

The recent case in the Upper Tribunal of *The Executors of Lord Howard of Henderskelfe deceased v HMRC [2013] UKUT 0129* was a surprise until you got into it.

The Executors were claiming that a painting by Sir Joshua Reynolds which had been sold for over £9 million was a wasting asset and therefore exempt from CGT. A wasting asset is one which has a predictable life of less than 50 years and as this painting had been painted prior to 1776 one might imagine that the executors had an uphill struggle.

However, the argument was a little more subtle. The executors claimed that the painting which was hanging in the public areas of Castle Howard and represented a genuine attraction to visitors, should be regarded as plant and machinery. How did this help? Because s44, Taxation of Chargeable Gains Act 1992 provides that plant and machinery is regarded as having a predictable life of less than 50 years irrespective of its actual characteristics and is therefore exempt as a wasting asset.

So, this case was nothing to do with capital gains tax or wasting assets - it was another case about plant and machinery, and all those famous cases regarding the meaning of plant and machinery were analysed in depth. The upshot was that the Upper Tribunal decided that the painting was used for the promotion of the trade carried on at Castle Howard and was sufficiently permanent (even though it could be taken away at any moment) to be regarded as plant. Accordingly, it was properly regarded as plant and machinery, it was therefore a wasting asset under s44 and exempt from CGT.

A nice argument, but one might well ask why the exemption in s44 was not overridden by s45 which provides that the exemption does not apply when the relevant asset is used for the purposes of a trade and was eligible for capital allowances.

The answer is that the trade (of opening the Castle to the public) was carried on by a company, and the painting was owned by the Duke personally. It was accepted by all concerned that the exemption in Section 44(a)(c) does not contain any requirement that the person owning the plant had carried on the trade in which the object was used.

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