

AVOIDING LAND TRADING TRANSACTIONS

by Patrick Soares

Under the Budget of 22 April 2009, the top income tax rate will go up from 40% to 50% in 2010/11. It is more important than ever that taxpayers who make a profit from the disposal of land make a capital disposal, paying tax – in the case of an individual – at 18%, as opposed to a disposal of trading stock. If a taxpayer acquires land with the intention and ability to hold on to it and receive rents for a period of time, and he disposes of the property because of an unexpected offer and keeps appropriate minutes showing the investment intentions, he should be able to establish the profit without difficulty as being one of a capital nature. On the other hand, if the taxpayer acquires land with a view to turning it over – even though he may receive rent in the interim – and he advertises for purchasers, that would clearly be a trading transaction. Between these two extremes is a whole host of possibilities. The writer's checklist on factors indicating whether the taxpayer is a trader or not, which has never let him down to date, is set out below.

TRADING CHECK LIST – POINTS TO CONSIDER IF THE TAXPAYER WANTS TO AVOID A TRADING ASSESSMENT

	Cases	Acts or omissions	Indicators for and against	Weighting
(1)	<i>Page v Pogson</i> 35 TC 545	Repetition	If the taxpayer has carried out similar trading transactions before, it is more likely to be a trader	5
(2)	<i>Harvey v Caulcott</i> 33 TC 159	Involvement	If the taxpayer is involved in land transactions generally, e.g., as an estate agent, this points to trading	3
(3)	<i>Taylor v Good</i> [1974] STC 148	Motivation	An intention at acquisition to turn the land (as opposed to an intention to hold it long term) is a strong indication of trading	25
(4)	<i>Iswera v CC of IR</i> [1965] 1 WLR 6634	Enjoyment	No personal enjoyment, e.g., no personal occupation of a house or flat, may	3

			indicate trading	
(5)	<i>Cooke v Haddock</i> 39 TC 64	Income	If the land is not income producing, this indicates trading	6
(6)	<i>McCelland v TC of C of A</i> (1971) 1 All ER 969	Gift/Inheritance	Land acquired by gift or by inheritance indicates non-trading	4
(7)	<i>Turner v Last</i> 42 TC 517	Time	Land held for a short time – this indicates trading	5
(8)	<i>Johnson v Health</i> [1970] 3 All ER 915	Retention	If the taxpayer would not find it difficult to hold the land long term, this strongly indicates non-trading	10
(9)	<i>Iswera v CC of IR</i> [1965] 1 WLR 663	Surplus	If taxpayer has acquired land surplus to its own occupational requirements this may indicate trading	4
(10)	<i>IRC v Livingston</i> 11 TC 538	Work	If the taxpayer has not worked on the land, e.g., built an extension or carried out a refurbishment, this indicates non-trading	5
(11)	<i>Turner v Last</i> 42 TC 517	Planning	If the taxpayer obtains planning permission, this may indicate trading	2
(12)	<i>IRC v Livingston</i> 11 TC 538	Alterations	If the nature of the land interest is altered, e.g., a lease extended, this may indicate trading	2
(13)	<i>Cooke v Haddock</i> 39 TC 64	Nature of Land	Some land interests , by their very nature, indicate trading, e.g., building a housing	2

			estate	
(14)	<i>West v Phillips</i> 38 TC 303 <i>Simmons v IRC</i> (1980) STC 350	Reasons for Sale	Unanticipated reason for sale, e.g., unexpected offer, indicates non-trading	10
(15)	TMA 1970	Memory	Taxpayer has good memory – should help in defeating a trading attack by HMRC	2
(16)	TMA 1970	Taxpayer alive	More likely to defeat trading attack by HMRC	4
(17)	<i>Marson v Morton</i> [1986] STC 463	Comprehension	Taxpayer does not fully understand the land deal – indicates not trading	2
(18)	<i>Marson v Morton</i> [1986] STC 463	JV/Partnership	Existence of a joint venture or partnership structure may indicate trading	2
(19)	<i>Taylor v Good</i> [1974] STC 148	Minutes	Super contemporaneous ‘minutes’ kept of intentions not to trade – powerful indicator of not trading	5
(20)	<i>Taylor v Good</i> [1974] STC 148	Age	Age of taxpayer – land is the ‘pension’ of client – indicator of non-trader	1

Needless to say the weighting must be used with a degree of caution!