Show me the proof

Proving that there is an entitlement to valuable tax reliefs is important. **JULIE BUTLER** explains how to gain tax protection through evidence of farming activity.

What constitutes farming and how is it defined for the purposes of income tax, capital gains tax and inheritance tax? The answer generally rests on whether the produce arising from the activity is food production for human consumption. The key to the eligibility for tax reliefs often depends on the quality of evidence and forensic understanding.

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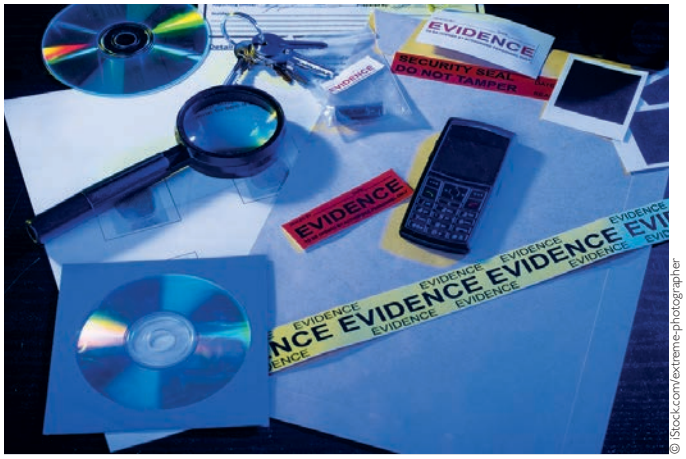
Technical definition

According to ITA 2007, s 996, 'farming' is 'the occupation of land wholly or mainly for the purposes of husbandry' but does not include market gardening. Note there is no territorial limitation. Thus, to be a farmer a person must satisfy two tests:

- the person must be in *occupation* of land (other than market garden land); and
- the *purpose* of the occupation must be at least mainly for husbandry.

KEY POINTS

- The definition of farming and husbandry has been the subject of several cases.
- The *Branded Garden Products* case examined whether edible flowers constitute food.
- Taxpayers must provide evidence to establish characteristics.
- Evidence of activity is important for all taxes.



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Section 996(2) states that husbandry includes hop growing; the breeding and rearing of horses and the grazing of horses in connection with those activities; and short rotation coppicing, but only if conducted within the UK.

In *Lowe v J W Ashmore Ltd* 46 TC 597, husbandry was given its ordinary meaning to include all forms of tillage of soil and use of land by livestock held for its produce or for food.

The court in *CIR v Cavan Central Co-operative Agricultural and Dairy Society Ltd* 12 TC 1 examined the origin of the word. It accepted it to mean every industry conducted by a husbandsman – a person who tilled the soil. This included such diverse activities as bread-making, homespun cloth and homebrewed ale. In practice, husbandry in 2017 will not normally include such activities. The court thought that the origin of husbandry suggested a liberal interpretation that would include some activity on the land whose manifest object was the benefit of mankind and the support of life.

Indeed, the origin of husbandry explains why activities unconnected with the production of food but which are now undertaken by those who till the soil, such as short rotation coppicing and the growing of biomass, can properly be regarded as husbandry on historical grounds and rightly regarded as farming for tax purposes.

Intensive farming

Care must be taken when considering intensive farming because not all activities thought to be farming in ordinary parlance fall within the statutory definition. The courts have often suggested that fiscal farming – where the occupier carries out the minimum to obtain the single payment – requires an activity to be conducted which is linked to the produce of land. The linkage required does not exist to a sufficient extent when livestock are kept indoors or fish are kept in tanks, and the livestock or fish are fed on purchased feed. Such intensive rearing of livestock or fish is not fiscal farming (see *Lean and Dickson v Ball* 10 TC 341, *Jones v Nuttall* 10 TC 346 and *Reid v CIR* 28 TC 451). As mentioned, where there is tillage of the soil, the crop produced need not be food.

Zero rating

The First-tier Tribunal looked at the question of the definition of food specifically with regard to VAT zero rating of edible flowers in *Branded Garden Products* (TC5604). It covered the parallels with farming and the question of whether the production is farming or market gardening.

Another case, *Thorne* (TC3851), reviewed the question of whether the growing of asparagus was market gardening and emphasised the need for strong evidence to help HMRC to decide.

In *Branded Garden Products*, the tribunal looked at food for VAT purposes. In this instance, it was whether edible flowers or, to be precise, the seeds or shrubs for the same were food and therefore zero rated.

The taxpayer argued that the flowers were edible and therefore were food. HMRC said being edible did not make them food. To be so, it insisted that the flowers had to be regarded by an average consumer as such. HMRC considered the plants were ornamental, with a sideline of being edible.

Market gardening or farming

ITA 2007, s 996(5) defines market gardening as the occupation of land as a garden or nursery for the purpose of growing produce for sale.

In *Thorne*, the First-tier Tribunal deemed that breeding horses was farming but the growing of asparagus was not because it was market gardening. It was agreed that the two businesses could not be treated as one trade under ITTOIA 2005, s 9. The case progressed to the Upper Tribunal where the market gardening issue was taken to another level. The judge looked at the difference between a farm and a market garden and decided:

- a garden must be a distinct and defined area;
- the method of cultivation used on the land must be consistent with market gardening, not farming; and
- consideration should be given to scale, history and evidence to establish the characteristics of a garden.

The Upper Tribunal remitted the matter to the First-tier Tribunal to find more facts and evidence on the nature of the asparagus growing to answer the question of whether the enterprise was farming or a market garden. More evidence and research was necessary.

The First-tier Tribunal also emphasised the importance of evidence in *Branded Garden Products*. Witnesses discussed the taste of the flowers, but no samples were offered to the tribunal. This was unusual because it usually tries to evaluate the product directly. The tribunal said it had insufficient evidence to decide in the taxpayer's favour.

This is a warning to all farmers, tax advisers and accountants that they must obtain evidence and forensically understand what happens in all marginal areas.

The question of evidence to present tax and ownership arguments arises frequently in the tribunals. In *Ham v Bell and others* [2016] EWHC 1791, the High Court considered whether farmland used in a partnership was indeed held as partnership property or by the individual partners.

Evidence is necessary to be able to claim tax reliefs whether the item under review is edible flowers for VAT, asparagus growing for income tax or the growing of hay for horses for inheritance tax. It is not enough to make assumptions. *Ham v Bell* highlighted the problem of making assumptions with regard to partnership property.

The emphasis here is on forensic understanding. Advisers must ask questions and the farmers and producers must provide full information as to what is happening and being produced. The same applies to probate and private client legal advisers in exercises such as will drafting. To do this correctly, there must be understanding as to whether the farm is or is not partnership property.

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Action strategy

The farming, agricultural, market gardening and nursery industries have to provide full information for basic accounts, tax and VAT advice. The accounts must be produced from evidence and from strong understanding. It would also be helpful for HMRC to develop its work on definitions of all the farming and associated activities to help advisers and taxpayers.

Branded Garden Products may have been a VAT case, but its point about evidence is important for solicitors trying to decide how to claim agricultural property and business reliefs for inheritance tax. Taxpayers must also be prepared to provide more detailed information to help with the advice they need.

This is a lesson for all trades and professions – not only farming – that everyone must be prepared to provide evidence to support their decisions on claims for tax reliefs. ■

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