

Trade manufacture



This is what ICTA 1988 defines trade as. By its very nature this is a vague description and it leaves it open for the courts and commissioners to decide on the merits of each case whether a certain income can be taken to be a trade. The case law only heightens this and in my opinion is highly unsatisfactory and there should be more clarity on what constitutes a trade. Whilst I accept that there must be some leeway given in respect to the individual facts of a case, the badges of trade and definition of a trade must be made clear for there to be any legal certainty a principle of utmost importance in large scale business transaction. Thankfully the courts and commissioners appear to be consistent in their judgments in their approach to the badges.

In respect to the case of *Marson v Marton* it was held that there was no trade as it was outside the taxpayer's typical transactions. (in this case a one off purchase and sale of land) I accept this as it follows the badges of trade to the letter and takes into account all aspects of the case. It's clear that the transaction was merely an investment and thus would not be taxable as a trade under ITTOIA (schedule D).

Later cases present more of a problem. In regards to *Ensign Tankers Ltd v Stokes*, it was held by the commissioners that there was not a trading transaction taking place. On appeal to the court of appeal this decision was turned around and a trading transaction was held to be taking place. This however only took into account the single transaction the allowance was being claimed on. Upon going to the House of Lords a different view was taken. They stated that the case dealt with tax avoidance and thus the entire set of transactions was looked at (Ramsey principle). They referred the case

back to the commissioners to look at the possibility of the single transaction being constituted to being a trade.

It's of my opinion that the original findings of the commissioners stand.

Whilst the money sought by Ensign Tankers Ltd in itself appears to meet the principles to be a trade, one cannot look only at the transaction leading to the allowance claim but must also look at all other transactions relating to the allowance claim. If this can be seen to be a blatant tax avoidance scheme the party seeking the allowance as a trade should not be allowed.

This follows the principles laid down as the circumstances responsible for realization of a trade were looked and weren't met. I agree with this as a matter of common sense and fairness. It was said in the arguments that even if the badges were met if there was no intention to trade on behalf of the parties then there could be no trade. A party involved in a tax avoidance scheme, thus having no real intent to trade, should not be allowed to benefit from supposedly being in a trading transaction. This is the view that was upheld.

Finally the case of Clarke v BT Pension Scheme Trustees must be looked at. This case and appeal was concerned with the taxation of pension schemes. It was held by the Commissioners that there was no trade. Whilst this was contested in the courts, ultimately in the Supreme Court of appeal the commissioners' decision was upheld. There was some ambiguity as to the approach taken to statutory interpretation it had no real effect on the decision and thus was not taken into account. It is upon this case that my

previous fears of uncertainty come into play. The commissioners and court both admit that the transactions look very much like a trade.

They happen regularly, for profit, the subject matter was of a monetary nature, they were extensive and very business like. The badges of trade therefore do appear to have been met. The commissioners however took the view that this was not a trade. They stated that you had to look at the nature of the transaction, the surrounding circumstances. Sometimes it was obvious as to whether there was a trade but often an area of no mans land existed (such as the current case), where it's left to the commissioners to decide. I find this unacceptable for legal certainty and this area should be made clearer. Thus the original finding of the commissioners was upheld as the mitigating circumstances must be looked at. I agree with the findings as whilst certain badges were met the reasons and intent of the parties had to be looked at.

In conclusion I find that the current case law is more than sufficient in establishing the rules laid down for finding liability for trading under ITTOIA 2005. Whilst there is still some uncertainty the courts are showing consistency by sticking to having to meet all the badges of trade. I still however state that there should be more certainty for large scale companies. Consistency in the courts is all well and good but is no substitute for legal certainty.