



TC01235

Appeal reference: TC/2010/5348

CAPITAL ALLOWANCES – cost of fencing around business premises – was fencing for security of partners – no – special threat conditions not met – sec 33 Capital Allowances Act 2001 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX**

**P D, MRS J AND L D BROCKHOUSE
T/A A5 AQUATICS**

Appellant

- and -

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**Tribunal: Lady Mitting (Judge)
Mr. M Farooq (Member)**

Sitting in public in Manchester on 18 April 2011

Mr. P Carvell appeared for the Appellant

Mr. M Chapman appeared for the Respondents

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DECISION

1. The Appellants were appealing against a Closure Notice issued on 11 November 2008 for the year ended 5 April 2007 following the conclusion of an enquiry into their partnership self-assessment tax return. The issue before the tribunal was whether the expenditure of the partnership laid out for fencing on land owned by the partnership in the sum of £81,353 for the accounting period 1 January 2006 to 31 December 2006 was subject to Capital Allowances under Section 33 Allowances Act 2001, it being the contention of the Appellants that the fencing was erected for the personal security of the partners and met the Special Threat provisions within Section 33.

2. We heard oral evidence from the decision-making officer, Ms. Karen Lynch. None of the partners attended the tribunal and no oral evidence was given on their behalf. The best evidence before the tribunal was therefore the correspondence which had passed between the Appellants' representatives and the Respondents, and the notes of an interview which had taken place on 2 September 2008 attended by Mr. P D Brockhouse, Mr. Carvell and Ms. Lynch. Mr. Carvell helped the tribunal with additional information where he could but very fairly declined to answer when he did not know.

3. Various arguments on behalf of the Appellants had been put forward during the course of the enquiry, principally that the expenditure on the fence should have been classified as a repair and set against taxable profits or alternatively that the fence was a capital asset and should have been classified as "plant", the expenditure thus qualifying for Plant and Machinery allowances. Both these contentions had been abandoned by the time of the hearing but had featured prominently in correspondence to which we were referred.

The facts

4. The Appellants had traded for a number of years, their business being that of selling fish, aquariums, ponds and associated products. The business is operated from two sites which are situated opposite each other, separated by the main A5 road Watling Street. On the one side of the road is the retail outlet and the partners' private residence and opposite on a roughly oblong-shaped field there is situated a large storage lake which occupies some 40 to 50% of the land. The total perimeter length of the field is some 2,300 metres and there is one means of access to it, on one of the short sides, off Watling Street.

5. In approximately 2002, the Appellants had erected some 30 metres of galvanised steel palisade-type fencing around the area of the entrance gate. In autumn 2006, the remaining 2,270 metres was similarly fenced, and it is the cost of this additional fencing which is the subject of this appeal. The field had previously been fenced in by a not very secure timber post and pail fence with barbed wire running along the top of it. Mr. Brockhouse had told Ms. Lynch that the original fencing was already in a state of disrepair when the land had been purchased in 1991.

6. During the course of the interview of 2 September 2008, a discussion had taken place regarding the reason for the erection of the fencing. Ms. Lynch's note of the discussion, the content of which was not challenged by Mr. Carvell, read:

5 "Ms. Lynch asked Mr. Brockhouse why he had installed / replaced the fencing and he said that it was to improve security. He had suffered from poachers to such an extent that he had an 18 month suspended sentence."

What Mr. Brockhouse had meant by this statement was to be the subject of some dispute at the hearing so we, the tribunal, requested sight of Ms. Lynch's original handwritten note. This had read:

10 "Why replace – improve security (Mr. B had suspended sentence from protecting land)."

7. Following the interview of 2 September, Ms. Lynch rejected the Appellants' claim that the expenditure was one of repair, and by letter dated 22 December 2008, Mr. Carvell contended that the fence should be classed as "plant", thus giving rise to
15 an entitlement to capital allowances. His letter stated:

20 "The expenditure on fencing as mentioned in our previous correspondence was incurred to improve the security and due to the increased number of trespassers, vandalism and poaching for the security of our clients. The fencing expenditure was incurred, it is not part of the premises and is providing a function rather than being merely structural."

By letter dated 28 January 2009, Ms. Lynch rejected Mr. Carvell's claim. Mr. Carvell had at no time referred to a section 33 claim but for the sake of completeness, Ms. Lynch did include in her letter the following statement:

25 "With regard to subsection (2), while it is possible that the security fence might be classed as a security asset falling within section 33, section 33 is quite specific in that PMAs are available on expenditure on a security asset only in circumstances where there is a special threat to an individual's personal physical security that arises only or mainly as a result of the trade being carried on. Clearly this is not the case here."

30 8. By letter dated 27 February 2009 and thereafter, the Appellants pursued their claim under section 33, Mr. Carvell pointing out that Mr. Brockhouse had felt threatened and vulnerable to attacks and had had to install a high number of security CCTV cameras; he had suffered attacks of vandalism and poaching in the past; had had previous confrontations with trespassers; that the remote location of the stock lake
35 meant that access was restricted and that personal protection was offered to those tending the stock, and finally the close proximity of the dwelling house to the business premises and the stock lake.

9. The tribunal's attention was drawn to extracts of earlier correspondence between the parties when the claim which was being pursued was one for repairs. We were referred to a letter dated 8 May 2008 in which Mr. Carvell had written:

5 "The cost relating to fencing is not excessive considering the length of the site borders and the amount of damage caused by vandalism. For security purposes the repair of the existing fence was necessary. The lake and premises have suffered increased loss of fish due to poaching."

10. In a letter dated 27 April 2009, Mr. Carvell had written:

10 "Principally the fencing exists to restrict or prevent trespassing, vandalism and poaching to and from the fish lake. Our client has experienced significant problems in this area and so the existence of the fencing enables it to carry on its trading activities more efficiently, more effectively and more profitably. The fish stock is not only protected but it can live and grow in a more stress-free environment."

15 11. In later correspondence, in pursuit of the section 33 claim, Mr. Carvell had qualified this earlier statement in the following terms:

20 "Our letter of 27 April 2009 states that principally the fencing exists to restrict trespassers and poachers from the area. Our client fears for his personal safety due to the previous security issues. The incidental use of the fencing to protect the fish so they can live and grow in a more secure and stress-free environment and also complying with safety requirements should be ignored for the purpose of section 33."

Evidence on behalf of the Appellants

25 12. Mr. Carvell put in evidence, on behalf of the Appellants, two letters. The first in time was dated 26 February 1996 and was from Leicestershire Constabulary to Mr. Brockhouse's solicitors, Messrs Lester, Dixon and Jeffcoate. The second was dated 7 May 1996 and was from Messrs Lester, Dixon and Jeffcoate to Mr. Peter Brockhouse. The second letter was by way of confirmation to Mr. Brockhouse of the outcome of a Crown Court hearing on 1 May 1996, at which Mr. Brockhouse had been either
30 convicted or pleaded guilty to carrying a loaded shotgun in public and to assault charges. Mr. Brockhouse had been given a suspended sentence, and the solicitors commented that the custodial sentence was suspended "only due to the exceptional circumstances of your case". Mr. Carvell had very little information about the incident which had given rise to the charges. It appears that it arose out of a trespass
35 onto the Appellants' land, the motive for which, Mr. Carvell said, was to steal fish. He did not know whether the intruders were armed and he did not know what the "exceptional circumstances" were to which the solicitors had referred in their letter.

40 13. The first letter from the Constabulary to the solicitors appears to have been written in response to queries raised of the Constabulary, probably raised by the solicitors in connection with their preparation of the defence to the assault charges.

Without any background whatsoever it is difficult to make total sense of the letter, but it does appear to relate to an act of criminal damage perpetrated with an aerosol can on 22/23 July 1995, this incident being a separate one from the incident on 26 July 1995 out of which the charges against Mr. Brockhouse arose. The letter also refers to
5 Mr. Brockhouse being marked as a “repeat victim”. The only other incident prior to 1996 of which Mr. Carvell had any knowledge took place, he thought, in early 1995 when an intruder brought dogs onto the Appellants’ land, which said dogs threatened Mr. Brockhouse, but Mr. Carvell did not believe they had attacked him. Mr. Carvell was asked what incidents had taken place since 1996 but again he had no specific
10 knowledge. He thought that there had been some which had not been reported to the police, and he believed that intruders had been caught on the land. One such incident, we were told, had ended in a car chase. Although Mr. Cavell had no first-hand knowledge of any further incidents, he did say that although Mr. Brockhouse had been threatened, he had not been attacked but that the incidents had played on Mr.
15 Brockhouse’s mind. He did say that the attraction to intruders was the value of the fish in the lake, but in fact because the lake was netted, theft was difficult and therefore there was not a particularly great risk of physical loss of property. The risk, Mr. Carvell told us, was not so much a theft of fish as injury to Mr. Brockhouse.

Legislation

20 14. Section 33 Allowances Act 2001 provides as follows:

“33(1) This section applies to expenditure if –

(a) it is incurred by an individual or partnership of individuals in connection with the provision for, or for use by, the individual, or any of the individuals, of a security asset.

25 (b) the individual or partnership is carrying on a relevant qualifying activity, and

(c) the special threat conditions are met.

33(2) The Special threat conditions are that –

(a) the asset is provided or used to meet a threat which –

30 i. is a special threat to the individual’s personal physical security, and

ii. arises wholly or mainly because of the relevant qualifying activity, and

(b) the person incurring the expenditure –

35 i. has the sole object of meeting that threat in incurring that expenditure, and

- ii. intends the asset to be used solely to improve personal physical security.

33(3) If –

- 5
- (a) the person incurring the expenditure intends the asset to be used solely to improve personal physical security, but
 - (b) there is another use which is incidental to improving personal physical security, that other use is ignored for the purposes of this section.

10 33(4) The fact that an asset improves the personal physical security of any member of the family or household of the individual concerned, as well as that of the individual, does not prevent this section from applying.

33(5) If –

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- (a) the asset is not intended to be used solely to improve personal physical security, but the expenditure incurred on it would otherwise be expenditure to which this section applies, and
 - (b) the person incurring the expenditure intends the asset to be used partly to improve personal physical security,

this section applies only to the proportion of the expenditure attributable to the intended use to improve personal physical security.

20 33(6) In this section “security asset” means an asset which improves personal security; and here “asset” –

(a) does not include –

- i. a car, ship or aircraft, or
- ii. a dwelling or grounds appurtenant to a dwelling, but

25 (b) subject to paragraph (a), includes equipment, a structure (such as a wall) and an asset which becomes fixed to land.”

Case law

15. The only authority to which we were referred by the parties was that of *Lord Hanson v Mansworth* (HMIT) (2004) SpC410.

Submissions

30 16. It was not disputed by the Respondents that paragraphs 33(1)(a) and (b) were met. Neither was it disputed that a fence was capable of being a security asset (paragraph 33(6)). The Respondents’ challenge and contention was that paragraph

33(1)(c), the “special threat conditions” had not been met. These conditions are defined in paragraph 33(2)(a) and (b) and the Respondents maintained that the Appellants fulfilled neither condition. First Mr. Chapman contended that Mr. Brockhouse was under no greater threat than the average retail business holder in the UK and secondly that the erection of the fence was not for the sole purpose of his personal physical security.

17. Mr. Carvell contended that the threats which Mr. Brockhouse faced went considerably beyond those faced by ordinary businesses – both by their nature and by the length of time over which they had occurred. In support of this contention he cited the police description of Mr. Brockhouse as a “repeat victim”. It was Mr. Carvell’s contention that the test of the existence of the threat was a subjective test in that the Act did not specify it to be objective. In Mr. Carvell’s submission, if someone “got himself worked up” to the extent that he believed he and his family were in danger, then the risk became real and the threat existed. Further if that person became sufficiently worked up then the threat became special and the condition was met. Mr. Carvell further maintained that the sole purpose of the fence was for self-protection even though it served an incidental use of the protection of the business. This was evidenced, in Mr. Carvell’s submission, by the value and nature of the fence. This was no ordinary fence, which could well have sufficed to protect the business alone, but an immensely expensive and sound structure, the cost of which could only have been justified if it was to afford personal security. Mr. Carvell rated the risk to the business as low in any event, first because the lake was netted so that it would have been an exceedingly difficult operation to remove and steal the fish, and secondly that even if a theft had occurred, the loss would have been covered by insurance. It had to follow that the sole purpose of *this particular fence* was to protect against personal physical risk.

Conclusions

18. The first issue which we address is to ask whether Mr. Brockhouse faced a special threat to his personal physical security. We mention Mr. Brockhouse specifically, even though there are three Appellants in the partnership, because it was the Appellants’ contention that it was Mr. Brockhouse who faced the threat. We adopt the same definition of “special” as that taken by the Special Commissioners in *Lord Hanson*, namely “exceptional in quality or degree, unusual, out of the ordinary” (Shorter Oxford English Dictionary). This definition accords with Mr. Carvell’s definition, which he took from an online dictionary, of “surpassing what is common or usual” or “exceptional”.

19. Without hearing from Mr. Brockhouse, we have only limited evidence of the threats to which he was or had been subject. We know from the Constabulary letter that on 22/23 July 1995 there had been an act of criminal damage on the Appellants’ premises. We also know there was a further incident on 26 July 1995 which resulted in Mr. Brockhouse’s conviction. We know nothing more of either incident. Mr. Carvell did not know whether the intruders had been armed and we have no knowledge of the personal physical risk which Mr. Brockhouse faced in either incident. We also have no information relating to the “previously reported incidents”

which had led to Mr. Brockhouse being identified as a “repeat victim”. Most significantly we do not know whether these incidents were targeted against the business or Mr. Brockhouse. We know from the correspondence and the interview notes that the business premises had been subjected to criminal damage, vandalism and poaching, but we were told nothing of the degree of risk, if any, faced by Mr. Brockhouse in any of these incidents. Most importantly, we heard nothing that could lead us to conclude that any threat which he may have faced was out of the ordinary or exceptional. Equally it cannot go without mention that no evidence was put before us of any threat faced by Mr. Brockhouse between 1995 and 2006, some eleven years later when the fence was erected. It cannot be realistically argued that a threat was so real and so exceptional that the person facing that threat waited eleven years to address it.

20. We should also say that we do not accept Mr. Carvell’s argument that the test of whether Mr. Brockhouse faced any such threat is a subjective test. How a person reacts to any given threat is subjective, but whether or not any such threat exists in the first place has to be established objectively. For the purposes of meeting this condition, the threat has to be a reality and the severity of that threat can only be judged objectively. On this issue, there is far too little evidence before us to conclude that Mr. Brockhouse faced a special threat to his personal physical security and we find that the condition set out in paragraph 33(2)(a) is not met.

21. As both conditions had to be met, it is technically not necessary for us to go any further, but for the sake of completeness we will look at the condition set out in (b) and ask whether Mr. Brockhouse has satisfied us that in incurring the expenditure he had the sole object of meeting the threat and whether he intended the fence to be used solely to improve his personal physical security. Again there is no evidence before us to support Mr. Carvell’s contention that this condition is met. In fact what evidence there is leads directly to the only conclusion that the purpose in incurring the expenditure was to protect the land and the stock. Not only is this what is set out in the correspondence but it is precisely the answer which Mr. Brockhouse gave to Ms. Lynch when she asked why he had replaced the fencing. We find that on the evidence before us, the condition in paragraph 33(2)(b) is not met either.

22. The appeal is therefore dismissed.

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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LADY MITTING
JUDGE
Release Date: 9 June 2011