HMSO Tax Cases/Volume 55, Official Tax Case Reports/Gittos v Barclay (H M Inspector of Taxes) - 55 TC 633

Gittos v Barclay (H M Inspector of Taxes)[1]

1 Reported [1982] STC 390.

HIGH COURT OF JUSTICE (CHANCERY DIVISION)

5 MARCH 1982

Income tax - Income arising from the letting of holiday villas - Whether assessable to tax under Schedule D Case VI or Schedule D Case I - Income and Corporation Taxes Act 1970, ss 67, 109 - Whether General Commissioners' decision one to which they could reasonably come - Taxes Management Act 1970, s 56.

G was the tenant of two holiday villas which were sub-let during the period from March to October each year. G provided the furnishings and employed a cleaner and caretaker to maintain the villas. He advertised the villas in the press, made bookings, collected deposits and final payment and prepared the villas at the beginning of the season, and cleared them at the end of the season. The enterprise was run by G's wife under the name "Kelletts".

There being no claim for separate assessment, an assessment was made on G in respect of his wife's earnings for these operations under Schedule D Case VI, the Inspector relying on s 67(1), para 4 of the Income and Corporation Taxes Act 1970. G contended that the enterprise was in the nature of a trade and that tax should be charged under Schedule D Case I. The General Commissioners confirmed the assessments. G appealed.

Held, in the Chancery Division, dismissing the taxpayer's appeal that the question was essentially one of fact and it was not possible to say that the Commissioners had misdirected themselves or come to a wholly unreasonable conclusion.

Case

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the General Purposes of the Income Tax for the Cheltenham Division in the County of Gloucester for the opinion of the High Court of Justice.

1. At a meeting of the said Commissioners held on 4 November 1980 at the Magistrates' Court, St. George's Road, Cheltenham, Derek George Gittos ("the Appellant") appealed against an assessment made on him in respect of his wife's earnings for the years and in the amounts as follows:- 1978-79 £500 and 1979-80 £500.

2. Shortly stated the question for our decision was whether in the circumstances hereinafter described the Appellant fell to be assessed under Case VI of Schedule D (by virtue of the provisions of para 4 of Sch A in s 67 of the Income and Corporation Taxes Act 1970 or under Case I of Schedule D as income from a trade. That decision having been made, it then fell to us to determine the amount of the assessment. It was common ground that the amount to be assessed was capable of being agreed between the parties and determined by us in those agreed figures and as subsequently appears the amounts of the said assessments were so agreed and we the said Commissioners

determined those assessments in accordance with those figures at a subsequent meeting.

3. The Appellant appeared in person and gave evidence before us. He called as a witness his wife, Freda Annis Gittos.

4. Whilst documents were produced in evidence before us they are not annexed hereto as exhibits because the contents thereof were common ground between the parties and accordingly those contents so far as they are relevant are set out as facts proved or admitted.

5. As a result of the evidence adduced before us we found the following facts proved or admitted:-

(a) The assessments arose from lettings of holiday villas at Millendreath Holiday Village, near Looe, Cornwall. The holiday village was a complex of holiday bungalows and many other facilities were available for persons enjoying holidays there including a marina, launderette, shop and tennis court all of which were enjoyed by holidaymakers residing in the village. The assessment concerned two holiday villas of which the Appellant was tenant, Nos. 74 and 92 Millendreath, and the ground rent was £192.40 per annum for each villa the price reflecting the use of the facilities referred to. The lease contained a clause restricting the use of the villas for any purpose other than that of a holiday bungalow and requiring the villas to be closed during the months of November, December, January and February except for storage of furniture. Those restrictions were enforced on the landlord by reason of the planning permission obtained by him for the use of the Millendreath site for holiday villas of which there were 140.

(b) The Appellant could, as tenant, either have holidays booked through the good offices of the landlord which included all servicing of the villas or, deal with the servicing and booking of the villas himself. If the landlord dealt with bookings and servicing the tenant would receive only 75 per cent. of the holiday rental and the landlord would take the remaining 25 per cent. The Appellant decided not to avail himself of these services.

(c) The amenities provided by the Appellant for holiday lettings were furnishings, a colour television, the general maintenance of the villas by a cleaner and caretaker

(employed for six hours weekly) and the collection of refuse under an arrangement made between the landlord and the local authority: that is to say the Appellant paid the landlord a proportionate part of the cost to the landlord of providing such a service for the entire holiday village.

(d) The enterprise was run by Mrs. Gittos under the name of "Kelletts". That name was registered under the Business Names Act in 1975 and the application for registration referred to a business of a holiday letting. The enterprise has a separate bank account in Cheltenham.

(e) For the purpose of holiday letting advertisements were placed in five newspapers circulating in Gloucestershire and in addition circulars were sent every January to former customers. Processing of the resultant enquiries meant that particulars had to be sent, bookings confirmed, deposits collected and it was the Appellant's practice to arrange a visit to those who had confirmed bookings. Once the final payment was made two duplicated holiday sheets were sent to the person concerned and the caretaker was notified. Preparation for the season involved two journeys to Cornwall taking blankets and house linen and 16 hours there preparing the villas for the season. At the end of the season a similar amount of time was involved in clearing the villas. Apart from

time spent at the villas for necessary work they had not been occupied by the Appellant or his wife. No services other than those involved in preparing for the season or for the winter were personally supplied by the Appellant or his wife.

(f) Both villas were self-contained semi-detached concrete bungalows built in 1973-74. One was acquired in 1974 for £4,452 and the other in 1975 for £5,190. The contents were worth approximately £1,000.

(g) Accounts were submitted in the tax years prior to 1976-77 and showed losses which were agreed. The first assessment issued was for the tax year 1976-77 and that assessment was under Case VI of Schedule D as were all subsequent assessments. The losses agreed for the earlier years were carried forward to these later years.

(h) An element of the assessment (services) fell outside Case VI of Schedule D but still within that Schedule.

6. It was contended by the Appellant that:-

(a) the enterprise was in the nature of a trade;

(b) in considering the meaning of the word "trade" the Commissioners were bound by the guidelines laid down in Ranson v Higgs [1] 50 TC 1, namely the degree, frequency, organisation or intention involved;

[1] [1974] 1 WLR 1594.

(c) the evidence adduced showed that the trade was that of promotion and sale of seaside holidays;

(d) the properties involved were not dwellings;

(e) the amount charged varied depending on the demand for holidays and accordingly were related to the trade claimed and not to the properties themselves the ownership of which was merely incidental to the trade.

7. It was contended by H.M. Inspector of Taxes that the income received fell clearly within the terms of Schedule A and by virtue of para 4 of that Schedule were correctly assessed under Case VI of Schedule D as furnished lettings. In his argument he made the point, relying on Salisbury House Estate, Ltd. v Fry [2] 15 TC 266 that the Schedules for tax purposes are mutually exclusive. He contended that the assessments were properly made under Case VI of Schedule D and should be determined accordingly such part thereof as related to services being likewise assessable under Schedule D.

[2] [1930] AC 432.

8. Reference was made to:- Ransom v Higgs 50 TC 1; [1974] 1 WLR 1594; Salisbury House Estates, Ltd. v Fry 15 TC 266; [1930] AC 432; Northend v White 50 TC 121; [1975] 1 WLR 1037; Salt v Chamberlain 53 TC 143.

9. We the Commissioners who heard the appeal gave our decision as follows:-

(1) The Appellant was correctly assessed under Case VI of Schedule D on income from furnished lettings.

(2) We adjourned the hearing sine die so that the parties might attempt to agree precise figures and whether an allowance could be made by the Revenue in respect of matters which might fall outside Case VI of Schedule D.

55 TC 633 at 636

10. Immediately after our decision was expressed the Appellant expressed his dissatisfaction therewith as being erroneous in point of law. It was pointed out to him that the Commissioners had not determined the appeal in view of the said adjournment.

11. At a meeting of the said Commissioners held on 20 January 1981 at the Magistrates' Court aforesaid the appeal was restored and we were informed that the parties had agreed figures but no breakdown of those figures as between Case VI and any other case of Schedule D was given to us. The figures were as follows:-

	£
1978-79	1,036

1979-80 508

12. We determined the said appeal in those figures accordingly whereupon the Appellant immediately expressed his dissatisfaction therewith as being erroneous in point of law and on 22 January 1981 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and do sign accordingly.

13. The question of law for the opinion of the Court is whether on the facts as found by us and set out in para 9 of this Case our decision is correct.

17 November 1981.

High Court

The case was heard in the Chancery Division before Goulding J. on 5 March 1982 when judgment was given in favour of the Crown, with costs.

The taxpayer in person.

Robert Carnwath for the Crown.

The following case was cited in argument in addition to those referred to in the judgment:- Salt v Chamberlain 53 TC 143.

Goulding J. -

This is an appeal from a decision of the Cheltenham General Commissioners in an income tax matter. The Appellant, Mr. Gittos, was assessed in respect of the years 1978-79 and 1979-80 in certain sums representing receipts of money arising from the ownership and use by his wife of certain accommodation, holiday villas, near Looe. The Inspector of Taxes relied on assessments under Case VI of Schedule D, those being appropriate by virtue of para 4 of Schedule A set out in s 67(1) of the Income and Corporation Taxes Act 1970, so the Inspector said. Mr. Gittos, on the other hand, contended before the General Commissioners and contends before me (where he has put his case, if I may say so, with great clarity and moderation) that his wife was carrying on a trading activity with this property that she owned, and that

55 TC 633 at 637

the sums in question ought to have been assessed, if at all, under Case I of Schedule D. The practical importance of the distinction, I think, is that Case I income ranks as earned income for the purposes of the Income Tax Acts.

As regards the primary facts of the case, I can do no better than read para 5 from the Case Stated. There, the Commissioners found the following facts proved or admitted:

"(a) The assessments arose from lettings of holiday villas at Millendreath Holiday Village, near Looe, Cornwall. The

holiday village was a complex of holiday bungalows and many other facilities were available for persons enjoying holidays there including a marina, launderette, shop and tennis court all of which were enjoyed by holidaymakers residing in the village. The assessment concerned two holiday villas of which the Appellant was tenant, Nos. 74 and 92 Millendreath, and the ground rent was £192.40 per annum for each villa the price reflecting the use of the facilities referred to. The lease contained a clause restricting the use of the villas for any purpose other than that of a holiday bungalow and requiring the villas to be closed during the months of November, December, January and February except for storage of furniture. Those restrictions were enforced by the landlord by reason of the planning permission obtained by him for the use of the Millendreath site for holiday villas of which there were 140. (b) The Appellant could, as tenant, either have holidays booked through the good offices of the landlord which included all servicing of the villas or deal with the servicing and booking of the villas himself. If the landlord dealt with bookings and servicing the tenant would receive only 75 per cent. of the holiday rental and the landlord would take the remaining 25 per cent.. The Appellant decided not to avail himself of these services. (c) The amenities provided by the Appellant for holiday lettings were furnishings, a colour television, the general maintenance of the villas by a cleaner and caretaker (employed for six hours weekly) and the collection of refuse under an arrangement made between the landlord and the local authority: that is to say the Appellant paid the landlord a proportionate part of the cost to the landlord of providing such a service for the entire holiday village. (d) The enterprise was run by Mrs. Gittos under the name of 'Kelletts'. That name was registered under the Business Names Act in 1975, and the application for registration referred to a business of a holiday letting. The enterprise has a separate bank account in Cheltenham. (e) For the purpose of holiday letting advertisements were placed in five newspapers circulating in Gloucestershire and in addition circulars were sent every January to former customers. Processing of the resultant enquiries meant that particulars had to be sent, bookings confirmed, deposits collected, and it was the Appellant's practice to arrange a visit to those who had confirmed bookings. Once the final payment was made two duplicated holiday sheets were sent to the person concerned and the caretaker was notified. Preparation for the season involved two journeys to Cornwall taking blankets and house linen and sixteen hours there preparing the villas for the season. At the end of the season a similar amount of time was involved in clearing the villas. Apart from time spent at the villas for necessary work they had not been occupied by the Appellant or his wife. No services other than those involved in preparing for the season or for the winter were personally supplied by the Appellant or his wife. (f) Both villas were self-contained semi-detached concrete bungalows built in 1973-74. One was acquired in 1974 for £4,452 and the other in 1975 for £5,190. The contents were worth approximately £1,000. (g) Accounts were submitted in the tax years prior to 1976-77 and

showed losses which were agreed. The first assessment issued was for the tax year 1976-77 and that assessment was under Case VI of Schedule D as were all subsequent assessments. The losses agreed for the earlier years were carried forward to these later years. (h) An element of the assessment (services) fell outside Case VI of Schedule D but still within that Schedule."

Those were the primary facts as found by the General Commissioners, who were asked by Mr. Gittos to hold that the enterprise was in the nature of a trade and accordingly the profit from it should be assessed under Case I of Schedule D, while the Inspector of Taxes contended that the income fell clearly within the terms of Schedule A, being receipts from the ownership of land, and by virtue of para 4 in s 67(1) of the Act of 1970, was correctly assessed under Case VI of Schedule D as income from furnished lettings.

The argument before me has ranged over essentially the same ground, but one additional element has been debated which so far as appears from the Stated Case was not relied on before the Commissioners below. That is the question whether the holiday occupiers of Mrs. Gittos's bungalows are her tenants or only licensees. Mr. Gittos introduced that in argument by saying, and I think correctly saying, that if they are not tenants the language of para 4 in s 67(1) of the Act of 1970, is not applicable. However, the real question before me, as it was before the Commissioners, is whether or not the income is profit of a trade, and for that purpose I think the question whether the occupying holidaymakers were tenants or licensees is at most of only slight importance. In that respect compare the observations of Lord Greene M.R. in Croft v Sywell Aerodrome, Ltd. [1] 24 TC 126 at page 139. I do not think it would be right for me to express any view on that because the issue "lease or licence?" was not so far as I can see the subject of evidence or argument before the General Commissioners, and in my view it is not within the matter with which I can properly deal. Nor do I think in the end that it is critical to the decision of the controversy. Mr. Gittos invited me to consider what Lord Wilberforce said in Ransom v Higgs [2] 50 TC 1, at page 88, where he said that "trade" could not be precisely defined and added: "Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed." As regards intention, the last of the elements mentioned by Lord Wilberforce in the passage cited, Mr. Gittos reminded me of the finding that Mrs. Gittos

ran the enterprise under a business name which was registered as such, and he said that that pointed clearly to an intention to use the land for the purposes not merely of deriving a rental or similar income but for a commercial undertaking properly described as trade. Next, as regards the degree of the activity, Mr. Gittos gave me a brief account of the activities summarised in the paragraph I have read from the Stated Case, starting with the advertising of the accommodation, which is followed of course by receiving a number of inquiries and by negotiation and agreement with some but not all of the inquirer; and then the physical preparation of the bungalows, the making of arrangements for the maintenance, all the necessary communications with the intended occupiers, the clearing up at the end of the season, and so on. He suggested that when you saw the number of separate operations of one kind or another that would have to be done by or on behalf of Mrs. Gittos during the season, it was the proper conclusion that this was indeed a trade. Then, as to the

frequency of what was done - one of the other elements in Lord Wilberforce's remarks - Mr. Gittos pointed out that the bungalows were continuously available for some 35 weeks in the year, and again pointed to the number of active steps that had to be taken by or on behalf of Mrs. Gittos, spread over much the greater part of the year and with one constantly followed by another, so that the activity was also frequent. There was one other element spoken of by Lord Wilberforce, and that was organisation. There, Mr. Gittos relied on the same facts and showed that the advertising, booking, arranging for cleaning and maintenance, and the general supervision of the bungalows, involved, as he submitted, a substantial degree of organisation on the part of himself and his wife. He said that putting all those things together under Lord Wilberforce's tests, really the only proper conclusion was that there was a trade.

1 [1942]1 KB 317.

2 [1974] 1 WLR 1594.

Mr. Carnwath, for the Crown, referred me to Salisbury House Estate, Ltd. v Fry [1] 15 TC 266, a decision of the House of Lords, and to the Sywell Aerodrome case [2] which I have already mentioned. I think that in the end he found the kernel of the matter in the latter part of Lord Macmillan's speech in the Salisbury House case at page 330. That was a case where the Crown unsuccessfully contended that a company owning blocks of offices in London could be assessed on the profits of a trade arising from the letting out and management of the offices and the provision of cleaning, heating, lighting and caretaking services, men to run the lifts and so on. What Lord Macmillan said (at the foot of page 330) was this:

1 [1930] AC 432.

2 24 TC 126.

> "A landowner may conduct a trade on his premises, but he cannot be represented as carrying on a trade of owning land because he makes an income by letting it. The relatively insignificant services for which the Company makes charges to its tenants are not in my opinion sufficient to convert the Company from a landowner into a trader, though the profits so made may quite properly be charged with tax under Schedule D. To hold otherwise would be to invert the rule that the principal follows the accessory."

So the real question that was before the General Commissioners in the present case and which, so far as I can see, they properly grasped - and, indeed, they were referred to the Salisbury House case - was whether the activities of Mrs. Gittos over and above the mere exploitation of her landed property were significant enough to make her a trader and not a mere landowner who derived an income by exploiting her property. It is not of course possible to give an answer to such a question in general terms. It is a question of fact and degree. I can quite see that there are forceful arguments on both sides. Mr. Gittos, in his address in reply, took the case of an hotelier, who is undoubtedly carrying on a trade, and pointed out how similar, so far as they extend, are his wife's activities in respect of Millendreath to those of an hotelier. But, of course, they do not go nearly so far or require nearly so much activity on the owner's part.

I am persuaded in the end, that, having regard to the limits put on the jurisdiction of this Court on such an appeal as the present by the Taxes Management Act 1970, s 56, the decision upon which side of the line the case lies is essentially one for the judges of fact, here the General Commissioners, and I am authorised to interfere with it only if I can see that they went wrong in law or, at any rate, that in my view no reasonable Commissioners could have arrived at the conclusion at which they arrived. I am quite unable to say that.

55 TC 633 at 640

I might or might not myself have come to the same conclusion on the facts set out in the Stated Case, but it appears to me that the Commissioners were referred to the relevant authorities and approached the matter in a careful way, and they came to the conclusion that the facts did not go far enough to establish the carrying on of a trade. I certainly cannot say that they misdirected themselves as to the law or arrived at a wholly unreasonable conclusion in that respect, whether or not I would have come to the same myself. Accordingly, I must dismiss this appeal.

Appeal dismissed, with costs.

[Solicitor:- Solicitor of Inland Revenue.]