[2016] UKFTT 614 (TC)

TC05350

Appeal number: TC/2015/06419

INCOME TAX – capital allowances – caravans required by the appellant's employer to be provided by the appellant to enable him to carry out the duties of his employment as assistant warden of caravan sites – whether the caravans were 'plant' – held no, applying the functional test in* Benson v The Yard Arm Club Ltd *– whether the caravans were necessarily provided for use in the performance of the duties of the employment – held yes, because the duties could not realistically be performed unless a caravan was provided – whether allowances in respect of expenditure on the caravans was excluded by ss 21 or 22 CAA 2001 – held no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL TELFER **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
MS ELIZABETH POLLARD

Sitting in public at Darlington on 19 May 2016

The Appellant in person

Mr A D Burke, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Paul Telfer, appeals against amendments to his self-assessments for the years ended 5 April 2011 and 5 April 2012 contained in closure notices issued by the Respondents ("HMRC") on 4 September 2015. The amendment for the year ended 5 April 2011 ("2010/11") refuses capital allowances of £1,603.20 claimed by Mr Telfer for that year, and the amendment for the year ended 5 April 2012 ("2011/12") refuses capital allowances of £1,650.00 claimed by Mr Telfer for that year.

2. The issue arising in the appeal is whether the expenditure incurred by Mr Telfer on acquiring a caravan qualifies for capital allowances under Part 2 of the Capital Allowances Act 2001 ("CAA") – plant and machinery allowances. During the course of the hearing the parties asked us to give a decision in principle only, and leave them to work out the details of how our decision should be applied.

3. Mr Telfer gave evidence and Mr Burke, for HMRC, although he had the opportunity to do so, declined to cross-examine him. On the basis of Mr Telfer's evidence and the documents before us, we find the following facts.

The facts

4. Following a series of employment contracts with the Camping and Caravanning Club in 2007 and 2008, Mr Telfer was employed by the Caravan Club Limited ('the Caravan Club') as an assistant warden. Mr Telfer and his wife are both employed and they work together. The employments with the Caravan Club started on 21 March 2009. Mr and Mrs Telfer were assistant wardens at the Club's Grange-over-Sands site under contracts which ran from 21 March to 9 November 2009.

5. On 4 March 2010 he purchased a Lunar Delta caravan from Catterick Caravans, Catterick at a cost of £21,840. The caravan which he had owned beforehand was part-exchanged. He worked for the Caravan Club, presumably with Mrs Telfer, at the Beechwood Grange site, York from 13 March 2010 until 24 May 2010.

6. On 25 April 2011 until 4 November 2011 Mr Telfer worked for the Caravan Club at the Southland site on the Isle of Wight.

7. On 30 November 2011, Mr Telfer purchased a Bailey Unicorn Barcelona caravan from Chichester Caravans, Bromsgrove at a cost of £19,800. He part exchanged the Lunar Delta caravan, which had a number of defects which had arisen as a result of heavy usage.

8. On 14 March 2012, Mr Telfer worked for the Caravan Club at the Tewkesbury Abbey site. His contract ran until 9 November 2012, but by 2 July 2012 he had moved sites and was working at the Broadway site in Worcestershire.

9. Each of these engagements took place under a separate contract.

10. Although we were not shown complete copies of the contracts, we were shown a document issued by the Caravan Club entitled 'Assistant Warden Introduction' (the 'AWI') and an extract from the 'Terms and Conditions of Employment for Site Staff' (the 'Ts & Cs'), in particular clause 9, which deals with 'Living Accommodation'. Mr Telfer also provided us with more relevant details of the terms of employment.

11. From the AWI it is clear that the Caravan Club recruits from its 'membership base' – that is, from caravan users – it is a requirement that someone wishing to become an Assistant Warden must have been a member of the Caravan Club for at least one year and to have used the Club's 'Site Network' during this time.

12. It is stated in the AWI:

> 'Due to the nature of the role [of Assistant Warden], including working hours and the need to work in different locations, we do not accept applications from individuals with a requirement for dependants to live on site. The role requires you to live on site in your own outfit although there are a few sites where accommodation is provided. On the majority of sites, you will have the use of a private bathroom and shared laundry facilities with other site employees.
>
> Initial contracts for Assistant Wardens are usually offered to commence training and employment at the state of the Season, in March of each year …
>
> …
>
> Working hours are generally between 38 and 46 hours per week rostered over a 6 day period. Due to the seasonal nature of the Site Network, holiday entitlement is typically taken at the end of the contract period.'

13. Clause 9 of the Ts & Cs (Living Accommodation) states as follows:

> '9.1 It is a requirement that all Wardens reside on Site throughout the duration of their Agreement.
>
> Wardens will normally live on Site in their own caravan/motor home on a pitch provided for them. Living conditions vary from one Site to another, particularly among sites not owned or leased by the Club. The general aim is to provide a shower/WC room for the exclusive use of each Warden couple (this being available for use by both Warden and Assistants where separate facilities have not yet been provided) and, where appropriate, to provide a washing machine also for their use. In addition each Warden/Assistant will be provided with refrigeration and freezing facilities for their own use. Wherever possible it is aimed to provide a garage for both Wardens and for Assistants when carrying out a full Season, but this cannot be guaranteed.
>
> 9.2 On a limited number of Sites, living accommodation is made available for the use of Wardens during certain periods of the Season. However, occupation of that accommodation is at the Club's sole discretion and vacant possession must be given if required, upon termination of the Assignment, when Wardens

are appointed to another Site, or when Wardens leave the Club's employment (for any reason) or where Wardens are unable to perform their duties for whatever reason. It is a requirement of entering into this Agreement that, in addition to any accommodation you may have on Site, you also have a permanent home or have the means to purchase/rent accommodation and/or a caravan should The Club require you to move to a Site without such accommodation, either during a Season or for subsequent Seasons. In signing the Acknowledgement at the end of your Offer of Assignment, you jointly signify that assurance.'

14. The start date, end date and number of working hours are communicated to Mr Telfer by the Caravan Club by email. Whatever the number of working hours, an Assistant Warden is required to maintain a presence on the Site to which he/she is assigned. That means they must have accommodation on the Site 24 hours a day. Sometimes, as indicated by Clause 9.2 of the Ts & Cs, this is living accommodation made available by the Caravan Club (though this appears to be available only to Wardens and not to Assistant Wardens) – otherwise 'the role requires [the Assistant Warden] to live on site in your own outfit' (as per the AWI). Mr and Mrs Telfer have used living accommodation provided by the Caravan Club at a couple of sites (in Edinburgh and Hertfordshire) but this was in 2013, outside the period with which this appeal is concerned.

15. Sites vary in size. The larger sites have more than 250 pitches. On such sites there might be 3 or 4 couples working as wardens or assistant wardens. Other smaller sites, with, say, 50 to 60 pitches, have only one couple working as wardens or assistant wardens. In all cases a warden or assistant warden is on call 24 hours a day. Although the office hours (when the site office is open) are generally 8:30 a.m. to 6:00 p.m., there is a doorbell which can be rung by site users for out-of-office-hours contact with the warden or assistant warden. This doorbell can be used up to 8:00 p.m. for enquiries and after that time for emergencies – such as the need to call an ambulance. On bigger sites warden or assistant warden couples take turns in being on call out of office hours. Every warden or assistant warden couple is obliged to be on call out of office hours at some time – in smaller sites where there is only one such couple, the duty to be on call pit of office hours applies all the time.

16. As indicated in Clause 9.2 of the Ts & Cs, assistant wardens must be ready to be moved to another site at the Caravan Club's discretion part way through a season. We were also told that it was very rare that a warden or assistant warden couple would be assigned to the same site for two seasons in a row, and it was the Caravan Club's policy to move such couples to different sites – as had happened in Mr and Mrs Telfer's case.

17. A caravan is therefore needed by wardens and assistant wardens to fulfil the duties of their employment with the Caravan Club (at any rate in most cases where living accommodation is not provided in accordance with Clause 9.2 of the Ts & Cs). The caravan is sited on a gravelled area in the site, where there is a power point.

18. During office hours, the duties of an assistant warden include meeting and greeting customers arriving at the site, dealing with telephone and internet enquiries and administrative matters, including those involving health and safety. The assistant warden is the first point of contact for making enquiries. Usually one member of the assistant warden couple is in the office during office hours, and the other member is outside, dealing with ground maintenance, hedging, collecting rubbish and other maintenance.

19. The Caravan Club awards both Summer and Winter Contracts. Summer Contracts run from March to November, and Winter Contracts run from September to March. As indicated above, Mr and Mrs Telfer originally took only Summer Contracts. However, later they took Winter Contracts as well. Winter Contracts (only on those sites which remain open during the winter – many do not) always require wardens and assistant wardens to move to another site from the site where they were stationed for the previous Summer Contract. Although sometimes Summer and Winter Contracts overlap, in most cases there is a break between them of between a week and 10 days. We were told that wardens and assistant wardens were in 'continuous employment' for employment rights purposes.

20. There are also possibilities of joining the Caravan Club's 'Flying Squad'. The 'Flying Squad' is made up of wardens and assistant wardens who are prepared to move at very short notice to sites where they are required – taking their caravans with them. In this case there is no guarantee of continuous work. Mr and Mrs Telfer have been in the 'Flying Squad', though after the years 2010/11 and 2011/12, with which this appeal is concerned.

21. Mr Telfer told us that he knew of cases where colleagues of his, working as assistant wardens for the Caravan Club had had their claims for capital allowances in relation to their caravans accepted by HMRC.

The submissions of the parties

22. Mr Telfer's case is that his claim to capital allowances should be allowed because he carried on a qualifying activity and incurred qualifying expenditure on the provision of the two caravans for the purposes of that qualifying activity, and he owned the two caravans as a result of incurring the qualifying expenditure (section 11, CAA). The qualifying activity in question was his employment with the Caravan Club as an assistant warden (cf. section 15(1)(i), CAA).

23. Mr Burke, for HMRC, points out that the general rule for entitlement to plant and machinery allowances is affected by other provisions of the CAA, and in particular by Chapter 3 (section 11(5) CAA). He points to section 36 CAA (part of Chapter 3), which contains restrictions on qualifying expenditure in the case of an employment or office. The relevant restriction is that expenditure on a caravan 'is qualifying expenditure only if [the caravan] is necessarily provided for use in the performance of the duties of the employment or office' (section 36(1)(b) CAA).

24. Mr Burke submitted that the requirement for the caravan to be necessarily provided for use in the duties of Mr Telfer's employment was a 'rigorous test', which

was not met if the facts were only that the Caravan Club (Mr Telfer's employer) required Mr Telfer to provide a caravan for the purposes of his employment. It was necessary that the duties of the employment themselves required the provision of the caravan.

25. Mr Burke cited *White v Higginbottom* [1983] BTC 46 (a decision of Vinelott J), *Ricketts v Colquhoun* (1924-26) 10 TC 118, *Brown v Bullock* (1959-63) 40 TC 1, *Nolder v* Walters (1928-31) 15 TC 380, and *Fitzpatrick v Inland Revenue Commissioners (No. 2)* [1992] BTC 204. He submitted that these decisions were authority for the proposition that an asset is necessarily provided for use in the performance of the duties of an employment only if it is provided for use in 'doing the work of [the employment], in doing the things which it is his duty to do while doing the work of [the employment]' (per Rowlatt J in *Nolder v Walters*).

26. He submitted that the provision of a caravan by an assistant warden employed by the Caravan Club was not 'for use in doing the work of the employment', and was not necessary for the performance of the duties of the employment. He referred to the fixed accommodation available for wardens at some sites as showing that the provision of a caravan was not necessary for the performance of the duties of Mr Telfer's employment. He pointed out that it is not enough for the provision of an asset to be relevant to the employment or to be in connection with the duties of the employment or to put the employee in a position to start his duties or to keep him qualified to do his duties or to be preparation for the employee to carry out his duties – it must be necessary for use in the performance of the duties.

27. Mr Burke also referred to section 21 CAA (also part of Chapter 3), by which expenditure on the provision of plant or machinery does not include expenditure on the acquisition of a building, and section 22 CAA (also part of Chapter 3), by which expenditure on the provision of plant or machinery does not include expenditure on the acquisition of various structures and other assets, listed in the section. Although neither section 21 nor section 22 in terms refers to a caravan, Mr Burke relies on section 23(3) and (4) CAA, which sets out expenditure unaffected by sections 21 and 22 – in List C in section 23(4). List C includes, as item 19, 'caravans provided mainly for holiday lettings'. Mr Burke argued that we should infer from the inclusion of item 19 in List C in section 23(4), that the exclusion of expenditure on the provision of buildings, structures and other assets in section 21 and 22 from the relevant concept of expenditure on plant or machinery, that expenditure on some caravans came within that exclusion. He submitted that expenditure on a caravan that occupied a fixed site and was not regularly moved as part of normal use in a trade or employment (as relevant) would be excluded from the relevant concept of expenditure on plant or machinery pursuant to section 21 or section 22 CAA. This exclusion would catch the expenditure on Mr Telfer's caravans because they were only moved between employments and not during the course of the performance of his duties in any employment.

28. Mr Burke had a more fundamental objection to Mr Telfer's claim, namely that under the law as it had been developed in decided cases, the caravans were excluded from being 'plant or machinery' because they were not assets by means of which the

duties of Mr Telfer's employments were carried out, but played no part in the carrying out of those duties, being only the place within which they were carried out. He cited *Benson v Yard Arm Club Ltd* (1975-81) 53 TC 67 in support of this submission.

29. He submitted that the caravans were used to provide Mr and Mrs Telfer with accommodation on the caravan sites. They were not used in carrying out Mr Telfer's duties, which were all performed on the caravan site or in the office (also on the caravan site). He contended that even if Mr Telfer had carried out some of the duties in his caravans, the caravans would not have been apparatus with which those duties were performed (cf *Yarmouth v France* (1887) 19 QBD 647) but would instead have been the place or setting within which they were performed. This being the position, the caravans would not rank as plant or machinery for relevant purposes.

Discussion and Decision

30. We approach our decision by considering whether Mr Telfer's caravans qualify as being plant or machinery for relevant purposes, whether, if so, Mr Telfer 'necessarily' provided the caravans for use in the performance of the duties of his employment(s) for the purposes of section 36(1)(b) CAA. We also consider whether expenditure on the provision of the caravans is disqualified from eligibility for capital allowances by section 21 or 22 CAA.

31. First of all, we note that, for relevant purposes, 'expenditure incurred for the purposes of a qualifying activity by a person about to carry on the activity is to be treated as if it had been incurred by him on the first day on which he carries on the activity' (section 12, CAA). Therefore, if it is correct to regard the individual contracts entered into by Mr Telfer with the Caravan Club as separate employments, the expenditure incurred by him in the purchase of the Lunar Delta caravan on 4 March 2010 is to be treated as if it had been incurred on 13 March 2010, the day he started his duties as assistant warden at the Beechwood Grange site, York, and the expenditure incurred by him in the purchase of the Bailey Unicorn Barcelona caravan on 30 November 2011 is to be treated as if it had been incurred on 14 March 2012, the day he started his duties as warden at the Tewkesbury Abbey site. Mr Burke, for HMRC, did not suggest otherwise. Even if the general rule or ascertaining when capital expenditure is incurred for the purposes of the CAA applies – namely that the relevant time is fixed at the earliest time when there is an unconditional obligation to pay the expenditure (section 5 CAA), the incurring of the expenditure on Mr Telfer's caravans is placed in the years 2009/10 (not 2010/11) and 2011/12 respectively.

32. Mr Telfer originally (in a letter dated 21 October 2013) indicated that he wished to claim capital allowances for the year 2009/10 (£3,640) as well as 2010/11 (£10,740) and 2011/12 (£8,250). HMRC responded (in a letter dated 26 February 2014) stating that there was no entitlement to capital allowances and adding that 'to have a right of appeal, you would need to make tax returns for the years for which you want to claim allowances, we would then enquire into those returns and issue you with an enquiry closure notice which you could appeal'.

33. Eventually, after some discussion between Mr Telfer and HMRC, on 20 July 2015, Mr Telfer emailed HMRC (Dean Lloyd, PT Operations PSA Complaints Team) as follows:

> 'Hi Dean,
>
> Thanks for the telephone call today and your efforts to progress this matter.
>
> In line with our telephone conversations, I wish to formally amend my tax returns. This in [*sic*] relations to the 2010-11 and 2011-12 returns.
>
> I wish to add capital allowance claims in relation to my employment with the Caravan Club.
>
> For year 2010/11 this is a claim for £10,740.
>
> Year 2011/12 is a claim for £8,250.
>
> I understand my claim for 2009/10 will be considered in the event my application is upheld.
>
> If you require any further information, I can supply via e-mail.
>
> Yours sincerely,
>
> Paul Telfer'

34. This correspondence led to the opening of enquiries on 4 August 2015 into Mr Telfer's self-assessment tax returns for the years 2010/11 and 2011/12 and, ultimately, to the closure notices issued on 4 September 2015, incorporating the amendments which are the subject of this appeal.

35. It is not clear to us, on the facts recited above, that Mr Telfer incurred any expenditure on the provision of caravans which can be treated as having been incurred in the year 2010/11.

36. Turning to the question of whether Mr Telfer's caravans qualify as being plant or machinery for relevant purposes, we consider first the functional test, set out in cases such as *Yard Arm Club Ltd*. In that case, which involved a trading entity, not an employee, the Court of Appeal drew the distinction between a structure which is something by means of which the business activities are in part carried on, and a structure which plays no part in the carrying on of those activities, but is merely the place within which they are carried on.

37. Applying the functional test, we must ask ourselves whether Mr Telfer's caravan was something by means of which he carried out the duties of his employment, or merely the place (or part of the place) within which those duties were carried out. This leads us to a consideration of the ambit of Mr Telfer's duties as an assistant warden employed by the Caravan Club. The evidence of the passage from the AWI which we

have cited is that the Caravan Club considered that 'the role requires [an assistant warden] to live on site in your own outfit although there are a few sites where accommodation is provided'. We can discard consideration of the few sites where accommodation is provided, partly because they were not sites where Mr and Mrs Telfer worked in the years relevant to the appeal, and partly because there is evidence (Clause 9.2 of the Ts & Cs) that such accommodation was available to wardens, not to assistant wardens. We recall that Clause 9.1 of the Ts & Cs states that '[i]t is a requirement that all Wardens reside on Site throughout the duration of their Agreement'.

38. The Caravan Club's 'requirement' that an assistant warden must reside on site throughout the duration of his/her employment is not enough to make the assistant warden's caravan 'something by means of which he carried out the duties of his employment'.

39. The Caravan Club's view that 'the role requires [an assistant warden] to live on site in your own outfit' goes some way to satisfying the functional test. The facts found by the Tribunal supporting this view of the Caravan Club are first, that an assistant warden must be on site out of office hours to deal with enquiries (up to 8 p.m.) and emergencies at other times, and also that the role of assistant warden requires the person filling it to be ready to move sites at the Caravan Club's discretion (including part way through a season).

40. Although we readily accept that Mr Telfer could not legally (*via-à-vis* the Caravan Club), or realistically on the facts, have performed the duties of his employment as an assistant warden without the use of the caravans, we are driven to the conclusion that the caravans were not something by means of which those duties were in part carried on, but were instead structures which played no part in the carrying on of those duties, but were merely the place within which they were carried on. Thus, with some regret, we have concluded that the caravans do not pass the functional test and cannot therefore be regarded as plant for relevant purposes.

41. On the other hand we do consider that the facts we have found support the proposition that Mr Telfer 'necessarily' provided the caravans for use in the performance of the duties of his employment(s) for the purposes of section 36(1)(b) CAA. We accept that the test imposed by section 36(1)(b) CAA goes beyond a legal requirement by the employer that the asset concerned is provided by the employee and requires an examination of whether or not the duties of the employment objectively require the provision of the asset. In this case, the duties of Mr Telfer's employment did objectively require him to live on site 'in his own outfit'. The duties required Mr Telfer to be on site at all times, and to be ready to move to another site at the Caravan Club's discretion, and on any realistic basis this means that those duties required him to live in his caravan on site. The caravans were used (as shelter and living accommodation) by Mr Telfer in the performance of the duties of his employment(s).

42. Finally, we consider the application of section 21 and 22 CAA in this case. We have reached the conclusion that those sections (which exclude defined assets from

the meaning of plant or machinery for relevant purposes) have no application in this case. Mr Telfer's caravans were not 'buildings', even within the extended meaning of 'buildings' in section 21 – nor were they assets treated as buildings within List A in section 21. Nor were the caravans fixed structures – their essence was that they were mobile – and therefore they were not 'structures' within the meaning of section 22 (see: section 22(3)(a), which requires a 'structure' to be a fixed structure of any kind, other than a building (as defined by section 21(3)). They did not fall within any of the categories of structures and other assets in List B in section 22(1) CAA.

43. That being the position, we reject Mr Burke's submission that the caravans in issue in this appeal, not being caravans provided mainly for holiday lettings, are somehow brought within section 21 or section 22 CAA by the wording of item 19 in section 23 CAA. This is an argument from redundancy – that is, an argument that it would be redundant for a class of caravans to be excluded from the application of sections 21 and 22 by section 23 CAA, if section 21 or section 22 did not apply to caravans. Lord Hoffmann famously said that he seldom thought that an argument from redundancy carried great weight (*Walker v Centaur Clothes Group Ltd* [2000] 1 WLR 799 at 805D), and we respectfully agree. Further, it seems to us that section 21 or section 22 CAA could only apply to fixed caravans and plainly Mr Telfer's caravans were not fixed.

44. We have been asked to give a decision in principle on the qualification of Mr Telfer's expenditure on caravans for capital allowances. Our decision in principle is that, for the reasons given above, the caravans cannot rank as plant. We therefore dismiss the appeal.

45. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 31 AUGUST 2016