2012 UKUT/111 TCC

Appeal number: FTC/44/2011

VALUE ADDED TAX — option to tax land — whether option survived partnership changes — whether one partnership or two — First-tier Tribunal apparently decided only one — whether tribunal's findings of fact supported by evidence — unclear — appeal remitted to First-tier Tribunal for re-hearing

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

WRAG BARN GOLF & COUNTRY CLUB **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp
Judge Judith Powell

Sitting in public in London on 28 and 29 February 2012

Keith Gordon and Ximena Montes Manzano, counsel, instructed by DLA Piper UK LLP for the Appellant

Amanda Tipples QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision ("the decision") of the First-tier Tribunal (Judge Fionagh Green) ("the judge") by which she dismissed the appeal of the appellant partnership against a decision of the respondents, HMRC, to the effect that the partnership is bound by what is commonly called an option to tax, exercised on 27 June 1990. The dispute came before the judge as a preliminary issue in a set of three related appeals in which other matters arise; the nature of those matters does not have any bearing on the preliminary issue, and neither we nor the judge have explored them.

2. Much of the factual background to the appeal was common ground, or at least undisputed, and the judge's findings in relation to those matters are not challenged, though the conclusions she drew from those findings are very much in dispute. There were some relevant matters on which the judge made no, or no clear, finding. The parties did not differ about some of them and, save as we identify below, we have set those matters out as if they were findings. There are other matters which the judge did not decide and about which there remains a dispute, and we shall deal with those as well. We need first, however, to deal with the relevant legislation.

The option to tax

3. The option to tax (in the legislation referred to as a waiver of exemption) first appeared in the United Kingdom's domestic law as paras 2 to 4 of Sch 6A to the Value Added Tax Act 1983, which was introduced by the Finance Act 1989 and came into force on 1 August 1989. It was accordingly relatively new and untested legislation in the summer of 1990. The detail of the legislation has been changed in many ways since then, but in the version in force in 1990 it provided, so far as material to this appeal, that:

> "2(1) Subject to … paragraph 3 below, where an election under this paragraph has effect in relation to any land, if and to the extent that any grant made in relation to it at a time when the election has effect by the person who made the election, or where that person is a body corporate by that person or a relevant associate, would (apart from this sub-paragraph) fall within Group 1 of Schedule 6 to this Act, the grant shall not fall within that Group.…
>
> 3(1) An election under paragraph 2 above shall have effect—
>
> (a) from the beginning of the day on which the election is made or of any later date specified in the election …;
>
> (2) An election under paragraph 2 above shall have effect in relation to any land specified, of a description specified, in the election …
>
> (6) An election under paragraph 2 above shall be irrevocable …."

4. Ordinarily, though with some exceptions irrelevant for present purposes, transactions in land fall within Group 1 of what was then Sch 6 to the 1983 Act (and is now Sch 9 to the Value Added Tax Act 1994) and are exempt from VAT. Subject to some restrictions, also irrelevant for present purposes, para 2 of Sch 6A

made it possible for an election to be made to waive the exemption, with the consequence that a sale or other disposal of the land for consideration became taxable. The benefit to the person making the election of doing so was that he became able to recover input tax incurred by him on expenditure, for example in making improvements, which was attributable to an actual or intended disposal. Paragraph 3(6) was designed to prevent the making of an election in order to recover the input tax, followed by a revocation to avoid the need to charge tax on a subsequent disposal.

5. It will be observed that paras 2(1) and 3(2) make it clear that the election attaches to the land; however, para 2(1) also provides that it applies only to a disposal of the land by the person who made the election. These provisions had, first, the rather curious result that it was possible to elect in respect of someone else's land, usually in the expectation of an acquisition (which is not a consideration here), and second, which is important, that once any interest in the land of the person who made the election had passed to a different person the election ceased to have any practical effect, since the person who made the election was no longer in a position to dispose of the land. It was not necessary for the person making an election to be VAT-registered at that time, although he would need to become VAT-registered if he later made a disposal affected by the election.

The tribunal's findings of fact

6. We make the preliminary point that the numbering of the paragraphs in the decision is confused, in particular in that it re-starts from 1 in the section headed "Findings of fact" which begins on page 8; accordingly, in what follows, we have provided both paragraph and page number in our references to passages in the decision.

7. In about 1967 James Manners and his wife Suzanne Manners (to whom for simplicity we shall refer respectively as "the father" and "the mother" and collectively as "the parents") acquired the freehold interest in a farm in Wiltshire, apparently then known as Bellingham Farm but later renamed Wrag Farm, or Wrag Barn Farm. They carried on business as farmers in what must be assumed to have been an informal partnership (as one might expect in the case of a married couple). In 1967 their two sons, Timothy and Richard (to whom we shall refer individually by their first names and collectively as "the sons"), were still children, but as they grew up they took an increasing part in the farming business and became partners with their parents. There were later changes in the identities of the partners in the farming business, of no immediate consequence. It is common ground that at all times material to the appeal, irrespective of the composition of the partnership carrying on the farming business, the ownership of the land used for farming lay with the parents alone.

8. In 1984, as the judge found, the father became ill and, as we infer from subsequent developments, found it necessary to reduce his working activities. (He has since died, and there was no evidence from him before the tribunal.) In about 1987, the decision was taken that part of the farm land should be taken out of agricultural use and converted into a golf course, for eventual commercial exploitation. A company, Wrag Barn Golf and Country Club Limited ("the

company"), was acquired, it seems "off the shelf", in July 1987. The parents alone were the directors; the decision does not record the shareholdings but we were shown accounts of the company for the period to 30 June 1990, to which we shall refer again later, which reveal that each director held one of the two issued shares. The company was registered for VAT. The decision records the description in the accounts of the company's principal activity as "developers of a golf club".

9. The company undertook the work of converting the relevant part of the farmland into a golf course, incurring expenditure of £152,843 in doing so. The accounts to which we have referred also show that it purchased machinery to a value of £20,728 and office equipment worth £2,554. The tribunal found as a fact that it claimed input tax credit in respect of that expenditure. Timothy oversaw the development of the course, which seems to have been complete by June 1990, save that a clubhouse was not constructed until early 1991.

10. On 27 June 1990 the father sent four documents to Customs and Excise ("HMCE"), who were then responsible for administering VAT. The first was a covering letter, typewritten on apparently plain paper, which showed the parents' initials and surname as the senders, with their home address, rather than the address of the golf course. It was signed by the father alone. The letter had no heading. Its text was as follows:

> "We enclose forms VAT1 and VAT2 to effect registration of the partnership with effect from 27 June 1990.
>
> In addition we enclose our 'option' notice in respect of the Wrag Barn Golf Course.
>
> Your early notification of registration would be appreciated."

11. Form VAT1 is an application for registration for VAT; form VAT2 must accompany an application by a partnership, and must be completed with the names and addresses of the partners. The information given in the form VAT1 is controversial and we shall return to it; it is not disputed that the only names which appeared on the form VAT2 as submitted were those of the parents. The VAT1 was signed by the mother alone. The "option" notice, also dated 27 June 1990 and, like the covering letter, in typescript and from the parents' home address, signed by the father alone, was in these terms:

> "OPTION TO TAX
>
> We hereby give notice of our election to waive exemption (option to tax) on the disposal of Wrag Barn Golf and Country Club pursuant to VATA 1983 Sch 6A s 2."

12. All four documents were received by HMCE on 29 June 1990 (the judge's reference to 25 June, at para 16 (page 10) of the decision, is an obvious mistake). The application for registration of the parents for VAT was accepted, and took effect from the date of the application, 27 June 1990. The election was also accepted by HMCE as being in proper form; it is not now disputed that the father's signature alone was sufficient, although it appears that there was at some point some doubt about it.

13. On 10 August 1990 an HMCE officer wrote to a firm of accountants who were found by the judge to be acting for the parents and the company; whether

they were also instructed by any other members of the family is not recorded in the decision. There is also no finding (we deduce because there was no evidence) about the reason why the letter was written. The decision records, at para 19 on page 10, the answers the accountants gave by letter of 16 August 1990, but we think it worth setting out also the questions. Both HMCE's letter and the answer were headed with the names of the company and of the parents. The questions were:

> "(i) Who are the owners of the golf course and the golf club, *ie* the limited company or the partnership?
>
> (ii) Did the partners always own the land, and merely lease it to the limited company who carried out the construction work?
>
> (iii) If the limited company were the owners and have transferred the land to the partners, please give details of the assets that were transferred.
>
> (iv) It would appear that the limited company now no longer has any intention to make taxable supplies and the requirements of its registration are no longer met. Please state if any taxable supplies have been made to date or are expected to be made."

14. The replies were:

> "1. The owners of the golf course and of the golf club are [the parents] who are in partnership.
>
> 2. The partners always owned the land and allowed the limited company to carry out construction work on it.
>
> 3. No transfer has taken place.
>
> 4. The limited company has borne the expense of the construction work on the golf course and this is now being re-invoiced to the partnership. The date of the raising of the invoice is not known but the matter will be dealt with shortly. We will advise you as soon as this takes place."

15. On 22 November 1990 an HMCE officer visited the golf club premises, where she saw the mother. The meeting is dealt with at some length at para 20 (page 11) of the decision, but we can deal with the matters of significance which emerged more shortly. The officer was told that the sons were now partners in the golf club business, and in due course the VAT registration for which the parents had applied in June was amended to reflect that fact. The judge made a finding of fact (the significance of which was a matter of dispute before us) that it had been decided that "the partnership should own the golf course and club". The decision also contains some confusing and incomplete findings about the transfer of the business activity to the partnership, to which it will be necessary to return.

16. On 7 February 1991 the parents and the sons entered into a partnership agreement, by which it was agreed that they would "carry on in Partnership the business of a Golf Club under the name of the Wrag Barn Golf Club". The agreement also recorded that the partnership commenced on 1 July 1990. The partners were to share profits and losses in equal shares. On the same day, that is 7 February 1991, the parents executed a deed of gift. It recorded that the parents owned the freehold of land identified on a plan which was not before us or the judge, but which it is agreed was the site of the golf course, and that they

conveyed the land to themselves and the sons, each to have a one-quarter share. The consideration was expressed to be natural love and affection, and no money changed hands.

17. At paras 5 to 7 (page 9) of the decision the judge made these findings:

> "5. During the period of construction of the golf course discussions were held among the family and with professional advisers as to how the golf course would be run and operated.
>
> 6. At some time before 27 June 1990 a decision was taken that the golf course would be operated by a partnership and not by the company.
>
> 7. There is no contemporaneous evidence to support or explain the decision to operate the golf course by a partnership and not by a company."

18. These findings were uncontroversial. It was agreed that the original intention had been that the company would run the club (as a proprietary club accepting both subscriptions and green fees and, once the clubhouse was constructed, making catering and bar supplies) but the family was advised, by whom and for what reason is unclear, that it would be better to run it through the medium of a partnership, and there was a consequent change of course.

19. At para 9 (page 9) the judge said:

> "The partnership between [the parents] carrying on business as a 'golf course club' made its first supply on 27 June 1990. The partnership between [the parents] carrying on business as a golf course club was in existence on 27 June 1990. The partnership began trading on 27 June 1990."

20. These findings, which are crucial to the judge's principal conclusion, are plainly taken from the forms VAT1 and VAT2 submitted by the father on 27 June 1990. They reflect the details given on the forms about the identity of the partners, the nature of the business (described in form VAT1 as "golf course club") and the date of the first, or expected first, supply, all of which an applicant for registration is required to provide. There was a difference between the parties about the reliance which could be placed on the VAT1, and the conclusions which the judge could legitimately draw from it, with which we shall need to deal in some detail later.

21. Before moving on to the points of dispute it is, we think, desirable to return to the company's accounts. They were prepared in June 1992, and made up to 30 June 1990. They record the various items of expenditure incurred in developing the course which we have described above, which have been capitalised as tangible fixed assets. The description of the major item is "development of golf course". In the accounts of the partnership (of the parents and the sons, as "Wrag Barn Golf and Country Club") for the period to 30 April 1991—a start date is not specified—the same assets are recorded, also as fixed assets, at opening values identical to those shown in the company's 30 June 1990 accounts. The description of the major item is "golf course and clubhouse", the cost of construction of the club house being reflected (we were told—the judge made no finding in this respect) in an addition during the period. The company's profit and loss account to 30 June 1990 reveals no income; the partnership's accounts show various items of income, principally subscriptions and green fees.

The central issue

22. The kernel of the dispute between the parties is whether the option exercised on 27 June 1990 endures so as to bind the partnership between the parents and the sons, created or, perhaps, confirmed by the agreement of 7 February 1991. The judge concluded that it did. She made several comments about the witnesses' incomplete recollection of events; then, on page 13, she said

> "35. The oral evidence was given honestly but witnesses were not surprisingly unable to recall the details of events nineteen years ago.
>
> 36. The best evidence available in order to determine the preliminary issue is the contemporaneous documents which clearly show that on 27 June 1990 the partnership of [the parents] elected under paragraph 2 of Schedule 6A to waive exemption to tax in relation to the golf course."

23. Those observations led to the conclusion, at para 46 on page 17, where the judge said:

> "Having carefully considered all of the evidence it was decided that the best evidence available after such a long period of time is clearly the contemporaneous documentation. It was decided that the documents should be given considerably more weight and the documentary evidence was preferred. It was therefore decided that the contemporaneous documentation clearly shows that on 27 June 1990 the partnership of [the parents] elected under paragraph 2 of Schedule 6A to the Value Added Tax Act 1983 to waive exemption to tax in relation to the golf course and that this election is irrevocable and binding on the later partners [the parents and the sons] the partners pursuant to the partnership agreement of 7 February 1991 and that accordingly the appeal in respect of the preliminary issue relating to the option to tax dispute is dismissed."

24. Although the judge did not say so explicitly, such a conclusion necessarily implies that the sons were admitted to a partnership between the parents, one of whose existing assets was the land on which the golf course had been built. If the judge was right to reach that factual conclusion the parties agree she was also right to find that the election attached to the land despite the change in the composition of the partnership.

25. The appellant's case, in essence, is that the factual conclusion is quite wrong; the tribunal should have decided that there was one partnership between the parents as landowners and another as proprietors of a golf club, that the sons were admitted to the latter partnership but not the former, that the transfer of the ownership of the land from the parents to themselves and their sons was a quite separate event, which did not relate to a golfing partnership asset, and that the transfer effectively nullified the election since the parents, alone, were no longer in a position to dispose of the land. Moreover, the judge's conclusion was not supported by adequate reasons, itself a ground of appeal: see *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409. The Commissioners' primary argument is that the finding at para 46 is a straightforward finding of fact, properly reasoned and supported by the evidence, and that it cannot be disturbed in this tribunal: see *Edwards v Bairstow and Harrison* [1956] AC 14.

The appellant's submissions

26. Mr Keith Gordon, for the appellant, first argued that the information set out on the form VAT1 could not be relied upon because, as the judge recorded at para 16 on page 10, it had been corrected and was, even to the untutored eye, clearly written in more than one hand. It is convenient to deal with the evidence relating to this point here. The only correction was to replace "JH & S Manners", which had been entered in the box marked "Full name", with the parents' full names. More pertinent are Mr Gordon's points, first, that the trading name which had been inserted, also "JH & S Manners", was unlikely to have been chosen for a golf club business and, second, that the anticipated turnover for the following 12 months was said to have been estimated at only £25,000, a figure which the judge accepted was low: see the same paragraph of the decision. Mr Gordon argued that £25,000 was consistent with a rental value, which may well be so, but (as the judge found) neither the company's nor the partnership's accounts show the payment of any rent. Mr Gordon's argument nevertheless was that these two factors, as well as the submission of the election with the registration forms, were consistent with an intention to register as a property-owning partnership, but not as a golf club business.

27. Also within para 16 on page 10 the judge stated that "Although [the mother] may not have completed the form in its entirety herself [the mother] declared that all the entered details and information were correct and complete." We interpose that it is not at all clear from its context whether that statement merely recites what appears on the form VAT1 itself, or is a reflection of the mother's evidence before the judge. We were told that HMRC had invited the appellant to ask for a copy of the judge's notes of evidence in order that they could be produced to us, but the appellant had declined to do so on the ground that they were not relied upon. In the absence of the notes we have considered the mother's witness statements, produced for the purpose of the hearing before the First-tier Tribunal and provided to us, and have found in them no suggestion that the entries on the VAT1 were incorrect, albeit the mother maintains that she did not write any of them herself—she merely signed a form completed by others. She does not contend in those witness statements that she and the father intended to register as a property-owning partnership.

28. That does not, however, address Mr Gordon's point that there were nevertheless two discrete partnerships. His contention was that there would be no purpose to an election by a golf club partnership, since no disposal of the land by that partnership was in contemplation, nor did one take place for more than a decade. On the other hand the property-owning partnership of the parents did intend to make a disposal of the land, to the golf club partnership consisting of the parents and the sons. He emphasised that the election itself referred to a disposal, as support for his contention that one was intended.

29. It made sense, he said, for the property owners to elect to tax: they had incurred input tax on the cost of developing the course (the expense had of course been incurred by the company, but the decision had by then been made that the company would re-charge the cost to the partnership). The election made it possible for them, as property-owners, to recover what would otherwise have been

irrecoverable input tax. Had the transfer to the golf partnership been made for consideration it would have represented a taxable supply although, in the event, the transfer was for no monetary consideration. Conversely, he said, it made no sense to elect to tax when no disposal was in contemplation, and if (as HMRC contend) the intention was simply to admit the sons to an existing golf partnership the election would achieve nothing since the input tax would be recoverable in any event, being attributable to the taxable supply of playing facilities to golfers. Moreover, since the election, once made, was irrevocable the family would be obliged to charge VAT on any later arm's length disposal, whether or not the purchaser was in a position to recover it as input tax—thus the election would unnecessarily tie their hands. For these reasons, Mr Gordon argued, the judge's decision was irrational, since she had not taken account, or proper account, of the improbability of what she had decided.

30. Alternatively, he said, the judge's reasoning was inadequately explained. On closer analysis, however, it seems to us that this argument is in reality no more than a complaint that the judge did not justify her preference for the documentary over the oral evidence. Mr Gordon pointed out that the judge found that the witnesses (the mother and Timothy) gave their evidence honestly, yet discounted it; she found that the VAT1 form had been amended, yet concluded that it was reliable; she gave no or inadequate weight to the partnership agreement or the partnership accounts; and she failed to take account of the fact that the existence of the option was not brought to the appellant's notice by HMCE until 11 years after it had been made.

31. We should say at once that we see no merit in the last of those points, since there was nothing before us to suggest that there was any reason why HMCE should draw the existence of the election to the appellant's attention, and Mr Gordon was unable to suggest one. We shall deal with the remaining points in our conclusions, but we need to explain the facts relevant to the third a little more at this stage.

32. As we have mentioned above, the company's balance sheet at 30 June 1990, prepared in 1992 and therefore well after the partnership agreement and deed of gift had been entered into in February 1991, sets out asset values which are reflected exactly in the partnership's accounts. Despite the absence from the accounts of a start date, it is an obvious inference—and neither party suggested otherwise—that it was 1 July 1990. The end date of the period covered by those accounts was 30 April 1991, and therefore some weeks after the land had been transferred to the parents and sons together. The opening figure for "golf course and clubhouse" is the amount carried forward from the company's accounts, an amount which represented the cost of development only (there was and is no suggestion that the company ever had any more than a licence to occupy the land while the development was undertaken), and, as we have said, there is an addition during the year representing the cost of constructing the clubhouse. The value of the land itself has evidently been disregarded. The partnership agreement, too, is silent about the land (and, indeed, any other partnership assets). The deed of gift makes no mention of the use of the land, or of the existence of a partnership.

The respondents' submissions

33. HMRC's case, as it was put to us by Amanda Tipples QC, is that there was no evidence to support the contention that there were two distinct partnerships, nor any other reason why the tribunal should have come to the conclusion that there were. All of the evidence pointed to there having been a partnership between the parents, which elected on 27 June 1990 to waive the exemption, and that the sons joined the partnership, formally, on 7 February 1991 albeit their entry into the partnership was backdated to 1 July 1990. Only one entity was registered for VAT from 1990 until there was a change in the family's arrangements in 2001, long after the relevant events. The tribunal had been called upon to make a finding of fact, and it had done so. Its finding was consistent with the evidence and could not be challenged on appeal.

34. The complaint that the tribunal's conclusions were unexplained, or inadequately explained, was without substance. It was perfectly clear from the decision why the judge reached the conclusions she did: she found as a fact that the VAT1 form was reliable and reflected the parents' intentions at the time it was submitted, that they intended to and did waive the exemption in respect of the land on which the course had been built, and that the documentary evidence which led to those conclusions was quite reasonably to be preferred over the hazy recollection of oral witnesses. Far from disregarding the partnership agreement and the deed of gift the judge mentioned them several times in the decision and it was a necessary inference that she had them very much in mind when reaching her conclusions.

Discussion

35. It is pertinent to begin by making the point that we agree with Miss Tipples that the judge's task was to make a finding of fact—indeed Mr Gordon did not suggest otherwise. He did contend that he was not asking us to set aside the conclusion on the grounds that was irrational to the extent that the observations of the House of Lords in *Edwards v Bairstow* were engaged, but in our view there is no other basis upon which we could do so, since there was no issue of law, properly so called, before the judge. Moreover, Mr Gordon's arguments were consistent only with such an attack, focussed as they were on what he argued were unfounded, or contrary, findings. It is not sufficient, as Mr Gordon recognised. that another judge, or we ourselves, might have come to different conclusions on the available evidence; if we are to allow the appeal we must be persuaded that the judge's conclusions cannot stand.

36. We have commented at several points that the judge failed to make a finding, or made only an unclear finding, on a number of matters. But fairness demands that we should also make it clear that we recognise that her fact-finding task was difficult. It is understandable that the witnesses had, at best, a hazy recollection of events many years earlier; the judge was faced also with only limited documentary evidence. Moreover, as we have indicated, some of the documents provided little explanation of their purpose or contained only limited detail, and there were conflicts between them. In particular, the brevity of the partnership agreement is unhelpful, and it is odd, to put it no higher, that the land

was the subject of a deed of gift, in the context of a partnership, if it was in fact entered into in that context.

37. While we can accept Mr Gordon's points that "JH & S Manners" is an unlikely name for a golf club, and that £25,000 was significantly lower than the turnover actually achieved by the golf club business in the following period, it does not seem to us to be open to him now to challenge the judge's conclusion that the form VAT1 should be treated as reliable. Her finding that a partnership between the parents, whose business was the running of a golf course, came into existence, was registered for VAT and began making supplies on 27 June 1990 is consistent with what was entered on the form and also with the accountants' August 1990 letter, and is not inconsistent with any other evidence before her. Relatively minor objections such as those Mr Gordon made lead to no more than the possibility that a different judge might have reached a different conclusion, but that is a long way from showing that this conclusion is irrational. It is, therefore, unassailable in this tribunal.

38. Mr Gordon laid considerable emphasis on his argument, as we have set it out above, that there was no good reason for the golf partnership to opt to waive the exemption in June 1990. We can accept that he may well be right. But it is just as difficult to understand why the property-owning partnership, assuming there was one, exercised the option, since the same objection arises. The expense incurred in the development could properly have been recharged to the (on Mr Gordon's case separate) golf partnership which could equally properly recover the input tax, and if the partnership accounts produced for the period to 30 April 1991 are correct (and we are aware of no suggestion they are not) that is exactly what happened: the assets found their way from the company to the golf (if it was only golf) partnership without any reason to think they had passed through a separate property-owning partnership. Whether there was one partnership or two, the election served no useful purpose.

39. We find great difficulty too with Mr Gordon's argument that the reference in the notice electing to waive the exemption to a "disposal" indicates that there was in contemplation a disposal by the parents to the golf club partnership. It was clear from the evidence, and accepted by the judge, that the family did decide, at some time before the meeting with the HMCE officer in November 1990, that the sons would be admitted to the golf partnership, a decision implemented by the partnership agreement of February 1991, and that the effective commencement date of the partnership between the four was deemed to have been 1 July 1990. But it is impossible to discern an intention by the parents, formed on or before 27 June 1990, to dispose of the land to that partnership, because of the accountants' letter of 16 August 1990. That letter contains no hint of an intention to dispose of the land, nor indeed any hint that the sons were to be admitted to the golf partnership. There is, in addition, no hint in the letter of separate property and golf partnerships; on the contrary, the letter is wholly consistent with the existence of a single partnership. The judge's finding, at para 20 on page 11, is that the sons joined that single partnership at some time between August 1990, when the letter was written, and the visit in November 1990. In our judgment that is a finding of fact consistent with the evidence before the tribunal. Indeed, any conclusion to the contrary might be considered perverse.

40. However, that conclusion still does not dispose of all Mr Gordon's arguments. As we said at para 24 above, the judge's determination necessarily implies a finding of fact that the land was an asset of the golf partnership. In some circumstances an implication of that kind might be enough. Here, we do not think it is, because it is not apparent from the decision that the judge addressed her mind to the point at all, and in consequence we cannot be confident that she did in fact make such a finding on the evidence before her. There was some evidence which might support the conclusion, for example the coincidence in date of the deed of gift and the partnership agreement, the absence of any payment of rent by one partnership to the other, and the fact that the election and the application for registration for VAT were made on the same day. Indeed, since one cannot run a "golf course club", to adopt the description used in form VAT1, without a course, and one cannot have a golf course without land, it might be thought unlikely that the parents decided to create two separate partnerships between themselves, one for the golf club business and the other as property owners. On the other hand, if the land was already a partnership asset in February 1991 it is difficult to understand why it should have been thought a deed of gift was necessary, and we have (and the judge had) no explanation of why the land is not recorded as one of the partnership's fixed assets in its accounts. All one can safely say is that the documents do not speak for themselves and lead to a clear answer.

41. For that reason it is not possible for us to remake the decision ourselves, and we must remit the matter to the First-tier Tribunal. There are some advantages to a further hearing before the same judge, and some to a fresh hearing before a differently-constituted panel. On balance, we consider the latter course is preferable.

Disposition

42. The appeal is allowed, and the matter is remitted to the First-tier Tribunal, to be heard again by a differently-constituted panel.

Colin Bishopp
Upper Tribunal Judge

Judith Powell
Upper Tribunal Judge

Release date: 29 March 2012