P1 Painting and decorating

The claim for the cost of painting and decorating, and of various other wall finishes, was rejected by the commissioners in *Wimpy* and this view was upheld in the High Court and then by all three judges in the Court of Appeal. Fox LJ commented as follows:

> "There was expenditure on plaster, paint, varnish and other wall finishes. All of it was incurred to put the premises, including the staff area, into decorative order for use. The commissioners rejected the claim that it was expenditure on plant. I agree with Hoffmann J, that the items were in the same position as the artex claim and were rightly held not to be plant."

The cost of painting and decorating was also considered in *McMillin*, where the taxpayer argued that paint applied to the walls of her holiday cottages helped to keep the air clean as its organic nature was non-polluting and dust free. This argument was rejected by the FTT, as follows:

> "On balance we find that the claims made by the manufacturers do not support Mrs McMillin's claim that the paint cleans the atmosphere after it has been applied. The paint may be breathable and may sterilise the wall to which it is being applied but we do not find that a claim is being made that it sterilises the air after application. If, as Mrs McMillin suggests, the paint does indeed attract less dust onto the wall from the air then the possibility must remain that the dust in the room will remain in the atmosphere and/or be deposited on other surfaces.
>
> We find that none of the information supplied shows that the paint has a function beyond that of covering the walls and making them easier to clean and the paint is not therefore so obviously plant that it can escape the premises test. We find that the paint has not retained a separate identity from the walls onto which it has been painted. It has in effect become part of the premises and is excluded from plant and machinery allowances."

Cases: *Wimpy International Ltd v Warland* [1989] BTC 58; *McMillin v HMRC* [2011] UKFTT 65 (TC)

P2 Panelling

The correct tax treatment of wall panelling costs is not clear cut. The case law is contradictory and in some ways unsatisfactory and a further case may be needed to throw light on the appropriate factors to weigh in the balance.

The first question to be asked is whether panelling is caught by statutory restrictions, which place a specific prohibition on "walls" (list A, item 1) and which also deny allowances for assets that are incorporated in a building or are of a kind normally so incorporated.

If it is accepted that panelling is caught by those provisions, it can only qualify for plant or machinery allowances if rescued by s. 23. This leads to the possibility that it might qualify as thermal insulation (see s. 28), as trade-specific sound insulation (list C, item 7), as moveable partitions (unlikely, but see item 13) or, most probably, as "decorative assets provided for the enjoyment of the public in hotel, restaurant or similar trades" (item 14).

The last of these possible exemptions from the statutory bar on claiming allowances has been considered in the courts. In *Wimpy*, the correct treatment of the panelling was considered to be borderline, but it was accepted as plant "under the general description of embellishments". The commissioners decided that even in a fast food restaurant, some heed could be paid to the creation of atmosphere. They could not ignore the evidence that the panels had been chosen to create the right environment for the trade in question.

The opposite conclusion, though, was reached in *Wetherspoon*, where the company was unable to persuade the commissioners that the wooden panelling had (despite being affixed to the property) retained a separate identity.

The author does not find it easy to follow the reasoning of the commissioners in *Wetherspoon*. They began, quite fairly, by saying that:

> "it seems to us that we are being asked whether the decorative panelling is more appropriately described as part of the premises in which the pub's trade is carried on or instead as an

> embellishment used to enhance the atmosphere of those premises."

They then introduced a novel test, by saying:

> "A factor ... which seems to us to be helpful to consider in the context of the decorative panelling is the extent to which the panelling can be regarded as an unexceptional component which would not be an unusual feature of premises of the type to which the Appellant is inviting the public. If an item is or becomes such an unexceptional component of the premises into which it is introduced, that, in our view, is a factor tending to the conclusion that it does not retain a separate identity for relevant purposes."

This test was purportedly based on the reference (in what is now s. 21(3)(b)) to assets of a kind normally incorporated into a building, a reasoning that the author finds puzzling. Having posed that test, the commissioners concluded as follows:

> "Because the decorative panelling in the Prince of Wales effectively turns the premises, or that part of them to which it is applied, from an unpanelled room into a room which is mainly panelled, we consider that it is an unexceptional component of the type of premises, in contradistinction, for example, to the fixed but not easily removable metal sculpture, which was held, in Scottish & Newcastle Breweries, to be plant.
>
> Balancing all the above matters, we conclude that the panelling is more appropriately described as having become part of the premises than as having retained a separate identity. Therefore it does not qualify as plant."

The author's difficulty with this may be summarised as follows. The commissioners refer to an unexceptional component in "premises of the type". So this seems to be saying that if decorative panelling may often be found in a hotel, restaurant or similar premises, then it is less likely to qualify as plant. Yet it cannot possibly be right to deny the status of plant to assets that are trade-specific, when the whole thrust of the case law and even the legislation is to say that an asset used for the specific purposes of a trade is more likely to qualify as plant.

The author finds the conclusion of the commissioners all the more puzzling given that, earlier in their deliberations, they had commented as follows:

> "We accept that the panelling was an embellishment to create ambience for the purposes of the Appellant's trade; this was not in dispute. The Revenue's case was that the panels were fixed to the wall and formed part of the premises."

Yet the fact that the panels were fixed to the wall and formed part of the premises was not the right question to pose. The legislation precisely recognises that certain assets may be affixed to the property and yet qualify as plant or machinery if, for example, they are intended to create the appropriate atmosphere in the premises. Having found as a fact that the panelling was an embellishment to create ambience, the *statutory* bar on claiming allowances was removed.

The author does not assert that the conclusion in *Wetherspoon* was necessarily wrong, merely that the reasoning seems inadequate and that the case therefore provides a poor precedent on this particular issue. The author respectfully suggests that another case on similar facts could therefore lead to a different conclusion, or might at least provide a better analysis.

Law: CAA 2001, s. 21 (list A, item 1), 22, 23 (list C, items 7, 13, 14), 28

Cases: *Wimpy International Ltd v Warland* [1989] BTC 58; *J D Wetherspoon plc v HMRC* (2007) Sp C 657

P3 Partition walls

Partition walls qualify as plant in some circumstances, but care is needed.

Walls are specifically included in the extended definition of "building" in list A at CAA 2001, s. 21. As such, the starting point is that they do not qualify as plant or machinery. Even if a partition cannot specifically be said to be a wall, it may still be caught by s. 21 on the basis that it is "incorporated in the building".

List C at s. 23, however, does provide a possible statutory let-out as it refers to "partition walls, where moveable and intended to be moved in the course of the qualifying activity" (item 13). This would be subject to any HMRC argument that the principal purpose of the

partition walls is to enclose the interior of a building or to provide an interior wall that is intended to remain permanently in place (see s. 23(4)). This therefore reinforces the requirement that the partition walls must be movable and intended to be moved, but taxpayers should also note the requirement that the principal purpose must be something other than to enclose the interior of the building.

This does not mean that moveable partition walls necessarily constitute plant but it gives them a chance to do so. It will therefore be necessary to consider the matter on first principles, guided by case law.

First principles lead to the question of whether the partitions are part of the premises within which the activity is conducted or whether they are an asset more akin to equipment used in the trade. In the *John Good* case, partitions were accepted as qualifying on the grounds that:

> "instead of having internal walls in its office building, needs to have, and does have, for the special requirements of its business, movable partitioning, by means of which it can, in response to changing volumes of business in its departments or to the cessation of departments or the emergence of new departments, rapidly and cheaply and without much interruption of business alter the sub-divisions of its office building".

In this case, the partitioning could "undoubtedly" be regarded as plant. This decision was commended by the House of Lords in the *Barclay, Curle* case. Partitions were also accepted as plant, though without any discussion of the issues, in *Cadogan Garden Developments*.

The HMRC view is that some moveable partitions are not plant. Advice to local tax officers is that they "should check to see if they need to possess mobility as a matter of commercial necessity before you accept the claim". Officers are also advised to check whether the partitions have ever in fact been moved (though the fact that they have not should not necessarily be considered fatal to the claim).

This serves as a reminder that there are two distinct requirements – not only must the partitions be moveable but there must be a commercial intention to move them.

The concept of being "moveable" is not defined: in one sense, any wall is moveable, but the legislation clearly envisages something less permanent than a normal wall. A key test is whether the partitions can be moved around without causing structural damage to the surrounding parts of the building.

If this hurdle is successfully negotiated, the second part of the test must also be considered. HMRC may ask for evidence of an actual intention to move the partitions in the course of the qualifying activity. Any evidence should be obtained and preserved, including in particular any discussions with the business installing the partitions in the first place. Given that there is a premium price to be paid for moveable partitions, as compared with a simple wall, it is reasonable to assume as a starting point that there may have been an intention to move the partitions at some point. But if the partitions have been disguised, perhaps by being papered over, this may be an indication that there is no intention to move them in the course of the trade.

For treatment of partitions in a particular context, see also **Toilet cubicles.**

Law: CAA 2001, s. 21 (list A, item 1), 23 (list C, item 13)

Cases: *Jarrold v John Good & Sons Ltd* (1963) 40 TC 681; *CIR v Barclay, Curle & Co Ltd* (1969) 45 TC 221; *Lupton v Cadogan Gardens Developments Limited* (1971) 47 TC 1

Guidance: CA 21120

P4 Partnerships

Capital allowances are potentially of great value to partners, especially professional partners or others who are paying tax at 45%. The detailed special rules applying to partners and partnerships are covered in depth in *Capital Allowances*, also available from Claritax Books and written by the same authors as this book. A few key points are covered here, however, by way of some particular issues to consider.

Partnerships claim allowances at partnership level, and claims by individual partners are not permitted. This would apply, for example, to a fleet of cars provided for the partners of a large firm.

The same principle applies if partners personally own an asset (e.g. a car) that is used for the purposes of the qualifying activity carried on

by the partnership. The only exception is if the partner charges for use of the asset (e.g. rent), such that the partnership is able to claim a tax deduction for the amount paid. In this case, the individual partner can claim allowances to offset against the taxable income received from the partnership.

Partnership changes are normally ignored for the purposes of claiming plant and machinery allowances, as long as at least one person carrying on the activity before the change continues to do so thereafter. The ongoing partnership continues to claim allowances as if anything done by former partners had been done by the present partners.

A partnership may claim **Annual investment allowances**, but only if all the members of the partnership are individuals. It follows that partnerships with a corporate or trust member, or indeed with a partnership as a member, may not claim AIAs.

Any AIA, FYA or WDA is made to the present partners. The allowance is calculated as if the present partners had at all times been carrying on the qualifying activity and as if everything done to or by their predecessors had been done to or by them.

Law: CAA 2001, s. 3, 38A, 263, 264, 557