[2011] UKFTT 493 (TC)

TC01340

Appeal number TC/2010/06844

Appeal against a charge to capital gains tax on the sale by the Appellants of the painting Omai by Sir Joshua Reynolds which was owned by them and lent to the Castle Howard Company which displayed the painting – Appellants claimed that they were entitled to relief under Section 45 of the Capital Gains Act 1992 on the basis that the painting was plant in the hands of the Company and a wasting asset – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

THE EXECUTORS OF LORD HOWARD OF HENDERSKELFE (DECEASED)

Appellants

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
R.WATTS DAVIES F.C.I.P.D M.I.H

Sitting in public at 45 Bedford Square, London WC1 on 13 and 14 June 2010

Mr William Massey QC for the Appellant

Ms Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the Appellants against the amendment of the Appellants' trust & estate tax return for the tax year 5 April 2002 made by a closure notice issued by the HMRC dated 30 April 2010.

2. In the closure notice HMRC stated that their conclusions in making the amendment included that the gain accruing on the disposal by the Appellants of a painting entitled "Omai" by Sir Joshua Reynolds ("the Painting") was chargeable to capital gains tax.

3. The principal issue for determination in this appeal was whether the Appellants were entitled to relief under Section 45 Taxation of the Chargeable Gains Act 1992 ("TCGA 1992") in relation to the gain that accrued on the disposal of the Painting on the basis that the Painting was "plant" in relation to the Appellants and, therefore, a wasting asset.

4. If it is held that the Appellants are not entitled to relief under Section 45 TCGA 1992, there is a secondary issue as to the amount of the chargeable gain. The parties have agreed that the Tribunal does not need to determine the secondary issue at this stage of the proceedings. In the event that the parties cannot subsequently resolve the secondary issue they will seek to restore the hearing in order for the Tribunal to determine quantum.

5. Evidence was given by Mr Simon Howard, one of the executors of the estate.

Background and facts

6. Lord Howard died on 27 November 1984.

7. He resided until his death at Castle Howard ("the House") in North Yorkshire. The House has been owned by Castle Howard Estate Limited ("the Company") since 1950.

8. Since 1952, the Company's principal activity as stated in its accounts has been the carrying on of activities relating to land ownership. Specifically it has, inter alia, carried on the trade of opening the greater part of the House ("the Public Part") and the surrounding grounds, and the exhibiting of the works of art within the Public Part to members of the public, in consideration of admission fees ("the House-opening Trade").

9. The Public Part of the House is open all year round apart from certain off-season periods

10. Lord Howard owned a number of works of art. During his life Lord Howard permitted the Company to use a large number of these, including the Painting, for exhibition in the Public Part in the House-opening Trade. The agreement or arrangement was that the Company would bear the costs of the insurance, maintenance, restoration and security of the works exhibited.

11. During Lord Howard's lifetime there was no formal lease, hire or loan in relation to the use of the Painting by the Company. There was no provision for the Company to pay any hire or rental fee to Lord Howard.

12. This arrangement continued after Lord Howard's death between the Appellants and the Company in relation to the works of art previously owned by Lord Howard and exhibited by the Company.

13. HMRC were told that the Appellants considered that formal loan/hire/lease arrangements were unnecessary given that the directors of the Company and the executors of Lord Howard's Will (the Appellants) were the same individuals.

14. The Appellants continued the longstanding arrangement whereby the Company was responsible for the insurance, maintenance, restoration and security of the Painting.

15. The Painting was conditionally exempted from inheritance tax on the death of Lord Howard on the basis of certain undertakings. In the event that the Painting was sold the exemption would be lost. The undertaking meant that the Painting had to be kept in the UK and seen by the public.

16. The Painting was displayed by the Company throughout the Executors' period of ownership (November 1984 to November 2001) except for 3 periods totalling approximately 7 months in all when it was exhibited at three galleries in Paris, London and York respectively.

17. During the tax year 2001-02 the Executors sold the Painting at auction at Sotheby's on 29 November 2001 to an unconnected purchaser for a hammer price of £9.4 million from which commission and VAT totalling £220,900 was deducted.

18. The Appellants' trust & estate tax return for the tax year 5 April 2002 was submitted on 29 January 2003 and included the gain accruing on the disposal of the Painting as a chargeable gain.

19. By letter dated 10 June 2003 the Appellants sought to amend the return on the basis that the gain accruing on the sale of the Painting was exempt from capital gains tax by virtue of Section 45 of the TCGA as a gain accruing on the disposal of a tangible movable property which was "plant" and therefore, by virtue of Section 44(1)(c) of the TCGA, a wasting asset.

20. On 12 January 2004, HMRC opened an enquiry into the Appellants' trust & estate tax return. On 30 April 2010 after some lengthy correspondence HMRC issued a closure notice stating the conclusion that the gain accruing on the disposal of the Painting was a chargeable gain not exempted by Section 45 of the TCGA because the Painting was not "plant".

21. The Appellants appealed the closure notice on 28 May 2010. They also notified HMRC that they required a statutory review of the matter in question.

22. On 5 August 2010 the Reviewing Officer informed the Appellants of his conclusion which upheld the closure notice issued by HMRC on 30 April 2010 in full.

23. Mr Simon Howard gave evidence that the executors had power under the will to license the Company to use any of the chattels forming part of the estate. There was however no formal agreement.

24. A focal point of the rooms on display was the room in which the Painting was hung.

25. He was required to live at the House in order to look after it and he has a lease with the Company.

26. On cross examination he confirmed that given that the works of art were essential to the House-opening Trade. They were on a perpetual loan to the Company but there was nothing to stop the Appellants moving items away from the exhibits and they were at liberty to move them around from time to time. Items might be taken out of use and vice versa. This was arbitrary and there was nothing formal.

27. However Mr Howard said that in order to justify the admission fees the items were vital to the House-opening Trade. If you took away the number of visitors who came to see the works of art the Company would no longer have a viable business.

28. He believed that the reasons why members of the public visited the House were to appreciate its architectural qualities, to admire its historic contents, and to understand the range of historical narratives underpinning the history of the house. He believed that the art collections at the House were and had been, in his experience, central to bringing to life the house and the history surrounding it in the eyes of its visitors and for that reason proved a very considerable draw to the visiting public.

29. The Painting was sold because he needed the money for his divorce settlement. The proceeds went into the estate. There was no benefit to the Company and the proceeds were split equally between the beneficiaries.

The Legislation

30. Section 45(1) of the Taxation of Capital Gains Act 1992 ("TCGA") relevant to the 2001/02 tax year states:

> (1) Subject to the provisions of this section, no chargeable gain shall accrue on the disposal of, or of an interest in, an asset which is tangible movable property and which is a wasting asset.
>
> (2) Subsection (1) above shall not apply to a disposal of, or of an interest in, an asset—
>
> (*a*) if, from the beginning of the period of ownership of the person making the disposal to the time when the disposal is made, the asset has been used and used solely for the purposes of a trade, profession or vocation and if that person has claimed or could have claimed any capital allowance in respect of any expenditure attributable to the asset or interest under paragraph (*a*) or paragraph (*b*) of section 38(1); or

(*b*) if the person making the disposal has incurred any expenditure on the asset or interest which has otherwise qualified in full for any capital allowance.

(3) In the case of the disposal of, or of an interest in, an asset which, in the period of ownership of the person making the disposal, has been used partly for the purposes of a trade, profession or vocation and partly for other purposes, or has been used for the purposes of a trade, profession or vocation for part of that period, or which has otherwise qualified in part only for capital allowances—

(*a*) the consideration for the disposal, and any expenditure attributable to the asset or interest by virtue of section 38(1)(*a*) and (*b*), shall be apportioned by reference to the extent to which that expenditure qualified for capital allowances, and

(*b*) the computation of the gain shall be made separately in relation to the apportioned parts of the expenditure and consideration, and

(*c*) subsection (1) above shall not apply to any gain accruing by reference to the computation in relation to the part of the consideration apportioned to use for the purposes of the trade, profession or vocation, or to the expenditure qualifying for capital allowances".

31. Section 44 of the TCGA defines a wasting asset as :

(1) In this Chapter "wasting asset" means an asset with a predictable life not exceeding 50 years but so that—

(a) freehold land shall not be a wasting asset whatever its nature, and whatever the nature of the buildings or works on it;

(b) life", in relation to any tangible movable property, means useful life, having regard to the purpose for which the tangible assets were acquired or provided by the person making the disposal;

(c) plant and machinery shall in every case be regarded as having a predictable life of less than 50 years, and in estimating that life it shall be assumed that its life will end when it is finally put out of use as being unfit for further use, and that it is going to be used in the normal manner and to the normal extent and is going to be so used throughout its life as so estimated;

(d) a life interest in settled property shall not be a wasting asset until the predictable expectation of life of the life tenant is 50 years or less, and the predictable life of life interests in settled property and of annuities shall be ascertained from actuarial tables approved by the Board.

(2) In this Chapter "the residual or scrap value", in relation to a wasting asset, means the predictable value, if any, which the wasting asset will have at the end of its predictable life as estimated in accordance with this section.

(3) The question what is the predictable life of an asset, and the question what is its predictable residual or scrap value at the end of that life, if any, shall, so far as those questions are not immediately answered by the nature of the asset, be taken, in relation to any disposal of the asset, as they were known or ascertainable at the time when the asset was acquired or provided by the person making the disposal."

32. Section 15 TCGA states

(1)The amount of the gains accruing on the disposal of assets shall be computed in accordance with this Part, subject to the other provisions of this Act.

(2)Every gain shall, except as otherwise expressly provided, be a chargeable gain."

Appellant's Submissions

33. Mr Massey submitted that the Painting was a significant asset in the hands of the Company's House-opening Trade. Sotheby's record that the Painting was "exhibited at the Royal Academy in 1776 to great acclaim" and that Reynolds exhibited 12 other portraits that year, "being at the height of his powers at this period, responding to the arrival in London two years earlier of Thomas Gainsborough. Sotheby's go on to state: "Omai has always been considered to be one Reynolds's greatest works."

34. Mr Massey submitted on behalf of the Appellants that it was common ground that the Painting had, in fact, a predictable life of more than 50 years. However if it was "plant" in the context of the statutory expression "plant and machinery", it would be regarded for CGT purposes by Section.44 (1)(c) TCGA as having a predictable life of less than 50 years, and therefore as being a wasting asset.

35. He submitted that Sections 45 (2) and (3) TCGA, where they apply, had the effect of removing (Section 45 (2)) or restricting (Section 45 (3)) the exemption under Section 45 (1), in circumstances where capital allowances were available in whole or in part to the disponor on any expenditure attributable to the asset under s.38 (1)(a) or (b) TCGA. These sub-sections were not in issue. Capital allowances were never available in principle to the Appellants.

36. Mr. Massey submitted that there was no statutory definition of the phrase "plant and machinery" for the purposes of Section 44 (1)(c)TCGA. There was equally no statutory definition of the phrase in other taxing statutes. He said that the Capital Allowances Act 1990 was amended by s.117 Finance Act 1994 by the inclusion of a Schedule AA1 to the Capital Allowances Act 1990 which qualified the availability of capital allowances in relation to plant and machinery incorporated into buildings but this had no effect for other statutes.

37. He contended that the meaning of the word "plant" in the context of the phrase "plant and machinery" had been considered extensively by the courts in other tax contexts, particularly the statutes relating to capital allowances, where again the word "plant" in the wider phrase "plant and machinery" was not statutorily defined.

38. The Appellants submitted that on the facts the Painting functioned as, and therefore was "plant" in the context of the phrase "plant and machinery" in s.44 (1)(c) TCGA 1992, as that word has been interpreted by the courts and tribunals in previous cases.

39. Mr Massey contended that the two issues were whether the Painting functioned as "plant" at all in the trade of the Company and; was it necessary, as contended by HMRC, in order for an item to be "plant" in the phrase "plant and machinery" within Section 44 (1)(c) TCGA to which the exemption under s.45 TCGA applied, for the trade, in which the item is used, to be owned or carried on by the owner of the item, or was it sufficient, as contended by the Appellants, that the item functioned as plant in a trade, in this instance the House-opening Trade carried on by the Company.

40. The function of the Painting and indeed of the other exhibits in the Public Part of the House was to attract visitors to the House in order to produce trading income for the Company from the House-opening Trade.

41. As to the use to which the works of art were put, the Appellants relied, inter alia, on the copies of the Guide Books to the House (1958 edition), (1972 edition), (1988 edition), and (1997 edition)) and the evidence from Mr. Simon Howard, one of the executors and the chairman of the Company, which demonstrated the function of the works of art on display, both those owned by the Company, and those licensed to the Company by the executors, including the Painting.

42. He submitted that plant in its ordinary sense included whatever apparatus was used by a businessman for carrying on his business, not his stock in trade, but all goods and chattels, fixed or moveable, live or dead, which he kept for permanent employment in his business.

43. Mr. Massey cited the case of *Yarmouth v France* (1887) 19 QBD 647 in which it was decided that a horse could be considered a workman's "plant" within Section 1(1) of the Employers' Liability Act 1880.

44. He submitted that the House-opening Trade could not have functioned without the art. If instead of inheriting the art the Appellants had bought art in the market in 1984 and hired it to the Company for use in its trade then he submitted that this would have satisfied the plant test. The works of art exhibited in the public area of Castle Howard, including the Painting, were clearly chattels used by the Company for the purpose of the House-opening Trade.

45. The item need not be essential to the business in order to be plant. It was enough that the item is used for carrying on the business. He submitted that in *Yarmouth v France* the statement made by Lord Esher MR clearly implied that other items less material, but nevertheless used for the purposes of the business, were still part of the plant:

> "Horses and carts, wagons and drays" seem to me the most material part of the plant: they are the materials or instruments which the employer must use for the purpose of carrying on his business"

46. Mr. Massey submitted that in order to determine whether or not an item is plant, it is necessary first to determine the nature of the business and thereby to assess the role that the asset plays within it and he cited *Andrew v RCC* [2011] SFTD.

47. He contended that the trade here was that of opening the Public Part and the surrounding grounds, and the exhibiting of the works of art within the Public Part to members of the public, in consideration of admission fees.

48. The works of art were items used in that trade. Without such items, the trade could not have functioned.

49. Mr. Massey cited the case of *IRC v Scottish & Newcastle Breweries Ltd* 55 TC 252. There the primary purpose of the taxpayer was to provide hotel accommodation, a part of which, on the facts found, involved the provision of ambience or atmosphere. In that context the items were held to have the function of providing or contributing to that ambience or atmosphere.

50. The House-opening Trade carried on by the Company involved the display of the House and the display of the historic works of art within it for the viewing, enjoyment and appreciation of the paying visitors.

51. Mr. Massey said that HMRC had contended that the Painting should be denied the status of plant on the ground that, even it was plant "in the hands of the Company", that was not determinative of the character of the Painting in the Appellants' hands.

52. The Appellants submitted however that an item which functioned as plant in the context of the phrase "plant and machinery" in Section 44 (1)(c) TCGA is "plant", whether or not it belongs to the trader himself or alternatively to the person who makes it available to the trader for use in his trade.

53. Mr. Massey submitted that to restrict the phrase "plant and machinery" to "plant which is used in a trade of the disponor and machinery" is to put a non-statutory gloss on the unqualified words of Section 44(1)(c).He said that Section 44 (1)(c) imposed no such restriction.

54. He submitted that there was no policy reason to infer such a restriction. To do so would result in an illogical distinction in CGT treatment between "plant" and "machinery" in the phrase "plant and machinery" for which there is no justification. For an item to qualify as "machinery" in the context of Section 44 (1)(c), the item clearly need not function as machinery which is used in a trade of the disponor.

55. If machinery is used by the disponor's family company in the course of that company's business, it is clearly machinery nonetheless and eligible for exemption. For example, a motor-boat owned by the shareholder but licensed to the company and used in the company's business would be "machinery" within the meaning of the phrase "plant and machinery" even though not used as such by the owner, and would undoubtedly be exempt under Section 45(1) TCGA.

56. There is no policy reason to treat "plant" in that phrase any differently. Just as an item which functions as machinery is machinery in the context of the phrase "plant and machinery", regardless of whether or not it functions as such in the trade of the disponor, there is no reason to construe "plant" in the context of the phrase "plant and machinery" any differently, and to impose a non-statutory restriction to require it to function as plant in the trade of the disponor.

57. Mr. Massey submitted that it would be odd if, in the above example, the gain on disposal of the motor-boat owned by a shareholder and licensed to the company and used in its trade was exempt as "plant and machinery" but the gain on disposal of the

sailing ship (or other non-mechanical item) similarly licensed and used was not exempt.

58. He submitted that the case of *Macsaga Investment Co. Ltd v Lupton* (1967) 44 TC 659 illustrated the point, in the context of a case where the taxpayer company claimed allowances under s. 298 Income Tax Act 1952 on capital expenditure incurred by it on the installation of items of equipment into a building leased by the Appellant and sub-let by it to the Ministry of Works. Neither the lessor taxpayer nor the lessee Ministry carried on a trade. He said that the Court of Appeal were clear that the term "plant" in the expression "machinery or plant" was apt to mean items used in a trade, not necessarily the trade carried on by the owner of the "machinery or plant".

59. He said that his submissions all tended to support the Appellants' proposition that items will be "plant and machinery" or "machinery or plant" if their function is to be used as such in a trade, and that the items will be "plant and machinery" whether testing the tax position of the owner, or testing the tax position of the trader in whose trade the items are used.

HMRC's Submissions

60. Ms Nathan submitted that there was a charge to capital gains tax on any capital gain made by the person who disposed of an asset. The Painting was an asset and therefore the gain should be charged to tax.

61. This basic proposition was however modified if the asset was a wasting asset. A wasting asset was defined as an asset with a predictable life not exceeding fifty years but Section 44(1)(c) provided that plant and machinery was always treated as having a predictable life of less than fifty years.

62. She accepted that if the Painting was plant then its sale was exempt for the purposes of capital gains tax.

63. HMRC did not accept that "the Painting would be "plant" if owned by the Company" or that a painting on display in a house open to the paying public was "plant".

64. HMRC questioned whether the Painting was a business asset of the Company. The Painting remained in private ownership throughout the relevant period, so that it never became a business asset of the Company's House opening Trade.

65. HMRC also questioned whether, even assuming that the Painting were to be owned by and placed on display by the Company, it was appropriate to regard the Painting as "plant".

66. Ms Nathan contended that just because the asset could be a wasting asset it did not mean that it was so in the hands of someone other than its owner. The starting point was whether the Painting was a wasting asset in the hands of the person disposing of it.

67. Ms Nathan cited the case of *Munby v Furlong* 50 TC 491 for HMRC. The case concerned the question of whether the legal books of a barrister constituted plant. The Court of Appeal held that they did. Lord Denning MR stated at p 503:

> "the statements by the majority of the House of Lords in the dry dock case of *Commissioners of Inland Revenue v Barclay, Curle & Co. Ltd.* 45 TC 221, show quite conclusively that in this Taxing Statute the Courts do not apply the meaning to the word "plant" as the ordinary Englishman understands it. It has acquired by the course of decisions a special meaning in tax cases. It has acquired a special meaning, it seems to me, in the interests of fairness, that "plant" extends virtually to a man's tools of trade - that is the phrase which Cross J. used. It extends to the things which he uses day by day in the exercise of his profession. Mr. Medd, in his excellent argument before us, would confine a professional man's "plant" to things used physically like a dentist's chair or an architect's table, or, I suppose, the typewriter in a barrister's chambers, but, for myself, I do not think "plant" should be confined to things which are used physically. It seems to me that on principle it extends to the intellectual storehouse which a barrister or a solicitor or any other professional man has in the course of carrying on his profession. The difficulty has arisen because the Legislature, when it extended this provision to professions, did not make clear the scope of the word "plant" in that context. It seems to me, in the context of a profession, the provision of "plant" should be so interpreted that a lawyer's books - his set of law reports and his textbooks - are "plant"."

68. Further she cited the case of *IRC v Barclay, Curle & Co Ltd* 45 TC 221 in which the House of Lords needed to consider whether a shipbuilding dry dock was "plant" for capital allowances purposes. Lord Guest stated at page 244

> "To qualify for the allowance of three-tenths under Chapter II the expenditure must be incurred on the provision of plant. There is no definition of the word "plant" in the Act. The *locus classicus* for the definition of "plant" is in the words of Lindley L.J. in *Yarmouth v France* (1887) 19 Q.B.D. 647, at page 658:
>
> > ". in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business".
>
> This definition has been accepted as accurate for income tax purposes as recently as 1959 by Lord Reid in *Hinton v Maden & Ireland Ltd*. 38 TC 391. In *Yarmouth v France* it was held that a horse was "plant" in a question under the Employers' Liability Act 1880. It has been suggested that for that reason the definition is not apposite when considering "plant" in its present context. But without attempting to elaborate the definition it appears to me satisfactory. The emphasis is on "an apparatus used for carrying on business". I agree that in that case there was no contradistinction between a structure and plant, as in Part X of the Income Tax Act 1952. But the question under Part X of the Act is not whether it is a structure or plant. It may be both. Section 276 makes it plain that

> Chapters I and II are not mutually exclusive. The question, therefore, is whether, notwithstanding that it may be also a structure, the dry dock is "plant" within the terms of s. 279. The conjunction of "machinery" and "plant" suggests to me that they both must perform some active function. In order to decide whether a particular subject is an "apparatus" it seems obvious that an inquiry has to be made as to what operation it performs."

69. She submitted that in *CIR v Scottish & Newcastle Breweries* 55 TC 252 the House of Lords applied the principles enunciated in *Yarmouth v France* when seeking to determine whether items of decor in hotels and licensed premises were "plant". In holding that such items were "plant", the Lord Wilberforce in the House of Lords made the following observation:

> In the end each case must be resolved, in my opinion, by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade. I do not think that the courts should shrink, as a backstop, from asking whether it can really be supposed that Parliament desired to encourage a particular expenditure out of, in effect, taxpayers' money, and perhaps ultimately, in extreme cases, to say that this is too much to stomach. It seems to me, on the Commissioners' findings, which are clear and emphatic, that the Respondents' trade includes, and is intended to be furthered by, the provision of what may be called "atmosphere" or '"ambience", which (rightly or wrongly) they think may attract customers... The amenities and decoration in such a case as the present are not, by contrast with *Lyons* case, the setting in which the trader carries on his business, but the setting which he offers to his customers for them to resort to and enjoy...[the items claimed] can be regarded as apparatus of the trade and so as plant."

And Lord Lowry quoted with approval Lord Cameron's speech in the Court of Sessions:

> "In my opinion the Commissioners have not been shown to have misdirected themselves nor `is the conclusion at which they arrived in any sense unreasonable. The problem which the Commissioners were called upon to solve was one concerned with a 'service industry': I think this factor is important, because the question of what is properly to be regarded as 'plant' can only be answered in the context of the particular industry concerned and possibly, in light also of the particular circumstances of the individual taxpayers' own trade... I think that much difficulty is caused by seeking to place limitative interpretations on the simple word 'plant': I do not think that the classic definition propounded in *Yarmouth v France* suggests that it is a word which is other than of comprehensive meaning - 'whatever apparatus is used by a business man for carrying on his business' - whatever the business may be... It is difficult to see that the provision of conditions of comfort or even luxury lies outside the legitimate operations of an hotel keeper or by consequence that he should not be entitled in his business to make use of articles designed to subserve that purpose... To do this may, in one sense of the word, no doubt be regarded as providing or enhancing the

> 'setting' in which the services are themselves provided - but at the same time the 'setting' (as opposed to the structure or place within which the businessman conducts his business)... is something the use of which is itself one of the services which the hotel owner makes available to his customer. I do not think that the fact that certain objects of furnishing or even of decorative quality alone can be characterised as serving only an amenity purpose is in any way to be regarded as a prima facie ground for rejecting a claim to have expenditure on them held to be expenditure on plant."

Lord Lowry also quoted from the speech of Lord Stott in the Court of Sessions

> "In the present case the fallacy in the Crown's contention, as it seems to me, comes from a failure to recognise the true character of a hotelier's trade. The chair and table which provide the bodily comfort of the guests, and the lighting and decor which provide for his visual or mental enjoyment, are alike material by the use of which the hotelier may provide the service which it is part of his function to provide, and accordingly in my opinion may alike be held to fall within the definition of "plant" as the word has been construed in the relevant authorities."

70. She submitted therefore that the courts have consistently, therefore, taken into account the function performed by a particular item in determining whether that item is "plant" in relation to a particular taxpayer.

71. HMRC submitted that the Appellants were not entitled to the capital gains tax exemption given by Section 45(1) TCGA 1992 because the Painting disposed of by the Appellants was not "plant" in their hands and consequently not a "wasting asset". It was common ground that the Painting was an asset and a chattel.

72. However, HMRC submitted that that not every asset which is a chattel is "plant". For example, a horse could be an asset bought for the purposes of pleasure or it may, as in *Yarmouth v France,* be apparatus used in the carrying on of the business.

73. Ms Nathan submitted further that a chattel was not automatically "plant" from the moment that it was created nor was its character immutable. For example, the items of decor that qualified as "plant" in *CIR v Scottish & Newcastle Breweries* were stock in trade in the hands of the persons supplying them to the taxpayer but were "plant" in the taxpayer's hands.

74. She submitted that the Appellants' approach of creating a two limbed test was misguided and unsupported by authority. The cases indicated that the concept of "plant" does not exist in a vacuum. Instead, what is required when determining whether an asset is "plant", is to consider the factual context and the use to which the purported "plant" as per Lord Guest in *IRC v Barclay, Curle & Co Ltd.*

75. By way of illustration, legal books which could be regarded simply as investments (of a collector) or as stock in trade (of a bookseller) were regarded in *Munby v Furlong* as "plant" in the hands of a barrister because in his hands the books were the apparatus with which he carried on his profession.

76. Further HMRC submitted that the character of the Painting when employed in the trade of the Company was not conclusive of the character of the Painting in the Appellants' hands. In other words, it may be the case that the Painting was apparatus with which the Company conducts its trade, so that the Painting is fulfilling the function of "plant" in relation to the Company. However, whether the Painting is "plant" in relation to the Appellants must be determined by looking at the use to which the Painting is put by the Appellants.

77. HMRC submitted that the judicial approach to determining the meaning of "plant" is to consider what "plant" means "in its ordinary sense" (per Lindley LJ in *Yarmouth v France* at p 658) and then to see if it bears any other meaning in the context of the specific statutory provision that the courts are considering.

78. Ms Nathan submitted that following that approach the courts have determined that plant is something used in the trade of the person who claims that the asset is plant.

79. She submitted that held in the private hands of the Appellants the Painting was an asset. The Appellants could not therefore get the exemption because the Painting was not plant in their hands.

80. She contended that a chattel did not automatically become plant on its creation; it remained a chattel until used in a certain way that caused it to be treated as plant. Even if a chattel was plant in relation to one person it did not become plant in someone else's hands.

81. Ms Nathan contended that in considering whether a chattel can be considered plant it is necessary to consider the factual context and the use to which it is put.

82. It was necessary to consider whether the taxpayer was in business and if so what business and what services were provided as part of that business.

83. It was necessary to consider to what use the chattel was put in the business and whether it was used with a degree of permanence or could be taken away at any time as the Painting was when put on exhibition and eventually sold.

84. Plant was any asset which acquired its colour from the context in which it was used. A horse for instance might be a horse dealer's stock but plant in the hands of a riding school and an investment in the hands of a race horse owner.

85. Ms Nathan contended that the cases showed that the courts constantly looked at the use to which the asset was put in the hands of the owner and unless it was exempt in the owner's hands it was chargeable when the owner disposed of it.

86. In the case of *Stokes(H.M.Inspector of Taxes) v Costain Property Investments Ltd* which was an appeal against a decision that the taxpayer was not entitled to capital allowances Fox L.J. said that

> "Put very shortly, the issue arises in this way. The allowances are not available if the plant and machinery did not belong to the taxpayer at the relevant time. At that time the plant and machinery were landlord's fixtures in buildings leased to the taxpayer on long leases. The question is whether it can be said that the items did "belong to the taxpayer at the time.
>
> The only ground for saying that it did is that the taxpayer held a lease of the property…….I do not think that it is an apt use of language to say that landlord's fixtures belong to the leaseholder. He cannot remove them from the building. He cannot dispose of them…."

87. HMRC submitted that *Stokes v Costain* and *Melluish v BMI (No3) Ltd* did not assist the Appellants. In those cases it was accepted by the parties that the requirements of s41(1)(a) Finance Act 1971 and s44(1)(a) (respectively) were met: on the facts the taxpayer companies had incurred capital expenditure on the provision of machinery or plant for the purposes of their respective trade or business. Those cases, therefore, do not provide any useful guidance on the meaning of "plant" or the principles to be applied in determining whether a particular asset is "plant".

88. Ms Nathan distinguished the case of *Macsaga Investment Co. Ltd v Lupton* which had been referred to by the Appellants on the basis that the case involved machinery. She said that"machinery" however is easily recognised and has an intrinsic character and quality that identifies it. "Plant" has no such innate quality: it is merely an asset that is put to a particular use in a particular context and acquires its colour from the context in which it is used.

89. Ms Nathan questioned the business of the Company. Was it displaying pieces of art or displaying the House or displaying the history, wealth and position of the Howard family through the ages? HMRC contended that it was the latter and the objects of art were part of the setting rather than having any functional use. The art embellished the House and hence the Painting did not serve a particular business purpose.

90. She submitted that on looking at the visitor numbers to the House the sale of the Painting had not resulted in any falling away of visitors to the House and therefore in any event it was not essential to the Company's business.

91. Although the Appellants had contended that lessors could get capital allowances even although they were not owners of the assets, in all those cases the owner of the asset was using it for a business purpose, that is the leasing of the asset.

92. None of the cases referred to by the Appellants had provided any authority for the proposition that a privately owned asset, not used as a business asset by the owner could qualify as plant purely because it was loaned on an informal basis for no charge to a trader.

93. The Appellants were not engaged in any business activity in relation to the Painting and so it was not apparatus used in the business of its owner.

94. The proposition that a privately owned asset not used as a business asset by the owner could qualify as plant purely because it was loaned on an informal basis for no charge to a trader would open up substantial tax avoidance possibilities. The owner of an asset would just need a third party to use a valuable asset in their business and then could rely on that third party's exemption when he decided to sell the asset. It could certainly, Ms Nathan submitted, not have been Parliaments' intention for the provision to be used in this way.

95. The Painting was an asset; certainly not the type of item intended to be a wasting asset. Rather it was an investment. The Appellants did not carry on a business and when the family needed funds the Painting was reclaimed by them.

Findings

96. We find that whilst the Painting owned by the Appellants and loaned to the Company was no doubt greatly admired by the visitors its sale did not cause any reduction in the visitor numbers. In fact visitor numbers went up by ten per cent from 2001 when the painting was sold.

97. We find that the Painting was loaned to the Company on an informal basis and could be removed by the Appellants at any time. It lacked therefore any degree of permanence with the Company as described by Lord Reid in the case of *Hinton (Inspector of Taxes) v Maden and Ireland Ltd* [1959] 1 W.L.R.

98. We considered Mr Massey's example at paragraph 44 above but the painting was not hired to the Company. Its use by the Company was on an informal basis.

99. We find no reason to describe it as a wasting asset in the hands of the Appellants. We find that the Appellant executors did not have a business and in order to be "plant" and fall within the exemption provided by Section 44 (1)(c) TCGA it is necessary for the asset to be owned by the business or at the very least leased formally to it.

100. We find no reason for the Painting to be capital gains tax exempt in the Appellant's hands just because it might have a different character in someone else's hands. As stated by Vinelott J in the case of *Melluish (HM Inspector of Taxes*) v BMI (No 3) Ltd and Others:

> "It is not in question that the taxpayers are all persons carrying on a trade and that they incurred capital expenditure on the provisions of plant for the purpose of that trade. The only question is whether in consequence of the incurring of that expenditure the plant could be said to belong or have belonged to them".

101. We find Mr Massey's submission that there was no policy reason to restrict the phrase "plant and machinery" found in Section 44(1)(c) to "plant which is used in the trade of the disponor and machinery" to be difficult to accept on the basis that not to do so would open up all sorts of tax avoidance possibilities as described at paragraph 94 above.

102. As submitted by Ms Nathan machinery is easily recognised and has an intrinsic character and quality that identifies it. However, "plant" has no such innate quality: it is merely an asset that is put to a particular use in a particular context and acquires its colour from the context in which it is used.

Decision

103. The appeal is dismissed.

104. 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.

TRIBUNAL JUDGE
RELEASE DATE: 22 July 2011