

DIY livery businesses under attack – Part 1

With the ‘investment line’ considerations dominating Business Property Relief (BPR) claims in recent Tribunals, for example, *A C Curtis Green v HMRC* (TC 4427) and *Pawson (HMRC v Lockyer & Anor (as personal representatives of Pawson dec’d))* [2013] UKUT050 (TCC), there has been a lot of focus on the eligibility for BPR for property businesses. There have also been the cases of *Zetland* and *Best* which evidence this HMRC approach.

The concern is that HMRC is now arguing that the owning and holding of land in order to obtain an income from that land is generally to be characterised as an investment activity. It is therefore no surprise that HMRC are attacking DIY [Do It Yourself] livery businesses on the grounds that they are an investment business. It is worth considering what services are undertaken in a DIY livery yard and to consider how

BPR on livery yards can be preserved against this very aggressive HMRC approach.

Comparing holiday accommodation to a DIY horse livery service

With regards to the case of *Pawson*, in the context of a livery yard, there are strong arguments to say that looking after the horses and being on call for any sort of equine emergencies cannot be compared to the business of ‘holidaymakers’ residing in a cottage. However, HMRC are pursuing this route very closely. When horses are at livery, the business is effectively custodian of those horses for the entire time that the horse owner is not on site. In this regard, the horse owner is often only on site for less than 30 minutes a day. From time to time, the horse owners did not arrive at all during the day.

A clear illustration of the additional services is if the ‘holidaymaker’ or tenant were taken ill this would not be the responsibility of the landlord. For example, if the horse at livery ‘collapses with colic’, or should be kicked by another horse or sustain a paddock injury then the immediate problem falls to the owner of the DIY business. However if a holidaymaker falls ill then it is the relatives of the holidaymaker who would deal with the emergency. At worst the holidaymaker would visit Accident & Emergency (A&E) which is available on the NHS [National Health Service]. Therefore there is no comparison with holiday accommodation and DIY liveries.

A livery yard is so far removed from that of a holiday letting business there cannot be a comparison in general terms. Those who keep animals (whether they are dangerous or non-dangerous) are under a duty of care to prevent possible harm to other people by their animals. The business owner is the keeper of the animals and is bound by this duty of care. Holidaymakers do not generally escape from the field and cause damage when running free. In general terms if the keeper of a horse is negligent in the looking after or restraining that horse and this negligence then causes damage to another person or their property, then the keeper will be liable to that other person through the tort of negligence. Whilst the horse is defined as a non-dangerous animal species, there is still large risk associated with looking after horses. Under s(2) of the Animals Act 1971, where damage is caused by a horse, the keeper of the horse is liable for the damage. The DIY livery yard is the keeper of the horses. The risks involved in holding the role of a keeper of animals are at a completely different end of the spectrum to that of holding investments.

Difference between commercial property and livery

The users of commercial property (eg *Zetland*) do not come with the same risks as faced by the livery yard. The facts show that most DIY livery yards would qualify for BPR and advisors must certainly contest this point in the strongest of terms with HMRC. The livery yard is trading, and it is a trading business and the property used therein definitely must qualify for BPR.

One of the biggest misconceptions of ‘DIY liveries’ is perhaps in the name ‘DIY’. It actually means that the owners do ‘some of the tasks themselves’ but the owner of the yard is still left with a large amount of responsibilities, risk and work; far, far above that of an investment business.

The livery yard as a keeper of animals

In arguing that DIY livery yards are an investment business, HMRC often refers to the task of carrying out repairs to fences as maintenance work, ie the work of the landlord, without consideration to the element of risk protection for the business. It is worth looking at the House of Lords case of *Mirvahedy v Henley*, House of Lords March 2003.

“Mr Mirvahedy was driving home at night; he was seriously injured when a number of stampeding horses collided with his vehicle. He was undoubtedly an innocent party, given that the horses had escaped from a field. The fencing had always been adequate in the past, but something had spooked the horses, and they escaped by trampling the fencing.” It was held that the escape of the horses did not result from the negligence of the keeper or the owner of the horses, but nevertheless, the House of Lords found that the liability still attached to the owner/keeper of the horses.

When this case is viewed in line with the Animals Act 1971, which is very onerous in so far as the owner or keeper of animals is concerned, it shows the importance of the role of the owner and keeper of the horse. Section 2.2 of the Animals Act provides that where there is a likelihood of injury, and that arises as a result of a characteristic of an animal, and that characteristic is at least generically known about by the owner or keeper, then a strict liability can attach.

Services provided – worming

It is generally considered that HMRC is in agreement that cleaning the fields including ‘poo-picking’ falls into the service category as does the provision of water and ‘being on call’ for problems with horses.

It is also generally considered that the worming programme is very much a service that is provided to the livery clients. The worming products are invariably purchased by the livery yard and distributed to the livery clients where appropriate and in most cases administered orally to the horses. Worming horses is a complex procedure. It involves carrying out a faecal egg count and knowing how to interpret the results. The livery yard is often involved in explaining to novice horse owners and customers how worming procedures work, especially those relating specifically to the operation of that yard.

Services provided – provision of hay

The provision of hay in winter is a service provided and one that the livery clients (the owners of the horses) find essential due to the hours they work. Hay should be distributed to the individual horses throughout the entire winter. Hay provision is an essential service for livery clients because without the hay, the horses would suffer serious loss of condition when the supply of grass is reduced during the winter months. The livery fees therefore can

be inclusive of extensive services. These must be clarified. The hay has to be produced or purchased, stored and then individually distributed into separate piles for each horse every single day during the winter and adjusted to the needs of each horse. In some cases the hay has to be soaked as to reduce the amount of dust contained within the hay. All of this amounts to a very arduous task for a livery client to undertake themselves. In the core winter months many of the horse owners travel to their place of work in the dark and come back in the dark. This is very difficult for horse owners to look after their own horses during an English winter and this horse care and service falls to the livery business. The horses need to be fed in the hours of light not the hours of darkness as such action is dangerous as there can be fights among the horses.

Services provided – the checking of horses

Another service that is provided by many DIY livery yards is the daily checking of the horses. The yard business is the custodian of the horses whilst the owners are not there. New female horses (mares) can cause problems within an established herd of horses. The male horses (although gelded) can fight amongst themselves to try and ‘win over’ the new mare. This needs checking and policing with separate paddocks. Such a degree of care is all part of the basic livery package and is clearly a service and something that the clients rely on. Holidaymakers do not need such checks for fighting and separation.

A livery yard which provides these services is not mainly a business of holding investments nor is the main prerogative the exploitation of land for a fee, it is a trade. Such a full and complete range of services is clearly enough to ensure that BPR is due on the business property and is far enough along the ‘spectrum’ of the trading business to qualify.

Ad-hoc and substantial advice from the yard owner – novice owners of horses

Many of the customers of DIY livery yards are inexperienced or new to horse care issues. There is a very large amount of horse care knowledge needed and the yard owner and their team does help provide that advice to novice owners. Such

help can save the owners a large amount in unnecessary vet bills and prevent the horse suffering from inexperienced owners making mistakes in basic animal care. Furthermore, horse owners can be temperamental and fight amongst themselves. In this regard there can be no comparison to *McCall* and cattle grazing agreements. Managing many horse owners with varying levels of experience requires far more management by the yard owner and business than one farmer with a herd of cows as in *McCall*. Horse owners can be precious, jealous and aggressive when it comes to disputes – and there will always be disputes amongst horse owners!

Horses are herd animals and fight amongst themselves when there are changes in the herd. The horses come in and out of the field – to be ridden, to be groomed, to go to shows, to stay in stables, etc. This constant movement causes disruption and pressure within the herd and horse friendship groups. That cannot be compared to *McCall* and a herd of cows.

In *McCall* the cattle all stay in the field grazing. With regards to most livery operations, there is a lot of movement in and out of the paddocks. There have to be different paddocks to contain horses with different needs, which again has to be supervised by the yard manager.

The novice horse owner/customer

The novice owners of horses need advice on looking after their horses which can be supplied by the owner of the DIY yard and their team. There is no comparison with *Zetland* and *Buller*. Serviced offices do not have customers who would escape and could end up loose on the road. In both cases there was no reference to the taxpayer providing the majority of the customers food needs. There is no parallel to the advice that is needed to be given regarding the care of horses for novice owners.

Part 2 of this article will be published in the December/January issue of *Farm Tax Brief*.

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