HOLIDAY LET-OUT

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It has become increasingly common for individuals to let out property which they own as holiday accommodation. Unfortunately, it is clearly established by case law that the granting of furnished lettings does not constitute a trade for tax purposes however extensive and time consuming the letting may be: *Gittos v Barclay* (1982) 55 TC 633. This principle was recently confirmed by Vinelott J in *Griffiths v Jackson* (1983) 56 TC 583 at page 591:

> "...the income derived by the owner letting the property furnished, whether for a short or a long term and whether in small or large units and whether in self-contained units or to tenants who share a bathroom or kitchen or the like is not income derived from carrying on a trade but is still taxable under Schedule A, or in the case of paragraph 4, under Case VI of Schedule D."

This tax treatment is obviously very disadvantageous for those who provide lettings of this sort. They will often wish to set trading losses made in the early years against their general income and will only be able to claim certain reliefs from capital gains tax (e.g., retirement relief and roll-over relief) if they had been using the property which they sell in carrying on a trade. In order to alleviate this problem and to encourage holiday lettings, measures were introduced in 1984 which are now Taxes Act 1988 ss.503 and 504. Under these provisions, in order to be treated as a trade for tax purposes, the taxpayer must be providing "commercial letting of furnished holiday accommodation". A letting is a "commercial letting" if it is let "on a commercial basis and with a view to the realisation of profits": s.504(2)(a). However, the definition of "holiday accommodation" in s.504(3) causes certain problems.

The tests set out in s.504(3)(a) and (b) are fairly straightforward. In order to decide whether there is a trade in the year of assessment in which the letting commences, one applies the 140 day and 70 day rules to the period of twelve months from the time when the letting begins. Thereafter, one applies those rules to the year of assessment in question itself. The difficult test is that contained in s.504(3)(c). This provides that:

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> "Accommodation shall not be treated as holiday accommodation for the purposes of this section unless -
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> > ...(c) for a period comprising at least seven months (which need not be continuous but includes any months in which it is let as mentioned in paragraph (b) above) it is not normally in the same occupation for a continuous period exceeding 31 days."

"Month" means calendar month: see Sch 1 to the Interpretation Act 1978. However, a calendar month for this purpose will not necessarily run from the first of a month to the last day of that month. This is clear from s.504(4) which provides that the first twelve month period is to begin on the date on which the letting begins. This could, of course, be any day of the month. If, for example, the letting begins on the 12th August, each "month" for the purposes of sub-section (3)(c) will run from the 12th of the month to the 11th of the next month. As regards the second and subsequent years of assessment, the reference period is a year of assessment itself, and therefore each "month" will begin on the 6th of a month and end on the 5th of the following month. This much is tolerably clear from a careful reading of the sections.

It has been suggested to me that the "continuous period exceeding 31 days" must fall completely within the seven month period. This, on the face of it, seems a natural construction of the paragraph. However, if it were taken to its logical conclusion it would mean that paragraph (c) would have no practical effect. The property in question could be continuously occupied, otherwise than as holiday accommodation, for all but one month in a year of assessment without falling foul of paragraph (c). This is because the seven qualifying months need not be consecutive. Suppose the one free month was July. One could now choose seven months during which period the property was not in the same occupation for a *continuous* period exceeding 31 days. These months might be April, June, July, August, October, December and February. This would mean, in practice, that whenever a property complied with paragraphs (a) and (b) it would automatically comply with paragraph (c). In my view, a Court would always reject a construction which robs a statutory provision of any effect, and favour a construction which gives the provision the effect which was clearly intended.

The preferred construction of paragraph (c) is that the phrase "a continuous period exceeding 31 days" is describing the type of occupation which must not be present at any time during at least seven months of every year. In other words, paragraph (c) operates in the following way. In each relevant period (usually a year of assessment) one must look at each "month" (defined above) and ask whether at any time during that month the property in question is occupied by a person who is occupying the property for a continuous period exceeding 31 days. If there are at least seven months in the relevant period which do not fall into that category, then the property is not disqualified as being "holiday accommodation" for a year of assessment to which the relevant period relates. Even if this rule is broken in one particular year of assessment, the property will continue to be "holiday accommodation" for that year if, taking one year with the next, the taxpayer "normally" complies with the rule. From correspondence, it appears that this is the view of the Revenue, although they take a slightly different view of the word "normally".

The practical difficulty with ss.503 and 504 is that a property owner very often will wish to make holiday lettings in the summer months and to let the property on assured shorthold lettings in the winter. However, one of the requirements of an assured shorthold letting is that it must last for at least six months. Does this mean that the

property owner cannot qualify under s.504(3)(c)? The answer to this question turns on the meaning of the bracketed words "...but includes any months in which it is let as mentioned in paragraph (b) above...". The Revenue's view is that the months referred to in paragraph (c) can be any seven months provided they include all the months in (any part of) which there is, as a question of fact, holiday letting. This would appear to mean that one *must* count a month in which there is actual holiday letting as one of the seven months. Therefore, if one of those months is "infected" by a period of long term occupation, the property will not qualify as "holiday accommodation". This appears to lead to the following conclusion which seems to me to be contrary to any rational statutory intention.

Example Month	*Occupation*
April (i.e., 6th April-5th May)	All holiday accommodation lettings.
May	All holiday accommodation lettings.
June	All holiday accommodation lettings.
July	All holiday accommodation lettings.
August	All holiday accommodation lettings.
September	All holiday accommodation lettings.
October	30 days holiday accommodation lettings.
November	5th November two month let begins.
	Two month let (month 1).
December	Two month let (month 2).
January	Vacant.
February	Vacant.
March	Vacant.

Although the property has been occupied for six months and 30 days as holiday accommodation, and was vacant (and available for letting as holiday accommodation) for three months, it does not qualify as "holiday accommodation) for that year of assessment, according to the Revenue's interpretation of the bracketed words. This is because one must look at the seven months in which there was actual holiday letting (i.e., April to October inclusive) and out of those months only six (April to September inclusive) qualify. October is not a qualifying month because there is one day of long term letting in that month (i.e., 5th Nov). It is not possible to count any of the months in which the property was vacant and available for holiday letting.

I prefer an interpretation of the bracketed words which allows for the possibility of a six month assured shorthold letting. In my opinion, the most natural meaning of the bracketed words is that any month in which there is actual holiday letting is automatically a qualifying month, whether or not there is any long term letting during that month. As well as being the natural meaning of the bracketed words this seems to me to be consistent with the policy of ss.503 and 504. This policy is that there should be a "season" of seven months in which the property is occupied as holiday accommodation. It is accepted that months in which the property is available for holiday accommodation, but the owner is unable to let it, should form part of the season. However, a month in which there is actual occupation as holiday accommodation is to be particularly favoured, and will qualify as part of the "season" despite the fact that a long term let begins or ends in that month. Suppose the six month letting were to be begin on 15th September and to end on 15th March of the following year. It would be five months (April to August) which clearly qualified under paragraph (c). The six and seven months could be March and September if there was actual occupation as holiday accommodation during both of those months.

I understand that my interpretation of the bracketed words in paragraph (c) has been put to the Revenue. I am not, however, aware of any reply and would be interested if any readers of the Review have any further information.