EQUINE BUSINESS – WHO OCCUPIES THE LAND

There were a number of legal and tax developments in the last decade for the equine business to be prepared and learn from.

Inheritance Tax

Looking first at the inheritance tax (IHT) position. An area HMRC is targeting is the trade of horse liveries where licences are given to customers with horses on their land. HMRC's argument is that this constitutes an investment business rather than a trading business. For anybody involved in this area of equine trade, it is well known that such an activity is hard work and an 'intelligent businessman' would see this as a trading operation.

Various matters must be looked at in order to evidence the claim for business property relief (BPR), ie, it is essential that trading accounts are prepared. It is important to ensure that HMRC accept the operation as trading on the income tax return and Class 4 National Insurance was paid on trading profits.

Part of the fact finding for IHT is to understand what is really happening on the ground. Have the full facts been considered? Is the operation an activity conducted in a regular manner on sound and recognised business principles? Is the business conducted with the emphasis on strong income results? For example, are there a large number of liveries that change all the time? Is there evidence that the proprietor has carried out positive marketing for new liveries?

Equine Litigation

Litigation is another potential problem facing equine businesses. The case of *Brian Lear v Hickstead Limited and W H Security Limited* shows the importance for landowners and those operating equine events to carry out risk assessment and to put in place systems to deal with reasonable expectation of foreseeable accidents. This case was described as "timely tragic". The case looks closely at the Occupiers' Liability Act 1957. The case also looks at duty of care owed to lawful visitors to property and the duty of care owed to them by the occupier of the land. Ironically, who "occupies" the land is also a key tax question and therefore a legal analysis that farmers and equine businesses must understand.

The worry of accidents

The facts were that Mr Lear suffered a very serious spinal injury when the ramp to his horsebox fell on him. The incident occurred at the All England Jumping Course, Hickstead in West Sussex. Mr Lear attended the Showground with his horsebox and lowered the hydraulic ramp, as it was a hot day, to allow the flow of air to his horses. When Mr Lear returned a few hours later, he found that someone had closed the ramp, so he reopened it. As he released the second of the two locking catches which secured the ramp, it sprang out and fell on him causing him serious spinal injury. The accident occurred because whoever had closed the ramp had not used the hydraulic system, but had lifted the ramp manually. The issue before the Court was whether Hickstead Limited, the owner of the showground, or W H Security Limited, the company responsible for the horsebox parking on the day, was liable for this injury.

Who was liable?

On the facts the Judge did not find either Hickstead Limited or W H Security Limited liable for the accident. The Judge found both defendants owed Mr Lear a duty of care as it was reasonably foreseeable that people might raise and lower other people's ramps and reasonably foreseeable that personal injury may result from this. It can be said that it is reasonably foreseeable that a large number of equine activities could result in personal injury. However to establish that this duty of care had been breached, Mr Lear had to show that his horsebox created an obstruction and that was the reason that the ramp had been lifted. The evidence provided showed that the ramp had been raised to enable whoever had raised it to gain a quick exit from the showground by reversing, rather than driving forwards, and not because Mr Lear's horsebox or the ramp were causing an obstruction.

Reasonable system in place to deal with problems

The Judge's view was that even if Mr Lear's ramp had caused the obstruction, it would not necessarily lead to a breach of duty if there was a reasonable system in place to deal with such obstructions. The parking at the showground did have a reasonable system in place; lorry drivers were required to display their telephone numbers on their passes in the windscreen so that they could be contacted. Mr Lear had actioned this. In these circumstances, the system operated was entirely reasonable and the Judge decided there had been no breach of duty. Everyone on reading about this tragedy would see that it could be repeated in a variety of circumstances.

Equine Tax Losses

Equine tax losses and HMRC's interest therein has been a feature of the last decade including cases being heard in the tax tribunals. HMRC has become very active in challenging claims to set off equine trading losses against other income.

The facts of one of the tax tribunal cases were that in 2004, Mrs Thorne began trading as a horse breeder of event horses to sell. Four years later Mrs Thorne began a new trade of asparagus farming which she anticipated would return substantial profits, although it would be three years before the first crop was harvested.

In Mrs Thorne's 2008-09 self-assessment tax return, she claimed sideways loss relief under ITA 2007, s 64(1) and (2) for her equestrian and asparagus businesses. HMRC refused the loss claim. Mrs Thorne appealed. The First-tier Tribunal (FTT) dismissed her appeal, saying that the taxpayer was operating two ventures as a single trade but although the asparagus element was run on a commercial basis, the horse breeding one was not.

Many equine businesses are an integral part of another separate business and effectively trade as one operation. Some businesses are merged incorrectly as one trade possibly to "mask" the poor equine trading results; sometimes the full extent of the equine losses are not realised. This combining of different activities can be a subconscious action on the part of the business owner or deliberate to try and achieve tax efficiency. In this case Mrs Thorne was keen to show the two trades were SEPARATE so that the asparagus loss could still be claimed. It was agreed that the FTT

had applied the wrong test for deciding if equine activity and asparagus growing was a single trade. The irony was that horse breeding is farming and asparagus growing could well be defined as market gardening. The Judge stated that: “In our view whether the asparagus business was farming or market gardening was a relevant matter and the failure to consider the question and reach a conclusion on it was an error of law.”

Mixing equine losses with other losses

The Upper Tribunal stated the FTT had made an error in law in saying there was a single trade. It was therefore necessary to consider whether the asparagus business was market gardening and, if it was, whether as a matter of fact the equestrian trade and the asparagus business constituted a single trade. The judge concluded that there was insufficient information about the relevant factors to decide whether the land on which the asparagus was grown was a market garden. More details were also needed about how the land was cultivated, the use of farming machinery and the skill required to grow it. The Upper Tribunal decided to remit the case to the FTT to reconsider the issue. On that basis, it was not appropriate to judge whether the asparagus growing and horse breeding were a composite single trade.

Many equine businesses are combined with other non-equine businesses and it is essential that there is sufficient detail to decide if they are one trade. This highlights the complexities facing equine businesses – there must be enterprise accounts to define the different activity at the least.

“Forensic analysis” is needed to achieve the loss relief. In addition, there must be legal agreements, good records, and where the equine business does merge with a more profitable activity, it must be possible to “demerge” the business. Business plans and enterprise accounts are essential. Actually understanding what the business is doing and what is the correct tax treatment. Help is provided by s 996(5) Income Taxes Act 2007 where market gardening is described as the occupation of land as a garden or nursery for the purposes of growing produce for sale.

Grazing Agreements

Who occupies the land and what activity is really carried out on the land are questions that have to be asked. For example, the tax impact of arrangements between owners of grazing land, and livestock farmers who graze their animals on that land are not always straightforward. The critical question for the landowner is whether he is farming the land, or whether he is merely receiving rent for the use of the land. In England and Wales, landowners seeking to ensure that they are regarded, at least by the tax authorities, as farming their land are not helped by the language often used in the legal agreements. References to letting and grazing ‘rents’ are not helpful. However, it is not the language used in everyday conversation that should matter. Instead, the important questions should be the legal nature of the arrangements, and what the parties actually do rather than how it may be loosely described that is important for tax relief.

In England and Wales, the “grazing” arrangement is generally regulated by some form of grazing license. This has to be a license rather than a tenancy, because an essential feature of the landlord and tenant relationship is that the tenant is entitled to exclusive possession of the land. It would follow that only the tenant can be the ‘occupier’ of the land. ‘Occupation’ is important in context, because for income tax purposes, the trade of

farming is defined in terms of the occupation of land, by s996 Income Tax Act 2007. In practice this approach is invariably followed for capital gains tax (CGT) and inheritance tax (IHT) purposes. There are many tax disadvantages of only being the "landlord". In Northern Ireland the traditional grazing agreement is taken further by the 'Conacre' arrangement.

The First-tier Tribunal have recently considered Conacre arrangements in more detail and allowed the taxpayer's appeal in *Allen v HMRC* [2016] UKFTT 342 (TC) regarding capital gains tax.

"Conacre

7. *'Conacre' is a method of farming land: see Dease v O'Reilly (1845) 8 Ir LR 52, per Crampton J. It is a method or system which had become well-established across the whole of the island of Ireland by the mid-19th century at the latest, and which reflected the social and economic condition of the agricultural worker in Ireland at the time. In many cases, they were landless and living a hand-to-mouth existence close to the poverty line. A scholarly discussion of Conacre's origins and survival may be found in David Moore's article 'From Potatoes and Peasants to Quotas and Squires: The Endurability of Conacre from 1845-1995' in Dawson, Greer and Ingram 'One Hundred and Fifty Years of Irish Law' (1996).'*

Capital Gains Tax (CGT)

The question was whether the taxpayer was carrying on a trade for the purpose of CGT Business Asset Taper Relief. The relief itself may now be receding into history. But the fundamental question namely whether the taxpayer had been carrying on a trade is as topical now as it was when the Schedules of the first Income Tax Acts were drawn up.

The Tribunal emphasised that 'Conacre' was specifically an Irish arrangement, and that their comments should not be regarded as being applicable to other parts of the UK such as England and Wales. Nevertheless, as pointed out in the IHT Manual, IHT principles should be applied in Northern Ireland in the same way as in the rest of the UK. It is suggested that the comments and analysis of the Tribunal may be useful in other parts of the UK.

Allen was considered to be carrying on a trade for CGT purposes, whereas this is often not the case with mere grazing agreements.

Action Points

Detailed analysis of who is occupying the land and for what purpose is essential. Protection against the lack of assessment of "reasonably foreseeable" accidents that may arise need to be considered. Nothing involving land can be taken on unresearched assumptions.

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1 March 2017