

Focus on trade

Julie Butler and **Fred Butler** highlight the importance of focusing on a business as opposed to just assets in transactions.

As we continue into 2023, there are many First-tier Tribunal cases from 2022 where the need to establish a business or there being a trade in existence are of prime importance for a number of tax reliefs. Indeed, the decision in *Haymarket Media Group Ltd* (TC8495), which was about the transfer of a going concern (TOGC) for VAT, highlights the importance of a business as opposed to just assets.

In his excellent article on that case, 'Caution in correspondence!' (*Taxation*, 9 February 2023), Kevin Hall focused on the generic need for care with client/adviser communication. Here we will look at why, although *Haymarket Media Group* concerned a publishing company, the case is of broad importance for farming.

Existence of a business

The question of business or charity ties into the recent VAT case of *Paradise Wildlife Park* (TC8729) which featured the application of the Court of Appeal ruling in *Wakefield College v CRC* [2018] STC 1170 ruling and *Revenue and Customs Brief 10/2022*. Such tribunal cases range from the need for a trade for business property relief (BPR) so as not to get caught under the definition of 'holding investments' under IHTA 1984, s 105(3).

An example was *Mr and Mrs Firth as Trustees of the L Batley 1984 Settlement* (TC8542) and the apart-hotel case that did not qualify for BPR. There are other areas, for example *Babylon Farm Ltd v CRC* [2021] STC 1913, a VAT case concerning the disallowance of input tax where it was considered there was not enough income to justify a trade. Another is *Valyrian Bloodstock Ltd* (TC8578) which denied enterprise investment

Key points

- Understanding the criteria for business definition relevant to each specific tax taken from legislation and tribunals is important when advising on both farms and all property businesses.
- The *Haymarket Media Group* case is relevant to farmers who sell property and part of their business.
- It is important to understand the impact of opting to tax.
- Deciding if a transaction qualifies as a transfer of a going concern must be done in advance.
- The concept of vacant possession is also an essential element of grant and termination.



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scheme (EIS) relief on buying and keeping horses because the activity was considered not to be a trade for EIS purposes. The matter of stamp duty land tax and an ongoing business or trade status of the activity on the land can have tax planning advantages. The treatment of VAT on both land and business sales is very complicated. Here we consider a transfer of going concern (TOGC) VAT case and impact on SDLT and VAT.

Passive property letting

In *Haymarket Media Group Limited*, the First-tier Tribunal (FTT) found that the sale of Teddington TV studios to a property developer by the Haymarket Group could not qualify as a TOGC for VAT purposes.

The vendor, Haymarket, and buyer, Pinenorth Properties Limited (PPL), were not carrying on the same kind of business. The case is relevant to farmers who are having to sell off property and parts of their farming business to survive financially and to emphasise the role of trade on so many areas of farm tax planning.

Opt to tax

The land and buildings were sold to PPL in November 2015 for £85m and the sale was treated as a TOGC. This was on the basis that Haymarket was transferring both a property development and property lettings business. Without TOGC treatment, the sale proceeds would have been subject to VAT at the standard rate because Haymarket had opted to tax the site in question. The VAT would have been claimed as input tax by PPL but the TOGC treatment produced a cash flow saving for the buyer and also a substantial SDLT saving as this is charged on the VAT inclusive amount.

At the time of the sale, rental leases were in place with two parties, but both tenants were connected to the buyer and there had been no serious lettings activity in place for Haymarket at the time of the transfer. There are a lot of tax lessons in the *Haymarket* case as it is a clear example of the full impact of how opting to tax for VAT needs to be understood from the outset and that it is necessary to consider

what the implications of future development of the property will be. The opting to tax point in understanding the full importance of considering future use is clearly shown by *Mouldale (trading as Mouldale Properties) v CRC* [2023] STC 715 in the Supreme Court.

Trading or not trading

Haymarket's representatives argued that the expenditure on consultancy fees and management time by Haymarket meant that it had traded as a property developer, an activity continued by PPL. HMRC disagreed, saying the purpose of the fees and time spent was to enhance the value of the property asset – for future sale purposes – rather than to trade as a property developer. In reality, Haymarket had never traded as a property developer. Haymarket did not charge VAT on the sale, treating it as neither a supply of goods nor a supply of services under the TOGC rules. The FTT dismissed Haymarket's appeal for TOGC because of their evidenced intention to sell the site. Again, many farmers are selling property for development and this ruling is useful guidance.

The tribunal considered that Haymarket held the site as an investment, generating passive rental income. Haymarket had not intended to develop the site prior to sale and the capital costs of undertaking the development were in excess of what the group could afford. Attention was placed on the evidence around the sale. The site was marketed as a development opportunity, not a development business. The heads of terms were consistent with the transfer being that of a freehold interest with planning consent, rather than the business of development.

The tribunal decided that, while Haymarket had spent £870,000 over 18 months obtaining planning permission, this was to enhance the value of the site as an investment and to enable development to take place. This was not active development in itself. A s 106 planning permission agreement was entered into by Haymarket on the basis that the s 106 conditions would be fulfilled by the purchaser of the site. That has many similarities to farmers selling off farmyards with a few 'passive tenants'.

The case highlights the possible SDLT advantage of the transfer of the TOGC compared to the sale of the property and to take advantage there must be a genuine sale of a going concern.

Not a TOGC of a property letting business

The FTT emphasised that the site was required to be transferred to PPL with vacant possession. It is quite normal to sell farm property and farming operations with vacant possession as this refers to the legal obligation to ensure that a property is in a state fit to be occupied at a future date.

The concept of vacant possession is also an essential element of grant and termination of leases and other tenancy agreements associated with farming. It was established that the facts showed that the vacant possession was the agreed position throughout, from initial marketing until completion. Although minor leases were in place at completion, these were tenants connected to and originating from the purchaser. It was decided that the tenants were not, in substance, true tenants of a property lettings business carried on by Haymarket.

It appeared that the TOGC outcome was an 'afterthought' intended to save SDLT and VAT. Again, the case shows the importance of planning in advance and to prepare for lots of

eventualities that might bring 'tax hurdles' with them. Last minute representation of the facts is a difficult route to take, especially when the evidence does not support the taxpayer arguments.

The negatives of the 'after thought' approach to tax planning has been shown in a number of mixed usage claims for SDLT, such as *J and C Averdieck* (TC8623), and other changes to SDLT forms. Genuine mixed usage claims are of substantial advantage to farming.

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A failed TOGC can have serious adverse VAT consequences for a seller. If HMRC determines that a property sale does not qualify for TOGC, the seller will be liable for any VAT due and might have problems of recovery from the buyer. The case shines a light (as many of those mentioned) on the need to plan the genuine business status before the sale, before death and before the VAT transaction. Plan ahead and don't approach the tax on transactions from the position of post transaction advice (see 'Starting well', *Taxation*, 16 March 2023).

The question of business definition can also apply to the intention to trade for VAT – see *Hedge Fund Investment Management Ltd* (TC8596) which was successful on the question of establishing intending trader status at the time the input VAT was claimed. The exact date a farming business starts can be critical for many farming tax reliefs such as the hobby farming rules.

So many tax and VAT tribunal decisions rely on the need for evidence and the importance of legal documents that support the transaction, that is of huge significance for the farming community who are well-known for their lack of clear documentation – as the disputes that make it to the courts show. ●

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