



TC03217

Appeal number: TC/2012/06595

*INHERITANCE TAX – relevant business property – section 105 IHTA 1984
– unquoted shares – whether business of company was mainly holding
investments – yes – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**JOHN BEST
(EXECUTOR OF THE ESTATE OF
ALFRED WILLIAM BULLER DECEASED)**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR DAVID MOORE**

Sitting in public in Belfast on 15 November 2013

Mark Orr QC instructed by TD Gibson & Co Solicitors for the Appellant

**Nicholas Hanna QC instructed by the General Counsel and Solicitor of HM
Revenue & Customs for the Respondents**

DECISION

Background

1. Alfred William Buller deceased (“the Deceased”) died on 1 December 2007. At the time of his death there was a deemed transfer of value for the purposes of inheritance tax of property including 25,000 shares in Bullick Developments (1986) Limited (“the Company”).

2. The Company owns and manages the Valley Business Centre (“the Business Centre”) in Newtownabbey, County Antrim. The Business Centre comprises land and buildings on an 8 acre site which are occupied for office and light industrial use.

3. On 31 January 2012 HMRC determined, pursuant to section 221 of the Inheritance Tax Act 1984 (“IHTA 1984”) that the shares in the Company were not relevant business property for the purposes of section 104 IHTA 1984, having regard to the provisions of section 105(3). That determination was upheld following a statutory review on 18 May 2012.

4. The appellant is the executor of the estate of the Deceased. By notice dated 21 June 2012 the appellant sought permission to appeal out of time and, subject thereto, appeals to this tribunal against the determination. The respondents have not objected to the application for permission to appeal out of time and we grant permission accordingly.

5. The principal issue on this appeal is whether the business of the Company consists wholly or mainly of holding investments. If that is the case, then the value of the business reflected in the shares would not qualify for relief as “relevant business property” under section 104 IHTA 1984. Put briefly, the appellant contends that the nature and extent of services provided by the Company to occupiers was such that the business of the company was not mainly the holding of investments.

6. We set out below the relevant statutory provisions followed by our findings of fact based on the evidence before us. In our decision we consider the submissions of both parties.

Statutory Provisions

7. For present purposes it is sufficient to set out the following statutory provisions.

“ 104. The relief

(1) Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced –

(a) in the case of property falling within section 105(1)(a) (b) or (bb) ... below by 100 per cent;

...

but subject to the following provisions of this Chapter.

...

105. Relevant business property

5 (1) *Subject to the following provisions of this section ... “relevant business property” means, in relation to any transfer of value, —*

(a) *property consisting of a business or interest in a business;*

(b) ...

10 (bb) *any unquoted shares in a company;*

...

15 (3) *A business or interest in a business, or shares in or securities of a company, are not relevant business property if the business or, as the case may be, the business carried on by the company consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments.”*

8. It was common ground that the shares were unquoted shares within section 105(1)(bb). It was also common ground that relief is available unless the business
20 carried on by the Company consists wholly or mainly of holding investments.

9. Subject to section 112 IHTA 1984, relief is provided on an “all or nothing basis”. The property in question is either relevant business property, or it is not. However even where shares are relevant business property, the relief available is reduced by the value of any “excepted assets”. Section 112(2) provides as follows:

25 “An asset is an excepted asset in relation to any business property if it was neither –

(a) *used wholly or mainly for the purposes of the business concerned throughout the whole or the last two years of the relevant period ..., nor*

30 (b) *required at the time of the transfer for future use for those purposes ...”*

10. There has been no agreement or determination as to the value of the shares in the event that full relief is not available. We are not concerned in this appeal with questions of valuation.

Findings of Fact

35 11. We must consider the nature of the business in December 2007, at the time of the transfer of value. We were not told of any significant change in the way the Business Centre has operated since 2007.

12. The Appellant relied on oral evidence from Mr Alfred Buller, the son of the Deceased and a director of the Company. HMRC relied on oral evidence from Mrs
40 Joanne Beard, together with a witness statement from Mr Colin Ryder which was not disputed. In the light of all the evidence we make the following findings of fact.

13. The Company acquired the Business Centre in 1987. It obtained finance to assist in the purchase from the Local Enterprise Development Unit. The memorandum of association of the Company is drafted in wide terms and does not assist in defining the nature of the Company's business.

5 14. The Business Centre provides office, industrial and warehouse space for small to medium sized businesses. It was not purpose built, but was originally used as factory premises, located on the outskirts of Belfast. It comprises 105,000 sq ft of units, the smallest unit being 100 sq ft. There is 20,000 sq ft of office and showroom space. Units can be taken on a short or long term basis but in fact there is very little
10 turnover of occupiers. Mr Buller described it as "*a very settled community*". 15 units might be empty at any one time The site includes car parking space available to occupiers, their employees and customers. There is a reception area with a receptionist employed by the Company. Occupiers have 24 hour access to the site and the Company provides site security. Entrance to the site is via a manned security
15 barrier.

15 15. Approximately 15% of the Company's income from the Business Centre comes from office space let to a company called Burdens. Those offices are in a large self-contained corner unit of the site. It is common ground that the offices let to Burdens are in the nature of an investment.

20 16. Apart from Burdens, approximately 10% of the Business Centre is offices. The balance is two thirds warehousing used by retailers or wholesalers and one third light industrial use. In total there are approximately 400 people in or around the Business Centre on a typical working day.

25 17. The Deceased spent a lot of his time at the Business Centre dealing with the everyday matters that might arise with occupiers. On his death the Company employed a full time replacement as a "site administrator".

30 18. Businesses occupying units at the Business Centre do so on standard form licence agreements. The agreements recite the fact that licensees do not have exclusive possession of a unit. Units are lockable and licensees have their own keys, with the Company retaining a master key.

19. Monthly licence fees are payable calculated on a weekly basis. An apportioned service charge is also payable at monthly intervals. The services in respect of which the service charge is payable are set out in the First Schedule of the licence agreement as follows:

35 "THE FIRST SCHEDULE"

1. *Grass Cutting*
2. *Pest Control*
3. *Cleaning of the common areas*

4. *Site Security 5pm – 9am Monday to Friday and 24 hr Security at Weekends & holidays (to be determined by Bullick Developments Ltd)*
5. *Buildings Insurance*
6. *Water Charges*
- 5 7. *General Plumbing/Electrical Repairs and Maintenance to items that have been installed by the Licensor only*
8. *Provision of Receptionist to answer telephone calls, sort incoming and outgoing mail and take delivery of parcels, together with general reception duties for visitors and guests*
- 10 9. *Site Maintenance and Repairs*
10. *Provision of 1 unallocated Car Parking Space per Unit/Office*
11. *Provision of domestic hot water to toilets, soap and towels or hand dryer*
12. *For Office Occupiers only – provision of heat between 1st October and 30th April. Electrical Lighting*
- 15 13. *For Office Occupiers only – provision of heat to common parts of the building between 1st October and 30th April ”*

20. It was common ground that the services provided within the service charge at items 1-7 and 9-13 of the First Schedule, including security, were the types of services a landlord would commonly provide to occupiers. That left the provision of a receptionist at item 8 as arguably comprising an additional service which might be a non-investment activity.

21. The Second Schedule of the licence agreement provides for further services to be provided by the Company if required by the licensee at an additional fee as follows:

“THE SECOND SCHEDULE

1. *Provision of telephone services, calls and line rental*
2. *Provision of Forklift Driver, if required*
- 30 3. *Provision of Secretarial Services*
4. *Provision of Photocopying and Postage facilities*
5. *Acquisition of Stationery, if required*
6. *Provision of Fax Facilities for both incoming and outgoing correspondence*
- 35 7. *Hire of Boardroom*
8. *Additional Car Parking for extra vehicles, if required*
9. *For Industrial occupants – metered electrical supply, if required ”*

22. The Company invoiced occupiers on a monthly basis for the provision of services itemised in the Second Schedule. Unfortunately we were not provided with any examples of those invoices.

23. The Company employs a site maintenance person and a forklift truck driver at the Business Centre. Both are full time employees. The forklift truck driver is assisted by his brother. In addition there is a full time receptionist providing secretarial and other support services both to occupiers and to the Company, and another person
5 doing the same job part time. In total there are 3 full time employees and 2 part time employees. There are also 3 security guards employed.

24. In relation to Item 1 in the Second Schedule, the occupiers of industrial units and most of the offices do not have their own telephone landline. The receptionist operates a switchboard and each occupier has an extension number. Calls are put
10 through to the extension, or to the occupier's mobile phone number. Outgoing calls are re-charged to users

25. The layout and physical limitations of the Business Centre mean that many of the industrial units are accessible only by small vans. For example, some internal units occupy the ground floor in circumstances where height restrictions prevent
15 larger lorries gaining access. Where such occupiers have deliveries from larger lorries they utilise the forklift truck service provided by the Company to move deliveries to the unit. This is the service referred to in Item 2. Mr Buller estimated that there would be 18 large lorries a day delivering to occupiers at the Business Centre, however it was not clear to what extent those deliveries would require the forklift truck service.

26. Mr Buller said in evidence that some units with restricted access would be
20 unlettable without the provision of a forklift truck service. The appellant also relied on a large number of signed standard form "statements" from occupiers of units to the effect that "*Our business could not be sustained without the forklift services*". The circumstances in which those statements came to be signed are such that we place
25 little weight on their content. We are not satisfied that the occupiers fully appreciated the significance of what they were being asked to sign.

27. We do not accept that units would be unlettable without the provision of a forklift truck service. A significant number of units are occupied by small businesses which would have no need for large deliveries. For example the occupier of one unit
30 operated a dog grooming business and would have no need of large deliveries.

28. The cost of supplying services within Items 3-6 is re-charged to users according to use. The amount of profit generated was not clear from the evidence. The Business Centre also has a Boardroom suitable for business meetings which can be hired by occupiers. This is referred to in Item 7. Similarly car parking charges are made where
35 an occupier requires more than the one space per unit provided for in the licence agreement.

29. In relation to Item 9, each unit has a separate electricity meter and the Company bills each user according to use. The Company is responsible for paying the electricity supplier for all electricity used at the Business Centre. It does receive a rebate from
40 the electricity supplier which is effectively the Company's profit on this service. We were not told the amount of the rebate.

30. The income of the Company generated from licensees in the year-ended 31 December 2007 may be summarised as follows:

	£
Licence Fees	447,068
Service Charges	53,335
Sundry	4,517
Equipment Hire	4,452
Heat and Light	31,284
Telephone	45,568
Postage	20,056
Car Parking	5,192
Total	611,472

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31. The service charges of £53,335 cover the services itemised in the First Schedule. Surprisingly, Mr Buller was not clear in his evidence as to how the income from the services itemised in the Second Schedule was accounted for in the annual accounts. Nor was he otherwise able to identify the income derived from the services itemised in the Second Schedule. It was clear to us however that the items identified separately in the financial accounts correspond to the items in the Second Schedule. In particular, and we find as a fact, that the item described as “equipment hire” in the accounts was the income from providing the forklift truck service.

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32. The Company therefore derived an income of approximately £4,500 from providing the forklift truck service. Mr Buller said, and we accept, that often the Company would not charge occupiers for use of the forklift truck as a gesture of goodwill. The employee who drove the forklift truck would charge an occupier who had booked the service in advance, but if an occupier wanted to use the service on an ad hoc basis without booking it would often not be charged.

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33. The service of arranging deliveries for occupiers, including use of the forklift truck service, is available at all times including when the occupier is not present.

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34. The income from heat and light, telephone and postage was generally a re-charge of expenditure incurred by the Company in providing those services. The sundry income of £4,517 relates to hire of the Boardroom, secretarial services and stationery. Most of this related to hire of the Boardroom.

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Decision

35. There are now a number of authorities in the context of land which consider the question of whether a business consists wholly or mainly of holding investments. The most important of those authorities is the decision of the Court of Appeal in *IRC v*

5 *George (exors of Stedman decd)* [2003] EWCA Civ 1763. The authorities, including a decision of the Court of Appeal in Northern Ireland in *McCall (personal representatives of McClean decd) v Commissioners of HM Revenue & Customs* [2009] NICA 12, were recently reviewed by the Upper Tribunal in *Commissioners of HM Revenue & Customs v Lockyer (personal representatives of Pawson decd)* [2013] UKUT 050 (TCC).

10 36. There was no real issue between the parties as to the nature of the test to be applied. We do not propose to repeat a similar review of the authorities, but we derive the following principles to be applied in deciding whether or not a business consists wholly or mainly of holding investments:

- 15 (1) The various activities involved in operating a business relating to the exploitation of land may be allocated between “investment” and “non-investment” activities.
- (2) In the light of that allocation the question is whether the investment element of the business is predominant (See *George* at [11]).
- (3) The ultimate issue concerns the relative importance of non-investment activities to the business as a whole (See *George* at [51]).
- 20 (4) There is a wide spectrum involved in such businesses. At one end is the granting of a tenancy together with activities sufficient to make it a business. At the other end is the running of a hotel or shop on the land. The holding of land as an investment may be the very business carried on or it may be merely incidental to the business. It may also be one of a number of principal components of a composite business (See *George* at [12] and [16]).
- 25 (5) It is necessary to look at the business in the round. The relative income and profitability of the various activities is relevant but not determinative (See *George* at [13]).
- (6) The exception in section 105(3) IHTA 1984 is not confined to purely passive property investment (See *George* at [18]).
- 30 (7) Property “management” is part of the business of holding property as an investment, including finding occupiers and maintaining the property as an investment. However that term does not extend to additional services or facilities provided to occupiers and it is irrelevant whether the provision of such additional services is included in the lease. The characterisation of such services depends on the nature and purpose of the activity and not on the terms of the lease (See *George* at [27] and [28]).
- 35 (8) The test to be applied is that of an intelligent businessman, concerned with the use to which the asset was being put and the way in which it was being turned to account (See *McCall* at [11]).
- 40 (9) The test involves a question of fact and degree as to where a particular business falls within the spectrum (See *McCall* at [18]).

37. In the context of property management and additional services Carnwarth LJ said in *George* as follows:

5 “[27] ...*In the case of a building for letting, it is unlikely to be material. [The additional services] will not be enough to prevent the business remaining “mainly” that of holding the property as an investment.*”

38. In *Lockyer*, Henderson J considered the decision of the Court of Appeal in *George* in detail and said this:

10 “[30] ... *The implication is in my judgment clear. In any normal property letting business, the provision of additional services or facilities of a non-investment nature will either be incidental to the business of holding the property as an investment, or at least will not predominate to such an extent that the business ceases to be mainly one of holding the property as an investment.*”

39. Mr Hanna QC who appears for HMRC described this as a “working presumption”. We prefer not to use the term “presumption”, and we note that Henderson J did not use that terminology. Analysis in terms of a presumption is likely to give rise to subsidiary questions, such as what is a “normal property letting business” and what is the significance of any variation from such a business on the facts of a particular case. That would deflect from the ultimate issue we have to decide which both parties are agreed is a question of fact and degree, to be decided on the basis of the evidence.

40. In the present appeal it was common ground that the Company was carrying on a business. However there was some divergence as to what was comprised in that business. Mr Hanna submitted that the business of the Company was not a composite business of the type referred to by Carnwarth LJ in *George*. However it seems to us that the offices let to Burdens, which the appellant accepts viewed on their own were an investment property, could arguably be considered to be a separate component of the business. That part of the business was wholly or mainly the holding of an investment. Alternatively it may be that the Burdens offices did not form part of the business at all and would fall to be treated as an excepted asset under section 112 IHTA 1984. Whilst these distinctions were canvassed in closing submissions, the evidence itself was not really directed towards such issues. In the event however we are able to decide this appeal without reaching any concluded view on these issues.

41. The submissions of Mr Orr QC for the appellant centred on the additional services provided under the Second Schedule, and in particular the provision of fork lift truck services. Such services, he submitted, should be viewed in the context of the unusual physical nature of the Business Centre with restricted access to many units. He argued that use of some units by occupiers would be difficult or impossible in the absence of a forklift truck service. Essentially the appellant’s case was that without the forklift truck service the land would not generate much if any income.

40 42. Mr Hanna submitted that forklift truck services fall within the category of services that would normally be provided by a property investment business rather

than in the category of additional services. In making that submission he drew an analogy with a lift in a residential block facilitating access to apartments. We do not consider that is a good analogy. The lift is part of the building itself, over which rights would no doubt be granted to occupiers. As such it is properly viewed as part of the subject matter of the tenancy together with access to all other common parts. There is no service involved in the provision of a lift. The only service would be maintenance of the lift, which would, we consider, be part of the maintenance of the investment. The fact that provision of a lift or the maintenance of a lift could not be described as a non-investment activity does not help us categorise the provision of a forklift truck service.

43. Mr Orr's submission amounts to a "but for" test which we do not think is supported by the authorities. Even if the basis for his submission was established on the facts, we do not consider that it leads to a conclusion that the forklift truck service predominates. The fact that some units could not be let without the provision of a forklift truck service would tend to suggest that the service is part of the investment activity. It is an element of sensible property management, not generally but certainly in the context of this particular property.

44. In any event, and for the reasons given above, we are not satisfied on the evidence that many of the units do rely on the forklift truck service. Further we are not satisfied that any units would be unlettable without such a service.

45. We accept that it is necessary to look at the business in the round, and in doing so the relative contribution to income or profits is relevant but not determinative of the issue. On the facts of the present case we must consider the nature and extent of the additional services and their contribution to the business. The analysis involves both qualitative and quantitative assessments.

46. The non-investment services provided by the Company include the forklift truck service and the provision of office type facilities. We do not consider that those additional services predominate when considering the activities of the Company as a whole. Even if we were to take out the Burdens side of the business, the real nature of the business remains an investment business exploiting the land by granting tenancies and licences. Most of the income from additional services relates to re-charges for electricity, telephone and postage. The income from the other additional services is very modest compared to the licence fee income. Considering the facts by reference to the nature of the activities and the income produced by those activities puts the Business Centre well towards the investment end of the spectrum.

47. We were told by Mr Orr that finance from the Local Enterprise Development Unit when the Company purchased the Business Centre in 1987 was not available for investment projects. To some extent Mr Orr relied on this fact as supporting the appellant's case. We were not taken to any statutory or regulatory provisions in relation to such finance, but in any event we do not consider that the position in 1987 under a different regulatory regime provides any assistance in dealing with the issue under Section 105(3) IHTA 1984. We are required to look at the position at the time of the transfer of value in 2007.

Conclusion

48. For all the reasons given above we must dismiss this appeal. The business of the Company was mainly holding investments and as such the shares in the Company were not relevant business property.

5 49. 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
10 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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**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 13 January 2014

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