



Evelyn - the importance of evidence of active farming

A recent case *Deborah Evelyn (TC997)* can be seen to emphasise the need for the activity of 'active farming' in order to secure the establishment of a trading activity/business to achieve tax relief.

The *Evelyn* case features the 'conacre' lettings – they are short term lets for the purpose of growing grass for silage. The conacre was featured in *McCall* where the trading activity was considered insufficient to qualify the land for Business Property Relief (BPR) for Inheritance Tax (IHT) purposes.

The *Evelyn* case featured Business Asset Taper Relief (BATR) but the principles of Entrepreneurs Relief for Capital Gains Tax (CGT) should also be considered moving forward. The *Agnew* case also shows the need to obtain persuasive evidence about the understanding of 'prevailing practice' for the treatment of letting or farming income.

What are the facts of the Evelyn case?

Deborah Evelyn was a partner in a property partnership. HMRC opened an enquiry into her 2000/01 return in connection with the capital gain on a disposal of land. The enquiry was eventually closed, with HMRC agreeing to allow BATR on the gain.

In 2004, the partnership sold some land which had been rented to tenants on short-term lets for the purpose of growing grass for silage (the 'conacre'). Deborah Evelyn declared her share of the proceeds of her land sale in her 2004/05 tax return, claiming BATR for CGT purposes.

HMRC enquired into the tax return of one of Deborah Evelyn's partners and queried the BATR claim and subsequently opened an enquiry into the taxpayer's Return and issued a discovery assessment saying that BATR was not due.

Deborah Evelyn appealed - whilst accepting that BATR was not due on the 2004/05 CGT disposal, she disputed the discovery assessment saying the requirements of TMA 1970, section 29 had not been met by HMRC.

Deborah Evelyn claimed that the error in her return was made in accordance with the practice generally prevailing at the time of the 2004/05 return, which treated all income from farmland held in conacre as a trade for tax purposes. Therefore, the taxpayer considered that the capital gain was not eligible for BATR.

The first tier tribunal

The first tier tribunal set out the fact that under TMA 1970 section 29 (2) it was for the responsibility of the appellant to show that the prevailing practice had been to treat lettings in conacre as trading activities where the owner did not farm the land 'in hand'.

The tribunal held that the evidence produced did not support Deborah Evelyn's specific circumstances. According to the tribunal, Deborah Evelyn's error in claiming BATR was due to her misunderstanding of the correct tax treatment of conacre lettings, not her understanding of the prevailing practice.

It was held that the HMRC's discovery assessment did meet the conditions in section 29 TMA 1970. The taxpayer's appeal was dismissed by the tribunal.

Key points of the Evelyn case

One of the points shown by the *Evelyn* case is the understanding of section 29 TMA 1970 and the

discovery process.

Another point to consider is the understanding of the tax treatment of entries on the tax return by the taxpayer and understanding of who is responsible for that decision – taxpayer or tax adviser? The tax return is the responsibility of the taxpayer but who decides grey areas?

In addition, another of the clear action points arising from the *Evelyn* case are to review all farm lettings (including conacre arrangements) to ensure that the client is aware of the problems of the potential lack of eligibility for both Entrepreneurs Relief for CGT and BPR for IHT.

It can be argued that there must not be assumptions about the tax treatment by taxpayers; there has to be clear understanding and warning from tax advisers.

The advantages of 'active' farming 'in hand' compared to lettings are highlighted in this case and there must also be the consideration for taxpayers to change conacre/letting arrangements to active farming – to return to farming in hand as a trading activity within the confines of the (perhaps onerous) terms of the existing lease agreement and being able to change to the trade of farming from farm letting.

The trade of farming contains many grey areas with regard to tax treatment and this case shows the need for considering and understanding prevailing practice of the tax treatment of any worry or debatable areas.

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