How horses graze the land

With so many horses grazing in the UK countryside, many must wonder what the legal and tax position is of such arrangements. Obviously, the first thought is not how attractive the horses look. This is particularly poignant in the light of the current area of attack by HMRC with regard to disallowing Business Property Relief (BPR) for Inheritance Tax (IHT) on property on the grounds that it qualifies as an investment business under s105(3) where the land is used for 'DIY' horse liveries. The details of the legal arrangement between the horse owners and the services provided by the landowners need to be considered in order to maximise the IHT reliefs as well as legal protection.

There is perhaps tax confusion over the fact that a DIY livery yard involves extensive 'badges of trade' but the name 'Do It Yourself' would indicate that there are little services carried out by the landowner. These are generally a high level of services with liveries.

The control of horses

Ironically, such attacks come at a time when the Control of Horses Act 2015 has come into force (from 26 May 2015). The new Act appears to be useful and beneficial for the landowner left with horses on his land after the ending of a tenancy or grazing licence and expiry of notice to quit. Landowners and lawful occupiers of land now have the right to detain horses unlawfully left or 'dumped' on their land. The landowners must inform the owner of the animal (if known) and the police within 24 hours of detention. The landowner should be compensated for damage, loss and some expenses. If after 96 hours the horse is not removed, ownership of the horse passes to the landowner (detainor) who can then dispose of the horse (or horses) by 'selling it, arranging for it to be destroyed or in any other way'. The detainor must supply the horse with food and water.

Licences for horses

With such changes facing the equine world it is also key to look at what legal agreement should be in place by landowners for their livery businesses. A licence is a simple form of agreement between landowner and horse owner, and is used typically to permit the horse owner (non-exclusive) use of land for grazing. The use of simple licences (and *profit à prendre*) are, in most cases, better limited to situations where the proposed arrangement is of short duration and relates to grazing for private recreational horses.

The alternative to a licence is a livery agreement between the 'livery operator' (the farmer/landowner) and the owner of the horse. There are many templates and those produced by solicitors normally protect the landowner/livery yard owner, whilst the British Horse Society (BHS) template has a clear focus on horse welfare! In this article we try to match these considerations with tax protection.

The risk of a tenancy and loss of BPR

If the licence purports to grant the horse owner exclusive occupation of the land, that will result in it being construed as a tenancy (it is the essence of a licence that the licensee is not granted exclusive rights of occupation) and therefore no BPR can be achieved where there is a tenancy. Furthermore, to avoid the risk of a licence being construed as a tenancy by the courts, the licence should not:

- Use the language of landlord and tenant (eg use of the expression 'rent'); or
- Impose tenant-type obligations (eg for hedging and ditching, maintenance and repair).

In addition to the tax worries of a tenancy, the danger to the landowner of a licence being construed as a tenancy is that the horse owner may have conferred on him rights which the landowner never intended the horse owner should have the benefit of; this is particularly so if what purports to be a licence, is subsequently determined by the courts to be a business tenancy, and that brings us again to business tax relief.

Not an investment business – The need for BPR

Returning to the tax angles of livery arrangements, one point that has come through from the tribunal case of *Pawson* is that HMRC must not have a starting point of the assumption that a land-based business is an investment business. Using the example of DIY liveries, there must be an activity that is a serious undertaking and earnestly pursued, and that there is reasonable and recognisable continuity in order to achieve BPR. In the view of an 'intelligent businessman', a DIY operation that does provide services is a trading business. However, HMRC have been trying to employ the 'investment line' approach to income from property.

There is no doubt that the owner of a property-based equine business will need a portfolio of evidence to show what side of the investment line the business falls on and how to defeat HMRC in its aggressive and fairly unpleasant attack on genuine DIY livery businesses trading and operating with full and clear badges of trade.

Profit à prendre

What other type of legal arrangements are there for the occupation of land?

A *profit à prendre* is a right to take something from the land, which in the case of animals is grass by grazing (a 'profit of pasturage'). It is in the parties' (and particularly the landowner's) interest that the granting of a profit of pasturage should be documented by deed. A profit of pasturage comprises an incorporeal rather than a corporeal hereditament and, accordingly, no tenancy of land arises. The animal owner does not acquire exclusive possession of the land, and remains free to exercise all rights over it (including granting rights to third parties), which are not inconsistent with the right of pasturage granted to the animal owner.

A *profit à prendre* arrangement can be attractive to landowners who wish to be treated for tax reasons mainly to achieve Agricultural Property Relief (APR) for IHT and continuing to farm the land (ie by growing a crop of grass on the land). As with licences, the deed granting the *profit à prendre* must avoid language or terms which infer any exclusivity of occupation on the part of the horse owner, or seeks to impose tenant-type obligations on the horse owner. Again, as with licences, all responsibility for care of the animal will lie with the animal owner which will prevent the claim for BPR. The prudent landowner will, however, maintain public liability insurance in respect of his land due to the responsibilities of liability under the Animals Act 1971. Service provided by the landowner will help the BPR situation and many grazing licences/ 'profit of pasturage' are now involving services by the landowner. Legal and tax advice must be taken on all these matters.

The risk of the business tenancy

One of the grazing agreements that a farmer will use for an individual or individuals in respect of ponies or horses kept for private recreational use will usually be a tenancy under common law. In principle the land will use BPR as it is let out and not traded. There is tax mitigation which has to be considered. BPR may be available through the *Balfour* principle on the basis that the overall business is trading and the letting is part of the overall operation. It is essential (for the tenancy to be treated as a common law letting) that the proposed tenancy is not for a horse owner's use in connection with a trade or business. There is, however, a catch for the unwary in that a landowner granting a tenancy to a group of horse owners who are running a business may unwittingly create a business tenancy. The definition of business in the Landlord and Tenant Act 1954 s23(2) includes 'any activity carried on by a body of persons, whether corporate or unincorporate'.

A common law letting for a fixed period will simply expire at the end of its contractual term without any special notice provisions. Periodic common law tenancies, however, require termination by notice, the relevant period of notice being dependent on the type of periodic tenancy.

It is worth noting that a common law tenant has no right to compensation for improvements to the property let, unless provision for such is written into the tenancy agreement, however the business tenant does have this right which should be avoided by the landowner. Once a business tenancy is created there is the risk of paying compensation.

Development land

With the current need and pressure for houses there is a lot of 'land in waiting' of potential development. If this land is allowed to be redundant it will fail in a claim for BPR, APR and business CGT reliefs. The answer is that many landowners simply let horses graze there.

There is a problem if these horses are 'just for pleasure' as in *E Blaney* (TC4103) where business asset taper relief was not allowed. If the horses are a business, there is a problem that it will be deemed an 'investment business' and will not achieve BPR on the 'hope value', nor will any sale achieve entrepreneurs' relief or rollover relief for CGT. There is a misconception that turning out a few horses on the land will help the tax relief on potential development land but that is flawed logic. However, should this be a dedicated trade with full business operation, tax reliefs can be fought for. It is often easier to graze livestock in a determined and commercial way as a farmer.

Summary and action points

Any horses 'grazing the land' has to be reviewed in terms of legal and tax protection. It is essential to review both the tax and the legal position very carefully.

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