business. On the evidence it was in a state of suspended animation and carried on no trade or business. Park J applied *Edwards v Bairstow* [1956] AC 14, and held that there was no misstatement of law, and the decision was one to which the Special Commissioner could have come. Referring to *American Leaf*, he said that although the normal conclusion when a company lays out its assets and earns an income return is that it is carrying on a business, that is not inevitably so as a matter of law.

31. Park J said (at p 489):

> " [The Special Commissioner] has taken it for granted, rightly in my judgment, that if WCL was not carrying on an investment business it was not carrying on any other kind of business. The kinds of activities which our tax law recognises as species of business are trades, professions, vocations and investment. I am not aware of any other, and if another exists I am sure that it does not apply to the facts of WCL in 1995.
>
> Mr Furness accepts that WCL was not carrying on an investment business merely by having its money on deposit at the bank. When I asked him what sort of business WCL was carrying on he said: 'It was in the business of gainfully employing its assets while keeping itself in existence pending any trading opportunity which might arise.' That is not a kind of business. It is just a description of the company's profile in the relevant period, stated in the grandest terms that can be managed for facts which amounted to scarcely anything, and then the epithet 'business' is attached.
>
> It seems to me that the question which [the Special Commissioner] asked himself, though not couched in the precise words of the statute, was nevertheless the real question to which the statute gave rise on the particular facts of this case. He tacitly assumed that if WCL was not carrying on an investment business, it was not carrying on any business at all. In my judgment he was entirely right, and there is no misstatement of law to be found in his decision."

32. *Land Management Ltd v Fox* [2003] STC (SCD) 152 was also a case on whether an associated company was carrying on a business for the purposes of section 13(4). The associated company, The Share and Debenture Trust Ltd, did not carry on any trade, but it owned shares in the taxpayer company and a freehold property. The Special Commissioner approached the matter by looking at each of the activities of the associated company and asking in respect of each activity whether it amounted to a business, and then by standing back and asking whether, viewed broadly, it was in each of the relevant years carrying on any business. She concluded that in each of the years the associated company carried on business in the managing and letting of property because the Memorandum of Association showed that it was incorporated for the purpose of carrying on or undertaking business of an investment nature, and in the relevant years (or some of them) payments were made by the associated company for insurance, repairs, renewals, and professional fees. It was also involved in the business of holding and making of investments. It did not only hold them but also paid administration expenses and distributed dividends to its shareholders. Consequently both the holding and the making of investments constituted the carrying on of business. It also made a loan to the taxpayer company, and the activity of making that loan and receiving interest amounted to the carrying on of business. Standing back and considering the activities of the associated company as a whole, the Special Commissioner concluded that in addition to receiving its four sources of income the associated company each year paid administration expenses including remuneration; paid the expenses of managing the residential properties; and distributed its profits to the shareholders. Overall, it was carrying on business in each relevant year.

33. At paragraph 41 of the Decision, the Special Commissioner, in referring to the decision of Park J in *Jowett v O'Neill* [1998] STC 482, said:

> "It is possible that, if the only activity carried on by the associated company in this appeal, were the receipt of interest from the deposit at the bank, then this might also have been one of the exceptional cases. However, in this appeal the other three activities of the associated company point to the conclusion that it was carrying on business in the relevant years."

IV The Special Commissioner's decision

34. The Special Commissioner's decision was as follows. It was common ground that MML did not carry on any trade in the relevant financial years. The issue was whether MML carried on business during those years. The relevant facts were:

(1) At all material times MML owned and received rent from the business property in West Regent Street.

(2) In each year MML incurred agent's fees and accountancy costs, which had been discharged.

(3) In respect of each year MML had filed accounts (not dormant accounts) showing the company's "principal activity" to be "property investment." The notes to the accounts record that "no depreciation is provided in respect of freehold Investment Property."

(4) In respect of each year MML was chargeable to tax under Schedule A.

35. The following principles could be derived from the authorities:

(1) A company need not carry on a business (as assumed by section 13) but there was a strong prima facie inference that it does so when it puts its property to gainful use by letting it out for rent: *American Leaf*.

(2) It may be relevant that the company was carrying out one of the principal objects stated in its Memorandum: *American Leaf*; *Land Management Ltd v Fox* [2003] STC (SCD) 152, at [24].

(3) The act of receiving bank deposit interest having ceased one trade before starting another was not the carrying on of a business: *Jowett v O'Neill.*

(4) In a case such as the present the only business that MML might be carrying on was that of investment: *Jowett v O'Neill*.

36. Business was "an etymological chameleon; it suits its meaning to the context in which it is found": *Town Investments Ltd v Department of the Environment* [1978] AC 359, at 383, per Lord Diplock. The context in section 13 was that an associated company is ignored for calculating the small companies' relief if it had not carried on any trade (which it was common ground that it had not) or business at any time in that period. Section 13 envisaged that a non-trading company could receive income without carrying on a business of investment. That seemed to indicate that why it received income and what it did to receive the income was relevant.

37. The issue was one of fact. The following facts were particularly relevant:

(1) MML did not purchase the West Regent Street premises as an investment; it traded from there, then moved in 1966 and traded from other premises until 1995 when it ceased trading, the West Regent Street premises being let during this time.

(2) The same tenant had occupied the premises since 1966, although the lease was renewed in 1990 (and possibly on another occasion since 1966).

(3) The lease was a tenant's repairing lease.

(4) The Special Commissioner inferred that MML (through the agent) insured and collected the insurance from the tenant in accordance with the lease; although not shown in the accounts it was strictly a receipt and payment by MML.

(5) He also inferred that MML instigated rent reviews every three years, the one in 1998 being the only time in the relevant years, which was presumably the cause of the phone call from the agent mentioned in paragraph 19(7).

(6) MML employed an agent, at a cost at the end of the relevant periods of £757, who presumably did more than accounting for the rent after the agent's commission twice-yearly direct to ML (the group banking company), for example keeping the insurance current and collecting the insurance premium from the tenant, which activity should be attributed to MML because it was paying someone else to do something that it would have otherwise had to do itself under the terms of the lease.

(7) MML used to trade and has objects primarily enabling it to trade; the renting of the West Regent Street premises was in accordance with object III(18) in its Memorandum of Association "to sell, feu, let, lease, or otherwise dispose of, or transfer, or deal with, the business, property, rights, interests, or undertakings of the Company, or any branch or part thereof, in consideration of feu duty, rent ..." rather than the main object which envisaged both purchasing and letting.

(8) The rest of MML's assets built up from its trading, amounting to £1.24 milion at the end of the relevant period, were lent interest-free to ML, and so the premises from which it received rent, which were in the balance sheet of MML at a director's valuation of £60,000 in the accounts up to July 31, 1999 and £90,000 thereafter, were a small part of MML's assets.

(9) The only difference between any of the years under appeal was that in the years ended July 31, 1998 and 1999 MML in addition had expenditure relating to the Union Street premises from which it had formerly traded.

38. Taking all of these factors into account, the Special Commissioner found as a fact that in each of the relevant years MML did not carry on an investment (or any other) business. The letting was the continuation of the letting of former trading premises, a state of affairs that had continued for nearly 30 years while MML was trading, and which merely continued after the cessation of trading.

V The Revenue's appeal

39. The Revenue agreed before the Special Commissioner that whether MML carried on business was a question of fact. On this appeal the Revenue accepts that it must demonstrate that the Special Commissioner was wrong in law on the face of the decision, or satisfy the court that no person, properly instructed in the law and acting judicially, could have reached the same determination: *Edwards v Bairstow* [1956] AC 14**.**

40. Section 13 contains a targeted anti-avoidance provision, and should be construed in such a way as to give effect to the anti-avoidance purpose: *IRC v McGuckian* [1997] 1 WLR 991, at 1005. Section 13 seeks to prevent abuse of the small companies' relief provisions, which would otherwise be effected by spreading income between more than one company. This could be effected by having associated companies (in effect to be treated for these purposes as a single economic grouping) organising their affairs to reduce the aggregate tax burden, by taking advantage of the small companies' rate. If their results were aggregated, within one company, that company's taxable profits would be above the small companies' rate limit. If MML was not carrying on business, the opportunities for defeating the anti-avoidance provision are obvious, and not just for MML. There is no reason in principle why a company operating similarly to MML should not have turnover of £500,000, and profit before tax of £50,000.

41. The structure of section 13 does not imply a lacuna between (on the one hand) trading/carrying on business and (on the other) dormancy. It may be that (as in *Jowett v O'Neill* [1998] STC 482) a limited lacuna was unavoidable in relation to companies which simply have cash on deposit. Interest rates and inflation are not mathematically tied, but it is a matter of general experience that they do move broadly in parallel. Putting money in an account at the bank and otherwise doing nothing further to manage the money is in broad terms dealing with it in such a way that it will not lose its real value. That is very different from being invested in an income producing asset

other than cash. The recognition of any wider lacuna would undermine the plain purpose of the section.

42. In the circumstances, the Special Commissioner was wrong to conclude that the prima facie inference that a company putting its assets to gainful use by letting from rent (cf. *American Leaf* [1979] AC at 684) was negated. Further or alternatively, the Special Commissioner should have considered that the facts of this case were closer to those of *Land Management v Fox* (where the relevant company's principal activity was deriving income from rented residential property) than to those of *Jowett v O'Neill*.

43. In the financial year ended July 31, 1999 MML had a turnover of £11,186, and profit before tax of £4,571. The common sense view (just from looking at the accounts) was that it must have been "trading" or "carrying on business" in the way those words are commonly understood.

44. MML filed active accounts. It did not meet the test for dormancy in section 249AA of the Companies Act 1985, which requires consideration of whether a "significant accounting transaction" has taken place. Although the Revenue does not invite the court to construe section 13 of the 1988 Act by reference to section 249AA, the court should test the commonsense of the Special Commissioner's approach against it. Dormancy is doing nothing as opposed to doing something.

45. Without prejudice to the submission that the Special Commissioner considered the wrong question, if it was necessary for the Special Commissioner to categorise MML as a property investment company within the meaning of section 130 of the 1988 Act in order to reject SPPL's appeal then, on a proper consideration of the agreed facts and the unchallenged documentation, he ought in any event to have concluded that it was.

46. Section 130 provides "In this Part of this Act [i.e. sections 53 to 130] 'investment company' means any company whose business consists wholly or mainly in the making of investments and the principal part of whose income is derived therefrom". The definition looks primarily to an actual state of affairs. That definition is apt to describe MML's business in the relevant years.

47. MML's Memorandum of Association contains objects drawn in wide terms. Clause III(2) includes "to purchase or otherwise acquire and hold … property". Further, Clause III(18) allows MML "to … let … the … property … of the Company" It therefore cannot be suggested by SPPL that property investment was a business outwith the Memorandum.

48. MML's accounts refer to the company's principal activity being "property investment". The directors' own assessment of the company's business in the relevant years should be accorded serious weight.

49. By section 15(1) of the 1988 Act: "Tax is charged under [Schedule A] on the annual profits arising from a business carried on for the exploitation, as a source of rents or other receipts, of any estate, interest or rights in or over land in the United Kingdom". Corporation tax returns showing profits chargeable under Schedule A were submitted by MML for each year. For each year both the Directors' Report and the note on Tangible Fixed Assets are predicated on MML's business being that of investment. MML plainly carried on business within the meaning of section 15(1). The tribunal's determination that MML had "not carried on any … business" within the meaning of s13(4) in the financial years ended July 31, 1998 to July 31, 2001 is unsustainable.

VI Respondent's argument

50. Section 13 is neither an anti-avoidance provision nor a targeted anti-avoidance rule. Section 13 contains a scheme for charging companies which are "small" in terms of profits to a lower rate of corporation tax: it is a relieving provision (which operates by providing for reduced rates of corporation tax) and is described as such in its title.

51. Section 13(4) seeks to prevent section 13(3) from having an adverse effect on the amount of small companies' relief available to a collection of associated companies by excluding from the number of associated companies between which the relief is divided, companies which do not carry on any trade or business. Section 13(4) is, accordingly, itself a relieving provision, which is designed to exclude from the division of relief a company which, though associated and possibly in receipt of income, does not carry on any trade or business.

52. Section 13 should be construed in the way described in *Barclays Mercantile v Mawson* [2004] UKHL 51, [2004] 76 TC 446 at [36]:

> "… the two steps which are necessary in the application of any statutory provision; first, to decide on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so."

53. Section 13 does not, in terms, describe a "transaction" but it describes a relief, a division of relief and a relief from division. A company will answer the description necessary for the relief from division if it does not carry on any trade or business. The purpose of the provision is to allow one tranche of small companies' relief to a group of associated companies all of which carry on trades or businesses, but to exclude from the division of the relief associated companies which, though they may derive income (or realise gains), do not carry on a trade or business. The Special Commissioner correctly construed section 13 and correctly decided that the company in question, MML, did not carry on any trade or business in the relevant years and, accordingly, that SPPL should obtain relief from division so far as concerned MML.

54. Whether or not a business is carried on is a question of fact, and the fact that the company receiving rents in *American Leaf* was held to be carrying on a business does not mean that MML is carrying on a business or that the Special Commissioner should have decided that the facts of this case were closer to those of *Land Management Limited v Fox* than to those of *Jowett v O'Neill*. "Rents" *may* constitute income from a source consisting of a business; and will do if they are received in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent: [1979] AC at 683. The Special Commissioners' conclusion in *American Leaf* – that, in carrying out the object set out in its Memorandum, a company was, as a matter of law, conclusively carrying on a business – was not a conclusion of fact, but of law. The Privy Council would not endorse the view that any isolated act of a kind that is authorised by a Memorandum if done by a company necessarily constitutes the carrying on of a business: [1979] AC at 683. The Special Commissioner properly considered the effect of MML's Memorandum of Association and correctly concluded that it was a relevant but (implicitly) not a determinative factor: see also *John M Harris (Design Partnership) Ltd v Lee* [1997] STC (SCD) 240, at 243. In the case of a company (by way of contrast with an individual) letting out property for rent, it may not be easy to envisage circumstances, in practice, which would displace the prima facie inference that the company was carrying on a

business: [1979] AC at 684. The Privy Council did not say that this inference could not be displaced and, indeed, envisaged that it might be rebutted: ibid. In MML's case, the facts are strong enough to and do rebut the prima facie inference; and having properly considered all the relevant facts and the strength of the inference from *American Leaf*, the Special Commissioner was entitled to decide the issue in the Respondent's favour.

55. The facts regarding MML coincide with those in *American Leaf* in the following respects. In each case the relevant company had, at one time carried on a trade and had ceased to carry on that trade and, in each case, the relevant company derived or derives rental income. In *American Leaf*, however, there were sales of machinery in the years after cessation of the trade ([1979] AC at 681), and there were at least five licences or lettings (also after cessation of trade), each of which would have involved strong indicia of commerce or business (advertising, negotiations, engagement of lawyers, etc.).

56. By way of contrast, in MML's case, the lettings of the West Regent Street premises took place in 1966 (over 30 years before the years under consideration) and, since cessation of the money lending trade on November 30, 1995 there has been nothing indicative of business in MML. All administration is and has been done by letting agents from whom income has been received net, and there have been no corporate activities such as the payment of dividends and director's fees.

57. There is no justification for limiting the type of income referred to in *Jowett v O'Neill* [1998] STC 482 to income from cash on deposit. MML has existed and received income without carrying on business since it ceased its money lending trade on November 30, 1995.

58. The facts relating to MML make it another of these exceptional cases and the Special Commissioner was right to decide that it is. The figures from the accounts do not provide the answer to the question whether MML was carrying on business in the relevant years in this case: the figures in the accounts were not conclusive in *Jowett v O'Neill* and are not conclusive in this case. A company which has withdrawn from its previous trade or business and has merely put its money on deposit is not at this time carrying on a trade or business: *Jowett v O'Neill* at 490. The principle should be no different in circumstances where MML has withdrawn from its previous money lending trade, has not disposed of its original premises and has merely continued to earn rental income from a lease granted some thirty years previously: accordingly, MML has not, since withdrawing from its money lending trade, carried on a business and the Special Commissioner was entitled so to decide.

59. The terms and expressions "trading" and "carrying on business" used in section 13 are not used or used only in contradistinction to dormancy. The heads of business envisaged by tax law are "trades, professions, vocations and investment"; and there is not a general head of business which falls within (in whole or in part) the alleged lacuna between trading, carrying on business or dormancy: *Jowett v O'Neill* at 487 and 489. But there may be the receipt of income or gain otherwise than from a trade, profession, vocation or investment and outside the context of dormancy. In the circumstances, the Special Commissioner considered the correct question and he arrived at the correct answer.

60. Section 130 of the 1988 Act is not relevant to the issue in this case, and it was not necessary for the Special Commissioner to decide whether MML was a property

investment company. In any event, there is no evidence to support the conclusion that MML carried on a business which consisted "wholly or mainly in the making of investments". In the circumstances, if the Special Commissioner had considered section 130 to be relevant he would have been wrong to conclude that MML was within it.

61. MML's activities for the four years under appeal have included little more than the receipt of income from land. MML's case, in which there is the receipt of rental income and the absence of activities comparable to the other three activities identified in *Land Management Limited v Fox*, is one of the exceptional cases in which a company which has laid out its assets and earned an income return is not carrying on business.

62. In *John M Harris (Design Partnership) v Lee* [1997] STC (SCD) 240 the Special Commissioner held that it did not follow that because the formal object of the company was to carry on the business of an investment company, the company in fact carried on that business when it acquired the holiday home. The Special Commissioner also refused to accept that a company must be carrying on business merely because it owns property (at 243). The Special Commissioner in the present case was entitled and correct to apply the same principle.

63. Section 15(2) of the 1988 Act deems transactions which lead to the receipt of income from land in the United Kingdom to constitute a business for the purpose of the Schedule A charging provisions and related computational provisions. The deeming provisions of section 15 have no bearing on the meaning of business in section 13 and, indeed, could be said to indicate that, absent them, the receipt of rent may not (in all cases) amount to business.

64. The Special Commissioner correctly asked himself the question of fact to which section 13 ICTA 1988 gave rise on the particular facts of this case. He correctly applied the principles which derive from the authorities. There is no mis-statement of law in the Special Commissioner's decision, and the court should resist any attempt to dress up the question of fact as if it involved a question of law: *IRC v George* [2003] EWCA Civ 1763, [2004] STC 147, 163, per Hale LJ.

65. It cannot be said, on the facts found by the Special Commissioner, that "the only true and reasonable conclusion contradicts" his determination. The relevant question is not whether the appellate tribunal would have come to the same conclusion as the Special Commissioner. There is a "no-man's land" of fact and degree, where it is for the Special Commissioner to evaluate whether or not the particular activity amounts to the carrying on of business: *Cooper v Clark* (1982) 54 TC 670 (at 677F-H).

VII Conclusions

66. In the present case it is common ground that the question of whether MML carried on any business was a question of fact and that the court should interfere on appeal from the Special Commissioner's decision in accordance with the *Edwards v Bairstow* principles. *Edwards v Bairstow* [1956] AC 14 is, of course, in appeals of this kind a very familiar decision, but because the issue in that case was whether the transaction in question was an adventure in the nature of trade, it is useful to set out the tests laid down by that decision. Viscount Simonds said (at 29) that a finding of fact should be set aside if it appeared that the Commissioners had acted without any evidence or upon a view of the facts which could not reasonably be entertained. Lord Radcliffe said (at 36) that the court must intervene if the facts found were such that no person

acting judicially and properly instructed as to the relevant law could have come to the determination. It did not matter whether that state of affairs was described as one in which there was no evidence to support the determination or as one in which the evidence was inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicted the determination. He preferred the last formulation. The duty of the court was no more than to examine the facts found by the Commissioners with a decent respect for the tribunal appealed from and if the court thought that the only reasonable conclusion on the facts was inconsistent with the determination, to say so without more ado.

67. The question for me is therefore whether the Special Commissioner acted without any evidence or upon a view of the facts which could not reasonably be entertained, or found facts such that no person acting judicially and properly instructed as to the relevant law could have come to the determination, in the sense that there was no evidence to support the determination or as one in which the evidence was inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicted the determination. The question is not whether I would have come to the same conclusion on the facts.

68. Applying those tests, I have come to the firm conclusion that the appeal should be dismissed. The Special Commissioner took into account a number of factors which might have supported a conclusion that MML had carried on a business. They included these: (1) MML filed active accounts; (2) the accounts described its principal activity being "property investment"; and (3) corporation tax returns showing profits chargeable under Schedule A were submitted by MML for each year.

69. I do not consider that there are any special rules of construction which would affect the result. "Rents" *may* constitute income from a source consisting of a business; and will do if they are received in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent: [1979] AC at 683. Lord Diplock's use of the word "may" indicates that rents may come from a source which does not consist of a business; and the Special Commissioner was entitled to come to the decision of fact that the rents do not come from a source which amounts to a business in this case. It is clear from that decision that not every act of a kind which is authorised by the Memorandum of Association necessarily constitutes the carrying on of a business: [1979] AC at 683. The fact that MML's Memorandum permits the letting of property does not, therefore, necessarily lead to the conclusion that MML carries on or has carried on a business. The Special Commissioner properly considered the effect of MML's Memorandum of Association and correctly concluded that it was a relevant but not a determinative factor.

70. The Special Commissioner acknowledged that Lord Diplock had said in *American Leaf Blending* ([1979] AC at 684):

> "… 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…."

The Special Commissioner was entitled to take into account that the lettings of the West Regent Street premises took place in 1966 (over 30 years before the years under consideration) and, since cessation of the money lending trade on November 30, 1995, there had been nothing indicative of business in MML. In *Jowett v O'Neill* [1998] STC 482, at 487, Park J said:

> "… the legislature might be said implicitly to have recognised that a company could exist and have some income without that inevitably meaning that it was carrying on a trade or business."

71. The figures in the accounts were not conclusive in *Jowett v O'Neill* and are not conclusive in this case. I accept the submission for MML that the circumstance that MML's income derives from land rather than bank deposits as in *Jowett v O'Neill* does not inevitably mean that MML carries on business.

72. Schedule A.1(2) in section 15(2) of the 1988 Act deems transactions which lead to the receipt of income from land in the United Kingdom to constitute a business for the purpose of the Schedule A charging provisions and related computational provisions. The deeming provisions of Schedule A have no bearing on the meaning of business in section 13.

73. The Special Commissioner was entitled, in my judgment, to come to the view on the facts that MML did not carry on an investment (or any other) business, especially in the light of the following matters: MML did not purchase the West Regent Street premises as an investment; it did nothing in the relevant years except receive the rents from its agent, and authorise a rent review; and the premises were a small part of its assets. This was a case of a company left with former trading premises which it let out without any active participation or management. It is not in any sense an artificial arrangement to take advantage of small companies' rate, and nothing in this judgment (nor, it is plain, in the Decision of the Special Commissioner) is intended to deal with, or encourage, any artificial scheme so designed.

74. I will therefore dismiss the appeal.