Holiday business – BPR denied

Julie Butler, Fred Butler and Libby James discuss the implications of the *Tanner* case on business property relief in the context of furnished holiday accommodation.

The case of *The executors for the estate of the late Gertrud Tanner* (TC9456) has raised a large number of important issues on the understanding of business property relief (BPR) on the very sensitive issue of furnished holiday (FH) accommodation.

Ms Tanner died on 17 September 2017 leaving a holiday accommodation business comprising five short-let properties near Whitby, which took a lot of organising. The units were located together along a private cul-de-sac near Ms Tanner's home which included an annexe containing a reception area, office and a garage also used in the business. The business engaged a number of staff including a full-time manager; and up to eight part-time employees.

To many, this would appear to be a fully-fledged business and the executors claimed BPR under IHTA 1984, s 105. HMRC denied the claim on the basis that the business was simply providing customers with FH accommodation and this was therefore an investment activity. With £1,168,801 (subject to valuation) of IHT at stake, the executors appealed against HMRC's decision.

Distinction between business and investment

The distinction between a business and an investment has long been debated, with taxpayers and advisers alike demanding clarification on where exactly the 'bright line' lies. In this appeal regarding the status of the holiday homes brought by the executors of Ms Tanner the contentions turned on an interpretation of IHTA 1984, s 104 and s 105 and whether the business was 'wholly or mainly' one which made or held investments. With the statute remaining somewhat silent on the matter, the First-tier Tribunal (FTT) analysed each element of the business' activities.

The amount charged for bookings included the accommodation, gas and electricity, bed linen and towels. For one particular unit, bathrobes and slippers were also included. An analysis of the services showed that there were full kitchen facilities, laundry facilities, heating and a telephone that could receive incoming calls in all the properties, along with a small number of books and DVDs. Each property was provided with tea, coffee, milk and sugar, eggs, homemade scones with jam and butter, the local newspaper, a weekly weather forecast and a tide timetable. Tourism information would be given verbally and brochures and leaflets were also provided. The business undertook housekeeping and cleaning services, primarily on changeover days, although additional cleaning services were provided at an extra charge when customers requested.

Key points

- The *Tanner* case considers the difference between 'business' and investment' with regard to furnished holiday lets (IHTA 1984, s 104 and s 105).
- It is the nature of the activity rather than the intensity (in time or funds committed) that is important.
- This denial of relief could see owners of holiday accommodation redesigning and restructuring into small hotels.

Nature versus intensity

The tribunal noted that the quality of the accommodation's fit-out and furnishings provided was not a deciding factor. It was the nature of the activity rather than the intensity (in time or funds committed) that was important.

While housekeeping, cleaning, laundry, information packs, welcome baskets, books and DVDs, etc were non-investment activities, this was work embedded in any FHL business and was characteristic of many such businesses. The FTT described them as being 'ancillary or incidental' to the investment activity and therefore 'neutral' in terms of the availability of BPR.

Notably, entries in the guestbook focused on the accommodation and location, not the provision of any services. It was considered that simply because an activity involved a significant amount of time and cost, this did not mean they should be given more weight. On the executors' assertion that staff enjoyed meeting and helping guests, the tribunal said this

was a characteristic of the staff involved and not something that could be considered a service provided by the business. On that point many differ. A characteristic of a good hotel is the quality of the staff and a point that could be debated in charging structure. However, the view that the hospitality aspects of the business did not outweigh its investment nature was supported by the fact that the business could not charge a premium in the local market and instead set its prices in line with local competitors, despite believing that it offered services they did not. With the changed tax reliefs for FH lets many might consider a total restructure moving more towards the model of a 'hotel' or 'motel' with the outlying accommodation forming part of the 'hotel operation'. Moving forward, the focus needs to be on the commercial organisation and operation of holidays, in 'special accommodation' but as part of a vibrant tourist offering.

Moving over the 'bright' investment line

The tribunal concluded that none of the factors put forward by the executors were enough to take the business 'over the non-investment line'. The factors viewed individually or as a whole, showed the business primarily provided accommodation to customers. Any additional elements were ancillary to the accommodation or insufficient to make the business a 'non-investment' one. Customers were buying the use of a property in which they could stay and use as their own, not purchasing a wider package of services which outweighed the provision of a place to stay.

The binding Upper Tribunal (UT) decision of *Pawson* found that the starting point when considering whether a business such as this qualifies for BPR is: 'The owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity … such an investment could be actively managed without losing its essential character as an investment.' The approach was subsequently endorsed by the Court of Appeal (CoA) ([2013] EWCA Civ 1864), making the investment line a very high hurdle. Perhaps trying to jump higher is no longer enough, rather the whole operation needs to be redesigned to be a complete tourist offering.

Ironically, the expert seemed to be more of a witness supporting the appellants and the evidence made no difference to the outcome, partly because Judge Anne Fairpo and her colleague John Woodman visited the location ahead of the hearing in North Shields.

Both parties made significant reference to the decision of the non-binding FTT decision in *Graham* (TC6536), where the 'personal care lavished upon guests' by Ms Graham was considered by the judge to be part of what distinguished that business.

Purpose of the underlying legislation

The executors' barrister contended that the tribunal should take a purposive approach to the legislation, ie ignore the wording of the law, and that the denial of relief would be contrary to the acknowledged purpose of the relief, which was said to be aimed at businesses with little or no element of trading. The key arguments rested on whether the properties were of higher quality than standard holiday lets and whether the additional services changed the nature of the offering or were incidental.

The FTT rejected the appeal as the business viewed as a whole is mainly one of holding investments. While it may operate to a high standard and is clearly well managed, the non-investment activities are not sufficient for it to fall on the non-investment side of the line. The non-legal member, John Woodman noted that in his view this decision was reached with some regret because case law has strayed from the apparent purpose of the underlying legislation, to support the continuation of genuine business activity whilst withholding relief from property held for purposes of long-term capital benefit. However, he accepted that this could only be dealt with by the higher CoA.

A right to appeal was granted and there will undoubtedly be many people out there waiting with great interest to see whether this case goes on to an appeal or not. With the rise in the staycation in recent years, there are farmers up and down the country who have diversified, creating complete tourist offerings alongside accommodation. Surely this is enough to push the activity over the investment line, though a lot of farmers are likely to be reliant on the *Balfour* principle that the trading activities outweigh the investment activities. Other rural businesses may be reliant on enough diversified 'quasi trading' activities to their critical mass that they constitute a trade.

These rural businesses that sit somewhere on the investment line (DIY livery, dog walking parks, fishing lakes, etc) or have multiple quasi-trading activities need to really consider what services they are providing as part of the baseline charge, as well as what further additional services they can provide and ensure the customer is charged for them accordingly (either outright or as part of the baseline charge). As the *Tanner* case sets out, just helpful and polite staff is not a service that the customers are paying for. As ever, can there be further services that tip the 'investment activity' into a trading activity. An on-site shop (or honesty box system), provision of in-house workshops (dog-training etc), anything that goes above and beyond the passive receipt of rent.

While *Pawson* certainly makes it difficult for HMRC and tribunals alike to judge when an activity has moved over the line, there are countless holiday accommodation operations that do, particularly those found on farms. Indeed, perhaps the direction of such operations moving forward is not just to try and go over the 'investment line' and hope, but to redesign the core of the business with strength and change to 'wear the badges of hotel and tourism', and not simply providing accommodation.

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