

The Gazebo Case

Introduction

In the recent case of *Mrs. C. A. Andrew -v- HM Revenue & Customs* (2010), the First-Tier Tribunal (Tax Chamber) had to decide whether a gazebo in the grounds of a public house qualified as plant for capital allowances. The first question for the Tribunal was whether the gazebo was plant in accordance with the tests established by case law. If the gazebo passed those tests, then the Tribunal had to decide whether the gazebo was prevented from being plant by statute law, by virtue of being a building or a fixed structure.

The Capital Allowances Act 2001 (CAA 2001) sets out in Sections 21 and 22 that buildings and fixed structures are not plant. There are exceptions to this rule. An asset can be a building (including part of a building) or a fixed structure and still be plant if it is covered by Section 23 of CAA 2001. The gazebo would be covered by Section 23 if it were either a decorative asset provided for the enjoyment of customers, or it was a moveable building intended to be moved in the course of the taxpayer's business.

The facts of the case

The taxpayer, Mrs. Andrew, purchased a wooden gazebo in August 2008 and had it placed in the garden of her country pub in West Sussex. The gazebo was purchased to provide cover for customers who smoked and who, as a result of the smoking ban, could not smoke inside the pub. It was not limited to use by smokers and could be used by any customer, just like one of the garden bench tables.

The gazebo had a regular polygonal plan, with a wooden floor and walls up to the height of about three feet. Above the walls was crosshatched wooden lattice that extended up to the wooden roof. The gaps in the lattice work were not filled in and the wind and rain could pass through. One side of the polygon was an open entrance and work, there was no door. Around the panelled sides of the gazebo was wooden seating. The gazebo was simply placed on the ground and held down by its own weight, rather than fixed in any way. It could be moved and it was accepted by the Tribunal that Mrs. Andrew was considering moving it.

The decision of the Tribunal

In reaching their decision, the Tribunal relied heavily on the dicta established in the case of *Wimpy -v- Warland* (1988) and particularly the way in which Hoffmann, J set out the business use test and the premises test. In order to be plant, the asset in question must play a role within the business being carried on, but if it is part of the premises in which the business is conducted, then it is not plant.

In addition, Lord Lowry in *IRC -v- Scottish & Newcastle Breweries Ltd.* (1982) distinguished something that was part of the "setting" of the business with something that was part of the premises in which the business was carried on. The Tribunal went on to state:

"What Lord Lowry does in his speech is to make clear that merely because an asset is part of the setting in which a trade is conducted, does not necessarily mean that it is part of the premises. Something that contributes to the setting can, but need not necessarily be, apparatus and therefore plant, but if it is part of the premises it will not be plant. Whether or not something contributes to the setting depends upon whether it is used in the particular trade of the taxpayer for a particular function in that trade."

The Tribunal then noted that the business of running a country pub involved not only the provision of food and drink, but also the provision of facilities for the customers to enjoy. Such facilities, if not part of the premises, will be plant. The distinction was then drawn between a polygonal bench surrounding a table and a fixed roof on pillars. The Tribunal had no doubt that the former would be plant and the latter would be premises. Whilst the gazebo had been added to the garden of the pub and the garden was part of the premises, the gazebo had retained a separate identity.

The Tribunal acknowledged that plant and setting are not mutually exclusive concepts, but that plant and premises are. Regarded as a whole, the Tribunal thought it more appropriate to call the gazebo apparatus, than to call it premises.

Having concluded that the gazebo was plant in accordance with case law, the Tribunal went on to consider whether statute law ruled it out from being plant because it was a building or a fixed structure. The Tribunal decided that the gazebo was neither a building, nor a fixed structure.

As the gazebo was not a building or a fixed structure, it was not necessary to consider whether it was one of the assets included in List C at CAA 2001, Section 23, to which Sections 21 and 22 do not apply. For the sake of completeness, the Tribunal went on to consider whether the gazebo was a decorative asset (item 14 of List C) or a movable building (item 21 of List C).

The Tribunal decided that the gazebo was not a decorative asset because its primary function was to provide seating and shelter, whereas visual amenity was a secondary consideration. The Tribunal also decided that if the gazebo

was a building, then it would be a movable building and there was at least the possibility of it being moved. If it was moved, then such movement would have been in the course of the qualifying activity.

Finally, the Tribunal reiterated that the gazebo was plant and that it was not a fixed structure or building. Because it was not a fixed structure or a building, it was not necessary for the gazebo to fall within List C in order to escape from the restrictions in Sections 21 or 22. The taxpayer, Mrs. Andrew, was therefore successful in her appeal and first year allowances were available.

Conclusions

This case emphasises the confusion that can arise between the concepts of "setting" and "premises." An asset can be plant and also form part of the setting in which the business is carried on, but plant cannot be part of the premises. Whilst the gazebo could be said to have a dual function, as apparatus used in the business and also as part of the setting in which customers sat to eat, drink, smoke or converse, it did not become part of the garden and was not, therefore, part of the premises.

It was contended by HM Revenue & Customs (HMRC) that the gazebo just provided shelter and was, therefore, part of the premises. As HMRC had acknowledged that the gazebo was movable, there was no argument put forward that it was a building. The best that counsel for HMRC could do was to argue that if the gazebo was a fixed structure it would not be a decorative asset.

The Tribunal agreed with HMRC that the gazebo was not a decorative asset and could find no evidence that it created ambience. The Tribunal gave far more credence to the argument for the taxpayer that the gazebo functioned in a similar manner to a movable piece of garden furniture. In the end, it was probably the fact that the gazebo was capable of being moved that was the deciding factor.

For further advice concerning any of the issues raised, please contact one of our key individuals detailed below, or alternatively call our helpline on 0800 526262. Information on other property tax related topics can also be found on our website at <http://bankingtaxfinance.davislangdon.com>.

London

Paul Farey
+44 (0)20 7061 7139
paul.farey@
davislangdon.com

Scotland

Michael Murray
+44 (0)131 550 9473
michael.murray@
davislangdon.com

North

Christine Weaver
+44 (0)161 819 7600
christine.weaver@
davislangdon.com

Midlands

Tim Beresford
+44 (0)121 710 1333
tim.beresford@
davislangdon.com

South

David Rees
+44 (0)23 8068 2801
david.rees@
davislangdon.com

Ireland

Lois Stirling
+44 (0)28 9024 9800
lois.stirling@
davislangdon.com

Program, Cost, Consultancy

<http://bankingtaxfinance.davislangdon.com>
www.davislangdon.com
www.aecom.com

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