

# DIY Livery Businesses Under Attack

With the “investment line” considerations dominating business property relief (BPR) claims in recent tribunals, for example *A C Curtis Green v HMRC* (TC4427) 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 of property businesses. There have also been the cases of *Zetland* and *Best* which evidence this HMRC approach.

The concern is that HMRC are 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 can not 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 A&E (Accident & Emergency) 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 of 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 section(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 (e.g. **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 the “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 refer 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 are 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 the 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 lightness not the hours of darkness as such an 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 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 vets 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 has 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 horse 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.

## The importance of pasture management – the muck heap

The ‘general maintenance’ (eg harrowing, rolling, and fertilising) aspects are all essential badges of trade of the business and should be regarded as services. Together with the growing of grass, one of the features of the trade of DIY is pasture management as this is

essential in retaining clients and attracting new clients as well as understanding horse welfare. It can be considered that maintaining the “muck heap” would again fall into the trading category of undertaking a service. If the operation was just the exploitation of land eg a lease then the tenant would be responsible for the muck heap, but in a DIY yard this falls to the owner, especially the function of overall control. Controlling the manure is beyond the very basic maintenance and repair function of merely exploiting land in return for a fee. There are both health and safety and environmental issues surrounding the control of the manure generated by the horses which has no comparison to *Pawson*, *Zetland* and *Buller*.

## Too much emphasis on *Pawson* – DIY liveries not falling on the investment side

At this point consider paras 44, 45 and 46 of *Pawson* and whether the provision of cleaning heating and hot water were sufficient to “prevent the business being mainly one of the holding of the property as an investment.” The services we have shown are so away from the investment side that they are the badges of trade. Generally the trade of livery services in operation have been shown and accepted on the trading pages of the tax return for a number of years. Horses are not humans and cannot be compared to tenants.

## *Zetland* and *Buller*

It is impossible and incorrect to compare an active equine business to “serviced offices and serviced industrial units.” In *Zetland* and *Buller* the taxpayer did not grow food for the tenants. All the food for all the horses can be provided by the livery yard owner. There can be no comparison to these cases. There was no risk of the tenants escaping and causing damage under the Animals Act 1971 as already mentioned.

## Harrowing, rolling, fertilising fields

HMRC have tried to argue in some cases that this work falls under the heading of maintenance and repair. That is not the case with a DIY yard. There are a large number of tribunal cases that show that fertilizing the fields is the act of the active farmer and qualifies as a trading operation. Good pasture is a food source. It is about the growing of a crop. Good pasture is important for the survival of horses not just healthcare. The DIY yard is responsible for growing the crop of grass. The role of a livery yard owner is that of an active, experienced farmer. This DIY trade is a serious undertaking, earnestly pursued with reasonable and recognisable continuity. The DIY operation is a genuine trading business often operated well into the old age of the owner hence the need for the BPR claim.

## Pasture management - controlling "horse-sick" grass

Horses are selective grazers and therefore do not make the most of their pasture. It is possible for the grass to become "horse-sick" with "roughs" which are unpalatable. An invasion of weeds and poached ground will contribute towards horse-sick pasture. This is another reason why the case of *McCall* cannot be compared to the trade of a horse livery. Cattle are much more efficient and less fussy grazers than the horse. Horses create bare "rolling" patches as they enjoy rolling in mud and dirt. Bare patches need to be reseeded. Ragwort has to be pulled out by hand. Weeds and poisonous plants thrive on horse grazing which have bare patches and latrine areas. Cattle and sheep are not selective grazers which is again why *McCall* cannot be compared to the trade operated by a livery yard. The cattle eat rough patches. BPR should apply to the trade of DIY livery.

## The difference between cattle to horses - *McCall*

At para 21 of *McCall* there is the quote "even if the landlord has to engage in activities of maintenance and management which are required by the lease or incidental to the letting."

There is not one main lease of grazing agreement as there was in *McCall* but the sale of livery services. Also the maintenance (pasture management) is much more complex with horse livery than with cattle. The management is more complicated with many owners as opposed to one farmer as explained.

In *McCall* the cattle stayed grazing in one field with all the same need to eat the crop of grass to put on weight. The herd of cattle would have been "level" and generally all of the same breeding. This is not the same with a livery yard. There would be a mix of horse types including thoroughbreds, Irish draughts, UK native breeds, ex-racehorses, Shetlands, Cobs etc. These all have totally different dietary needs.



The management of horse pasture is therefore much more complex as the goals of the growth of grass as a crop for horses are so different from a herd of cattle, whose aim would be to increase body weight and grow. There is no comparison to *McCall* where most herds of cattle are "youngsters" – they will be sold essentially to supply meat to the food chain. Succulent, young, tasty (not tough) meat to the food chain. More money will be achieved at market for the farmer if they have more young body weight. Obviously they are grazing in the field to produce more kilos of meat.

More horses at livery have a variety of complex needs – some will be needing a “starvation paddock” and some will need to put on condition for competition. Cattle need to eat as much grass as possible – horses cannot or else they fall to laminitis. Looking after horses is complex, the livery yard business has to orchestrate the needs of many owners and many horses.

## Selling a product and a service not collecting a rent

Para 21 of Pawson (with reference to *McCall*) cannot be compared to a DIY livery yard which is not a business of holding an investment. Helping horse owners, looking at horses who are too fat, too thin, losing condition, controlling the worming, giving advice to novice owners, sorting out disputes between owners etc. cannot be compared to *McCall* and does not “fall on the investment side of the line” but on the “business side of the line.” This is not “incidental maintenance work.”

In para 43 of Pawson there is reference to “carrying out maintenance and repairs and maintenance of the grounds.” In Pawson there was no supply of a considerable part of the food needs of the holidaymakers. DIY livery yards are responsible for providing the majority of the food needs of the horses as grass and hay. The good supply of grass is achieved through the correct maintenance of pasture. Such demands are not “incidental.”

There is a fundamental supply of a product as part of the sale of the livery. The livery yard are selling the product of grass and a secure field with the use of a secure stable as required. The livery yard is not “collecting the rent” as there was no rent from just one farmer, indeed the charge was not even a rent, but sales to a multitude of clients for a multitude of needs. It is the supply of a product – grass, “tailor made” to the needs of each horse with services of worming and advice included. The livery agreement is a contract not a lease.

## Agricultural Property Relief (APR)

In addition to BPR, there has to be consideration given for the DIY livery yard to qualify for APR (Agricultural Property Relief). There is a focus on pasture management. The livery yard often carries out the “harrowing, rolling, fertilising of fields.” Which is to grow a crop of grass. It is well known that the special commissioner’s decision in *Wheatley’s executor’s v CIR* [1998] SSCD60 should be approached with care and indeed the case is considered flawed.

It is clear that the activities connected with the growing of a crop of grass are an agricultural operation, irrespective of which animal species eats the grass. There is no doubt that the livery yard is in occupation of the land (s.117) which is used in the business of livery proprietor. The land can qualify as agricultural property s.115 (3) IHTA 1984.

## Summary of Services

The following services can be regarded as services provided by the DIY livery yard that can achieve BPR.

1. “Poo-picking” the fields (removal of manure)
2. Provision of water
3. Being on call for problems
4. Administering the worming programme on a specific and general basis
5. Provision of hay in the winter

6. Daily health and fitness check of the horses - the careful eye
7. Fertilising the fields – the growth of a crop of grass
8. Risk management as a keeper of animals – s.2(2) Animals Act 1971.
9. Pasture Management controlling horse-sick grass
10. Ad-Hoc and substantial advice from the yard owner and their team.

Such services might appear a contradiction with the name “DIY livery”. The owners would still, for example, ride and train their horses and produce them for shows, events etc. Horses take a lot of looking after and the DIY business still has a lot of involvement in the horse care on a 24 hour basis.

There are many indications that a DIY livery case would succeed at tribunal in both the claim for BPR and APR in respect of the land used in the trade.

Whilst a livery yard might sound very specialist, there are a large number in the country and a large part of the UK is covered in them. In addition, some of the land that is used for DIY horse livery has development potential, ie “hope value”. This is the difference between market value (s 160 IHTA 1984) and agricultural value (s 115(3) IHTA 1984).

## Proactive Advice

All livery yards must consider the need to achieve BPR in the future and what extra services can be provided to ensure this valuable relief is preserved. It is also important that the VAT implications of the extra services are considered. The supply of simply a stable can be exempt for VAT purposes. Likewise the supply of grass can be zero-rated for VAT purposes.

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